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PRIVATE ENFORCEMENT IN CARTEL CASES: ACCESS TO DAMAGES

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DECLARATION

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where stated otherwise by reference or acknowledgment, the work presented is entirely my own. This thesis is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of Witwatersrand, Johannesburg.

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ABSTRACT

In an open market, firms compete to win the business of their customers by offering more products or services at lower prices. Cartelists, however, by colluding with their competitors to fix higher prices at lower output, effectively transfer money out of the pockets of unsuspecting consumers into their own coffers in the form of higher profits. Because cartelists do not compete for their profits, there is little incentive for them to be efficient or to innovate. This is not only bad for consumers but ultimately harmful to the economy as a whole.

To acquire any compensation for the harm done, victims of cartels have to approach the civil courts. This path to compensatory damages in competition cases is not well defined in South African jurisprudence. The competition authorities regulate a particular understanding of competition law within a public enforcement context, which has not been conveyed to the civil courts. Damages claimants face challenges related to resources and access to evidence and must navigate the court system.

The focal point of this dissertation is how private enforcement can become more accessible to victims who have been harmed by cartel conduct. The current legal framework in South Africa does very little to promote private enforcement and I call for policy intervention. Using theories of damages, I explore how one could establish the cause of action between the harm done by the cartel and the injury suffered by the claimants. I conclude that there are aspects of common-law and statutory damages that may be useful for the claimants to argue their case. I assess the economic models that quantify the damages claim and conclude that the model used should be case dependent.
I examine the certification criteria required for claimants to bring a class action complaint and argue that private enforcement in South Africa should not be advanced through case development in the courts alone, but that there is also a need for policy reform which I will extrapolate from the issues I have covered below. I explore the debate on whether direct and indirect purchasers should

be entitled to damages, and the possibility of the cartel raising a passing-off of the overcharge defence. In doing so, I examine cases in the United States and the European Union, which have dealt extensively with this issue. I argue that in South Africa, unlike in the US, both direct and indirect purchasers should be allowed to claim damages, with some qualifications. Finally, I assert that evidence the Competition Commission obtains through its corporate leniency policy used to prosecute cartels should be shared with the damages claimant. I provide recommendations for a White Paper policy guideline which could lead to legislative intervention.

In South Africa, there is more emphasis on public enforcement of cartels and perhaps it is time we strengthen the private enforcement and encourage more competition law damages cases. Damages claimants are deserving of access to justice.

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Extracts of this chapter have been published in a peer-reviewed book: K Moodaliyar, under the chapter title 'South Africa' in AA Foer & JW Cuneo (eds) *The International Handbook of Private Enforcement of Competition Law* (Edward Elgar, 2010) 553. The chapter has since been updated.

CHAPTER 1: INTRODUCTION

1.1 Background

This thesis is concerned with the rights of private claimants seeking damages for economic harm suffered as a result of cartel conduct. The ability of claimants to access justice in this regard will depend on the legal framework for the private enforcement of competition law and the experience claimants will have in bringing their actions for damages. In my research I have sought to:

(i) identify the main obstacles and challenges faced by claimants;
(ii) explore what can be learned from international and South African experiences about how these obstacles and challenges can be overcome; and
(iii) identify what steps (if any) need to be taken in South Africa in order to ensure that private claimants can access justice where they have suffered economic harm as a result of cartel conduct.

With regards to point (iii) above, my approach has been to examine the various approaches taken by policy makers and courts of law internationally in dealing with private damages claims with a view to identifying how precedents have developed for purposes of enabling access to justice. I consider such approaches in the context of South African law, the precedents that have developed in South Africa, the extent to which key challenges can be addressed in principle through the development of case precedent and/or whether other policy instruments are needed to ensure access to justice.

In this chapter, I begin with an overview of the objectives of private enforcement with reference to the purposes of awarding damages for economic harm. This is followed by a description of the problem of cartels and the legal framework for addressing it. I then provide an overview of the legislative basis in South African competition law (as set out in the Competition Act), which allows for civil damages cases to be brought in regard to cases where conduct falls foul of the Act. I take cognisance of the few competition law damages cases in South Africa that have provided some direction. I thereafter explore the type of claimant who should be allowed to claim damages and highlight the obstacles faced by private claimants from bringing their action for damages. Finally, I provide the premise and objectives of this dissertation by focusing on the scope and limitations and conclude this chapter by providing a brief summary of each chapter to follow.

1.2. The objectives of private enforcement and the purpose of awarding damages for economic harm

In this section, I consider the objective of private enforcement with reference to the purpose of awarding damages for economic harm. There are three reasons why the law should provide for the award of damages to parties harmed by anti-competitive practices:[1]

(a) To bring justice to the injured party. This involves compensating the injured party for the loss arising from the injury. Just compensation requires returning the aggrieved party to a state of affairs as if the injury had not occurred at all.[2] In the literature, this has been referred to as 'making the plaintiff whole'.[3] In European law, this has been articulated as a principle of 'full compensation', with victims of the infringement entitled to an amount equal to the actual loss *(damnum emergens*), profit lost (*lucrum cessans*), and including interest forgone from the time the damage occurred.[4]

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[1] Franklin M Fisher 'Economic analysis and antitrust damages' (2006) 29(3) *World Competition* 383.
[2] Fisher op cit note 1 at 387. See *Blue Shield of Virginia v. McCready* 457 U.S. 465, 472(1982).
[3] Fisher op cit note 1 at 383.
[4] White Paper on Damages actions for breach of the EC antitrust rules, COM(2008); and Commission Staff Working Paper accompanying the White Paper on Damages actions for the breach of the EC antitrust rules, SEC(2008), available at *http//ec.europa.eu/competition/antitrust/actionsdamages/documents.html*, accessed on 18 October 2012.

(b) To prevent the wrongdoer from profiting from its illegal activity; i.e. ensuring that there is no 'unjust enrichment'.[5] The unjust enrichment doctrine is used in a variety of applications.[6] Elkin-Koren and Salzberger provide what they term a 'fresh definition' of the unjustified enrichment process, which is to establish whether the party has a legal right to the restitution and the means to go about compensating the victim.[7]

(c) To provide disincentives or deterrence to others from breaking the law or repeating the illegal act.

A violation of s 4(1)*(b)* of the Competition Act (the cartel provisions) may cause significant harm to those affected by the cartel conduct.[8] The Competition authorities will assess the extent of the anticompetitive harm to determine the appropriate sanction. In doing so, the authorities' principal concern is the harm done to society and the interest of consumer welfare rather than the injury done to the individual. In this context, the purpose of a penalty is primarily as punishment and a deterrent. Sanctions, or the Competition Tribunal's issuance of an administrative penalty of 10 per cent of the cartel firm's annual turnover for the preceding financial year, may offer such deterrence.[9] In the seminal case on penalties, *Southern Pipeline Contractors*, the Competition Appeal Court provided guidance on how to administer the imposition of sanctions.[10] It is within the Competition authorities' remit to determine the penalty to be imposed on the offending firm as a means of punishment and deterrence.[11]

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[5] Niva Elkin-Koren & Eli M Salzberger 'Towards an economic theory of unjust enrichment law' (2009) 20 *Int'l Rev. L. & Econ.* 551.
[6]—enrichment arising from a transfer made for an illegal or immoral purpose (The *Condictio Ob Turpem Vel Iniustam Causam*).
[7] Elkin-Koren & Salzberger op cit note 5 at 555.
[8] The problem of cartels is discussed further in section 1.3 below. The economics of cartel harm is discussed in more detail in Chapter 3.
[9] Section 59 of the Competition Act 89 of 1998 (as amended).
[10] *Southern Pipeline Contractors and Concrete Walls (Pty) Ltd v The Competition Commission SA* 105/CAC/Dec10.
[11] See also Competition Commission South Africa *Guidelines for the Determination of Administrative Penalties for Prohibited Practices* 1 May 2015, available at *http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Guidelines-for-Determination-of-Admin-Penalties-MAY-2015.pdf*,

In the US, unlike in South Africa, a significant incentive is the treble damages offered by §4 of the US Clayton Act:

> 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, and the cost of suit, including a reasonable attorney's fee.[12]

This means that the successful claimant will get three times the damages award. Trebling damages is compulsory and not left to the jury's discretion. Not only is this a huge incentive for injured parties to claim damages, but it also acts as a deterrent.[13] Claimants are most likely not prioritising deterrence as an incentive but rather the compensation in the form of triple damages. Nevertheless, its effectiveness is evident in the fact that on average about 90 per cent of antitrust cases are damages cases brought directly by plaintiffs instead of the antitrust authorities.[14]

In the EU, as in South Africa, only single damages are awarded. The EU directive is quite explicit that the injured party can claim compensation but that the award should not be extended to 'punitive, multiple or other damages'.[15] Like the EU, South African

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accessed on 13 May 2016. The Guidelines state (at 5 para 2.1): 'The primary objective of administrative penalties is deterrence. Administrative penalties serve as a specific deterrent against future anti-competitive behaviour by firms that have contravened the Act and as a general deterrent to other firms that may consider engaging in anti-competitive conduct.'

[12] 15 U.S.C. §15 c (2006). §4 states: 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore 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 reasonable attorney's fee.'

[13] *Texas Industries Inc. Radcliff Materials, Inc*., 451 U.S., at 639, 101 S.Ct., at 2066; *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp*., 456 U.S. 556, 575-76 (1982).

[14] See Sourcebook of Criminal Justice Statistics Online, available at *http://www.albany.edu/sourcebook/pdf/t5412006.pdf*, accessed on 24 August 2015. The data, which go through 2006, show percentages of private action from 1995 to 2006, ranging from 89 per cent to 96 per cent.

[15] European Union 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 PE-CONS 80/14 (2014) para 13, available at *http://eur-*

common law allows for a claim for patrimonial loss but does not allow for punitive damages.

In South Africa's bifurcated jurisdictional system, follow-on damages claimants would be focused on compensation rather than on the deterrent effect that the damages award would have on future cartel behaviour. Effective private enforcement does contribute to the overall objective of deterrence which aligns with the public enforcement objectives of the competition authorities.[16] In this thesis, my focus will be on the private enforcement of follow-on damages to compensate victims of cartel conduct rather than the deterrent effect of public enforcement.[17]

1.3 The problem of cartels: policy and legal framework

There is no universally accepted legal characterisation to define cartel behaviour. A simple explanation would be that a cartel is formed when two or more competitors get together and conspire to restrict competition in the markets within which they operate. The forms in which collusive activity can take place are usually price-fixing (conspiring

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lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0104, accessed on 3 September 2015. This directive requires the EU Member States to harmonise their law to make the claim for damages more accessible for plaintiffs.

[16] See George J Stigler 'The optimum enforcement of laws' (1970) 78(3) *J. Pol. Econ.* 526; Gary S Becker 'Crime and punishment: An economic approach' (1968) 76(2) *J. Political Economy* 169; William M Landes 'Optimal sanctions for antitrust violations' (1983) 50 *U. Chi. L. Rev.* 652; A Mitchell Polinsky 'Private versus public enforcement of fines' (1980) 9(1) *J. Legal Studies* 105; Wouter PJ Wils 'The European Commission's 2006 Guidelines on Antitrust Fines: A legal and economic analysis' (2007) 30(2) *World Competition: L. & Econ. Rev.* 1; Robert H Lande 'Why antitrust damage levels should be raised' (2004) 16(4) *Loyola Consumer L. Rev.* 329; John M Connor & Robert H Lande 'How high do cartels raise prices? Implications for optimal cartel fines' (2005) 80 *Tul. L. Rev*. 513; Wouter PJ Wils 'Optimal antitrust fines: Theory and practice (2006) 29(2) *World Competition* 183; W James Smith et al *Cartels and Antitrust: The Role of Fines in Deterring Violations at the Margin* (1987); Robert D Blair & Christine Piette Durrance 'Antitrust sanctions: Deterrence and (possibly) overdeterrence' (2008) 53(3) *Antitrust Bulletin* 643; Philippe Cyrenne 'On antitrust enforcement and the deterrence of collusive behaviour' (1999) 14(3) *Rev. Ind. Organ.* 257. For a greater discussion on consumer welfare, see David C Hjelmfelt & Channing D Strother, Jr 'Antitrust damages for consumer welfare loss' (1991) 39 *Clev. St. L. Rev*.

[17] See P Smith & A Swan 'Quantifying cartel damages: South African policy and research developments', paper presented at the 7th Annual Conference on Competition Law, Economics and Policy, Johannesburg, September 2013, (available at *http://www.compcom.co.za/wp-content/uploads/2014/09/130821-Smith-and-Swan-Quantification-of-cartel-damages.pdf*) for a more detailed discussion on quantification of administrative penalties within a South African context.

to charge maximum prices), dividing the market (either by product, or geographically) and bid rigging (tender collusion). Authors Neven, Papandropoulos, and Seabright affirm that collusion is often referred to as either 'hard core' when the collusive activity is very apparent from the behaviour of the cartel members or 'soft' when there are tacit agreements among the cartel members and the collusive activity is not quite as apparent.[18]

The Organisation for Economic Co-operation and Development (OECD) has been instrumental in lobbying for stricter cartel enforcement from its member states. In a survey conducted by the OECD over the period between 1996 and 2000, it was found that from the sixteen largest cartel cases alone, the total affected commerce was estimated to be in excess of US$55 billion. The survey revealed that the cartel problem was also a global challenge, in that there were fourteen international cases reported.[19] These figures are just the tip of the iceberg, as, because of the secret nature of cartels, not all cartels have been detected on both the national level and the global level. The OECD defines a hard core cartel as:

> a) an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quota, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
>
> b) the hard core cartel category does not include agreements, concerted practices, or agreements that
>
> (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies,
>
> (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or
>
> (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be

[18] Damien Neven, Penelope Papandropoulos & Paul Seabright. *Trawling for Minnows: European Competition Policy and Agreements Between Firms* (1998) 45.
[19] OECD *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003) 9.

> hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives.[20]

The OECD definition is an extensive one, and tries to capture all possible types of cartel behaviour, be they agreements, concerted practices or arrangements. It is significant in the sense that the terminology used in this definition has been echoed in subsequent competition legislation around the world.

In South Africa, there is no concise definition of the type of behaviour that characterises a cartel. However, the South African Competition Act prohibits cartel-type behaviour under s 4(1)(b), which states:

> 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—
>
> …
>
> (b) it involves any of the following restrictive horizontal practices:
>
> (i) directly or indirectly fixing a purchase price or selling price or any other trading condition;
>
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
>
> (iii) collusive tendering.[21]

Section 4 also encapsulates firms that are in an association, for example a trade association. For one to prove a cartel, all that is required is to show that an agreement or concerted practice or decision by an association took place, which had the purpose of fixing prices, dividing the market or bid rigging.[22]

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[20] OECD op cit note 19 at 59.
[21] Section 4(1)*(b)* of the Competition Act 89 of 1998 (as amended).
[22] Ibid.

Members of cartels are commonly known to collude in secret, making their behaviour difficult to detect.[23] Thus this type of anticompetitive behaviour poses a challenge to competition authorities to investigate. Competition authorities around the world have recognised that cartel behaviour is one of the most damaging violations of the law to the economy.[24] In fact, cartels have been described as 'a cancer in our economy'.[25]

In a study conducted by the OECD in 2000, it was discovered that in the United States (US), the exposed cartels overcharged their customers approximately US$1 billion.[26] These cartels also affected the global economy by billions of dollars. The OECD stressed that:

> In addition to those overcharges, these cartels have caused waste and inefficiency that has been even more harmful to countries' economies and to the global welfare. It is estimated that the average illegal gain from price fixing is 10 percent of the selling price, but in such cases the harm to society *may amount* to 20 percent of the volume of commerce affected by the cartel.[27]

There have been several global cartels that have been caught operating in a variety of industries such as vitamins, citric acid, graphite electrodes and lysine. The US has been especially vigilant in tracking down these cartels and imposing penalties such as heavy fines and imprisonment.

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[23] JM Griffin 'An inside look at a cartel at work' in *Fighting Cartels—Why and How* (Konkurrensverket/ Swedish Competition Authority 2001) 30, available at *http:// konkurrensverket.se/globalassets/publikationer/pros-cons/rap_pros_and_cons_fighting_cartels.pdf#page=29*, accessed on 25 July 2007.

[24] Bundeskartellamt *Effective Cartel Prosecution: Benefits for the economy and consumers* (2016) 5. https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Brosch%C3%BCren/Brochure%20-%20Effective%20cartel%20prosecution.pdf?__blob=publicationFile&v=12, Accessed on 15 November 2018.

[25] Graeme Samuel 'Cracking cartels: International and Australian developments' (November 2004). Presented at the ACCC Cracking Cartels: International and Australian developments—law enforcement conference, available at *https://www.accc.gov.au/media-release/cracking-cartels-accc-enforcement-conference*, accessed on 1 August 2007.

[26] OECD Report *Hard Core Cartels* (2000) 5.

[27] OECD 'New initiatives, old problems: A report on implementing the hard core cartel recommendation and improving co-operation' (2000) 2(2) *J. Competition L. & Policy* 12.

In the global *Lysine* case, for example, the cartel was composed of the world's five largest lysine producers, which included the producers in the US, Hungary, Indonesia, France, Italy, Japan, Thailand, Korea and Mexico. 'Our competitors are our friends. Our customers are the enemy', is a statement by one of the cartel members that sent shockwaves throughout competition jurisdictions around the world. This cartel fixed prices and sales quota of lysine throughout the world, and raised its prices to the extent that it overcharged customers by approximately US$140 million.[28]

The global *Vitamins* cartel involved firms from the US, Canada, Europe and Australia. This cartel operated for about a decade and fixed prices and allocated markets for the sale of certain vitamins. The OECD estimated that the cartel may have overcharged its US customers by about US$500 million.[29]

In South Africa, if the South African Competition Commission (Commission) has sufficient evidence of anticompetitive conduct, it will refer the case to the Competition Tribunal for adjudication.[30] If the respondent is found to have contravened the Act, the Tribunal may impose an administrative penalty of up to 10 per cent of the respondent's annual turnover (sales) in South Africa for the preceding year.[31] The Tribunal has in some cases based its penalty on the annual turnover in other affected markets as well. In order to determine the penalty, the Tribunal has to consider the following factors:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and
- whether the respondent has previously been found in contravention of this

[28] *United States v Andreas* US 216 F.3d 645 7th Cir (2000).
[29] *United States v F. Hoffman-La Roche Ltd* (N.D.Tex 1999) 1017.
[30] Section 26(3) of the Competition Act.
[31] Section 59(2) of the Competition Act.

Act.[32]

South Africa has had its own successes when it comes to cartel enforcement. The Commission, mainly through its corporate leniency policy (which is essentially a whistleblowing policy for firms), has uncovered a number of cartels in industries ranging from bread, bicycles, furniture removal to construction. The Competition Tribunal levied the largest fine of R1,46 billion against the construction cartel.[33] Table 1.1 shows the penalties imposed in the 2015/2016 period. Of relevance to this thesis, save for the one case, most of these fines are for the s 4(1)*(b)* contraventions.

Table 1.1: Fines levied by the SA Competition Tribunal in 2015/2016

Decision Date	Name of Respondent	Case Number	Section Transgressed	Penalty Levied (R)
22/04/2015	African Oxygen Ltd	2011Apr5739	4(1)(b)(ii)	3 269 865
13/05/2015	Amsteele Systems (Pty) Ltd	2010Apr5034	4(1)(b)	2 800 000
05/06/2015	A & B Movers CC	2011Jun0069	4(1)(b)	199 301
06/05/2015	Pele Kaofela CC	2009Sep4641	4(1)(b)(iii)	437 624
27/07/2015	Execu Move CC	2011Jun0069	4(1)(b)(iii)	831 514
12/08/2015	SA Metal Group (Pty) Ltd	2007Aug3121	4(1)(b)(i)(ii)	22 430 000
13/08/2015	Wallenius Wilhelmsen Logistics	2013Aug0401	4(1)(b)(i)(ii)(iii)	95 695 529
19/08/2015	Tosaco Commercial Services	2012Aug0480	4(1)(b)(i)(ii)(iii)	3 000 000
08/09/2015	Nippon Yusen Kabushiki Kaisha Ltd	2012Sep0544	4(1)(b)(i)(ii)(iii)	103 977 927
08/09/2015	Nippon Yusen Kabushiki Kaisha Ltd	2012Sep0544	4(1)(b)(i)(ii)(iii)	966 196
16/09/2015	Copper Tubing Africa (Pty) Ltd	2008Nov4111	4(1)(b)	8 000 000
02/09/2015	Malasela Tahan Electric	2010Mar4981	4(1)(b)(i)(ii)(iii)	20 200 000
16/09/2015	H & M Removals	2011Jun0069	4(1)(b)(iii)	196 364
31/08/2015	BLD Leads Logistics of South Africa	2013Aug03664	4(1)(b)(i)(ii)	928 306
18/11/2015	Dura Soltanche Bachy	2009May4447	4(1)(b)(iii)	988 589
07/10/2015	Fruit & Veg Holdings	2012Aug0468	13A(3)	750 000
09/12/2015	Compania Sud Americana De Vapores SA	2012Sep0544	4(1)(b)(i)(ii)(iii)	8 813 227
09/12/2015	Murray & Roberts	2009Sep4641	4(1)(b)(i)	64 141 799
18/02/2016	Key Moves CC	2011Jun0069	4(1)(b)(iii)	216 249
TOTAL				337 842 490

Source: Competition Commission South Africa.[34]

While the fines may serve as a punishment and deterrent to violators of the Competition Act, these fines do not compensate the aggrieved parties who have been

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[32] Section 59(3) of the Competition Act.
[33] D Daws 'Construction companies fined R1,46bn for collusion' *Engineering News* 24 June 2013, available at *http://www.engineeringnews.co.za/article/construction-majors-fined-r146bn-for-collusion-2013-06-24*, accessed on 9 August 2014.
[34] Competition Commission *Annual Report 2015/2016* at 64, available at *http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AR2015-16-text.pdf*, accessed on 10 October 2016.

directly affected by anticompetitive behaviour as the fines go into the national fiscus. These effects may be large on the victims of anticompetitive behaviour. Civil damages fulfil both the purpose of compensating the victims and it has a deterrent effect.

1.4 Legislative basis for civil damages in South African competition law

Private enforcement litigation in competition law cases is a rarity in South Africa. The main cases include the Bread cases which relate to a follow-on damages case arising from a cartel infringement; and the two airline cases, Nationwide and Comair against SAA which was found to have abused its dominant position. These cases will be analysed in greater detail further on in chapters 2 and 3. The Competition Act, which governs the rules and regulations of competition law in South Africa, allows for parties to seek reparation for damage in the civil courts only after the competition authorities (the Competition Commission, Competition Tribunal and if there is an appeal, the Competition Appeal Court) have made a final determination as to whether anticompetitive conduct has taken place. This is referred to as follow-on damages. Thus, according to section 65(6) of the Act, parties seeking damages in competition law cases have to wait for the outcome of that decision before pursuing redress.

The Competition Act provides:

> 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);[35] 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

[35] The High Court will determine the basis on which damages can be awarded. Section 49D(1) does not appear to specify or restrict the type of applicant who may make a claim for damages.

> been found to be a prohibited practice in terms of the 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.[36]

Many additional factors work against the private plaintiff such as the cost of litigation and the time it takes to finalise these types of cases. The anticompetitive conduct may have caused the aggrieved party to suffer significant economic loss, thereby limiting the resources available to a claimant to underwrite litigation. Injured parties can seek legal assistance on a contingency basis[37] (although there may not be too many willing litigators).

Since the inception of the Competition Act in 1999, there have been four damages cases. The first one occurred in 2008, where Nationwide Airlines (a company that is currently being liquidated) sued South African Airways (SAA) after the Tribunal had made a finding that SAA had abused its dominant position.[38] Nationwide Airlines subsequently settled with SAA for an undisclosed amount.[39]

The second was a series of cases in South Africa, based on cartel anticompetitive conduct in the bread industry was the *Bread* cases which were brought by the distributors of bread and the consumers (the hearings were combined).[40] This was

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[36] Section 65(6) of the Competition Act.
[37] Contingency Fees Act 66 of 1997. Legal practitioners can enter into a 'no win, no fee' arrangement (s2(1)(a)) or they can charge more than their usual fee in the event of success (s2(1)(b)) as long as the fees do not exceed the normal fee by 100%. Also, with monetary claims in the second arrangement they may not charge more than 25% of the total award, excluding costs (S2(2)).
[38] Case no: 83/CR/Oct04, available at *http://www.comptrib.co.za*, accessed on 13 January 2006. See also Tamara Dini 'Nationwide settles damages claim for SAA's abuse of dominance' 19 February 2008, available at *http://www.bowman.co.za/Law/Articles/Law-Articles.asp?id=2132417250*, accessed on 28 April 2008.
[39] Dini op cit note 38.
[40] The *Trustees for the Time Being of the Children's Resource Centre Trust v Pioneer Foods (Pty) Limited*, Western Cape High Court, Case no 25302/10 and *Imraahn Ismail Mukkaddam v Pioneer Foods (Pty) Limited*, Western Cape High Court, Case no 25353/10. (hereafter referred to as the 'Bread cases Western Cape High Court decision'). The High Court issued one decision for both cases.

heard at the Western Cape High Court. The flour mills sold their product to independent distributors at cartel prices. Consumers who bought bread at these bakeries also bore the brunt of these overcharges. These cases where the distributors and consumers sued the bread manufactures for damages in separate mattes were heard in the High Court, and its subsequent appeal cases are a focal point of discussion in this dissertation.[41]

After SAA was found guilty of abusing its dominance by the Competition Tribunal,[42] a decision subsequently reaffirmed at the Competition Appeal Court, two more airline cases were finalised.[43] Two airlines, Nationwide Airlines[44] and Comair,[45] sued SAA for damages in the third and fourth damages cases in South Africa. In many respects these cases focused largely on the quantum of damages based on a factual analysis of the airline industry, rather than the substantive nuances of establishing a damages claim as we saw in the Bread cases such as the certification issue. I also take note that these are abuse of dominance cases, whereas the focus of my thesis is on cartel cases. Therefore, I will only discuss these airline cases briefly in subsequent chapters 2 and 3 where relevant.

Since the Bread cases, there has not been much development in the area of private enforcement specifically related to cartel antitrust cases in South Africa. The Comair and Nationwide cases since then gave some insight into the calculation of damages in abuse of dominance cases. Damages claims have had a slow start in South Africa, which may be due to the barriers to bringing claims, such as the lack of procedural

[41] After the case was heard by the Constitutional Court, the Court referred the case back to the Western Cape High Court to be heard on the merits of the damages case. This matter has not been settled or finalised by the Court as yet.

[42] *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01) [2005] ZACT 50 (28 July 2005), hereafter also referred to as 'First Tribunal'. *Nationwide Airlines (Pty) Ltd & Comair Limited v South African Airways (Pty) Ltd* (80/CR/SEPT06) [2010] ZACT 13 (17 February 2010), hereafter referred to as 'Second Tribunal'.

[43] *SAA v Comair Limited and Nationwide Airlines (Pty) Ltd,* 92/CAC/Mar10.

[44] *Nationwide Airlines (Pty) Ltd (In Liquidation) v South Africa Airways (Pty) Ltd* 2016 (6) SA 19 (GJ).

[45] *Comair Limited v South African Airways (Pty) Ltd* (2008/23443; 2011/34079) [2017] ZAGPJHC 10 (15 February 2017).

clarity, single damages (as opposed to treble damages in the US), legal costs and the significant time it takes to reach a resolution.[46]

1.5 The eligible damages claimant

The Competition Act allows a very general category of persons who have suffered loss or damage as a result of anticompetitive conduct to bring civil actions for damages. There is no specific doctrine of standing for damages claimants. Plaintiffs can apparently be direct purchasers, indirect purchasers, suppliers or competitors, provided they have not been participants in the anticompetitive conduct. It should also be noted that 'the more remote a claimant's loss is from the infringement, the less likely it may be to obtain damages'.[47] The claimant thus has to prove that there is a direct, significant link between the anticompetitive conduct and the loss suffered.[48] In *Ferreira v Levin*, the Constitutional Court held that these tests are to be broadly applied to ensure that prospective parties fully enjoy their constitutional rights.[49]

In competition-related cases, as in other cases, a party generally has the capacity to litigate as a person or as a company.[50] Under the common law, a partnership, unincorporated association or firm that was not a legal person did not have standing.[51] The High Court rules went beyond the common law and permitted standing for an association ('any unincorporated body or person, not being a partnership'[52]) or a firm ('a business carried on by a body corporate, carried on by the sole proprietor thereof

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[46] K Moodaliyar, JF Reardon & S Theuerkauf 'The relationship between public and private enforcement of competition law — a comparative analysis of South African, European and Swiss law' (2010) 127(1) *SALJ* 141.
[47] David Harrison & Rachel Cuff 'Private damages actions in competition law' (September 2007) *The In-House Lawyer* 52 at 55.
[48] See *S v Mokgethi* 1990 1 SA 32 (A).
[49] Justice Chaskalson: 'It is my view that we should adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.' *Ferreira v Levin NO* 1996 (1) SA (CC) ¶165.
[50] See Companies Act 71 of 2008.
[51] Jones & Buckle *The Rules* Rule 54-2. Jones, Buckle, Erasmus & Van Loggerenberg *The Civil Practice of the Magistrates' Courts in South Africa: The Rules* Vol 2, 9 ed (Juta 1997).
[52] High Court rule 14(1).

under a name other than his own'[53]). Conversely, a third party, even one that has a direct financial interest in the company (for example, a shareholder), does not have standing in South Africa unless it has an interest that was directly and substantially affected by the conduct. Under South African rules of civil procedure, a direct and substantial interest[54] requires:

> (a) the plaintiff /applicant for relief must have an adequate interest in the subject-matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;
> (b) the interest must not be too far removed;
> (c) the interest must be actual, not abstract or academic;
> (d) the interest must be a current interest and not a hypothetical one.[55]

The South African Constitution broadens the scope of 'direct and substantial interest' with regard to actions taken under the Chapter 2 Bill of Rights. Section 38 specifies who may be a claimant in these circumstances. The claimants may include:

- anyone acting in their own interest;
- anyone acting on behalf of another person who cannot act in their own name;
- anyone acting as a member of, or in the interest of, a group or a class of persons;
- anyone acting in the public interest; and
- an association acting in the interest of its members.[56]

A prospective plaintiff in a competition-related damages action can bring suit in accordance with these provisions only if the suit raises constitutional issues implicating

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[53] High Court rule 14(1).
[54] It is interesting to note that the SCA recently distinguished between delicts committed against a company and delicts committed against a shareholder. The SCA confirmed that only the company could claim damages and not the shareholder as the shareholder had merely invested in the company, and the shareholder cannot rely on the breach of legal duty by the wrongdoer to recoup its share losses. See Itzikowitz v Absa Bank Limited (20129/2014) [2016] ZASCA 43 (31 March 2016).
[55] Jones et al *The Rules*: Rule 6-7 in Pete et al *Civil Procedure: A Practical Guide* 15. See also *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151E, *Judin v Wedgwood* 2003 (5) SA 472 (W) at 475 H-476 A, and *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N).
[56] Section 38 of the Constitution of the Republic of South Africa, 1996.

the Bill of Rights.[57] Some of the issues that could be raised would be, for example, the right to equality (s 9), the right to freedom of trade, occupation and profession (s 22), the right of access to information (s 32), the right to just administrative action (s 33), and the right of access to courts (s 34). It has been argued that '[i]n view of the lack of adequate protection of collective interests under our traditional civil procedure model, the innovation under consideration [that is, the proposed extension of s 38 provisions to the civil courts] must be hailed as a major development in the quest for effective access to justice for all in the new South Africa'.[58] The question of standing and identifying the correct plaintiff becomes increasingly important when issues such as the pass-on defence are raised. The concept of passing-on is evaluated in chapter 5 of the dissertation.

1.6 Obstacles faced by damages claimants

Substantive and procedural obstacles may cause frustration in claimants trying to access justice in addition to time delays, cost of litigation and lack access to information required to build a case. In South Africa, a claimant must file a civil action within three years of the date on which the cause of action arose.[59] In a damages claim arising under the competition law, the claimant must wait for the outcome of the decision by the competition authorities before proceeding.[60] It is unclear whether this requirement in conjunction with the statute of limitations infringes the claimant's right to due process because the claimant cannot make a claim for damages without the Competition Authorities deciding on the case first.[61]

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57 See for example *Competition Commission v Clover Industries et al* Case no 103/CR/Dec06, available at *http://www.comptrib.co.za*, accessed on 30 May 2010, where points regarding the constitutionality of summons issued by the competition authorities were called into question.
58 W le R De Vos 'Reflections on the introduction of a class action in South Africa' (1996) 4 *TSAR* 639 at 641.
59 Prescription Act 68 of 1969.
60 Section 65 of the Competition Act.
61 Section 34 of the Bill of Rights states that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' Constitution of the Republic of South Africa, 1996.

Another barrier to bringing a civil claim is the prospect of a prolonged delay before such a claim can be led. The competition authorities may spend years finalising a matter, especially if the case goes on appeal, and the claimant must wait for that final decision before proceeding.

Even though the Tribunal or the Appeal Court's findings may be persuasive in the civil courts, the information that the competition authorities receive may be confidential. Therefore, the information that the competition authorities are allowed to share with the claimant is limited to non-confidential information, which may not be sufficient to carry a damages case forward. The parties who have submitted the confidential information may be asked to waive confidentiality; however, this is far from guaranteed. These delays can be a prohibiting factor for claimants who may be out of business by that time, or may not have the resources to wait, or may simply lose interest in the matter.

Assuming these initial barriers can be overcome claimants will face a number of specific obstacles on their way to a successful award for damages. In my research, I have focussed on certain key challenges faced by claimants. These are by no means exhaustive but are likely to be inherent obstacles and/or persistent challenges that would arise in the majority of cases. These include:

- Establishing a cause of action

One of the first challenges that all claimants will face is to establish a cause of action, i.e., to establish that there is a causal nexus between the economic harm done by the cartel and the injury suffered by the claimant.

- Calculation of the damages amount

If a claimant is to be awarded with damages the amount must be quantified. This can pose as a significant obstacle as courts will have to be satisfied that the methodology employed to calculate the amount to be determine is correct and that there is sufficient evidence to support the calculation underpinning the damages amount. This is likely to be highly contested by parties and courts will have to choose between different methodologies and competing opinions over the veracity of facts and figures used.

- Class actions

An important procedural issue that is likely to arise relates to the circumstances under which a grouping or collective of harmed individuals may bring a class action for damages in a cartel case. The ability of an individual to join a class action, and the prospects of success of such a class action, is an important consideration impacting whether there can be access to justice for those harmed by cartels.

- Direct versus indirect purchasers

A debate which has arisen in a number of jurisdictions relates to whether indirect purchasers should be prevented from claiming damages, or whether both direct and indirect purchasers should be given the opportunity to claim damages. While there may be practical consideration impacting the extent to which those who have been indirectly harmed by cartels can reasonably expect to claim damages an overly restrictive approach which would only consider direct purchasers may mean that some who might have a valid claim are effectively denied access to justice.

- Access to evidence in leniency cases

One potential challenge faced by damages claimants relates to whether or not they are able to access evidence uncovered in cartel cases. In South Africa, a significant number of cases have involved a whistle-blower that has provided evidence to the Competition Commission in exchange for leniency. If claimants had access to information provided by the leniency applicant this could assist in proving their damages case.

1.7 The premise and objectives of this dissertation

Claiming damages in competition law cases is a relatively new concept in South Africa so it is important for claimants to have some definitive guidance on how to navigate these legal and economic channels as well as to provide a reflection on private damages issues from policy and jurisprudence viewpoints. A law review article on private damages concludes, '[I]n many cases, potential claimants may consider that the lengthy procedure, uncertainty of outcome, and relatively low level of damages that are likely to be available (at least when compared to the US) outweigh the potential benefits of bringing an action'.[62] This is possibly partly because in South Africa—unlike in the US, where claimants can be awarded treble damages—only single damages can be claimed and punitive damages are not available. In South Africa, there is more emphasis placed on public enforcement and perhaps it is time we strengthen the private enforcement and encourage more competition law damages cases too.'[63]

We have very little jurisprudence and literature on competition law damages in South Africa. This dissertation is designed to fill this lacuna by contributing to the advancement of knowledge in this area. I do this by interlinking the conceptual framework of damages and competition law within a South African context. The central argument of the thesis is that the current legislative regime is inadequate to accommodate private damages cases in competition law. Our courts have pioneered the development of private enforcement but this is not ideal. Cases take time to reach finalisation and litigation is costly. In this regard, I will evaluate the progress being made in developing important case precedent as well as identifying where policyintervention may be needed in order to assist damages claimants. For example, I propose that white paper policy changes leading to legislativeamendments be made

[62] Harrison & Cuff op cit note 47 at 54.

[63] Kasturi Moodaliyar, James Reardon and Sarah Theuerkauf op cit note 46 at 162.

for quantification of cartel damages under chapter 3, guide class actions in chapter 4 and access to information under the Corporate Leniency Policy in chapter 6.

To undertake this research, I will be using primary and secondary resources being cases, legislation, policy and materials, mainly from the European Union and the United States, the leaders in private enforcement of cartels. I will provide a critical assessment of the South African jurisprudence and analyse legal and economic avenues to facilitate damages actions in competition law cases. In addition, I will aggregate primary case data on leniency applications and penalties collected by the South African Competition Commission.

The scope of this research is limited in the following aspects. The central focus of my dissertation is on claiming damages as a result of cartel conduct. I do not purport to deal with other anticompetitive behaviour such as vertical restraints or abuse of dominance. This research is limited to private enforcement, and not public enforcement by the competition authorities, even though some of the effects of private enforcement may deter cartels. I begin with the premise that damages in competition law cases should be accessible and I examine ways for it to become more accessible to claimants. Although this is a dissertation on the legal assessment of damages, one cannot remove the economics aspect completely from a competition law problem. Thus, I look generally at the various economic methods to calculate damages from a legal viewpoint, rather than interrogate the econometric details of the quantification of damages.

1.8 Chapter outline

To begin the process of claiming damages, a claimant has to understand the legal processes involved and the evidence required for a successful outcome. Chapter 2 evaluates the significant elements to win the damages claim, those being, to bring a case to a civil court, a plaintiff must prove the existence of the cause of action. The plaintiff must provide evidence to show that there is a causal nexus between the economic harm done by the cartel and the injury suffered by the plaintiff. I begin by devoting attention to the Bread cases and critically analyse the arguments raised in the court a quo and subsequent appeal courts. The Bread cases paved the way for plaintiffs to launch damages claims in a competition law context. I explore whether statutory or common-law delictual actions would be more appropriate, with the goal of compensatory damages in mind.

In chapter 3, I provide an overview of the economic thinking that informs the quantification of the extent of the harm suffered. I begin with an analysis of the economic theory that informs why the creation and perpetuation of cartel activity is considered harmful. This includes an explanation of the economics of how cartels capture rents and how this results in a consumer welfare loss. It is a challenge to calculate the cartel overcharge to best compensate the victims of the cartel. I will provide an explanation of the economics of the consumer welfare loss as reflecting a quantification of the harm caused by cartels. I will look at the different categories of claimants and its corresponding complexities. Further, I will consider the various methodologies proposed by economists in the EU and the US and I analyse the quantification methods developed through the case law.

In chapter 4, I look at a significant procedural issue, which are the class actions to claim damages. Class actions are potentially a very significant engine for access to court. They also entail enormous complexities and huge burdens and should not be taken lightly. Litigation in any area of law is costly, and it would be more cost effective for claimants to share the risk and the reward if successful. I will begin with the premise that the certification process is necessary, analyse the development of class actions through significant South African cases, and I will then argue that this process should be developed through a policy changes leading up to legislative interventionrather than a jurisprudential route.

I draw attention in chapter 5, to the debate whether indirect purchasers should be prevented from claiming damages, or whether both direct and indirect purchasers should be given the opportunity to claim damages. The US has led this discussion through two seminal cases. I investigate the arguments dominating these cases. I also look at the possibility of a cartel defendant being given the opportunity to claim a passing-on defence, meaning that the cartel overcharge that it charged to an intermediary has been passed on to the end-consumer. I propose various scenarios to deal with this issue in South Africa and I will provide an optimal solution. Although this dilemma has not been debated in South African courts as yet, it is important to consider the issues to avoid confusing outcomes.

Moving on to chapter 6 and keeping with the theme of the evidence required by damages claimants to prove their case, I explore how the claimant could access vital evidence of the cartel provided by a whistle-blower in terms of the corporate leniency policy. Damages claimants are challenged by asymmetric information and are restricted by what is available in the public domain. If they had access to information provided by the leniency applicant this could assist in proving their damages case. I will address the debates raised by the courts in the EU and also highlight the US tool to draw a balance to protect the leniency application process and assisting the damages claimant with information. I will conclude on what would work in South Africa, drawing heavily from the EU perspective.

Finally, in chapter 7, I contend that using a judicial vehicle to drive the development of claiming damages in cartel cases, although effective, may be imperfect. Litigation is time consuming and costly. It would be more effective to provide streamlined and transparent guidance to damages claimants. I conclude that policy intervention would be a preferred option to address the damages claimant's access to justice through a more definitive way to deal with establishing a cause of action, quantification of damages, handling leniency documents and dealing with indirect purchasers, rather than relying only on waiting for progress through the courts. I suggest that a White Paper policy guide be drafted which should be developed further into legislation and I provide recommendations for the White Paper.

CHAPTER 2: ESTABLISHING THE CAUSE OF ACTION IN DAMAGES CASES

2.1 Introduction

In the previous chapter, I canvassed the broader goal of damages claimants having to claim compensation through the civil courts to access justice. There have been some developments in case law that take the claim for damages forward in South Africa. The so-called 'Bread cases' (described more fully below) have made some strides towards clarifying the pursuit for damages. Victims of cartels do not receive compensation from the administrative penalty awarded to cartels, and therefore have to claim civil damages to seek restitution. While the Bread cases were initially heard in the Western Cape High Court as claims for damages, the appeal courts focused rather on the certification of a class action process, which I discuss in chapter 4, and gave judicial content to establishing the causation of action in competition law damages cases.

In this chapter, I examine the cause of action, which is one of the substantive issues for courts to consider when analysing damages cases. To establish the cause of action, the damages claimant has to prove that a nexus exists between the harm done (by cartels) and the injury suffered by victims (damages). The establishment of the causal link is left to the interpretation of our courts. Claiming damages in the civil courts can be a protracted process. South African courts have dealt with numerous damages cases, for example, road accident claims and medical legal claims, but civil suits for damages in competition cases are in their teething stages. In recent years, there has been just a handful of cases adding to the competition law damages jurisprudence.

Although this may appear to be an elementary exercise, tracing the history of the Bread cases is necessary. The focal point of my analysis is on the damages cases which followed on after the public enforcement of the cartel by the Competition authorities. These Bread cases paved the way for competition civil damages in South Africa. In this context, I lead the Bread cases analysis by providing a detailed background to the original cartel price-fixing case brought before the Competition Tribunal. In South Africa, we can only claim follow-on civil damages after the competition authorities have made a decision. The Bread cases saga began when the Competition Commission uncovered a price-fixing cartel formed by bread manufacturers. The Tribunal confirmed that the companies in question had contravened the Competition Act and they were subsequently fined. Consumers and distributors who were harmed by the cartel filed a claim for damages against the cartel members.

The Tribunal, acting within its jurisdiction, focused on the prohibited conduct of the bread manufacturers, whereas the civil courts looked at two significant matters, namely the certification of a class action and the cause of action. For purposes of this chapter, I focus on the cause of action only and will examine the subject of certification in the following chapter on class actions.

In conceptualising this chapter on establishing the cause of action, I begin by presenting the arguments of causal uncertainty raised in the Bread cases. I also explore the debate of whether common-law or statutory delictual actions would be most appropriate for a competition law damages case. From a South African legal standpoint, I assess whether the claimant should be entitled to compensatory damages amounting to an out-of-pocket loss, as have been awarded in some of the mainstream damages cases, or whether the claimant should be allowed to claim punitive damages, as done in the United States (US). I examine the evidentiary value attributed to the certificate issued by the Tribunal with regard to proving the wrongful conduct. The United States and the European Union (EU) have advanced jurisprudentially in the area of competition law damages, and I draw from their experiences to provide some direction to the South African circumstance. I extract a clearer roadmap for damages cases, drawing on the recent South African developments such as the *Lee* and *Silicosis* cases. Ultimately, I conclude that competition law cases do not fit into the mainstream delictual approach in South Africa and I argue that the cause of action is a common law delict but that some unique elements of this delict should be recognised.

2.2. Background to the Tribunal's decision in the bread price-fixing case

The South African Competition Commission, upon completion of its investigation into the bread manufacturing industry, referred two complaints to the Tribunal.[64] The first claim became known as the 'Western Cape complaint' and the second was referred to as the 'national complaint'. Tables 2.1 and 2.2 depict a snapshot of these two complaints, indicating the companies involved, the outcome of the complaint and the fine administered, if any. A discussion of each complaint follows below.

2.2.1. Western Cape complaint

Table 2.1: Western Cape cartel complaint: First complaint

Bread manufacturer	**Premier**	**Tiger Brands**	**Pioneer**
Brand of bread	Blue Ribbon	Albany	Sasko and Duens
Outcome	Applied for leniency in terms of the corporate leniency policy.	Commission referred matter to Tribunal. A settlement was reached on the basis of a consent agreement.	Denied involvement in the cartel. Hearing held by the Tribunal. Pioneer found guilty of contravening Competition Act.
Fine – if any	Immunity from fine.	Tiger Brands paid fine of R98 874 869.90 (5.7% of its turnover) after a settlement was reached.	R46 019 954 (9.5% of Sasko's turnover for the Western Cape).

In 2006 the Commission received information from a whistleblower and began an investigation into possible price-fixing among bread manufacturers in the Western

[64] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd*, Competition Tribunal Case No 15/CR/Feb07 and 50/CR/May08.

Cape. The Commission identified the cartel members as Premier Foods (operating under the 'Blue Ribbon' brand of bread), Tiger Brands (selling the 'Albany' brand) and Pioneer Foods (selling the 'Sasko' brand of bread). Altogether, these three companies had dominated bread sales in the Western Cape.[65] Premier was the first company to come forward to the Competition Commission to apply for amnesty from the fine in terms of the corporate leniency policy (CLP). After the Commission's investigation and the finalisation of the Tribunal hearing, Premier was granted such leniency and did not have to pay a fine.[66]

In cooperating with the Commission's investigation (under the terms of the CLP) Premier also revealed that the cartel extended beyond the Western Cape to other parts of the country as well. The Commission then initiated another investigation that became the national complaint.

Tiger Brands undertook to negotiate a settlement agreement with the Commission. The Tribunal fined Tiger Brands in excess of R98 million for its role in the Western Cape bread cartel. It was not involved in the national cartel.[67]

Pioneer denied its involvement in both the Western Cape and the national cartels. It sought to contest the findings of the Commission at a trial.[68] At the stage of final argument in the hearing, Pioneer changed its adversarial strategy and admitted its involvement in the Western Cape cartel. It disclosed that the cartel fixed the discount amount given to its agents/resellers and it fixed the price of toaster bread.[69] Pioneer did not, however, admit to being involved in fixing the price or the timing of the increase

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[65] Collectively these three companies had 60 per cent of the bread sales in the Western Cape. See *Competition Commission v Pioneer Foods* case nos 15 and 50 supra note 64 at 12.
[66] See *Competition Commission v Foodcorp (Pty) Ltd*, Competition Tribunal Case number 50/CR/May 08 and *Competition Commission v Tiger Consumer Brands (Pty) Ltd,* Competition Tribunal Case number 15/CR/Feb07.
[67] *Competition Commission v Tiger Consumer Brands (Pty) Ltd* case no 15 supra note 66.
[68] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* case nos 15 and 50 supra note 64. Both complaints were combined and filed with the Competition Tribunal.
[69] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 11.

of the standard loaf in the Western Cape, which the competition authorities saw as the most harmful effect of the cartel.[70]

At the Tribunal hearing, witnesses revealed that meetings would take place between executives from all three companies to 'discuss, *inter alia*, price increases, the timing thereof and discounts to agents'.[71] These agents or distributors were paid a commission by the bread manufacturers to distribute the bread (also referred to as a 'resellers fee').[72] In its decision, the Tribunal provided a detailed account of the extent of the price-fixing contravention and held that:

> *(a) all three firms would increase the discounted price of toaster bread on 5 February 2007 to realize R4.25 per loaf including tax;*
>
> *(b) all three firms would increase the price of the standard loaf of bread by 35c per loaf from 18 December 2006;*
>
> *(c) the dates by which the bread price increases were to be implemented would be staggered so as not to be implemented on the same date;*
>
> *(d) discounts (commissions) given by all three firms to agents in the Paarl area would be capped at 90c and 75c for agents in the Cape Peninsula;*
>
> *(e) none of the firms would supply new distributors;*
>
> *(f) none of the firms would supply each other's former employees; and*
>
> *(g) none of the firms would make bread deliveries on 25 and 26 December 2006*.[73]

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[70] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 11.
[71] Ibid.
[72] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 15.
[73] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 23.

The intricacies of the cartel conspiracy, secret meetings, denial of alleged agreements and arrangements of price-fixing agreements are detailed in the Tribunal judgment. I will not elaborate on the detail of those intricacies save to say that, after finding Pioneer guilty of a conspiracy in the Western Cape cartel, the Tribunal administered almost the maximum penalty of 9,5 per cent of Sasko's 2006 bread turnover in the Western Cape which amounted to an excess of R46 million.[74]

2.2.2 National complaint

The national cartel complaint also included Foodcorp operating under the brand 'Sunbake', which had revealed its participation in the cartel, signed a settlement agreement and was fined in excess of R45 million. Premier's application for leniency also extended to the national complaint. Pioneer again denied its involvement in the cartel on a national level.

Table 2.2: National cartel complaint: Second complaint

Bread Manufacturer	**Premier**	**Tiger Brands**	**Foodcorp**	**Pioneer**
Brand of Bread	Blue Ribbon	Albany	Sunbake	Sasko and Duens
Outcome	Applied for leniency in terms of the Corporate Leniency Policy.	Commission referred matter to Tribunal.	Commission referred matter to Tribunal.	Denied involvement in the cartel. Hearing held by the Tribunal. Pioneer found guilty of contravening Competition Act.
Fine- if any	Immunity from fine	Tiger Brands signed a consent order (settlement). Paid a fine of R98 874	Foodcorp signed a consent order (settlement). Paid a fine of R45 406	R149 698 660 (10% of Sasko's national turnover less that of the Western Cape)

[74] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 58.

		869,90m (5.7% of its turnover).	359,82m (6.7% of its turnover).	

The Tribunal found that all four members of the cartel had agreed to fix prices and divide the market by geographical territories. It clarified that, although termed the 'national' complaint, the cartel itself did not operate equally across the region, and it referred only to operations outside the Western Cape.[75] Although Pioneer denied its participation, it was revealed that the cartel was involved in a number of prohibited activities, such as dividing the market geographically into Southern Gauteng, Free State, North West and Mpumalanga. For example, it was agreed that Sasko would shut down its bakery in the Welkom area so that Albany could expand its operations in that area, and in return, Albany would not operate in the wider Free State area for the sake of Sasko's growth in that area.[76] In some geographical areas all four members of the cartel also agreed not to compete with each other for business in the informal trade sector (i.e. 'hawkers, spaza shops and the like who would buy bread directly from the bakery').[77] Not only did they agree not to compete in certain areas, but they also decided to withhold supply or remove certain areas from their distribution route.[78] Pioneer, Blue Ribbon, and Sunbake agreed to certain price increases and allocated customers by not allowing their customers to switch suppliers.[79] There were numerous meetings to discuss their coordination including the implementation of price increases and decreasing of discounts.[80]

The Tribunal made the following findings after hearing the evidence of the cartel in the national region:

[75] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 24.
[76] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 26.
[77] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 27.
[78] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 29.
[79] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 30.
[80] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 33.

> *1. From 1999 to date [the reasons for the decision was issued in 2010], Premier Foods, Tiger Brands, Pioneer and Foodcorp were parties to an agreement in terms of which they divided markets amongst themselves in the South Gauteng, Free State, North West and Mpumalanga regions;*
>
> *2. Between 2003 and 2004, Pioneer, Foodcorp and Premier Foods:*
>
> *2.1. fixed the selling price of bread and the dates by which the said prices were to be implemented;*
>
> *2.2. entered into a 'gentlemen's agreement' in terms of which they resolved that during the period of bread price increases, they would not allow customers to switch suppliers in order to benefit from any differences in the prices provided by each supplier;*
>
> *2.3 agreed not to poach one another's customers;*
>
> *3. During July 2006, Pioneer, Premier and Tiger Brands agreed to fix trading conditions in that they agreed not to compete on price in the Vanderbiljpark area; and*
>
> *4. During November 2006, Pioneer, Premier and Tiger Brands, fixed the selling price of bread by agreeing to increase the said price by 30c per loaf in Gauteng with effect from 18 December 2006.*[81]

When determining the penalty, the Tribunal took into consideration the factors outlined in s 59 of the Competition Act and the cartel's conduct, as well as the impact on consumers 'in the form of higher prices, less choice and inferior services'.[82] Pioneer was fined a maximum penalty of approximately R149 million (10 per cent of Sasko's national turnover less that of the Western Cape). Its total fine for its conduct in the Western Cape and national region amounted to close to R200 million.

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[81] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 43.
[82] *Competition Commission South Africa v Pioneer Foods (Pty) Ltd* supra note 64 at 53.

In acknowledging harmful effects of cartel behaviour in South Africa, the Tribunal further stated: 'While we cannot determine the total or quantify the extent of the damage accurately, the result of this was that the poorest of all South Africans paid more for their bread than any other person.'[83] The agents/distributors were also affected by the cartel's practice of 'fixing the agents' commissions and the agreement not to poach agents in the Western Cape [which] led to higher costs of distribution into the informal sector and eliminated the negotiating power, if any, of these agents'.[84]

Although this case went on appeal to the Competition Appeal Court, it was subsequently settled a day before the hearing could take place. Instead, in a separate action, the agents/distributors and consumer groups who felt aggrieved by the cartel conduct then turned to the High Court in terms of s 65 of the Competition Act to claim damages for the loss suffered. The matter was first heard at the Western Cape High Court, it thereafter went on appeal to the Supreme Court of Appeal and finally on appeal to the Constitutional Court. I analyse the arguments canvassed in these courts.

2.3 The value of the Tribunal's section 65 certificate in a damages claim and its impact on statutory liability.

The Section 65 certificate was issued by the Tribunal after it had confirmed that the cartel existed in the bread industry. The certificate, which is binding on a civil court, bears conclusive proof of this outcome.[85] This allowed for a follow-on claim where the victims of the cartel mentioned above decided to take their matter to the civil court

[83] Ibid.
[84] Ibid.
[85] Section 65(7).

to claim damages. The courts have not yet clarified whether the s65 certificate allows for a statutory cause of action or provides a common law delictual claim.

The Western Cape High Court issued a decision[86] in November 2010 in the claim for damages brought by the consumers and the distributors. These claimants wanted to claim back the overcharge of the cartel prices they paid for bread. The consumer group comprised nine applicants and was led by The Trustees for the time being of the Children's Resource Centre Trust (the 'consumers' of bread)[87] and a separate application for damages was brought by the agents/distributors of bread led by Imraahn Mukkadam and two others (the 'distributors').[88] The Court dealt with the pertinent issues of certifying a class action and establishing the cause of action raised by both parties.[89] I will address the class action debate in chapter 4.

There is some doubt about the basis or cause of action for damages claims in competition law. This has not yet been settled by the courts. The claimants in the Bread cases argued that they had a cause of action to bring a claim for damages against the cartel. The Western Cape High Court held that the parties did not properly demonstrate and establish the cause of action.[90] The consumers brought their claim as a follow-on action in terms of s 65 of the Competition Act, after the Competition Tribunal found that the cartel members contravened the Act. They thus asserted a statutory basis for the damages claim. Section 65[91] allows for civil damages claims

[86] The Bread cases Western Cape High Court supra note 40.
[87] The other consumer applicants were: The Trustees for the time being of the Black Sash Trust, Congress of South African Trade Unions, National Consumer Forum, Tasneem Bassier, Brian Mpahlele, Trevor Ronald George Benjamin, Nomthandazo Mvana and Farreed Albertus. I also refer to this case as the '*Children's Trust*' case.
[88] The other distributor applicants were: W.E.M. Distributors CC and Abdul Kariem Ebrahim. I also refer to this case as the '*Mukkadam*' case.
[89] The consumers and the distributors filed two separate actions before the Western Cape High Court. Due to the urgency of the matter (the case was close to prescribing), the judge undertook to deal with both cases in one judgment.
[90] Bread cases Western Cape High Court decision supra note 40 at 38.
[91] Section 65(6) states:

> 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 49(D); or

arising from anticompetitive conduct to be brought only after the competition authorities have finalised the case and issued a certificate to confirm that the firm/s in question have engaged in a prohibited practice. 'The certificate issued in terms of the Competition Act constitutes proof of its contents.'[92] The question remains, what should a court do with the findings of the Tribunal or the Competition Appeal Court? What value does the s65 certificate hold and can these findings be used in a damages claim?

This issue, however, was not properly traversed in the Bread Cartel cases as the Court's concern was with the prima facie case that had to be established in a class action.

Van Zyl AJ in the Western Cape High Court pondered the various types of damages actions and concluded that the consumers' claim was not contractual in nature, neither was it one of personal injury loss nor pure economic loss.[93] He observed that contractual liability was not possible as there was no contract between the consumers and the members of the cartel.[94]

The High Court based its reasoning on the lack of a direct contractual relationship between the bread manufacturers (cartel members) and the consumers. Consumers purchased their bread through the distributors or retailers.[95] The Court observed that

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(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.

[92] *Imraahn Ismail Mukkaddam v Pioneer Foods (Pty) Ltd and others* (CCT 131/12)[2013] ZACC 23; 2015 (5) SA 89 (CC) (hereafter referred to as '*Mukkadam*, Constitutional Court') at 26 para 54.
[93] Bread cases Western Cape High Court decision supra note 40 para 90.
[94] Bread cases Western Cape High Court decision supra note 40 at 38.
[95] Bread cases Western Cape High Court decision supra note 40 at 39.

there was no legal basis for a fiduciary relationship.[96] Under EU law, Clifford Jones argues that the breach of contract may not be enough as a general remedy to adequately protect the rights under EU competition law.[97] Brealey and Green also make the point that 'the situation in competition law, where a tort is committed, which worsens the financial position of a wide group of customers or competitors, is much more open-ended. It may therefore be very difficult, if not impossible, to transpose the remedy to this situation.'[98]

In addition, the application was procedurally defective because the parties failed to obtain a certificate that the Competition Tribunal issues confirming Premier's contravention of the Act, which is required in terms of s 65.

I am in agreement with the High Court on the position that the lack of the certificate from the Competition Tribunal leads to a defective procedure. Section 65 is quite clear on that point. However the Court did not properly justify why this claim should be either delictual or statutory. If it is delictual then there should be a chain of events, even if the relationship link between the cartel members and the applicants is an indirect one. If it is statutory, then causality would be one of the requirements for liability. Statutory claims would be less burdensome on the damages claimant as not all the elements of a common law delict would have to be proven.

On appeal of the Children's Trust case in the SCA, the basis for liability was put forward by Premier Foods, one of the cartel respondents. Premier argued that the legal basis here should be a breach of a statue and not delict. Premier Foods argued that the complainants' claim under s 65 of the Act was 'bad in law'. Premier's justification for this statement was that s 65 allows for follow-on damages claims (that is, once the Tribunal has made a finding of anticompetitive conduct) and that 'on a proper construction of the Act this remedy is exclusive and precludes a common law

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[96] Bread cases Western Cape High Court decision supra note 40 at 40.
[97] Clifford A Jones *Private Enforcement of Antitrust Law in the EU, UK and USA* (1999) 119.
[98] Mark Brealey QC & Nicholas Green QC (eds) *Competition Litigation UK Practice and Procedure* (2010) 471.

delictual action'.[99] Premier also argued in the alternative that the 'proposed claim is, by virtue of the relief being sought, not a claim for damages and accordingly not a valid delictual claim'.[100] I do not find Premier's alternative argument convincing. I do believe that the complainants' purpose in bringing this case was to recover damages. Whether or not that claim was a valid one was what had to be determined.

Wallis JA at the SCA was not persuaded by Premier's argument of exclusivity[101] and averred that s 65 provides for the 'possibility' of a follow-on damages claim and it does not state that 'such a person will have an action, nor does it purport to determine the requirements for such an action'.[102] I agree with Wallis JA that s 65 does allow for the possibility of follow-on damages and it is not an absolute right stemming from the proof of an anticompetitive act (the complainant would have to establish a prima facie case first). My position is that this section of the Act may in itself be too general.[103] The Act was perhaps short-sighted, with the legislators not having contemplated the various nuances and debates leading up to who would actually be entitled to bring such a follow-on damages claim and under what circumstances.

The SCA did not provide a definitive stance as to whether the s 65 certificate creates a statutory claim for damages or whether the claimant would have to prove all the elements of a common law delict.[104] It is clear from this SCA judgment that this would not mean that causality would not be required and it perhaps would not be that different from delictual claims except that it would not be necessary to show that the defendant acted unlawfully. One argument would be that both the *Nationwide* and the *Comair* cases support the notion that section 65 triggers an examination of a damages claim. When the SCA judgment is read together with the contextual problems of s 65 (6) (a), it may well be that all that is required from the court is to quantify the amount of

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[99] *Trustees for the Time Being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2013] 1 All SA 648 (SCA) (29 November 2012) para 66. (Hereinafter referred to as the 'SCA SCA *Children's Trust* decision').
[100] Ibid.
[101] SCA *Children's Trust* decision supra note 99 para 68.
[102] SCA *Children's Trust* decision supra note 99 para 69.
[103] See Section 65(6)(b) of the Act.
[104] SCA *Children's Trust* decision supra note 99 para 22.

damages which can be claimed after a finding of a breach of a prohibited practice by the Competition Tribunal or, if on appeal, the Competition Appeal Court. This explains why the Court in both *Nationwide* and *Comair* cases, dealt primarily with the facts of the case and the quantification of damages, without going to other elements of establishing a delictual action such as the cause of action. As Wallis JA points out, it is not sufficient to just say that the plaintiff suffered harm as a result of the harmful conduct. The plaintiff must show that the respondent 'owed them a legal duty to prevent such loss so that their failure to do so is wrongful in accordance with the legal convictions of the community'[105]. In the *Nationwide* and *Comair* cases, the causal link between the SAA's anticompetitive conduct and Nationwide and Comair respectively, had been established at the Tribunal, and the Tribunal's s65 certificate may have been enough for the High Court to show the established link or in addition, the facts raised at the High Court showed evidence of a prima facie case. In the SCA bread case, Wallis JA was more critical of the case presented by the plaintiffs stating that their case had "been advanced on too simple a basis to determine whether the foundation for the legal duty necessary to support a delictual claim exists."[106] The bread producers argued that their price increases were as a result of rising input costs.
The distributor plaintiffs in this case were unable to establish a prima facie case to show that the increase in prices by the bread producers (as a result of cartel conduct), led to the plaintiffs paying more for the price of bread than they normally would have.[107]
Therefore, upon the examination of Wallis JA's judgment in the SCA Bread case, it is my opinion that the purpose of the section 65 certificate is not to raise a new cause of action. The certificate merely brings about a new procedural requirement leading to follow-on damages. Even though the s65 certificate may have been a trigger for examinaing the quantification of damages in the Nationwide and Comair cases, this may not always be the case, and it will depend on the factual nature of the case. The Wallis JA judgment shows that it may still be necessary to establish a prima facie case and to show that a legal duty exists.

[105] SCA *Children's Trust* decision supra note 99 para 71.
[106] SCA *Children's Trust* decision supra note 99 para 73.
[107] SCA *Children's Trust* decision supra note 99 para 74.

It would perhaps be somewhat easier to argue for a strict (i.e. faultless liability), where the liability is statutory, rather than delictual.[108] In delict it may be somewhat more difficult to show unlawfulness because these claims are for pure economic loss. The mere fact that a breach of statute becomes the basis for liability would also not allow for claims that go beyond compensation. I think that the SCA's interpretation of the wording of the provision in its criticism of the statutory liability part is correct and that the interpretation that supports the statutory liability approach is too literal.

When one looks at the pros and cons of basing liability on delict, it is not sufficient to say that the delict approach is preferred because it would mean that mere compensation can be claimed, or that causality would only be a requirement here. This would be the case also where liability is based on a breach of statute. The law of delict can be adopted to accommodate special features of competition claims and this would be better than regarding it as a separate remedy. Perhaps Wallis JA's support for the idea that unlawfulness normally has to be shown with the understanding that special accommodation can be made for unlawfulness in the context of competition claims could produce the best possible result here. To adopt an orthodox delict approach loses sight of the purpose of s 65 and the focus on the question of the award of damages as opposed to the other elements of the law of delict. The problem that confronted Wallis JA was the issue of damages, albeit that he sought to deal with the question within the broader framework of the law of delict.

The Constitutional Court in *Mukkadam* may have suggested that s 65 creates a statutory claim, however, it is limited its scope by claiming that: 'It has not yet been determined in our law what the true nature of a claim under section 65(1) is and it is unwise to attempt to do so at this early certification stage of the proceedings'.[109]

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[108] SCA *Children's Trust* decision supra note 99 para 70.
[109] *Mukkadam*, Constitutional Court supra note 92 at para 54.

In the recent *Nationwide*[110] and *Comair* damages cases,[111] the High Courts validated the approach that the s 65 certificate issued by the Tribunal shows that the anticompetitive harm has been committed. The Court in *Nationwide* held that: 'It is common cause that section 65(6) of the Act contemplates a claim for damages. This section enables those found to have engaged in prohibited anti-competitive conduct to be liable for damages to any person harmed by that conduct. The certificate is conclusive proof of its contents and is binding on a civil court.'[112] This provides a definitive stance on the matter and in a follow-on damages suit, it saves the plaintiff from having to prove in a civil court that the anticompetitive conduct took place.

In the *Nationwide* case, the High Court mentioned that this is the first delictual claim for damages arising out of anticompetitive practices of our national airline. The Court largely focused on the factual evidence presented by Nationwide to show how SAA's abuse of dominance led to a loss of their profits. SAA also tried to argue that Nationwide's loss of profits was caused by other circumstances such as poor management.[113] The Court, using the but-for test found that if SAA had not influenced travel agents to divert business away from rival airlines such as Nationwide, then Nationwide would not have been forced to exit the market.[114]

The *Nationwide* and *Comair* cases missed out on the opportunity to provide stronger guidance as to the elements necessary for a damages claimant to prove to succeed in its claim. *Nationwide* however did consider the basis of liability to be a delict. This places a burden on the damages plaintiff to prove all the elements of a common law delictual claim than a statutory liability claim would have called for.

The same principle is applied in the EU, where a breach of Articles 101 and 102 of the EC Treaty could be characterised as a breach of a statutory duty. A breach of Article

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[110] *Nationwide* supra note 44.
[111] *Comair* supra note 45.
[112] *Nationwide* supra note 44 para 11.
[113].*Nationwide* supra note 44 para 12.
[114] Ibid.

101 and 102 of the EC Treaty is aligned to the principles of English law in terms of the breach and the remedy. The UK approach is that liability is based on tort but breach of statute would constitute a breach of duty for the purposes of tort law. For example, in the English case *Garden Cottage Foods Ltd v Milk Marketing Board*,[115] the seminal case in this regard, the House of Lords refused to grant an application for interim relief on the basis that damages would be available as an alternative to the plaintiff. In this case, Garden Cottage alleged that the Milk Marketing Board refused to supply it with butter, and the respondent thereby abused its dominant position in the market, which also constituted a breach of a statutory duty.

Before this case, there was a debate as to whether a plaintiff had to show some sort of new cause of action that arose from an anticompetitive action. *Garden Cottage* provided clarity and paved the way for future cases, such as *Arkin*[116], where the Court found that it was common cause that a plaintiff who had suffered loss from anticompetitive conduct under the EC Treaty could bring an action for damages by arguing that there has been a breach of a statutory duty. Lord Diplock in the *Garden Cottage* case described the statutory duty 'that is imposed not only for the purpose of promoting the general economic prosperity of the Common Market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty'.[117] The plaintiff would have to prove that the statute does allow for a civil cause of action (a condition satisfied by Articles 101 and 102 of the EC Treaty); that there has been a breach of the statutory duty (anticompetitive conduct); and that the breach not only has an appreciable effect on competition and trade between the member states but also caused loss to the plaintiff.[118] Under English law it still sees this as the Tort of breach of statutory duty. There are three possibilities: (1) Delict or tort liability where breach of the statute will be one of the factors to be taken into account for the purpose of determining unlawfulness; (2) Delict or tort liability where breach of the

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[115] [1983] 3 CMLR 43.
[116] *Arkin v Borchard Lines Ltd* [2001] Eu LR 232, QBD (preliminary issues); EWHC 687 (Comm), [2003] ALL ER (D) 173. In *Arkin* the Court found that causation was not properly established.
[117] *Garden Cottage* [1983] 3 CMLR 43, [1984] A.C. 131 at 140.
[118] [1983] 3 CMLR 43. See also Aimee Goldstein, Elizabeth Morony, James Hosking et al 'Private antitrust remedies' in *Global Counsel Competition Handbook* (2001) 113.

statute by itself establishes unlawfulness; (3) Statutory liability that is not based on tort where one or some of the requirements of tort law could be applied or not.

When examining the cause of action, the courts in South Africa may question whether the legal liability or loss is too remote.[119] Respondents could argue that the connection between the loss to the plaintiff and the competition harm is too remote.[120] It may be more difficult to argue remoteness in cases where there is a breach of a statutory duty because, as Brealey and Green rightly point out, 'in order to establish liability (…) the claimant must establish that it belonged to the category of person that the statute was intended to protect, and that the damage is of the type that the statute intended to prevent. Having done so, there is little room within which a defence of remoteness can operate.'[121]

The English and EU perspective is one that should be considered in South Africa. I believe that the South African Competition Act under s 65 does place a statutory duty on firms to behave competitively. There should be no need to show a contractual obligation. A legal obligation not to harm competition (which should include competitors, suppliers, and customers) should suffice. Breach of that obligation would open the firm to a damages claim.

2.4 Causation in the Common-law delictual approach

In the South African law of delict, there are five elements one has to prove to win a common-law damages claim.[122] Those elements are conduct, wrongfulness, harm,

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[119] *Fourway Haulage SA v SA National Roads Agency* 2009 (2) SA 150 (SCA).
[120] This was one of the arguments raised in the English case *Courage v Crehan* where the respondent tried to argue that Crehan's loss was caused by being forced to buy beer at full price off Courage's price list (i.e., not discounted prices) and it had nothing to do with the Inntrepreneur. The Court rejected this argument and held that even though Courage fixed the prices on the list, it was the contract with the Inntrepreneur which held Crehan to those prices and prevented him from buying beer at discounted prices. *Courage v Crehan* [2003] EWHC 1510 (Ch), [2003] Eu LR663 paras 232–4.
[121] Brealey & Green op cit note 98 at 488–9.
[122] J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 6 ed (2010).

fault and causation. My focus for this chapter is on the causation element. In the law of delict, causation can take the form of factual causation and legal causation, which are discussed below. I will touch on the possibility of remoteness as well.

Whether it is a statutory claim or a common law delict, the damages claimant would have to prove a causal link between the prohibited practice and the harm it suffered as a result. Factual causation in delict, is proved using the *sine qua non* or the 'but for' test. When testing for factual causation one would ask, for example: 'But for the cartel conduct, would the plaintiff have suffered a loss of Rx amount?' I explore how these counterfactual tests are used in greater detail in chapter 3. In *Nationwide*, SAA raised causation as a defence, arguing that mismanagement was the cause of Nationwide's loss of profits, and not because of SAA's prohibited conduct. The Court also used the but-for test to determine but for the SAA's conduct would Nationwide have been in the same financial position. The Court in Nationwide however, was also cautious not to deal with the causation as a separate element of delict.

The 'but-for' test was applied in the Constitutional Court decision of *Lee v Minister of Correctional Services*,[123] where a prisoner sued the State for damages after he claimed he contracted tuberculosis (TB) in prison. The SCA, which heard the case before its final appeal, dismissed Dudley Lee's claim because he could not prove that, if the Department of Correctional Services (DCS), which oversees the running of prisons, had taken reasonable measures, he may not have contracted TB. The Court acknowledged that there was a negligent breach on the part of the DCS for failing to maintain and manage an adequate system for TB suffers. However, they found that Lee could not show a factual causal link between his contracting TB and any wrongdoing of the Correctional Services. In his final appeal, the Constitutional Court considered whether the 'causation aspect of the common-law test for delictual liability was established and, if not, whether the common law needs to be developed to prevent an unjust outcome'.[124] The approach the Constitutional Court took was to

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[123] *Lee v Minister of Correctional Services* (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012).
[124] Ibid para 2.

engage with the factual enquiry first to see whether the conduct by the DCS caused the harm that gave rise to the claim. If it did not, the enquiry would have ended there. If it did, the Court would enquire into the legal causation, i.e. whether the conduct is 'linked sufficiently closely or directly for legal liability to ensue or whether the harm is too remote'.[125] The Constitutional Court disagreed with the SCA's rigid approach that for Lee to show a causal link he would need to establish the exact source of his infection.[126] The Constitutional Court quoted Nugent JA in *Minister of Safety and Security v Van Duivenboden*, who stated:

> [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.[127]

The Constitutional Court in the *Lee* case concluded that:

> [w]hat was required, if the substitution exercise was indeed appropriate to determine the factual causation, was to determine hypothetically what the responsible authorities ought to have done to prevent potential TB infection, and to ask whether that conduct had a better chance of preventing infection than the conditions which actually existed during Mr Lee's incarceration. Substitution and elimination in applying the but-for test is no more than a mental evaluative tool to assess the evidence on record.[128]

The Court, after much examination, overturned the SCA decision and held that the common law in South Africa allowed for a more flexible approach and that *Lee* had proved the probable causation.

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[125] *Lee* supra note 123 para 38.
[126] *Lee* supra note 123 para 44.
[127] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), quoted in *Lee* para 47.
[128] *Lee* supra note 123 para 58.

Critical of the Constitutional Court's ruling, Fagan[129] questioned whether the Court correctly applied the rules to factual causation and the common law in the *Lee* judgment.[130] According to Fagan the four common law rules applied by the SCA were:

> '(1) A person who performed negligent conduct can be delictually liable for harm suffered by another person only if the negligent conduct was a factual cause of the harm;
>
> (2) negligent conduct was a factual cause of harm if and only if, but for the negligent conduct, the harm would not have occurred;
>
> (3) a court is justified in concluding that a defendant's negligent conduct was a factual cause of a plaintiff's harm if and only if the defendant has proved that the negligent conduct probably was a factual cause of harm; and
>
> (4) a plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm if and only if the plaintiff has proved that, but for the negligent conduct, the harm probably would not have occurred'.[131]

Fagan then describes the Constitutional Court's interpretation of common law rule (2) as being rather that:

> '(2)* Negligent conduct was a factual cause of harm if and only if either:
>
> (a) but for the negligent conduct the harm would not have occurred; or
> (b) the circumstances were exceptional and *but for the conduct*, the harm would not have occurred.'[132]

He then interprets the Constitutional Court's application of rule (4) as

[129] Anton Fagan *Undoing Delict: The South African Law of Delict under the Constitution* (2018).
[130] Fagan op cit note 129 at 218.
[131] Fagan op cit note 129 at 216 quoting 626E, 626I- 269C, 629 F of the Lee SCA judgment.
[132] Fagan op cit note 129 at 217.

'(4)** A plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm if and only if:

(a) the plaintiff has proved that, but for the negligent conduct, the harm probably would not have occurred; or
(b) the circumstances were exceptional and the plaintiff has proved that, *but for the conduct*, the harm probably would not have occurred; or
(c) the circumstances were exceptional and the plaintiff has proved that, but for the negligent conduct, *the risks of that harm would have been reduced*.[133]

Based on this interpretation of the common law principles, the Constitutional Court overturned the SCA decision.[134] Through the exploration of hypothetical examples, Fagan argues that other situations could have resulted in a different outcome which could have been achieved depending on whether the SCA's common law rules (2) and (4) or the Constitutional Court's rules (2)* and (4)** were applied. He maintains that Constitutional Court's introduction of rules (2)* and (4)** were done in error. The Court should have rather applied rules (2) and (4) as was done by the SCA.[135]

I agree with Fagan that the Constitutional Court failed to grasp the main point, which is that 'in order to determine whether negligent (or wrongful) conduct was a factual cause of harm, one has to mentally eliminate or "think away" *as much of the conduct as, but no more of the conduct than*, was negligent (or wrongful). Therefore, one must ask: if *this much, but no more*, of the conduct were eliminated, would the harm still have occurred? If the answer is: yes, the harm would have still occurred, the negligent (or wrongful) conduct was not a factual cause of the harm. But if the answer is: no, the harm would not have occurred, the negligent (or wrongful) conduct was a factual cause of the harm.'[136] Fagan hones in on his point by stating that 'the course of conduct which one posits or imagines should deviate from the actual *conduct no more*

[133] Ibid.
[134] Ibid.
[135] Ibid at 218.
[136] Ibid at 220.

than is necessary to deprive the conduct of its negligent (or wrongful) character.'[137] Fagan's idea is that the hypothetical conduct could change 'the actual conduct *only just enough* to render it non-negligent (or lawful).'[138]

Fagan provides that the South African common law allows for 2 exceptions to rule (2) and (4), namely:

> '*Except in cases of concurrent or supervening causation*, negligent conduct was a factual cause of harm if and only if, but for the negligent conduct, the harm would not have occurred.
>
> *Except in cases of concurrent or supervening causation*, a plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm and only if the plaintiff has proved that, but for the negligent conduct the harm probably would not have occurred."[139]

Fagan says that these qualified rules (2) and (4) would fall short of the 'flexible approach' taken in the *Lee* case, because this approach allows for the non-application of rules (2) & (4) also in cases not involving these concurrent or supervening exceptions.[140] The Lee case did not have any instances involving concurrent or supervening causes.

Fagan did not agree that rules (2) and (4) have 'the potential to cause confusion between factual causation and negligence'.[141] I agree with Fagan that the majority judgment acceptance of rules (2)* and (4)** were done so erroneously.[142]

Interestingly, Fagan believe that though the Constitutional Court may be mistaken in its promotion of rules (2)* and (4)**, it is possible for the SCA and the High Court to ignore these rules as the Constitutional Court in *Lee* did not develop the common law

[137] Ibid.
[138] Ibid.
[139] Ibid at 233.
[140] Ibid.
[141] Fagan op cit note 129 at 234 quoting *Lee* supra note 123 at 1621.
[142] Fagan op cit note 129 at 244.

to an altering extent. This means that the SCA and the High Court could still follow the application and reasoning of common law rules (2) and (4) and the rules of common law are not necessarily static.

In the *Mashongwa v Prasa* case,[143] the Constitutional Court agreed with the *Lee* decision that the but-for test would be sufficient to establish causation. The Court held that '*Lee* never sought to replace the pre-existing approach to factual causation. It adopted an approach to causation premised on the flexibility that has always been recognized in the traditional approach.'[144] Rather than following the (2)* and (4)** rules in *Lee*, the Court in *Mashongwa* used the traditional test of causation to establish that the defendant carried a duty to prevent harm, and its omission to do so resulted in injury to the plaintiff.

Post the *Lee* case, the developing nature of common law was highlighted in the High Court in the *Silicosis* damages case which took the approach that '[c]ommon law is dynamic, fluid and ever changing'.[145] It was argued by counsel in that case that plaintiff was not required to establish the causal link, but was only required to establish 'that the wrongful conduct was probably a cause of the loss'.[146]

Looking at the historical placement of common law in South Africa, the Court in the *Silicosis* case stated:

> There is no revelation to say that to remain purposeful and to retain its moral authority the common law should whenever necessary change to meet changing facts and circumstances. This has long been accepted, and … been applied by our courts. As knowledge or ideas change, and as political, social and economic life progresses,

[143] *Ivan Van Sam Mashongwa v Passenger Rail Agency of South Africa (PRASA)* 2016 (3) SA 528 (CC) (26 November 2015).
[144] *Mashongwa* supra note 143 at 25 para 65.
[145] *Silicosis Nkala v Harmony Gold Mining Company Limited* (2016) High Court of South Africa: Gauteng Local Division, Consolidated case number 48226/12, 2016 (7) BCLR 881 (GJ) (13 May 2016) at 106. (hereafter referred to as the '*Silicosis*' case).
[146] Sara Evans 'Silicosis class action suit: A question of causality' *Mail & Guardian*, 13 October 2015, available at *http://mg.co.za/article/2015-10-13-silicosis-class-action-suit-a-question-of-causality.html*, accessed on 14 May 2016.

> develops and advances with time so should the law. Indeed, on more than one occasion it has done so. This approach is not alien to the Roman or the Roman-Dutch legal systems. It is embedded in the very fabric of the two legal systems. It is on this principled basis that the common law has retained its utility and its moral authority. The principle is also not exclusive to the Roman or Roman Dutch legal systems.[147]

The Court spoke of a constitutional imperative to develop the common law and keep it in line with our ever-changing circumstances in this country. The common law is an evolutionary concept rather than a static one. The *Silicosis* Court articulated that judges would be duty-bound to consider common law in a manner that is consistent with the Constitution. It further stated that

> Sub-sections 8(3) and 39(2) of the Constitution explicitly enjoins the court to develop the common law to the extent that it is necessary to make it consistent with the values enshrined in the Constitution, especially those explicitly mentioned in the Bill of Rights.[148] … The development must reflect the '*spirit, purport and objects of the Bill of Rights*'. We are duty-bound to develop the common law so that it does not '*deviate*' from the '*spirit, purport and objects of the Bill of Rights*'. It is a duty we cannot abdicate.[149]

These cases show that the test for causation does not have to be a rigid one. It evolves as the law requires. Whether it is an organisation that had a duty of care to the plaintiff or whether it is a firm that has the legal duty not to extract cartelised profits from its customers, the 'but-for' test appears to be the standard to establish whether that link exists.

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[147] *Silicosis* supra note 145 at 106.

[148] Sub-sections 8(3) and 39(2) of the Constitution read:

> '8(3) when applying a provision of the Bill of Rights to a natural or juristic person in terms of s8(2),
> (a) a court in order to give effect to a right, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right, and,
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with s36(1).
> 39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[149] *Silicosis* Infra note 145 at 199.

2.5 Jurisprudential developments regarding antitrust injury in the United States of America

The US antitrust causation analysis fits into the post-Lee delictual framework. In order to establish the causal nexus in damages cases in the US, the plaintiff must show that the anticompetitive conduct caused the alleged injury. There is a body of US cases that examined the concept of 'antitrust injury' in this regard, examples of which I have provided below.

The US Supreme Court in the *Blue Shield of Virginia v McCready* case held that the plaintiff must show that the defendant's conduct was 'inextricably intertwined with the injury'.[150] It held further that the standard did not require a fixed set of indicators or price output.[151] This indicates a similar, more flexible approach, as articulated in the *Lee* and *Silicosis* cases.

Plaintiffs in the US have also had difficulty in meeting the requirements for relief. For example, in the US case of *Bell Atlantic Corp. v Twombly*,[152] the plaintiff had to prove that the telecoms companies had engaged in cartel behaviour through market allocation. In this case, the plaintiff failed to adequately plead that the parallel conduct resulted in anticompetitive conduct. This is difficult to prove because the act of parallel pricing itself does not necessarily mean that an agreement exists or that the act is anti-competitive.[153]

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[150] 457 U.S. 465 (1982) at 484.
[151] 457 U.S. 465, 482 (1982).
[152] 550 U.S. 544 (2007).
[153] *Theatre Enterprises, Inc. v Paramount Film Dist. Corp.,* 346 U.S. 537, 540 (1954). See also *Matsushita Electric Industrial Co. v Zenith Radio Corp.,* 475 U.S. 574, 588 (1986) ('[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.').

The concept of antitrust injury was explained in the US case of *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc*[154] where the court said that 'plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful'.[155] In this case, the plaintiff, a small bowling alley, challenged the acquisition by the defendant of its rival. The plaintiff alleged that the rival was going out of business and had it done so, this would have meant more income and market share for the plaintiff.[156] The court emphasised the need to show causation and held that the plaintiff must be able to factually demonstrate that the antitrust violation did cause the plaintiff harm.[157]

Jacobson and Greer, in the course of their research, noted that post-*Brunswick*, there was a significant drop in civil damages cases. They attribute this to the *Brunswick* court's standard of proving the antitrust injury.[158] The plaintiff has to show that the type of loss suffered is the kind of loss that antitrust law is trying to protect, and for no other reason.[159]

Story Parchment Co. v Paterson Parchment Paper Co.[160] is recognised as one of the seminal cases in the US. A parchment manufacturing firm alleged that it was forced out of business by a cartel conspiracy that the defendant and two other firms were involved in. The plaintiff won its case and the court trebled the award in accordance with the US Clayton Act section 4 which allows for triple damages. The Court of Appeals rejected the judgment, and the Supreme Court reinstated it on appeal. The Supreme Court held that:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that [plaintiff] had sustained some damage, and the

[154] 429 U.S. 477(1977).
[155] *Brunswick* supra note 154 at 489.
[156] *Brunswick* supra note 154 at 484.
[157] *Brunswick* supra note 154 at 484.
[158] Jonathan M Jacobson & Tracy Greer 'Twenty-one years of antitrust injury: Down the alley with *Brunswick v. Pueblo Bowl-o-Mat*' (1998) 66 *Antitrust L. J.* 273 at 273.
[159] See for example *Fischer v. NWA, Inc*., 883 F.2d 594, 600 (8th Cir. 1989).
[160] 282 U.S. 555 (1931).

> measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.[161]

This case provided greater certainty that the courts believed that proof of an antitrust violation or, in this case, the conspiracy to remove the plaintiff from the market also, in turn, showed evidence of the antitrust injury to the plaintiff and hence established the causal link.

In another US case, *Continental Ore Co. v Union Carbide & Carbon Corp*,[162] Justice Frankfurter commented with regard to causation that a plaintiff must be given the opportunity to present its case to a jury if it has shown 'sufficient evidence for a jury to *infer* the necessary causal connection between respondents' antitrust violations and petitioners' injury'.[163]

This case also held that the plaintiff must show that the defendant's conduct 'materially contributed' to the harm done to the plaintiff.[164]

Also, the *Zenith Corp v Hazeltine Research Inc* case established that it is not only difficult to show the amount of damage caused but also to show the legal injury. The US Supreme Court in this case stated '[i]t is enough that the illegality is shown to be a material cause of the injury'.[165]

The jurisprudential development in the US shows that there is an explicit requirement in establishing factual causation that there must be a causal nexus between anticompetitive conduct and the harm suffered by the damages plaintiffs. We must remember that in many instances these cases are not follow-on damages cases, and

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[161] *Story Parchment* supra note 160 at 562.
[162] 370 U.S. 690 (1962).
[163] *Continental Ore* supra note 162 at 700 (emphasis added).
[164] 370 U.S. 690, 702 (1962).
[165] 395 U.S. 100, 114 n.9 (1969).

the plaintiffs have the onerous task of first proving that the anticompetitive conduct existed before establishing the causal nexus. In South Africa, we are in our infancy in developing the legal principles that will apply to claims for damages due to breaches of competition law. Judgments like *Lee* and *Silicosis*, which formulated a broader, evolving approach to the common law, help to pave the way in competition law cases. They made it clear that it was not necessary to develop a new test for causation. The traditional 'but-for' test was sufficient for determining the factual causation. In a competition law context, rather than applying strict common law-rules, we need to understand that, the suppliers, distributors and customers and other downstream parties could be affected by the cartel's anticompetitive conduct. It should be possible to bring a claim for harm caused to these third parties, even if they are not necessarily directly contracted to the cartel. Our evolving common-law approaches allow us to entertain these types of possibilities in a competition analysis in civil courts.

2.6 Conclusion

In this chapter, I examined the seminal cases in South Africa that were concerned with on a cartel in the bread industry. The first competition law damages case to be heard in the civil courts was in the Western Cape High Court in 2011. This case together with its appeal decisions paved the way for civil damages in South Africa. The Bread cases raised important debates on causation in these courts. Important questions around procedural aspects were also made in these courts.

The definition of damages is generically applied throughout the jurisdictions discussed, whether labelled as a 'delict' in South Africa or a 'tort' in the US and England. Within this conceptual, theoretical account, Carrier draws a comparison between tort law and antitrust law. He states:

> [O]n a broad level, the antitrust and tort fields share similar goals in seeking to deter and compensate for behavior that falls below certain standards and causes certain types of harm. Second, tort and antitrust causation objectives overlap; tort law tests

> the connection between breach of a duty and plaintiffs harm, and antitrust doctrine focuses on the link between challenged conduct and anticompetitive effect.[166]

He states further that:

> [T]he two elements of tort's causation analysis naturally apply to antitrust law. Factual cause demonstrates that the challenged conduct is responsible for the harm suffered. And legal cause limits the universe of factual causes that can give rise to liability by asking if the law should address the behaviour.[167]

These distinctions were also articulated and examined in the *Lee* and *Silicosis* cases. Although not competition law related, it is beneficial to drawing principles from these existing delictual law cases to expand the causation context.[168]

It appears that common law has a broad appeal, one that is ever changing, and more importantly, one that must remain in line with our constitutional values. As quoted in the *Silicosis* case, Innes CJ in *Blower v Van Noorden* spoke of the principle of the common law that is not fixed and allows some freedom of change, when he stated:

> There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the Courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when there are so important or so radical that they should be left to the Legislature.[169]

There is a lack of jurisprudence in competition law damages cases in South Africa, and where possible, I drew principles from cases in the US, England, and European

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[166] Michael A Carrier 'A tort-based causation framework for antitrust analysis' (2011) 77 *Antitrust Law J.* 414.
[167] Carrier op cit note 166 at 414.
[168] See Carrier op cit note 166 at 414.
[169] *Blower v Van Noorden* 1909 TS 890 at 905.

Union to interpret the trends in these established jurisdictions. I proceed to analyse the debates in establishing causation in the context of South African law and continue to frame the definition of damages within a competition law framework.

In doing so, I examined the value of the s 65 certificate issued by the Competition Tribunal and the role it serves to assist the damages plaintiffs in the civil courts. In the SCA *Children's Trust* case, Wallis JA provided some support for Premier's argument by taking a rather literal approach to s 65(6)*(a)* and s 49D(4), by referring to these provisions as providing a 'mechanical process' in which only the amount of the claim for damages can be assessed.[170] It does not suggest that causality is irrelevant but rather that it would not be necessary to prove that a duty has been breached or that the conduct is unlawful..

The SCA found that the applicant failed to properly advance their cause of action on a prima facie basis. The applicant did not explicitly state whether it was pursuing the case on the basis of a delictual claim for breach of a statutory duty or whether it was one based on a breach of a constitutional right and thus a claim for constitutional damages in the alternative. One would require a clear understanding of the nature of the case in order to respond meaningfully.[171] The SCA spoke to the cause of action at this stage almost as incidental to establishing a class action certification. It said that the applicants need to show that the cause of action arose from the respondents' conduct (in this case, the price-fixing).[172] Either way, these standards should not impose an onerous task on the applicants. The applicants do need to provide clear evidence of the cause of action and the factual, legal and policy support to show its link to the damages suffered by the applicant before it approaches the steps of a court. This approach will strengthen their case for compensation for the harm suffered due to the cartel conduct.

[170] SCA *Children's Trust* decision supra note 99 at 50 para 72.
[171] SCA *Children's Trust* decision supra note 99 at 32–3 para 43.
[172] SCA *Children's Trust* decision supra note 99 at 43 para 62.

Having reviewed the theoretical framework and the interpretation of section 65 and its practical case application, especially with regard to Wallis JA's position in the Bread case at the SCA, I conclude that damages claims in a competition law context should be based on the common-law delict incorporating competition law aspects which is compensatory in nature. This approach as well as the economic considerations highlighted in the following chapter 3 will contribute to restore the damages claimant's access to justice.

CHAPTER 3: THE ECONOMICS OF CARTEL DAMAGES: IDENTIFICATION AND QUANTIFICATION OF HARM

3.1 Introduction

Damages awards are a means for injured parties to receive compensation for the harm suffered by them as a result of cartel infringements. The optimal outcome in a damages case is to return the plaintiff to the financial position it would have enjoyed had the counterfactual scenario in which the defendant had not caused the anticompetitive harm occurred.

Having laid down some of the legal foundations of my broader research question in the previous chapter, I propose in this chapter to focus on how these damages should be quantified and cartel victims appropriately compensated.

Calculating damages in practice is a difficult exercise and thus one of the main challenges faced by courts in competition law damages cases. This is because there may be several plausible alternative counterfactual scenarios. Selecting the most likely scenario will be informed by a thorough understanding of the relevant markets. Further, access to reliable information and data about the industry and pricing is often difficult to obtain. Skilled economists are therefore required to construct hypothetical scenarios using their knowledge of the relevant markets and the appropriate economic techniques to assess the estimated award.

In this chapter, I provide an overview of the economic thinking that informs quantification of the extent of the harm suffered. I first considered the economic theory that informs why the creation and perpetuation of cartel activity is considered harmful. This includes an explanation of the economics of how cartels capture rents and how this results in a consumer welfare loss. I then explore how the concept of a consumer welfare loss provides an economic basis for establishing the causal link between the injured party as claimant, and the injury suffered because of cartel behaviour. I identify different categories of claimants likely to be affected by cartel behaviour and discuss some of the complexities that may arise in determining the extent of the harm done to parties that may be indirectly affected by cartels in related markets in the supply chain.

In this chapter I will examine how optimal damages could be determined on the basis of various economic methodologies used by experts with reference to the EU and the US and to the developing case law in South Africa. Various methodologies for establishing causality and quantifying the extent of harm will be discussed. If jurisprudence in competition law damages cases is to develop in South Africa, it is important that both the courts and policymakers provide guidance on the quantification exercise. I will consider what form such guidance might take with refrence to economic approach to determining overcharges and calculating damages within the legal framework. This chapter will show that it will be important for courts in South Africa to go beyond mere conjecture in determining the calculation of damages. Any quantification must be based on sound economic evidence. The appropriate methodology will be informed by the facts and circumstances of the case at hand as well as practical considerations such as the quality and availability of data. Although there is no one best approach or optimal methodology an analysis of the developing case law suggests some guiding principes that may be applied, which principles I will address in this chapter.

The literature covers a variety of cases that deal with exclusionary abuse of dominance and those that involve collusion. In this chapter, and in keeping with the theme of the thesis, my examination will be mainly to damages claims in cartel cases although I may refer to certain cases involving other areas (such as abuse of dominance) to the extent that these provide guidance for calculating damages that may also apply to cartel cases. In doing so, I explore the methods available to a damages claimant to quantify the overcharge and possible lost profit.[173]

[173] Raised cartel prices may result in loss of profits, especially for those customers who use the products, such as intermediate products that are used to manufacture a downstream product. 'Lost profit' is any increase in sales or profit the injured party would have had if the cartel infringement did not occur.

3.2 The economics of cartel harm

Economists have traditionally used the model of a perfectly competitive market as a benchmark against which different competitive outcomes can be assessed[174]. The benchmark of perfect competition can be compared (for example) with imperfectly competitive markets, oligopoly markets and the case of monopoly. This approach also provides a theoretical framework for assessing the effects on the welfare of consumers and producers under different competitive conditions. In the discussion which follows, I will examine briefly the model of perfect competition and its welfare implications, followed by a short overview imperfectly competitive market structures (including monopoly and oligopoly). I will consider the welfare effects of perfect competition when compared with that of monopoly as this will inform the assessment of the economic harm arising from cartels.

3.2.1. Perfect Competition

It is important to note that the model of perfect competition is a theoretical construct and, as such, does not reflect the messy conditions of competitive markets as they exist in the real world. However, it serves a useful analytical purpose that allows the economist to investigate in a structured way the imperfectly competitive conditions which arise when the assumptions which underpin conditions of perfect competition are relaxed. This analytical framework is also useful for purposes of structured thinking about the counterfactual of a competitive scenario versus one in which anticompetitive outcomes have been observed. The basic model of a perfectly competitive market depends on the following assumptions:[175]

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[174] Paul A. Samuelson, William D. Nordhaus *Economics* 19th Edition (2019)149 - 207.

[175] Ibid at 150.

- A large number of buyers and sellers trading quantities which are small compared to the overall size of the market;
- Products sold by different firms are homogenous i.e., easily comparable (and substitutable) in terms of product characteristics;
- Firms and consumers enjoy perfect information allowing them to respond immediately to any changes in price or quantities;
- All firms have access to the same production technologies and no one firm has a cost advantage over the other;
- Barriers to entry are non-existent and there is no limit on firms entering or exiting the market; and
- All firms charge prices at levels of output which maximise their individual profit.[176]

An important feature of the perfectly competitive market is that individual firms are *price takers* because (given the above assumptions) any attempt to raise prices independently will result in a loss of sales to competitors and any attempt to lower prices will be observed and immediately matched by competitors.[177] This competitive process results in an equilibrium market price and level of output in which the market clears any surpluses or deficits in supply and demand. Although each firm seeks to maximise its individual profit the intense process of competition tends to eliminate any excess profits and, when the market is in equilibrium, each firm finds itself in a position where it earns just enough revenue to cover its costs and remain in the market.[178]

Although individual firms in perfect competition are price takers, they must nevertheless choose what level of output to produce. The main assumption is that firms choose the level of output which maximises their profits. The highest profit is at the level of output where total revenue exceeds total cost by the greatest amount.

[176] Ibid.
[177] Ibid at 150.
[178] Ibid at 157.

Economists also assess the behaviour of firms using what is called marginal analysis.[179] Marginal analysis involves an examination of the impact of the last unit produced. Marginal revenue is the revenue (or income) received from selling the last unit of output.[180] Marginal cost is the cost incurred from the production of the last unit of output. In the case of perfect competition, the marginal revenue received by the firm from the production of each additional unit of output is the market price (recall that firms under conditions of perfect competition are price takers and cannot influence the market price to earn more revenue).[181] When the market price is greater than the individual firm's marginal cost it will be profitable for the firm to produce an additional unit of output. Marginal cost rises as the level of output grows. The firm will continue to increase its output up to the point that the price it receives equals its marginal cost. Any sale of units beyond this point would lead to falling profits as with each extra unit of output sold marginal cost would be increasing and exceeding the price received. [182]

With reference to the microeconomic foundations of these models the important feature to emphasise is that firms in a perfectly competitive market will select a level of output such that marginal cost equals price[183]. This is because in a perfectly competitive market with price takers the marginal revenue of the firm is also equal to the market price. Note further that in a perfectly competitive market the prices on each firms' supply curve will be equal to its marginal costs as each firm will be willing to sell an additional unit of output on the basis that the price it receives covers its marginal cost of producing that unit of output.[184]

The profit maximising position of an individual firm under conditions of perfect competition is illustrated diagrammatically below in figure 3.1. Note the upward sloping marginal cost curve (which is also the firm's supply curve) and the horizontal marginal

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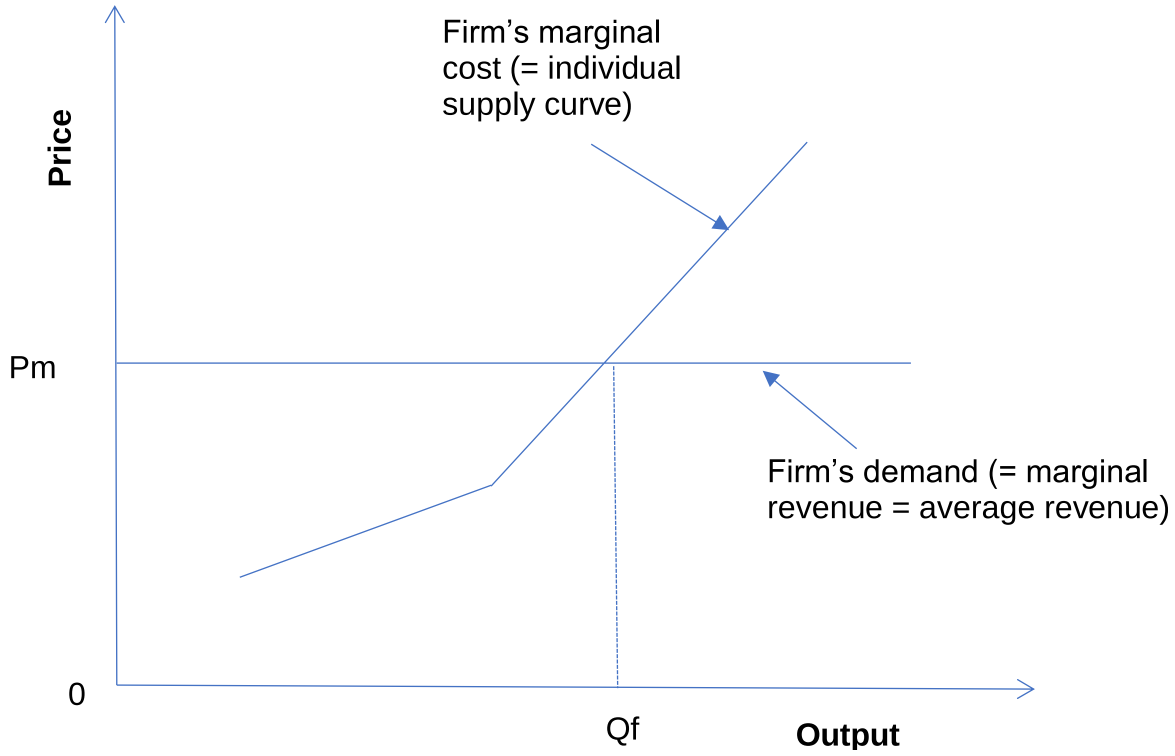
[179] Alfred Marshall *Principles of Economics* (1890) 403-476.
[180] Samuelson & Nordhaus op cit note 174 at 177.
[181] Ibid at 150.
[182] Ibid at 151.
[183] For a more detailed treatment of the microeconomic foundations of these models the reader is referred to texts such as Hal R Varian, *Intermediate Microeconomics: A Modern Approach* 8th edition (2010).
[184] Samuelson & Nordhaus op cit note 174 at 157.

revenue curve, which is also the firm's demand curve and which is fixed at market price Pm.

Figure 3.1. Individual Firm under Perfect Competition[185]



In figure 3.1 above, the firm will maximise its profit at the level of output Qm where the firm's marginal cost is equal to the market price Pm. At levels of output greater than Qf marginal costs would be exceeding marginal revenues and the firm would be experiencing a reduction in profitability.

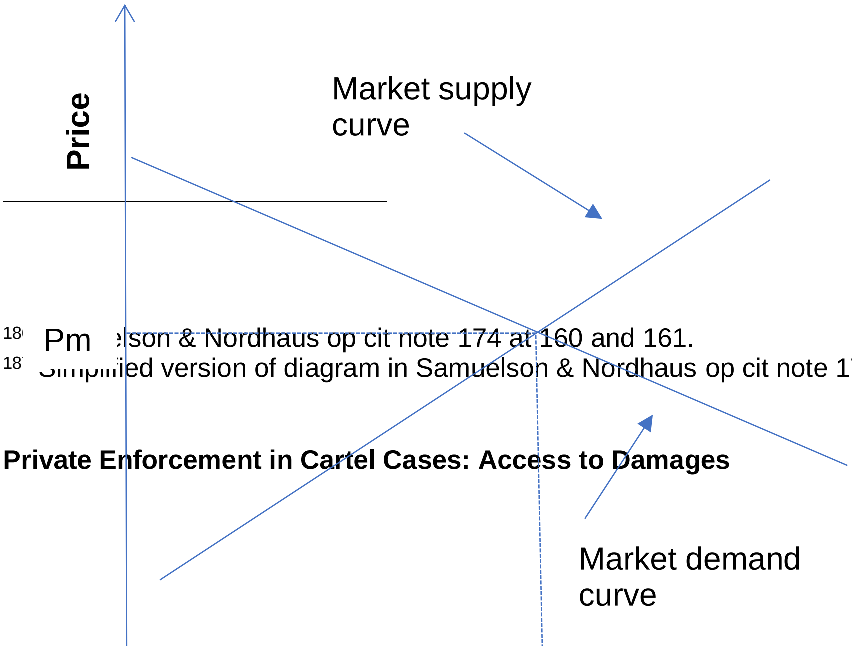
At the level of the market the total output of all the firms in the market can be ascertained by adding up the output that all the firms are willing to produce. This is

[185] Based on depiction by Natasha Kwatiah 'Equilibrium of the Firm and Industry under Perfect Competition' available at *https://www.economicsdiscussion.net/perfect-competition/equilibrium-of-the-firm-and-industry-under-perfect-competition/18579* accessed on 16 June 2020.

equivalent to the horizontal summation of all the individual supply curves resulting in a market supply curve which will have the same upward sloping shape as the individual supply curves. Note, however, that the market demand curve will be downward sloping, reflecting the inverse relationship between the price of a product and quantity demanded by consumers.

Market equilibrium is illustrated in the diagram below. The market is in equilibrium at the level of output Qm and Price Pm where the market demand and supply curves meet. At the market equilibrium output level Qm each individual firm is maximising profits. At this point price equals marginal cost for each individual firm and for the market as a whole[186].

Figure 3.2 Market Equilibrium under Perfect Competition[187]



186 Samuelson & Nordhaus op cit note 174 at 160 and 161.
187 Simplified version of diagram in Samuelson & Nordhaus op cit note 174 at 161.

This figure 3.2 shows that another important feature of this perfectly competitive market is that in long-run equilibrium firms will earn zero economic profits. This means that each firm receives enough income to cover costs and earn a 'normal return' sufficient to stay in the market (i.e., the firms' total revenues will equal its opportunity cost, including cost of capital).

3.2.2. Welfare Implications of perfect competition

A key feature of perfect competition is that the market equilibrium described above will achieve what is known as allocative efficiency. Allocative efficiency refers to an optimal outcome in which resources are used to produce the mix of goods and services that maximises value for society.[188] In any market allocative efficiency is achieved when production takes place up to the point where the additional value received from a unit of output equals the cost of producing that unit of output (i.e., at the level of output where price equals marginal cost).[189] Intuitively this outcome describes how intense

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[188] Samuelson & Nordhaus op cit note 174 at 160.
[189] Ibid at 163.

competitive pressure ensures that resources are deployed towards producing goods and services that consumers value[190].

Under conditions of perfect competition what is known as productive efficiency is also achieved because profit maximising firms will select the technology that minimises the cost of production.[191] Intuitively this makes sense as it captures how competitive pressure forces firms to seek means to lower costs to remain profitable and avoid (in the long run) being forced out of the market.

Note that the static model of perfect competition referred to here does not deal explicitly with any dynamic efficiency gains that may arise due to competition over time. Dynamic efficiencies gains are made when firms seek to improve allocative and productive efficiency over time.[192] This may be done for example by innovating and may involve trade-offs between static allocative and productive efficiency now and in the future.

Economists measure the welfare of consumers using a concept known as consumer surplus.[193] Consumer surplus is based on the notion that consumers will receive a net benefit if their valuation of a product (reflected in the price they are willing to pay) is higher than the price that is actually paid for the product. By adding together this net benefit across all the units consumed economists obtain a measure of consumer surplus.[194] This is shown if figure 3.3 below as the area between the demand curve and the market price.

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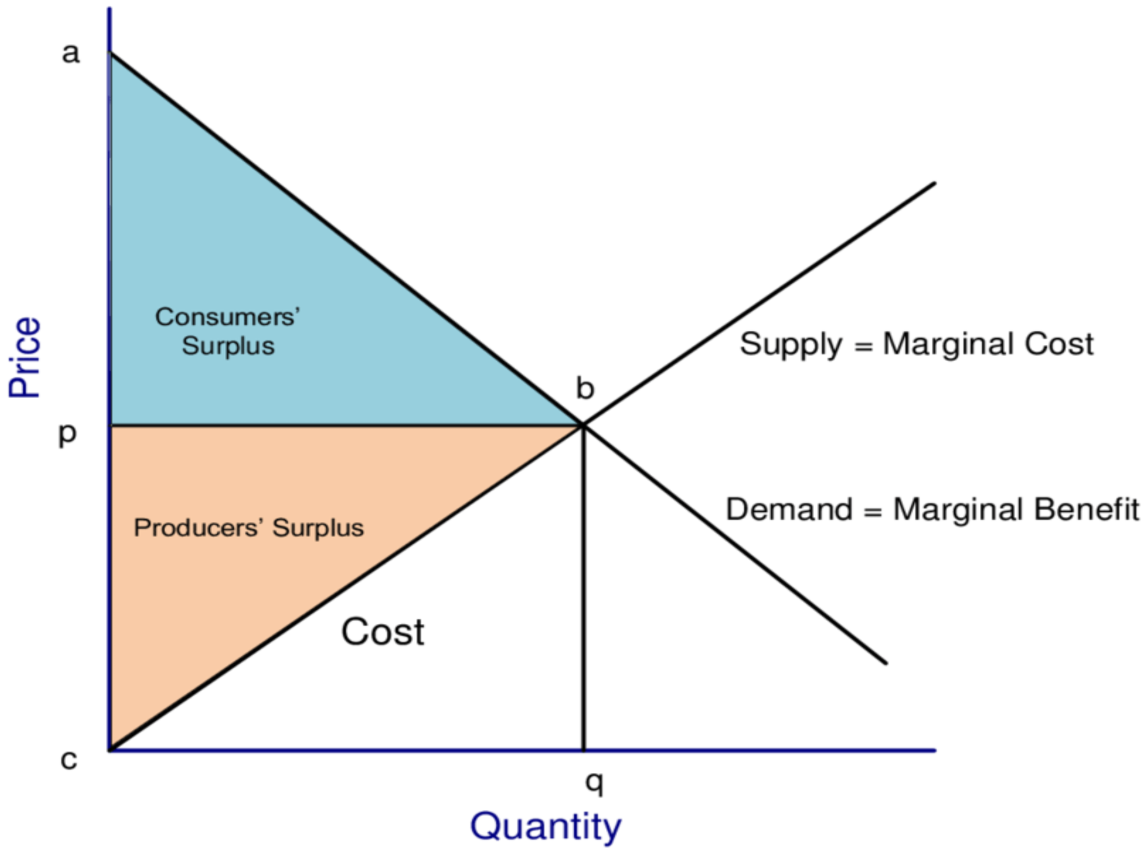
[190] Ibid.
[191] Ibid.
[192]*Robert Dolamore '*Dynamic efficiency - the key to lifting Australia's productivity performance?' 23 March 2014, available at *https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/March/Dynamic-Efficiency* accessed on 16 June 2020.
[193] Hal R Varian, op cit note 183 at 251- 270.
[194] Ibid.

In the case of producers, the net benefit they receive is measured as the difference in the price they receive for selling a product and the lowest price they would have been willing to accept to supply the product. By adding this net benefit up across the units produced a measure of producer surplus is obtained. This is shown in figure 3.3 as the area between the market price and the supply curve.

Figure 3.3 Consumer Surplus and Producer Surplus under Perfect Competition[195]



In assessing the total welfare effect of any given firm behaviour or market disturbance consideration is given to both consumer welfare and producer welfare by measuring changes in the sum of consumer and producer surplus.[196] Note that while economists would be interested in maximising total welfare, competition authorities and

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[195] Source: Garry W McDonald slides available *at https://www.researchgate.net/figure/Estimation-of-the-Consumers-and-Producers-Surplus-for-a-Substitutable-Ecosystem-Service_fig1_320935490*, accessed on 15 June 2020.
[196] Hal R Varian, op cit note 183 at 251.

practitioners have tended to focus on maximising consumer welfare, placing relatively less weight on producer welfare[197].

Figure 3.3 above shows the consumer surplus and producer surplus that arises in perfect competition. It is useful to compare this optimal outcome with the welfare outcomes that arise when the assumptions of perfect competition are relaxed. The extreme case is that of monopoly which considers the case of a market in which there is only one supplier and there is no prospect of entry by competitors. As will be shown below a monopoly leads to a reduction in total welfare compared to the case of perfect competition.

3.2.3. Welfare implications of monopoly

As noted above monopoly describes a market structure in which a single firm supplies all the product and there is no prospect of entry by a competitor. It is important to note that monopolies exist for different reasons. They may be artificially created or maintained or, in the case of natural monopolies, may be the most efficient structure given the nature of costs (e.g., very large economies of scale). Monopolies may be temporary or may be replaced over time due to technological disruption.[198] However, for illustrative purposes here, I will consider the case of a basic uncontested monopoly and its implications for total welfare. For purposes of this chapter, it is also important to note that the welfare outcomes in the monopoly case would be analytically equivalent to the case of a cartel that manged to control an entire market.

The fundamental difference between firms in perfectly competitive markets and monopoly is that the monopolist can affect the market price by adjusting its level of output whereas firms under perfect competition are price takers. By being able to

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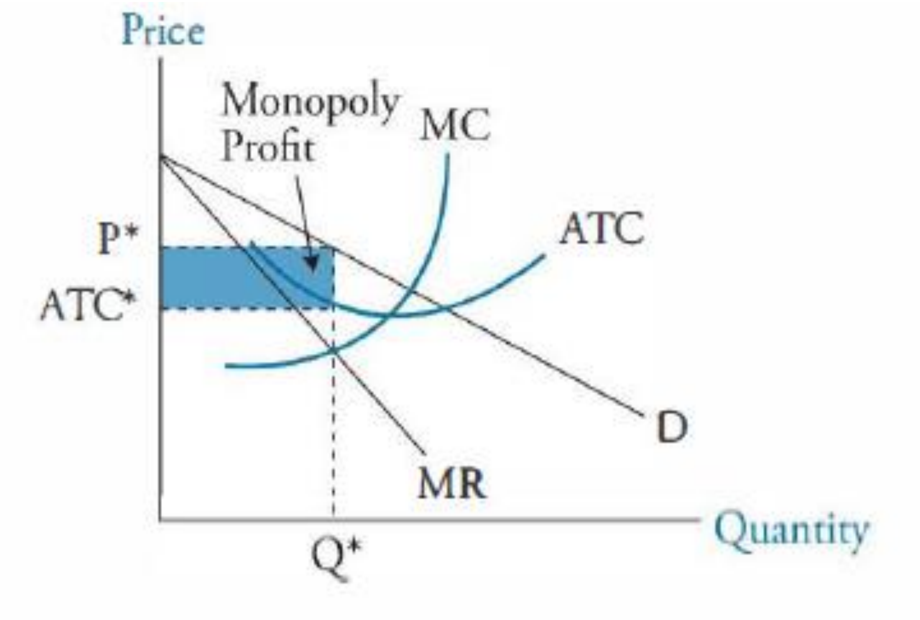
[197] See for example the European Commission Guidelines on the Application of Article 81(3), (n 25) para 33 which notes the central focus of competition law on consumer well-being and welfare. As clearly noted by the Commission, '[t]he aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.
[198] Samuelson & Nordhaus op cit note 174 at 177.

influence the market price the monopolist is conferred with market power[199] that is, the ability to raise prices and restrict output independently of any competitive pressure.

The monopolist faces a downward sloping demand curve, which is also the market demand curve. If the monopolist increases output, the resultant increase in revenues will equal the price it receives for the extra unit of output less the reduced revenues from lower prices for the other units sold. The monopolist thus faces a downward sloping marginal revenue curve. Note that this contrasts with the firm under perfect competition who faces constant marginal revenues at the market price. The monopoly outcome is illustrated below in figure 3.4. The diagram shows the downward sloping marginal revenue (MR), the marginal cost (MC) curve of the monopolist as well as its average total cost (ATC) curve. The monopolist maximises profit at the level of output where its marginal revenue is equal it's marginal cost. This allows the monopolist to charge a monopoly price P* at output level Q*. Note the existence of monopoly profits, which are calculated as the difference between P* and ATC* multiplied by the total number of units sold Q*. ATC* is the average total cost of the monopolist at Q* units of output.

Figure 3.4. Monopoly[200]

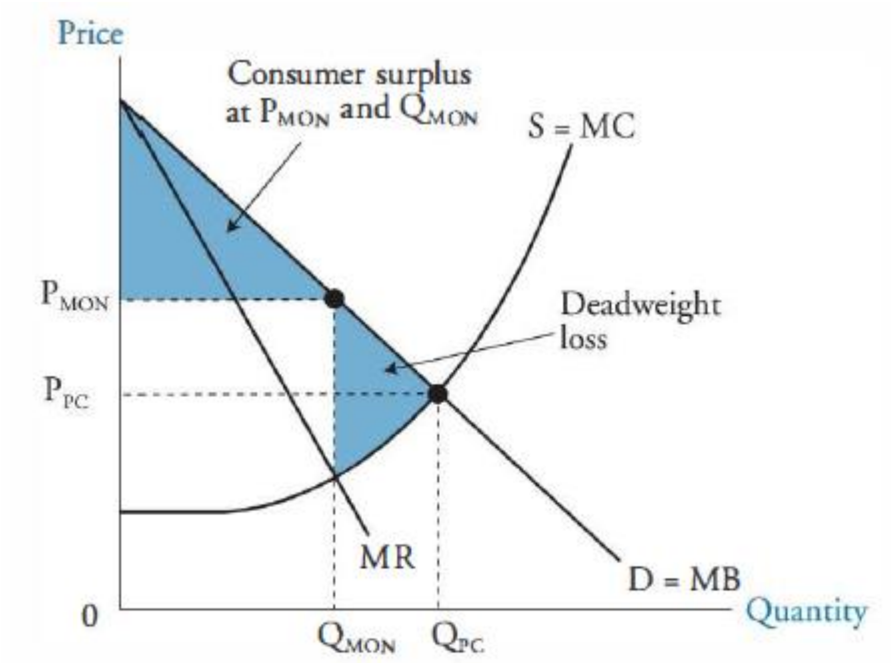
[199] See Lerner, A.P 'The Concept of Monopoly and Measurement of Monopoly Power' (1934) 1:3 *The Review of Economic Studies*, at 157 – 75.
[200] Source: Ecuba 'Monopoly v monopolistic competition' available at *https://www.educba.com/monopoly-vs-monopolistic-competition/* accessed 15 June 2020.



An examination of this diagram reveals some key differences with the outcomes under conditions of perfect competition. Firstly; there is the existence of excess profits which would have been competed away under perfect competition. Secondly; the monopoly outcome is not allocatively efficient due to the monopoly price P* being greater than marginal cost. The welfare differences become clearer when one compares the perfectly competitive outcome with the monopoly outcome as in figure 3.5 below:

Figure 3.5. Monopoly, Consumer Surplus and Deadweight Loss[201]

[201] Source: Ecuba 'Monopoly v monopolistic competition' available at *https://www.educba.com/monopoly-vs-monopolistic-competition/* accessed 15 June 2020.



In the figure 3.5 the industry supply curve (S) shows the sum of all supply curves of the firms competing in the market. As has been explained above the firms under perfect competition are price takers and will maximise their profits at the level where marginal revenue (Ppc) equals marginal cost. The quantity Qpc and equilibrium price Ppc in a perfectly competitive market is found at the point where the industry supply curve and the market demand curve (D) intersect. A monopolist on the other hand will maximise its profit at the level of output Qmon and price Pmon where its marginal revenue is equal to marginal cost. This results in a deadweight loss as the monopolist produces a quantity that does not ensure the maximisation of the sum of consumer surplus and producer surplus that would be achieved under conditions of perfect competition.

3.2.4. Imperfect competition, oligopoly and welfare implications

Real world markets tend to fall somewhere between the extremes of perfect competition on the one end of the spectrum and monopoly on the other end. Most real-world markets can be described as imperfectly competitive. However, the more competitive a market is, the closer it comes to achieving the welfare benefits of perfect competition. Similarly, the less competitive a market, the more likely it is that consumer welfare will be harmed with less efficient outcomes as in the monopoly case.[202]

A characteristic feature of any imperfectly competitive market is the existence of some degree of market power. From a competition policy perspective, the degree of market power is important as it indicates the extent to which firms (either individually or by colluding) can raise prices and restrict output independently of their competitors and customers. The rationale behind competition policy is to promote effective competition such that the undue and harmful exercise of market power is constrained.[203]

There are a large variety of imperfectly competitive market structures. Some imperfectly competitive markets may nevertheless be characterised by effective competition with conditions approximating that of perfect competition. Markets which are not effectively competitive are likely to have features which break the assumptions underpinning the model of perfect competition and produce outcomes more like that observed in monopolised markets. For example, barriers to entry may be high, limiting the number of firms in the market or information asymmetries may make it difficult for consumers to compare alternatives and respond accordingly.

Imperfectly competitive markets in which there are only a small number of suppliers (two or more) are known as oligopolies (a duopoly is an oligopoly with precisely two suppliers). Oligopolists engage in strategic behaviour and often make decisions based on expectations about how rivals and consumers might react.[204] Models based on the theories of Bertrand[205] (which describe interactions among firms that set prices and their customers that choose quantities at the prices set) and Cournot[206] (which

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[202] Samuelson & Nordhaus op cit note 174 at 187-203.
[203] Ibid.
[204] Ibid
[205] Hal R Varian, op cit note 183 at 512 reference to Bertrand J. 'Review of "Recherches sur les Principes Mathematiques de la Theorie des Richesses", (1883), 48 *Journal ses Savats* at 499-508.

[206] Ibid at 507 reference to Augustin Cournot *Researches into the Mathematical Principles of the Theory of Wealth* (1838).

describe an industry structure in which firms compete on the amount of output they will produce) allow for a variety of equilibrium outcomes which may be more or less competitive. Outcomes in such cases will depend on the circumstances of those markets and would have to be assessed on a case-by-case basis. Theoretical and empirical work done in this area falls within the broader field of Industrial Organisation (IO).

The above complexities notwithstanding where there are a relatively smaller number of firms in the market, there will likely be strong incentives to coordinate to maximise joint profits. The reason for this can be seen if one compares the welfare outcome under monopoly with the outcome under perfect competition. Firms which seek to maximise joint profits are in effect trying to achieve a result closer to the monopoly outcome and as far removed as possible form the perfectly competitive outcome.[207] They may achieve this tacitly (by for example, following a leader) or explicitly (by forming a cartel). Such collusive arrangements are not always stable and are susceptible to 'cheaters' breaking ranks. However, if such collusive efforts prove effective then the outcome will be a reduction in consumer welfare and a transfer of value from the pockets of consumers (in the form of higher prices, reduced output, lower quality, less variety etc) into pockets of the producers (in the form of higher profits). [208]

3.2.5. Welfare implications of cartels

Cartel conduct may take different forms such as price-fixing, market sharing or bid rigging. All such conduct involves collusion among competitors to restrict output and raise prices in a manner which achieves the same negative outcome as that of a monopolist. This monopoly outcome is considered harmful because it results in a transfer of welfare away from consumers to producers by forcing, through the exercise

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[207] Samuelson & Nordhaus op cit note 174 at 190.
[208] Ibid.

of market power, a less efficient outcome than would have occurred under conditions of perfect competition.

According to Motta,

> 'in economics, collusion is a situation where firms' prices are higher than some competitive benchmark. A slightly different definition would label collusion as a situation where firms set prices that are close enough to monopoly prices. In any case, in economics collusion coincides with an outcome (high-enough price), and not the specific form through which that outcome is attained.'[209]

Therefore, it is possible to assess the economics of the behaviour of a cartel in the same way as that of a monopolist. This is because cartels effectively take control of the market for purposes of achieving the same control over prices and output afforded to a monopolist. As discussed above, the monopoly outcome is an extreme case. Cartels may not succeed in monopolising entire markets. However, to the extent that they manage to suppress or avoid competition the welfare effects will play out in a similar manner. If the members of the cartel compete rather than coordinate to monopolise the market, the effect in the market will be a lower price at a greater level of output. This outcome is achieved because of the firms undercutting each other's prices in order to capture a greater share of the market individually. This rivalry among firms in the market results in a competitive price and level of output that is beneficial to consumers but leaves the rival firms in a relatively worse off position compared to the monopoly outcome. This is because the profits they would have made are effectively competed down to a level just enough for them to cover their costs and earn a 'normal' return. The power of the monopolist to increase price and restrict output relative to the competitive outcome can be shown to be equivalent to that of a cartel in which the members of the cartel coordinate to achieve the monopoly outcome. This is where profits above the level of a 'normal' return (monopoly profits) are appropriated by the members of the cartel. These monopoly profits are effectively a transfer from

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[209] Massimo Motta *Competition Policy: Theory and Practice* (2004) 138.

the pockets of consumers into the profits of the cartel members and therefore suggest a basis for estimating the quantum of the harm to consumers arising from the cartel.[210]

Where monopoly (or close-to-monopoly) prices arise as a result of collusion, and where it is possible to estimate what prices would have been had there been effective competition, this results in a quantifiable welfare loss to consumers.

This concept is illustrated in figure 3.5. above and has been discussed in some detail in section 3.2.3. In the discussion that follows, I focus more narrowly on the economic harm from cartels in the context of the cartel overcharge and when compared against the counterfactual case of perfect competition.

Figure 3.6. below shows a stylised market scenario with the range of prices and units demanded based on the market demand for a hypothetical product. Note that these prices and quantities are read off the downward sloping demand curve which is consistent with the economic principle of there being an inverse relationship between the price of a product and the quantity demanded of that product.[211]

In this case a cartel acts like a monopolist to maximise joint profits by choosing output Qm at monopoly price Pm. The counterfactual to the monopoly price Pm and quantity Qm is indicated by the greater level of output at quantity Qc at the lower competitive price Pc. This is the output Qc at the price Pc at which the market clears under conditions of perfect competition[212].

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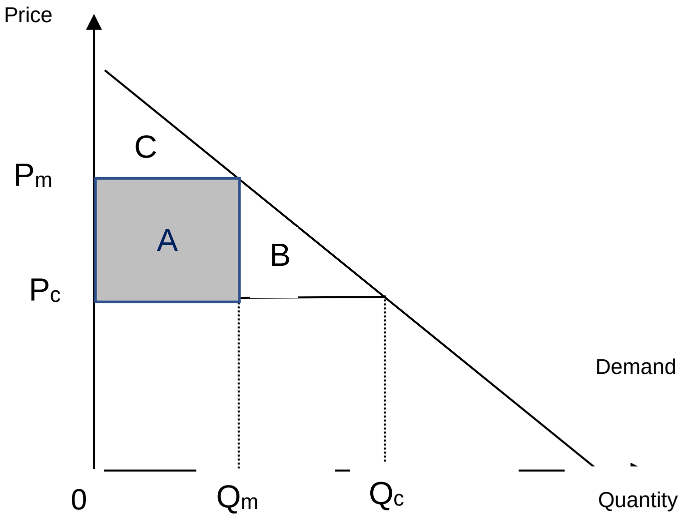
[210] Samuelson & Nordhaus op cit note 174 at 160 and161.

[211] For a detailed treatment of the underlying economic principles see Chapters 1 and Chapter 2 of Gunnar Niels, Helen Jenkins, James Kavanagh, *Economics for Competition Lawyers*, 2 ed (2016).

[212] Note that the cartel/monopoly and competitive prices and quantities respectively represent equilibrium values i.e., where market supply equals market demand and where each producer in the market is maximizing its profits. The market equilibrium position illustrated in figure 3.2 and figure 3.3 also applies in this context. As can be seen from figure 3.6. these equilibrium values are different depending on whether the market is competitive or monopolized by a single firm or cartel acting like a monopoly. See figure 3.5 for a complete picture.

Figure 3.6: Monopoly/cartel pricing v competition[213]



The area of the shaded square A in figure 3.6 represents the cartel overcharge. This is the quantity of units sold by the cartel (Qm) multiplied by the difference between the actual cartel price (Pm) and the counterfactual price (Pc). Triangle B shows the loss in volume arising from the difference between the cartel/monopoly outcome compared to the counterfactual competitive outcome. The counterfactual price is the price that would have been charged in the absence of the cartel under conditions of competition. The actual cartel price (Pm) in this stylised example is analytically equivalent to the monopoly price. Triangle C shows the difference between what consumers are willing to pay for each unit bought and what they actually pay and represents the consumer surplus in this market.

Motta reiterates that in economic terms, firms in collusion with each other price higher than the competitive equilibrium price.[214] Put succinctly, colluding firms exercise market power through their collective control of the market and are thus able to charge

[213] See Niels, Jenkins & Kavanagh op cit note 211 para 9.15 and W Kip Viscusi, John M Vernon & Joseph E Harrington *Economics of Antitrust* 3 ed (2001) at 79.
[214] Motta op cit note 209.

monopoly rates. Because joint profits are higher in such a scenario, they have no incentive to compete.

Tacit collusion is facilitated in markets that are highly concentrated and consist of only a small number of firms. Markets such as these have been characterised as oligopolistic.[215] These cartels are especially difficult to prove, as the firms do not necessarily have to be in direct contact with each other in order to avoid competition and achieve monopoly prices. The competition authorities must investigate whether the firms acting in conscious parallelism[216] in an oligopolistic industry are engaged in illegal, concerted practices.

In summary, there are three main effects arising from cartels:

i. A price effect: the equilibrium (market clearing price) under a cartel is higher than the competitive equilibrium price;
ii. An output effect: the equilibrium level of output under a cartel is lower than the equilibrium level of output under competition;
iii. A consumer welfare effect: the combined effect of higher price and lower output under a cartel results in a loss of welfare, as consumers are effectively denied the benefits of a lower price and greater supply in the market that they would have enjoyed under competition.

It should be noted that while some cartels may collude to fix prices, others may target volumes instead. For example, the OPEC petroleum cartel is known to target quantities.[217] As a general rule however hardcore cartels will most often result in higher prices regardless of whether prices or volumes are targeted.

Niels et al[218] notes that damages actions are usually focussed on the cartel overcharge

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[215] Samuelson & Nordhaus op cit note 173 at 190.
[216] Conscious parallelism is where firms price identically in a parallel fashion and there is no evidence of overt agreements to do so between them. Motta op cit note 209 at 131.
[217] https://www.bloomberg.com/quicktake/opec.
[218] Niels, Jenkins & Kavanagh op cit note 211 at 413.

harm (as represented by rectangle A in figure 3.1) as the impact of higher prices on customers of the cartel (direct and indirect) can be more directly linked to the actions of the cartel and that these are easier to prove. Actions involving reduced volumes (as would be represented by the triangle B in figure 3.1) would be more difficult to prove as it may be difficult to identify potential customers that did not purchase during the period of the infringement but would have made purchases at the lower more competitive price.

The stylised example discussed above shows the static price and quantity effects of cartel harm. However, it is also important to note the dynamic effects in which cartels can harm the structure and functioning of markets in the long term. Such long-term effects may include less innovation and/or greater inefficiencies which arise due to the lack of rivalry among cartel members. While such long-term effects may be of material interest from an economic perspective, they may be more difficult to prove from a legal perspective due to the challenge of establishing causality between the actions of the cartel and long-term market outcomes that may be due to a variety of factors.

As noted in chapter 1, there have been a significant number of cases of cartel conduct in South Africa in which companies have been penalised for violating the Competition Act**.** However, while the fines may serve as a punishment and deterrent to violators of the Competition Act, these fines do not compensate the aggrieved parties who have been directly affected by anticompetitive behaviour as the fines go into the national fiscus. These effects may be large on the victims of anticompetitive behaviour. For example, a study conducted by Mncube revealed that the overcharge in South Africa in the wheat flour industry ranged between 7 per cent and 42 per cent.[219] In a study conducted by Khumalo, Mashiane and Roberts, they estimated that the concrete products cartel overcharged its customers by 16,5 per cent to 28 per cent in the Johannesburg area and 51 per cent to 57 per cent in the Durban area.[220] These

[219] L Mncube 'The South African wheat flour cartel: Overcharges at the mill' (2014) 13(4) *J. Industry, Competition and Trade* 487–509.
[220] J Khumalo, J Mashiane & S Roberts 'Harm and overcharge in the South African precast concrete products cartel' (2014) 10(3) *J. Comp. L. & Econ.* 621–46.

overcharges affect not only the economy but the consumers or purchasers who are the direct victims of those cartels as well. Van Niekerk[221] takes the discussion further in his in-depth analysis of the overcharge, using the construction cartel as an example and drawing on various economic models that were also discussed in the Ashurst[222] and Oxera[223] reports.

3.3. Methods and Models for Quantifying Damages

In this chapter, I consider a general economic framework for quantifying the harm caused by cartels for purposes of calculating damages. The conceptual framework in this chapter is centred on the question of what would have happened had the infringement not taken place. This is described as the 'counterfactual'. In order to construct the counterfactual, one must provide a hypothetical yet plausible scenario of what conditions in the relevant market would have been like had there been no collusion—i.e., had there been competition. The model of perfect competition discussed in this chapter and the approach of comparing this with welfare outcomes arising under different imperfectly competitive market structures provides a theoretical framework for doing this. In practice, there are various methods and approaches that economists draw on to construct a plausible counterfactual. I argue that all methods will have their limitations, that there is no accurate measure, but rather best-estimate methods, which should be used in the appropriate cases.

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[221] Albertus van Niekerk 'Calculating cartel follow-on damages: General considerations and application to South African construction sector' (2015) Econex Report 3, available at *http://econex.co.za/publication/research-report-3/*, accessed on 5 April 2016.

[222] Emily Clark, Mat Hughes & David Wirth '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' Ashurst, 31 August 2004, available at *http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf*

[223] Oxera 'Quantifying antitrust damages: Towards non-binding guidance for courts' (2009),available at *http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf,* accessed on 8 April 2016.

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With regards to the main methods for quantifying damages I discuss the two popular approaches, namely the ‘before-and-after’ and the ‘yardstick’ models used to measure damages overcharges. Each of these models draws on economic theory and has its own strengths and weaknesses, which have been tested in competition law cases. Niels et al note that the before-and-after and yardstick approaches are both comparator-based approaches with the former involving comparisons over time and the latter involving comparisons across product or geographic markets[224]. In addition to the comparator-based approaches Niels et al also identify ‘financial-analysis-based’, and ‘market-structure-based’ approaches[225]. Niels et al[226] note that financial-analysis-based approaches can be viewed as a form of comparator-based approach in that they involve counterfactual values derived from comparing markets or time periods (e.g., margins or profits before and after the cartel infringement).

In the case of market-structure-based approaches Niels et al[227] refers to models drawn from Industrial Organisation (IO) theory that are used to simulate counterfactual scenarios of prices and volumes. As noted in section 3.2.4 above, the duopoly and oligopoly market structure often involve strategic interactions among firms resulting in different equilibrium outcomes depending on the characteristics of the market. Game theory is a tool often deployed by IO theorists in this regard. A discussion of the application of IO theory to the simulation of counterfactual scenarios is beyond the scope of this thesis. However, it is worth noting that to the extent that such simulations rely on theory and assumptions they tend to be useful as a cross-check or as additional support for validating the more traditional comparator-based approaches that may form the basis of any given damages case. However, in cases where enough data exists such that the parameters of the IO model can be estimated then such uses of IO may carry greater weight.

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[224] Niels et al op cit 211 at 423.
[225] Ibid.
[226] Ibid at 437.
[227] Ibid at 441.

Where a cartel infringement has occurred, it is not unreasonable to infer that the overcharge of the cartel exists and can be quantified as some positive amount by applying an appropriate economic methodology. In this section, I review some of the case law in which various economic methods have been applied to the determination of cartel overcharges.

Empirical data suggests that most cartels that have been studied do indeed have a positive overcharge. Table 3.1 summarises the findings of the critical studies conducted and indicates the number of cartels studied and the median value of the overcharge.

Table 3.1: Studies estimating cartel overcharges

Study	No. cartels studied	Median value of cartel overcharge[228]
Posner (2001)	12	28%
OECD (2002)	14	13%–16%
Werden (2003)	13	15%
Conner & Lande (2008)	674 observations from 200 research papers	20%
Oxera (2009)	114 observations filtered for robustness from the Conner & Lande study	18%

The Oxera study found that the cartel overcharge is positive (i.e., above zero) in 93 per cent of the cases studied. This provides some empirical support for the theory that the cartel overcharge is positive. Alternatively, it also demonstrates that there are a small but significant number of cartels where there is no overcharge. For example, in the *Cooper Tire* case, the economic expert for the plaintiffs argued that the cartel led to a significant increase in prices, whereas the respondent's economic expert

[228] Expressed as a percentage of the actual cartel price i.e., the total cartel overcharge is calculated by applying the percentage to the amount that the buyer of the cartel actually paid for its purchases.

argued that there was no material overcharge at all.[229] It is possible that the greater proportion of cartels in the studies have positive overcharges because the empirical studies focused on functional cartels that impacted significantly on the affected markets.[230]

It would, therefore, be necessary to determine with reference to the facts of a particular case whether or not the cartel overcharge is positive. Put differently, an assessment would have to be done of the extent of the economic benefit accruing to the firm as a result of the cartel activity. In *Berliner Transportbeton*, the court maintained that the greater the durability of the cartel (in terms of duration and geography) the 'higher the requirements that have to be imposed on a court if it wants to deny that the cartel agreement produced any economic benefits'.[231]

In *Landgericht Dortmund*,[232] the court assumed that the cartel overcharge would be positive and based its calculation of damages on the difference between the price charged by the defendant during the cartel period and the lower price post-cartel. In some cases, where the quantification cannot be an exact calculation due to asymmetrical information, it is still possible to infer the amount from the evidence.[233]

Although it may be relatively straightforward to establish the likelihood that economic benefit accrued to the cartelists, the quantification of the cartel overcharge is required if a damages value is to be determined. I will briefly discuss the cost-based approach, economic price predation and simulation methods and thereafter focus on the more popular 'before-and-after' method, the 'yardstick' method and lost profits.[234]

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[229] *Dunlop Oil Marine Limited & 25 others v Dow Chemical Company Limited* English High Court, case number 2008–703; *Cooper Tire & Rubber Company Europe Ltd v Shell Chemicals UK Ltd* English High Court, case number 2007–1676.
[230] Oxera 'Quantifying antitrust damages: Towards non-binding guidance for courts' (2009), available at *http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf* at 91 accessed on 15 June 2011.
[231] *Oberlandsgericht Dusseldorf, Berliner Transportbeton* I, KRB 2/05.
[232] *Landgericht Dortmund*, Case Number 13 O 55/02 *Kart – Vitaminpreise*, 1 April 2004.
[233] *Bigelow v RKO Radio Pictures* 327 U.S. 251 (1946), where the court said that amount of damages could be determined inferentially; *Zenith Corp v Hazeltine Research Inc* 395 U.S. 100 (1969) at 123-24.
[234] Study on the conditions of claims for damages in case of infringement of EC competition rules.

The cost-based approach involves calculating the average unit cost of production of the members of the cartel and estimating a competitive price by adding a profit margin that would approximate that attained under competitive conditions.[235] The constructed cost-based competitive price may not be an appropriate benchmark, and there may be difficulties in estimating profit margins, given changes in the business cycle, rewards for innovation, risk taking and efficiency improvements, and inflated cartel costs.

Econometric price prediction is a more sophisticated version of the benchmark and yardstick approaches that applies techniques of regression in which counterfactual prices are estimated on the basis of historical relationships between prices and other variables. These predictions could be used to forecast the plaintiff's profits absent the cartel.[236]

The simulation method is a tool used extensively in merger analysis. Simulation models apply industrial organisation theory to simulate an oligopoly structure for purposes of estimating the counterfactual price. Simulation models are often used with cost-based approaches and require information about the market structure.[237] There are a variety of models of oligopoly behaviour that may apply, depending on the characteristics of a particular market. This may be a useful tool when examining counterfactual simulations.[238]

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[235] Theon van Dijk & Frank Verboven 'Quantification of Damages' Competition Law and Policy (*ABA Section of Antitrust Law* 2008) 2331, available at *http://economie.fgov.be/en/binaries/201021_Verboven_2_tcm327-111467.pdf*, 2336–7. accessed on 13 September 2010.
[236] Fisher op cit note 1 at 389.
[237] Organisation for Economic Cooperation and Development (OECD) Roundtable on the Quantification of Harm to Competition by National Courts and Competition Agencies: Background note by the Secretariat (7 Oct 2011) DAF/COMP (2011/1), available at *https://www.eca.com/sites/default/files/background_note_oecd_quantification_of_harm_20111007_en.pdf* at 18, accessed on 13 June 2013.
[238] Van Dijk & Verboven op cit note 235 at 2337.

3.3.1. The ‘but-for’ test: establishing the counterfactual

The actual loss suffered could be defined as the injured party’s ‘out of pocket loss’ or the extent of the lessening of the assets the damages award would need to account for to make the injured party ‘whole’ again.[239] Whatever the framework used to determine the quantum of the loss, it is generally the case that a damages claim seeks to return the claimant to the financial position it would have attained were it not for the infringement.[240] This is the fundamental principle underlying the calculation of the damages claim. In so doing, economists apply the ‘but-for’ test to establish the counterfactual.

With this test, one must hypothesise a market where the cartel agreement does not exist (i.e. the ‘counterfactual’). The damages amount is the profit difference between this counterfactual situation and one where the cartel exists.[241]

In the famous global *Lysine* cartel case the injured party argued that but for the cartel, the price of lysine would be equivalent to the marginal costs. It then had to estimate what that marginal cost would be. The respondent in the case, also relying on the but-for test, argued that the counterfactual price would have been in excess of the marginal cost.[242] These estimates raised by the parties were substantially different. The case was settled, so the question was not properly resolved here.

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[239] Joined cases C-295/04 to C298/04 *Manfredi* [2006] ECR I- 5161, 36. See also 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’ SWD (2013) 2015 at 7.

[240] Herbert Hovenkamp ‘Quantification of harm in private antitrust actions in the United States’ *University of Iowa Legal Studies Research Paper* (9 February 2011); paper for the Roundtable on the Quantification of Harm to Competition by National Courts and Competition Agencies, OECD (October 2011) op cit note 302 at 2; Oxera report op cit note 230.

[241] Van Dijk & Verboven op cit note 235 at 2332.

[242] John M Connor ‘“Our customers are our enemies”: The Lysine cartel of 1992–1995’ (2001) 18 *Rev. Ind. Organ.* 5.

Therefore, to estimate damages one must develop an accurate counterfactual that can be compared with the factual as experienced by the claimant. Once this has been done, the difference between the counterfactual and the factual must be converted into a final value for the damages claim.

In establishing methods for calculating damages claims (i.e., correctly identifying the factual and counterfactual and converting the difference into a damages value), it is important to strike a balance between the conflicting objectives that arise (a) from the difficulties with determining the most accurate possible calculation (one would look at economic variables, for example: market shares, actual prices, profits, volume of sales and costs, and agreements between parties[243]) and (b) with ensuring access to justice through private damages. If too much weight is placed on determining the most accurate damages value possible, a successful damages claim may prove almost impossible, given the methodological difficulties that arise. There will also be cases where there is asymmetric information; for example, where the defendant has information the plaintiff requires to prove its case and the plaintiff has information the defendant needs to maintain its defence.[244] Therefore, ensuring access to justice through private damages claims requires an approach with clear rules that are easy to apply.

If the plaintiff is to be made whole (or the principle of full compensation applied), there must be some degree of precision in the estimate of the damages value so that courts can be satisfied that there is neither under nor overcompensation of victims. An exact number would require complete information on the factual and the counterfactual. As this is impossible, the counterfactual must be simulated using economic and financial models that simplify assumptions. This is a complex and contentious process. The assumptions for determining the counterfactual process by which such a counterfactual is established and require considerable analysis of data and information.

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[243] European Commission Staff Working Document op cit note 239 at 10.
[244] OECD Roundtable op cit note 237 at 2.

The degree of complexity allowed in the course of estimating an accurate damages value will depend on the applicable national policy and legal framework. Some countries will seek to remove obstacles to private damages claims by simplifying the process, whereas others will abide by a more stringent legal framework that insists on precision when it comes to calculating damages. For example, in Sweden, the courts awarded damages of a relatively small amount against a firm that had abused its dominance in the supply of CD-ROM copies, because the claimants had failed to provide sufficient evidence regarding the correct quantum of the damages claim.[245] However, in Italy, in a case involving a car insurance cartel, the Supreme Court ruled that, where a precise estimation of the damages claim is difficult, it is permissible for courts to invoke Article 1226 of the Italian Civil Code and award an equitable amount of damages—*ex aequo et bono*.[246] The Italian Supreme Court noted that the use of 'probabilistic presumptions' is permissible in such cases. Although courts were required to take into account all evidence aimed at rebutting presumptions, it would nevertheless be 'permissible for the judge to use presumptions to evaluate the loss suffered by a claimant'.[247]

In the recent *Comair* case[248] in South Africa, the High Court used the 'but-for' or counterfactual test when determining the quantum of damages. In this case, both the plaintiff and defendant appeared to agree with this approach. In defining damages high court used the 'but-for' method to quantify damages and stated

> There is broad agreement between the experts on the methodology to be used to calculate Comair's damages. If SAA's infringing schemes had an adverse effect on Comair's profits, damages equal the revenues that Comair lost as a

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[245] *Europe Investor Direct Aktiebolag v VPC*, November 20th 2008 Cases T 32799-05 and T 34227-05 Stockholm District Court.
[246] *Fondiaria SAI SpA v Nigriello*, February 17 2007 Corte di Cassazione (Italian Supreme Court).
[247] Oxera report op cit note 230 at 6.
[248] *Comair* supra note 45 at paras 70–85, 18–85.

> result of this schemes, adjusted for the costs that Comair may have avoided because of reduced passenger numbers.
>
> In other words, in order to put Comair back into the financial position it would have been in but for SAA's infringing schemes, a comparison of the position that Comair is currently in (the "actual scenario") must be made with the hypothetical position that Comair would have been in 'but for' the anti-competitive agreements (the "counterfactual scenario").
>
> Experts agree that damages equal lost revenues less avoided costs. Lost revenues are equal to Comair's counterfactual revenues minus its actual revenue and avoided costs are equal to the difference between the costs that would have been incurred but for SAA's conduct and actual costs.[249]

Although the *Comair* case provided a definition for the quantification of damages in an abuse of damages case and a claim by a competitor, this counterfactual could be extended to cartel cases as well. One should note that while confirming the but-for test the court in *Comair* was not required to make a determination on the accuracy of damages required.

However, in the *Nationwide*[250] case the High Court, in the first delictual claim of its kind to be brought before it, gave specific consideration to the quantification of damages to be awarded to Nationwide due to harm suffered as a consequence of the anticompetitive conduct of South African Airways. Although this case related to an abuse of dominance the court nevertheless provided useful guidance that is of general application to competition law cases, including cartel cases. Of particular relevance is the approach of the court regarding the standard of evidence acceptable for determining the correct quantum of the damages claim.

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[249] *Comair* supra note 45 paras 68-70.
[250] *Nationwide* supra note 44.

In *Nationwide* doubt had been caste over whether certain information contained in a ‘route profitability spreadsheet’ constituted sufficient evidence for accurately determining Nationwide’s costs.[251] In considering this matter the court noted as follows:

> It has long been established that in some cases damages are difficult to ascertain with any precision, but this does not relieve the wrongdoer of the necessity of paying damages. In *Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (A)* the plaintiff was the owner of a garage and filling station who claimed damages for loss of petrol due to a leaking petrol tank. The defendant sought absolution from the instance on the basis that the plaintiff was in a position to lead evidence to show the quantum of damages but elected not to do so and instead relied on a schedule of damages. The question was whether the plaintiff had produced all evidence reasonably available to him. The Appellate Division upheld the trial court's decision that it had no cogent reason for doubting the accuracy of the records on which the schedule was based. Similarly, in this case I have no reason to doubt that the route profitability spreadsheet is, to a substantial degree, an accurate reflection of Nationwide's costs.
>
> In any event the evidence relating to the route profitability is covered by section 3 of The Law of Evidence Amendment Act 45 of 1988. The amendment was introduced as a response to the tendency of South African courts to exclude evidence which was reliable, but which could not be admitted because of the rule against hearsay. The amendment confers a judicial discretion on courts to admit hearsay evidence if it is in the interests of justice[252].

In Nationwide, the High Court has thus usefully clarified that an unattainably high standard of precision in the calculation of a damages amount should not serve as a

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[251] Ibid.
[252] *Nationwide* supra note 44 para 83 and 84.

barrier to a claimant being awarded damages. In this regard the court had reference to Section 3 of the Law of Evidence Amendment Act[253] which provides that:

> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:
>
> (a)...;
> (b...;
> (c) The court is of the opinion that such evidence should be admitted in the interests of justice, having regard to:
>
> (i) the nature of the proceedings;
>
> (ii) the nature of the evidence;
>
> (iii) the purpose for which the evidence is tendered;
>
> (iv) the probative value of the evidence;
>
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of the evidence depends;
>
> (vi) any prejudice to a party which the admission of such evidence might entail;
>
> (vii) and any other factor which should be taken into account."

In defending the admissibility of the 'route profitability spreadsheet' Nationwide noted that the spreadsheet satisfied all of the requirements of section 3(1)(c). Although he did not explicitly evaluate each of the criteria under 3(1)(c), Judge Nicholls noted that 'I am satisfied that the evidence has shown that the figures contained in the route profitability spreadsheet are largely reliable.'[254]

In the sections that follow I examine the economics underlying various approaches to developing the counterfactual and provide an overview of methods employed for converting the difference between the counterfactual and the factual into a damages value.

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[253] The Law of Evidence Amendment Act 45 of 1988.
[254] *Nationwide* supra note 44 para 87.

3.3.2. Developing the counterfactual

To develop an accurate counterfactual the nature of the harm done to the claimant must be properly characterised. The nature of the injury depends on the type of infringement.[255] For the purpose of this chapter, I focus on cartel conduct, though other types of infringement are harmful in their own way and may be subject to damages claims.

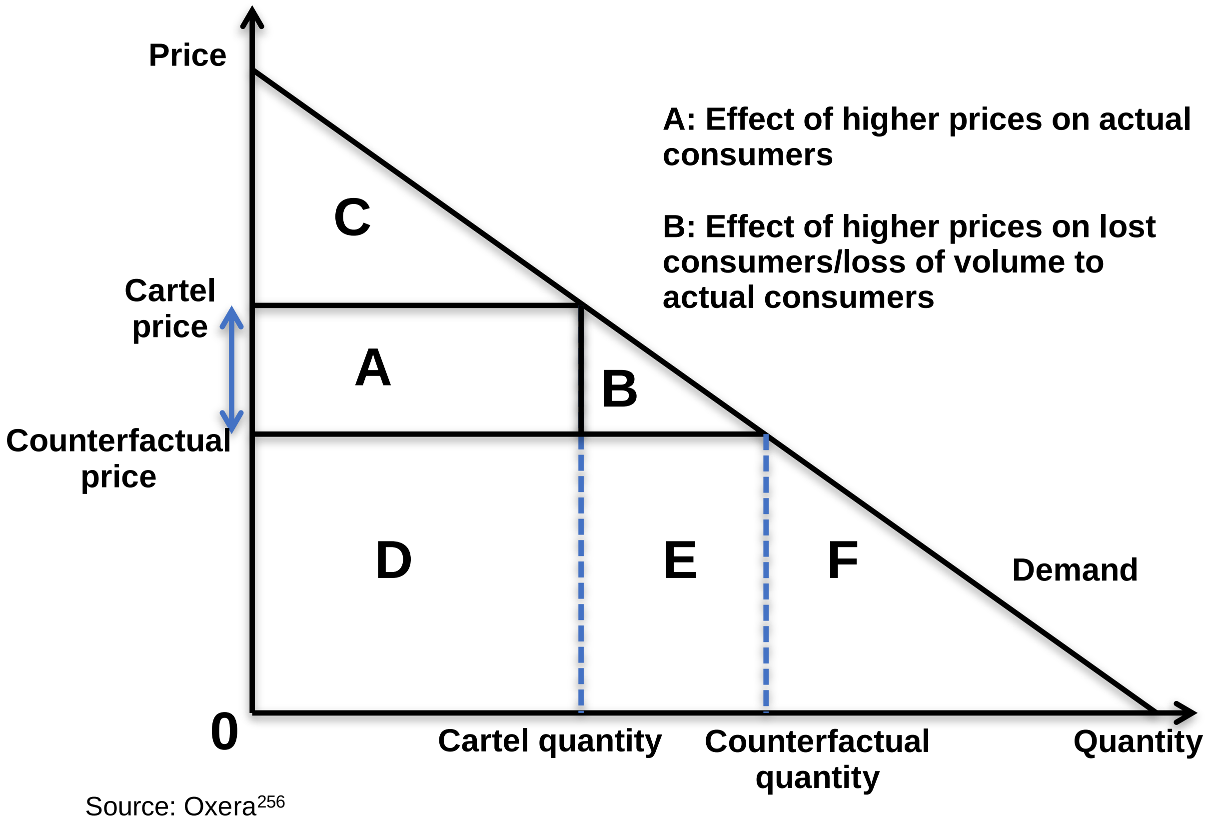
- Nature of harm arising from cartel conduct

The typical cartel arrangement is one in which firms collectively fix prices at a higher level than that which would have emerged under competition. Such a price increase is also likely to go together with a reduction in output. This affects the direct purchasers in two ways. First, purchasers who buy the product pay a higher price and are thus effectively denied the lower competitive price. Second, there are purchasers who would have been willing to trade at the competitive price whose foregone purchases are reflected in the reduced volumes associated with the higher price of the cartel.

This situation is reflected explicitly in figure 3.7, which shows the overcharge paid on all the units actually sold (area A) and the lost volumes associated with would-be purchasers who would only have been willing to trade at the competitive price (area B).

Figure 3.7: Effect of price-fixing cartel

[255] See Van Dijk & Verboven op cit note 235 at 2331.



Source: Oxera[256]

In this scenario, the cartel price is at P, and the counterfactual price is at Pc. The cartel quantity is at Q and the counterfactual quantity at Qc. The cartel overcharge is equal to the number of units actually sold by the cartel multiplied by the difference between the price actually charged by the cartel and the price that would have been charged had there been no cartel (the counterfactual price):

Cartel overcharge = Qc(Pm – Pc)

The overcharge can be expressed as a percentage of the actual price or revenue of the cartel. In this way, the total amount of the overcharge is calculated by applying the percentage to the amount that the buyer actually paid for its purchases. For example, if the cartel price is R100 and the counterfactual price is R90, the cartel overcharge

[256] See Oxera report op cit note 230 at 98 and Niels et al op cit note 211 Figure 9.1. and paras 9.15 to 9.18.

would be 10 per cent (R10 is 10 per cent of R100). If the cartel sold 2 million units at a price of R100 the total overcharge would be R20 million.

If a particular customer could demonstrate that its total purchases from the cartel amounted to R8 million, then the amount it was overcharged is 10 per cent of R8 million—i.e. R800 000. This amount constitutes cartel overcharge harm and can be legally claimed by the customer of the cartel. The customer could be an end-consumer or an intermediate purchaser of some input product produced by the cartel.

The harm arising from the lost volume effect is reflected in area B in figure 3.7. As discussed in section 3.2.3 above and as illustrated in figure 3.5 this is known as a deadweight welfare loss.[257] As noted above, purchasers who would have been willing to trade at the counterfactual price but not at the cartel price are not served by the cartel.[258] The excluded consumers are harmed as a result. However, for purposes of the damages claim it may be difficult to identify the injured parties—particularly those who did not purchase at all during the period of the infringement but would have purchased the product at the competitive price.[259] In practice, damages claims are typically brought by parties that were actual purchasers of the cartel during the infringement period.[260]

Other forms of hard-core cartel conduct are likely to cause related harm. For example, a cartel that allocates customers will give each cartel member monopoly power over their allocated customers, allowing them to raise the price and restrict output relative to the competitive counterfactual. Likewise, a geographic market allocation will produce similar outcomes in the allocated markets. Other cartels may fix quantities

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[257] Landes op cit note 16 at 652.
[258] Melanie W Havens, Michael F Koehn & Michael A Williams 'Consumer welfare loss: The unawarded damages in antitrust suits' (1990) 15 *U. Dayton L. Rev.* 457, 459–60.
[259] Hjelmfelt & Strother op cit note 16 at 506–8.
[260] Christopher Leslie 'Antitrust damages and deadweight loss' (2006) *Antitrust Bulletin* (symposium) 521. It may still be possible for a wholesale purchaser to claim for lost profits, including the deadweight loss, if there is adequate proof of the quantity that would have been sold but for the anticompetitive conduct. See *Illinois ex rel. Hartigan v Panhandle Eastern Pipeline Co*., 852 F2d 891, 896 (7th Cir.1988) (en banc), cert denied, 488 U.S. 986 (1988).

rather than prices. The restriction in output and the corresponding increase in price is harmful in the same manner as that of a price-fixing arrangement. Bid rigging is also a form of cartel conduct with effects like that of a price-fixing cartel.

There are also longer-term effects arising from cartel activity. By reducing rivalry among firms, cartels reduce incentives for innovation and slow the pace at which improvements in efficiency can be achieved.[261] Cartels in input product markets may distort downstream markets if reduced volumes lead to excluded purchasers and thus potentially more concentrated downstream markets. These dynamic effects may also factor into the damages calculation. This is because such long-terms effects may affect the counterfactual price. For example, the counterfactual price may have been much lower if there had not been a cartel, as cost-reducing innovations would have been more likely in a competitive market. In such circumstances, the cartel overcharge would be higher. However, establishing a causal link between the infringement and the long-term harm is likely to be difficult in practice.

3.3.3. Using the results of the counterfactual analysis to determine the final damages value

The results arising from the counterfactual analysis must be organised and inputted into a financial valuation model to calculate the final damages value. There are two main parts to this:

a) Calculating the cartel loss. In cartel cases, there is generally only one kind of loss considered, i.e., the cartel overcharge. Cartel overcharges and methods of calculation are discussed in the next section. However, there are cases where the loss of volume arising from the cartel harm may also factor in the damages claim. In such a situation a monetary value for the

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[261] See Joseph E Harrington, Jr 'Post-cartel pricing during litigation' (2004) 52(4) *J. Indus. Econ.* 517–33.

cartel overcharge loss would have to be added to the monetary value for the volume loss.

b) Adding up the losses over time. Cartel infringements often take place over many years. As a preliminary stage in the process a cartel overcharge may have been estimated for each year of the infringement. To determine a single monetary value the yearly cash flow would have to be added up. In order to ensure fair compensation, the calculation would have to account for the time value of money. This is discussed below, after addressing methods for calculating cartel overcharges.

Damages awards should be viewed as a tool that should be available to injured parties to be compensated for the harm suffered through such cartel infringement. It is within this legal framework that this chapter focuses on how these damages should be quantified to compensate cartel victims. The challenge is how best to estimate the overcharge. The overcharge is the difference between the actual price charged and the assumed price had the collusion not occurred.[262]

Calculating the overcharge in practice is a difficult exercise and thus one of the main challenges faced by courts in competition law damages cases.[263] This is because there may be a number of plausible alternative counterfactual scenarios. Selecting the most likely scenario will be informed by a thorough understanding of the relevant markets. Further, access to reliable information and data about the industry and pricing is often difficult to obtain. Skilled economists are therefore required to construct hypothetical scenarios using their knowledge of the relevant markets and the appropriate economic techniques to assess the estimated award.

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[262] See Van Dijk & Verboven op cit note 235 at 2334.
[263] European Commission 'Staff Working op cit note 239 at 7.

3.3.4. The 'before-and-after' method

This approach simply involves calculating the difference in profits and costs before the cartel was formed and after the cartel was caught. This is done by comparing the prices that prevailed during the period of the cartel with the prices that prevailed post (or pre) cartel, assuming that the post or pre-cartel prices approximate those that would prevail in the absence of the cartel. The benchmark period should ideally reflect long-run equilibrium prices averaged over a sufficient period of time. It is, therefore, important to assess the conditions under which prices have been determined during the benchmark period. Consideration should be given to variables such as input costs, possibility of substitutability and import costs.[264]

In the *Eastman Kodak Co v. Southern Photo Materials* case the US Supreme Court approved the use of the before-and-after method to quantify damages. The Court stated that the 'amount of the damages could not be determined by mere speculation or guess, but must be based on evidence' and that the before-and-after method put forth by the plaintiff 'sufficiently showed the extent of the damages, as a matter of just and reasonable interference'.[265] In this case, the defendant manufactured and sold photographic supplies to the plaintiff, who then sold the supplies to downstream professional photographers. The defendant was involved in a monopolisation arrangement and prevented the plaintiff from selling supplies of the defendant's competitors.[266] After the defendant failed to take over the plaintiff's company, it started squeezing out the plaintiff by stopping discounts, and thus inadvertently the plaintiff had to pay higher prices for its supplies.[267] In quantifying damages, the plaintiff analysed prices and profit over a four-year period from before and after the defendant's antitrust infringement to come up with the best estimate of loss profits.[268]

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[264] Van Dijk & Verboven op cit note 235 at 2335.
[265] 237 U.S. 359 (1927) 376. 379.
[266] Ibid at 368–9.
[267] Ibid.
[268] Ibid at 376.

Assessing the market conditions may not be a simple exercise if data is lacking. There may also be price changes due to external factors (increased input costs, demand, changes to the market, etc.) that may not reflect in the empirical data.[269] These control variables must be accounted for in the calculation.

The before-and-after approach may also be problematic if there is uncertainty regarding how long the cartel existed.[270] Havens et al suggest that if there is no 'before' period the price elasticity could be measured statistically.[271] Another concern with these benchmark prices is the post-cartel effect where there could be standing long-term contracts in place.[272] Though this may be of concern, Harrington suggests that post-cartel firms may be tempted to price above the non-cartel price.[273] The pre-cartel pricing is perhaps the closest accurate estimate. The defendants in the leading US cases of *Eastman Kodak Co*,[274] *Story Parchment Co*[275] and *Bigelow*[276] also tried to argue that constructing the but-for world was too uncertain. The Supreme Court rejected the defendants' arguments in all three cases and allowed for approximations or a 'just and reasonable estimate'[277] of the damages amount.[278] The application of these cases in the context of cartels could be difficult. These are particular issues with the *Bigelow* case which makes its yardstick approach problematic. The profits earned by the yardstick firm would have been influenced by the scheme that also led to the exclusion of the plaintiff.

Although the *Eastman Kodak Co* and *Bigelow* cases are not cartel cases, it is interesting to note the way in which this test was applied in damages cases, albeit,

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[269] OECD Roundtable op cit note 237 at 14–17.
[270] Ibid.
[271] Havens, Koehn & Williams op cit note 258 at 463.
[272] Ibid.
[273] Harrington op cit note 261 at 517.
[274] *Eastman Kodak Co. v Southern Photo Materials Co*., 273 U.S. 359 (1927).
[275] *Story Parchment* supra note 160 at 562.
[276] *Bigelow* supra note 233.
[277] *Bigelow* note 233 supra at 264.
[278] ABA Section of Antitrust Law *Proving Antitrust Damages: Legal and Economic Issues* 2 ed (2010) at 55.

being a case of monopolisation. It does illustrate the importance of the evidence presented and that the quantum of damages cannot be based on mere speculation.

Consideration should be given to variable factors, such as the possibility of the product or geographic markets changing or input costs increasing for external reasons. Some authors have suggested that the before-and-after method may misjudge the overcharge on a lower scale.[279] Connor and Harrington argue that pre-cartel information would provide the best estimate.[280]

3.3.5 The 'yardstick' approach

With the yardstick approach, the cartel prices are compared with a similar market where there has not been cartel conduct.[281] The yardstick method is quite analogous to the before-and-after method. It is important that the benchmark market has similar competitive characteristics to the cartelised market.[282] Economists draw inferences from similar market conditions, supply, costs, or it could be the same or similar product markets in different geographic regions.[283] The *Paper Wholesale Cartel* case reaffirmed the advantage of having data of the actual situation to compare with same or similar markets.[284]

In the US in *Bigelow* the Supreme Court endorsed the use of the yardstick method to calculate damages.[285] A conspiracy arose in the distribution of new movies to movie theatres. The respondents were controlled the distribution and, in some cases,, owned the movie theatres as well. The Respondents such as RKO conspired to favour their

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[279] See John M Connor 'Global cartels redux: The Amino Acid Lysine Antitrust Litigation' (1996) in John E Kwoka, Jr & Lawrence J White (eds) *The Antitrust Revolution* 4 ed (2004) 252; and see Harrington op cit note 261 at 517.
[280] Ibid.
[281] Eg *Greenhaw v Lubbock County Beverage Assn*., 721 F.2d 1019 (5th Cir. 1983).
[282] *Aspen Highlands Skiing Corp v Aspen Skiing Co.*, 738 F2d 1509 (10th Cir.1984) looked at prices in a comparable competitive market.
[283] See Van Dijk & Verboven op cit note 235 at 2336.
[284] *Paper Wholesale Cartel* case No KRB12/07 (2007).
[285] 327 U.S. 251 (1946) 264.

own theatres and released the new movies at higher prices.[286] The claimants, also movie theatre owners, received the films much later and were forced to charge lower rates.[287] The Supreme Court acknowledged that a first run theatre would have a competitive advantage over a later run theatre. The plaintiffs submitted two methodologies to quantify damages. The before-and after-method which is discussed above and secondly the yardstick method which compared their earnings over a five-year period to those of one of the defendants' competitors.[288] Although the defendants tried to argue that the market conditions were different, the District Court and the Supreme Court found that these two businesses were quite comparable and allowed the damages award based on the yardstick method.[289]

There are limitations to the yardstick method. Molyneaux found that

> [t]he primary difficulty in using the yardstick method is finding a suitable yardstick. The plaintiff must demonstrate that the yardstick is substantially similar to its injured business. Even though allowances can be made for differences between the yardstick and the injured business, the yardstick must still be closely comparable to the plaintiff's business.[290]

It is possible that the analyst may not be able to find a comparable geographic or product market to use as a yardstick.[291]

The approach is only likely to work under the assumption that the comparator markets and price movements are sufficiently similar such that differences in the prices between the two markets can be reliably attributed to the cartel.[292] There is a need to

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[286] *Bigelow* supra note 233 at 253–4.
[287] *Bigelow* supra note 233 at 254, 258.
[288] *Bigelow* supra note 233 at 254.
[289] *Bigelow* supra note 233 at 258.
[290] Michele Molyneaux 'Quality control of economic expert testimony: The fundamental methods of proving antitrust damages' in Kevin S Marshall (ed) *The Economics of Antitrust Injury and Firm-Specific Damages* (2007) 91.
[291]Frank, Maier-Rigaud, & Ulrich,Schwalbe**,** 'Quantification of antitrust damages' in David Ashton & David Henry (eds) *Competition Damages in the EU: Law and Practice* (2013) at 247.
[292] See Maier-Rigaud & Schwalbe ibid.

control for various differences in the markets as well—income, input costs, capacity usage etc.[293]

3.3.6. Lost profit and diminished revenue damages

Raised cartel prices may result in loss of profits, especially for those customers who use the products, such as intermediate products that are used to manufacture a downstream product.[294] Lost profit is any increase in sales or profit that the injured party would have had if the cartel infringement did not occur.[295]

Future losses may therefore also form part of the harm suffered—e.g., if the victim cannot immediately recover the market position it would have been in had there been no infringement. If losses will be incurred by the victim in the next three years, then this would need to be added to the present value of the harm over the first five years. Assume the losses are R75, R50 and R25 with a discount rate of 10 per cent. R75 occurs in the current year and is thus not discounted; R50 in the next year is discounted once (R50 divided by 1.10 = R45.45); R25 in two years' time is discounted twice (R25 divided by 1.10 to the power of 2 = R20.66. The present value of the total harm over the entire eight years would then be R812.68. To make a best estimate assumption one would require '[d]ata sources utilised in lost profit analysis, in general, include company profit and loss statements, strategy and marketing documents, production reports, historical stock price data, and balance sheet information'.[296] It is also much more difficult for a firm to sue for damages where it substituted a product because it did not want to pay the increased cartel prices.[297]

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[293] Van Dijk & Verboven op cit note 235 at 2336.
[294] James A Brander & Thomas W Ross 'Estimating damages from price-fixing' in Stephen GA Pitel *Litigating Conspiracy: An Analysis of Competition Class Actions* (2006) 336.
[295] Joined cases C-295/04 to C298/04 *Manfredi* [2006] ECR I-5161, 36. See also 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' SWD (2013) 2015 at 7.
[296] Van Dijk & Verboven op cit note 235 at 2348.
[297] In *Montreal Trading, Inc. v. AMAX, Inc.,* 661 F.2d 864 (10 Cir. 1981) the court found that the firm, a non-purchaser, who bought substitute products, did not have standing to sue.

According to Jones, '[i]f projected future lost profits are sought, they must be reduced to the present value to take into account the time value of money. In appropriate circumstances, diminution in the value of capital investment may be recoverable as an item of damage as long as it does not overlap with other items, causing duplication'.[298]

The UK case of *Courage v Crehan* is an example of where a claimant claimed for lost profit. The claimant sought damages for the years that it endured a reduced profit due to the infringement as well as for being driven out of business.[299] The Court of Appeal awarded damages for lost profits by assessing the value of the hypothetical future profitability lost and the actual profits lost.

The various methods discussed here are complementary and are often used in combination to ascertain whether they yield the same results and to test the robustness of the estimates.

In South Africa, our courts were tasked with determining the quantification of damages in the abuse of dominance cases of *Comair* and *Nationwide*, respectively. In the *Nationwide* case the court, which also looked at the loss-profit factor stated: 'In simple terms the lost profit is the difference between what Nationwide would have earned but for SAA's abusive conduct and what Nationwide in fact earned'.[300] Both courts then delved into largely factual detail of the airline's cases and arguments presented by the economic experts and both courts ultimately found against SAA.[301]

In *Nationwide* the High Court noted that the determination of lost profit involves a comparison of the actual situation in the relevant markets with the hypothetical (i.e., counterfactual) position in the same markets, absent the abuse of dominance. In the

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[298] Clifford A Jones op cit note 97 at 218.
[299] *Courage v Crehan* supra note 120 at 663.
[300] *Nationwide* supra note 44 para 50 at 17.
[301] In the *Comair* case the plaintiffs were awarded damages of R554 million plus interest and in the *Nationwide* case the plaintiffs were awarded damages of just over R104 million plus interest.

case of a cartel infringement a similar logic would likely apply with regards to the profit lost by (for example) the purchaser of an intermediate input product that had been cartelised. In such a case the lost profit would be the difference between what the harmed party would have earned but for the cartel infringement and what the cartel members in fact earned: 'The damage is then the difference in the wealth of economic actors in both scenarios'[302].

3.4 Market characteristics and implications for assessing damages

In assessing damages, it is important to identify the type of market in which the infringement occurred, as well as the features of that market. In *Quantifying Antitrust Damages* Oxera draws the following distinctions between types of markets with reference to the calculation of damages:[303]

a) Intermediate goods versus consumer goods

The cartelised widget may be just a component in the final product. The primary distinction here pertains to the role and level of any pass-on of the overcharge. For end-consumer goods there is clearly no further scope for passing-on. 'Intermediaries typically absorb some relatively small portion of the overcharge, sometimes ranging down to zero, while the larger portion of the overcharge rests with customers.'[304] However, for wholesale and input markets, harm may be done along a long supply chain. An intermediary may be able to claim for damages minus the overcharge it passes on. There would have to be a knock-on effect of claims of this nature to recover the full overcharge.[305] The stage at which the harm occurs and pass through 'ends' would have to be assessed on a case-by-case basis.

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302 Ashton and Henry op cit note 291 at 244 para 8.074.
303 Oxera report op cit note 230 at 28.
304 Hovenkamp op cit note 240 at 6.
305 Fisher op cit note 1 at 388.

b) Mature versus rapidly evolving markets

The authors note that the duration of anticompetitive harm will differ depending on the level of maturity of the market.[306] So-called 'mature' markets are stable and less susceptible to disruptive changes. In such cases anticompetitive arrangements may endure for longer. However, in rapidly evolving markets any harm is likely to be short-lived, as the competitive environment is in a state of flux.

c) Differentiated versus homogeneous goods

Although homogeneous goods markets are more susceptible to collusive arrangements, they are also potentially very competitive. This means that the magnitude of the harm suffered in homogeneous product markets (compared to the competitive counterfactual) may be greater than in the case of differentiated product markets, where some degree of market power is inherent under competitive conditions. The authors also note 'conditions in homogeneous goods markets can sometimes be more predictably modelled than in differentiated product markets, and therefore the counterfactual competitive price or output may be more easily determined'.[307]

d) International markets versus national or local markets

In order to determine the harm caused by the infringement it will also be important to identify the scope of the geographic market. The authors note that the estimation of the damages may be complicated depending on whether the conduct has taken place across borders or within national borders. Cross-border competitive dynamics pose challenges for the assessment of the counterfactual and the data analysis (e.g., differences in currency and taxation).

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[306] Oxera report op cit note 230 at 28.
[307] Oxera report op cit note 230 at 28.

e) Bidding markets versus traditional markets

According to the authors, bidding markets need to be modelled differently to traditional markets when it comes to assessing the counterfactual in a simulation exercise. They note that sometimes 'the outcomes in bidding markets can be more predictably modelled than "normal" oligopoly markets'.[308]

Once the market has been identified, the particular features of that market must be evaluated in order to understand the implications for the counterfactual and the estimation of damages.

f) The structure of the market

The basic structural features of the market are important to understanding the nature and extent of the harm. An assessment of these features includes determining the number of competitors and their respective market shares, whether the market is growing or shrinking, the history of entry and exit, and changes in prices and output of firms over time. Understanding the characteristics of the affected product is also important. This includes: identifying substitutes and complements and assessing the degree of differentiation and customer loyalty.

g) The structure of the supply chain

Evaluating the structure of the supply chain entails identifying the degree of vertical integration and the contractual and commercial arrangements that exist between manufacturers, suppliers, distributors and customers.

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[308] It is important to distinguish between bidding markets and bid rigging. Bid rigging may take place in respect of tendering processes which may not be considered as bidding markets.

h) Pricing and costs

It is important to understand the impact of infringers' pricing over time. This involves examining pricing conventions in the industry in order to ascertain what drives changes in prices over time. In addition, the key drivers of the costs of production must be understood. This entails unpacking the components of fixed and variable costs as well as ascertaining the extent to which economies of scale influence changes in prices and costs.

The relevance of where the parties fit in the supply chain and the types of goods and market conditions become relevant when examining how the cartel overcharge could possibly be passed on downstream.

3.5 Possible damages claimants

In simple terms, the claimants can be identified as those consumers that, as illustrated in figure 3.1, suffer losses through higher prices and reduced supply as a result of the cartel's restriction of competition for purposes of extracting monopoly profits.
In establishing a causal link between the harm suffered by the claimant and the infringement, it follows that the claimant must fall within a category of parties that are capable of being harmed by the activity of a cartel—for example, a flour mill that pays a cartelised price for wheat. The mill then manufactures the wheat into flour and sells to bakeries who bake bread and distribute to supermarkets and finally to the end user.[309] In its study commissioned by the European Commission on quantifying antitrust damages Oxera sets out seven categories of 'potentially affected parties in a typical supply chain':[310]

[309] Referred to hereafter as the 'bread example'.
[310] Oxera op cit note 230.

a) Direct purchasers (customers), who are intermediate sellers (producers, distributors, or retailers).

Direct purchasers are customers who buy directly from the members of the cartel. In the bread example, this would be the flour mill buying the wheat from farmers who are setting increased cartel prices. The flour mill would have to show the profit it would have made absent the cartel pricing.[311]

b) Indirect purchasers, who are intermediate sellers (producers, distributors or retailers).

Indirect purchasers are customers who buy from firms who are downstream from the cartel members. These purchasers suffer harm if the cartel overcharge (or some portion of it) is passed on to them by the direct customers of the cartel (the pass-on effect).[312] In the bread example these would be the intermediaries, such as the bakeries and supermarkets who pass on the product and perhaps the cartel overcharge. Whether this portion is significant enough to warrant a damages claim may depend on a degree of factors such as the quantity of the portion, and 'whether or not all downstream firms are equally affected by the cost increase due to cartelisation and the demand elasticity of a non-competitive industry'.[313]

As discussed in chapter 5, 'The Direct And Indirect Purchaser's Claim To Competition Law Damages And The "Passing-On" Defence In Cartel Cases', the US federal courts allow only direct purchasers to claim damages irrespective of the passing on of the overcharge.[314] Indirect purchasers are not allowed to share these damages. According to Hovenkamp, the premise on which the *Illinois Brick* rule was based can be brought into question today.[315] The court made it almost impossible to quantify the passing on

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[311] Van Dijk & Verboven op cit note 235 at 2332.
[312] Herbert Hovenkamp op cit note 240 at 7.
[313] OECD Roundtable op cit 237 at 7.
[314] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977).
[315] Hovenkamp op cit note 240 at 7.

of a portion by requiring an incidence and shifting theory usually used in tax cases. The court also focused on the claim for damages at one level in the supply chain, rather than providing for an allocative requirement through the supply levels, which would have increased the incentives to bring claims.[316] Hovenkamp offered a solution to assessing damages where there is a multi-layer of distribution in the chain: '(1) the passed on overcharge to the end user consumer; and (2) lost profits to each intermediary in the distribution chain. The latter measure would include both absorption of loss on markup and also losses resulting from reducing volume'.[317]

In South Africa, the courts are yet to consider the direct and indirect economic effects of collusive pricing on direct customers and passing this on to indirect purchasers.[318] This is, of course, assuming that the reduced profits are as a result of the price increases caused by collusive behaviour. Van Dijk and Verboven, after making economic determinations of the pass-on and output effects in damages cases find that most jurisdictions fail always to be considerate of the pass-on and output effects when calculating direct purchaser awards.[319]

If this becomes a debate in South African courts, judges should consider that it is possible to quantify harm arising from both direct and indirect purchaser suits.[320] The methodology on how this is done is likely to be case dependent.[321]

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[316] Hovenkamp op cit note 240. Although the rational in *Illinois Brick* was upheld and reiterated in *Kansas and Missouri v Utilicorp United, Inc* 497 US 199 (1990) the Supreme Court also took note that 'we might allow indirect purchasers to sue on when, by hypothesis, the direct purchaser will bear no portions of the overcharge and otherwise suffer no injury' 110.S.Ct at 2818.
[317] Hovenkamp op cit note 240 at 8.
[318] See Van Dijk & Verboven op cit note 235 at 2332.
[319] Van Dijk & Verboven op cit note 235 at 2334.
[320] *In re Western Liquid Asphalt* cases, 487 F.2d 191 (9th Cir. 1973), cert denied, 415 U.S. 919 (1974) the court allowed for an apportionment of damages where an intermediary was involved. This case predates *Illinois Brick*.
[321] In South Africa, our courts have not expressly excluded indirect purchasers from claiming damages.

c) End-consumers.

Consumers purchase either directly or indirectly from cartel members. In the bread example this would be the end user buying the bread at the supermarket. End-consumers who purchase directly from the cartel suffer the full extent of the overcharge. However, this overcharge will be diminished in the case of indirect purchases, as it is passed through successive layers of the supply chain.

d) ‘Counterfactual’ customers.

These are the excluded customers who would have purchased a product at a competitive price but for the cartel. In the bread example, they could be competitors or potential competitors to the flour mill. These customers have suffered harm in effectively being denied access to a product they would have purchased at the competitive price or have had to purchase suboptimal alternatives.

e) Competitors.

It is unlikely (in theory at least) that competitors would suffer direct harm from cartel conduct. They are likely to benefit from the higher prices of the cartel. However, the activities of a cartel may extend beyond mere price-fixing. For example, a cartel may refuse to supply to customers that have previously switched away from the cartel in order to discourage such switching in future, reduce the sales of non-cartel members, and keep customers captive of the cartel.

f) Suppliers.

As a consequence of the restricted output of the cartel fewer inputs might be required, thus reducing volumes sold by suppliers. Depending on the nature of the cartel this could also lead to foreclosure of suppliers.

g) Firms in connected markets.

A cartel in a complementary product market may raise costs in a connected market potentially depressing activity in that market.

The European Commission has spent a considerable amount of time and effort in developing several working papers on competition law damages, leading up to its European Union Directive in 2014.[322] The EU, through its Communication Working documents,[323] which were done in anticipation of the EU Directive on Damages, recognises that the injured parties of cartel conduct have the right to claim compensation.[324] The directive states that an injured party could claim damages irrespective of whether or not they fit in the supply chain, or whether the competition authorities have made any prior findings.[325] The EU Directive established the elements to prove the quantification such as the rebuttable presumption that cartels cause harm, as well as a rebuttable presumption that the cartel overcharge was passed on to firms at the next level of the supply chain, making it easier for plaintiffs to demonstrate the harm suffered.

Through its working papers and directive, the EU has provided guidance on addressing challenges that damages victims could face in pursuing their claims, which I have discussed in earlier chapters. This right has also been entrenched in some of

[322] See European Union 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 PE-CONS 80/14 (2014). See also European Commission Green Paper 'Damages actions for breach of the EC antitrust rules' EU Commission 2005, available at *http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0672*, accessed 18 March 2009; European Commission White Paper 'Damages actions for breach of the EC antitrust rules' EU Commission 2008, 165, available at *http//ec.europa.eu/competition/antitrust/actionsdamages/index.html*, accessed on 23 May 2010. Staff working SEC (2008) 404, and for commissioned discussion papers on the quantification of harm in actions for damages, see *http://ec.europa.eu/competition/antitrust/actionsdamages/index.html*, accessed on 12 June 2011.

[323] 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' SWD (2013) 2015.

[324] European Union op cit note 322 at para 12.

[325] Ibid para 13.

the leading judicial precedents.[326] I would advocate that the South African courts and policymakers take the same position, and recognise the rights of all injured parties to claim damages where the causal link can be established and publish quantification guidelines that would assist damages plaintiffs South Africa would benefit from adopting policy leading to legislative intervention that directly speaks to quantification of damages, as was done by the EU Directive, which is a more effective means of establishing these principles.

3.6 Guidance on how to approach the quantification of damages

The legal framework in which courts in *Nationwide* and *Comair* approach the quantification of damages includes the following two considerations being (1)the establishment of the causal link between the illegal act and the harm caused and establishing the basis for the quantification of harm and (2) the latitude available to the courts to quantify harm on the basis of best estimates on a reasonable basis and the standard of evidence required in this regard. For each of these considerations I summarise the key guiding principles arising from the discussion in this chapter.

3.6.1.The establishment of the causal link between the illegal act and the harm caused and establishing the basis for the quantification of harm.

Although there are no specific rules as such courts in South Africa can be expected to observe principles of equivalence and effectiveness[327]. Various methodologies for establishing causality were discussed in this chapter. The main guiding principle is that the injured party be returned to the financial position it would have been in had the infringement not occurred[328]. This involves identifying the counterfactual and then

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[326] See *Courage v Crehan* [2001] ECR I-6297 and *Manfredi* [2006] ECR 1-6619, 60.
[327] See *Nationwide* and *Comair* cases.
[328] European Union, 'Compensation for Victims of Competition Law Infringements: The Challenge of Quantifying the Harm Suffered' Communication from the Commission on Quantifying harm in actions

converting the difference between the counterfactual and the factual into a monetary amount constituting the damages award. In cartel cases, this will generally be reflected in the calculation of a cartel overcharge. This basic process is in itself not contentious. However, the methodology employed to identify the counterfactual and the method for calculating the damages value is likely to be greatly contested by claimants and respondents alike.

In the recent *Comair* case in South Africa, the High Court used the 'but-for' or counterfactual test when determining the quantum of damages. Although the case involved an abuse of dominance a number of guiding principles emerged which would also have application in damages cases involving cartels:

- In principle injured parties should be returned to the financial position they would have been 'but for' the anticompetitive conduct. In the context of cartels, the discussion in this chapter on overcharges is of relevance;[329]

- In order to achieve meaningful compensation the position that the injured party in currently in (the "actual scenario") must be made with the hypothetical position the injured party would have been in 'but for' the cartel conduct (the "counterfactual scenario[330]"); and

- The calculation of the damages amount will involve determining the difference between hypothetical values based on a counterfactual scenario and actual values. In Comair this was lost revenues equal to the counterfactual revenues minus actual revenue and avoided costs (which avoided costs are equal to the difference between the costs that would have been incurred but for the anticompetitive conduct and actual costs). As noted above, the calculation of

for damages based on breaches of Article 101 and 102 of the Treaty on the Functioning of the European Union (2013/C 167/07).

[329] *Comair* supra note 45 paras 183-193 .

[330] *Comair* supra note 45 paras 69-70.

cartel overcharges would be relevant in most cartel cases and involves a similar comparison of actual and counterfactual values[331].

3.6.2. The latitude available to the courts to quantify harm on the basis of best estimates on a reasonable basis and the standard of evidence required in this regard.

Ideally, the methodology used to quantify damages should be such that it provides full compensation to the injured party without major difficulties. However, the analyses of these economic methods reveal their limitations. Challenges lie in the possibilities of the unavailability of data or asymmetric data, historical data that may have been lost or destroyed,[332] and a heavy reliance on assumptions. It is not easy to tell with absolute precision whether the markets would have reacted in that way, given the assumptions. Although accurate data may be difficult to come by, experts will have to look for the best estimates on a case-by-case basis, while accounting for possible errors or market imperfections.

In the US *Story Parchment* case, the Supreme Court held:

> while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with … exactness and precision.[333]

This approach is echoed in the *Nationwide* case in South Africa in which the court provided guidance regarding the standard of evidence acceptable for determining the correct quantum of the damages claim. Importantly the High Court usefully clarified

[331] *Comair* supra note 45 paras 102-106,
[332] *Devenish Nut108ation v Sanofi-Aventis SA (France)* [2007] EWHC 2394.
[333] *Story Parchment* supra note 160 at 563.

that an unattainably high standard of precision in the calculation of a damages amount should not serve as a barrier to a claimant being awarded damages[334]. In this regard the High Court considered that hearsay evidence may be admitted in the interest of justice having regard to the purpose of the evidence submitted and its probabitive value.[335] In this regard consideration shoud be given as to the reasons why the evidence is not given directly by the person upon whom the credibility of the probative value of the evidence depends and whether or not there is any prejudice to a party as a result of the admission of such evidence.

As discussed in this chapter, there are various economic models that can be employed for estimating damages. Despite their shortcomings, these models have their own beneficial characteristics to help provide the best estimate to quantify damages. The tractability of any model is dependent on the amount of data available. The quantification of the harm caused by the cartel infringement can be a very difficult and costly exercise for the claimant, and according to the EU directive, the 'quantification of harm in competition law cases can thus constitute a substantial barrier in preventing elective claims for compensation'.[336]

When quantifying damages, it is most important to consider carefully what kind of data exists, what assumptions can be made and what inferences can be drawn, rather than merely choosing one method over the other on subjective grounds.[337] The key guidance for the courts is to ensure the robustness of any estimate obtained by testing how well the method employed holds up under different assumptions. Rather than being based on the selection of a single methodology, the final damages claim awarded by a court is likely to be the one that is consistent with the application of a variety of methodologies that are 'robust' in the sense that the underlying assumptions are realistic, given the actual economic and market characteristics of the infringers

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[334] *Nationwide* supra 44 at para 51,
[335] *Nationwide* supra 44 at paras 69, 84-89.
[336] European Union 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 PE-CONS 80/14 (2014) para 45.
[337] Oxera report op cit note 230 at iv.

and their victims. Therefore, detailed and sophisticated economic analysis and complex financial valuations are likely to characterise court proceedings on the calculation of damages awards.

3.7 Conclusion

In this chapter various methodologies for establishing causality and quantifying the extent of harm were examined through the lense of the economic theory of cartel harm. If jurisprudence in competition law damages cases is to develop in South Africa, it is important that both the courts and policymakers provide guidance on the quantification exercise. In this chapter, I have considered what form such guidance might take with reference to economic approach to determining overcharges and calculating damages in the context of the developing case law in the US, the EU and South Africa. A key insight is that it will be important for courts in South Africa to go beyond mere conjecture in determining the calculation of damages. Any quantification must be based on sound economic evidence. Importantly, the appropriate methodology will be informed by the facts and circumstances of the case at hand as well as practical considerations such as the quality and availability of data. Claimants seeking damages will be held to high standards of evidence in estimating the quantum of damages. However, it is important that such standards do not make access to justice unattainable by those harmed by cartel conduct.

CHAPTER 4: CLASS ACTIONS IN COMPETITION LAW DAMAGES CASES

4.1 Introduction

The previous chapter examined the quantification of damages. This methodology of quantification and apportionment of damages become relevant especially regarding class action damages claims.[338] For claimants seeking damages, a class action suit paves the way for access to justice. Litigation is usually a costly exercise, not just to cover legal fees but also to pay for economic experts to calculate the damages by consulting a number of methodologies, as mentioned in the previous chapter. For an individual, the costs can be a prohibitive barrier to embarking on a damages claim and access justice, no matter how strong the case may be. Under a class action to claim compensation, claimants share both the risk and the reward. Claims for damages in competition law cases in South Africa have been few. This could be due to the much uncertainty around the legal process to bring class action cases in non-constitutional law cases. This chapter explores the journey that litigants have to face when embarking on a class action in a competition law damages case in South Africa.

In this chapter, I identify the challenges for a claimant bringing a class action in the competition law context. First, I explore, but also rule out, the possibility of a 'joinder' application which has its own set of rules when it comes to these proceedings. I then focus on class actions within the South African competition law context that do not raise elements of constitutional infringements. I first consider whether a broader interpretation of the rules of standing is required to allow such class actions to proceed. I then trace the three seminal cases driving the development of class actions in South Africa, namely *Nguxza*, the Bread cartel cases, and the *Silicosis* judgments. I briefly examine whether the regulation of class actions should appear in the form of a policy model or be developed through case precedents. A major factor affecting class actions, which I consider in detail, is the certification of the class. I thereafter discuss other nuances to class actions such as commonality, class representation and the

[338] In this thesis I have focused primarily on the quantification of damages in Chapter 3. The apportionment of damages amongst members of a class for example, is not within the scope of this study.

suitability of legal representation and settlements. I conclude that class actions are a powerful mechanism for bringing access to justice but question whether, in the absence of formal policy and legislative intervention, does the judicial process offer legal certainty?

Rachel Mulheron, using several sources to arrive at a suitable definition, stated:

> [A] class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and how have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.[339]

Although Mulheron's definition is simply put, class actions do have their complexities. The South African Law Commission (SALC), in its 1998 report sought to provide a more formal and less detailed definition than that of Mulheron and recommended that a class action should be defined as: 'an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified

[339] Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 3.

as a class action in terms of the Act'.[340] The essential feature of the outcome of the litigation binding all members of the class is not mentioned explicitly in this definition.

All these class action definitions allow many people (or firms) who have the same or similar cause of action to claim civil damages. In the competition law context, this action is extremely significant. As stated in earlier chapters, despite the consumer welfare objective of the Competition Act and the public enforcement of cartels, the victims of the cartel do not have any claim to the administrative penalty awarded against the respondent companies by the Competition Tribunal, as these administrative fines are paid into the national fiscus. To seek redress, these claimants have to institute civil damages in a separate action. It may be so that as an individual the costs to litigate are prohibitive. It is also a wasteful use of resources to the Court to hear the same matter over and over again brought by individuals who all have the same cause of action. If these individual claimants come together and, provided that they are certified as a class—a matter that I will discuss in broader detail—they can pool their resources and share the risk.

Ideally, claimants should do a cost/benefit analysis before embarking on a damages suit. It should be noted that part of that risk is whether the claimants' interests are being adequately represented. Further, legal bills are likely to be astronomical, especially if the case goes against them and costs are awarded against them. The class will make decisions based on majority votes. Those that voted against will not be pleased to have to abide by the majority decision: early settlement pay-outs may be a lesser sum than what was originally claimed. The claimants only get a portion of the pie after the legal costs have been paid.

4.1.1 Suitability of raising a joinder application

A class action is not a joinder process. It is a judicial process to handle a mass litigation, with defendants who share a similar cause. There are no formalised rules

[340] South African Law Commission 'Project 88: The recognition of class actions and public interest actions in South African law' 33 (August 1998), available at *http://salawreform.justice.gov.za/reports/r_prj88_classact_1998aug.pdf*, accessed on 8 August 2011.

for class actions in non Bill of Rights cases as envisioned by the South African Law Commission. It is unfortunate that the SALC recommendations were not taken any further by the legislature. Thus, the process of bringing an action has evolved through the cases. The cause of action would have to be established before they can proceed. That would be one of the determinations during the certification process. The complexities of proving a cause of action will not be dealt with in this article.

In a claim for damages, one might consider raising a joinder application where there is more than one claimant, as an alternative to bring a competition law-based class action damages case. However, it may not necessarily be optimal based on the arguments extrapolated from the cases below. I consider in this section the distinction between the two procedures to further define a class action.

In South Africa, joinder applications in accordance with Rule 10(1) Uniform Rules of Court occur when:

> Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, separately or in the alternative may join as plaintiffs in one actions against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action be entitled to bring such action, provided that the right to relief of persons proposing to join as plaintiffs depends on the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.

Cameron AJ in *Ngxuza*,[341] quoting Kalven and Rosenfield[342] in relation to the US rules, observed:

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[341] *Permanent Secretary, Department of Welfare, Eastern Cape & another v Ngxuza & others* 2001 (4) SA 1184 (SCA) at 1187 (hereafter referred to as '*Ngxuza* SCA') at para 85.
[342] H Kalven, Jr & M Rosenfield 'The contemporary function of class suit' 1941 *U. Chi. L. Rev.* 684 at 687–8.

> The cardinal difficulty with joinder … is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations, such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus, while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints—they may never come.
>
> What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.

Cameron AJ in the *Ngxuza* case draws the distinction between joinder applications and class actions and finds that a joinder proceeding could 'unduly complicate the attainment of justice'[343] and that 'class action cuts through these complexities'.[344] In a competition law context in South Africa, we have a follow-on damages process. It is only after the public enforcement mechanisms have been finalised where the competition authorities have investigated, established that the anticompetitive harm exists and the defendants have been fined, that damages actions are allowed to follow in civil courts. This evidence gathered by the competition authorities provides a significant amount of groundwork that is now covered for the claimants. It is likely that the claimants affected by the cartel conduct could have a unified cause of action to bring the matter, and taking Cameron AJ's view of negating unnecessary complexities, there would be no need to argue for a joinder application. It may be different if the claimants are not all consumers for instance, but rather a mix of consumers and suppliers and distributors, who are all affected by the cartel, but had different

[343] *Ngxuza* SCA supra note 341 at 1187.
[344] *Ngxuza* SCA supra note 341 at 1186.

relationships with the cartel firms. This scenario does present a different set of complexities, and there may be cause to argue for a joinder application.

It will be shown below that class actions and joinder is the most efficient means to bring a damages action where there are multiple claimants which allows for procedural suitability in such cases.

4.2 Tracing the development of class actions in South Africa

The development of class actions in South Africa can be traced through three instances of litigation, namely the *Ngxuza* cases, the Bread cases and the *Silicosis* case. I first consider the common-law position and then the Constitutional position for these and other cases.

4.2.1 Common-law position

Prior to the Constitution, the common law did not recognise class actions. Traverso DJP confirmed this in *Firstrand Bank Ltd v Chauncer Publications (Pty) Ltd,*[345] who stated that, save for constitutional matters, 'the South African common law does not recognise a class action'. We, therefore, see the development of the law on class action through case precedent. One such case is Froneman J's decision in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*.[346] Although it is not competition-law related, it is a seminal decision in tracking the history of class action in our jurisdiction and thus worthy of discussion.

In this case, four applicants on welfare disability grants had their benefits suspended by the respondent without notice or a hearing and reasons. They brought their application against the Department of Welfare and asked the Eastern Cape Division

[345] 2008 (2) SA 592 (C).
[346] 2001 (2) SA 609 (E) (hereinafter referred to as 'Ngxuza Eastern Cape').

of the High Court to recognise them as a class in terms of s 38*(c)* of the Constitution and to bring the matter on behalf of others in terms of s 38*(b)*.[347]

Froneman J in the Eastern Cape Division *Ngxuza* case accepted the applicant's standing to sue. He did so by considering the development in English common law, which began to view representative action 'as not being a rigid matter of principle, but a flexible tool of convenience in the administration of justice, [that] should be applied, not in the strict and rigorous sense, but according to its wide and permissive scope'.[348]

Froneman J also, through the case of *John v Rees; Martin v Davis; Rees v John*,[349] looked at

> the practical objections to granting the kind of relief sought in representative or class litigation may be summarised as follows: (1) the 'floodgates' argument—that the courts will be engulfed by interfering busybodies rushing to court for spurious reasons; (2) the 'classification' difficulty—that often the common interest of the applicants and those they seek to represent will be broad and vague; (3) the 'different circumstances' argument—that seen from the respondents' side the persons seeking relief must be treated differently; (4) the '*res judicata'* difficulty—that some members of the group may not wish to associate themselves with the representative litigation; and (5) the 'practical impossibility' argument—that it is impossible for Courts to deal with cases involving thousands of people and that it would adversely affect the public administration if scarce resources have to be used to defend such cases in Court.[350]

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[347] The reason the applicants brought the matter under s 38*(b)* as well is because they claimed that the respondents also stopped disability grant payments to a number of other people too. The applicants asked that the respondents provide them with a list of those affected people.
[348] *Ngxuza* Eastern Cape supra note 346 at 623.
[349] [1969] 2 All ER 274 (Ch).
[350] *Ngxuza* supra note 346 at 623–4.

Froneman J was persuaded by the *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa*,[351] where Pickering J did not believe that a representative action would open the floodgates to vexatious litigation. He said that the litigants would be mindful of high cost orders that could be awarded against them. This cost order will be a prohibitive factor to opening the floodgates.[352]

Froneman J sees that classification, different circumstances and practical impossibility can be addressed by the parties, either based on issues of standing or merit. *Res Judicata* could be resolved by giving sufficient notice through an opt-in or opt-out functionality.[353]

On appeal, Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*[354] saw the benefit of the elements of a class action, which 'cuts through' the complexities and formalities of a joinder.[355] Class action participants can take advantage of the litigation award and have the choice of opting out of the litigation. Cameron JA agreed with Froneman J and dismissed the appeal. Cameron JA saw that even constitutional class actions were dependent on the development of common law.[356] Whereas Froneman J had a more theoretical approach to class actions, Cameron JA assumed the theory from the Eastern Cape Division and focused primarily on the application to the facts. It would have been more preferable if Cameron JA had openly endorsed Froneman J's approach to class actions.

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[351] 1996 (3) SA 1095 (Tk) at 1106.
[352] *Ngxuza* supra note 346 at 624.
[353] Ibid.
[354] *Ngxuza* (SCA) supra note 341.
[355] *Ngxuza* (SCA) supra note 341 at 1189.
[356] *Ngxuza* (SCA) supra note 341 at 1196.

4.2.2 Constitutional position

Prior to 1994, class actions were not given any recognition in SA law.[357] Section 38 of the Constitution provided this new opportunity to bring a class action. It did not, however, provide for a blanket form of civil litigation. In fact, class actions in South Africa were initially only recognised where a constitutional right had been infringed. Potential competition law damages litigants whose cases did not contain a breach of a constitutional right could therefore not be classified a class under s 38. This section states that:

> **Enforcement of rights**
> 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members.

Constitutional litigation was the beginning of the development of class actions South Africa. In the *Ngxuza* case, the SCA judgment in 2001 gave effect to s 38*(c)* as this case was mainly concerned with the constitutional class action.[358]

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[357] *Nguxza* cases. A Kok 'Has the Supreme Court of Appeal recognized a general class action in South African law?' (2003) 66 *THRHR* 158 where Kok believed that the SCA in Nguxza advocated for a more general class action taking it beyond just Bill of Rights infringements; E Hurter 'The class action in South Africa: *Quo vadis*' (2008) 41 *De Jure* 293. See also *Beukes v Krugersdorp Transitional Local Council & another* 1996 (3) (SA) 467 (W).
[358] *Ngxuza* (SCA) supra note 341.

Section 38 of the Constitution was also raised as a possible argument in the Bread case. This was the case that began in the Western Cape High Court, which became the first to rule on a competition law damages. Van Zyl AJ, who presided over the matter, took a conservative approach to both the distributors (*Mukkadam*) and the consumers' (*Children's Trust*) class action cases.[359]

Counsel in the consumer case appeared to find it difficult to establish their case. Part of the problem was that they broadened the scope of the class to cover every bread consumer in South Africa. It is important to note that the class was not defined in a manner that would allow persons to determine whether they were inside or outside of the class and it was not properly defined with reference to the legal basis that was argued, namely, a breach of the Constitution. The founding affidavit started off narrowly with 'consumers whose rights were adversely and unlawfully breached by the respondents.'[360] This was later expanded to 'affected consumers in the Western Cape'[361], which admittedly was wider. It is in this context that the founding affidavit stated 'the affected customers in the Western Cape constitute a very substantial number of people, running into literally millions'.[362] Arguing for a class of this size is a rather far reach and a major pitfall in the Applicant's argument to secure certification of the class. Even Van Zyl AJ made the point in jest that a class of this size could even include him, as a consumer, and perhaps he should recuse himself.[363]

The consumer's counsel cited s 38 of the Constitution as the basis for bringing the class action, which was also a bit of a stretch. This section would be applicable if the case came about as a result of a constitutional infringement under the Bill of Rights, which it did not. The Applicant's counsel argued that the respondent's conduct violated s 27(1)*(b)*, which provides that everyone has the right to have access to sufficient food,

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[359] Bread Cases Western Cape High Court decision supra note 40.
[360] Bread cases Western Cape High Court decision note 40 at 29 para 67, citing consumer's founding affidavit para 22.
[361] Bread cases Western Cape High Court decision supra note 40 at 29 para 67, citing consumer's founding affidavit para 48.
[362] Bread cases ibid.
[363] Bread cases Western Cape High Court decision supra note 40 at 34.

and s 28(1)*(c)*, which gives every child the right to basic nutrition.[364] Van Zyl AJ agreed with the respondents that these sections did not place a positive duty on the respondents to grant those rights to the consumers.[365] The arguments put forth in the Applicant's case were too far reaching, and the Applicants shifted their position from one where only consumers were affected by the price-fixing to a broader one where every consumer of bread qualified to be in the Western Cape, which was not very helpful and confusing. The Applicants argued for an opt-in basis for the class action but failed to show the Court that adequate notice was given to the public.[366] The Court held the view that 'it would be nearly impossible to define this intended class sufficiently for the purposes of a damages action to enable those members of the public who may qualify as members of the class to decide whether to opt out or not and for the respondents to know who qualify as members and who not.'[367] I agree with Van Zyl AJ that in the case presented was not properly defined. It was simply too broad and the Applicant's arguments far too reaching.

Wallis JA, in the Bread case at the Supreme Court of Appeal (SCA), took a progressive approach to viewing class actions in competition law cases by identifying the criteria to establish certification of class actions in non Bill of Rights cases.[368] Prior to this judgment, there was no authority that a class action could only be brought to a South African court if the conduct fell outside s 38 of the Constitution.

Section 38 is only applicable when the very specific constitutional infringement has occurred. If the class action could not find any constitutional arguments to base their claim upon, they would not be eligible to form a class in terms of this provision.

In the Bread case, the SCA considered two seminal issues: firstly, when a class action may be brought and secondly, what procedural requirements must be satisfied before

[364] Bread cases Western Cape High Court decision supra note 40 at 31.
[365] Bread cases Western Cape High Court decision supra note 40 at 32.
[366] Bread cases Western Cape High Court decision supra note 40 at 74.
[367] Bread cases Western Cape High Court decision supra note 40 at 77.
[368] SCA Children's Trust decision supra note 99 at 16 para 19-22.

it is instituted. The Court described a class action as an action in which a representative brings proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf. The Court confirmed that this type of class action has been recently established in South African law.

While the Constitution entrenches a class action,[369] the SCA recognised that the legislature has not taken steps to regulate the position.[370] I address the regulatory gap more fully in section 3.2.3 below. The SCA's decision in the Bread case, advances our jurisprudence on class actions, in the absence of a policyframework. The SCA located its power to address the lacuna in section 173 of the Constitution, which grants the courts the inherent power to protect and regulate their own processes and to develop the common law in the interests of justice.

Until the Bread cases litigation[371], class action cases were limited to constitutional claims. The Supreme Court of Appeal and the Constitutional Court in the Bread cases have now introduced rules to make it a procedural possibility to bring all other claims that are not of a Bill of Rights nature as class actions.[372] The SCA called for legislative intervention. But at the same time Wallis JA developed the common law further by also providing jurisprudence for future class action litigants to follow.

Denying potential claimants the ability to bring a class action (on condition that they are certified as a class) on the basis of a lack of constitutional breach is a denial of

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[369] Section 38(c) of the Constitution.
[370] Bread case SCA supra note 99 para 15.
[371] Bread producers in South Africa were found guilty of price fixing by the Competition Tribunal (see *Competition Commission South Africa v Pioneer Foods (Pty) Ltd*, Competition Tribunal Case numbers 15/CR/Feb07 and 50/CR/May08 and *Competition Commission v Foodcorp (Pty) Ltd*, Competition Tribunal Case number 50/CR/May/08. A class action civil case for damages was brought by the distribution of break *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) (27 June 2013) (herein after referred to as "Mukkadam") and the consumers of bread (*Trustees for the Time Being of the Children's Resource Centre Trust v Pioneer Foods (Pty) Limited*, Western Cape High Court, Case No: 25302/10 (herein referred to as the "Children's Trust") collectively herein referred to as the "Bread cases".
[372] *Mukkadam*, Constitutional Court supra note 92 at 89 and SCA *Children's Trust* supra note 40 para 26.

access to justice. The Constitutional Court in the *Mukkadam* case aptly quoted from the *Chief Lesapo* case, emphasising the importance of having access to courts as:

> The right of access to Court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to Court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to Court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.[373]

The SCA in the *Children's Trust* case acknowledged that Section 38 of the Constitution allowed any person to bring a class action '*in the interest of*' a class. In particular, the SCA noted that the appellants invoked section 27(1)(b) of the Constitution to frame the intended action. The Court found that the reliance on section 27(1)(b) was not necessary as the class of people who the appellants seek to represent was large and poor. The Court found that the case could have also been framed as one which was based on the section 34 right of access to courts.[374]

The Constitution, through s 38, establishes the right for any person (juristic or natural) to bring a class action suit. The Court in the *Silicosis* case noted that even though Roman-Dutch law did not contemplate such actions, this should not deprive persons in non-Bill of Rights cases from bringing class action cases.[375]

More recently the Court in the *Silicosis* matter looked to the South African Law Commission recommendations published in 1998, which stated that applicants should be certified as a class before proceeding with the action. The Court defined a certification application as

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[373] *Mukkadam*, Constitutional Court supra note 92 at 14, quoting *Chief Lesapo v North West Agricultural Bank & another* [1991] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).
[374] *Children's Trust* SCA supra note 40 para 19.
[375] *Silicosis* supra note 145 para 25.

> no more than a request for permission to enter the portal of court *en masse* and for the applicant(s) to be accepted as representative(s) of the entire mass. Absent such an order, the applicant(s) seeking to institute a class action would be precluded from doing so. The need for certification is based on the time-honoured principle that the Court alone should be the master of its own process ...'[376]

The certification judgment in the *Silicosis* case[377] is unprecedented, being the largest class action case brought before the South African courts. It is important to understand the nature of this case, as it is fundamental to taking the class action cases forward. There were 69 applicants who were former mineworkers and 32 respondents which were mining companies. The plaintiffs were suing these mining companies for harm caused by a disease called silicosis. According to the judgment, '[S]ilicosis is an occupational lung disease which is contracted by mineworkers who work underground in the gold mines. It is caused exclusively by the inhalation of crystalline silica dust.' This dust is raised during the process of mining during, for example, drilling, blasting and transporting rock material. The outcome of this is that the mineworkers affected have contracted silicosis, which is 'an irreversible, incurable, and painful lung disease'.[378]

The *Silicosis* judgment emphasised the welfare gains of a class action by saying that:

> It is not only for the benefit of plaintiffs that the class action process was conceived, it is also designed to protect a defendant(s) from facing a multiplicity of actions resulting in it having to recast or regurgitate its case against each and every individual plaintiff. Furthermore, it enhances judicial economy by protecting courts from having to consider the same issues and evidence in multiple proceedings, which carries with it the possibility of decisions by

[376] *Silicosis* supra note 145 at 27.
[377] *Silicosis* supra note 145.
[378] *Silicosis* supra note 145 at 13.

> different courts on the same issue. On the other hand, a class action allows for a single finding on the issue(s), which finding binds all the plaintiffs and all the defendants.[379]

The majority in the *Silicosis* case emphasised that it was in the hands of the Court to now decide how the certification process should proceed. The Court in this case went so far as to extend the reach of delictual claims to allow for the estate or the executor of deceased mineworkers to claim damages.[380] The Court accommodated the needs of society and constitutional rights and principles. [381] This position creates a level of certainty and an opportunity for more claimaints to pursue damages cases in the future.The Bread case and later confirmed by the *Silicosis* case demonstrates a gradual development in the interpretation of the s 38 right.

4.2.3 Non-constitutional law cases

As the Constitution introduced the class action in section 38, it is now beyond dispute that rights-based litigation is more amenable to being framed as class actions. It is arguable, that most competition law cases (for purposes of this dissertation I confine my contribution to cartel behaviour) may not be as amenable to being framed as one which violates a specific right in chapter 2 of the Constitution. The section 38 entrenchment of class actions poses the risk that litigants may unnaturally push their cases to be framed as one that violates a constitutional right when the circumstances do not warrant that approach.

The question arises as to how competition law cases (which ordinarily may amount to being non-constitutional rights cases) will be litigated in the absence of legislative regulation. Fortunately, in the Bread case, the SCA took up the cudgels and addressed this scenario expressly. The Court stated:

> '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

[379] *Silicosis* supra note 145 at 24.
[380] Ibid.
[381] *Silicosis* supra note 145 at 20.

> appropriate circumstances, merely because of the claimants inability to point to an 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 to 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. I accordingly reject the suggestion…that we should await legislative action before determining the requirements for instituting a class action in our law. The legislature will be free to make its own determination when it turns its attention to this matter and in doing so it may adopt an approach different from ours. In the meantime, our courts must prescribe appropriate procedures to enable litigants to pursue claims by this means.'[382]

The SCA has given express direction that class actions could be brought outside of the Bill of Rights and that the common law had to be developed to achieve that.[383] The adoption of definitive policy guidelines on how class actions should be managed and steps to certification and apportionment of damages should also be considered .

4.2.4 Lack of a legislative and policy framework

In 1998 SALC published its report on Class Action and Public Interest actions in SA,[384] which called for the promulgation of legislation to formalise these two process and developed a class action and public interest model akin to those in the United States (US) and Canada.[385] With regard to class action, the report outlined specific certification requirements of which the courts took notice. This is discussed in greater detail below.[386] The report ends with a detailed proposed legislation, which

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[382] *Children's Trust* SCA supra note 99 para 21.
[383] *Children's Trust* SCA supra note 99 at 46.
[384] SALC op cit note 340.
[385] Wouter Le R De Vos 'Is a class action a 'classy act' to implement outside the ambit of the Constitution?' (2012) 4 *TSAR* 739.
[386] SALC note 340, Clause 6.

unfortunately was not taken any further by the legislator. This is unfortunate, as legislation would have ironed out, very early on, the processes to follow in a class action and it may have saved some time and uncertainty for litigants. There should either be a revivial and revision of these proposals or a policy paper motivitation how legislation can achieve more efficient outcomes and better access to justice.

South African jurisprudence on class actions has thus become reliant on developments through our case law. Our courts have drawn from the SALC report as well as from other jurisdictions to establish a process for class action suits. For example, at the SCA, Cameron JA in the *Ngxuza* matter had regard to the four prerequisites to a class action contained in Rule 23(a) of the US Federal Rules of Civil Procedure, which provides that a member or members of a class may represent and sue on behalf of all members only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[387]

According to De Vos, '[A]lthough the American class action has its roots in the early equity practice of the Chancery Court of England, the modern lawmakers in the United States deemed it necessary to provide a sound basis for this procedure by adopting, at federal level, a comprehensive court rule.'[388]

When looking at the Competition Act provision that allows for civil damages,[389] the statute itself is neutral and silent on class actions. Therefore, the Competition Act does not create a class action. However, class actions outside the constitutional sphere have been developed in the context of the damages claims under the Competition Act.

[387] *Ngxuza* (SCA) supra note 341 at 1186 fn 8.
[388] De Vos op cit note 385 at 743.
[389] Section 65 of the Competition Act.

The landmark Bread cases were used as the test case to break the barriers and paved the way for all other class action cases that were not based on s 38 of the Constitution. The lack of clear legislative and policy framework developments created a lacuna in our law. Our courts are now playing a significant role in developing class actions in South Africa. One of the major issues canvassed was the certification of a class. This is taken further in the next section below.

4.3 Certification of the Class

Before engaging on the merits of the class action suit, damages litigants have to show that they actually belong to a class that is affected, and the courts must certify this procedure. The certification process is slowly evolving in our law through these seminal cases. In developing the common law, the SCA in the *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*[390] agreed with the South African Law Commission that certification is necessary for class action cases.

In November 2010, the Western Cape High Court heard the first competition law case on a class action claim for damages in South Africa, which arose from the harm caused by the bread price-fixing cartel. The Court took a rather restrictive approach to the arguments raised in favour of certification and dismissed the applications by distributors (Mukkadam) and consumers (Children's Trust).[391] The Court held that it was not possible to certify the class because the class was too wide in that it could have included every consumer of bread.[392] There was a difficulty identifying the class even if it was confined to those consumers who were negatively affected by the cartel bread prices.[393] Insufficient notice was given to the public to exercise the opt-out option that the Applicants were advocating for.[394] In addition to that the Court found that it was not clear what the affected periods were nor in which regions of the country the

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[390] *Ngxuza* (SCA) supra note 341 at 16.
[391] Bread case Western Cape High Court supra note 40 at 33–8.
[392] Bread case Western Cape High Court supra note 40 at 33.
[393] Bread case Western Cape High Court supra note 40 at 34.
[394] Bread cases Western Cape High Court supra note 40 at 74.

cartel conduct influenced the price of bread.[395] The Court also felt strongly that the question regarding whether class actions should be made available in South African law in a non-constitutional case and in particular, a damages class action, by developing the common law was not properly argued.[396] This combination of factors together with the criticism that the Applicants failed to establish a cause of action,[397] led the Court to reject the Applicant's request to bring a class action damages suit. It is possible that it being the first time a case of this nature was before a Court, that the Applicants were not prepared to argue sufficiently to justify their need to bring a class action, as required. To be fair, there was no judicial or policyguidance in place before this case, and the subsequent cases have now provided a more formative formula on how these cases should be argued and assessed.

On appeal, the SCA overturned the decision of the Court a quo, allowing for certification in the *Children's Trust* case and dismissing *Mukkadam's* case. The SCA began by declaring that class action cases had to be certified before going to trial. The reasoning behind this appears to be to prevent the defendants and courts from being overwhelmed with frivolous cases and also, as the SCA points out, to bind all parties with the decision and to resolve the issues between the parties. The Court in the *Silicosis* case points out that the SCA in that matter did not specify or restrict certification to non-Bill of Rights cases only.[398]

The SCA *Children's Trust* case also provided reasons for insisting on certification:

> Most jurisdictions around the world require certification either before institution of a class action or at an early stage of the proceedings. The exception is Australia. The justifications are various. First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's

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[395] Bread case Western Cape High Court supra note 40 at 35. The region was later revised by the applicant's attorneys and was narrowed to the Western Cape region.
[396] Bread cases Western Cape High Court supra note 40 at 82.
[397] Bread cases Western Cape High Court supra note 40 at 94.
[398] *Silicosis* supra note 145 para 35.

> own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the Court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even through the case lacks merit. Fourth, certification enables the Court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggest that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement. Lastly, the Australian experience has not proved entirely satisfactorily, with numerous interlocutory applications and significant costs and delays being experienced.[399]

The SCA *Children's Trust* provided sound reasons for having the certification criteria. There are concerns about opening the floodgates to litigation if there is more than one damages claimant and the certification criteria attempts to curb such abuse.
The amici in the SCA Bread case however, argued against certification, perhaps seeing it as a barrier for claimants to get justice. However, learning from the Australian experience, where parties are tied up in interlocutory applications that cost additional time and money, not having the certification process would put claimants at a greater disadvantage.[400]

The SCA advanced the way we should look at certification in general by proposing seven requirements that must be met for approval. These are:

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[399] SCA *Children's Trust*' supra note 99.
[400] Stuart Clark & Christina Harris 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?' 2008 *Melborne University Law Review* 32(3) 775.

- the existence of a class identifiable by objective criteria;
- a cause of action raising a triable issue;
- that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- that the relief sought, or damages claimed, flowed from the cause of action and are ascertainable and capable of determination;
- that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- that the proposed representative is suitable to be permitted to conduct the action and represent the class;
- whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.[401]

In dismissing the *Mukkadam* case, the Constitutional Court cautioned against casting the above seven requirements in stone, and instead considered them as suggestions when evaluating the certification arguments.[402] Without being too prescriptive, the Constitutional Court posited that the fundamental element is that the certification must be in the interest of justice.[403]

The Ally and Konstant paper provides a critical view on the Bread cases. They gave little credence to the Constitutional Court and, as they explained, 'this may be partly attributed to the fact that the majority judgment accepts most of the groundwork of the Children's Resource Centre Trust case and does not provide any in-depth engagement into the nature of class actions'. Nevertheless, they emphasise that the Constitutional Court judgment was not merely a confirmation of the SCA case.[404]

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[401] SCA *Children's Trust* supra note 99 at 24.
[402] *Mukkadam* Constitutional Court supra note 92 at 35 and 37.
[403] SCA *Children's Trust* supra note 99 at 47.
[404] Nurina Ally & Andrew Konstant 'Difficulties in regulating class action litigation', available at *http://www.saflii.org/za/journals/DEREBUS/2014/81/.html*, accessed on 9 February 2015.

Ally and Konstant criticised the Constitutional Court for not providing adequate guidelines on the certification criteria. They argued that the Constitutional Court reduced the certification criteria to just a guideline rather than emphasising the importance of the individual criteria in the Wallis judgment. They reasoned that the Constitutional Court

> does not offer any examples of instances where the Children's Resource Centre Trust case criteria may not be met, and yet would nonetheless be in the interests of justice to grant certification. Most striking perhaps is the failure to offer substantive reasoning as to why it may be in the interests of justice to allow for opt-in class actions even when a suitable alternative procedure is available that adequately allows for access to courts.[405]

I agree that the Constitutional Court should have gone further in *Mukkadam's* case in its certification analysis and provided greater direction to the parties. The Court disagreed with the judgment of Nugent JA that opt-in class actions should only be used in 'exceptional circumstances'. The lack of restriction provides greater options to damages claimants as long as they follow a defined process.

Nugent JA's judgment in *Mukkadam* argues that this was not an occasion for class action, there was a relatively small number of litigants, an ill-defined cause of action and, it did not t measure up to the necessary certification requirements. I agree with Nugent JA that the *Mukkadam* case lacked the substance required to properly argue for a certification of the class. Seeing as it was the first time a distributor had brought a class action for damages in a competition law case, some of these faux pas were bound to occur. Nugent JA provided some guidance to the parties as to the requirements that should be met to bring a certification of a class action.

In comparison to Malcolm Wallis JA's decision in the SCA, the Constitutional Court's, which just adopted this interest of justice formula was a poor judgment. The

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[405] Ally & Konstant op cit note 404.

Constitutional Court has given up the opportunity to hand down a comprehensive judgment about class actions and they developed an almost trivial formula which does not really engage with the complexities of class actions. It compares rather poorly with the Wallis JA's judgment. This is particularly in the light of the mature jurisdictions that have developed class actions such as in the US, where one sees that many issues can arise that need careful consideration. The Wallis JA judgment began to make those determinations and draw on the learning of those jurisdictions, whereas there was a judicial avoidance by the Constitutional Court.[406]

Following closely on the heels of the debates in the Bread cases the first successfully certified class action case in South Africa was the *Linkside* case,[407] which was brought by class action on the constitutional ground of the children's right to education. The Court allowed for an opt-in class of Eastern Cape Schools who had paid teachers out of their funds or who needed to fill teaching posts. 'The Court set down in order to bring a class action, there would need to be *certification*, i.e. that the matter involves definition of the class, identification of the class, and that class action is the appropriate procedure. *Linkside* is the first case which has implemented this guidance and satisfied the criteria to be a class action'.[408]

The *Silicosis* court was guided by the seven requirements outlined in the SCA *Children's Trust* case. The Court rejected the mining companies' argument that the large number of claimants made the class action unmanageable.[409] Some of the issues raised during the application of those requirements are dealt with below.

The *Linkside* and *Silicosis* cases show the value of the jurisprudence of the Bread cases. The Bread cases paved the way for courts to adequately deal with the issues

[406] Iain Currie (1999) 'Judicious Avoidance' *South African Journal on Human Rights*, 15:2, 138-165.
[407] *Linkside & others v Minister of Basic Education & others* (3844/2014) [2014] ZAECGHC 111.
[408] Shona Gazidis 'Victory in first certified class action sees teachers appointed and paid' 18 April 2014, available at *http://ohrh.law.ox.ac.uk/victory-in-first-certified-class-action-sees-teachers-appointed-and-paid/*, accessed on 18 June 2015.
[409] *Silicosis* supra note 145 para 52.

of certification in damages cases and the parties prepared for what to expect in arguing these certification cases.

4.3.1 Commonality

The notion of commonality among the class was raised as one of the seven requirements in the Bread case. Claimants could fall short of their application if this is not properly argued at the certification stage. The Western Cape High Court in the Bread case was not convinced that the applicants showed sufficient commonality in respect of all members of the affected class on the grounds of law and fact.[410] This is one of the bases upon which the Court refused to certify the class of bread distributors (*Mukkadam*).

In the *Silicosis* judgment, the Court raised some of the complexities when addressing a class action suit. There may be issues common to the class and some that affect the individuals differently. Addressing the common issues during a class action certification would be more expedient and in the interest of justice and due process than to have each individual claimant file a suit, which would result in a duplication of evidence, and be costly and time-consuming. It is left to the trial court to decide the logistics of managing these differences. In this article, I will not delve into the precise details as to how a class action should be handled, save to say that when determining the management strategy, the interest of justice should be the ultimate load star. Courts will have to decide on that on a case-by-case basis, depending on the facts and make-up of the class. I will rather focus on the aspect of certification before the action reaches trial stage. The *Silicosis* court did not agree with respondent Anglo American's argument that the common issues should outweigh the non-common issues of law and fact for a certification endorsement. This Court did not feel the need to do such a balancing test, but rather made its determination on whether there were *sufficient* (my emphasis) common issues among the class to warrant certification.[411]

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[410] Bread cases Western Cape High Court supra note 40 at 29–38.
[411] *Silicosis* supra note 145 at 71.

To provide some background to the application, the Court in the *Silicosis* case was presented with a bifurcated process by the mineworkers. The first stage of the process was where all the issues of commonality among the claimants were dealt with and the second stage was where individual claimants' concerns were addressed.[412] The mineworkers also requested that the first stage be an opt-out process in terms of which any miner can decide to step out of the process. Those that remain and do not opt out will be bound by the outcome of the decision at the first stage.[413] They then asked that the second stage be an opt-in process. Any miner who does not opt in will be bound by the ruling in the first stage but not subject to the decision in the second stage. He could still pursue his individual claim at the second stage. The SCA commented that the 'obvious attraction of the double-barrelled approach is that it ensures that the individual mineworkers are afforded the widest possible choice'.[414]

It is worth noting that the decision to opt in or opt out has been subject to debate in other jurisdictions.[415] In South Africa, the Constitutional Court disagreed with Nugent JA's SCA decision that opt-in class actions should only be used in 'exceptional circumstances'.[416] Interestingly the *Silicosis* decision did not take an either or option but rather allowed for both opt-in and opt-out as the mineworkers chose to take advantage of a bifurcated process.

This approach was opposed by respondent Anglo Gold, as it objected to the bifurcated process on the basis that it was intended to overcome the lack of commonality but it did not succeed in doing so. The Court accepted that this was a criticism of the lack of commonality rather than the bifurcated process. .[417] The mining companies also objected to the use of both the opt-in and opt-out processes, saying that it creates

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[412] *Silicosis* supra note 145 at 73.
[413] Ibid.
[414] *Silicosis* supra note 145 at 74.
[415] *Silicosis* supra note 145 at 59.
[416] *Silicosis* supra note 145 at 74-75.
[417] Ibid.

uncertainty. The SCA did not believe that this objection had merit.[418] The system proposed by the mineworkers gave a better indication as to how many claimants should be part of a class action, as this information would assist with how damages should be awarded.[419] The SCA in addition stated that just because the numbers of mineworkers affected may not be known beforehand, is not a reason to reject the certification of the class or refuse the bifurcated system.[420] This approach produces a fairer outcome in the interest of justice.

Now that commonality was established, the liability of each respondent would be considered at the second leg of the proceeding, once all the mineworkers and their affected dependents had issued their claims.[421] This concerns the determination of specific liability of every defendant for a part of the total sum of damages that has already been determined.

4.3.2 Suitability of class representatives and legal representatives

The suitability of class representatives was raised as one of the seven requirements for certification in the *Children's Trust* case at the SCA. The Court held that there were many characteristics attributed to the certification application, which included first that the representative had the 'time, the inclination and the means to procure the evidence necessary to conduct the litigation'[422] as well as the financial means to do so, or a plan to finance the litigation. Second, the representative required legal representation to conduct the litigation. Third, consideration should be given to how these resources will be funded; and lastly, if the funding is based on a contingency fee basis, details of such arrangement must be presented to avoid any conflict in the future. Importantly, the SCA emphasised that the litigation should be driven by the interests of affected claimants rather than for the lawyers' own gain.[423]

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[418] *Silicosis* supra note 145 at para 122-125.
[419] Ibid.
[420] *Silicosis* supra note 145 at 125.
[421] *Silicosis* supra note 145 at 225.
[422] *Children's Trust* SCA supra note 99 at 35.
[423] *Children's Trust* SCA supra note 55 at 35–6. See above

In support of this, the Constitutional Court in the *Mukkadam* case held that '… a representation in whose name the class action would be brought must be identified. The interests of the representative must not be in conflict with those of the members of the class. In addition, the representative must have the capacity to prosecute the class action, including funds necessary for litigation'.[424]

The Court in the *Silicosis* case, drawing on the author, Mulheron,[425] said that the

> role of the class representatives in class action proceedings is essentially threefold: they may be required to have personal knowledge of material facts for the purposes of establishing a prima facie case for certification; they are responsible for instructing the legal representatives on the conduct of the litigation on behalf of all class members; and they play an important role in facilitating communication with other class members throughout the litigation.[426]

The Court in the *Silicosis* case held that applicants were entitled to bring their application through representatives of the class, and if they were not satisfied, they had the option to opt out of the class action.[427] The Court concluded that the 'surviving applicant mineworkers' are suitable to be appointed as class representatives in this case.[428]

The Court went into further detail on fee-sharing arrangements, which I will not be addressing in this article.[429] One of the deciding factors of certifying the class as provided in one of the seven requirements is for the claimants to establish a cause of action.

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[424] Constitutional Court *Mukkadam* supra note 92 para 18.
[425] Mulheron op cit note 339 at 290–300.
[426] *Silicosis* supra note 145 at 78–9.
[427] *Silicosis* supra note 145 at 81.
[428] Ibid.
[429] For further reading on this refer to the *Silicosis* case at 83–91 (supra note 145).

In a damages case, it is likely that many claimants to the class action are in a vulnerable state. The SCA in the *Children's Trust* case now provides a more transparent process to access justice in class action cases. At the same time, it also protects the respondents from being subjected to frivolous litigation that sees no end.

4.4 Settlement

The SCA in the *Children's Trust* case and the Constitutional Court in the *Mukkadam* case were silent on what happens after certification and if the parties decide to reach a settlement. To be fair, this could be because these cases did not go beyond the certification arguments and there was no finality on the merits of the class action. Does the settlement agreement require an order of ratification by the Court? The *Silicosis* Court addressed the question and held that such a settlement would be subject to the Court's approval and becomes valid after such approval. The reason for this is 'to ensure that the settlement reached is fair, reasonable, adequate and that it protects the interest of the class'.[430]

4.5 Conclusion

The reason why class actions are particularly well suited to competition litigation is that anticompetitive conduct like cartels potentially affects thousands or even hundreds of thousands of people and benefits consumer welfare overall. So, it is not at all surprising that a competition law case substantially contributed to the development of class actions in South Africa. Class action jurisprudence is beginning to develop in South Africa in non-constitutional based cases. The motivation behind it is that it can lead to the resolution of a competition law damages dispute for a multiplicity of claimants, save time of the courts that would otherwise have to judge the same issue a number of times, and there is one outcome that binds both claimants and respondents.

[430] *Silicosis* supra note 145 at 26.

As mentioned earlier, the only recourse that victims of anticompetitive conduct have in redressing this harm is to claim damages in the civil Court. The Bread cases set a precedent as these were the first to look at class action beyond the parameters of constitutional-based action. Wallis JA rightly stated that '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.'[431] However, the Constitutional Court took a step back in the *Children's Trust* case and was quite dismissive of the SCA criteria as being mere guidelines that should not be determinative factors.[432] This approach was quite limiting even though Wallis JA, in the *Children's Trust* case, brought some clarity to the enforcement of non-constitutional rights and access to class action civil litigation, which encouraged future class action damages cases. Wallis JA's criteria received support in the *Silicosis* case, which used the SCA's requirements as a guide to certification.

We learned that if requirements are met, a class action is potentially a very significant engine for access to the courts for the recovery of losses. This was suitably displayed in the *Silicosis* case, where a class action suit was the only pragmatic approach that made it possible for the mineworkers to seek justice and compensation. The Court in this case held that 'it is the only way they would be able to realise their constitutional right of access to court bearing in mind that they are poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are continually battling the effects of two extremely debilitating diseases'.[433]

With reward comes risk and class actions also entail considerable complexity, cost and effort and so should not be taken lightly. Claimants and respondents have to consider how this would affect their resources such as time, costs, possibility of losing the case and cost awards against them. In addition, in the Bread case, the Western Cape High Court highlighted some of the difficulties with regard to class action suits that Froneman J dealt with in the *Ngxuza* case. For example, one of the concerns that

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[431] SCA *Children's Trust* supra note 99 at 18 para 17.
[432] Constitutional Court *Mukkadam* supra note 92 at 15–16 paras 35–6.
[433] *Silicosis* supra note 145 at 67.

Froneman J raised in *Ngxuza* was the opening of the floodgates to frivolous and vexatious claims. The litigation process can be quite burdensome on the State itself. Consideration should be given to how equipped our courts are to deal with these cases in regard to complexity and manageability of discovery, which in a class action suit is a massive enterprise. It should be noted that in the competition law space in South Africa, the floodgates did not open as anticipated after the Bread cases. To date, no other class action suit for competition law damages has come before the Courts.

Various issues were covered in this chapter, including commonality, representation and settlement. These are all necessary considerations for a class action case of damages. For example, in awarding the certification to the class action, the Court in the *Silicosis* case found that there may be many common issues and evidence that can be dealt with by the trial court and this Court cannot prescribe how that process should be done.[434] It went on further to say that the certification of a class is not determinative of the liability of the respondents. The liability of each defendant will be determined at the second stage of the proceedings.[435] These safeguards must be in place to ensure that the interest of the class is properly represented.

Although the watershed Bread cases created the way for future class action cases, it was not without its limitations. The judicial process takes time and judges could disagree on approaches as was seen in the Bread cases, and it takes time to find a common ground which delays access to justice. A more efficient way to address this is perhaps through policy or legislative reform in South Africa. SALC's recommendations have been indirectly adopted as a guide in the various class action cases. I suggest that these recommendations be freshly revised in light of the new developments and become part of a refined published policy paper or legislative Act. A definitive policy would provide an understanding, clarity, efficiency, the predictability of process and case management, which is especially necessary in cases of such magnitude as the *Silicosis* case. The way forward on the class action process is

[434] *Silicosis* supra note 145 at 126.
[435] *Silicosis* supra note 145 at 127.

infused with common-law and constitutional law principles with all the complexity that implies. A policy framework would help to address important challenges such a certifying a class and to provide legal certainty.

Some legislative frameworks now make specific provisions for class action suits. For example, s 157(1) of the Companies Act 71 of 2008; s 4(1) of the Consumer Protection Act 68 of 2008; and s 32 of the National Environmental Management Act 107 of 1998 allows for the potential damages suits. As more class action suits are being filed for competition law damages, I would recommend that in the interest of justice, clarity and efficiency, and pragmatism of future class action cases the South African Competition Act be amended to also include a class action framework. It is a suitable area to develop the doctrine, but the legislation needs to grow in a nuanced way. The absence of the lack of formal legislation should not be a deterrent to the bringing of class actions in competition law cases, as attested to by the victories in recent class action cases.

An earlier version of this chapter was published in an international journal: K Moodaliyar, 'The Direct and Indirect Purchaser's claim to Competition Law Damages and the Passing-Off Defence in Cartel cases' *Global Competition Litigation Review* (2018) Issue 8 at 114.

CHAPTER 5: THE DIRECT AND INDIRECT PURCHASER'S CLAIM TO COMPETITION LAW DAMAGES AND THE 'PASSING-ON' DEFENCE IN CARTEL CASES

5.1 Introduction

When a violation of the Competition Act has occurred, any number of market participants in the supply chain may suffer harm as a result either in the upstream or downstream markets. As seen in the Bread price-fixing cases,[436] in South Africa where the damages claimants who tried to claim compensation were end-consumers as well as distributors of bread, the relationship of the claimants to the firms engaged in anti-competitive conduct may also vary. These claimants could be end-consumers, purchasers of intermediate inputs, or both and could range individuals, firms or class actions as established in the previous chapter.

None of the courts in the Bread class action cases or other subsequent competition law damages cases in South African courts dealt with the essential question, which is: whether all participants in the supply chain, regardless of their role as end-consumers (indirect purchasers) or purchasers of inputs (direct purchasers), should be given standing to sue an upstream cartel for damages? Would the Defendant be allowed to argue that the direct purchaser passed on the overcharge to its downstream customer

[436] Bread cases Western Cape High Court decision supra note 40. The Bread case was filed at the Western Cape High Court after the Competition Commission brought a case against the bread manufacturers for prohibited price fixing (see *Competition Commission South Africa v Pioneer Foods (Pty) Ltd*, Competition Tribunal Case No 15/CR/Feb07 and 50/CR/May08.) The flour mills sold their product to independent distributors at cartel prices. Consumers who bought bread at these bakeries also bore the brunt of these overcharges. In this case both the distributors and consumers sued the bread manufactures for damages. (*Trustees for the Time Being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2013] 1 All SA 648 (SCA) and *Imraahn Ismail Mukkaddam v Pioneer Foods (Pty) Ltd and others* (CCT 131/12)[2013] ZACC 23; 2015 (5) SA 89 (CC)).

(the indirect purchaser)? The net of liability could stretch right down to the end consumer. Although the South African courts have thus far overlooked these questions in all the competition law damages cases, it is an important aspect to consider when analysing damages claims in a competition law context. The implications of not allowing an indirect purchaser to claim damages have a severe impact on the end-consumers case. Allowing both indirect and direct purchasers to claim damages, in turn, affects the amount payable by the defendant firm.

Take for example a manufacturing cartel, between firms that own flour mills, which sells flour at a 10 per cent overcharge to bakeries ('direct purchasers'). The bakeries add an additional 10 per cent to the price of bread and pass on the overcharge[437] to supermarkets. The supermarkets add on 10 per cent to their costs and pass on the overcharge to the consumer. The supermarkets and end consumer did not purchase the bread directly from the manufacturers and are thus 'indirect purchasers'.

The indirect purchasers were indirectly harmed by the price-fixing of the flour mills. Should they be allowed to claim damages from the cartel members? What is the relevance of the direct purchasers' increases to them? Should both indirect and direct purchasers be able to claim damages and perhaps join their claims? In their defence, should cartel members be allowed to argue that direct purchasers passed on the overcharge to the indirect purchasers and therefore not suffer the harm of the cartel overcharge?

This subject has been debated by the courts and scholars in the United States (US), and it is a contentious issue that has also been considered by the European Commission. In the US, there are two noteworthy cases that are instructive on this debate. An early case decided by the Supreme Court was *Hanover Shoe, Inc. v United*

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[437] This is the difference between the market price of the goods and the price actually paid. See *City of Atlanta v Chattanooga Foundry and Pipe Co*., 101 F. 900, 901 (C.C.E.D. Tenn.1900), aff'd, 203 U.S. 390 (1906), which was a claim for damages that arose as a result of the anticompetitive agreement in the *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

Machinery Corp,[438] where the direct purchaser claimed damages from a monopolist. The Court held that the Defendant (the cartel) could not avoid liability for damages by arguing that the direct purchaser had passed on[439] the overcharge to subsequent indirect purchasers. Nine years later, in 1977, the *Illinois Brick Co. v Illinois et al*,[440] case came before the Supreme Court. Indirect purchasers who claimed they suffered harm from an upstream cartel brought this case. The Court held that only direct purchasers could sue and excluded the indirect purchaser plaintiffs from recovering damages in federal cases. This meant that only the direct purchaser could recover damages from the cartel, even though it passed on the overcharge and the indirect purchasers who may have suffered the full impact of the price increase would not have any recourse. This stimulated a debate in the US, with many questioning the reasoning of these decisions and their fairness and impact.[441] The central debate arising from these cases is whether only direct purchasers or both direct and indirect purchasers should have legal standing recover damages from the cartel and whether the cartel is allowed to claim a passing on defence.

After providing an overview of the *Hanover Shoe* and *Illinois Brick* cases I assess the US debate regarding whether there should be a right of recovery for indirect purchasers. As previously mentioned, the South African courts are yet to engage with this issue in competition law damages cases and this is why the US cases that have engaged in this debate are of relevance.

An exception to the *Illinois Brick* doctrine was put forward by the Supreme Court in the *ARC America* case,[442] allowed indirect purchasers to sue for damages where the

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[438] 392. U.S. 481. 1968.
[439] Before the *Hanover Shoe* decision, the competition law violator was allowed to use the pass-on defence in cases where the direct purchaser was suing or in the case of an indirect purchaser suing, if the product was sold as is (i.e. without being altered). If the product was used as an input to produce another product, then the passing-on defence could not be used. See *Twin Ports Oil Co. v Pure Oil Co*., 119 F. 2d 747 (8th Cir. 1941), cert. denied, 314 U.S. 644 (1941).
[440] 431 U.S. 720 (1977).
[441] See Oxera 'Passing the buck: The passing-on defence in cartel damages cases', 2007, available at *http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Cartel-damages-claims.pdf?ext=.pdf*, accessed on 6 April 2010.
[442] *California v. ARC America Corp*., 490 U.S. 93 (1989).

indirect purchaser has suffered harm due to anti-competitive conduct. I discuss this case, and the implications should cartels be allowed to argue for a pass-on defence in cases brought by the direct purchaser. I also review the attempts to overcome the precedent set by *Illinois Brick* through legislative changes. I also consider the more recent US decision of *Apple Inc v Pepper*[443] which shows how changing technology platforms and online market structures could sometimes blur the distinction of an indirect purchaser and allow for another party who may not necessarily be seen as direct purchaser (as was in Apple's argument) to also earn the right of standing to claim damages. I consider the approach of the European Commission in trying to create incentives for private enforcement of cartel infringements, and I examine the Directive on competition law damages issued by the European Commission, which provides for these incentives. Drawing on this comparative analysis and overview, I then offer possible approaches that the South African courts should consider when adjudicating on direct and indirect purchaser damages claims. I conclude that the indirect purchaser should be given legal standing to claim damages, and the Defendant should be allowed to raise passing-on as defence if a direct purchaser is claiming damages against it.

5.2 The American Approach: An Analysis of Legal Standing

The *Hanover Shoe* case was a case of an abuse of dominance, whereas the claim for damages in the *Illinois Brick* case was as a result of a cartel. The outcomes of these two cases affected the defence the Defendant could raise and the legal standing of the indirect purchaser. This is examined below.

5.2.1 *Hanover Shoe, Inc. v United Shoe Machinery Corp*

Preceding the *Hanover Shoe* case, the Defendant, the United Shoe Machinery Corporation, a company that enjoyed dominance in a market that provided

[443] *Apple Inc. v Pepper* 587 US S.Ct. (2019).

manufacturing equipment with strict restrictions, was found guilty of monopolisation[444] through long-term leasing contracts.[445] In the US, the competition laws (referred to as 'antitrust' laws) are enforced by public agencies (the Federal Trade Commission and, in the case of criminal matters, the antitrust division of the Department of Justice). Judge Wyzanski recognised that the United Shoe company grew its market share by offering superior products and services, but expressed a strong disapproval of its lease-only policy of its machinery.[446] He saw that United Shoe's strength and control in the market coupled with its policies to lease and not sell its machinery 'furthered the dominance of one firm'[447] and posed 'unnatural barriers',[448] thus restricting competition and violating s 2 of the Sherman Act.[449]

Private plaintiffs who suffer harm due to antitrust violations are also able to bring actions. Section 4 of the Clayton Antitrust Act provides a remedy in the form of treble damages[450] for the successful private plaintiff stating:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore 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.[451]

The purpose of s 4 is to compensate victims as well as deter future anti-competitive behaviour.

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[444] In defining the elements of an illegal monopolisation, the Court in *United States v Grinnell Corporation*, 384 U.S. 563, 570–1 (1966) set out a two-part test: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'
[445] *United Shoe Machinery Corp. v United States*, 110 F. Supp. 295 (D. Mass. 1953).
[446] *United Shoe* supra note 445 at 344–5.
[447] *United Shoe* supra note 445 at 344–5.
[448] *United Shoe* supra note 445 at 345.
[449] *United Shoe* supra note 445 at 323–5, 340–6. Section 2 of the Sherman Act declares it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."
[450] Unlike in South Africa, where only single damages can be claimed.
[451] §4 15 U.S.C (1982).

Stemming from this case, the District Court initially heard the claim for damages brought by the plaintiff, Hanover Shoe, a manufacturer of shoes. In terms of Section 4 of the Clayton Act it complained that it suffered harm from the illegally high prices imposed by United Shoe, which monopolised the shoe machinery market by forcing its customers, like Hanover Shoe, to lease as opposed to buying its best machines.[452]

In its defence, United Shoe argued that it was not liable for damages because Hanover Shoe did not suffer any losses as it had passed on the overcharge to its customers (the purchasers of shoes). United Shoe also put forth the claim that, if Hanover Shoe 'had bought machines at lower prices, [it] would have charged less and made no more profit than it made by leasing'.[453] United tried to support its defence by arguing that, if the demand were inelastic, Hanover would have been able to pass on the overcharge and not endure any loss of sales.[454] Thus in the context of s 4 of the Clayton Act, Hanover was not 'injured in his business or property'.

The District Court[455] heard the first *Hanover Shoe* case and rejected United Shoe's argument that the overcharge had been passed on. The Court recognised that Hanover Shoe was entitled to recover damages under s 4 of the Clayton Act, as its 'injury occurred when it was charged too much for the machinery'.[456] Quoting from the *S. Pac Co v Darnell-Taenzer Lumber Co* case, the Court stated that '[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step' and exonerate a defendant because of 'remote consequences'.[457] The District Court found in favour of Hanover Shoe, and United Shoe appealed the decision to the Supreme Court.

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[452] *Hanover Shoe, Inc. v United Shoe Machinery.Corp*., 185 F. Supp. 826, 830 (M.D. Pa.1960).
[453] *Hanover Shoe* Supreme Court case supra note 314 at 392.
[454] *Hanover Shoe* Supreme Court case supra note 314 at 492.
[455] *Hanover Shoe* District Court case supra note 452.
[456] *Hanover Shoe* District Court case supra note 452 at 490–1, n.8.
[457] *Hanover Shoe* District Court case supra note 452 at 829–30. *S. Pac. Co. v. Darnell-Taenzer Lumber Co*., 245 US 531, 533 (1918).

There were two aspects that the Supreme Court considered. The Court first took note of the fact that to allow a passing-on defence would result in a complexity of litigation that would be difficult to manage. It expressed concern that 'there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued'.[458] Also, 'wading through' the various levels of the supply chain and determining the cost increases requires substantial evidence and often the parties have to engage in complex economic theories.[459]

The second aspect the Court focused on was the adverse effect that the passing-on defence would have on deterrence. It felt that if the pass-on defence were allowed it would disincentivise potential direct purchasers from seeking recovery because their chances of success would be limited.[460] Indirect purchasers may either be too weak or remote, too dispersed or have a small claim against the Defendant and may not regard it as worthwhile to claim damages or join a class action to do so.[461] Competition law violators would thus get off lightly and 'retain the fruits of their illegality', since indirect purchasers 'would only have a tiny stake in the lawsuit and hence little incentive to sue'.[462] Allowing the passing-on defence will thus not act as a deterrent to future competition damages as envisioned by the Clayton Act.

The Supreme Court provided for one exception where the passing-on defence would be allowed: instances where the product may have been sold under a pre-existing 'cost-plus' agreements,[463] where the indirect purchasers bought the product at a fixed price and quantity, and would thus be easier to prove.[464].

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[458] *Hanover Shoe* Supreme Court case supra note 314 at 493.
[459] *Hanover Shoe* Supreme Court case supra note 314 at 493.
[460] *Hanover Shoe* Supreme Court case supra note 314 at 494.
[461] Ibid.
[462] Ibid.
[463] Hovenkamp describes 'cost-plus' agreements where a 'dealer adds a pre-specified *dollar amount* to its price for a product before resale or in which the dealer adds a pre-specified *percentage* of its cost to the sale price.' Herbert Hovenkamp 'The indirect-purchaser rule and cost-plus sales' (May 1990) 103(7) *Harv. L. Rev.* 1721.
[464] Ibid.

Thus, by the Supreme Court in *Hanover Shoe* denying the passing-on defence to the defendants, long drawn-out hearings were avoided.[465] The indirect purchaser, if allowed to claim, would have a task that the Court described as that which 'would normally prove insurmountable'.[466] Direct purchasers were given the opportunity to claim full damages and defendants could not argue that the overcharge had been passed on, as this would substantially reduce the deterrent effect of the private enforcement of damages.[467]

5.2.2 *Illinois Brick*

The State of Illinois and about 700 local government entities in Chicago commissioned general contractors for construction to be done on several projects. These general contractors bought supplies from masonry contractors. The masonry contractors bought concrete bricks from the Illinois Brick Company. It was discovered that the Illinois Brick Co was in a cartel that conspired to fix the prices of concrete bricks. The State of Illinois and the government departments brought a claim for damages against Illinois Brick Co. The government applicants argued that, even though the masonry contractors were direct purchasers of the bricks from Illinois Brick Co, it was themselves, as indirect purchasers, who suffered from the price-fixing conspiracy because the overcharge was passed on to the government applicants and they had to bear the additional costs.[468]

The defendants contended that the *Hanover Shoe* case took precedent in this instance, in that it not only prevented the Defendant from exercising the passing-on defence but also barred indirect purchasers such as the State of Illinois from recovering damages.[469] They argued that this position should apply to this case as well.

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[465] Ibid.
[466] Hovenkamp op cit note 463 at 493.
[467] Ibid.
[468] *Illinois Brick* supra note 314 at 726.
[469] *Illinois Brick* supra note 314 at 727.

On appeal, the Supreme Court by a 6–3 majority ruled that the State of Illinois could not bring a claim for damages against Illinois Brick Co. because it did not purchase the bricks directly from the company and instead purchased the product via contractors. Justice White[470] saw two options: 'either we must overrule Hanover Shoe … or we must preclude [the indirect purchasers] from seeking to recover on their pass-on theory'.[471] The Supreme Court denied that the pass-on defence could be used as on offensive strategy: 'Whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants.'[472] This means that, if the pass-on defence could not be used defensively by a defendant in a case of damages where the direct purchaser is the claimant (as in *Hanover Shoe*), it surely could not be available for an indirect purchaser to use offensively to show their right to a claim. If indirect purchasers were allowed to sue it would pose 'a serious risk of multiple liability for defendants'.[473]

The Supreme Court reiterated the *Hanover Shoe* sentiment regarding the problem of multiple liability. The Court envisioned the possibility that there would be multiple claims for damages in various courts by indirect purchasers who were positioned at different levels of the supply chain all seeking treble damages for the overcharge they paid.[474] This could result in inconsistent judgments reached at the various courts. The Court acknowledged '[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness'.[475] The Supreme Court in *Illinois Brick* faced the dilemma of either overruling the *Hanover Shoe* case or refusing to permit indirect purchasers to recover damages that were passed on to them.[476] The Court also affirmed the *Hanover Shoe* view that prohibitive costs would reduce the

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[470] Justice White also wrote the majority judgment in the *Hanover Shoe* Supreme Court decision.
[471] *Illinois Brick* supra note 314 at 736.
[472] *Illinois Brick* supra note 314 at 728.
[473] *Illinois Brick* supra note 314 at 730.
[474] *Illinois Brick* supra note 314 at 731–3.
[475] *Illinois Brick* supra note 314 at 737.
[476] *Illinois Brick* supra note 314 at 736.

incentives for indirect purchasers to sue for damages.[477] The Court believed that in keeping with the Clayton Act it would serve the interest of justice to allow the direct purchaser to claim damages rather than attempt to apportion damages to multiple claimants at different levels of the supply chain, which would have a greater deterrent effect; it stated that:

> [t]he apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group …. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.[478]

The only exceptions the *Illinois Brick* Court considered were the cost-plus contracts as delineated in the Hanover case and instances where the direct purchaser is owned or controlled by its customers. The *Illinois Brick* Court explained that '[t]he only way in which the antitrust violation alleged could have injured defendants is if all or part of the overcharge was passed on by the masonry and general contractors to defendants, rather than being absorbed at the first two levels of distribution'.[479]

The dissenting judges noted that fairness and compensation should be bestowed upon consumers who bore the overcharge. Rejecting the indirect purchasers' claim would unduly deny them that relief.[480] They disagreed with the majority that deterrence should outweigh compensation and felt that 'from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation'.[481]

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[477] *llinois Brick* supra note 314 at 734–5.
[478] *llinois Brick* supra note 314 at 745.
[479] *Illinois Brick* supra note 314 at 727.
[480] *Illinois Brick* supra note 314 at 759–60. The Court also stated'[I]n many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers…pass on the bulk of their increased costs to consumers farther along the chain of distribution.' *Illinois Brick* supra note 457 at 764.
[481] *Illinois Brick* supra note 314 at 760.

Richman and Murray found that the *Illinois Brick* rule actually added to the complexity of these damages cases because the indirect purchasers who were prevented from suing in the federal court instituted parallel actions against the defendants in state courts, 'creating a confusing mosaic of antitrust litigation'[482]

5.2.3 Concluding remarks on the background to the seminal cases

Although the Supreme Court decisions in *Hanover Shoe* and *Illinois Brick* are restricted to damages claims under US federal law, these decisions brought about much discussion and debate regarding the indirect purchasers right to claim damages and the Court's rejection of the passing-on defence.[483] The Supreme Court also questioned whether the goals of compensation and deterrence could be adequately achieved.

Before the *Illinois Brick* case, there was much confusion and disagreement in the lower courts as to whether indirect purchasers could sue for treble damages, because *Hanover Shoe* only dealt with the position of the direct purchaser.[484]

The Supreme Court simplified the enquiry by allowing only direct purchasers to claim damages. It would be easier to show that the cartel overcharged the direct purchaser.[485] Cases involving intermediate markets, especially when the form of the product has significantly changed and moved through various levels of the supply chain would be much more difficult to prove.[486] It denied the passing-on defence and

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[482] Barak D Richman & Christopher R Murray 'Rebuilding *Illinois Brick*: A functionalist approach to the indirect purchaser rule' (2007–2008) 81(1) *S. Cal. L. Rev.* 69 at 99.

[483] See George J Benston 'Indirect purchaser's standing to claim damages in price fixing antitrust actions: A benefit/cost analysis of proposals to change the Illinois Brick rule' (1986) 55 *Antitrust L. J.* 213; Frank Verboven & Theon Van Dijk op cit 235 at 457–91; Herbert Hovenkamp op cit 463 at 1721.

[484] See pre-Illinois Brick cases: *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation*, 50 F.R.D. 13 (E.D. Pa. 1970) and In Re Western Liquid Asphalt 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).

[485] See John H Johnson & Gregory K Leonard 'Frictions and sticking points: Applying the textbook model to the analysis of cost pass-through in indirect purchaser class actions' 2008 *Antitrust Insights* 1.

[486] See Maarten Pieter Schinkel, Jan Tuinstra & Jakob Ruggeberg 'Illinois walls: How barring indirect purchaser suits facilitates collusion' (2008) 39(3) *RAND J. Econ.* 683.

multiple liability, thereby avoiding the possibility of costly and lengthy trials. This stance also protected the damages award of direct purchasers who had recovered the entire overcharge, which cannot be apportioned to indirect purchasers.[487] Benston comments that '[c]onsequently, potential plaintiffs and their attorneys were pleased, as were the courts and those who saw private cases as an important means of deterring antitrust violations'.[488] Sarris[489] illustrates this confusion about whether an indirect purchaser can sue for damages (pre *Illinois Brick*) in her discussion of two cases, *In Re Western Liquid Asphalt*,[490] where the plaintiffs, and affected government departments, successfully sued for damages. They had used contractors to build roads and highways, and these contractors purchased asphalt directly from the competition law violator. However, in the *Philadelphia Housing Authority*[491] case, the District Court held that the builders and owners of homes who had indirectly purchased fixtures from the Defendant were too remote to prove the anti-competitive harm to them and they were denied damages. The *Illinois Brick* Court cleared up the ambiguity and confusion by ruling on the use of the passing-on defence and the indirect purchaser's ability to recover damages.[492]

It is to be expected that the same Court would uphold its prior decision in *Hanover Shoe* and extend the argument to the *Illinois Brick* case. If they had allowed for the offensive use of passing-on, and thus allowed indirect purchasers to claim damages, this would have contradicted their earlier decision and rendered it obsolete or if could have led to a double liability of defendants. The fallout from this is that end-consumers end up paying the overcharge, especially in the case of intermediate products, and lose out further because they are barred from claiming damages. If direct purchasers

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[487] Benston op cit note 483 at 213.
[488] Benston op cit note 483 at 214.
[489] Valerie Sarris *The Efficiency of Private Antitrust Enforcement: The 'Illinois Brick' Decision* (Doctoral thesis, Yale University, 1979) 5.
[490] 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).
[491] *Philadelphia Housing Authority v American Radiator and Standard Sanitary Corporation*, 50 F.R.D. 13 (E.D. Pa. 1970).
[492] Sarris op cit note 489 at 5.

chose not to sue, the cartelist would get off quite lightly.[493] If indirect purchasers were allowed to sue for damages this could also expose the cartelist to multiple damages cases.[494]

There was dissatisfaction with the *Illinois Brick* decision and a call for Congress to overturn the decision, which it has not done. In 1989 the Supreme Court in *California v. ARC America Corporation*[495] provided an exception to the *Illinois Brick* rule by leaving it up to the individual states to determine whether they would allow indirect purchasers to sue provided that they did not deny the direct purchasers to sue for the full overcharge under federal law. Some states passed *Illinois Brick* repealer laws to allow for indirect purchasers to claim damages.[496] The result was that various states have taken different positions on this matter, but in federal cases the *Hanover Shoe* and *Illinois Brick* rules still apply. The Court in *ARC America* held that *Illinois Brick* rules could not be imposed on individual states who were governed by their own competition laws.[497]

A task team was appointed by the Antitrust Modernization Commission in the US, to consider whether, in light of the *ARC America* decision, any action should be taken to address the indirect purchaser problem. They recommended:

> (1) The full amount of the overcharge, trebled, can be recovered by (i) direct purchasers who sue under federal law; (ii) the customers of those direct purchasers who sue under state law; and (iii) under most state Illinois Brick repealers, by indirect purchasers at every other stage of distribution down the line.

[493] Martin Hellwig 'Private damage claims and the passing-on defence in horizontal price-fixing cases: An economist's perspective' *Max Planck Institute for Research on Collective Goods* (2006) 2, available at *https://www.coll.mpg.de/pdf_dat/2006_22online.pdf*, accessed 17 May 2010.
[494] Schinkel, Tuinstra & Ruggeberg op cit note 486 at 683–4.
[495] 109 S. Ct. 1661 (1989).
[496] Frank Verboven & Theon Van Dijk 'Cartel damages claims and the passing-on defense' (2009) 57(3) *J. Ind. Econ.* 457–91.
[497] See *California v ARC America Corp*., 490 U.S. 93 (1989) at 1667.

(2) The overcharge that an indirect purchaser can have trebled may be a multiple of the overcharge to the direct purchaser because indirect purchasers can claim that their sellers' markups on the original overcharge are also inflated because of that overcharge.

(3) The direct purchaser cases can be prosecuted in federal court and the indirect purchaser cases can be prosecuted in state court(s). Indeed, the Supreme Court seemed to encourage that kind of multiple litigation in ARC America by broadly hinting to federal courts that they utilize pendent jurisdiction principles for state law indirect purchaser claims.[498]

(4) The results in the direct and indirect purchaser cases need not be consistent. The overcharge which is treated as the direct purchaser's in the federal court can be treated as the indirect purchaser's in the state court. In fact, if the indirect purchaser casers are brought in several state courts, there may be inconsistencies in those decisions.[499]

There were about fourteen states at the time of *ARC America* who took up the opportunity to allow indirect purchasers to sue for damages.[500] Hovenkamp contended: '[W]hen viewed together, the state and federal antitrust systems render the rationales of Illinois Brick practically meaningless, because "duplicative" recovery will exist and pass-on will have to be established in litigation, albeit under state law.'[501] The US Courts have accepted that an indirect purchaser may apply for equitable relief or injunction (in SA interdict), even though they would not be able to claim damages.[502] With some State cases resolved in a different manner to the Federal *Hanover Shoe* and *Illinois Brick* cases, may still leave us with uncertainty in South Africa as to what should be the optimal approach.

5.3 Is the passing-on defence necessary to show a proper assessment of

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[498] Antitrust Modernization Report (2007)at 103, available at http//www.amc.gov/report_recommendation/toc.html accessed on 14 June 2015.
[499] Section of Antitrust Law ABA 'Report of the Indirect Purchaser Task Force' 994–5.
[500] Hovenkamp op cit note 363 at 1718.
[501] Ibid.
[502] See e.g. *Mid-West Paper Prods. Co. v. Continental Group*, 596 F.2d 573, 589-94 (3d Cir.1979).

damages?

In a world where indirect purchasers are allowed to claim damages, how necessary is it to allow for the passing-on defence? Should the defendant cartel be allowed to use the passing-on defence and thereby limit its liability for compensation to the direct purchaser plaintiff? If the Defendant uses the passing-on defence the burden shifts to the defendants (the cartel) to show how the overcharge has been passed on from the direct purchaser to the indirect purchaser. It would be an easier exercise to determine the overcharge in the case of cost-plus contracts.[503] But the link between the upstream prices and the downstream prices may not be that obvious. Justice White in *Illinois Brick* envisioned a highly sophisticated analysis regarding prices and output decisions, which he thought would have undermined the effectiveness of private damages cases.[504]

Is it okay to deny the Defendant from using the passing-on defence to avoid complicated multiparty litigation and expense? Harris and Sullivan argue that '[t]he Court, however, without considering chain complexity, erroneously inferred from chain length alone that it is difficult to determine whether passing-on has occurred'.[505] They believe that, if the various levels of supply could be identified, the determination of the overcharge would be manageable.[506] They say that empirical techniques would be adequate in calculating the overcharge, although tedious: 'It is, perhaps, a worthy goal to protect courts from tedium, but surely not at the cost of depriving parties injured by a blatant wrong from appropriate redress.'[507] If the passed-on overcharge can be easily traced, should the defence be available to the defendants?

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[503] *Kansas v Utilicorp United Inc.*, 497 U.S. 199, 110 S. CT.
[504] *Illinois Brick* supra note 314 at 737–45.
[505] Robert G Harris & Lawrence A Sullivan 'Passing-on the monopoly overcharge: A comprehensive policy analysis' (Dec 1979) 128(2) *U. Pa. L. Rev.* 338–9, referring to *Illinois Brick* at 741–4.
[506] Harris & Sullivan op cit note 505 at 339.
[507] Ibid.

Another point to consider is, if the Defendant is able to successfully argue that the direct purchaser plaintiff had passed on the overcharge, the focus then shifts to the indirect purchaser to bring the action.[508]

How should a direct plaintiff, who has passed on the overcharge, be compensated for the harm that resulted from that passing-on? Would a direct purchaser be incentivised to sue for damages knowing that the Defendant is likely to raise the passing-on defence? Currently, the direct purchaser does not have to concern itself with passing-on, the recovery is higher and certain and need not be shared with downstream litigants.[509] When deciding to pursue a claim for damages, the direct purchaser should consider the impact of the court allowing the passing-on defence and weigh factors such as costs, evidence and strength of the case to determine their chances of success. It's important that these facts do not have 'little impact on the overall deterrent effect'. The role of the passing-on defence should not outweigh these factors.[510]

5.4 Characterising the indirect purchaser

The *Illinois Brick* case introduced the difficulty of defining an indirect purchaser who has legal standing. It is easy to identify the direct purchaser due to its direct point of sale with the cartelist. But indirect purchasers could extend quite far down the supply chain rabbit hole. For example, consider a market where a steel cartel sells steel sheets to the direct purchaser. An indirect purchaser would include every customer who bought a product from the direct purchaser and every customer who now has an end product that includes the steel sold by the cartel. Steel sheets could be used as input in nuts and bolts, the construction industry, car manufacturing, etc., and the form of the end product could be completely different to that which the cartel sold. There could be a number of levels of the supply chain where the product could be used in its

[508] Fabio Polverino 'A class action model for antitrust damages litigation in the European Union' (2007) 30(3) *World Competition* 492.
[509] Sarris op cit note 489 at 129.
[510] 'The defense of "passing-on" in treble damage suits under the antitrust laws' (1961) 70(3) *Yale L. J.* 478, available at *http://www.jstor.org/stable/794440*, accessed on 3 September 2010.

raw form, or value could be added to the product. The cartelised product could look quite similar to the finished product or be completely unrecognisable. Types of modifications may also relate to the various costs added on to the cartelised product. If the input product accounts for 'only a small percentage of the price of the product, then the increment in price of the final consumer product attributable to an overcharge may be too small to measure'.[511] Should standing extend to any firm/person who bought the product at any level of the supply chain? Should we include purchasers who switched to an inferior input product because they could not afford to pay the cartelised prices? Or should legal standing be given to competitors of the cartel who were squeezed out the market and want to claim for lost profits? How far should we go to show harm caused by the cartel? Courts would not allow injuries that are too remote to permit the recovery of damages.[512] These complexities make it more difficult to prove why indirect purchasers should be allowed to claim damages and to calculate the overcharge. This section highlights the two main difficulties with characterisation and the two main problems highlighted by some commentators. This debate concerns whether to include or exclude the indirect purchaser from suing for damages.

First, both indirect and direct purchasers are injured by anti-competitive conduct. The *Illinois Brick* case, in its pursuit of deterrence, withholds compensation to all victims harmed by the anti-competitive conduct. Under *Illinois Brick,* direct purchasers benefit (even if they passed on the entire overcharge) at the expense of the indirect purchasers. Hovenkamp emphasises that the 'indirect purchaser rule potentially awards the direct purchaser more than three times the damages "by him sustained", while indirect purchasers receive nothing'.[513] In his dissenting judgment of the *Illinois Brick* case, Justice Brennan expressed his discontent that it is the consumers, being

[511] John E Lopatka & William H Page 'Indirect purchaser suits and the consumer interest' (2003) 48 *Antitrust Bulletin* 546.
[512] *Loeb v Eastman Kodak Co*., 183 F. 704, (3rd Cir. 1910) set out the direct injury test and asks whether the plaintiff's injury was 'indirect, remote, and consequential' at 709.
[513] Hovenkamp op cit note 463 at 1718. Quoting s 4 of the Clayton Act, Hovenkamp argues that the *Illinois Brick* rule is inconsistent with the allocation of compensation that this Act tried to encourage.

indirect purchasers, who 'bear the brunt of antitrust violations' and who will be denied the opportunity to recover damages under the *Illinois Brick* rule.[514]

Second, there may be circumstances where direct purchasers do not wish to pursue damages claims. Direct purchasers may fear claiming damages if there is a threat of limit or delay of supply from the cartelist, particularly where there is an inelastic demand.[515] If the direct purchaser can add on a fixed percentage markup and can profit from it and pass on the overcharge, it would rather do so than run the risk of claiming damages and possible threat to supply.[516] If the indirect purchaser is barred from suing the cartelist, a possible claim for damages will no longer serve as an incentive to stop the violation. Harris and Sullivan argue that this would lessen the deterrent effect of private damages cases.[517] Arguing against the position taken by Harris and Sullivan, Landes and Posner support the *Illinois Brick* decision and argue that the direct purchaser would have every incentive to sue for the damages windfall. They provide three reasons why this decision enhances the deterrent effect:

> First, the direct purchaser is a more efficient enforcer of the antitrust laws than the indirect purchaser and should therefore be given maximum incentive to bring antitrust suits. Second, the problem of apportioning damages among direct and indirect purchasers would be so costly that it would decrease the incentives of *any* purchaser to sue. Third, even if direct and indirect purchasers were equally efficient antitrust enforcers, and even if allocation problems could be solved without seriously depleting the recovery pool, deterrence would be weakened if the right to sue were divided among more parties, so that each claim was relatively small.[518]

There is a flaw in Landes and Posner's reasoning, in that they believe the only reason why a direct purchaser would not have the incentive to sue is if there were perverse

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[514] *Illinois Brick* supra note 314 at 764.
[515] See Harris & Sullivan op cit note 505 at 249–54.
[516] Sarris op cit note 489 at 133.
[517] Harris & Sullivan op cit note 505 at 249–54.
[518] William M Landes & Richard A Posner 'The economics of passing-on: A reply to Harris and Sullivan' (1980) 128 *U. Pa. L. Rev.* 608–9.

incentives preventing them from doing so.[519] There may be many cases where direct purchasers may plainly not have any incentive to sue. In a case brought in the State of Iowa, *Comes v Microsoft Corporation*,[520] the indirect purchasers were granted standing to sue Microsoft for damages. They had to prove that the direct purchasers were harmed and that the direct purchasers had passed on the overcharge to them. What was interesting in this case was that the direct purchasers themselves did not pursue any case of damages against Microsoft. Some may say that this is perhaps the exception to the rule, but this case has shown that the possibility exists that a direct purchaser may not sue for damages, which may occur in future cases.[521]

Third, another reason for a direct purchaser not to sue for damages is that they could also be aiding the cartel. Schinkel, Tuinstra and Ruggerberg were able to show through their study that the *Illinois Brick* rule is capable of assisting collusion between suppliers.[522] If a firm in the upstream cartel is able to strike a deal with their downstream customers (direct purchasers) through perverse incentives, this can prevent the direct purchaser from pursuing an action for damages against the cartel.[523] The cartel essentially buys the direct purchaser's silence. But, even if one had to accept the possibility outlined in this study, one cannot ignore the fact that the *Illinois Brick* rule includes the exception that indirect purchasers can sue if it can be proven that the direct purchaser co-conspired with the cartel.[524] In the *Paper Systems* case the Court held that '[t]he first buyer from a conspirator is the right party to sue'.[525] Taking its cue from *Illinois Brick,* the Court explained that the conspiracy, in this case, took place between the manufacturer and the middlemen and the first non-conspirator in this chain of supply would be eligible to sue—this would be the indirect purchaser. The indirect purchaser would thus have an opportunity to bring the action, but

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[519] Landes & Posner op cit note 518 at 613–14.
[520] 646 N.W. 2d 440, 450 (Iowa 2002).
[521] See Lopatka & Page op cit note 511 at 561.
[522] Schinkel, Tuinstra & Ruggeberg op cit note 486 at 684.
[523] Ibid.
[524] *Illinois Brick* supra note 314 at 736.
[525] *Paper Systems v Nippon Paper Industries Company* 281 F.3d 629, 631 (7th Cir.2002).

consequently, it would have an additional burden to prove the conspiracy between the cartel and the direct purchaser.

One of the reasons why indirect purchasers were refused standing was because the *Illinois Brick* Court wanted to avoid multiparty litigation. There is no denying that multiparty litigation lawsuits are costly. In the US, the Defendant could be liable for treble damages in each of these lawsuits. Court resources are limited, and some believe that 'it makes even less sense to permit inconsistent judgments as to who bore the overcharge'.[526] This could happen in a case, for example, where an indirect purchaser is successful in one court, and the direct purchaser is unsuccessful in its claim in another court.[527]

The *Illinois Brick* Court foresaw the problem of duplicative damages recovery if the indirect purchaser was allowed to sue for the overcharge that was passed on to it and the direct purchaser could also lay a claim to the overcharge against the Defendant.[528] The Defendant would thus be liable for more than envisioned by the Clayton Act. Hovenkamp repudiates this claim by saying that the indirect purchaser will only claim what the direct purchaser has passed on to him.[529] Although this still means that the cartelist would be obliged to compensate part of the harm more than once.

The *Illinois Brick* case became part of a vigorous debate for many decades to come. I outlined the conflicting views of Harris and Sullivan and Landes and Posner regarding who would be most appropriate to be compensated. Although the Illinois Brick case still remains intact at the Federal level, many state courts have taken the alternative view and allowed indirect purchasers to sue. This dichotomous approach by the federal and state courts does not provide any clarity on the way forward. *Hanover Shoe* offers a lifeline to the defendant firms by way of the passing-on defence, and the

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[526] Section of Antitrust Law ABA 'Report of the Indirect Purchaser Task Force' op cit note 499 at 995.
[527] Sarris op cit note 489 at 123. See also Kevin J O'Connor 'Is the *Illinois Brick* wall crumbling?' (2000–2001) 15 *Antitrust* 34 at 34.
[528] *Illinois Brick* supra note 314 at 730–1.
[529] Hovenkamp op cit note 463 at 1730.

Illinois Brick rule fails to compensate end-consumers. Compensation should not be forfeited in favour of deterrence. In fact, the ideal solution would be one where both are achievable.

Is it just unfortunate that *Illinois Brick* was decided after *Hanover Shoe*? In a separate dissent, Justice Blackmun lamented 'an unhappy chronology' that bound *Illinois Brick* to *Hanover Shoe*, musing that '[i]f [*Hanover Shoe*] had not preceded this case … I am positive that the Court today would [grant standing]'.[530] Other commentators also feel that because of the chronology of these two cases, the majority in *Illinois Brick* felt obligated to give equal treatment to plaintiffs and defendants and to uphold the *Hanover Shoe* decision.[531]

The indirect purchaser rule which has been applied for decades to traditional market structures, is in itself, rigid. Online digital platform markets are changing the landscape and it is not always clear who the indirect purchaser is or what the cartelised or monopolised product is. The courts in the United States were split when it came to who the indirect purchasers are in online marketplaces.

In the *Campos v Ticketmaster* case, concertgoers sued Ticketmaster for the monopolistic prices that concert venues were charging for their admission tickets. Ticketmaster was dominating the ticket distribution sales by entering into exclusive contracts with concert venues.[532]

According to the 8th Circuit Court majority decision, the agreements between Ticketmaster and the venues were "antecedent transactions" which the venues itself (and not the concert goers who paid the Ticketmaster with the service fee built into the price of admission) were the purchaser who were directly affected by the supracompetitive prices. The court found that the concert goers who bought tickets

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[530] Lopatka & Page op cit note 511 at 765.
[531] See Roger D Blair & Jeffrey L Harrison 'Reexamining the role of *Illinois Brick* in modern antitrust standing' (1999) 68(1) *Geo. Wash. L. Rev.* 42; O'Connor note 314 at 34. Andrew I Gavil 'Antitrust remedy wars episode 1: *Illinois Brick* from inside the Supreme Court' (2005) 79 *St. John's L. Rev*. 553, 576–605.
[532] *Campos v Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998) at 1169-71.

from an intermediary like Ticketmaster were indirect purchasers, although they bought the tickets directly from Ticketmaster. In keeping with the Illinois brick doctrine, the concert goers who were the indirect purchaser in this case was not allowed to sue Ticketmaster for damages due to its monopolistic pricing.

The *Ticketmaster* case is in sharp contrast to the 9th Circuit Court's decision in the 2017 *Apple* case[533]. Apple sold apps through its Apple App Store, made by third party developers, and charged the developers a 30% commission. Apple charged developers a 99$ annual membership fee, the app developer could set any price and Apple charged a 30% commission on the app. Four iPhone owners contended that Apple charged too much for the apps and sued Apple for abusing its monopoly position by charging higher than competitive prices in the aftermarket for the Apple apps. Apple argued that the iPhone owners did not have standing as they were not direct purchasers of the App, keeping in line with the reasoning of the Illinois Brick case.[534] Apple argued that the 30% commission it charged to the App Developers were passed on to consumers in the form of higher prices. The consumers were thus indirect purchasers and cannot sue Apple under the *Illinois Brick* rule. The Court held that Apple was the distributor of apps, selling these apps directly to end users through its App Store, and therefore the end user would have standing (according to *Illinois Brick*) to sue Apple for its alleged monopolisation of the sale of Iphone Apps as a direct purchaser.[535] The 9th Circuit acknowledged its departure from the 8th Circuit Court in the Ticketmaster case.[536]

On appeal, at the Supreme Court in what was now called the *Apple v Pepper Inc* case to determine whether it was the 8th or 9th Circuit Court which had the correct interpretation. The Supreme Court favoured the 9th Circuit Court's decision that in the absence of any intermediary in the chain of distribution between Apple and the end

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[533] *In Re: Apple Iphone Antitrust Litigation Et al v Apple Inc* 846 F.3d (9th Cir.2017) at 324.
[534] Ibid.
[535] Ibid at 313, 324.
[536] Ibid.

user, the end-user is viewed as a direct purchaser for the purposes of the Illinois Brick doctrine.[537]

The decision appears to question the boundaries of *Illinois Brick* is the US case of *Apple Inc. v Pepper*[538].

The US Supreme Court held that under the *Illinois Brick* case, the iPhone owners were direct purchasers and did have standing to sue Apple for alleged monopolization. The Court drew on section 4 of the Clayton Act, which states that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue.' 15 U. S. C. §15(a). The court held:

> 'That broad text readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer'.[539]

The Court felt that unlike the indirect purchasers in the *Illinois Brick* case, the consumers of the Apple apps being the iPhone owners, are not at the bottom of the vertical supply chain attempting to sue a manufacturer at the top of the chain.[540]

Put plainly, Justice Brett Kavanagh, writing for the majority stated that ['t]he plaintiffs purchased apps directly from Apple and therefore are direct purchasers under *Illinois Brick*.'[541]

Apple argued that *Illinois Brick* allows consumers to sue the party that set the retail price and in their case they do not set the retail price. That is done by the app

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[537] *Apple, Inc. v Pepper*, 139 S. Ct. 1514, 1521 (2019).
[538] *Apple Inc. v Pepper* supra note 443.
[539] Ibid.
[540] Ibid at 587-588.
[541] Ibid at 588.

developers.[542] The Supreme Court stated that section 4 of the Clayton Act broadly provides for injured parties to sue for antitrust damages and that *Illinois Brick* creates a bright line where direct consumers (and not indirect purchasers) could sue for antitrust violators from whom they purchased goods or services.[543] 'When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue.'[544] The Court did not favour Apple's extension of a 'who sets the price rule' from the indirect purchaser rule of *Illinois Brick*.[545]

The Court did not address the merits of the antitrust claim and referred the matter to the lower courts.

In the dissent penned by Justice Gorsuch, J., the dissenting judges were of the view that the App developers who were charged the 30% by Apple, had passed on the overcharge (if any) to the iPhone owners and that this would lead into a complex inquiry into how Apple charges its commission. The dissenting judges also agreed with Apple that the apportionment of damages in such a case becomes difficult and brings the possibility of double damages.[546]

The ruling allows for both the consumers of the app and the app developers to sue Apple for damages, and this could deviate from avoiding monopolisation cases at multiple levels which *Illinois Brick* sought to avoid. Although, the Apple supply chain, which has iPhone users who are purchasers of apps and the app developers may be a unique one.

This ruling did not expand the scope of antitrust standing; however it is possible that the victim centered approach in the *Apple v Pepper* case may encourage more plaintiffs, using the growing number online platforms especially the large corporations like Apple, to push the boundaries of *Illinois Brick* to eventually seeing it overturned.

[542] Ibid at 594.
[543] Ibid.
[544] Ibid
[545] Ibid at 595.
[546] Ibid at 5 of dissent.

This ruling did not expand the scope of antitrust standing; however it is possible that the victim centered approach in the Apple v Pepper case may encourage more plaintiffs, using the growing number online platforms especially the large corporations like Apple, to push the boundaries of Illinois Brick to eventually seeing it overturned. There is no doubt that this case will create more private antitrust litigation. In assessing whether a plaintiff is a direct or an indirect purchaser under Federal Antitrust law, courts no longer will rely on who sets the price or how a retailer structures its financial arrangements with upstream suppliers. If it is an intermediary between a seller and a buyer, the buyer is an indirect purchaser barred from seeking antitrust damages. If there is no intermediary the buyer is a direct purchaser and must sue for damages.

The Ticketmaster and the Apple cases show that with the advent of online digital platforms, the marketplace is no longer a simple series of transactions as we have seen in Illinois Brick and Hanover Shoe where it was not in question which consumer was the indirect purchaser. These new digital platforms are becoming more complex and it may not always be easily determinative as to who the direct and indirect purchaser is. But what remains, is the principle that under Illinois Brick, the indirect purchaser is barred from suing the initial cartelist or monopolist at the top of the distribution chain.

5.5 The European Community's approach

Unlike the US, which has a robust register of private damages cases, private enforcement was rarely used in the European Community. It was 2004 when the outgoing European Commissioner at the time, Mario Monti, acknowledged that private enforcement could, in fact, be complementary to public enforcement.[547] As it stood,

[547] See Mario Monti 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation', 2004,Speech/04/403, available at *www.europa.eu/rapid/press-release_SPEECH-04-403_en.htm?locale=en* accessed on 30 July 2013; and Cani Fernández & Paloma González-Espejo Actions for Damages based on EC Competition Law: New case law on direct applicability of Articles 81 and 82 by Spanish civil courts' (2002) 23(4) *E. C. L. R.* 163.

plaintiffs could bring claims for damages in the national courts only. The European Court of Justice (ECJ) did not explicitly allow for these claims.[548] This changed with the groundbreaking *Courage v Crehan*[549]—a case that took thirteen years to reach finalisation, this case commenced in the UK national courts and also in the European Court of Justice (ECJ)[550] which had given a preliminary ruling on certain matters. The case was subsequently heard by the Court of Appeal[551]. The plaintiff in this matter, Mr Crehan, leased a pub from the largest brewery landlord in the UK, Inntrepreneur. He took on two leases where he would have to buy beer from Courage Ltd which owned 19% of the UK beer sales.[552] He argued that the twenty-year lease agreement forced him to purchase a minimum quota of beer, which was anti-competitive and he sued the Courage brewery for damages. Before this case, there was no ruling in the EC court or in the UK that allowed for damages in competition cases.[553] The English courts barred claims for competition damages as the plaintiff was party to that contract.[554] The ECJ took the contrary view and stated: '[T]he practical effect of the prohibition laid down in Article 81(1)EC would be put at risk if it were not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.'[555] This case opened the discussion on private enforcement by the EC.

The discussion was opened in the form of a Green Paper published by the EC in 2005. The EC asked for public comment exploring the possibilities of bringing damages

548 Tiffany Chieu 'Class actions in the European Union? Importing lessons learned from the United States' experience into European Community competition law' (2010) 18(1) *Cardozo J. Int'l & Comp. L.* 133.
549 C*ourage Ltd v Bernard Crehan* 2001 E.C.R. I-6297.
550 Ibid.
551 Court of Appeal [2004] EQCA 637.
552 *Courage and Crehan* supra 549 at 1-6297.
553 Ibid.
554 UK House of Lords decision *Inntrepreneur Pub Company v Crehan* [2006] UKHL 38. See also Cani Fernandez & Paloma Gonzalez-Espejo *Actions for Damages based on EC Competition Law* (2003) 179. Refer to the High Court *Crehan* case.
555 *Courage and Crehan* supra 549 at 1-6297 para 26. The argument under Article 81 can also be extended to Article 82. See European Commission 'Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules' Commission of the European Communities SEC (2008) 404 at 15, available at *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:0404:FIN:EN:PDF*, accessed on 16 February 2009.

actions in competition cases and listed a number of options for addressing the obstacles.[556] Soon after the Green Paper was published, the ECJ in the *Manfredi* case confirmed its view in *Courage v Crehan* that: 'It follows that *any individual* can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC.'[557] Some commentators believe that the *Courage* and *Manfredi* cases give guidance to the Member states to allow defendants to raise the passing-on defence.[558]

Even though the *Hanover Shoe* and *Illinois Brick* cases received widespread criticism in the European Union because these cases prevented the passing-on defence and indirect purchasers from claiming damages, some respondents to the EC Green Paper thought that allowing indirect purchaser suits and their complexities would clash with the public enforcement mechanisms offered by then Articles 81 and 82 (now referred to as Articles 101 and 102). However, a majority of respondents argued that to limit the standing of indirect purchasers would be to deny them full access to compensation.[559]

A follow-up to the Green Paper was the EC White Paper, which published a summary of proposals. The White Paper proposed that defendants in damages cases should be allowed to use the passing-on defence. To assist indirect purchasers in proving their case, the White Paper allows indirect purchasers to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety. The one justification by the European Union to go the route that is contrary to the *Hanover Shoe* and *Illinois Brick* cases is to prevent unjustified enrichment in a situation where the

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[556] John Pheasant 'Private antitrust damages in Europe: As the policy debate rages, what are the signs of practical progress?' (2007) 8 *Bus. L. Int'l* (2007) 227.
[557] Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR 1-6619.
[558] Philip Collins 'What are the problems with EC antitrust damage actions in Europe? Does the private pillar require enforcement?' (2007); background paper to the debate at Cartel enforcement and Antitrust damage actions in Europe, 8–9 March 2007, Brussels, Belgium. *http://www.vartotojuteises.lt/content/download/412/2587/file/Philip%20Collins%20Paper.pdf*, accessed on 4 August 2011.
[559] EC Commission Staff Working Paper note 239 at 13.

direct purchaser has passed on the overcharge and still wins compensation.[560] The White Paper makes it clear that the standard of proof for passing-on defence should be equivalent to the standard of proof which the Plaintiff must meet in its claim for damages.[561]

The EC Directive on Damages was subsequently published in 2014, and proposed to remove practical obstacles to compensate victims of EC infringements.[562] The Directive seeks to harmonise private enforcement of EU law across the national courts and it is applicable to both collective and individual damages claims available in the Member States. The Directive makes it clear that both indirect and direct purchasers are allowed to claim damages, and it gives the Defendant an opportunity to prove that the damages were passed-on from the direct to the indirect plaintiff. The direct purchaser would also have to show prima facie proof that the overcharge was not, or not entirely passed on to the indirect purchaser.[563]

5.6 Possible solutions and recommendations for South Africa

South African courts are yet to decide on whether to allow the Defendant to raise a passing-on defence, or engage in the debate as to whether the indirect purchaser should be allowed or prevented from claiming damages in a competition case. In anticipation of the courts engaging with these issues, I pose four possible scenarios for the courts to consider. Scenario (1) Allow the indirect purchaser to sue and do not allow the passing-on defence. (2) Do not allow the indirect purchaser to sue and allow the passing-on defence. (3) Do not allow the indirect purchaser to sue and do not allow the passing-on defence. (4) Allow the indirect purchaser to sue and enable the Defendant to raise the passing-on defence.

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[560] See C Pertrucci, 'The issues of the passing-on defence and indirect purchasers' standing in European competition law' (2008) 29 *ECLR* 33, who argues that the Court's ruling in *Courage v Crehan* implicitly recognises the role and legal standing of indirect purchasers.
[561] White Paper op cit note 322 at 8 and Commission Staff Working Paper op cit note 239 paras 215 and 220.
[562] EC Damages Directive op cit note 322.
[563] Ibid.

Sarris proposes a solution that depends on the statute of limitations and limiting overcompensation to damages claimants.[564] She assumes a scenario where there is one direct purchaser and one indirect purchaser. Starting with the premise of the *Illinois Brick* case, the direct purchaser would be entitled to sue for damages of the value of the overcharge. An assessment of passing-on is not required. The direct purchaser would have a four-year statute of limitations period to sue and that exclusive right will end after the four years have prescribed or 'one year after the indirect purchaser has filed a notice of intention to sue the price fixer, … whichever comes first'.[565] Thereafter the indirect purchaser would have an exclusive right to sue for triple damages without having to prove that the overcharge was passed on to him. If there is more than one level of indirect purchasers, they may all have a chance of recovery and would have to file a notice of intention to sue. 'Only one party at a time will have the right to recover.'[566] Sarris believes that this solution would address problems raised by the *Illinois Brick* Court, such as proving passing-on and avoiding multiple liability. In South Africa, the statute of limitations is three years. This solution may be workable; however, due process may be hampered if the respondent has to wait years for each party to file an intention to sue, which may take years if there are parties at multiple levels of the supply chain.

When both direct and indirect purchasers sue, does this result in the optimal deterrence? Are duplicating recoveries desirable?[567] Lopatka and Page have not found the indirect class actions to be of much benefit when it comes to deterrence. The primary reason is that in cases where the product in question is an input used as an ingredient in other products, they found that in most cases the class actions are not certified. If the cases are certified, the damages were either not awarded directly to the consumers who suffered harm but rather distributed to worthy causes, or the

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[564] Sarris op cit note 489 at 135–7.
[565] Sarris op cit note 489 at 136.
[566] Sarris op cit note 489 at 137.
[567] Lopatka & Page op cit note 511 at 533.

rewards are too low.[568] That in itself should not be reason enough to prevent indirect purchaser claims. The indirect purchaser class should be given the opportunity to weigh their risks. Distributing the damages to worthy causes should be seen as a positive step towards uplifting consumer welfare.

Many commentators see indirect purchasers as hindering the route to deterrence.[569] The goal of deterrence, although necessary in cartel cases, need not be the focal point in South African civil claims for damages. As stated in the earlier chapters, the competition authorities are the first port of call when it comes to enforcement. The Competition Tribunal fines firms that are found guilty of cartel behaviour. That in itself should be an adequate deterrent. The civil claims would add to that deterrence. However, the primary focus of civil claims for damages would be providing for appropriate compensation.

The ideal solution would be to provide compensation while promoting deterrence and doing so at the lowest administrative costs. Richman and Murray[570] have come up with a solution that they say captures all three of these criteria. They propose that all claims by victims, including indirect purchasers of the cartel, be combined into one consolidated application. Damages could then be allocated to the plaintiffs in one suit. They believe that this would provide an incentive and reward to the parties bringing the action. They also foresee the problem where one party opts out of the consolidation with the plan to bring its own stand-alone suit.[571] They propose a mandatory consolidation action curbing this problem. They call for legislative reform of the Clayton Act, which would allow for the single action brought by any purchaser (direct or indirect) to which other plaintiffs could join. They further propose that no parallel state actions should be allowed alongside these consolidated federal actions. This would limit administrative litigation costs and also enhance deterrence with

568 Lopatka & Page op cit note 511 at 569.
569 Lopatka & Page op cit note 511 at 569–70.
570 Richman & Murray op cit note 482 at 101.
571 Richman & Murray op cit note 482 at 102.

elevated damages fines which would cater for all the plaintiffs' losses.[572] This seems to be an almost utopian view of consolidated damages claims. But it does not actually solve the *Illinois Brick* problem.

Schinkel argues for a single collective damages claim in the European Union.[573] He says that this would bring effective and efficient deterrence. A consolidated claim can, however, bring its own complexities—such as who should take the lead or negotiate settlements. Richman and Murray feel that the court should appoint the lead plaintiff, who will also guide the settlement process. This should be based on the weighing process based on the presumptions of who initiated the proceedings and who is best at handling the litigation. A notice and time period should be published, giving potential plaintiffs an opportunity to join the action.[574]

In the four scenarios I proposed earlier, I am inclined to go beyond what Sarris and Lopatka and Page are offering. I am reluctant to offer scenarios 1 and 2 as a possibility as this would place an unfair advantage on the indirect purchaser in scenario 1 and on the Defendant in scenario 2. Scenario 2 allows the possibility of the Defendant to get away with not providing compensation to any party for the infringement. Scenario 3 is what is offered by the US cases of *Hanover Shoe* and *Illinois Brick*. It comes with its caveats: the direct purchaser who passed on the overcharge may be unjustly enriched; and the actual victims will not have access to those compensatory funds. Scenario 4 is the route that the EU papers have been steering towards. I think scenario 4 would be best, as South African courts could allow the passing-on defence to the Defendant, but without removing the possibility of the indirect purchaser from claiming damages. All victims of anti-competitive conduct should have the opportunity to put their case forward expediently.

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[572] Richman & Murray op cit note 482 at 103.
[573] Maarten Pieter Schinkel 'Effective cartel enforcement in Europe' (2006) 30 *World Competition: L. & Econ. Rev.* 539
[574] Richman & Murray op cit note 482 at 106–7.

This chapter is not about bringing reform to the US position, but rather, it highlights what lessons we can learn from the US so as to avoid the problems created by the *Hanover Shoe/Illinois Brick* situation in South Africa. With the advent of damages cases, we too will be seeing parties in multilayered supply chains who wish to institute damages. The challenges faced by the US and EU courts will not be any different to those arising in South African courts.

There have been several legislative attempts in the US since 1983 to repeal the *Illinois Brick* decision, but this has not changed the Supreme Court ruling on this matter.[575] In 2002 the US Congress established the Antitrust Modernization Committee ('AMC') to, inter alia, determine whether 'indirect purchaser litigation [could] be modified to reduce the complexity and inefficiency now present'.[576] The public submitted responses to the AMC which they addressed in their recommendations.[577] The AMC suggested to Congress that the *Illinois Brick* and *Hanover Shoe* decisions be overruled to allow for indirect purchaser suits to be heard in federal courts. Damages would be apportioned to all plaintiffs—both direct and indirect purchasers.[578] These recommendations, however, did not end this debate.

5.7 Conclusion

Unlike in the EU and South Africa, private damages play a pivotal enforcement role in competition cases in the US. Therefore, achieving deterrence and enforcement while sacrificing compensation was an essential point for the *Illinois Brick* Court to consider. The optimal solution would have been to promote both goals of enforcement and compensation to all victims.[579]

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[575] See H.R.2244, 98th Congress (1st Sess.1983); S.915, 98th Cong. (1st Sess. 1983); 131 Cong.Rec. S15, 931 (daily ed. Nov. 20, 1985), S.2022, 99th Cong.(2d Sess.1986); H.R.4321, 106th Cong. (2d Sess. 2000).
[576] Antitrust Modernization Commission Act of 2002, Pub.L.No. 107-273, §§ 11053, 11058, 116 Stat. 1856.
[577] Antitrust Modernization Report op cit note 498.
[578] Ibid.
[579] Sarris op cit note 486 at 117.

Despite criticisms in the US and the EU and calls for legislative changes, the *Illinois Brick* rule still remains law in the US today.[580] Some states have taken it upon themselves to issue repealer laws and allow indirect purchaser claims. The Court in *ARC America* allowed the case to proceed, as it did not see any conflict with the state and federal law.[581]

Some commentators agree that the *Illinois Brick* rule has contributed to greater deterrence of anti-competitive behaviour by giving exclusive rights to direct purchasers to sue for damages and thus lowering complexities and costs.[582] Others argue that the rule failed to promote competition enforcement and that the *Illinois Brick* rule sacrificed compensation for deterrence.[583] Sarris writes '[T]here is a tradeoff between efficient enforcement and the just compensation of victims of antitrust violations because the act of compensation consumes society's resources, and thus adds to the administrative costs of enforcement.'[584]

As Collins so aptly puts it: '[It] is not clear that standing and passing-on should be real barriers to the development of private actions and it may be best to allow the application of the principles to develop though individual cases.'[585]

This debate as to whether indirect purchasers should be allowed to claim damages and allowing the Defendant to use the passing-on defence remains untested in South African competition law cases. If the opportunity is created for more litigants to claim damages, this could impact not just the ability to be compensated but also have an effect on deterrence as well. Technology is changing rapidly, and digital platforms could add a new dimension to the conventional market structures as we have seen in the *Apple Inc v Pepper* case. These platforms may also result in a blurred distinction

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[580] See e.g. O'Connor op cit note 242; Richman & Murray op cit note 482 at 100; Harris & Sullivan op cit note 505 at 269; Benston op cit note 483 at 213, 214 nn 5–11.
[581] *California v ARC America Corp*., 490 U.S. 93 (1989).
[582] See Landes & Posner op cit note 507 at 1274–9; Edward A Snyder 'Efficient assignment of rights to sue for antitrust damages' (1985) 28 *J. L. & Econ.* 469 at 667; Benston op cit note 476 at 235–6.
[583] Richman & Murray op cit note 482 at 91.
[584] Sarris op cit note 486 at 120.
[585] Collins op cit note 558 at 59.

of the indirect and direct purchaser. Ultimately, access to justice for the damages claimant should be achieved or at least, achievable with the promotion of both public and private enforcement. More importantly, accessing justice would mean creating the space for all prospective damages claimants to claim compensation.

This is an updated version of the chapter that was presented as a paper at the Academic Society for Competition Law (ASCOLA) 9th annual conference on 'Procedural fairness in competition proceedings and workshop on competition policy worldwide', Warsaw, Poland. It was subsequently published in a peer-reviewed journal: K Moodaliyar 'Access to leniency documents: Should cartel leniency applicants pay the price for damages?' (2014) 7(10) *Yearbook of Antitrust and Regulatory Studies (YARS)* 159.

CHAPTER 6: ACCESS TO LENIENCY DOCUMENTS

6.1 Introduction

Cartels are known to be clandestine—operating in secret and capable of going undetected for a number of years. Competition authorities thus find it difficult to uncover cartel conduct without the help of a whistleblower.[586] If the cartel remains secret, its competitors, customers and suppliers may not be aware that they could be victims of cartel conduct. The South African Competition Commission ('Commission') developed a policy called the Corporate Leniency Policy ('CLP') to incentivise the whistleblower to come forward and give the Commission information about the cartel's activities.[587] The CLP has been a successful tool to entice a cartel member to race to the door of the Commission to blow the whistle, providing highly pertinent information to the Commission and destabilising the cartel. Whereas their fellow cartelists are penalised with fines running into millions of Rands, leniency applicants are rewarded for their confessions and cooperation by receiving immunity from those penalties.[588] The CLP does not extend its immunity to applicants who are named as respondents in private claims for damages.[589] The policy is also a useful tool to damages claimants as well, by bringing the conduct of the cartel to their attention, so that they would have the opportunity to bring follow-on private enforcement claims.

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[586] See K Moodaliyar 'Are cartels skating on thin ice? An insight into the South African corporate leniency policy'(2006) 18 *SA Merc. L. J.* 367.

[587] South African Competition Commission 'Corporate leniency policy' (23 May 2008) GN 628 *Government Gazette* 30164.

[588] Penalties from the leniency policy amounted to R5, 424 billion between 2008 and 2013.

[589] In South Africa the Competition Tribunal can fine a cartelist up to 10 per cent of their annual turnover. Criminal penalties were introduced in by the Minister of Economic Development on 1 May 2016. See Ebrahim Patel 'Economic Development Department Budget Vote 2016/17', available at *http://www.gov.za/speeches/minister-ebrahim-patel-economic-development-dept-budget-vote-201617-21-apr-2016-0000*, accessed on 29 July 2016. The CLP does not protect a cartelist from criminal sanctions based on any other legislation or criminal code.

In this thesis, I have demonstrated that it is often difficult to ascertain evidence to prove a damages case, and in particular to show causation, that I assessed in chapter 2, and the economic calculations of the quantum, which I explored in chapter 3, even if liability is assumed on the basis of administrative proceedings. In some cases, claimants might not even be able to make out a prima facie case from publicly available information, as the very nature of cartel conduct is itself secretive. Whether it is a class action trying to claim compensation, as I have analysed in chapter 4, or if the claimant who has established standing, the debate which I engaged with in chapter 5, the damages claimant still has the challenge of asymmetric information which could hinder their success in accessing justice. The leniency application provided to the competition authorities contains evidence to prove the cartel activity. This information could be used to establish the causal link of the cartel conduct and harm to the claimants. This is why damages claimants wish to exercise their rights to claim damages and request access to documents obtained through the leniency application to make and strengthen their case. The competition authorities are wary of disclosing such information, as they do not want to undermine their leniency policy. Cartelists might hesitate to cooperate with the competition authorities if it is likely that their company information will be disclosed to third parties and used against them in damages claims, which might exceed the administrative penalties that they can avoid through leniency.

The central questions addressed in this chapter are:

(i) Apart from the general rules of discovery, should a special dispensation be given to leniency applicants to protect the integrity of the policy, which competition authorities rely on extensively to uncover cartels; or

(ii) Is there an overriding public interest to consider where private damages claimants have an automatic right to the evidence submitted by the leniency applicant?

In addressing these questions, I first give an overview of the South African CLP; the implications for both the leniency applicant and the civil damages plaintiff; draw upon a comparison of jurisdictions with a significant focus on cases in the European Union, where these debates took place; and provide a brief analysis of the approach of the authorities in the United States (US) in creating incentives to resolve this issue. This paper addresses the dichotomous role of the competition authorities, who on the one hand have to protect the leniency policy, while they on the other hand have to give due regard to the interests of victims of cartel cases. I then provide recommendations on where the boundaries should lie in exercising these roles. The ultimate goal of this thesis is to provide the damages claimant with a claim for damages that is free from unnecessary legal and regulatory obstacles. This chapter provides some insight into how this can be done with the help of accessing the leniency documents to enhance the claimant's evidence whilst offering some protection to the leniency applicant.

6.2 The need for a corporate leniency policy in cartel cases

There is no question that cartels operate in secret and are usually quite tough to detect. Based on the principles of 'game theory' or the 'prisoner's dilemma', the CLP creates an incentive for the firm to break ranks with their fellow cartel members and race to the door of the competition authorities to provide information about the cartel conduct in exchange for leniency. In South Africa, where the administrative penalty for cartel conduct is up to 10 per cent of the firm's annual turnover, leniency would provide a substantial saving. Many competition jurisdictions around the world, including South Africa, have implemented their versions of the CLP.

6.2.1 Requirements and use of the South African corporate leniency policy

The Competition Commission introduced the first CLP in South Africa in 2004.[590] The idea was to ensure that cartel behaviour was identified by providing immunity to the

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[590] In its formative years, the Competition Commission had a number of successful merger cases and a minimal number of cartel investigations. Taking their cue from the success of their US counterparts,

first firm that confessed to the conduct, provided that the firm was not the instigator of the cartel.[591] Although the policy was based on international best practice, this first policy draft had a few drawbacks. The 2004 policy was underused due to its lack of clarity and certainty to potential leniency applicants.[592] Firms thus took the risk of remaining undetected rather than coming forward to blow the whistle. Between April 2004 and March 2008 there were only fifteen leniency applications.[593] To be fair, it is common that many jurisdictions often have an ineffective first draft of their leniency policy and it is subsequently improved to become more effective.[594]

The need for an efficient and meaningful CLP arose. The more successful 2008 version of the CLP provided clearer guidance to the immunity process.[595] Immunity is only given in cartel cases. Conditional immunity is awarded to the first firm 'to the door' of the Commission. The Commission benefits from the vital information that the leniency applicant provides about the workings of the cartel. Before this application process, it is possible that the Commission may not have been aware of the cartel, or if they were aware of it, they may not have had sufficient information available to to pursue the case.[596] In order to qualify for leniency, the applicant must act honestly and provide a complete and full disclosure of information and evidence about the cartel in order for the Commission to institute an investigation. The applicant may be instructed by the Commission to cease with the cartel conduct and not alert the other

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the CLP became a global trend, implemented by competition jurisdictions, to uncover cartels. See Moodaliyar 'Are cartels skating on thin ice?' op cit note 586 at 157.

591 Corporate Leniency Policy (GN 195 in *GG* issue no 25963 of 6 February 2004). The policy came into effect on 1 February 2004.

592 Moodaliyar 'Are cartels skating on thin ice?' op cit note 586 at 175.

593 Competition Commission Annual Report (2011/2012) 21.

594 For example, in the USA, when the first CLP policy was enacted in 1978, the Department of Justice had on average one application per year. It was also underused. Upon revision of the policy, the Department of Justice now receives on average 50 applications per year. See Scott Hammond 'The evolution of criminal antitrust enforcement over the last two decades' Speech given at the 24th Annual National Institute on White Collar Crime Presented by the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, Florida, 25 February 2010, available at *http://www.justice.gov/atr/public/speeches/255515.htm*, accessed on 9 November 2010.

595 Corporate Leniency Policy op cit note 587.

596 CLP 2004 para 5.5.2; the same sentiment is expressed in CLP 2008 para 5.5.

cartel members nor destroy any information.[597] Immunity can be revoked if the policy if the Commission's instructions are not complied with.[598]

If there is a subsequent firm that wishes to come clean to the Competition Commission about its cartel activities, the Commission can consider this as a mitigating factor in that firm's request to negotiate a lesser fine. The Commission could also ask the Tribunal for favourable treatment for the firm, depending on its level of cooperation and the information it brings.[599]

Total immunity is granted once the case has been finalised at the Tribunal or after an appeal— if there is one —and if all the conditions have been met.[600] The firm would have to apply for leniency in respect of each cartel transgression, as the CLP does not provide for an overall blanket leniency of all cartel infringements, unless the contraventions cannot be separated.[601] The diagram in figure 6.1 shows the flow of the CLP application process. Immunity is dependent on all the requirements of the policy being met.

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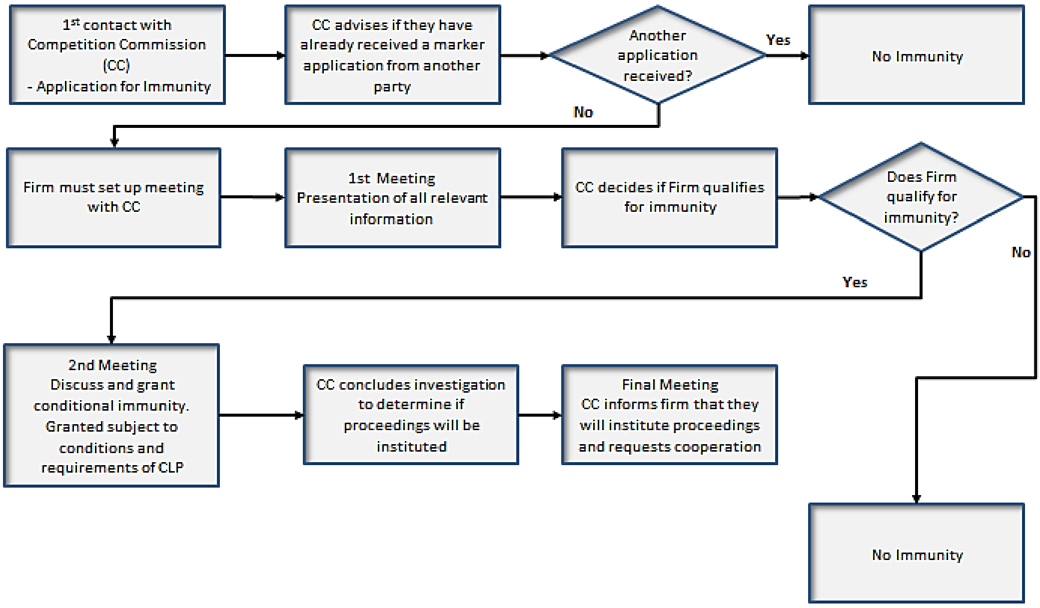
[597] CLP 2008 para 10.1.
[598] CLP 2008 para 13.
[599] CLP 2008 para 5.6.
[600] CLP 2008 para 9.1.2.
[601] CLP 2008 para 5.4.

Figure 6.1: Leniency application process



Source: diagram developed from CLP process.

In comparison with the 2004 policy, the 2008 policy took away the broad discretion of the Commission, thus addressing a major criticism of the 2004 policy and giving greater legal certainty to the leniency applicants about the process.[602]

The most significant new development in the 2008 policy was the introduction of the marker system.[603] The marker system allows the firm to approach the Commission, requesting a marker for the first place in the queue, while providing details of the firm, cartel conduct and the participants. The Commission has the discretion to accept the marker and can give an assurance to the firm that it is the first in the queue. The firm is then given time to gather evidence of the cartel conduct and provide such evidence to the Commission. While the marker is in place, no other firm can take first place. The

602 See Chantal Lavoie 'South Africa's corporate leniency policy: A five-year review' (2010) 33(1) *World Competition* 155; and Moodaliyar 'Are cartels skating on thin ice?' at 157.
603 CLP 2008 para 12.

marker system provides a greater comfort to firms who may not have all the evidence of the conduct available at the time of the application but still wish to apply for immunity.

Another change in the 2008 policy is that the instigator of the cartel is no longer excluded from bringing a CLP application.[604] The reason for this is that there may be cases where the cartel has existed for decades, with a turnover of staff and authority and it is thus difficult to identify which firm started the cartel. This amendment puts to rest any dispute that may have arisen in this regard. The 2008 policy now also provides for the applicant to make their submissions in writing and orally.[605] Some of the applicants are more comfortable giving oral statements, which can be later transcribed.

The 2008 policy not only provides the incentive for whistleblowers to come forward, but it also gives these firms an open and transparent guide on how the Commission will handle this process. This process gives the comfort that was otherwise lacking in the older policy.

Since the 2008 CLP, the Commission has been successful in uncovering cartels in a number of industries in South Africa. Without the whistleblowers coming forward, these cartels would have remained secret and undetected. The net effect is that because of the policy, more firms and individuals are now aware that they are victims of cartel conduct and the information retrieved through the public enforcement cases is useful to damages claimants to enforce their private enforcement rights.

6.2.2 Successful outcomes of the corporate leniency policy

[604] The 2004 CLP excluded the instigator from applying for leniency in terms of paras 5.8 and 10.1*(d)* of the policy.
[605] CLP 2008 para 15.

Unlike the 2004 policy, which was barely used, the 2008 policy stimulated the race for immunity. Lavoie attributes the success of the 2008 policy to a number of factors, including:

> (i) a growing awareness among the public and business community of the existence of the [Competition] Act and the CLP and the consequences of contravening the Act;
> (ii) the Commission's investigation in certain sectors of the economy creating instability amongst cartel members and a race to apply first for immunity;
> (iii) the dismantling of cartels in related sectors of the economy;
> (iv) the changing business environment whereby internal compliance investigations are being conducted within corporate ranks; and
> (v) the forthcoming introduction of criminal sanctions for individuals involved in cartel conduct.[606]

These are strong factors, which together with the improvements in the 2008 policy created the environment for companies to come forward and make use of the CLP.

Table 6.1 gives an indication of the fines received in particular industries from 2009 to 2013. Many are intermediary products, with fines running into the millions. Cartel pricing in these industries has a knock-on impact on the pricing.

Table 6.1: Industries involved in cartel activity uncovered through the corporate leniency policy process, 2009–2013

Industry	Total penalties
2009 decisions	
Phosphoric acid	R250 680 000.00
Health care (private hospitals)	R55 067 273.63
Concrete pipes and culverts	R69 352 054.00
Bread production	R241 124 974.00
2010 decisions	
Pipes (high density/polyethylene and PVC)	R801 069 086.00

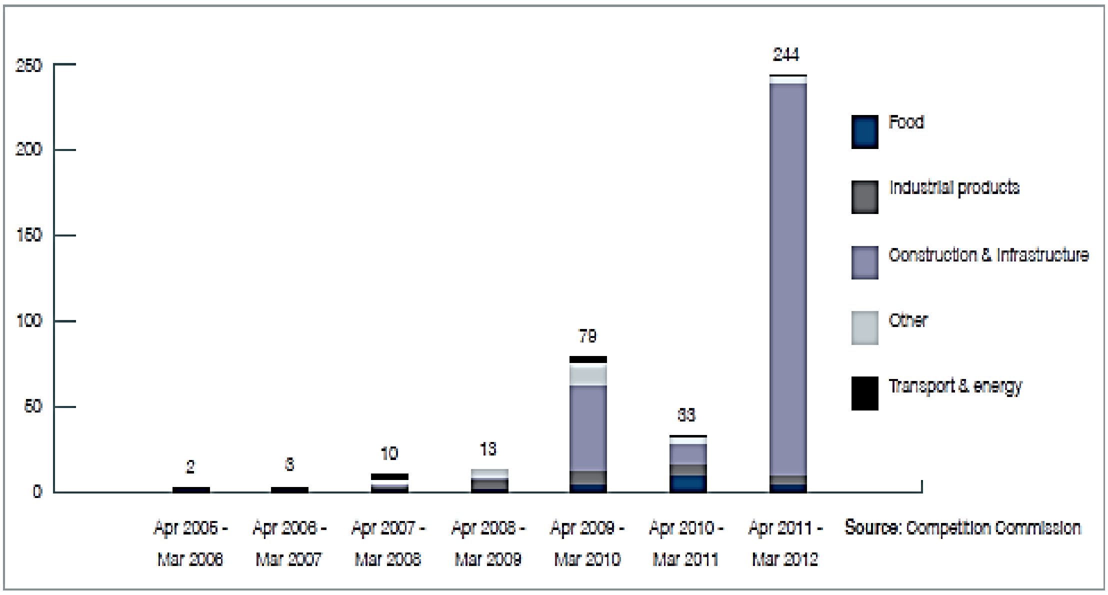
[606] Lavoie op cit note 602 at 155.

Roof mining bolts	R21 900 000.00
Precast concrete market	R14 157 697.00
2011 decisions	
Structural concrete reinforcement, construction, welded mesh fabric reinforcement and supply, cutting and bending of rebar (steel reinforcing bars)	R156 104 640.00
Petroleum and energy, bitumen	R68 559 480.00
Cement production	R148 724 400.00
2012 decisions	
Steel products	R856 383 565.00
Milling (white maize and wheat)	R595 230 349.00
Manufacture and supply of generic paving blocks	R132 070 036.00
Property and rental property	R27 218 795.00
Airline	R43 905 984.00
Petroleum, bitumen and bitumen products	R68 059 480.00
2013 decisions	
Construction and civil engineering	R1 519 810 439.00
Wholesale of glass product, manufacture and distribution	R502 416 855.00
Gas and chemicals supply and distribution	R73 591 076.00
Industrial and specialty gases	R276 297 870.00
Manufacture and supply of generic paving blocks	R67 256 547.00
TOTAL	**R5 424 215 779**

Source: Aggregated from Competition Commission Annual Reports 2009-2014.

The graph in figure 6.2, which tracks the number of CLP applications since the inception of the 2004 policy, shows a dramatic increase in applications post-2008, indicating the success of the amended policy.

Figure 6.2: Total number of CLP applications received per year, 2006–2012



Source: Competition Commission Annual Report 2011/2012

In the last financial year of the Commission (2011/2012) there was a spiked increase to 244 applications. This increase can be attributed to the Commission's fast-track settlement process in the construction industry, which was launched in February 2011. This was the first time the Commission had invited firms in this industry to engage in a fast-track settlement process of this nature. It became apparent that the construction sector was rife with cartel behaviour. The Commission settled with fifteen construction companies who admitted to collusive tendering and paid fines totalling R1,46 billion. Annexure A provides a detailed table of the leniency applications from 2008 to 2013. Those companies who did not receive leniency paid a substantial amount in fines—in total over R5 billion during that period.

The table and figure above show the growing success of the CLP in the early years of the revised policy. This spike in numbers may be due to the fast track construction cartel programme the Commission had initiated. Over the years beyond that the number of CLP applications has stabilised. Most recently the Commission reported that it handled 10 CLP applications in the 2016/2017 period in a variety of industries.[607] As more companies make use of the policy, the information they provide in exchange for immunity will assist future assist damages claimants, if they are able to access those leniency documents.

6.2.3 Legal challenge to the 2008 corporate leniency policy mandate

The Commission's power and authorisation of the leniency policy was challenged in the *Agri Wire* case.[608] This case was based on an investigation that the Commission initiated into the steel mill industry involving several companies, including Scaw South Africa (Pty) Ltd ('Scaw'). Scaw has management control of Consolidated Wire Industries ('CWI), which was one of the companies under investigation. Scaw conducted its own internal investigation and uncovered cartel conduct in both its companies. It applied for leniency and the Commission granted it conditional immunity in exchange for information and evidence of the cartel.[609] The Commission subsequently referred the complaint to the Competition Tribunal, in which it cited twelve companies being members of the cartel, including Agri Wire, and asked that all of these companies, except CWI, pay the administrative penalty of 10 per cent of their annual turnover.[610]

Agri Wire took the case to the High Court, challenging the immunity that the Commission gave to CWI in terms of the CLP application. It argued that the Competition Act 89 of 1998 did not authorise the CLP and therefore any information provided by CWI in terms of the CLP was inadmissible. To the same extent, it argued that the complaint and the referral to the Tribunal were unlawful.[611]

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[607] Competition Commission of South Africa Annual Report 2017/2018, pg 40-41, available at http://www.compcom.co.za/wp-content/uploads/2014/09/CCSA_AR2017_18e.pdf, accessed on 8 October 2018.
[608] *Agri Wire (Pty) Ltd et al v The Competition Commission et al* North Gauteng High Court, Case No 7585/2010.
[609] *Agri Wire* supra note 608 para 10.
[610] *Agri Wire* supra note 608 para 11.
[611] *Agri Wire* supra note 608 paras 29–31.

Judge Zondo, in his dismissal of the complaint, explained that conditional immunity as contemplated in the CLP is not to be interpreted in the normal sense of ‘immunity’, since the Commission does not have the final say on the fate of the leniency applicant.[612] It is a mere promise by the Commission to ask the Tribunal not to impose a fine upon the leniency applicant, in exchange for the applicant’s cooperation and assistance in the referral. The Tribunal has the final authority to decide whether a fine can be imposed. There is also nothing in the CLP obliging the Tribunal not to impose a fine on the leniency applicant.[613]

Regarding Agri Wire’s accusation that the Commission was selectively prosecuting companies, Judge Zondo held that the Commission had cited all the wrongdoers in its referral to the Tribunal, and that it acted well within its authority to seek relief against the selected respondents and to allow leniency to CWI.[614]

On appeal, the Supreme Court of Appeal (SCA) dismissed the *Agri Wire* case by taking an even more definitive stance, ruling that the Competition Act vested power in the Commission to issue the CLP, thus allowing it to grant conditional and total immunity to the leniency applicant.[615] The Court further stated that, if the Commission decides to refer a case to the Tribunal, then ‘the Act specifically provides that the Commissioner may refer all or some of the particulars of the complaint and may add particulars to the complaint submitted by the complainant’.[616] The SCA also found that the High Court erred in its judgment by stating that where the Commission had granted immunity the Tribunal could still impose an administrative penalty. The SCA made it clear that the Commission is allowed to grant conditional immunity notwithstanding the power vested in the Tribunal to take the party’s cooperation into consideration in determining the sanction. The SCA held that the leniency applicant will ‘only be

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[612] *Agri Wire* supra note 608 para 58.
[613] *Agri Wire* supra note 608 para 62.
[614] *Agri Wire* supra note 608 para 72.
[615] *Agri Wire (Pty) Ltd et al v The Competition Commission* SCA, Case no: 660/2011 [hereafter referred to as *Agri Wire SCA*] para 24.
[616] *Agri Wire SCA* supra note 615 para 24.

referred to the Tribunal for the purpose of adverse determination and the imposition of an administrative penalty if the Commission revokes its conditional immunity'.[617]

The CLP is a useful tool to combat cartel behaviour. The SCA in this case correctly pointed out that 'hard-headed businessmen, contemplating baring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit, before furnishing the cooperation that the Commission seeks from them'.[618] To do so otherwise would render the CLP 'far less effective, if not entirely useless'.[619] The CLP requires this cooperation for the process to work effectively. If such businesspeople are not forthcoming with information about the cartel activity, it makes the investigation much more difficult for the Competition Commission to prove that the Act has been contravened. Also, without the evidence that is provided through the CLP, the damages claimants will have a challenge in bringing substantial evidence to show that the cartel conduct existed. The legal challenge by *Agri Wire* may have put the CLP at risk if they were successful, but the SCA's decision gave clarity to the role of the CLP, thus securing its strength and enhancing the cases of the Competition Authorities and the damages claimants. Protection of the leniency policy also has implications for the damages claimant if they wish to use the information that is borne out of the leniency process to enhance their case for damages. The SCA decision in the *Agriwire* case was thus indirectly a victory to future damages claimants who became of the cartel through the leniency process or wish to rely on leniency information too.

Another legal challenge to the CLP would be in the context of the criminal sanctions, which were outlined in the Competition Amendment Act of 2009. With the desire to curb cartel conduct in South Africa, the Minister of Economic Development, Ebrahim Patel, announced that these criminal sanctions would come into effect on 1 May

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[617] *Agri Wire SCA* supra note 615 para 7.
[618] *Agri Wire SCA* supra note 615 para 9.
[619] Ibid.

2016.[620] There is still some uncertainty as to how the Competition authorities would work with the National Prosecution Authority ('NPA') to prosecute these cases. The CLP and the Competition Act are silent on the aspect of individual criminalisation of cartel conduct. The effect of criminalisation on the CLP is a discussion that is beyond the scope of this thesis. The challenge is that the current CLP does not provide immunity in criminal cases and the Commissioner is wary that the threat of criminalisation may discourage potential CLP applicants from coming forward to give evidence. A director representing a company who decides to make a CLP application puts himself/ herself at risk of being prosecuted as well. This possibility sabotages the effective use of the CLP programme. It is thus recommended that the CLP be expanded to provide immunity not only to the first firm to apply for leniency but to the first individual as well. This would require some negotiation with the NPA to allow for the Commission to provide this immunity and some legislative intervention to grant the Competition authorities this permission to offer individual immunity. Having individual immunity with the promise of avoiding prison time will provide a great incentive to make use of the CLP.[621] Transparency and predictability of the CLP process and the memorandum of understanding between the Competition Commission and the NPA will be key features to make this a success. The success of the leniency policy also has implications for the damages claimant. If the CLP is underutilized it makes it more difficult for the damages claimant to gain access to the leniency documents which would be of great assistance to claimant's civil case. A criminal case may offer some reprieve to the claimant in terms of accessing the evidence discovered, however, the criminal take may take years to reach finality whereas civil cases have to be initiated before they prescribe after three years.

[620] Ebrahim Patel 'Economic Development Department Budget Vote 2016/17', available at *http://www.gov.za/speeches/minister-ebrahim-patel-economic-development-dept-budget-vote-201617-21-apr-2016-0000*, accessed on 29 July 2016.
[621] Lavoie op cit note 602 at 160.

6.3 Should leniency documents be disclosed to third party damages claimants?

6.3.1 Issuance of the certificate by the Competition Tribunal

Not long after the fines in the construction cases were issued there were numerous media reports that the affected government departments wished to claim damages for the loss suffered as a result of cartel price-fixing.[622] As discussed in earlier chapters, unlike in the US where damages claimants can approach a court directly to initiate a civil claim without waiting for a finding from the Department of Justice,[623] the South African Competition Act allows only for follow-on damages. This means that claimants in South Africa can only institute a damages case in a civil court after the claimant has obtained a certificate from the Competition Tribunal once it has made a finding.[624] In most cases, the Commission does not cite the leniency applicant as a respondent on the referral papers. These challenges were addressed in the contentious *Premier Foods* case that was heard in the North Gauteng High Court.[625] It becomes a challenge to the damages claimant if the leniency applicant is not cited in the papers, because that applicant's name would not appear on the Tribunal's certificate. The implications are that the damages claimant would have no claim to that leniency applicant in the civil court. It may also pose a further challenge for the damages claimant's request to access those leniency documents.

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[622] See, for example, Nthambeleni Gabara 'Salga wants construction firms to pay up' *SA News.Gov.ZA* 5 July 2013, available at *http://www.sanews.gov.za/south-africa/salga-wants-construction-firms-pay*, accessed on 8 August 2013. Roy Cokayne 'Charge colluding individuals' *Business Report* 18 July 2013, available at *http://www.iol.co.za/business/companies/charge-colluding-individuals-1.1548686#.Ugfh8hzdI3U*, accessed on 8 August 2013. Lloyd Gedye 'Construction cartel not off the hook yet' *City Press* 30 June 2013, available at *http://www.citypress.co.za/business/construction-cartel-not-off-the-hook-yet/*, accessed on 8 August 2013.
[623] Section 4 of the Clayton Act 15 U.S.C. § 15.
[624] Section 65(6)*(b)* of the Competition Act.
[625] *Premier Foods (Pty) Ltd v Norman Maniom N.O. & the Competition Tribunal et al, North Gauteng High Court*, Case no 38235/2012, date of decision 2 August 2013.

Premier Foods, a leniency applicant, sought to question whether the chairperson of the Competition Tribunal or the Tribunal itself had the jurisdiction to issue such a certificate in terms of s 65(6)*(b)* against Premier. Premier was not cited as a respondent in the case against the other cartelists which was heard by the Tribunal.[626] Without that certificate, a prospective damages claimant would not be able to pursue a civil claim against Premier.

Premier argued that having a certificate issued against it by the Chairperson of the Tribunal when it was not cited as a respondent by the Commission, violated the *audi alteram partem* rule.[627] In his deliberation of the case Judge Kollapen held that:

> in as much as the principle of *audi* is inextricably linked to considerations of fairness, even handedness, objectivity and inclusiveness in the decision-making process, it is also both a matter of form and of substance. It may be appropriate in circumstances where form may be said to be wanting, to examine issues of substance in order to determine whether there has been observance of the principle notwithstanding any deficiency in form. Not to do so would run the risk of adopting an overly technical and formal approach to a principle that at the heart of it is about procedural fairness.[628]

In dismissing Premier's contention, Judge Kollapen maintained that the *audi* principle applied to Premier in that it 'was represented at the hearing, allowed its staff to participate and to contribute to the proceedings as witnesses and was heard in every sense of the term'.[629] In relation to whether the certificate could be issued against Premier it was pointed out by the Court that a certificate is issued based on the fact that the Tribunal has made a finding in that case.[630] In terms of s 66, any person can apply for that finding to be amended or set aside if it was issued erroneously or granted in the absence of a party.[631] Premier did not make such an application.

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[626] *Premier Foods* supra note 625 para 9 and 10.
[627] *Premier Foods* supra note 625 para 12.
[628] *Premier Foods* supra note 625 para 50.
[629] *Premier Foods* supra note 625 para 51.
[630] *Premier Foods* supra note 625 paras 42-3.
[631] *Premier Foods* supra note 625 para 44.

The outcome of this case was that, even though Premier being the leniency applicant was not cited as a respondent by the Commission in the case against the other cartelists, the Tribunal was still allowed to issue a certificate against it as their findings were not contested. There is thus no obligation on the Commission to cite the CLP applicant as a respondent in its referral of a cartel case to the Tribunal. By having a certificate issued against the CLP applicant even if not cited as a respondent, this opens the door for claimants to pursue a follow-on damages case against such CLP applicant.

On appeal The SCA disagreed with the *Premier Foods* High Court decision and took a different approach. The SCA held that Premier Foods was not cited as a respondent in the referral affidavit, it was not party to the proceedings before the Tribunal, and the SCA held that the Tribunal was thus not empowered to make a declaration of Premier's involvement in the cartel activity and should not have issued a Section 65 certificate against Premier Foods.[632]

Although it was intended that the CLP does not prevent damages claims against a successful CLP applicant[633], the implication of this decision was that because there was no finding against Premier Foods as a member of a cartel because the Tribunal did not have the power to grant any order against it[634], the damages claimant cannot bring a civil claim against Premier Foods. The Section 65 certificate has to be issued against the firm by the Tribunal in order for the claimant to pursue a follow-on damages claim. Going forward, the Commission should reconsider citing the leniency applicant as a respondent in its referral affidavit before the Tribunal. Omitting to do so takes away the possibility of a pursuit of damages against the leniency applicant. The

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[632] *Premier Foods v Norman Maniom Premier Foods (Pty) Ltd v Norman Maniom NO and the Competition Tribunal et al,* (20147/2014) [2015] ZASCA 159; 2016 (1) SA 445 (SCA); [2016] 1 All SA 40 (SCA) (4 November 2015) at para 27.

[633] CLP Clause 5.9 and underscored by Clause 6.4 which provides: '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 sanctions'.

[634] *Premier Foods v Norman Maniom* (SCA) supra note 632 at para 47.

Commission should not be subverting the possibility of private enforcement for the sake of public enforcement victories.

6.3.2 A South African court's view of access to privileged corporate leniency policy documents

The CLP does not prevent a plaintiff from instituting damages against the successful leniency applicant.[635] Should leniency documents receive special protection and not be disclosed to the damages claimant at all? If so, the question posed then is that, without the extension of this immunity in civil cases, would the threat of a much higher compensation awarded to plaintiffs in a civil action, deter leniency applicants from coming forward? The CLP has been a primary tool in the detection and destabilisation of cartels in South Africa. The zero pen alty is a huge incentive for companies to use the policy. Would a case of damages against the leniency applicant now take away that incentive? This begs the question whether the ultimate goal is to protect the leniency applicant and maintain the attractiveness of the leniency policy or protect the private interest of the cartel victims and give them access to leniency documents, thus providing greater access to justice.

What kind of protection are confidential documents given by the Competition authorities when a leniency applicant furnishes evidence in terms of the CLP? The privileged documents provided by the leniency applicant were brought into question in the *Arcelor Mittal (AMSA)* case.[636] AMSA and Cape Gate, which were members of an alleged steel cartel, requested access to documents provided by the leniency applicant, Scaw, to address the allegations against them. Cape Gate sought access to the leniency application and annexures of supporting documents by relying on Rule

[635] CLP 2008 para 5.9 and confirmed in *Premier Foods*.
[636] *Competition Commission of SA v Arcerlormittal SA Ltd* et al (680/12) [2013] ZASCA 84 [hereafter known as '*AMSA*'].

35(12) of the Uniform Rules of Court,[637] which confers a right to inspect and copy any document mentioned in the pleadings or affidavit by any party to the proceedings.[638] AMSA, relying on the Commission's rule 15(1) which gives a right to any person whether or not they are being investigated to inspect or copy the Commission's record, sought access to all the Commission's records generated after the investigation.[639] AMSA also requested access to the leniency application, marker, and discovery of all documents mentioned in the referral affidavit on the basis of Uniform Rule 32(12).[640] The Commission refused to disclose the documents on the basis that they formed privileged information prepared for litigation purposes. The Tribunal upheld the Commission's argument and dismissed the applications by the respondents, save for an order of limited disclosure of three documents that were referred to in the Commission's referral affidavit.[641]

At the Competition Appeal Court (CAC), AMSA now only sought access to the Commission's record, and both AMSA and Cape Gate wanted access to the leniency application. The CAC, however, made no order, on the basis that it found it unnecessary to decide on matters already determined by the Tribunal.[642] The CAC upheld Scaw's contention that the documents were protected from disclosure because it claimed confidentiality under s 44(1)*(a)* of the Competition Act and the CAC was of the view that access to information over which confidentiality had already been claimed was a matter to be determined by the Tribunal.

The case was then brought before the SCA due to the CAC's failure to either confirm or set aside the Tribunal's order. Before the SCA, the Commission argued that it was entitled to withhold the information from AMSA and Cape Gate because first, it was protected by litigation privilege and second, it is restricted information. It relied on

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[637] It is uncertain why the parties relied on these High Court rules when the Tribunal was still seized with this matter.
[638] *AMSA* supra note 636 para 15.
[639] *AMSA* supra note 636 para 16.
[640] Ibid.
[641] *AMSA* supra note 636 para 17.
[642] *AMSA* supra note 636 para 18.

Commission rule 14(1), which gives it the discretion to withhold information under s 37(1)*(b)* of the Promotion of Access to Information Act (PAIA).[643] In relation to disclosure of the Commission's record, the Commission argued that Commission rule 15 finds no application once litigation commences.[644]

The SCA in its analysis indicated that litigation privilege, which protects communication between a litigant or its legal advisor and a third party, exists when two requirements are met. First, 'the document must have been obtained or brought into existence for the purpose of the litigant's submission to the legal counsel for advice'. Second, 'litigation was pending and contemplated as likely at the time'.[645]

The SCA stressed that whether or not litigation privilege is attached to the leniency application depends on the facts of the case.[646] The Commission intended to use the information provided by Scaw to institute a prosecution and litigate against AMSA and Cape Gate. The SCA held that, as a result, the documents held by the Commission were privileged.[647] However, the SCA stated that the Commission impliedly waived this privilege when it openly referred to the leniency application in its referral affidavit to the Tribunal.[648] The referral affidavit contains evidence that the Commission intends leading during the hearing and the Commission was under no obligation to include or make reference to the leniency application.[649] The SCA also had to rule on the claim by Scaw that some of their documents were confidential. The SCA referred that matter back to the Tribunal for decision.

The implication of this judgment is that any reference to a leniency application in the Commission's referral affidavit can be regarded as a waiver of litigation privilege. Cartel members who may be considering using the CLP may question the protection

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[643] Act 2 of 2000.
[644] *AMSA* supra note 636 para 19.
[645] *AMSA* supra note 636 para 20–1.
[646] *AMSA* supra note 636 para 28.
[647] *AMSA* supra note 636 para 31.
[648] *AMSA* supra note 636 para 37.
[649] Ibid.

afforded by the policy. They may ask for an assurance from the Commission so that their information is not unduly exposed.

What does this judgment mean for the private plaintiff who wishes to claim damages? This judgment gives them greater access to the leniency documents provided during the process. If an applicant would like their documents to remain confidential the Tribunal will have to decide whether such information relates to 'trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available or known by others' as defined in the Competition Act.[650] The Tribunal will protect sensitive trade secrets, but any information outside this ambit would be subject to disclosure. Leniency applicants who have submitted their applications prior to this decision will now be concerned about the extent of information that the Commission would be obliged to release publicly. They would most likely be careful about how the information is disseminated to the Commission, though bearing in mind that non-cooperation will jeopardise their leniency application.[651]

In the *Standard Bank of South Africa Limited v. The Competition Commission of South Africa* case, the Applicants requested the Constitutional Court to compel the Competition Commission to disclose information (confidential information was not an issue in this case).[652] The request for information came at a time when the case was still under investigation by the Competition Commission and has not yet referred to the Tribunal for a hearing. The Commission was investigating allegations of price fixing by the banks in the forex market. As the investigation ensued, three banking entities Absa, Barclays Capital and Barclays plc claimed leniency whereas Citibank settled.[653]

[650] Definitions. Competition Act 89 of 1998 (as amended).
[651] See A Caruso 'Leniency programs and protection of confidentiality: The experience of the European Commission' 2010 *J. E. C. L. & Pract.* 454; and C Hodges 'Competition enforcement, regulation and civil justice: What is the case?' (2006) 43(5) *CML Rev.* 1390. There seems to be a general emphasis by these authors that the CLP should be protected even with the onset of follow-on damages.
[652] *The Standard Bank of South Africa Limited v. The Competition Commission of South Africa CCT* 158/18, 179/18 and 218/18 [2020]ZACC 02 (hereinafter referred to as "*Standard Bank CC*").
[653] Lynley Donelly 'Forex Cartel case drags on' *Mail & Guardian* 14 June 2019 available at https://mg.co.za/article/2019-06-14-00-forex-cartel-case-drags-on/ accessed on 30 October 2020.

Other respondents are contesting the Commission's investigation and Standard Bank and a group of seven companies referred to as "the Waco respondents" requested access to the Commission's investigation records in terms of Rule 15 of the Competition Commission Rules.[654]

Rule 15 allows the Respondent in the Commission's case to request access to a clearly specified document which is necessary for pleading purposes.[655] The Rule does not provide a time period by which the Commission should furnish the investigation report. The Tribunal held that Rule 15 envisages that the production of information should be handed over by the Commission within a reasonable timeframe.[656] Due to the complexity of this case and volume of data and the confidential information it would place a burden on the Commission to prepare the documents during the course of the investigation, and that it would be reasonable to wait for the discovery stage for the Commission to hand over the requested information to the Respondent. [657]

Standard Bank appealed the Tribunal's decision on the basis that there was no nexus between the disclosure of the Commission's investigation record under Rule 15 and the rules relating to discovery. The Competition Appeal Court agreed with Standard Bank that because Standard Bank was a litigant in the matter, it was entitled to the record, and the Appeal Court instructed the Commission to furnish its investigation

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[654] Rule 15: 'Any person, upon payment of the prescribed fee, may inspect or copy any Commission record—
(a) if it is not restricted information; or
(b) if it is restricted information, to the extent permitted, and subject to any conditions imposed, by
(i) this Rule; or
(ii) an order of the Tribunal, or the Court.'
'Rule 15 was amended with effect from 25 January 2019 to expressly introduce the qualifications that are present in section 7 of the Promotion of Access to Information Act 2 of 2000 (PAIA). See the Amended Regulation 15 of the Rules for the Conduct of Proceedings in the Competition Commission GN R64 GG 42191 of 25 January 2019. This amendment may impact the ability of respondents to seek access to information held by the Commission under rule 15 with effect from 25 January 2019. Nothing further, however, needs to be said of this amendment for the purposes of this case. This matter implicates a live dispute between the parties regarding the entitlement of the respondents to invoke rule 15 as it read at the time they submitted their applications.' *Standard Bank v CC* supra note 652 at fn 7.

[655] *Standard Bank CC* supra note *652.*

[656] *Standard Bank of South Africa Limited v The Competition Commission of South Africa* CR212Feb17/DSC027Apr17 at para 50. (Hereinafter referred to as *Standard Bank CT).*

[657] *Standard Bank CT* supra 656 at para 68..

record within five days.[658] The Commission appealed the decision to the Constitutional Court. In a majority judgment penned by Jafta J and Khampepe J, decided on 20 January 2020, Court was mindful of the fact that this request came at a stage when pleadings were not yet closed and discovery and a pre-hearing had not taken place as yet.[659] In its departure from the Competition Appeal Court Judgment, the Constitutional Court held that Rule 15 of the Commission's rules has a general public application and did not refer to a litigant seeking to develop its defence. While the matter is still under investigation the Commission's rules apply.[660] Only when the matter has been referred to the Tribunal, do the Tribunal's rules regarding discovery get triggered.[661]

The Constitutional Court provided a clarification regarding when it is considered to be a reasonable time to compel the Commission for information. It is understandable that during the investigation stage, the Commission should be well with its right to guard the investigation material, until it is ready to refer the matter to the Tribunal.

The European Union has also grappled with whether third parties should be granted access to leniency documents. They have taken a more measured approached, which has evolved through the cases. Their priority is to protect the integrity of the Leniency Programme. South African courts could be guided by the lessons in these cases. The *AMSA* decision is one case that closely aligns with the European position. Although the Standard Bank case does not specifically deal with confidential information, the Constitutional Court provides some sembalance regarding how leniency documents should be deal with during the Commission's investigation.

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658 *The Standard Bank of South Africa v. The Competition Commission of South Africa* (160/CAC/Nov17/ CR212Feb17/DSC027Apr17) (31 May 2018).

659 *Competition Commission of South Africa v Standard Bank of South Africa Limited Competition Commission of South Africa v Standard Bank of South Africa Limited Competition Commission of South Africa v Waco (Pty) Limited* CCT 158/18, 179/18 and 2018/18 [2020] Ibid at 65ZACC 02.

660 Ibid at 65

661 Ibid at 66-67.

6.4 Lessons from the European Union

Courts in the EU have grappled with the problem of balancing the demands of the leniency programme, with the third parties' rights to claim damages. The three cases below illustrate the development of jurisprudence in this regard. Unlike in the South African *AMSA* case where a fellow competitor requested accesses to the leniency information, in the EU, in all three cases, information was requested by a damages claimant, which was submitted as part of a leniency process—such as disclosure of documents that were submitted by the cartel members and confidential information from the European Commission's decision. The Courts in these cases were faced with this dichotomy, bearing in mind the EU rules and national laws. Before *Pfleiderer,* this issue did not raise much interest.[662] *Pfleiderer* was the case that set the ground rules.

6.4.1 *Pfleiderer*[663]

6.4.1.1 Background

The German Federal Cartel Office, otherwise known as the Bundeskartellamt ('BkA'), received a leniency application in 2008 from a company involved in a décor paper cartel. Three of Europe's largest décor companies were subsequently fined approximately €62 million for their involvement in the cartel. A customer of these companies, Pfleiderer AG, claimed that it had purchased over €60 million worth of special décor paper over approximately three years while the cartel was in operation, and had thus suffered losses as a result of high cartel prices and intended to claim damages against the three décor companies.

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[662] Yves Botteman & Paul Hughes 'Access to file: Striking the balance between leniency and private enforcement tools' 2013 *Global Competition Review: The European Antitrust Rev.*, available at *http://www.globalcompetitionreview.com*, accessed on 6 May 2015.
[663] *Pfleiderer AG v Bundeskartellamt*, Court of Justice of the European Union, Case C-360/09, 14 June 2011, available at *http://curia.europa.eu/juris/liste.jsf?language=en&num=C-360/09* [hereinafter '*Pfleiderer* (ECJ)'].

To strengthen its case for damages, Pfleiderer approached the BkA for full access to the leniency applications that implicated the cartel. The BkA provided their three decisions where the fines were imposed and removed certain information including a list of evidence recorded which was obtained during the investigation.[664] The BkA refused to grant Pfleiderer access to the statements and documentary evidence rendered as part of the leniency application process. The BkA reasoned that the cartelists making use of the leniency application assisted them with cracking the cartel in the décor industry. For the BkA to now grant access to leniency files to third parties who would use the information in a civil damages case would jeopardise future cartelists and witnesses from disclosing the cartel activity.[665] Pfleiderer then applied to the local German Court, the Amtsgericht Bonn, making a formal request for the leniency documents and to overturn the BkA decision.

The Amtsgericht Bonn found that Pfleiderer had a 'legitimate interest' in requesting the documents, and granted Pfleiderer's request to access the leniency documents in terms of German criminal law legislation that allowed for the information to be provided, but also, having acknowledged the BkA's concern in protecting the confidentially of the leniency files, stayed the implementation of that order.[666] The Court instead referred certain preliminary questions to the European Court of Justice ('ECJ') to seek further clarity on disclosing information from leniency applications to third parties.[667]

6.4.1.2 European Court of Justice decision

The ECJ first considered the matter from the point of view of the BkA, finding the leniency policy to be an effective mechanism for uncovering anticompetitive practices

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[664] *Pfleiderer* (ECJ) supra note 663 para 11.
[665] Albert Geiger 'The end of the EU cartel leniency programme' *Euractiv* 2011, available at *http://www.euractiv.com/section/competition/opinion/the-end-of-the-eu-cartel-leniency-programme/*, accessed on 4 October 2012.
[666] *Pfleiderer* (ECJ) supra note 663 paras 14–16.
[667] The German leniency policy is based on the European Commission Council regulation 1/2003.

like cartels.[668] It believed that the effectiveness of the leniency programme could be undermined if documents relating to leniency applications were disclosed and subsequently deterred companies from cooperating with the national competition authority.[669] The ECJ then focused on the equally important right of Pfleiderer to claim damages, a right that it said was already established in the *Courage and Crehan* case,[670] and reiterated the point in *Courage and Crehan* that civil damages also 'contributed to the maintenance of effective competition in the European Union'.[671] The ECJ, emphasising the principles of equivalence and effectiveness, held that there is nothing in the leniency programme regulation precluding a third party from gaining access to leniency documents.[672] To reach a solution, the Court would have to weigh 'the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'.[673] In a disappointing turn, the ECJ decided not to do the weighing exercise itself but rather left it at the discretion of the national courts to decide on case-by-case.[674] When making these decisions, the ECJ urged the national courts to consider the factors of the case in relation to the national laws, and the conditions and type of evidence submitted under the leniency programme and the rights and interest of the third party who wishes to institute a civil claim for damages.[675]

The weighing exercise raises an interesting debate, especially in consideration of damages claims against non-leniency and leniency applicants. The leniency process has been an overwhelmingly important tool for the competition authorities to detect cartels. It seems that almost all cartels globally would not have been discovered, but for the leniency process. [676] Even total immunity from damages is still 'pro-claimant'.

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[668] *Pfleiderer* (ECJ) supra note 663 para 25.
[669] *Pfleiderer* (ECJ) supra note 663 para 26.
[670] *Courage v Crehan* supra note 326.
[671] *Pfleiderer* (ECJ) supra note 663 para 29; and see *Courage v Crehan* supra note 326 para 27.
[672] *Pfleiderer* (ECJ) supra note 663 paras 30 and 32.
[673] *Pfleiderer* (ECJ) supra note 663 para 30.
[674] *Pfleiderer* (ECJ) supra note 663 para 31.
[675] *Pfleiderer* (ECJ) supra note 663 paras 30–1.
[676] See for example, Scott Hammond 'The evolution of criminal antitrust enforcement over the last two decades' Speech given at the 24th Annual National Institute on White Collar Crime Presented by the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, Florida, 25 February 2010, available at *http://www.justice.gov/atr/public/speeches/255515.htm*, accessed on 9 November

However, as noted above, even allowing some penalty against leniency applicants may be regarded as a fair practice and not render the CLP totally ineffective. This will favour a harsher line against leniency applicants.

The Advocate General Mazák's, opinion in the *Pfleiderer* ECJ case[677] was to provide the leniency documents to the third party and withhold any self-incriminating documents or statements provided by a leniency applicant. He saw the refusal to disclose leniency information to the third party claiming damages as a violation of their right to a fair trial, especially if those documents (provided they do not contain confidential business information) could help the claimant establish the causal link between the harm caused and the anticompetitive conduct.[678] This also gives leniency applicants, or even a non-leniency cartelist for that matter, an opportunity to raise the 'defence' of confidential business information. As it is in South Africa, it would be up to the courts to decide whether the evidence does actually contain information that would unduly prejudice the business.[679] Although the ECJ did not heed the opinion expressed by Advocate General Mazák, it is one that appears to provide a clearer solution.

6.4.1.3 Back to the local German court

Following the ECJ's decision, the *Pfleiderer* case was again taken up by the German Amtsgericht Bonn. This is the court that initially granted Pfleiderer's request for access to leniency documents. Following this guidance and weighing the factors outlined by

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2010. See also United Nations Conference on Trade and Development (UNCTAD) in collaboration with the Ministry for Foreign Affairs of Sweden *Competition Guidelines: Leniency Programs* (2016) pg 15 https://www.unctad.org/en/PublicationsLibrary/ditcclp2016d3_en.pdf.

[677] AG Mazak, Opinion in *Pfleiderer*, Case 360/09 No 48, available at *http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-360/09&td=ALL*, accessed on 15 May 2013.

[678] AG Mazak op cit note 677.

[679] *Competition Commission v Unilever PLC and others* (13/CAC/Jan02) [2002] ZACAC 1; [2001-2002] CPLR 29 (CAC) (14 February 2002).

the ECJ, the Amtsgericht Bonn reversed its initial decision and denied Pfleiderer access to the leniency documents held by BkA.[680]

The Court observed that the German Act against the Restrictions on Competition (ARC) determines as follows: “Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority - or court acting as such - in another Member State of the European Community…”[681] The Court accepted that this reduced the importance of access to the leniency application and increased the importance of having successful prosecutions of cartels.[682]

The Amtsgericht Bonn took the view that a refusal of access to the leniency documents were justified as to hand them over to damages claimants would threaten the effective detection and prosecution of cartel conduct. The leniency programme would no longer be attractive to potential leniency applicants if they feared disclosure of the documents they had voluntarily submitted and the potential of that information used against them by damages claimants.[683] This would ultimately also make it more difficult for private parties to succeed with claims as there would no longer be proceedings and documents into which private parties would have insight.

The Amtsgericht Bonn, in its deliberations, also considered that many of the civil damages claims were made after the competition authorities had uncovered the cartel. Subverting a successful leniency tool and thus hampering cartel investigations, would also impact negatively on future damages cases.[684] The competition authorities’

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[680] *Pfleiderer v Bundeskartellamt*, 51 Gs 53/09 AG Bonn, 18 January 2012.
[681] Section 33(4) of the German Act against the Restrictions on Competition (ARC).
[682] *Pfleiderer v Bundeskartellamt* supra note 680 at para 38.
[683] *Pfleiderer v Bundeskartellamt* supra note 680 at para 39.
[684] Caroline Cauffman ‘The interaction of leniency programmes and actions for damages’ (2011) 7(2) *The Competition L. Rev* at 4.

decision in itself should be useful enough to show the causal link between the cartel conduct and the damages to the third party. The court thus asserted that information gleaned from a leniency application would not be useful in quantifying those damages and normal civil procedure rules could be used to assess the loss suffered by the third party.[685]

6.4.1.4 Implications of *Pfleiderer*

The ECJ decision in *Pfleiderer* has been heavily criticised by the private bar.[686] Instead of providing the clarity that the parties sought, it introduced new problems. It could have set an EU-wide standard for dealing with requests for information from leniency applications. It left this decision in the hands of each member state to deal with. The Amstgericht Bonn decision, which was welcomed by the BkA and the European Community, had a detrimental effect on third-party claimants seeking damages. Confidentiality is a distinctive characteristic of the leniency programme, and these decisions do not provide much comfort to a future leniency applicant nor the third party requiring the information for their damages claim.

6.4.2 *Donau Chemie*[687]

6.4.2.1 Background

On 6 June 2013, the Court of Justice of the European Union ('CJEU')[688] handed down a judgment in the *Donau Chemie* case. This matter originated in Austria in 2010, where the Austrian competition authority, the Bundeswettberbsbehörde ('BWB'), through their leniency programme, uncovered a cartel in the wholesale distribution of printing

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[685] Ibid.
[686] See Scott Campbell & Tristan Feunteun 'Article on developments in English cartel and enforcement' Stewarts Law 2012, available at *http://www.stewartslaw.com*, accessed on 16 May 2013; Geiger op cit note 639; Botteman & Hughes op cit note 636.
[687] *Bundeswettberbsbehörde v Donau Chemie AG,* Case C 536/11, European Court of Justice, available at *http://www.eurlex.europa/LexUriServ.do?uri=CELEX: 62011CJ0536:EN:HTML*, accessed on 23 March 2013.
[688] The name of the ECJ Court changed to the CJEU when the Treaty of Lisbon came into force in 2009.

chemicals and imposed a fine of €1,5 million on Donau Chemie and the other companies who were involved.[689] The trade association, Verband Druck and Medientechnik, placed a request with the BWB to obtain access to the leniency documents to use in their follow-on damages case against the cartel.

Upon its analysis, the local Austrian court, the Oberlandesgericht Wien (the Vienna Higher Regional Court) found that a national Austrian law, applicable only in cartel cases, protected information submitted in cartel cases, and such information could only be divulged to third parties if all the parties consent to this waiver.[690] The cartelist refused to grant the trade association access to the leniency file. Parties can refuse to provide access to the information without furnishing reasons. This blanket restriction does not leave much room for the national competition authorities to consider the interest of the third party. The Vienna Regional Court was in doubt as to the compatibility of the local legislation with the EU rules, especially in light of the *Pfleiderer* ruling, and thus approached the ECJ for guidance.

6.4.2.2 Court of Justice of the European Union ruling

Drawing on the *Pfleiderer* dicta and its principle of effectiveness, the CJEU reiterated that a balancing exercise must be performed to weigh the interests of the third party, who requests access to the documents to help enforce its rights to claim damages, with the right to protect the leniency application information (such as the rights to protect personal or business secrets[691]) and not compromise the leniency programme.[692]

In its appraisal of the law, the CJEU found that:

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[689] *Donau Chemie* (CJEU) supra note 687 para 5.
[690] Austrian Federal Law of 2005 of Cartels and Other Restrictions of Competition para 39(2), which states 'Persons, who are not parties to the procedure, may gain access to the files of the Cartel Court only with the consent of the parties'.
[691] *Donau Chemie* (CJEU) supra note 687 para 33.
[692] *Pfleiderer* (ECJ) supra note 663 paras 30 and 31; reiterated in *Donau Chemie* (CJEU) supra note 687 para 9.

- The blanket restriction denying access to leniency information imposed by the national Austrian law should not result in making it virtually impossible for a third party to exercise its right to claim damages.[693]
- National courts must weigh the interests of the parties who wish to have access to the documents with those who do not want to disclose the information, because 'any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application' of the legislation, and 'the rights that provision confers on individuals'.[694]
- The national courts can conduct this balancing exercise on a case-by-case basis.[695]
- The leniency programme will not trump the disclosure of information that is necessary for a private claim.[696]The fact that such refusal by a leniency applicant may defeat a damages action 'to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused'.[697]
- The only exception is if there is a risk that the document may 'undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified'.[698]

6.4.2.3 Implications of the judgment

The CJEU's judgment in *Donau Chemie* can be seen as a victory for potential damages claimants, especially where there are laws providing a blanket restriction to

[693] *Donau Chemie* (CJEU) supra note 687 para 27.
[694] *Donau Chemie* (CJEU) supra note 687 para 31.
[695] *Donau Chemie* (CJEU) supra note 687 para 47.
[696] *Donau Chemie* (CJEU) supra note 687 para 46.[697] *Donau Chemie* (CJEU) supra note 687 para 47.
[697] *Donau Chemie* (CJEU) supra note 687 para 47.
[698] *Donau Chemie* (CJEU) supra note 687 para 48.

access leniency documents. However, the Court in this case did not stray any further away from the judgment in *Pfleiderer* and merely reiterated the weighing of interests test to be decided on a case-by-case basis and in some respects, on a document-by-document basis.[699] The *Donau Chemie* court has not properly defined the criteria in this weighing exercise. Measuring the public interest in relation to principle of effectiveness of the leniency also requires a proper standard of assessment, which was not addressed in this case. It also appears that the competition authorities bear the burden of proving that refusal to disclose is in the public interest. In addition, there is no guarantee to prospective leniency applicants regarding the certainty of confidentially of their documents. The court in *Donau Chemie*, just like *Pfleiderer*, provided a broad approach without the comfort of clarity to either the leniency applicant or the damages claimant. This case does show that it is becoming easier for damages claimants to obtain leniency documents, and that the competition authorities cannot provide a leniency applicant the absolute assurance that their information will be protected.

6.4.3 *National Grid*[700]

6.4.3.1 Background

This case was brought to the Chancery Division of the English High Court, where the Court had to evaluate whether confidential documents given to the European Commission (EC) could be disclosed to a potential damages claimant. The National Grid Electricity and Transmission company ('NGET') wished to bring a damages claim against companies[701] who were involved in the Gas Insulated Switchgear cartel. A €750 million fine was imposed upon the cartel members. NGET requested these documents, arguing that they were needed so that it could collect as much information as possible to prepare its follow-on damages claim. The documents in question

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[699] *Donau Chemie* (CJEU) supra note 661 para 47.
[700] *National Grid Electricity Transmission Plc v ABB Ltd* Chancery Division [2012] EWHC 869 (Ch).
[701] Some of the parent companies involved in the cartel were ABB, Siemens, Alstom and Areva. ABB was granted immunity from the fine in terms of the Commission's 2002 Leniency Notice.

comprised the confidential version of the EC's report. Some of the documents were disclosed to NGET, but it argued that it still required more information.[702]

6.4.3.2 High Court ruling

Justice Roth of the English High Court invited the EC to make oral submissions on the following points:

(1) Whether *Pfleiderer* applies to the disclosure of leniency documents in the context of the EC's decision?
(2) Whether national courts have the jurisdiction to hear matters related to the disclosure of leniency documents or whether this request could only be made to the Commission in relation to Article 15(1) of Regulation 1/2003, OJ 2003 L1/1?[703]
(3) If a national court does have such jurisdiction, what factors should it take into account in weighing the interests of the parties, as indicated in the *Pfleiderer* case paragraphs 30–31?[704]

After hearing arguments, Justice Roth's response was that:

(1) *Pfleiderer* had a broad application, which was not limited to national leniency programmes only. The EC did not suggest that there was any policy reason to give *Pfleiderer* a more restricted interpretation. He found that the ECJ's judgment did not allow for any qualification. Consequently, *Pfleiderer* applies

[702] See para 7, citing the High Court's judgment [2009] EWHC 1326 (Ch), which rejects the defendant cartels' application to stay the proceedings.
[703] Article 15(3) gives the national competition authorities and the European Commission the right to submit written submissions to the local/national courts of the member states for matters in relation to Articles 81 and 82 (now Articles 101 and 102) of the European Treaty.
[704] *National Grid* supra note 700 para 18.

with equal force to the Commission's leniency programme and those of the national competition authorities.[705]

(2) National courts did have the jurisdiction to rule on the application for disclosure. He said, 'there is nothing in Regulation 1/2003 that even remotely suggests that the court is precluded from applying its national procedures for access to documents'.[706] He agreed with the Commission that there is nothing preventing member states from adopting their own rules relating to the disclosure of leniency materials. He added that to rule otherwise would create a huge burden on the Commission: if every application for disclosure of leniency documents had to be referred to it, and if there were potential appeals, it could lead to substantial delays in finalising these cases.[707]

(3) The weighing exercise proposed by the *Pfleiderer* judgment is not a simple exercise, 'because the considerations that apply on the two sides are of a very different character, although it has similarities to the task of the court where a claim to public interest immunity is raised.'[708] In NGET's application, Justice Roth took several factors into account:

(a) Consideration must be given to the actual documents sought. In this case, NGET requested access to certain extracts that were incorporated into the Commission's decision and certain replies and requests for information and explanations. It did not ask for all the documents related to the leniency application.[709]

(b) Some of the defendants argued that leniency applicants have a legitimate expectation that their documents would be protected. He stressed that the leniency programme did not offer any legitimate expectation to the leniency

[705] *National Grid* supra note 700 para 26.
[706] *National Grid* supra note 700 para 28.
[707] *National Grid* supra note 700 para 29.
[708] *National Grid* supra note 700 para 30.
[709] *National Grid* supra note 700 para 31.

applicant that their documents would be protected from disclosure to third parties.[710]

(c) All parties to the cartel are equally liable for the wrongdoing. Therefore, disclosing the leniency documents would not increase the leniency applicant's legal liability to a greater extent than those parties who were not granted leniency.[711]

(d) He considered factors such as the amount of the fine that the leniency applicant avoided by applying for leniency, the duration for which the cartel had been in operation, the gain realised by the cartel members, the alleged loss suffered by NGET, and the difficulty for the damages claimant to access evidence required to substantiate its claim or to establish causation between the prohibited practice, the damage, and the quantification of damages.[712] These factors were weighed against the 'potential effect of a disclosure order' in this case and the deterrent effect it may have on potential leniency applicants involved in other cartels which are yet to be uncovered. If this is the company's main concern for not racing to the door to apply for leniency, it is a huge risk to take. Another cartel member could come forward and apply for leniency, thus uncovering the cartel, and the company who decided not to apply for leniency would be exposed to higher fines and potential civil damages claims.[713] He assessed the proportionality of these factors in the following terms: '(a) whether the information is available from other sources, and (b) the relevance of the leniency materials to the issues in this case'.[714]

(e) Justice Roth qualified this by adding that, even if the claimant could obtain the requested documents from other sources, there is no guarantee that it would be able to use those documents because cartel documents are usually known to be 'opaque or literally, cryptic'.[715] It is thus better to rely

[710] *National Grid* supra note 700 para 34.
[711] *National Grid* supra note 700 para 35.
[712] *National Grid* supra note 700 paras 37 and 40.
[713] *National Grid* supra note 700 para 37.
[714] *National Grid* supra note 700 para 39.
[715] *National Grid* supra note 700 para 50.

> on information given to the Commission, which is probably more reliable.[716] However, this does not mean that all information requests should be granted without considering the 'countervailing factor[s] to be weighed against disclosure'.[717] 'It is necessary to ascertain whether the particular documents or parts of the documents are of such potential relevance that specific disclosure should be ordered.'[718] Not all documents requested are relevant for the claimant's purpose. Accordingly, it would be wrong to order disclosure of all leniency materials without proper examination of each of them.[719]

Justice Roth inspected the documents and concluded that only a partial disclosure of the documents should be allowed.[720] This also means that the Commission is not immune to having to disclose confidential versions of its documents to claimants. This is an extension of the judicial intervention envisaged by the ECJ in *Pfleiderer* without overreaching.

6.4.3.3 Implications of the judgment

The *National Grid* judgment is an important contribution on a national level and post-*Pfleiderer*. Justice Roth shed more light to the debate on how to strike a balance between the use of the leniency policy to prosecute cartels by competition authorities and using the information from those cases to assist claimants to assert their rights in competition law damages cases in the national courts. However, it is noted that the balancing exercise was based on the facts peculiar to this case and should not be used as a definitive template. The weighing exercise offered a practical solution and as stated in *Pfleiderer*, it should be done on a case-by-case basis.

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[716] *National Grid* supra note 700 para 43.
[717] *National Grid* supra note 700 para 52.
[718] Ibid.
[719] *National Grid* supra note 700 paras 52 and 55.
[720] *National Grid* supra note 700 para 58.

6.4.4 *CDC Hydrogen Peroxide*[721]

6.4.4.1 Background

In the fourth case I analyse, the applicant, Cartel Damages Claims Hydrogen Peroxide ('CDC'), was formed with the purpose of instituting a damages claim against a cartel in the hydrogen peroxide industry. The European Commission fined nine companies €338 million for price-fixing.[722] In its quest to recover damages CDC asked the Commission for 'full access to the statement of contents of the case file in the hydrogen peroxide decision'.[723] CDC requested the non-confidential version of the index to this file relying on Article 4(2) of the Transparency Regulation.[724] This information would have helped CDC in the discovery process to identify the documents that the cartelists held, which could be used to strengthen their civil case. The Commission objected to the CDC's reliance on the Transparency Regulation and rather than weighing up the objectives as proposed in the *Pfleidere*r CJEU decision, the Commission denied CDC access to the documents because it could not disclose the companies' confidential commercial information and to do so would undermine the leniency process and investigation. The CDC turned to the General Court to request disclosure of the documents.

6.4.4.2 The General Court outcome

The General Court dismissed the exceptions raised by the Commission. The Court considered whether the index to the file, which was requested by the damages claimant, constituted protected commercial information. The Court held that the index

[721] *Cartel Damages Claims Hydrogen Peroxide Cartel Damages Claims (CDC Hydrogen Peroxide) v European Commission* [2011] ECR Case T- 437/08, [hereafter referred to as '*CDC*']. CDC is a company called Cartel Damages Claims that brings actions on behalf of cartel victims.
[722] Commission Decision C (2006) 1766. Case COMP/F/C.38.620 ('*The Hydrogen Peroxide* decision').
[723] *CDC* case supra note 721 para 1.
[724] Regulation (EC) No.1049/2001, which allows the public access to European Parliament, Council and European Commission documents ([2001] OJ L145/43) ('Transparency Regulation').

to the file itself was not required by the leniency applicant, and did not contain any information that could prejudice the commercial interests of the leniency applicant.[725] It could also not be concluded that the documents listed in the index, even if they were documents relating to commercial interest, would necessarily be used by the damages claimant. The usefulness of that information to further the claimant's case is a question that would be raised during the discovery process in the civil case.[726] Protecting the commercial interest of documents should not allow for the leniency applicant to avoid facing civil damages claims.[727]

The Commission submitted that the case may be appealed and thus disclosure would not be appropriate at this stage. The Court found that the Commission's investigation was complete and said that, even if the case went on appeal, it does not mean that access to the index should be denied.[728]

The Commission raised concerns that disclosure would undermine the leniency programme, as potential applicants would not cooperate. The Court dismissed the Commission's argument, saying that the leniency policy did not deserve any higher level of protection than the damages claim, as both private and public enforcement contributed to deterring cartel conduct.[729]

6.4.4.3 Implication of *CDC Hydrogen Peroxide*

Although the Commission jealously guarded every piece of information relating to the leniency case, including the index to its case file, this case raises further issues about the uncertainty of leniency document protection. Perhaps the request in this instance for the index may not have been the ideal point for the Commission to make in protecting access to documents. The index could clearly not be regarded as

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[725] *CDC* supra note 721 paras 45 and 70.
[726] *CDC* supra note 721 para 47.
[727] *CDC* supra note 721 para 49.
[728] *CDC* supra note 721 para 65.
[729] *CDC* supra note 721 paras 74-75.

confidential commercial interest information that would be used at a later stage. This case, like the others, emphasised that damages claimants have just as big a role to play in enforcement of cartels as leniency programmes. Their requests should not be easily disregarded and dismissed.

6.4.5 Summary of the EU approach

The CJEU in the *Pfleiderer* case set the tone for other European cases where there is a request for leniency documents. This Court understood the need for access to leniency documents by damages claimants while still protecting the leniency process. However, it is now left in the hands of the national courts in the EU to decide on a case-by-case basis how to weigh these objectives. Taking its cue from the *Pfleiderer* decision, the UK court in the *National Grid* decision widened the scope of the request for disclosure to include the leniency documents. The *CDC Hydrogen Peroxide* case showed that the Transparency Regulation is also an important tool to gain access to information held by EU institutions. A lesson of note is that one should take caution with the disparity in the application of the rules in these cases when it comes to access to leniency documents. As much as there is a need for damages claimants to use the leniency documents as a means to gain access to justice though civil claims, this should not be an opportunity for them to forum shop and take advantage where there is an disparity in the enforcement of the EU rules.

The South African courts are yet to engage whether the corporate leniency documents obtained from a party seeking leniency could be used by a damages plaintiff in a civil suit. The European debate is useful in helping us understand what some of the possible issues around the handing over of these leniency documents, and more importantly, in instances where the leniency applicant claims confidentiality over those agreements. South African courts will someday encounter the problem that faced the courts in *Pfleiderer, Donae Chemie, National Grid* and *CDH Hydrogen Peroxide,* of balancing the protection of the leniency programme with a third parties request for the leniency documents to assist in their right to claim damages.

If the South African courts took the view of the local German Court in *Pfleiderer* that protection of the leniency policy was of more importance than a damages plaintiff's access to the leniency documents, this may disincentivise civil damages claims if it is difficult to obtain evidence that could strengthen the plaintiff's case. A blanket restriction to leniency information is not helpful to South African damages plaintiff's as it would make the claiming of damages almost impossible. This was recognised by the Court in *Donau Chemie*.

I believe that South African courts should follow *CDC Hydrogen Peroxide* where the Court felt that both disclosure and the leniency policy deserved equal protection. Justice Roth in the *National Grid* case provided factors to take into account when balancing the effects of a disclosure request with the protection of the leniency policy which would also be useful for South African courts to consider.

Due to information asymmetries the damages plaintiff, deserving of compensation, would benefit from the use of the evidence in leniency documents to strengthen its case. Not only would this augment their access to justice, it also indirectly results in contributing to deterring future cartel conduct. Ultimately it would be necessary for the South African courts to weigh the interests of both parties and to conduct this balancing exercise on a case-by-case basis.

6.5 The Legislative developments in the EU

Although the courts in the EU tried to provide some guidance to find the balance in weighing up the rights of damages claimants to access documents with the imperative to protect the evidence gained through public enforcement, the National Courts in the EU did not make great strides in developing this area. Therefore the European Commission (EC) consulted the public on how to encourage damages cases and proposed procedure in the 2005 Green Paper and later in the 2008 White Paper. In

June 2013, it issued a proposed directive.[730] With regard to the disclosure of evidence, the EC called for the full protection of leniency documents, which cannot be discovered (even once the case has been finalised). This would apply to corporate statements, replies to request for information and other settlement submissions.[731] These documents are completely off limits and cannot be disclosed to third-party damages claimants. This was also confirmed recently in the *Gas Switchgear Cartel* case where the ECJ held that there was no overriding public interest on the part of a damages claimant to have access and use of the leniency documents.[732]

The proposed directive gave some reprieve to the damages claimant if it would like a precise disclosure of documents that would be substantively relevant to its case. These documents can only be disclosed after the competition authorities have finalised their case. National courts are now given the discretion to determine the scope and cost of the request for disclosure, while still protecting confidential and privileged information.

Following on from the proposals the final European Directive[733] was published in 2014 and it addressed two issues: first, it strengthened the engagement between the public and private enforcement of competition law and secondly, it addresses the claimant's rights to claim compensation due to anti-competitive harm. The EU directive takes a position on the disclosure of evidence to the damages claimant.[734]

Under Article 5(1) the national courts can order the defendant or a third party to disclose evidence in its control 'upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages...'. To avoid an overreaching request

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[730] EU Directive op cit 322.
[731] Ibid at 4.2.
[732] *Commission v Siemens Österreich & others*, *Siemens Transmission & Distribution v Commission*, *Siemens Transmission and Distribution and Nouva Magrini Galileo v Commission, Areva v Commission and Alstom & others v Commission*, Joined Cases C-231/11P, C-232/11P and C-233/11P and in Joined cases C-247/11P and C-253/11P (also known as the '*Gas Switchgear Cartel*' case).
[733] EU Directive supra note 322.
[734] See Article 6(4) and 6(7) of the EU Directive.

for information, only specific items of evidence or relevant categories of evidence can be requested.[735] Disclosure of evidence is limited to what is proportionate, and the national courts will make the determination as to what is proportionate.[736] If these limitations and conditions are met, the national courts have the power to order the disclosure of evidence containing confidential information which is relevant to the damages action.[737]

Article 6 provides further limitations on the disclosure of evidence. National Courts are now tasked to vehemently protect the disclosure of leniency applications rather than engage in the balancing exercise proposed by *Pfliederer*.[738]

In limited circumstances the National Court may allow a disclosure of evidence where: '(a) information was prepared by a natural or legal person specifically for the proceedings of a competition authority; (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (c) settlement submissions that have been withdrawn'.[739]

Although the provisions in this Directive may be welcomed by leniency applicants it does hinder the damages claimant from gaining access to the leniency documents. This does place a huge limitation on the damages claimant's case if the claimant cannot obtain other damning evidence about the cartel. However the Directive does provide clarity in the process rather than leaving it up for the courts to decide whether to allow disclosure of leniency documents, while maintaining the integrity of the policy.

The South African authorities are yet to embark on the level of discussion that the EU has had in relation to the leniency documents and their possible assistance in damages cases. The EU formalised a process through its Directive that allows for

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[735] Article 5(2) of the EU Directive.
[736] Article 5(3) of the EU Directive.
[737] Article 5(4) of the EU Directive.
[738] Article 6(4) of the EU Directive.
[739] Article 6(5) of the EU Directive.

more transparency and guidance for future leniency applicants and damages claimants so they will know where they stand in relation to these documents. To address the access to leniency documents, it would also require a policy review of the CLP.

6.6 The United States approach

In the US a successful damages claimant, who has been harmed by cartel conduct, is awarded treble damages. Being awarded three times what you have quantified in your claim is a great incentive to sue for damages.[740] Leniency applicants could thus easily become target respondents for damages cases, and the US competition authorities were therefore also concerned about protecting their leniency policy, especially since they have had immense success with the policy uncovering cartels.[741] In order to still incentivise use of the leniency policy, the US authorities enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), which de-trebles the damages award. This means that a claimant is only entitled to single damages from a leniency applicant if successful (and the successful leniency applicant is not jointly and severally liable..[742] A company which is sued cannot recover its compensation from co-conspirators.[743] The ACPERA incentive works well in the US because of the de-treble damages incentive. It also provides the leniency applicant some relief from in the form of single damages in exchange for satisfactory and timely cooperation with the damages claimant.[744] Since we do not have the treble damages incentive in South Africa, would not be possible to incorporate a similar structure into our law. However, it is worth considering, if the South African competition authorities could offer leniency applicants some kind of incentive to assist damages claimants as well. The effect of

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[740] I discuss the quantification of damages in chapter 3 of this thesis.
[741] Hammond op cit note 594.
[742] J Green & I McCall 'Leniency and civil claims' (2009) *Competition Law Insight* 3–5, SW Waller 'Towards a constructive public–private partnership to enforce competition law' (2006) 29(3) *World Competition* 367–81.
[743] *Texas Indus., Inc v Radcliff Materials, Inc*. 451 U.S. 630 (1981).
[744] ACPERA § 201-215. See also 2010 amendment to ACPERA Pub. L. No. 111-190 § 3, which added the 'timeous' requirement.

supporting damages claimants in this way is that it their claims also acts as a deterrent to potential cartel members to steer clear of this anticompetitive behaviour.

Empirical evidence shows that since its enactment ACPERA has had a minimal effect on the number of cartelists who applied for leniency.[745] Looking at a six-year period before ACPERA was enacted in 2004 there were 78 leniency applications, and during the period of six years after the enactment, there were 81 applications.[746] For those who did apply there was a 6 per cent increase of successful applications, especially in cases where the Department of Justice did not know about the existence of the cartel conduct.[747] Although there is a slight increase in applications, ACPERA may have brought a slight relief to leniency applications. The threat of criminal penalties still remains a greater incentive for these applicants to come forward to blow the whistle on the cartel.[748]

Most importantly, in the US Government Accountability Office report, it was found that the information the damages claimant obtained through the leniency applicant's cooperation in the ACPERA process helped to 'streamline their cases by reducing the burden of long and costly civil discovery because leniency applicants provided a roadmap to the conspiracy'.[749]

Through the ACPERA incentive to de-treble damages if the leniency applicant co-operates with the damages claimant and the competition authorities, the US authorities appear to have found a way to maintain the integrity of their leniency policy

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[745] United States Government Accountability Office (GAO) 'Criminal cartel enforcement: Stakeholder views on impact of 2004 antitrust reform are mixed, but support whistleblower protection' Report to Congressional Committees, July 2011, GAO-11-619 at 15, available at *https://www.gao.gov/assets/330/321794.pdf*, accessed on 20 August 2013 (otherwise known as the 'GAO report').

[746] GAO report note 745 at 16. 'These data include both corporate and individual applications though the vast majority of applications submitted both before and after ACPERA were corporate leniency applications'. Fn 40 in the GAO report.

[747] GAO report note 745 at 16.

[748] GAO report note 745 at 20.

[749] GAO report note 745 at 29.

and destabilise cartels. Damages claimants will have their case strengthened through the cooperation of the leniency applicant in exchange for a de-trebled damages award.

6.7 Analysis and Conclusion

The South African competition authorities place considerable value on the CLP, and indeed it has proven very useful in detecting cartel conduct.[750] It is therefore in their interest to protect the integrity of the policy. This becomes difficult when there is a paramount public interest for third parties claiming damages to gain access to this information, which may help establish causation and quantum of harm, in order to exercise their right to recover their losses. Private and public enforcement should be complementary components in eradicating cartel conduct. However, this often results in a battle over access to the leniency information.

One outcome would be to find a balance between suing the leniency applicant for damages (follow-on claims), partial leniency (such as in the US under ACPERA, where leniency applicants are still liable for single, not treble damages), and full leniency (where there are no follow-on claims). The empirical evidence on ACPERA, shows that the incentive to apply for leniency has not been substantially increased by the reduced civil liability.

The South African courts have not had the opportunity to deal comprehensively with this dilemma. Some of these issues did come to the fore in the *AMSA* case. In this case, the SCA did find an interest in protecting litigation privilege but did not have much choice regarding the disclosure of leniency information, considering that the leniency applicant was mentioned in the referral document. This opened the door to disclosure, with AMSA and Cape Gate requesting information so that they could

[750] Table 6.1 shows a list of industries which have been successfully prosecuted as a result of the CLP in South Africa.

accurately answer the Commission's allegations. However, the case did not deal with the challenges facing a damages claimant.

The EU has a more definitive approach in handling leniency documents in relation to third party requests. *Pfleiderer's* introduction of the principle of the weighing of interests and its consideration of the principle of equivalence and effectiveness introduced a new dimension to this debate. It could be argued that the ECJ could have taken the matter further by identifying the factors the national court should consider when conducting this exercise, rather than leaving it to the discretion of the national courts to decide on a case-by-case basis. This case should be lauded for entertaining the possibility that a damages claimant could show that their interest in obtaining the documents to strengthen the case is worth serious consideration. The CJEU in the *Donau Chemie* case agreed with *Pfleiderer's* weighing exercise and guarded against local laws that imposed blanket restrictions on access to documents. *National Grid* went ahead to outline certain factors to consider, while keeping in mind that it was based on the facts of this case.

These cases appear to lean towards disclosing certain leniency documents to the damages claimant, and not shutting them out completely. They have emphasised that private enforcement has just as big a role to play as public enforcement in eradicating cartel behaviour. The potential effect on the application of the leniency policy came into question, and all the courts were quite adamant that the leniency programme did not offer a legitimate expectation that all evidence submitted would not be disclosed to third parties.

The court in *National Grid* emphasised the point that there is a greater risk in not applying for leniency (i.e. a greater financial risk of being fined by the competition authorities and the possibility of losing a damages case) than using the leniency policy to obtain immunity from the fine, knowing that the information could be used in a damages claim against the applicant for leniency. *National Grid* was also an important case post *Pfleiderer*, as it provided more guidance at the national level.

The *CDC* case illustrated that the competition authorities can be very conservative when it comes to protecting leniency information. The authorities in *CDC* even tried to extend this protection to an index in a referral file. It remains to be seen whether companies would risk having their information being exposed to third parties and whether the national courts would permit a full disclosure to third parties, without revealing business secrets and confidential company information.

In finding a balance, the US does not offer us much help because the legal incentives of ACPERA differ significantly in South Africa. De-trebling damages would be very encouraging to a potential leniency applicant. The EU and US appear to be on the same page regarding joint and several liability of the co-conspirators of the cartel. Perhaps in South Africa we could offer a 50% discount on the damages claim if the leniency applicant co-operated fully with the damages claimant. This would be an approach similar to the US, providing an incentive to come forward through the leniency policy and offering some reprieve in the civil courts in return for their co-operation. .

Although I disagree with the blanket refusal of disclosure of leniency documents in by the EC Directive, it is still worth considering for the South African context. The national court rules may not apply because of our different legal structure. However, the provisions could still be considered. It does seem as though these directives were in direct response to the *Pfleiderer* decision. The EC is attempting to take a decisive stance, and it would be interesting to see if it holds up in court. The directives closely protect information given during the leniency process, which is a step back from the courts in *Pfleiderer*, *Donau Chemie*, *National Grid* and *CDC*, which all employ a balancing test and understand the position of damages claimants having asymmetrical information and the need to access leniency documents to strengthen their case. This is disquieting, especially since the motivation behind the EC Green and White papers and the proposed directive was to encourage more damages actions. The EU Directive acknowledges that the damages claimant has an information asymmetry issue whilst it also protects certain evidence and avoids interference in the Competition Commission's investigation, and to ensure that companies continue to use the leniency process. Leniency documents are now given absolute protection by the

National Courts, which comes at a huge disadvantage to damages claimants who may have been reliant on that evidence.

At this stage it is uncertain whether South African courts would support the denial of access to leniency documents to uphold the integrity of the Commission's leniency policy. It would be worrisome to think that the courts would have such a one-sided view, especially when damages cases in competition law are still rare and claimants need to be incentivised and encouraged in South Africa so that they can get some reprieve and be compensated for the anti-competitive harm as a result of cartel conduct. I do not think that providing these leniency documents to the damages claimants would really undermine the leniency policy. If the courts do have to decide, consideration must be given to cases such as *Pfleiderer, Donau Chemie, National Grid* and *CDC* and should be decided on a case-by-case basis. South African courts could draw from these decisions draw a balance between access to justice and the protection of the leniency policy.

If properly managed—and perhaps this should be done through a policy guideline or legislative directive, as in the EU perhaps—some comfort should be given to the leniency applicant without the blanket refusal of access to leniency documents as prescribed in the EU Directive. Perhaps by providing some assurances to the applicant as to how the leniency documents would be used, or whether they could be exempt from the damages claim, or have the quantum of the claim reduced for the leniency applicant, if the damages claimant is allowed to use the leniency documents in a civil trial. I believe that a balance could be struck between strengthening public enforcement and allowing the damages claimant access to justice in private enforcement cases. It would greatly assist the damages claimant and leniency applicant if the South African authorities provide this policy guidance as to how leniency documents should be handled.

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CHAPTER 7: CONCLUSION

7.1 Introduction

This thesis has explored the challenges of bringing cartel damages claims in South African civil courts. Companies that engage in price-fixing, market division or bid rigging have increased their prices beyond the competitive rate and overcharged their customers. Competition authorities are responsible for detecting, investigating and eventually issuing a fine to the cartelist, which in successful cases can be up to 10 per cent of the company's annual turnover. The fines are meant to deter future cartel behaviour. It is unfortunate that the penalty payment is not available to compensate the victims of the cartel. Instead, those victims who want any compensation have to seek their own restitution and sue the cartel for follow-on civil damages in the High Court. This restitution also has an indirect deterrent effect reinforcing public enforcement. In this thesis my focus has been on restitution rather than deterrence. Claiming damages in competition law cases is new to South Africa and the route to the civil courts has been strewn with obstacles. The reason for this is because we do not have a white paper policy or a guidance note to give claimants a clear understanding of the process and there have been only a few reported cases (bread and airline cases) that have added to the development of civil damages in competition law. Through the case analysis and academic discussion both locally and internationally, this dissertation provides a roadmap for private enforcement in South Africa.

I have argued in this dissertation that it is desirable and possible for damages claims for victims of cartel conduct to be made more accessible in South Africa. As demonstrated in chapter 2, the courts are willing to entertain such claims, as for example in the path-breaking bread cases. One important mechanism for damages claims to become more accessible is the class action device in civil procedure, as explored and detailed in chapter 4. I have emphasised in chapter 6 how private litigants can be afforded the enforcement advantages inherent in the use of a corporate leniency policy in competition enforcement. Finally, in determining how to make damages accessible to victims in competition matters, a principled choice needs to be made among different configurations of the passing-on defence and the distinction between direct and indirect purchasers. Thus, in chapter 5, I have argued that the most appropriate policy for South Africa is akin to that of the European Union where the passing-on defence is allowed and where indirect purchasers may pursue damages. From an economic perspective, the problems of method and valuation inherent in the recognition of damages claims are not insurmountable; surveying the three principal methods of calculating damages, I argued that they can each be applied in certain areas. It is thus desirable and possible for damages claims to be made more accessible to private litigants in competition matters in South Africa.

7.2 Argument of this thesis

I began my dissertation in chapter 1 with an understanding that cartels are bad for the South African economy. This dissertation examines the rights of private claimants seeking damages from economic harm they have suffered as a result of cartel conduct. The central argument of the thesis is that the current legislative regime is inadequate to accommodate private damages cases in competition law. My research has lead me to identify the obstacles faced by the damages claimants, I engaged with the debates raised in local and international cases and existing policies and call for policy reform in South Africa which enhances clarity and transparency when bring a damages case. I have emphasised that the primary purpose of a damages claim is to bring access to justice to injured parties by compensating claimants for injuries suffered as a consequence of the cartel conduct. Considering that South Africa is a newcomer to damages claims in competition law, it is important for claimants to have some definitive guidance on how to navigate these legal and economic channels as well as to provide a reflection on private damages issues from policy and jurisprudence viewpoints.

I looked at other established jurisdictions, such as the United States (US) and the European Union (EU). In this regard I examine the various approaches taken by courts in these jurisdictions in dealing with private damages claims with a view to identifying how precedents have developed for purposes of enabling access to justice. I also note the importance of considering such approaches in the context of South African law, the precedents that have developed in South Africa, the extent to which key challenges can be addressed in principle through the development of case precedent and/or whether other policy instruments are needed to ensure access to justice.

In chapter 2, I analysed the arguments presented in the Bread cases. For a successful damages case, the claimant has to prove that there is a causal link between the harm done by the cartel and the injury suffered by the claimant. I explored both common-law and statutory delictual objectives. I concluded that the common law does evolve over time, and claimants could rely on this to prove their damages claims. I reason that there is a possibility of arguing that a statutory duty also exists. I also believe that the s 65 certificate issued by the Tribunal should be sufficient to show that the cartel conduct has occurred, without the claimant having to establish that point in the civil courts again. The Bread cases and the Nationwide and Comair cases did not provide clear guidance as to whether the s65 certificate gave rise to a statutory claim or a common law claim. I conclude that claimants could bring a damage case under common law delictual liability with unique features to suit competition law cases.

Ultimately, the goal is for claimants to be compensated for their losses, and the process of claiming damages should not be an onerous one.

In chapter 3, I provided an overview of the economic thinking that informs quantification of the extent of the harm suffered. I considered the economic theory that informs why the creation and perpetuation of cartel activity is considered harmful and explained the basic economics of how cartels capture rents and how this results in a consumer welfare loss. I then explored how the concept of a consumer welfare loss provides an economic basis for establishing the causal link between the injured party as claimant and the injury suffered as a consequence of cartel behaviour and for quantifying the extent of the injury suffered. Building on this economic foundation I examined the legal challenges involved in the quantification of damages claims. I examined various economic models and theories used in competition law cases to develop the hypothetical counterfactual (imagining if the cartel didn't exist and these firms priced competitively) to calculate the cartel overcharge. I concluded that there is although we currently do not have a single best practice approach to calculating the overcharge we can implement policy guidelines to which courts can confer when quantifying damages. I also looked at the possibility that lost profits as a result of being subjected to a cartel can be regarded as reflecting the loss due to the cartel overcharge. While the most appropriate method would depend on the actual economic and market characteristics of the matter at hand useful case precedent has developed in South Africa (e.g., *Nationwide*) which provides pragmatic guidance on the burden of evidence that courts should consider when deliberating on appropriate methodologies and evidentiary bases for amounts calculated. In this regard Judge Nicholls' emphasis in *Nationwide* on the relevance of section 3 of The Law of Evidence Amendment Act 45 of 1988 is helpful. Judge Nicholls notes that 'the amendment was introduced as a response to the tendency of South African courts to exclude evidence which was reliable, but which could not be admitted because of the rule against hearsay. The amendment confers a judicial discretion on courts to admit hearsay evidence if it is in the interests of justice'[751].

[751] *Nationwide* supra note 44 para 84.

In chapter 4, I deliberate on an important procedural issue, which is how class actions that sue for damages could be certified. I argue that the claimant has to show a direct and substantial interest in the matter and that the claimant has a legal capacity to litigate. Damages cases are expensive to litigate; with a class action, the claimants can share the risks (costs) and the rewards. There may be a fear that class action suits may open the floodgates to frivolous litigation.[752] However, the cost of litigation and the certification requirements act as a barrier to such a proposal. The *Ngxuza* cases, bread cases and the *Silicosis* case made significant inroads into identifying the certification requirements necessary for a competition damages case. However, I contend that a policy guide is necessary to formalise these processes to make damages case procedure more transparent and accessible when dealing with leniency applications and confidential information.

In chapter 5, I engaged in the debate whether or not a claimant may only be a direct purchaser or whether the indirect purchaser may also bring damages claims. If a direct purchaser is allowed to claim damages, should the cartelist be able to raise the passing-on defence that the overcharge was passed on to the indirect purchaser? I provided a critical analysis of two seminal cases in the US, namely, *Illinois Brick* and *Hanover Shoe*. *Hanover Shoe* allowed direct purchasers to claim full compensation, while the cartelist could not argue that the overcharge was passed on; it also prevented indirect purchasers from claiming damages. I considered the characterisation of the direct purchaser and drew on leading academics to argue that indirect purchasers should be given the opportunity to claim damages. This is a stance taken by the EU as well. The EU was guided by its own cases, resulting in legislative amendments, in the form of the EU Directive, that allow for the passing-on defence and for indirect purchasers to claim damages as well. I also examined the changing landscape from the traditional marketplace to an online digital platform where it becomes difficult to establish who the indirect purchaser is as we have seen in the

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[752] See Bernard Murphy & Camille Cameron 'Access to justice and the evolution of class action litigation in Australia' (2006) 30 *Melb. U. L. Rev.* 399.

Ticketmaster and the *Apple* cases. I argue that even though that may be the issue, this does not change the principle of *Ilinois Brick* case in the US which precludes indirect purchasers from claiming damages. The South African courts have not adequately grappled with this debate I call for a policy guideline addressing factors for courts to consider when faced with the possibility of an indirect purchaser requesting standing and I propose that South African courts should allow the indirect purchaser to claim damages. This does not prevent the direct purchaser from claiming damages as well and for the Respondent to raise the passing-off defence of the overcharge.

In chapter 6, I evaluated the challenges of the evidentiary burden that the claimant has in claiming competition damages. It is a challenging and in most cases a costly exercise to obtain evidence to help prove such cases. I investigated the possibility of using existing information provided to the Competition Commission by its leniency applicant, which comes forward to blow the whistle on the cartel. The leniency applicant itself is not exempt from civil damages. It does hand over a wealth of information in terms of the corporate leniency policy to the Commission to help it make a successful prosecution of the cartel. I argue that the damages claimant should, in the interest of justice, have access to that information, rather than the information being fiercely protected by the Competition authorities for the sake of safeguarding the integrity of their leniency policy. I drew comparisons from case experiences in the EU and the US that were seized with these questions, and explored the conflicting differences of opinion. Judges in the EU looked to balance the interest of the damages claimant against the protection of the leniency policy, whereas the EU Directive took a definitive stance by imposing blanket refusal of disclosure of leniency documents. The EU Directive limits the debate and does not protect the interest of the damages claimant. In the US through its ACPERA legislation de-trebles civil damages by offering single damages to the leniency applicant if it co-operates in the civil damages case. This is a good incentive in a jurisdiction where treble damages exist. South African authorities need to engage with this issuethrough policy reform, allowing for a more favourable approach to the damages claimant gaining access to leniency documents , and perhaps provide a discounted civil damages award incentive to the leniency applicant if they co-operate with information in the civil damages case. This would also protect both the leniency process and assist the damages claimant. I argue that a revision of the CLP is necessary to include policy guidance and legislative certainty would assist greatly in implementing these changes and in clarifying these issues. Leaving privileged information aside, I believe that these matters should be dealt with on a case-by-case basis where the court could decide if the information should be disclosed to the claimant.

Overall, the South African courts have made valuable contributions to develop jurisprudence to bring access to justice to competition law damages claimants. Progress has been slow; perhaps due to the lack of competition law related damages cases and most importantly, the much-needed policy intervention providing definitive guidance to damages claimants on aspects such as establishing the cause of action, the economic methodology to quantify damages, certifying a class action, allowing an indirect purchaser to claim damages and access to leniency documents, to claim compensation for the economic harm suffered as a result of anti-competitive cartel practices.

7.3 **White Paper Policy Guideline.**

Throughout the thesis I put out a call for a white paper policy to drive the process to legislative intervention. Short of annexing a draft white paper to this thesis, I rather provide some semblance of what the white paper should contain based on the recommendations of the South African Law Commission's report[753] and the recommendations arising from the arguments in the thesis.

The main objectives of the White Paper are to address a clarification of the process to claim private damages in South Africa, in non-constitutional cases, and to have a victim-centric approach to enhance access to justice.

[753] SALC report op cit note 340.

Although published in 1998, the Law Commission's report, it is unfortunate that the legislature has not yet adopted the recommendations. This paper, which includes a background, 29 detailed recommendations, and a draft Bill[754] addressing issues of class actions and public interest in non-constitutional matters, should serve as a backdrop to the White Paper. I have listed these notable recommendations below:

- '1. The principles underlying class actions and public interest actions should be introduced by an Act of Parliament and the necessary procedures by rules of court. The Act and the rules should be introduced as a matter of urgency.'[755] To expedite access to justice, I agree that this Act should be treated as a matter of urgency.
- '2. Class actions and actions in the public interest should be treated as two separate and distinct procedures. The two procedures serve different purposes and have to comply with different requirements. The essential difference between a class action and a public interest action is that the judgment given in a class action binds all the members of the class and may, therefore, be pleaded as res judicata against the members of the class. The judgment in a public interest action does not bound the people in whose interest it is brought.'[756] In addition to class actions and public interest actions, the Bill should also include (or at least not preclude) the rights of individuals to bring a private action for damages claim on a delictual basis.[757]
- '3. The Act should define the term "public interest action". We propose the following definition: "public interest action" means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not be binding (res judicata) on the persons in whose interest the action is brought'.[758] A

[754] Ibid at 88-99.
[755] Ibid at 12.
[756] Ibid at 8-9.
[757] See chapter 2 of the thesis where I refer to view of Wallis JA in respect establishing a prima facie case and the casual link between the harmful conduct and the injury to the class/plaintiff.
[758] Ibid at 24.

definition of a "private interest action" should also be included to cater for individuals who claim damages in non-constitutional matters for e.g., a plaintiff claiming damages arising out of cartel offences.

- '4. Any person should be able to institute action in a court claiming relief by way of a public interest action in the interest of the public generally or of any particular section thereof, irrespective of whether or not such person has any direct, indirect or personal interest in the relief claimed. Such person shall identify the action as a public interest action and nominate a suitable person (with that person's prior consent) to represent the public interest in the matter concerned. Before the court appoints the representative, it must be satisfied that the contemplated action is a bona fide public interest action. The representative acts in the public interest and for this reason the court should be able to remove and replace him or her on good cause shown'. [759] This should apply to private interest damages cases as well.
- '5.If the remedy sought is an interdict or a mandamus, then a defendant should be cited in a public interest action. If the public interest litigant seeks a declaration of rights, then it is not necessary to cite a defendant.'[760] This should also apply to private actions.
- '6. The Supreme Court of Appeal, the Constitutional Court, the High Courts, the Land Claims Court, the Labour Court, and the Magistrates' Courts should be designated by the Minister of Justice to hear public interest actions with immediate effect. In addition, the Minister should be given the discretion to designate any other court to adjudicate public interest actions.'[761] For competition law related cases, the Land Claims and Labour Courts will not be relevant.
- '7. The court hearing the public interest action shall not make an order as to costs or order the representative to provide security for costs unless special

[759] Ibid at 26.
[760] Ibid at 29.
[761] Ibid at 30.

circumstances apply.'[762] Cost orders should be awarded in private enforcement cases. This would deter any vexacious litigation.

- '8. The Act should define the term "class action". We propose the following definition: "Class action" means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act.'[763] This is a clear definition which also encompasses the Mulheron definition discussed in Chapter 4 of the thesis.
- '9. The person commencing the class action or the person appointed as representative in the class action need not be a member of the class. Since the quality of the representative may be relevant, only suitable persons should be appointed as representatives. The Act should accordingly provide that the person who brings the application for certification may request the court to appoint him or her, or any other suitable person (with that person's prior consent), to be the representative. Before the court appoints the representative, it must be satisfied that the contemplated action is a bona fide class action. The Act should further provide that the court may dismiss a representative on good cause shown.'[764] I agree with this recommendation regard representation.[765]
- '10. In class actions a preliminary application should be brought before court requesting leave to institute or defend an action as a class action and to ask for directions as to procedure.'[766]
- '11. An application for certification as a class action may be granted by the court where: (a) there is an identifiable class of persons; (b) a cause of action is disclosed; (c) there are issues of fact or law which are common to the class; (d) a suitable representative is available; (e) the interests of justice so require; and

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[762] Ibid at 31.
[763] Ibid at 33.
[764] Ibid at 38.
[765] See Section 4.3.2 Suitability of class representatives and legal representatives, chapter 4 of the thesis.

[766] Ibid at 40.

(f) the class action is the appropriate method of proceeding with the action.'[767] As mentioned in chapter 4 of the thesis , the courts in the *Nguxa* and Wallis in the SCA bread case drew their certification criteria from this report.

- '12. At any time after a certification order has been granted the court should be entitled to order that the action no longer proceeds as a class action because the criteria for certification, or any of them, are no longer satisfied.'[768] I agree with this recommendation.
- '13. The court should be asked for directions as to procedure as part of the certification process. In this regard the court should have a wide discretion to determine its own procedures.'[769] Although this recommendation mentions a wide discretion, there should also be consistency in the decision-making where commonalities exist.
- '14. The courts should be given broad general management powers exercisable either on the application of a party or class member or on the court's own motion.'[770] I agree that courts should be able to manage their processes in this regard.
- '15. The Act should deal with the questions of when, by whom, to whom, and how notice should be given. As a general rule, notice to class members and prospective class members should always be given. The court should have the discretion to make opt-in, opt-out or no notice orders. In all cases it should be necessary for the court to consider whether notice of the application for certification should be given to all persons eligible to elect to join the class.'[771] I agree that claimaints in South Africa should have the option to opt-in or opt-out and it should not be statutorily prescriptive.
- '16. The court should have the discretion to make an order in respect of the binding effect of its judgment on the members of the class.'[772] I agree that the court should have this discretion.

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[767] Ibid at 50.
[768] Ibid at 51.
[769] Ibid at 52.
[770] Ibid at 54.
[771] Ibid at 60-61.
[772] Ibid at 64.

- ‘17. Common issues should be determined together and issues requiring the participation of individual class members should be determined individually. The term "common issues" should be defined. The court should not refuse to authorise a class action merely by reason of the fact that there are issues pertaining to the claims of some or all of the members of the class which will require individual determination or that different relief is sought for different class members.’[773] Earlier on I discussed the Silicosis case which is evidence of where there were two distinct commonality features. This recommendation makes provision for that.
- ‘18. In determining the amount of damages to be awarded the court may make an aggregate assessment or individual assessments. In this regard the court may appoint a commissioner to assist the court. When an aggregate assessment is made the court should give directions regarding distribution of the award to class members and may, where appropriate, require the defendant to distribute the damages directly to the class members. The Act should contain an express provision with regard to the aggregate assessment of monetary awards and the disposal of any undistributed residue of an aggregate award.’[774] In chapter 3 of the thesis I dealt with the quantification of damages in private enforcement cases. I have included my recommendation below.
- ‘19. It should eventually be possible to institute class actions in any court. Initially, however, only the Supreme Court of Appeal, the Constitutional Court, the High Courts, the Land Claims Court, and Labour Court should be designated by the Minister of Justice to adjudicate class actions. The Minister should, however, have the discretion to designate other courts in which class actions may be prosecuted. The appropriate procedure in the different courts should be prescribed by the authorities empowered to make rules for those courts.’[775] I agree that private enforcement cases should not be restricted to a particular court.

[773] Ibid at 64-65.
[774] Ibid at 66.
[775] Ibid at 68.

- ’20. The court hearing the application for certification as a class action should have the power to give directions as to the appropriate division or court in which the action should be instituted.’[776] I agree that the court should have discretion in this regard.
- ‘21. In determining whether a particular class action falls within the jurisdiction of the Magistrates' Courts the individual value of the claims should be the deciding factor. In this regard it must be borne in mind that in terms of section 50 of the Magistrates' Courts Act, 1944, the defendant may apply for the removal of any action from the Magistrates' Courts to the High Court.’[777] I agree with this recommendation.
- ‘22. In awarding costs in class actions the court should retain its discretion to apply the general rule that costs follow the result. The court may refuse to order the representative to provide security for costs. The court may also authorise a class action on condition that the Legal Aid Board grants the necessary funds or indemnifies the defendant(s) for his or her costs. Those members of the class who opt-in may be ordered to contribute towards costs and, where appropriate, to provide security for costs.’[778] Here, I do not think that the Legal Aid Board should be specifically named. There are many other public interest organisations who may be able to assist the claimants. Also, provision should be made for private claimants as well.
- ‘23. A legal practitioner may, subject to the Contingency Fees Act 66 of 1997, make an arrangement with the representative stipulating for the payment of fees, or fees and disbursements, only in the event of success in the class action.’[779] I agree that the contingency fee arrangement should be available to claimaints.
- ‘24. Contrary to our recommendation in the Working Paper, we no longer recommend the establishment of a separate public interest action and class actions fund. The Commission believes the existing Legal Aid Board should be

[776] Ibid at 69.
[777] Ibid at 70.
[778] Ibid at 72.
[779] Ibid at 73.

utilized as the mechanism to provide legal aid to indigent litigants in class actions and public interest actions.'[780] I disagree that the Legal Aid Board should have sole control of a litigant fund. There are many organisations capable of managing this fund, and the funds should be available to private enforcement litigants as well.

- '25. Settlement, discontinuance or abandonment of a class action should require the prior approval of the court.'[781] I agree with this recommendation.
- '26. The decision to certify an action as a class action is only the first step in the proceedings and should not be subject to appeal. The Act should, however, specifically provide that noncertification of an action as a class action is subject to appeal. If the representative does not appeal, or does not proceed with an appeal, it should be competent for another member of the class to do so with leave of the court.'[782] I agree with this recommendation. The bread cases are evident of the importance of an appeal of a certification judgment which I examined in chapter 4 of the thesis.
- '27. The certification of an action as a class action should suspend limitation periods for all class members until the member opts out, the member is excluded from the class, or the action is decertified, dismissed, abandoned, discontinued or settled.'[783] South African courts, for example, in the *Silicosis* case have allowed both the opt-in and opt-out options to plaintiffs.
- '28. The Act should deal only with class actions and public interest actions and not with organisational or derivative actions.'[784]
- '29. In the light of these recommendations and the draft Bill proposed in the Working Paper, the Commission recommends the adoption of the legislation contained in Chapter 6 of this report."[785] The proposed legislation should be updated to include private enforcement litigation and it should be adopted.

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[780] Ibid at 77.
[781] Ibid at 79.
[782] Ibid at 82.
[783] Ibid at 84.
[784] Ibid at 86.
[785] Ibid at ix.

In my thesis I have traversed issues relating specifically to private enforcement of cartel damages claims and arising from these, I submit the following additional recommendations to the White Paper:

- The definition of private enforcement should include the right of individuals, companies, and class actions to claim damages for harm suffered due to anti-competitive practices.
- The s 65 certificate issued by the Tribunal should be sufficient to show that the anti-competitive conduct has occurred.
- Rather than relying purely on the process of proving common law delictual liability, legislation should provide greater clarity on the precise protocols when bringing a damages action to the civil courts. A prima facie case must be established, and the plaintiff must show a causal link between harm and the damages suffered and provide a foundation for the legal duty necessary to support a delictual claim.
- The policy must highlight the methodologies used to quantify damages which involve determining the difference between hypothetical values based on a counterfactual scenario and actual values. This could be done by adducing evidence to establish the causal link between the illegal act and the harm caused and establishing the basis for the quantification of harm. There should also be latitude available to the courts to quantify harm on the basis of best estimates on a reasonable basis and the standard of evidence required in this regard. The appropriate methodology will be informed by the facts and circumstances of the case at hand as well as practical considerations such as the quality and availability of data.
- Damages claimants should have access to leniency documents filed in cartel cases. This would be necessary information required to strengthen their case. Where there is a question of accessing confidential information, the Tribunal should weigh the right of the Respondent to maintain confidentiality with the right of the plaintiff to access justice in obtaining said information.

- Indirect purchasers should be given standing to claim damages again. Direct purchasers are not precluded from claiming damages either and the Respondent would have the opportunity to raising the passing-on of the overcharge defence.

The recommendations listed is not an exhaustive list to generate a White Paper. The ultimate goal would be for legislative intervention based on these recommendations. This would contribute greatly to clarifying the process to claim private damages in South Africa in non-constitutional cases, and to clarification of the process to claim private damages in South Africa, in non-constitutional cases, and to reinforce access to justice.

7.4 Limitations of this thesis and suggestions for further research

The central concern of my dissertation is the obstacles faced by claimants for damages cases in cases brought within the context of competition law. Even though I look at how damages can be accessible to claimants, my focus is on damages arising from cartel conduct rather than all anticompetitive conduct. I provide some context as to why cartels are harmful to the economy, without going into substantial detail of individual cases, to show the impact of these harmful effects. I speak of deterrence as being almost a by-product of damages cases. Rather than trying to evaluate the overall deterrent effect that is needed for the purposes of cartel enforcement, I addressed compensating claimants for their specific losses as a result of cartel conduct. This is a matter of civil justice. Although mentioned in the dissertation, I did not embark on an investigation into the impact of criminalisation of cartel conduct. Instead, I sketched the role of private enforcement and the option of creating a regime of private enforcement, rather than engaging with the context of public enforcement. I am not trying to secure public ends; I am simply trying to defend private interests by way of compensatory damages for the losses that this particular form of behaviour causes.

In this dissertation, I have not embarked on an in-depth econometric analysis into cartel overcharges. There are numerous econometric models that one could create and assess. My research is limited to evaluating the legal complexities, and developing an understanding of how those econometric models fit into a legal analysis. With this dissertation, I kept in mind what Van Dijk and Verboven wrote:

> Even though the parties damaged and the amount of the damage may be clear from an economic perspective, in the end it is the legal framework within a jurisdiction that determines which violations can lead to compensation, which parties have standing to sue for damages, and the burden and standard of proof that must be met by plaintiffs and defendants.[786]

As discussed above, this dissertation has a limited scope, and there are several lines of research arising from this work that could be pursued in future. First, it would be worth expanding the study from private enforcement stemming from cartel conduct to include the challenges deriving from unilateral conduct.

The second line of research would be to explore suitable remedies in class actions. Class actions can be quite complex and could comprise hundreds or even thousands of claimants. It would be worth exploring how these actions could be managed, the distribution of rewards, the possibility of setting up a fund, and how that could be administered.

Third, setting out procedural aspects for competition law damages claims in legislation would be a worthwhile exercise. The EU has spent a significant amount of time trying to come up with a clear, easy-to-follow, directive to claiming damages. Claimants in South Africa could benefit from such a framework. This guide could extend beyond pure litigation in civil courts to include settlement agreements as well.

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[786] Theon van Dijk & Frank Verboven 'Quantification of Damages' Competition Law and Policy (*ABA Section of Antitrust Law* 2008) 2331, available at *http://economie.fgov.be/en/binaries/201021_Verboven_2_tcm327-111467.pdf*, accessed on 13 September 2010.

Finally, it would be a worthwhile investigation into whether the damages award had any deterrent effect on future cartel behaviour. One could also research how the damages award should be shared between the direct and indirect purchasers or among members of a class action. It would also be interesting to examine the economic models to calculate the interest on damages considering the length of that damages period.

7.4 Concluding remarks

This dissertation provides some useful insights and aims to assist claimants in accessing the civil courts to bring their damages actions so that that they can be compensated for cartel overcharges. South African courts are still finding their way in this area of the law. While acknowledging progress that has been made to date, this dissertation calls for further development of the law through case precedent as well as policy guidance intervention that would speed up this process and provide greater clarity for claimants in South Africa. Damages cases can be complex and costly, and the expectation is that this dissertation will contribute to reducing the uncertainties in this complex area of law.

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