Quantifying cartel damages: South African policy and recent developments

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Abstract

In this paper we analyse the implications of recent major developments on the practice of cartel damages estimation in South Africa. In the 2011 *SPC* judgment, the CAC clarified the approach to calculating administrative penalties – which has since been applied in other cases – recognising a balance between quantifying likely effects, and incentivising cooperation with enforcement efforts. On 24 June 2013, the Commission settled collusive tendering allegations with 15 construction firms, yielding penalties of R1.5 billion, under the terms of the Construction Fast Track Settlement Process – again balancing a consideration of the quantum of harm, within the practical constraints of the authority's investigative powers. On 11 June 2013, the European Commission issued a practical guide on the quantification of harm, accompanying recommendations to facilitate private damages claims and collective actions for competition infringements – this guide also attempts to balance accuracy in damages estimation with the effectiveness of the proposed new regime, through the use of a number of presumptions, assumptions and guidance. In parallel developments, the SCA has recently set out the first steps towards class actions in *CRC v Pioneer*.

With particular reference to the South African context, we discuss the economic principles behind the estimation of damages, in the light of these recent developments, and in particular we address the implications of the presumptions and other pragmatic short-cuts that have been proposed, in attempting to balance these policy objectives.

[1] This paper was written with the intention of stimulating debate and discussion on a number of novel and on-going developments in an unsettled area of policy and research both in South Africa and internationally. As such, it does not represent advice or methodological recommendations and contains unsettled opinions and proposals in order to achieve its objective within the constraints of a written paper. This paper may not reflect the views or opinions of RBB Economics.

Introduction

In this paper we consider the quantification of cartel damages, in light of a number of major recent developments.

Administrative proceedings are the starting point for almost all cartel investigations, and the consideration of likely effects should be the starting point in the calculation of administrative penalties. However, administrative penalties are applied within a wider policy context, in which a key objective is the deterrence of future cartel conduct, and the maintenance of effective competition. The effectiveness of administrative enforcement is significantly driven by the cooperation of infringing parties, most particularly leniency applicants, and the adoption of expedited procedures such as early settlement. Accordingly, administrative penalties also reflect the need to balance these policy objectives, which might justify the application of "discount" factors for cooperation, changes in behaviour, and early settlement.

Over the past three years the Competition Tribunal and Competition Appeal Court (CAC) have significantly revised the approach undertaken in the calculation of administrative penalties in South Africa in a number of closely followed cases. The preponderance of historical cases that were settled with the Commission by consent order implicitly recognised the administrative efficiency achieved by early settlement, and the *Construction Fast Track Settlement Process* provides an explicit example. We discuss these innovations and the policy objectives and substantive economic considerations that will continue to drive penalty calculations in the wake of these cases.

Private actions for damages aim to compensate the claimant for the actual damage suffered. However even in these cases wider policy objectives, including the market implications of damages awards as well as the overarching effectiveness of anti-cartel enforcement, may have a bearing on the manner in which damages are calculated and awarded. The European Commission has recently issued a practical guide on the quantification of harm, accompanying recommendations to facilitate private damages claims as well as collective actions for competition infringements. This guide attempts to balance accuracy in damages estimation with the effectiveness of the proposed new regime, through the use of a number of presumptions, assumptions and guidance. The UK has also issued draft legislation which includes proposals to facilitate private enforcement of competition litigation. We discuss the substantive economic importance of some of these proposals, and their potential application within South African practice.

Collective actions are a particular instance of private damages claims which are more likely to extend the potential scope of claims in situations involving large numbers of smaller individual damages. The European Commission and UK proposals mentioned above each include proposals to inform the approach to quantifying damages in

collective actions. In South Africa, the Supreme Court of Appeal (SCA) and Constitutional Court have recently set out the first steps towards class actions.[2] Collective actions, by their very nature, raise additional considerations, in particular concerning the basis on which damages are estimated, and the necessary procedure by which claims are progressed. We discuss the economic principles that underlie these policy considerations, and their impact on the practical estimation of damages.

[2] *Children's Resource Centre Trust v Pioneer Food*, (50/2012)[2012] ZASCA 182 (29 November 2012) *Mukaddam v Pioneer Foods and Others*, Case CCT 131/12 [2013] ZACC 23.

Administrative penalties

The calculation of administrative penalties

Over the past three years the Tribunal and CAC have significantly revised the approach undertaken in the calculation of administrative penalties in a number of closely followed cases.

The Tribunal's approach to administrative penalties was first set out in two vertical restrictive practice cases, *Federal Mogul* and *SAA*.[3]

In *Federal Mogul*, a wholesale distributor of car parts, Federal Mogul Aftermarket, was found to have infringed section 5(2) of the Competition Act on account of having set minimum resale prices for Ferodo brake pads.[4] In the reasons for its penalty decision, the Tribunal noted its general approach to setting penalties would be to use the 10% of turnover threshold provided for by section 59(2) of the Act as a reference point, and then consider each of the factors listed in section 59(3) in order to reach a final determination. In addition, the Tribunal noted that it had "*[i]dentified deterrence as the primary purpose of the imposition of administrative penalties, and that the deterrence element must have some relationship to the harm inflicted by the prohibited practice*…".[5] However, despite noting the importance of the quantum of harm caused, in common with several later cases the Tribunal had not received from the Commission, nor itself undertaken, any serious attempt to quantify this harm,[6] noting that there was "*no simple way of measuring this*" and that "*[i]t is not possible to calculate precisely, the loss of damage suffered as a result of the contravention, nor the level of profit, which accrued to the respondent*."[7]

In *SAA*, the Tribunal found that a set of loyalty rebate and individual reward schemes that South African Airways had in place with travel agents had the effect of inducing these travel agents not to deal with SAA's competitors and in turn gave rise to

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3 *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and others* (Case No. 08/CR/Mar01) and *Competition Commission v South African Airways (Pty) Ltd* (Case No. 18/CR/Mar01)

4 See the Tribunal's merits decision of 28 January 2003 in *Federal Mogul*, Case No. 08/CR/Mar01.

5 See the Tribunal's administrative penalties decision of 21 August 2003, paragraph 166 in *Federal Mogul*, Case No. 08/CR/Mar01. As noted in the decision, although the Tribunal had made a finding on the merits of the Commission's case against Federal Mogul Aftermarket in January 2003, on account of this being the first case in which it had been asked to impose an administrative penalty, the Tribunal postponed the issue of remedies for several months in order for further evidence and argument to be led by the parties.

6 Specifically, 5% of the turnover in respect of Ferodo brake pads - footnote 95 and paragraph 210 in the Tribunal's administrative penalties decision of 21 August 2003, *Federal Mogul*, Case No. 08/CR/Mar01.

7 See the Tribunal's administrative penalties decision of 21 August 2003, paragraph 209 in *Federal Mogul*, Case No. 08/CR/Mar01. The Tribunal went on to state that "*the nature of the product and the first respondent's position in the market enables us to conclude with confidence that the damage wrought to the competitive fabric of the market was significant*".

anticompetitive effects in the market for scheduled domestic air travel in South Africa.[8] The Tribunal applied specific weights to each of the Section 59(3) factors within the 10% maximum penalty in terms of section 59(2).[9]

The total weight accorded to those factors associated most closely with the extent of damage caused by the conduct (i.e. factors (a), (b) and (e)) amounted to just 4.5% out of 10%. As in *Federal Mogul*, the Tribunal did not seek to add any rigorous quantification of the harm to augment the Commission's case, concluding that the level of profit derived, and the effect on customers and consumers were either impossible to establish, or impossible to quantify more precisely than "*some loss [...] of a not insignificant nature*" [10]

The Tribunal first addressed administrative penalties in contested cartel proceedings in *Pioneer Foods*. The Tribunal stated that the weightings applied to the section 59(3) factors in *SAA* may not be appropriate in all cases,[11] noting in particular that *"absent any mitigating circumstances, [hard core cartelists] deserve the maximum penalty provided for in the Act."*[12]

The Tribunal further revised its approach in *Competition Commission v Southern Pipeline Contractors and Conrite Walls* (henceforth *"SPC"*), in relation to an alleged cartel that had operated in the supply of pre-cast concrete products for more than 40 years at both national and regional levels, and that was uncovered under the Commission's Corporate Leniency Policy ("CLP").[13] The Commission argued that fines based on affected turnover were potentially an under-deterrent to cartels of long

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8 Accordingly, the Tribunal found that the relevant incentive schemes contravened section 8(d)(i) of the Act. See the Tribunal's Reasons and Order in *SAA*, Case No. 18/CR/Mar01, 28 July 2005.

9 Specifically, the Tribunal attributed the following weights to each factor: (a) nature, duration and extent of contravention – 3%; (b) loss or damage as a result of contravention – 1%; (c) behaviour of respondent – 1%; (d) market circumstances – 1%; (e) level of profit derived – 0.5%; (f) degree of co-operation with CC and CT – 1.5%; (g) found in previous contravention – 2%. See Table 4 of the Tribunal's Reasons and Order in *SAA*, Case No. 19/CR/Mar01.

10 See paragraphs 295, 298, 316 and 338 of the Tribunal's Reasons and Order in *SAA*, Case No. 19/CR/Mar01. The penalty imposed by the Tribunal on SAA amounted to 2.25% of its affected turnover, i.e. domestic turnover of flown revenue sold through domestic travel agents (see paragraph 339).

11 See paragraph 145 of the Tribunal's Decision and Order in *Pioneer Foods*, Case No. 15/CR/Feb07 and 50/CR/May08, and paragraph 343 of *SAA*, where the Tribunal cautioned that the weightings were to serve only as a guideline and would not necessarily apply in all cases.

12 See paragraphs 148 and 151 of the Tribunal's Decision and Order in *Pioneer Foods*, Case No. 15/CR/Feb07 and 50/CR/May08. The Tribunal imposed an administrative penalty of 10% of Pioneer Food's national turnover in its baking division (excluding sales in the Western Cape), and 9.5% of its baking turnover in the Western Cape (the minor reduction to reflect the relatively shorter duration of the latter conduct). See paragraphs 173 and 174 of the Tribunal's Decision and Order in *Pioneer Foods*, Case No. 15/CR/Feb07 and 50/CR/May08. The Commission initially appealed the Tribunal's order to the CAC, challenging the Tribunal's approach to limiting the penalty to affected turnover as opposed to total turnover on the grounds that the former may not constitute an adequate deterrent for cartels of long duration. However, this appeal was subsequently withdrawn following a settlement agreement entered into between the Commission and Pioneer.

13 See the Tribunal's Reasons for Decision and Order in *SPC*, Case No. 23/CR/Feb09.

duration, and the Tribunal reviewed the approach to penalties adopted in other jurisdictions, in particular Europe and the UK.[14]

The European Commission Guidelines,[15] published in 2006, provide for the following basic procedure: an initial basic fine, calculated as a percentage of the value of relevant sales (0-30%, depending on gravity), multiplied by the number of years of the infringement, plus an additional "entry fee" deterrent for entering the cartel (a further 15-25% of relevant sales), then increased or decreased based on either aggravating or mitigating factors according to the behaviour of the respondent. The resulting fine is subject to a statutory limit of 10% of total global turnover. Further reductions are possible in the cases of leniency,[16] settlement,[17] or inability to pay.[18] A similar approach was adopted by the UK's Office of Fair Trading (OFT) in guidance first published in February 2000, updated in December 2004 and then again in September 2012.[19]

Accordingly, in *SPC* the Tribunal adopted a dual approach, on the one hand applying the "arithmetic" approach (a variant of EU and UK frameworks), and a "discretionary" approach similar to that in previous cases (both approaches subject to the cap imposed by Section 59(2)).[20] The Tribunal ultimately imposed penalties of 10% of SPC's *total* turnover, and 8% of Conrite Walls's *total* turnover given its more limited participation.[21]

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14 See, for example, paragraphs 22 – 24 and 39 of the Tribunal's Reasons for Decision and Order in *SPC*, Case No. 23/CR/Feb09.

15 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.
Official Journal C 210, 1.09.2006, p. 2-5

16 100% for first applicant, 30-50% for the second, 20-30% for the third, and up to 20% for any further applicants. See Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 8.12.2006, p. 17.

17 A potential 10% reduction. See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), Official Journal L 171, 1.7.2008, p. 3–5, and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2.7.2008, p. 1–6

18 See Information Note on the Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines.

19 See the OFT's guidance as to the appropriate amount of a penalty, OFT423, September 2012.

20 In the arithmetic approach the Tribunal applied percentages of 10% and 30% respectively to SPC and Conrite's affected turnover in the most recent year of the infringement (as per the UK and EU approaches, respectively) and multiplied the resulting "base fine" by the number of years of the infringement (in this case limited 10 years to reflect the duration of the Act). See paragraphs 75 – 81 of the Tribunal's Reasons for Decision and Order in *SPC*, Case No. 23/CR/Feb09.

21 In the case of Conrite Walls, since the arithmetic approach resulted in a penalty vastly exceeding the permissible cap, the Tribunal made its determination solely on the basis of the discretionary approach. See paragraphs 74-96 and 104-117 of the Tribunal's Reasons for Decision and Order in *SPC*, Case No. 23/CR/Feb09.

The Tribunal again noted the difficulty of quantifying harm, although it referred to testimony estimating the fall in price after the cartel had disbanded.[22]

SPC and Conrite Walls appealed the Tribunal's decision to the CAC, which found that the Tribunal had erred in its approach to the determination of penalties as it had failed to link sufficiently the size of penalty imposed to the damage caused by or profits gained from the conduct.[23]

In *Competition Commission v Aveng (Africa) t/a Steeledale and others* (henceforth *Steeledale*), 4 firms were alleged to have colluded to fix prices and allocate customers in the supply of reinforcing wire mesh products over a period between 2001 and 2008.[24] The Tribunal applied a new six step approach to penalties in respect of the two members of the cartel – RMS and Vulcania – that did not settle with the Commission.[25]

- **Step one**: affected turnover in the last financial year of the cartel's existence;
- **Step two**: the 'base amount', 0-30% of the affected turnover, based on the Section 59(3) factors: (a) nature, gravity and extent of contravention; (b) loss or damage suffered; and (d) market circumstances;[26]
- **Step three**: multiplying the base amount by the duration of the contravention, in years;
- **Step four**: rounding down, if the result exceeds the statutory cap of 10% of total turnover, from Section 59(2);
- **Step five**: adjusting the result for mitigating or aggravating circumstances to capture any further relevant factors set out in Section 59(3) (c), (e), (f) and (g);
- **Step six**: rounding down, if the result exceeds the statutory cap of 10% of total turnover, from Section 59(2).

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22 See paragraphs 83-84 of the Tribunal's Reasons for Decision and Order in *SPC*, Case No. 23/CR/Feb09.

23 See paragraphs 47, 51, and 56, *Southern Pipeline Contractors and Conrite Walls v Competition Commission*, Case No. 105/CAC/Dec10 and 105/CAC/Dec10.

24 See the Tribunal's Reasons for Decision and Order in *Steeledale,* Case No. 84/CR/Dec09.

25 The first respondent, Aveng (Africa) Limited t/a Steeledale settled a reinforcing wire mesh complaint and a separate reinforcing bar complaint, while the fourth respondent, BRC Mesh Reinforcing Limited was granted conditional immunity by the Commission in terms of the CLP. See The Tribunal's Reasons for Decision and Order in Steeledale, Case No. 84/CR/Dec09, paragraph 1. See also Senona, L., (2012), "Enforcement against cartels: a fresh approach to determining penalties in South Africa – For better or worse?"6th Annual Conference on Competition Law, Economics and Policy.

26 As noted at paragraph 144, the level of profit derived from the contravention (s59(3)(e)) could be examined at this stage or at stage 5 of the assessment depending on whether the facts were common to all firms in the cartel or differed from firm to firm.

The Tribunal noted that no effort had been made by the Commission to present evidence on the damage caused and profit derived, and it therefore had to accept Vulcania and RMS's evidence that the cartel arrangements had not been unduly profitable,[27] and applied a base amount of 15% (out of a maximum of 30%) of affected turnover.[28]

The six step approach developed by the Tribunal in *Steeledale* has subsequently been applied in a number of recent cartel proceedings.

Competition Commission v DPI Plastics (Pty) Ltd and others (henceforth *DPI*) concerned the alleged involvement of 10 manufacturers in agreements to fix prices, allocate markets and collude in tenders in the supply of various types of plastic pipes, namely polyvinylchloride (PVC) and high density polyethylene (HDPE) pipes.[29] Although the factor of 15% was used to calculate the base amount for all firms,[30] widely divergent discounts (from 20% in the case of MacNeil to 80% in the case of Petzetakis) were applied to reflect mitigating circumstances including the firm's role, cooperation with the Commission, and the level of profits derived.[31]

Competition Commission v RSC Ekusasa Mining and others (henceforth *RSC*) concerned an alleged customer allocation and bid rigging cartel in the supply of roof bolts for the mining industry, and was again brought to light as a result of a leniency application.[32] A base amount was calculated as 18% of affected turnover,[33] although the Tribunal found that it was unlikely that the conduct resulted in substantial additional profits for the firms nor substantial harm to the affected customer.[34]

The objectives of administrative penalties

In summary, and as discussed further below, the objective of administrative penalties is to promote competition through the deterrence of anti-competitive conduct, while achieving administrative effectiveness and efficiency.

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27 See paragraphs 159-164 of the Tribunal's Reasons for Decision and Order in *Steeledale,* Case No. 84/CR/Dec09.

28 In addition, the Tribunal applied a further reduction of 40% at step five to reflect mitigating factors relating to each firms' individual conduct.

29 See the Tribunal's Judgment in *DPI*, Case No. 15/CR/Feb/09. The first respondent, DPI Plastics, was granted conditional immunity in terms of the Commission's CLP.

30 All firms that had penalties imposed upon on them - the Tribunal decided not to impose a penalty on one respondent, Andrag, and dismissed the complaint against another, Gazelle.

31 The Tribunal considered the level of profits derived under the heading of mitigation, rather than the calculation of the base amount, see, for example, paragraphs 51 and 195 of the Tribunal's Judgment in DPI, Case No. 15/CR/Feb/09.

32 See the Tribunal's Reasons for Decision in *RSC*, Case No. 65/CR/Sep09.

33 Affected turnover related to a single tender for a single customer.

34 The base amount was increased by 10% under step five as, in the Tribunal's view, aggravating factors associated with the firms' conduct outweighed any mitigating circumstances. The Tribunal considered the lack of effect under the heading of mitigation, rather than the calculation of the base amount. See paragraphs 177-190 of the Tribunal's Reasons for Decision in *RSC*, Case No. 65/CR/Sep09.

Deterrence

The overall purpose of the Competition Act is to promote and maintain competition.[35] In regard to cartel offences, the purpose of administrative proceedings is to investigate and prohibit those practices that have been brought to light.[36] Administrative penalties give force to the prohibition and act as a deterrent, not only against re-offending (specific deterrence), but also against other conduct that has not been investigated (general deterrence).[37]

Effective deterrence (not to mention proportionality), requires that penalties are related to the benefit gained from infringement (which is typically related to the damage caused). Given the possibility of Type I errors (false convictions), basing penalties on estimated damages limits the potential market impact of any such errors, in particular reducing the potential disincentive effect on potentially pro-competitive activities both through the quantum and through reducing the uncertainty over the penalty.[38] The statutory limit on penalties in section 59(2) enforces some proportionality in relation to the size of the overall undertaking, although the CAC has made clear that the actual calculation of penalties should be even more closely tied to the damage caused.[39] Irrespective of the policy stance on the potential impacts of over or under deterrence, without a reasonable estimate of the damage caused (or profits derived), one cannot discuss whether or not a particular penalty is appropriate to achieve the fundamental deterrence objective.

Administrative effectiveness and efficiency

In addition to the mandate to promote competition, the preamble to the Act also recognises that "*credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy*." In regard to cartel offences the effectiveness of administrative bodies is driven by cooperation from infringing parties, in particular leniency applicants.

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35 Chapter 1, Section 2.

36 Chapter 2, Section 4.

37 See the Tribunal's administrative penalties decision of 21 August 2003, paragraph 166 in Federal Mogul, Case No. 08/CR/Mar01. See also the European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210, 1.09.2006, p. 2-5, paragraph 4.

38 Potential negative effects might include the discouragement of investment in potentially pro-competitive activities, such as output expanding joint ventures, or trade association membership. Damage based penalties would give firms additional comfort to base their decisions to engage in such activities more according to the effect on consumer welfare, rather than on the appearance of the arrangements.

39 See paragraphs 51, 56 and 57 in Southern Pipeline Contractors and Conrite Walls v Competition Commission, Case No. 105/CAC/Dec10 and 105/CAC/Dec10 CAC. Note that deterrence might be achieved by the combination of an administrative penalty and the potential for follow on damages, particularly where the administrative penalty is limited to 10% of turnover.

"*3.6 The CLP therefore serves as an aid for the efficient detection and investigation of cartels, as well as effective prosecution of firms involved in cartel operations.*", and

"*16.2 […] leniency policies in almost all jurisdictions concerned have proved to be one of the most effective tools to deal with cartels.*"[40]

The Commission's CLP has contributed to a huge increase in the number of cartel investigations, as well as facilitating the successful settlement of these cases.[41]

This experience is echoed internationally. By way of example, the US DOJ's leniency program has been described as "*the Division's most effective generator of international cartel cases*", and leniency applications increased twelve-fold following the program's revision, resulting in some USD1.5 billion in criminal fines.[42]

All agencies are subject to budgetary constraints, but particularly in a developing country there is an acute need to focus resources and operate efficiently. This is directly recognised in the Corporate Leniency Policy, as well as the references to cooperation under Section 59(3) of the Act.[43] The preponderance of cartel cases that have been settled with the Commission by consent order clearly recognise the importance of administrative efficiency achieved by early settlement, and the recent *Construction Fast Track Settlement Process* provides a further illustration.

In light of a number of concluded cartel cases and ongoing investigations relating to the construction sector, in 2011 the Commission invited firms in the construction industry to participate in a "fast track" settlement process which offered reduced penalties in return for expedient, full and truthful disclosure.[44] In addition, the Commission noted that the process would make provision for follow on damages actions. By June 2013, the Commission had reached settlement with 15 construction firms, which agreed to penalties collectively totalling R1.46 billion.[45] Corruption Watch, a civil society organisation made submissions to encourage the Tribunal to confirm the settlement

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40 See, for example, the Competition Commission's Corporate Leniency Policy, http://www.compcom.co.za/assets/Uploads/CLP-public-version-12052008.pdf

41 *Unleashing Rivalry*, Competition Commission and Competition Tribunal, 2009, page 54

42 A Summary of the Antitrust Division's Criminal Enforcement Program, James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, ABA Section of Antitrust Law Annual Meeting, (August 12, 2003), available at http://www.justice.gov/atr/public/speeches/201477.htm

43 See Section 59(3)(f). See also "The Commission's Approach to Prioritisation", *Competition News*, June 2008.

44 See paragraph 6, invitation document, and http://www.comptrib.co.za/assets/Uploads/Collusive-Tendering/Annexure-A.pdf

45 http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Construction-Fast-Track-Settlement-Process-Media-Release.pdf

agreements primarily on the grounds of administrative efficiency and the facilitation of follow on civil damages claims.[46]

A proposed replacement for the six step approach to setting penalties

The approach adopted by the Tribunal and CAC following *Steeledale* seems to introduce some unnecessary steps in the calculation. While nuances will no doubt apply to any individual case, these can surely be handled within the inherent discretion afforded to the Tribunal. There are effectively two primary policy objectives being targeted, within a statutory constraint. It would seem more straightforward to recognise those explicitly. Within the list of factors that *must* be considered, as set out in section 59(3):

Three relate to the damage caused:

> *(a) the nature, duration, gravity and extent of the contravention;*
>
> *(b) any loss or damage suffered as a result of the contravention;*
>
> *(e) the level of profit derived from the contravention;*

Three relate to the behaviour of the respondent.

> *(c) the behaviour of the respondent;*
>
> *(f) the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and*
>
> *(g) whether the respondent has previously been found in contravention of this Act.*

The residual factor might be classed under either of these areas:

> *(d) the market circumstances in which the contravention took place;*

Market circumstances might relate to the damage caused (if the cartel took place in circumstances in which customers were vulnerable or highly price sensitive), or might relate to the behaviour of the respondent (if the cartel took place in particularly challenging circumstances for the conspirators).

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[46] Available at: http://www.comptrib.co.za/assets/Uploads/Collusive-Tendering/Corruption-Watch-SUBMISSIONS-Final.pdf

The first step in the calculation should focus on the damage caused. With this in mind, there seems to be little basis for the limitation to 0-30% of "affected turnover", nor multiplying the most recent year's turnover by a simple integer. Not only is it easy to think of cases in which the most recent year's turnover would be a poor means to gauge the total profitability, or total damage caused by a cartel of significant duration,[47] but the Tribunal has already encountered such circumstances in practice.[48]

As discussed above, a more natural starting point would be an estimate of the damage caused, which is more closely linked to the objective of deterrence. Clarifying this first step as centred around the damage caused would also do away with the potential for double counting, when considerations of "effect" are also dealt with in mitigation.[49]

Being an administrative proceeding, and considering the discretion available to the Tribunal, it seems that a rough estimate would be acceptable at this stage. However, bearing in mind that the penalties can often be very large, it seems justifiable to make a reasonable effort in estimating the damage caused at this stage.[50] The interests of justice (or if the doctrine of proportionality were extended to consider the costs of administrative proceedings) might require that the degree of precision involved in the quantification of harm might be tailored to the circumstances of each case, in particular either the affected turnover, or total turnover of the respondents. In this regard, despite making few attempts to quantify the damage caused in the cases described above, the Tribunal has discussed some simple evidence that might be used in appropriate circumstances,[51] and a multitude of approaches of differing complexity have been applied internationally.[52] Furthermore, the Tribunal has recognised the potential negative impacts of costly proceedings on firms in considering the overall interests of justice.[53]

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47 For example, firms' revenues and profitability might fluctuate substantially from year to year, cartels may vary in their implementation, and cartels may break down following a period of relative instability and unprofitability.

48 See paragraph 156 of the Tribunal's Reasons for Decision in *RSC*, Case No. 65/CR/Sep09, in which the Tribunal used an average of the last two years' turnover in the calculation of the penalty.

49 See the Tribunal in *DPI*, paragraphs 51 and 195 of the Tribunal's Judgment, Case No. 15/CR/Feb/09, and *RSC,* paragraphs 177-181 (in relation to the level of profits) and 181-182 (in relation to the harm caused) of the Tribunal's Reasons for Decision, Case No. 65/CR/Sep09.

50 By way of a very rough comparison, and recognising the organisational and legislative challenges involved, the agencies' budgets for all activities were roughly 1/3 the size of total penalties imposed over the period 2006-2012 (Competition Commission and Competition Tribunal Annual Reports 2006-2012).

51 See paragraphs 83-84 of the Tribunal's Reasons for Decision and Order in *SPC*, Case No. 23/CR/Feb09,
paragraphs 47, 51, 56, 57 of *Southern Pipeline Contractors and Conrite Walls v Competition Commission*, Case No. 105/CAC/Dec10 and 105/CAC/Dec10

52 See the discussion of the EC Practical Guide, below.

53 See paragraphs 204-211 of the Tribunal's Reasons for Decision and Order in *Steeledale,* Case No. 84/CR/Dec09

In a recent working paper (Muzata *et al*., 2012),[54] economists at the Competition Commission acknowledge that a successful cartel enforcement policy depends on administrative penalties being linked to the quantum of damage caused (through deterrence and proportionality), but then emphasise the resource intensity and practical difficulties of damages estimation, and accordingly downplay the relevance of the exercise in particular in settlement proceedings. In our view the authors' fail to acknowledge the broad range of techniques that have been applied even in studies cited within the article, and have over-emphasised the costs and difficulties of quantifying cartel effects, particularly when the choice of methodologies might also be informed by proportionality, for example considering the size of affected turnover. Moreover, the paper does not appear to consider that rough rules of thumb, such as the Tribunal's six step procedure, might result in either over or under deterrence, and hence they under value the economic efficiency benefits that could derive from penalties that are more closely aligned with actual harm caused.

Following this first step, discounts or premiums might be applied based on the behaviour of the respondent. Clearly much discretion is involved in this step, and further guidance would be helpful here.

Finally, the resulting value must comply with the statutory constraint of 10% of total turnover.

Market impact and the inability to pay

One further policy consideration that has been recognised in the Tribunal's decision making is the potential direct impact of the administrative penalty itself on the process of competition. While administrative penalties might correctly be classified as fixed costs, which should not affect the short run trade-off between pricing and a firm's net profits, the timing over which penalties are paid could directly affect cash flow, and a firm's ability to maintain or expand production. In the longer term, onerous penalties could affect borrowing costs, and may increase the level of pricing that a firm is willing to withstand or respond to, making it a less effective competitor. The Tribunal has recognised some of these practical implications in the cases described above.[55] As discussed further below, this is also an important consideration in designing compensatory mechanisms for damages.

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[54] Muzata T.P., S. Roberts and T. Vilakazi, 2012, "Penalties and settlements for cartels in South Africa seen through an economic lens", UJ Centre for Competition Economics working paper 9/2012.

[55] In *SAA*, the Tribunal considered and then discounted this issue, as the State, SAA's shareholder, had always in the past come to its aid when it had been in financial straits (see paragraph 331 of the Tribunal's Reasons and Order in SAA, Case No. 19/CR/Mar01.
In *Steeldale*, as Vulcania had operated at a loss in the year prior to the imposition of the penalty, the Tribunal allowed both firms to pay their penalties over two years (See paragraph 199 of the Tribunal's Reasons for Decision and Order in Steeledale, Case No. 84/CR/Dec09).
See also the Tribunal's Judgment in *DPI*, Case No. 15/CR/Feb/09.

Follow on damages

Private actions for damages are aimed directly at compensating the claimant for the actual damage caused. However, even in these cases wider policy objectives, including the implications of damages awards, have a bearing on the manner in which damages are calculated, and claims considered within this context.

Prior to the institution of the class action proceedings discussed below, we are aware of only a single civil damages claim having been pursued since the inception of the Competition Act in 1999 – Nationwide Airlines' 2008 action for civil damages against SAA, a claim that subsequently settled out of court.[56] Similar actions seem likely to feature more prominently in future, *inter alia*, in the wake of the *Construction Fast Track Settlement Process*.

However, internationally, there have been number of important recent developments in this area. First, on 11 June 2013 the European Commission published three related documents: a Proposal for a Directive to promote and facilitate private actions for damages ("Proposed Directive"), a Recommendation on collective redress mechanisms ("Recommendation on Collective Redress"), and a Practical Guide on the quantification of harm in antitrust infringements ("Practical Guide").[57] Second, on 12 June 2013 the UK published a draft Consumer Rights Bill, which includes proposals to facilitate private enforcement of competition law, including through collective actions.

While a full review of these developments is outside the scope of this paper, we briefly outline some of the important aspects of these initiatives in particular commenting on those features that might have implications for the calculation of damages in follow on actions in South Africa.

The key substantive points that we highlight are establishing damages, and the treatment of leniency.

Establishing damages

In the first instance, the Proposed Directive sets out a rebuttable presumption of harm to direct purchasers, in the event of a cartel infringement decision.[58] While this is a presumption of some harm, there is no presumption as to the level of harm suffered. The Proposed Directive makes clear that damages are to be compensatory, as opposed to punitive or exemplary damages.[59] Conversely, practice in the US allows for

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[56] See http://www.bowman.co.za/News-Blog/Blog/NATIONWIDE-SETTLES-DAMAGES-CLAIM-FOR-SAA-S-ABUSE-OF-DOMINANCE-TAMARA-DINI

[57] See http://ec.europa.eu/competition/antitrust/actionsdamages/index.html. The European Commission also released a Communication on quantifying harm ("EC Communication") on the same day

[58] Proposed Directive, Article 16.

[59] Proposed Directive, Article 2.

treble damages,[60] and at least one case in the UK allows exemplary damages.[61] While the combination of administrative penalties and follow on damages actions might create some scope for exemplary or punitive damages in total, there seems that there is no formal mechanism by which the two sets of financial penalties might be coordinated or even considered together.

In regard to the quantification of harm, the Proposed Directive states that courts must ensure that the burden and level of proof does not render the exercise practically impossible or excessively difficult.[62] In order to assist claimants more generally, claimants will be allowed proportionate disclosure of evidence, once they have established plausible grounds for having suffered harm.[63] This discussion of a proportional approach to the quantification of harm could helpfully be applied following the consideration of the affected turnover, or nature of the case at hand.

The Practical Guide is informative and non-binding,[64] and attempts to balance accuracy in damages estimation with the effectiveness of the proposed regime, through the use of a number of presumptions, assumptions and by providing guidance. More generally the Guide aims "*to offer assistance to national courts and parties involved in actions for damages by making information on quantifying harm caused by infringements of the EU competition rules more widely available*".[65] In that sense it is to be welcomed, and may provide a useful reference point for other agencies. In particular, the guide provides a strong endorsement of the counterfactual approach under a compensatory damages framework, which is to place the injured party in the position in which it would have been, absent the infringement.[66] While several short-cuts, estimation methods, and practical proxies are discussed, the primary aim is clear and seems uncontroversial. In particular, the Practical Guide outlines a number of potential methods, and emphasises the need to ground the choice of methodology and information in a good knowledge of the industry,[67] the need to cross check and support

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60 Clayton Act, Section 4. Note that in practice US courts typically awards antitrust damages on the basis of overcharge alone, as opposed to considering the entire compensatory damage, which may also include a deadweight loss arising from a reduction in the volume of good sold). This may result in undercompensation, and underdeterrence. See, for example, Rubinfled, D.L., "Antitrust Damages", Research Handbook on the Economics of Antitrust Law, ed. Einer Elhauge, November 21, 2009, submitted in regard to the workshop on the quantification of antitrust harm in actions for damages, European Commission, 26 January 2010.

61 See UK Competition Appeal Tribunal, 2Travel Group v Cardiff City Transport Services [2012] CAT 19, 5 July 2012. However, as discussed below, the UK draft Consumer Rights Bill prohibits the UK Competition Appeal Tribunal from awarding exemplary damages in collective proceedings, see Draft Consumer Rights Bill, draft Amendment to the Competition Act, 1998, Section 47C (1).

62 Proposed Directive, Article 16.

63 Proposed Directive,, Article 5.

64 Communication, paragraph 12.

65 Communication, paragraph 11.

66 Practical Guide, paragraph 11.

67 Practical Guide, paragraph 40

necessary assumptions,[68] and the need for courts to engage in the substantive assessment of potential alternative approaches, in order to make an objective choice concerning the most appropriate methods of estimation, their implementation, and interpretation.[69]

However, the Practical Guide goes further, and also includes an attempt to support the presumption of harm in the Proposed Directive.[70] While proportionality might dictate the desired level of accuracy of a particular estimate of harm, it is difficult to see how the principle of effectiveness[71] would justify the presumption of a particular *level* of harm, in the absence of any evidence. It is also difficult to see why a "safety" adjustment, applied to take into account the uncertainties in a damages estimate, should be referred to as a "discount",[72] in the absence of any evidence that those uncertainties might be symmetrical, nor that the risks of over enforcement outweigh those of under enforcement.[73] It is clear from the Practical Guide and the Proposed Directive that compensatory damages are intended to consider the net position of the claimant, such that respondents will have the ability to raise a passing on defence.[74]

Indirect purchasers will also benefit from a rebuttable presumption of harm, following the proof of certain initial facts: infringement, implementation (an overcharge was implemented in respect of sales to direct customers), and a linkage such that the indirect purchases were either of the same goods or services, or contained the goods or services that were subject to the direct overcharge).[75] Clearly this raises the risk of a conflict between the two sets of potential claimants. The Proposed Directive

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68 Practical Guide, paragraph 100.

69 Practical Guide, paragraphs 122 to 125.

70 Practical Guide, paragraphs 139-145. In particular paragraph 141, which cites a study of cartels discussed in peer reviewed academic articles or books (footnote 118 acknowledges that the selection of such studied cartels might be biased within the sample of all cartels). See also paragraph 30, which describes that under some legal rules the intended price rises might be used as an estimate of the quantum of actual price rises.

71 Practical Guide, paragraphs 2, 93.

72 Practical Guide, paragraph 95.

73 See, for example, Bos, I. and Schinkel M. P. 2006 'On the scope for the European Commission's 2006 fining guidelines under the legal maximum fine', Journal of Competition Law and Economics, 2(4): 673-682
Harrington, J. 2012 'Optimal Deterrence of Competition Law Infringements', presentation at the conference Deterring EU Competition Law Infringements: Are We Using the Right Sanctions? Brussels, 3 December
Wils, W. P. 2006 'Optimal Antitrust Fines: Theory and Practice', World Competition, 29(2)

74 Proposed Directive, Article 12. Note that this defence will not be available where it is legally impossible for indirect purchasers to claim against damages that have been passed on. While this is a policy decision that might result in overcompensation of claimants who have passed damages on to indirect purchasers not in a position to recover damages, this may be weighed against the alternative of under-punishment of infringing firms.

75 Proposed Directive, Article 13.

addresses this to some extent by mandating coordination of actions for damages at different levels of the supply chain.[76]

This is an important consideration in South Africa, where there appears to be no formal mechanism by which different, and potentially conflicting, claims are coordinated (much less considered in the light of administrative penalties that might have preceded those claims). Judicial or legislative guidance on this point would address the policy challenge presented by actions subject to this complication.

Leniency

The Proposed Directive also makes provision for leniency applicants in recognition of the important role they play in the overall policy of cartel enforcement. Leniency applicants will be subject to some exceptions from joint and several liability for damages caused by all infringing firms.[77]

This echoes similar considerations addressed by the US ACPERA, first passed in 2004, and extended and slightly modified in 2009 and 2010, which increased criminal penalties for antitrust violations but eliminated treble damages and joint and several liability for successful leniency applicants that cooperate with claimants in follow on damages actions. In the six years after 2004, the number of leniency applications in cases that the DOJ was not previously aware of doubled.[78]

The recent decision in *Premier Foods v Norman Manoim* and others[79] makes clear that leniency applicants should expect that the Tribunal will issue a Section 65(6)(b) notice to claimants for the purpose of commencing follow on damages claims.[80] In light of the international experience, in which potential leniency applicants may consider the severity and likelihood of follow on damages claims when weighing up leniency, this could be a lost opportunity to encourage leniency applicants, particular at a time when follow on damages constitute a growing prospect, whether individually or collectively.

Additionally, the draft Directive ensures that leniency corporate statements and settlement submissions to the competition authority will not be disclosed for the

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76 Proposed Directive, Article 15.

77 Proposed Directive, Article 11.

78 Barnett, T.O., 2006, "Criminal Enforcement Of Antitrust Laws: The U.S. Model" (September 14, 2006) www.usdoj.gov/atr/public/speeches/218336.htm.
Lynch, Niall, and Fox, Kathleen, 2011 "How ACPERA Has Affected Criminal Cartel Enforcement", Law360, New York (August 11, 2011).

79 *Premier Foods (Proprietary) Limited v Norman Manoim N.O. and others*, Northern Gauteng High Court, 2 August 2013.

80 We have not been able to follow all of the reasoning in this decision. In particular the decision attributes meanings to words used by the legislature in the drafting of the Act; some of these attributions seem ambitious, given that the Act was drafted far in advance of the Commission's CLP, while other attributions seem unclear even between adjacent sections of the Act (see, for example, paragraph 22).

purpose of follow on actions for damages.[81] This provision is intended to address the uncertainty (and potential damage to the leniency policy) following the Pfleiderer case.[82]

Similar issues were canvassed in *Competition Commission v ArcelorMittal SA*,[83] in which the Commission had resisted disclosure of certain documents provided by a leniency applicant on the grounds that they are privileged because they had been prepared for the purpose of litigation, and also that they could be restricted under the Commission's rules. The SCA ruled that while the Commission was entitled to claim privilege over the documents because they had been prepared for the purpose of litigation, the Commission had waived the privilege, as they had any other right to restrict the use of the documents, by making reference to the documents in its complaint against Mittal and Cape Gate.[84]

Policy considerations with regard to follow on damages

As is clear from the discussion above, follow on damages actions raise important policy considerations in regard to the effectiveness leniency programmes, and the deterrence effect of the total financial penalties levied against an infringing firm, which do not merely apply to administrative proceedings.

In regard to leniency, the application of follow on damages may significantly affect the overall policy objective of effective cartel investigations, and ultimately deterrence that is so strongly driven by the prospect of leniency for applicants. Follow on damages actions can affect the incentives of leniency applicants in two main ways: first through the degree of liability of leniency applicants for follow on damages claims; and second through the treatment of documents provided to competition authorities under leniency policies. In addition, the prospect of criminal sanctions would provide a further consideration for potential leniency applicants. While the *ArcelorMittal* case appears to settle the approach to leniency documents, it appears that there is an opportunity to provide much needed guidance in regard to the other two areas.

In regard to the balance of the total financial penalties levied against an infringing firm, there seems to be no formal mechanism by which to coordinate the penalties clamed under administrative proceedings, and by multiple potentially conflicting claimants for

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81 Proposed Directive, Article 6.

82 *Pfleiderer v Bundeskartellamt*, European Court of Justice, Case C-360/09. The Court of Justice ruled that EU law does not prevent the disclosure of leniency documents submitted to the European Commission, but rather that the relevant Member State courts must undertake a balancing exercise considering the needs of claimants in follow on damages actions, and the likely impact on the effectiveness of the leniency policy. See also *National Grid v ABB and Others*, EWHC [2012] 869 (Ch)

83 Supreme Court of Appeal, 31 May 2013.

84 Although the SCA left open the possibility that Scaw might still be able to claim that the documents were confidential, which is a matter still to be decided by the Tribunal.

follow on damages.[85] Particularly in regard to multiple conflicting claimants, judicial or legislative guidance on this point would be likely to considerably facilitate coherent proceedings for actions subject to this complication.

Class actions

Class or collective actions constitute a specific kind of follow on damage action, and the potential for such actions has received much attention in Europe,[86] and recently in South Africa.[87] In addition to the issues in common with individual civil actions for damages (such as a consideration of the potential impact on deterrence and leniency programmes), class actions invoke further policy challenges. In particular, class actions must balance the conflicting objectives of promoting actions which would be less efficient or uneconomic to bring individually, with the potential to create incentives to bring unmeritorious claims, through the aggregative effect of damage awards and the representative nature of such claims (in which individual consumers may not face an adverse costs order in the event of losing the case).

In order to balance the incentives to bring unmeritorious claims, both the UK[88] and EC[89] proposals preclude exemplary damages. Each set of proposals also provides detailed recommendations in regard to the appropriate representatives, and acceptable funding mechanisms. The South African experience has also considered the suitability of the representative, although the approach to funding appears more flexible than that in the European proposals. An important bar to unmeritorious claims is an initial substantive certification stage.

Certification

The US Supreme Court has recently affirmed the requirement for a substantive assessment of the merits, at the stage of certification.[90]

While both the EU and UK proposals mandate some form of certification, neither provides any detailed substantive guidance at this stage.[91]

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85 Although the Act makes clear that if administrative penalties ordered by the Tribunal include any direct compensation of victims, then those victims are precluded from further actions for damages. See Section 65(6)(a) of the Act.

86 See the Recommendation on Collective Redress, and more generally http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

87 See *Children's Resource Centre Trust v Pioneer Food*, (50/2012)[2012] ZASCA 182 (29 November 2012), and *Mukaddam v Pioneer Food,* Case CCT 131/12 [2013] ZACC 23.

88 The UK draft Consumer Rights Bill prohibits the UK Competition Appeal Tribunal from awarding exemplary damages in collective proceedings, see Draft Consumer Rights Bill, draft Amendment to the Competition Act, 1998, Section 47C (1).

89 Recommendation on Collective Redress, para 31.

90 See, for example, *Whirlpool v. Glazer* (No. 12-322), *Comcast Corp. v. Behrend* (No. 11-864), and *Wal-Mart Stores v. Dukes* (No 10-277)

The EU draft Recommendation merely indicates that:

> *"8. The Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.*
>
> *9. To this end, the courts should carry out the necessary examination of their own motion."*[92]

The UK draft Bill requires that collective proceedings may only be continued if the Competition Appeal Tribunal makes a collective proceedings order. However, the substantive requirements for such a collective proceedings order are yet to be set out in the rules of the Competition Appeal Tribunal, apart from a criterion that the collective claims:

> *"raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings."*[93]

The South African jurisprudence has recently developed an approach to certification that has been set out in relation to the class applications following on from the Tribunal's decision in *Pioneer Foods.*

In *CRC v Pioneer,*[94] which concerned an application for class certification on behalf of indirect purchasers, the end consumers of bread, the SCA set out the relevant considerations in regard to class certification as: the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action raising a triable issue (a "prima facie" case); whether the representative is suitable; and, whether a class action is the most appropriate procedure to adopt. [95]

Mukaddam v Pioneer[96] concerned a parallel application for class certification on behalf of direct purchasers of bread, the bread distributors. The Constitutional Court endorsed prior certification, acknowledging that permitting some class actions may be oppressive, and thus inconsistent with the interests of justice.[97] The Constitutional

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91 It is beyond the scope of this paper to provide a full discussion of these proposals.
92 EU Draft Recommendation, "Admissibility", para 8.
93 See Draft Consumer Rights Bill, draft Amendment to the Competition Act, 1998, Section 47B (4-6), and draft Amendment to the Enterprise Act 2002, Section 15B(1-2). In addition, another requirement that has been specified is that the representative is suitable.
94 *Children's Resource Centre Trust v Pioneer Food*, (50/2012)[2012] ZASCA 182 (29 November 2012)
95 See *CRC v Pioneer*, paragraph 23
96 *Mukaddam v Pioneer Foods and Others,* Case CCT 131/12 [2013] ZACC 23.
97 *Mukaddam v Pioneer*, para 38.

Court reiterated a similar list of factors that should be considered in a flexible manner in deciding certification in the "*interests of justice*":[98]

- The existence of an objectively identifiable class,[99]
- A cause of action which raises a triable issue,[100]
- Common issues of fact or law.[101]

Collective actions present the potential for significant efficiencies in the simultaneous hearing of multiple similar claims. However, such a benefit comes at the cost of a substantive assessment, at the certification stage, to avoid the most obvious unmeritorious claims, purely designed to extract large settlement payments. The SCA and Constitutional Court have acknowledged this balance, and it remains for lower courts to apply the relevant principles to the cases at hand.

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[98] *Mukaddam v Pioneer*, paras 47, and 34-39.
[99] *Mukaddam v Pioneer*, para 15.
[100] *Mukaddam v Pioneer*, para 16.
[101] *Mukaddam v Pioneer*, para 17. "*The commonality must be of a nature that the determination of the issue may be achieved by deciding a single ground common to all claims.*" See also *CRC v Pioneer*, para 44, and footnote 45, quoting Scalia J in *Wal-Mart* "*The common contention, moreover, must be of such a nature that it must be capable of classwide resolution - which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke*", and quoting McLachlin CJC in *Hollick v Toronto (City)*, "*an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" ... Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims."*

Conclusion

We have discussed a number of important recent developments in regard to the quantification of cartel damages across administrative proceedings, and individual and collective follow on damages claims.

The primary objectives of administrative proceedings are to achieve competitive outcomes through the deterrence of cartel conduct within an effective overall administration of anti-cartel policies. Such policies crucially depend on cooperation from infringing firms, particularly leniency applicants. Administrative efficiency additionally depends on the ability to provide incentives for infringing firms to cooperate with investigations and settlement procedures.

In the light of recent CAC and Tribunal cases, we propose a more straightforward, and proportionate approach to the calculation of administrative penalties that is more closely grounded in the deterrence objective: first, administrative penalties should be grounded in an estimate of the damage caused (estimated to a level of precision and sophistication proportionate to the case at hand); second, such penalties may also need to balance other policy objectives, which could be achieved by applying factors with regard to the behaviour of the respondent firm.

Private actions for cartel damages have yet to take hold in South Africa, although recent cases, including the *Construction Fast Track Settlement Process*, provide further motivation for plaintiffs to bring such cases. Actions for damages have a potential impact on deterrence, and also encounter other policy challenges, in particular the effectiveness of cartel enforcement through altering the incentives to apply for leniency. Recent developments in the UK and the EC highlight policy areas in which further guidance is required in South Africa, in particular regarding the coordination of conflicting claims, and the treatment of leniency applicants.

Collective actions are a particular instance of private damages claims, and not only face similar considerations in regard to their potential effects on deterrence and leniency policies, but also extend the scope of claims in situations involving large numbers of smaller individual damages. Recent EU and UK proposals, as well as recent US Supreme Court decisions strengthening the approach to substantive certification, aim to address the potential for unmeritorious litigation. The SCA and Constitutional Court have recently set out a framework for class certification in South Africa that requires a substantive assessment at the stage of certification in an attempt to ensure that only valid cases proceed to trial, while allowing efficient access to justice for suitable claims.