Compensating for harm arising from anti-competitive conduct:

Follow-on damages litigation, class actions, the relationship between public and private enforcement and models for quantifying harm *

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Seventh Annual Competition Law, Economics and Policy Conference
5 & 6 September 2013

* Kindly note that this paper is an academic research exercise and does not necessarily represent the views of Edward Nathan Sonnenbergs Inc.

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1. **Introduction**

It is trite in competition law that anti-competitive practices can result in harm to an economy and impede the proper functioning of markets. Infringements of the Competition Act No. 89 of 1998 (as amended) (the “Competition Act”) also cause significant harm to individual consumers and firms alike. Accordingly, many jurisdictions, including South Africa, make provision for those parties that have suffered harm at the hands of a firm that has engaged in an anti-competitive practice to claim compensation or damages for the harm that they have suffered.

The view held in the European Union (“EU”) is that the goal of a fine or an administrative penalty is that of deterrence, while the objective of a claim for damages is to “repair the harm suffered because of the infringement.”¹ Similarly, in South Africa, “the primary object of an award for damages is to compensate the person who has suffered harm”² or to place the plaintiff in the position that they would have been in had the anti-competitive act not been committed, whilst the approach in the United States of America (“US”) is that a well-functioning process to award damages to claimants may also be actively and effectively used to deter and punish anti-competitive behaviour.

In South Africa, section 65 of the Competition Act creates a bifurcation of jurisdiction in respect of civil actions between the Competition Tribunal (the “Tribunal”) and Competition Appeal Court (the “CAC”) on the one hand, and civil courts on the other. The Tribunal, and the CAC on appeal from it, have exclusive jurisdiction to determine whether there has been a contravention of the Competition Act. However, save for the Tribunal’s power in terms of section 49D to confirm consent orders that contain damages awards, only a civil court may award damages suffered by private litigants as a result of such contraventions, and must apply the determination of the Tribunal or CAC in doing so. In other words, an individual or firm that has suffered damages as a result of a contravention of the Competition Act must bring their action to recover damages in the Magistrate’s Court or High Court. Such a claim for damages is known as follow-on litigation or follow-on damages litigation.

In a well-functioning competition law regime, follow-on litigation that allows individuals and firms that have suffered harm as a result of anti-competitive conduct to claim damages will assist authorities in the deterrence of future contraventions and increase the degree of compliance with the law.³ However, it is noteworthy in this regard that, since 2006, in only

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³ Supra n 1 19.
25% of all antitrust infringement decisions taken by the EU Commission have the ‘victims’ sought to obtain compensation.4

The picture in South Africa is arguably an even bleaker one: to date, although there have been attempts to seek compensation; no court has awarded damages to a claimant for harm suffered as a result of anti-competitive conduct5. There is presently little case law regarding follow-on litigation, particularly in the competition law arena. There have, however, recently been some developments in South African jurisprudence concerning follow-on litigation. Having regard to such recent developments and in anticipation of further developments in the near future, this paper aims to examine and describe the framework for follow-on damages litigation in terms of the Competition Act and consider how civil courts in South Africa may approach these claims in the future.

In this regard, we consider some of the possible interpretations of section 65 of the Competition Act (that deals with civil actions and jurisdiction) drawing on recent case precedent. We further consider the development of class actions in South Africa, having regard to the approaches adopted in the US and EU. We then turn to the issue of the relationship between public and private enforcement, and finally, we consider the issue of the quantification of harm, the various methods thereof and their potential applicability to the South African context.

2. Follow-on damages claims in South Africa

2.1. The legislative framework

As stated above, the Tribunal, and the CAC on appeal from it, have exclusive jurisdiction to determine whether there has been a contravention of the Competition Act.6 Following such a determination, a claimant seeking damages in a civil court must file with the civil court a notice from the Tribunal or CAC (a “section 65 certificate”), which is binding on the civil court, certifying that the conduct in question has been found to be a prohibited practice.7 Civil courts thus have no jurisdiction to consider anew whether the conduct in question occurred or whether it falls foul of the Competition Act – the certificate serves as conclusive proof thereof.

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5 We note that this does not take into account any award of damages made by the Tribunal pursuant to uncontested settlement arrangements.
6 Section 65(2) of the Competition Act.
7 Section 65(6)(b) of the Competition Act.
At the same time, save for the Tribunal’s power in terms of section 49D to confirm consent orders that contain damages awards, only a civil court may award damages suffered by private litigants as a result of such contraventions, and the civil court must apply the determination of the Tribunal or CAC in doing so.

It is thus clear that once the Tribunal or CAC have provided the section 65 certificate, a claimant must approach the civil court to pursue compensation. The question remains as to the kind of claim, being delictual or statutory, that arises and the essential requirements that a claimant has to meet in order to get compensation.

In the remainder of this section, we consider the two contending interpretations of section 65 regarding the kind of claim to which it might give rise – most recently the subject of discussion in the Supreme Court of Appeal (“SCA”) decision of *Children’s Resource Centre and others v Pioneer Food and others*. Although it was unnecessary in that case for the court to determine the correct interpretation of the section, it hinted at textual and other factors that would be instructive in such a determination. After briefly restating the facts of the *Pioneer Food* case, we consider hereunder the implications – advantages and pitfalls – of each interpretation.

### 2.2. *Children’s Resource Centre and others v Pioneer Food and others*

By way of background, in December 2006, the Competition Commission (“Commission”) received complaints that the three largest bread producers in the Western Cape province – Pioneer Food (“Pioneer”), Tiger Consumer Brands (“Tiger”) and Premier Foods (“Premier”) and others (collectively, the “bread producers”) had co-ordinated the implementation of price increases.

Although the relevance will only become apparent below, it is worth noting that the bread producers do not sell directly to the general public. Instead, their direct customers are large retail groups; smaller, general traders; and independent bread distributors or agents, who on-sell to smaller retailers and other customers. Prices are set nationally (“list prices”); and discounts and rebates off those list prices are negotiated individually with each retailer or distributor, and vary from one retailer or distributor to another, according to factors such as volume and location.

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8 Section 65(6)(a) of the Competition Act states that a person that has been awarded damages by way of a consent order is precluded from pursuing them in a civil court.

9 *Section 65(2)(a) of the Competition Act.*

10 *Children’s Resource Centre and others v Pioneer Food and others 2013 (2) SA 213 (SCA) (“Children’s Resource Centre”).*

11 *Id at para 2.*

12 *Id at para 4. Also see the judgment of the Western Cape High Court The Trustees for the Time Being of the Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd 2011 JDR 0498 (WCC); [2011] ZAWCHC at paras 9 to 11.*
After receipt of the allegations against the bread producers, the Commission conducted a preliminary investigation, after which it initiated a complaint (the “Western Cape complaint”) against the bread producers. Premier came forward and applied for leniency under the Commission’s Corporate Leniency Policy (“CLP”). On the basis of information provided by Premier, the Commission initiated a second complaint (the “national complaint”).

In February 2007, the Commission referred the Western Cape complaint against Tiger and Pioneer to the Tribunal. Tiger entered into a settlement agreement with the Commission in respect of the Western Cape and national complaints, which was made a consent order of the Tribunal in November 2007, and in terms of which Tiger paid an administrative penalty of approximately R98 million. The complaints against Pioneer were heard by the Tribunal, which found in February 2010 that Pioneer had contravened the section 4(1)(b)(i) and (ii) prohibitions against price-fixing and market allocation, and imposed an administrative penalty of approximately R195 million.

In November 2010, representatives of a class of consumers and a class of distributors brought an application to certify a class action for a claim for damages for the loss occasioned by the increase in the prices of bread. Following the dismissal by the High Court of both certification applications, the applicants appealed to the SCA.

In respect of the consumers’ Western Cape complaint, in a unanimous, seminal judgment penned by Wallis JA, the SCA made important developments to the law of class actions, setting down specific requirements for the certification of a class action, and, upholding the appeal, remitted the matter to the High Court for the filing of further affidavits in accordance with those requirements. The national complaint was dismissed.

In respect of the distributors’ case, Nugent JA dismissed the appeal. This decision was taken on appeal to the Constitutional Court, where it was decided that it ought also to be remitted to the High Court for the filing of further affidavits, in accordance with the Children’s Resource Centre requirements.
Below we consider the reasoning of *Children’s Resource Centre* judgment on two particularly significant questions: the interpretation of section 65 of the Competition Act, and the recognition of class action standing in respect of delictual claims.

2.3. *Competing interpretations of section 65*

Wallis JA considered two competing interpretations of section 65. The first possible interpretation was that advanced by the consumers in articulating their claim. Whilst recognising that the consumers’ claim was plagued by a lack of clarity,\(^\text{18}\) he concluded that they had “nailed their colours to the mast of a delictual action flowing from a breach of statutory duty”\(^\text{19}\).

It is worth pausing at this point briefly to consider the elements of a delictual claim in the ordinary course. Under the *lex Aquilia*, the essential requirements for delictual liability can be said to include harm, wrongfulness, fault (either in the form of intent or negligence) and legal and factual causation.\(^\text{20}\)

As regards the elements of a delictual claim, harm speaks to the requirement that a person must actually have suffered loss. Since the primary purpose of a delictual action is to compensate for loss, without harm having been suffered, there can be no claim.\(^\text{21}\) The question of wrongfulness relates to whether a defendant’s conduct is “legally blameworthy,” that is, whether it is reasonable, having regard to the legal convictions of the community, to impose liability therefor.\(^\text{22}\) Wrongful conduct constitutes the breach of a legal duty owed by a defendant to a plaintiff, which duty can either be imposed by statute or through the development of the common law.\(^\text{23}\) Once the wrongful character of the conduct has been established, the enquiry turns to fault, i.e. whether the defendant acted with intention or negligence.\(^\text{24}\) Finally, for a delictual action to succeed, a claimant must establish causation. In other words, there must be “a causal nexus between the defendant’s conduct and the detrimental consequences sustained by the plaintiff.”\(^\text{25}\)

Returning to the *Children’s Resources Centre* case, on the applicants’ interpretation, following the determination by the Tribunal or CAC that impugned conduct contravenes the Competition Act, a claimant must prove the elements of a

\(^{18}\) *Children’s Resource Centre* supra n 10 at para 43.

\(^{19}\) Id. The consumers persisted in a claim for constitutional damages, but only in the alternative, and it did not receive much attention in the judgment.

\(^{20}\) Van der Walt and Midgley supra n 2 at 2.

\(^{21}\) Id at 43.

\(^{22}\) Id at 69.

\(^{23}\) Id at 68.

\(^{24}\) Id at 155.

\(^{25}\) Id at 196-7.
delictual claim; in other words, that the wrongful and culpable conduct of the defendant caused the claimant loss. As Wallis JA noted, and as is well-established in our law of delict, it is not sufficient for a claimant to show only that a defendant has caused loss, even if it has done so deliberately. It must also be established that the conduct is wrongful, according to the legal convictions of the community and, therefore, that the imposition of liability is reasonable.\(^{26}\) The answer to this question is affirmative only if there is a legal duty on the part of the defendant, owed to the claimant.

Noting that the question of wrongfulness is particularly fraught and complex in the arena of pure economic loss (that is, loss arising from conduct in the absence of patrimonial harm) Wallis JA recognised that whether a statutory duty of the kind claimed exists is a question of statutory interpretation. In Olitzki\(^{27}\) and Steenkamp\(^{28}\) our courts have held that the questions that must be answered are, first, whether the statute was intended to provide a civil remedy and, second, whether the harm suffered is of the kind that the duty is intended to protect.

In this regard, the consumers claimed that section 65(6)’s contemplation of the existence of a claim for damages is indicative of a duty on the part of the bread producers not to cause them financial loss, which they deliberately breached by agreeing on the co-ordination of list prices.\(^{29}\)

Pioneer and Tiger did not dispute that section 65 contemplates a delictual claim, but argued that such a claim lacked a prima facie basis, because its constitutive elements were clearly lacking: legally, the conduct was not wrongful because the Competition Act is enacted for the benefit of competition, and not consumers and, therefore, no legal duty is owed to consumers in particular; and, factually, there was no evidence either of loss suffered by consumers, or of a causal link between the anti-competitive conduct and any increase in prices.\(^{30}\)

The second of the two possible (and mutually exclusive) interpretations of section 65 that Wallis JA considered was that offered by Premier. Premier opposed the claim on an altogether different basis. It argued that a claim in delict was bad in law, because section 65 of the Competition Act provides for a statutory follow-on claim, to the exclusion of any delictual or other common law remedy. By seeking to rely on

\(^{26}\) Id at 69 and Neethling, Potgieter and Visser Law of Delict at 33.
\(^{27}\) Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) at paras 19-21
\(^{28}\) Olitzki Property Holdings v State Tender Board 2001 (3) SA 1247 (SCA) at paras 12-14.
\(^{29}\) Children’s Resource Centre supra n 10 at para 64.
\(^{30}\) Id at para 65.
a delictual action, Premier claimed, the consumers had failed to formulate a competent claim.\textsuperscript{31}

On Premier’s interpretation, in order to assert a statutory claim in terms of section 65, a claimant must prove, first, that the Tribunal has determined that the defendant has committed a prohibited practice (evidenced by a section 65 certificate, which at the time was lacking against Premier\textsuperscript{32}), and, second, that the claimant has suffered loss (including the quantum of such loss) caused by that prohibited practice. Liability is strict, on this interpretation, because a claimant need not show any fault on the part of the infringing parties.

Because \textit{Children’s Resource Centre} was merely a preliminary application for the certification of the class action (thus requiring only a \textit{prima facie} cause of action to be shown)\textsuperscript{33}, the record was inapt for a conclusive interpretative exercise. Nevertheless, Wallis JA noted that the question of the existence of a legal duty in respect of the delictual claim was closely tied up with, and almost mutually exclusive to, the existence of an exclusive statutory claim. That is, if an exclusive statutory claim is said to exist, then a legal duty for the purposes of delict clearly does not; and conversely, if an exclusive statutory claim does not exist, then the clear contemplation of a claim in section 65(6) strongly suggests the existence of a legal duty.\textsuperscript{34}

He expressed doubts as to Premier’s interpretation, appearing inclined towards the view that the section, though contemplating an action for damages, was not itself an action-creating provision. It does not indicate who will have the action. Nor does it state what the requirements for the action will be. All it appears to do is regulate procedural matters regarding the relationship between the determination of the Tribunal and the civil court in which the action is brought. These factors support the interpretation that section 65 does not itself create a statutory claim, but rather that it is indicative of the existence of a delictual duty on the part of those that infringe the Competition Act.\textsuperscript{35}

However, Wallis JA also recognised textual factors in favour of Premier’s interpretation. Section 65(6)(a), which speaks of commencing an action “\textit{for the assessment of the amount or awarding of damages}” appears to imply the existence of a claim in terms of which only damages and nothing more need be shown. So too

\textsuperscript{31} \textit{Id} at para 66.
\textsuperscript{32} Premier had been granted leniency by the Commission and accordingly was not cited as a party to the referral.
\textsuperscript{33} See section 3 below.
\textsuperscript{34} \textit{Children’s Resource Centre} supra n 10.
\textsuperscript{35} \textit{Id} at para 69.
does section 49D(4), which makes reference to a claimant “applying for an award of civil damages”.36

Essentially, the difference between the exclusive statutory claim and the delictual claim is that the elements of wrongfulness and fault must be shown in the respect of the latter. These elements raise complex questions, a detailed consideration of which is beyond the scope of this paper. Because the above analysis was only conducted at the certification stage of proceedings, and because the SCA remitted the matter to the High Court for the filing of further affidavits on these precise questions, an outcome on them all is forthcoming.

One might argue that a strict liability approach as argued by Premier would provide greater access to justice to claimants. However, it would be interesting to consider in what circumstances it would ever be possible for a defendant to commit a prohibited practice, particularly a “hard-core” restriction, such that a civil court might find that it did not do so negligently, at least. In our view, this would only be in very rare cases. And because, in the view of Wallis JA, the corollary of rejecting the exclusive statutory claim interpretation would likely be the existence of a delictual duty, it is possible that not much will turn on the wrongfulness inquiry either.

In our view, therefore, even if the interpretation of a delictual claim is favoured, with its additional requirements of fault and wrongfulness, the principal hurdles that claimants will, for the most part, have difficulty in overcoming, are those that are common to both interpretations of section 65, namely, quantifying the harm suffered, and establishing that the defendants caused such harm. These topics are discussed below.

36 Id at para 72.
3. The development of class action standing in South Africa

Historically, the common law rule regarding *locus standi in judicio*, or legal standing, was that a litigant must have a sufficient, personal and direct interest in a case to litigate it. Complainants could not, therefore, act on behalf of others.

This was radically altered by section 38 of the Constitution of the Republic of South Africa, 1996, (the “Constitution”), which allows anyone, when alleging that a right in the Bill of Rights has been infringed or threatened, to bring a claim in their own interest; on behalf of another who cannot act in their own name; on behalf of a class; in the public interest; or, as an association on behalf of its members.

Class action standing is, therefore, explicitly recognised in section 38(c) of the Constitution. But the language of the provision (“when alleging that a right in the Bill of Rights has been infringed or threatened”) limits its application to those cases in which a right in the Bill of Rights is enforced. It would appear, therefore, that in strictly private and commercial claims, the old, restrictive common law rule of standing would apply.

However, in *Children’s Resource Centre*, Wallis JA explained that in many cases in which claimants seek to bring class actions, but do not explicitly enforce a constitutional right in doing so, the section 34 constitutional right of access to courts will necessarily be engaged (because they would be denied access to court in the absence of the class action being allowed), and section 38(c) may thus be relied upon. Moreover, he held, even in cases where section 34 would not be infringed were the class action disallowed, it would be “irrational” to allow class actions in cases where a constitutional right is relied upon, but to deny it in equally appropriate cases, including mass personal injury and consumer cases, where one is not. He thus developed the common law rules of standing, in the light of the permissive approach to standing envisaged by the Constitution, to allow for class action litigation subject to various procedural prerequisites.

In *Children’s Resources Centre*, the applicants, representing a class of consumers, sought to certify an “opt-out” class action. This is a class action in which all individuals identified as part of the class are bound by its outcome unless they choose to opt out of it. It is therefore a form of litigation that is often accompanied by strict notice requirements – it is particularly important that all those affected are informed of the litigation, as their failure to opt out bars them from bringing an individual claim due to the principle of *res judicata*.

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37 C Hoexter *Administrative Law in South Africa* (Juta & Co, Cape Town 2010) at 435.
38 *Children’s Resource Centre* supra n 10 at para 19.
39 Id at para 21.
40 Id at paras 18 and 29. See also *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E) at 624.
The fundamental prerequisite laid down in *Children’s Resource Centre* was that of certification. What this requires is that any party seeking to represent a class must, prior to the issue of summons, apply to the court for authority to proceed. In order for the applicant to succeed in its certification application, it must show the following:

i. the existence of a class clearly identifiable by objective criteria;

ii. a cause of action raising a triable issue (i.e. that a factually and legally tenable *prima facie* case is established on the evidence);

iii. that the claims arise from common issues of fact and law;

iv. that the relief sought flows from the cause of action;

v. that there is an appropriate method of distributing the damages to the class;

vi. that the proposed representative of the class is suitable; and, lastly,

vii. that a class action is the most appropriate means of determining the claims of the class members.

In *Mukaddam*, the distributors sought certification of an “opt-in” class action – that is, a class action in which the alleged victims of the infringement expressly decide to join their claims together. Nugent JA had dismissed their claim. Although he left open the possibility of “opt-in” class actions, he found that they would be available only in “exceptional” circumstances.

On appeal from the SCA, the Constitutional Court held that the distributors’ case should endure the same fate as the consumers’, that is, remittal back to the High Court for the filing of further affidavits. It also refined the developments that Wallis JA made in *Children’s Resource Centre* in three important respects. First, it emphasised that the requirements for certification set out by the SCA are not strictly required jurisdictional facts, but are instead subject to a broad interests of justice enquiry in terms of section 173 of the Constitution. Second, it explicitly left open the question whether prior certification should be a requirement in Bill of Rights cases, where class action standing is constitutionally guaranteed. Last, it held that exceptional circumstances are not necessary for opt-in class action litigation, which is subject to the same requirements, ultimately subject to the

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41 *Children’s Resource Centre* supra n 10 at para 23.
42 Id at paras 26 to 28.
43 *Mukaddam SCA* supra n 16 at para 14.
44 *Mukaddam CC* supra n 17 at paras 35 and 59.
45 Id at paras 40-41.
interests of justice, as opt-out class action litigation. It seems clear from the decision in Children’s Resources Centre that class actions will be permitted in relation to conduct that does not clearly infringe a right entrenched in the Bill of Rights.

Now that the path to be followed in a class action lawsuit has been made significantly clearer, it is possible that South Africa may see an increase in the number of these types of cases being brought before our courts, particularly in relation to follow-on litigation for damages arising from a finding of an anti-competitive conduct.

46 Id at para 55. In our view, the judgment of Jaffa J is, with respect, open to criticism on a number of grounds. First, despite never disputing the finding by Nugent JA that the procedures of joinder were available to the distributors, he asserts (without any reasoning as to why), that the right of access to courts is implicated by the unavailability of a class action. But it is difficult to understand why that right would be implicated at all where joinder is readily available. In fact, it appears that the very reason why Nugent JA held that “opt in” litigation would only be available in “exceptional circumstances” was because in such cases joinder is ordinarily available, and so class actions will rarely be the most appropriate means. But when summarising the requirements for certification at paras 15-18, Jaffa J leaves out entirely from his synopsis the requirement stipulated by Wallis JA that class actions must be the most appropriate means available (at paras 23 and 26 of Children's Resource Centre). Instead, Jaffa J merely asserts that the exceptional circumstances requirement is over-stringent, but offers no reasons for this conclusion, and omits the requirement that class actions must be the most appropriate means available. Secondly, the majority decision is entirely unclear whether it intends to leave open the question whether prior certification is a requirement in Bill of Rights cases generally, or only in those cases brought against the state (he first excludes from the application of the certification requirement “class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the state” and then later decides “to leave open the question whether the institution of a class action to enforce a right in the Bill of Rights against a private litigant, requires prior certification”. But regardless of this, the more fundamental problem is that he appears to mistake certification – which is a procedural step, recognised in most jurisdictions as providing valuable certainty and court oversight, and by Jaffa’s own judgment as “an instrument of justice rather than a barrier to it” – for a substantive limitation of the right to access to courts. Cf. the dissent on this point by Mhlanthla AJ at paras 58-62, which is surely preferable.
4. Comparative review

Given the dearth of private damages jurisprudence in South Africa, we now turn our attention to foreign experience for guidance. The EU has, in recent years, sought to find ways to facilitate private claims. However, in doing so, caution has always been expressed about the US approach, in which private claims are common and are regarded as an aid to deterrence and punishment. Both approaches are briefly set out hereunder, and, thereafter, an attempt is made to extract lessons for application in the South African context.

4.1. European Union

4.1.1. Private damages

The starting point in understanding the European approach to private damages actions is the prohibited practices set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). In addition to identifying a non-exhaustive list of infringements, Article 101(1) prohibits broadly “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...” Article 102 prohibits abuses by undertakings in a dominant position, and also sets out non-exhaustively ways in which such abuses may be carried out.

Although it has been known for some time that Articles 101 and 102 TFEU create rights and duties, which the national courts of Member States have an obligation to protect and enforce, it was for some time unclear whether such Member States were obliged to provide damages claims for harm arising from the breach thereof. However, it was confirmed in two consecutive landmark judgments that they clearly are.

The first of these was Courage Ltd v Crehan. Courage, a brewery with a 19% share in the United Kingdom beer sales market, brought a claim for undelivered beer against Mr Crehan, in terms of a pub lease agreement, which included an exclusive purchase obligation for Courage’s beer. Mr Crehan counter-claimed for damages on the basis that the exclusive purchase agreement was contrary to Article 85 of the

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Treaty (now Article 101 TFEU). The difficulty, the UK Court of Appeal found, was that English law barred a party to an illegal contract – in this case, Mr Crehan – to claim damages. Thus, even if Mr Crehan was correct that the lease was an infringement of the Treaty, English Law would not allow the claim. The Court of Appeal thus stayed proceedings and referred the matter to the European Court of Justice ("ECJ") to determine.

The ECJ held that any individual may rely on a breach of the TFEU before a national court, even where he or she is a party to an infringing contract. It held further that for "full effectiveness of Article [101 TFEU]" it is necessary for individuals to be enabled to bring claims for damages caused by conduct that restricts or distorts competition.

The second decision was Manfredi, in which the Autorità garante per la concorrenza e del mercato, the Italian competition authority, had found that various insurance companies implemented an unlawful agreement for the purpose of exchanging information, enabling them to fix prices. This decision was upheld on appeal.

Customers of the insurance companies brought a claim for damages, for the loss occasioned by the 20% increase in motor vehicle insurance prices during the relevant period.

The ECJ confirmed its earlier finding in Crehan that the full effectiveness of the prohibition would be put at risk if it were not open to individuals to claim damages where a causal relationship exists between the harm and the prohibited practice.

Importantly, the ECJ in both Manfredi and Crehan held that it is for the domestic legal systems of Member States to deal with the necessary procedural rules regarding the safeguarding of these individual rights, provided they comply with the principles of "equivalence" (which requires that such rules are not less favourable than those governing similar domestic actions) and "effectiveness" (which requires that such rules do

49 Id at para 26.
51 Id at para 14.
52 Id at paras 60 and 90.
not render practically impossible or excessively difficult the exercise of rights conferred by EU law).\(^\text{53}\)

Thus it is clear that EU law recognises the existence of actions for damages, but leaves it within the discretion of individual Member States to determine the procedural rules by which such actions are to be brought, provided such rules comply with the principles of equivalence and effectiveness.

But herein lay the EU’s fundamental problem: the extent to which private actions for damages are facilitated by procedural rules is ultimately a decision that each Member State must make.\(^\text{54}\) An August 2004 study of private damages claims in the EU, entitled *Study on the conditions of claims for damages in cases of infringement of EC competition rules* (referred to as the *Ashurst Report*) revealed a significant lack of homogeneity in these rules amongst different Member States, and that overall, such rules were insufficiently facilitative of claims.\(^\text{55}\)

Therefore, in December 2005, the EU Commission published a Green Paper, *Damages Actions for Breach of the EC Antitrust Rules* (the “*Green Paper*”). The Green Paper aimed to identify the main obstacles to an efficient system of damages claims, and set out various options for overcoming them. It presented options in respect of, *inter alia*, whether claimants’ access to evidence ought to be enhanced through special rules on disclosure of documents (see section 5.2 below);\(^\text{56}\) whether the burden on claimants to prove antitrust infringements ought to be eased or reversed;\(^\text{57}\) whether fault ought to be a requirement in damages claims;\(^\text{58}\) how damages ought to be calculated;\(^\text{59}\) and the availability of the passing on defence and the claims of indirect purchasers.\(^\text{60}\)

Then, in April 2008, the EU Commission published a White Paper, also entitled *Damages Actions for Breach of the EC Antitrust Rules* (the “*White Paper*”), in recognition of the fact that victims of EC antitrust infringements only rarely obtained compensation, and with the primary

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\(^{53}\) Id at paras 62 and 64 and *Crehan* above n 48 at para 29.

\(^{54}\) Whish and Bailey supra n 47 at 300.

\(^{55}\) Available at [www.ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html](http://www.ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html)

\(^{56}\) The Green Paper at 5.

\(^{57}\) Id at 6.

\(^{58}\) Id at 6 and 7.

\(^{59}\) Id at 8.

\(^{60}\) Id at 9.
objective of improving the conditions for such victims to exercise their rights to obtain reparation. The White Paper was a clear policy proposal, with concrete proposed reforms, some of which developed upon the options in the Green Paper aimed at facilitating private damages actions.

One proposed measure concerned the legal standing of indirect purchasers. Indirect purchasers are those who do not deal directly with the wrongdoer, but nonetheless may suffer harm due to the competition law infringement (for example, where the claimants are customers, who buy from retailers, but the infringers are wholesalers or producers that do not sell directly to the public, similar to the consumers and bread producers situation relevant in the Children’s Resources Centre case). The proposal was that Member States should have rules of standing that are as inclusive as possible and, therefore, that the claims of indirect purchasers should be recognised.

Another proposed reform concerned the requirement of fault when bringing a private damages action. The Staff Working Paper accompanying the White Paper noted that some Member States had no fault requirement, so that the mere infringement of competition law was conclusive of fault. In other Member States, fault was rebuttably presumed to exist. Whilst recognising no policy grounds against a strict liability approach, the White Paper proposed that once a victim shows a breach of Articles 101(81) or 102(82), the infringer ought to be liable unless it demonstrates that the infringement was as the result of an excusable error (i.e. it bears the onus to show an excusable error).

Peyer argues that, on the assumption that changes to the procedural rules regarding private damages claims are in fact necessary, there is good reason to limit these changes only to hard-core violations such as cartels. This is essentially for two reasons: first, because of the potential costs of widespread litigation, such as the nuisance of meritless claims and, second, such an approach would be consistent with an actual need,

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62 Id at 4.
63 Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust rules at 52.
64 The White Paper supra n 61 at 7.
66 Id at 633 – 638.
as evidenced by the fact that victims of cartels are, according to litigation data amongst different jurisdictions, least likely to seek remediation in courts.\textsuperscript{67}

Recently, on 11 June 2013, the EU Commission took a significant step and released a draft antitrust damage claims Directive (the “draft Directive”).\textsuperscript{68}

The draft Directive aims to remove obstacles to compensation for all victims of infringements of EU Competition law. It aims to do so by introducing measures which, \textit{inter alia}, provide easier access to evidence; allow for the recovery of lost profits; and attempt to facilitate the claims of indirect customers through a rebuttable presumption that they suffered loss; and a rebuttable presumption that cartels cause harm. Should the draft Directive be passed into law, Member States will be required to enact laws within two years to give effect to its provisions.

4.1.2. Collective redress

As mentioned above, a significant element of the White Paper was the proposal that collective actions ought to be facilitated. The proposal in the White Paper was that this ought to be done in two complementary ways and without any prejudice to the rights of individuals to bring claims in their own capacity. The first was by means of representative actions brought by qualified entities such as consumer associations, either certified in advance, or certified on an \textit{ad hoc} basis for a particular infringement.\textsuperscript{69} The second was by means of opt-in collective actions – in other words, class actions in which victims expressly decide to join their claims in a single action.\textsuperscript{70}

The Staff Working Paper accompanying the White Paper explains that the rationale for these proposals is that they can alleviate the improbability of individual consumers and small businesses bringing claims as a result of costs, delays and burdens arising therefrom.\textsuperscript{71}

Therefore, for reasons associated primarily with access to justice for

\textsuperscript{67}Id at 647 – 654.
\textsuperscript{69}White paper supra n 61 at 4.
\textsuperscript{70}Id.
\textsuperscript{71}The Staff Working Paper supra n 63 at 17-18.
low-value damages it proposed the above two measures as a means of aggregating claims.

Importantly, the White Paper noted the inter-connectedness of the issues of indirect purchasers and collective actions. Because the claims of indirect purchasers may often be small (though will sometimes be considerable), collective redress is an important tool whereby those who have suffered “scattered and relatively low-value” damage can nevertheless obtain compensation.72 The concrete proposal in this regard was for representative actions by qualified bodies such as consumer associations to be facilitated, and for the provision of opt-in collective actions.73

Delatre74 is critical of the White Paper to the extent that it dismisses the notion of opt-out litigation. She argues that it has been left out of consideration largely for political reasons, and not because it is unsuitable in the EU context. In fact, on the Staff Working Paper’s own version, opt-in class actions are preferable for the furtherance of “corrective justice”.75 In this regard, she notes that the EU Commission’s fear of importing the abuses of the US class action system led it to ignore the successful experiences of a number of Member States that are drastically at odds with the measures in the White Paper, and which provide guidance as to devising a European mechanism that ensures access to justice and compensation, while presenting safeguards against excesses.76

For example, the Portuguese “popular action”, widely regarded as Europe’s most liberal legislated approach to collective actions, includes a presumption of participation, so that potentially affected parties to an action are included therein even if they choose to take no action. In other words, only those affected parties that actively opt-out are excluded from the action.77 Moreover, Denmark and Norway have both introduced legislation that, although providing principally for opt-in class actions,

72 Id at 15 and 17.
73 The White paper supra n 61 at 4.
76 Delatre supra n 74 at 30-31
77 Id at 39-40.
allows opt-out actions in appropriate circumstances (for example, where the claims are so small that they are unlikely to be pursued otherwise).  

Delatre notes further that arguments regarding the supposed excesses of opt-out class actions, such as their excessive costs, and their tendency to promote unmeritorious lawsuits, are not borne out by the evidence. The Portuguese approach has not led to any of the above excesses, though she concedes that it may nevertheless be too broadly framed.

4.2. United States

4.2.1. Private damages

In addition to the relief provided in state-specific antitrust laws, section 4 of the US’s Clayton Act provides for private claims under federal antitrust laws (including the Sherman Act, the Clayton Act and section 2 of the Robinson-Patman Act). It provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” may obtain damages therefor. In addition, section 16 of the Clayton Act allows for injunctive relief.

In order to establish standing under section 4, a plaintiff must show that: a violation of antitrust law has occurred; actual economic injury has been suffered; that the defendant’s violation was a material and substantial cause of the loss; and that the injury suffered was “of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.”

However, despite being required to show loss, the remedy available to a plaintiff under section 4 is not limited to compensation for loss actually suffered. US law provides for treble damages, which means that a plaintiff may claim three times more than the loss actually suffered. As explained below, this is justified in part by the important deterrent role that the US system has acknowledged private actions play.

78 Id at 41-43
79 Id at 57.
In Hanover Shoe Inc v United Shoe Machinery Corp, it was held that the passing-on defence is not available to defendants to a federal antitrust claim. Carrying this reasoning to its logical conclusion, the Supreme Court held later in Illinois Brick Co v Illinois, that private damages are generally available only to direct purchasers in federal antitrust damages claims. These are two sides of the same coin. If passing-on is allowed as a defence, then the claims of indirect purchasers must surely be permitted, or the wrongdoer would escape a damages claim altogether. If, however, passing-on is not recognised as a defence, then the claims of indirect purchasers are unlikely to be recognised either, or else duplicate claims for damages would arise from the very same harm.

Thus, in contrast to the proposals in the EU Commission’s White Paper, the US has taken the approach – at federal level, at least – that the passing-on defence is unavailable. Again, as we attempt to explain in section 5 below, these divergences in approach are largely due to the deterrent and punitive (rather than merely compensatory) role that private damages play in the US antitrust system.

4.2.2. Collective redress

In the United States, Rule 23(a) of the Federal Rules of Civil Procedure sets out the requirements for the certification of a class action. These are that: the class is so numerous that joinder would be impracticable; there are issues of law and fact common to the class; the claims or defences of the representatives are typical of the class; and the representatives will protect the interests of the class adequately.

In addition, class actions must satisfy at least one of the three Rule 23(b) requirements. The most commonly invoked of these in monetary claims is commonly referred to as the “predominance rule”. It requires that “questions of law or fact common to class members predominate over any questions affecting only individual members” and that “a class action

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81 392 US 481 (1968).
83 See McLaughlin et al supra at 148, who note that 28 states in fact permit the claims of indirect purchasers.
is superior to other available methods for fairly and efficiently adjudicating the controversy."\(^85\)

The class action procedure in the United States allows plaintiffs only to opt-out. Opt-in class actions are not available.\(^86\) Rule 23(c)(2) provides that for any class action certified under the predominance rule, the court must "direct to class members the best notice that is practicable under the circumstances", and plaintiffs must thereby be given the opportunity to opt out, and advised as to the means and deadline for doing so. A failure by any member of the class thereafter to opt-out, will result in them being bound by the outcome of the litigation, and losing their right to bring a claim in their individual capacity.

Shwartz and Rees note that for many years, much of the world has viewed the US class action system "with a combination of fear, disdain and bewilderment."\(^87\) Certainly, as noted above, the EU Commission has been very cautious in any of its recommendations, to steer clear of what it regards as the excesses and abuses of the US system.\(^88\)

### 4.3. Lessons for South Africa

Although the dominant trend in Europe appears to be towards greater facilitation of private damages claims, there are warnings that, drawing on the US experience, care should be taken in doing so. Below we deal with two considerations with particular relevance in the South African context.

The first is in respect of indirect purchasers and the passing-on defence. Although not dealt with explicitly in the judgment, the claim brought by the consumers in *Children’s Resource Centre* was one brought by indirect purchasers. The bread producers never sold bread directly to the consumers who claimed to have suffered loss as a result of an increase in prices. Instead, the producers sold their bread to distributors, such as those that brought the claim in *Mukaddam*. Therefore, the only

\(^{85}\) Id at 26.
\(^{86}\) McLaughlin et al supra n 80 at 150
\(^{88}\) A key component of the US approach is the availability of contingency fees. Charlotte Leskinen, in “Collective Actions: Rethinking Funding and National Cost Rules” *The Competition Law Review* at pg 89 argues, that practically all class actions have been brought thanks to contingency fees. These allow plaintiffs to share the costs of litigating with their counsel, and incentivise counsel to bring such cases with the prospect of sharing in the millions that might be won. A well-publicised settlement of an antitrust class action involving alleged price-fixing in the airline industry, which resulted in an award of flight coupons supposedly valued at more than $400 million, saw $50 million in cash awarded to administrative fees and counsel’s contingency fees. This was despite the fact that the settlement was regarded by many as of little value to the claimants, due to the major use restrictions on the coupons. (In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297 (N.D. Ga. 1993)).
way in which both the distributors and the consumers could possibly mutually have a claim, is if it is recognised that the consumers are entitled to a claim despite the indirect nature of their loss, and in addition, if the distributors are only entitled to claim for their loss to the extent that they have not passed it on. Given the compensatory nature of damages claims in South Africa, it appears necessary (and indeed likely) that South Africa follow the proposed route in the EU, namely, to recognise the claims of indirect purchasers, and to recognise the passing on defence.

Regarding class actions, our law has gone very far – not via legislation, but through the courts – in allowing both opt-in (Children's Resource Centre) and opt-out (Mukaddam) class actions. The bread producers argued, in fact, that the courts went too far and that such a development was properly the terrain of legislative intervention. However, now that the court has taken the initiative, the question is whether legislation remains necessary.

Although some important safeguards were laid down in Children’s Resource Centre to prevent abuses that might arise from class action litigation, more needs to be done, and legislative intervention remains essential. For example, the EU recommendation of representative actions by bodies such as consumer organisations would be of particular use in a South African context, and would likely play a significant role in facilitating access to justice while ensuring the adequacy of the representative. In addition, strict notice requirements in respect of opt-out litigation, as exist in the US, should be legislated in South Africa. Significant danger exists that if an opt-out class action is certified, and litigation proceeds without the necessary notice being given to affected parties, they will be bound by an unfavourable outcome without ever having learned of the litigation.

89 Children’s Resource Centre supra n 18 at para 21.
5. **The relationship between public and private enforcement**

5.1. *Re-thinking traditional roles?*

South African lawyers, prone to relying on neatly defined legal categories, are likely to insist that the role of damages is purely to compensate for loss suffered, and the role of administrative penalties purely punitive and deterrent. The question, however, arises: is there room for a more nuanced approach, in which administrative penalties play a partly compensatory role,\(^{90}\) and, more pertinently for this paper, where private damages are regarded as an aid to deterrence?

It is an important question of policy whether, and to what extent, private damages actions should be facilitated as an aid to public enforcement.\(^{91}\) And, as Pheasant argues, merely to assert that the function of an action for damages is to compensate for private loss suffered is to avoid that policy question entirely. What must instead be asked is: what *should* be the role of private litigation in aiding public enforcement and deterrence?\(^{92}\)

This is not a merely theoretical question. The policy decisions that underlie private damages actions in South Africa are likely to determine the practical operation of those actions and the facilitative role the competition authorities play in the bringing of private actions. As Edgerton remarks, although the vast majority of jurisdictions provide for private actions for damages, the varying rationales underlying those actions gives rise to the diverse forms that they take.\(^{93}\)

For example, in the US, the provision for treble damages, the absence of a passing-on defence, and the refusal of claims of indirect purchasers are indications that private claims are regarded not merely as compensatory, but also as punitive. On the other hand, in Europe, where punitive damages are not permitted, and where the policy recommendations are for the passing-on defence and the claims of indirect purchasers to be made available in all Member States, the role of damages are regarded primarily as compensatory.

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90 The question of the potentially compensatory role of administrative penalties is beyond the scope of this paper. However, see Van Jaarsveld (2012) “Administrative Penalties as They Relate to Consumer Redress”, who argues that administrative penalties ought to be geared more towards compensating consumers that suffer harm. The difficulty with her position is that section 59 of the Competition Act explicitly requires that factors which are entirely divorced from compensatory considerations are taken into account, such as the extent of cooperation with the competition authorities, and whether the wrongdoer has previously contravened the Act. By including these factors, and by requiring that administrative penalties are paid into the National Revenue Fund, from which all South Africans benefit, the Competition Act appears to be based on a policy decision that administrative penalties are a means of compensating society as a whole, for harm done to competition generally. See Kevin Round “At the Mercy of the Market for Damages” at 2, who explains this in the Australian context.


92 Id.

In the South African context, there is no reason that the general approach to civil damages will not apply to those arising from competition breaches. In that regard, it is well established that damages are compensatory in nature, and that punitive damages are not recognised. Indeed, in the *Children’s Resource Centre* case, one of the bases upon which the matter was remitted to the High Court, was in order for the applicants to formulate a remedy that was sufficiently compensatory. The proposed remedy that the damages be paid into a trust for the benefit of bread producers generally was impermissible precisely because the members of the class were “not compensated either directly or indirectly for the loss they [had] suffered.”

Thus, a discussion of the potentially punitive role that damages could play in a South African context would, in fact, be largely academic. But, as aforementioned, the underlying beliefs about the proper role of private actions in aiding public enforcement also impacts practically on how the relationship between the competition authorities and private litigants ought to be regulated. This is a question with important practical consequences.

Indeed, in an important sense, public and private enforcement of competition law in South Africa are intertwined, of necessity, by the very wording of the Competition Act. That a follow-on claim may only be brought pursuant to a determination by the Tribunal entails that the availability of private damages is inexorably bound up with – in fact, dependent upon – the enforcement priorities, resource constraints and effectiveness of the competition authorities. Put simply, fewer findings of competition infringements by the competition authorities necessarily equal fewer private actions for damages.

And although damages might be aimed primarily at providing *ex post facto* compensation, they also serve as *ex ante* disincentives against future prohibited practices. That provides good reason, in principle at least, for public enforcers of the competition rules to facilitate private actions. Certainly, that line of thinking is the driving force behind the European Commission-headed reforms to facilitate private damages claims.

Below we consider a practical means by which the interaction of public and private enforcement becomes manifest, namely, in the context of the Commission’s CLP, to which the availability of private damages poses a potential threat.

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94 *Children’s Resource Centre* supra n 10 at 80.
95 Id at 87.
5.2. Corporate Leniency Policy

The Commission’s CLP is regarded as highly successful in the combating of cartel activities. The CLP allows a firm that has contravened the section 4(1)(b) prohibition against cartel activity to secure immunity against prosecution by co-operating with the Commission and making a full and truthful disclosure about the cartel activity.

The primary incentive for a leniency applicant is that it provides the financial benefit of escaping a significant administrative penalty. The difficulty that obviously arises in the context of private actions for damages is that, if allowed against leniency applicants, they threaten to disincentivise parties from coming forward in the first instance.96

Two important issues arise in the context of leniency applications and damage claims: the first relates to the question whether the liability of leniency applicants for damages ought to be limited at all and, if so, to what extent. The second relates to the degree of co-operation that the competition authorities can afford private claimants, for example, *inter alia*, what information and documentation a private claimant ought to have access to in bringing a civil claim against a leniency applicant.97

The US has adopted an approach whereby a successful amnesty applicant is at risk only of single, rather than treble damages.98 The purpose of this approach is quite logical: if a party obtains amnesty, that party would not suffer the punitive element of damages, but would still remain liable for the compensatory aspect thereof.

However, in Europe, as in South Africa, compensation for loss suffered is the maximum that may be awarded. And, as Celli and Riis-Madsen99 argue, it seems difficult to justify preventing a plaintiff from seeking compensation for its full losses and allowing a successful leniency applicant to pay only partial compensation.

Whilst public and private enforcement are certainly intertwined, it is difficult to find adequate justification for depriving a claimant of its right to claim full compensation, simply because the defendant has cooperated with the public enforcers. Indeed,

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97 There have been some interesting developments in South African jurisprudence regarding access to leniency documents, albeit not in the context of damages claims, most notably in the case of *the Competition Commission of SA v ArcelorMittal SA Ltd* (680/12) [2013] ZASCA 84 (31 May 2013), where the SCA ordered that the leniency applicant’s leniency application be released, subject to the Tribunal deciding on the confidentiality claim submitted at the time the leniency application was made.
98 Pheasant supra n 91 at 42.
99 Id at 26.
this is a view that recently received support in *Premier Foods Proprietary Limited and Norman Manoim N.O. and others.*\(^{100}\) In this decision, the North Gauteng High Court dismissed Premier’s application for a declaratory order to the effect that the Tribunal was not competent to issue a section 65 certificate against it, *inter alia,* as it had not been properly cited in proceedings before the Tribunal as a successful leniency applicant. It remains to be seen whether the knowledge that a section 65 certificate may be issued against a leniency applicant will have any impact on firms’ willingness to bring leniency applications. In our view, given the incentive that remains for firms to avoid the payment of administrative penalties, which are frequently large, it is unlikely to do so.

The White Paper referred to above proposed two measures in order to ensure that the successes of the EU Commission’s corporate leniency policy were not undermined by private actions for damages. The first of these was that adequate protection against the disclosure of corporate statements submitted by leniency applicants must be ensured, so as to avoid placing a leniency applicant in a worse predicament than its co-infringers in civil damages claims.\(^{101}\) The second was that the damages for which the leniency applicant is liable should be limited to direct and indirect contractual partners.\(^{102}\) In other words, a cartelist that is granted leniency would be liable for civil damages to direct purchasers, and to indirect purchasers, but not for damage suffered by those that did not directly or indirectly purchase its products, nor for harm caused by products or services bought from another cartelist. This is in contrast to a cartelist that had not been granted leniency – it would be liable *in full* for all harm committed by the cartel, and would then be entitled to claim from the other cartelists thereafter for their relative contributions.

As regards access to documents submitted by leniency applicants, in June 2011, the ECJ handed down its decision in *Pfleiderer AG v Bundeskartellamt,*\(^{103}\) in which it held that EU law does not prohibit access to leniency documents by civil damages claimants. The Court held that access to such documents must ultimately be regulated by national law. A year later, this decision was upheld by the ECJ in *Donau Chemie.*\(^{104}\)

The draft Directive entails a significant departure from *Pfleiderer.* Fearful of excessive discrepancy between Member States, the Directive would, if passed by the European Parliament, have certain uniform consequences. It provides for the

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\(^{100}\) *Premier Foods Proprietary Limited and Norman Manoim N.O. and others* Case No. 38235/2012

\(^{101}\) *The White Paper* supra 61 at 10.

\(^{102}\) Id.


\(^{104}\) Case C-536/11
absolute protection of two types of documents, namely corporate leniency statements and settlement submissions.\textsuperscript{105} This is crucial in order to ensure that those parties that decide to seek leniency, or to settle, are not thereby prejudiced in a civil claim relative to their co-infringers.

In respect of the damages that may be claimed, the draft Directive extends on the principle contained in the White Paper that, in a cartel involving multiple undertakings, each cartel member is jointly and severally liable for the damage caused. This means that, generally speaking, a claimant can claim its full loss from a single firm. However, the draft Directive provides that successful leniency applicants are exempt from joint liability, and are liable only to their own direct and indirect purchasers, unless the claimant can show that it is unable to obtain full compensation from the other undertakings involved in the infringement.\textsuperscript{106}

In our view, the draft Directive appears to strike a necessary, delicate balance. It protects the attractiveness of leniency by disallowing access to the leniency statement, and thereby preventing prejudice to the leniency applicant in comparison to its co-conspirators. It also protects the rights of each claimant to obtain its loss, but simultaneously limits the liability of the leniency applicant relative to its co-cartelists.

Given the particular success of the CLP programme in combatting cartel conduct in South Africa, it is of utmost importance that whatever approach is taken to the facilitation of private actions, the efficacy of the CLP is protected and maintained. This means protecting the rights of claimants to claim full compensation for loss suffered, but at the same time not prejudicing leniency applicants relative to their co-defendants by allowing unlimited access to leniency documents. Striking this balance in South Africa might be achieved in a number of ways, such as through the existing rules pertaining to confidentiality claims or through the introduction of some form of category exception. However, provided that the correct balance is struck, the means by which it is achieved is of only secondary importance.

\textsuperscript{105} Article 6 of the Draft Directive.
\textsuperscript{106} Article 11 of the Draft Directive.
6. **Quantification of Harm**

6.1. *Introduction*

As discussed above, many jurisdictions make provision for a party that has suffered harm as a result of the anti-competitive conduct of another to claim damages. Regardless of the route taken to lodge the claim, the question of how the harm should be quantified will eventually arise. The difficulty that claimants, defendants and courts alike encounter in quantifying the harm suffered (if the experiences of claimants in other jurisdictions is anything to go by), will not be unique to South Africa.\(^\text{107}\)

The question of quantification of harm is one that has plagued competition authorities, and more particularly, those that have suffered the harm and seek compensation, for many years. This is not a novel problem. More than 100 years ago, in the US, in that country’s first private claim for damages arising from cartel activity, there was a claim for damages in respect of overcharges.\(^\text{108}\) There, the amount of the damages was determined by “multiplying the quantity the plaintiff purchased by the estimated difference between the just and fair market price of the goods and the price actually paid.”\(^\text{109}\)

100 years later, the best method to calculate harm is still a vexing question.

Recently, the EC, through the publication of the Green Paper in 2005, the White Paper in 2008, as well as its Draft Guidance Paper\(^\text{110}\) and its Commission Staff Working Document\(^\text{111}\), have attempted to address some of the difficulties encountered in quantifying harm in actions for damages based on a breach of Article 101 or 102 of the TFEU. The latter two publications indicate that their purpose “is to place at the disposal of the courts and parties to damages actions economic and practical insights that may be of use when national rules and practices are applied.”

With reference to such publications and others, we have attempted to briefly summarise some of the variety of possible economic methods and models that can

\(^{107}\) Supra n 1.


\(^{109}\) Id.


be used to quantify harm, as well as assess the appropriateness of their application in the South African context.

6.2. Methods and models used to quantify harm

6.2.1. General Approach to the Quantification of Harm

As indicated above, the primary purpose of an award for damages in South Africa, as in the EU, is to compensate the individual or firm that has suffered harm and not to punish an offender. An EU citizen that has suffered harm as a result of a breach of the antitrust provisions of the TFEU is entitled to compensation for such harm. This approach can be contrasted with that followed in the US where the Clayton Act permits the award of treble damages (plus attorney’s fees) to a successful plaintiff, essentially comprising compensation as well as punishment for engaging in the conduct.

Thus, quantification of harm requires that a comparison be drawn between the actual position of the plaintiff and the position that plaintiff would have been in had the harm arising from the competition law / antitrust contravention not occurred – the so called ‘but-for analysis’ or the counterfactual scenario. The central question therefore being, “what is likely to have happened without the infringement?”

Importantly, even with the aid of the models described below, it is not possible to accurately describe and precisely predict how a market would have evolved absent the anti-competitive conduct. Prices, sales volumes and profit margins are all interrelated and depend on the complex interactions of the various market participants. Accordingly, an estimation of a counterfactual scenario or hypothetical market construction will rely heavily on a number of assumptions. There are, therefore, considerable limits to the degree of certainty and accuracy that the various models can provide in the calculation of harm. Thus, “[t]here cannot be a single ‘true’ value of the harm suffered that could be

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112 Van der Walt and Midgley supra n 2 216 - 217.
115 Supra n110, at 8 to 9.
116 Id. at 9; Supra n 113 at 37.
117 Id. at 9.
determined, but only best estimates relying on assumptions and approximations.”

In assessing the robustness of a particular model and the usefulness thereof under the relevant circumstances, three important factors should be considered. First, the data used and the quality thereof. The quality of data is vital for ensuring that a model produces an accurate estimate. The quality of the data that is used to populate a particular model will have a significant influence on whether the results of an analysis are reliable or not. Second, the assumptions that a model relies upon. Models range from those that rely entirely on economic theory to predict results to those that gather data which are used to identify patterns which are then explained. In either case, it is important that the assumptions being relied upon are clear. Third, the inferences that can be drawn from the outputs. As stated above, no model can predict precisely how a market would have evolved and therefore what the exact counterfactual would be. It is therefore necessary to understand what inferences can reasonably be drawn from the results of a particular model.

The various models and techniques that are available in the calculation of damages have been subject to various classifications over the years. The EC appears to favour a categorisation based on a distinction between i) comparator-based methods, and ii) simulation models, cost based and finance-based analysis and other methods. Oxera, in its Report prepared for the Directorate-General for Competition of the EC favours an approach based on i) comparator-based approaches, ii) financial analysis based approaches, and iii) market structure based approaches.

We briefly explain these methods below.

6.2.2. Comparator-Based Methods

Comparator-based models seek to compare the affected market to the counterfactual scenario by reference to data from sources or markets

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118 Id., at 9.
119 Supra n 113 at 38 to 39.
120 Supra n 111, at 15 and 33.
121 Supra n 113, at 42 – 45.
122 Due to constraints regarding the length of this paper, we have not discussed the various theories regarding how anti-competitive conduct can cause harm, rather, we have in each instance presumed that harm would be caused.
that are unaffected by the infringement. In both the EU and US, courts frequently make use of comparator-based methods.\textsuperscript{123} There are essentially three different sources that can be used as the comparator, namely, comparisons over time in the same market, comparisons with other geographic markets, and comparisons with alternate product markets. There is a fourth option which involves a combination of the comparisons over time and product and geographic market methods.\textsuperscript{124}

**Comparisons over time on the same market\textsuperscript{125}**

As the name suggests, comparisons over time involve the comparison of the actual situation during the period in which the effects of the competition law violation were felt with the situation on the same market before or after such effects were felt. This method is also sometimes referred to as the ‘before-after method’ or the ‘benchmark method’. A comparison over time can be made with an unaffected pre-infringement period, an unaffected post-infringement period, or both an unaffected pre- and post-infringement period.\textsuperscript{126}

One of the advantages of this method is that the comparison will be made with the same product and geographic markets. Accordingly, the market characteristics are more likely to be comparable than when comparisons are made with different product or geographic markets.\textsuperscript{127}

A major drawback of the method is that it does not account for market dynamics outside the infringement and assumes that all of the difference between the time periods is attributable to the infringement. It ignores the possibility that there may have been other events which had an impact on the market, for example, some form of demand or supply shock.\textsuperscript{128}

Selecting whether the appropriate reference point is the pre- or post-infringement period (or a combination of the two) must be made with reference to the specific circumstances of the case. Factors that must be considered are whether there is certainty regarding the time periods that were affected by the infringement. For example, while a cartel may

\textsuperscript{123} Supra n 111, at 16; Supra n 114 at 6.
\textsuperscript{124} Id, at 15.
\textsuperscript{125} These are also sometimes referred to as time series approaches.
\textsuperscript{126} Supra n 111 at 16-17.
\textsuperscript{127} Id at 17.
\textsuperscript{128} Supra n 113 at 55.
have been discovered by the competition authorities, it may take some
time for the effects of the cartel to dissipate as a result of the information
gleaned from competitors during the duration of the cartel.\textsuperscript{129} In addition,
doubt may exist regarding the date of commencement of a cartel and
particularly the effects thereof. Furthermore, competition authorities will
frequently limit their assessment of the duration of a cartel for purposes
of their findings where in fact the infringement may have lasted longer.\textsuperscript{130}

Ultimately, “[m]aking an informed choice of reference period and type of
data will usually require good knowledge of the industry in question” and
be influenced by the type and quality of the available data.\textsuperscript{131}

**Comparison with data from other geographic markets**

Comparisons with data from other geographic markets (also referred to
as the yardstick or benchmark approaches)\textsuperscript{132} consider data drawn from
a different geographic market to estimate the counterfactual scenario.\textsuperscript{133}

An inherent assumption of such model is that any observed differences
are due to the effects of the infringement. Accordingly, it is vital that
comparisons are made on a like-for-like basis.\textsuperscript{134} The greater the
similarities between the selected market and the market affected by the
infringement, the more suitable it will be as a comparator market.\textsuperscript{135}

In practice, a comparison based on geographic markets is most
appropriate where the infringement concerns geographic markets that
are wide in scope, for example, regional or national. Importantly, the
market used for the comparison does not need to be similar in every
aspect, rather, all that is required is that there is sufficient similarity.\textsuperscript{136}

Similar to the drawback of the comparisons over time method, it is not
always clear precisely what the geographic extent of an infringement
was. In particular, the lack of competition in an adjacent market may
result in a lessening of competitive pressures in the comparator market,
thereby resulting in an understatement of the harm suffered.

\textsuperscript{129} Supra n 113; Supra n 111 at 17 to 18.
\textsuperscript{130} Supra n 111 at 18.
\textsuperscript{131} Id. at 17.
\textsuperscript{132} These are also sometimes referred to as cross-sectional approaches.
\textsuperscript{133} Supra n 111 at 19.
\textsuperscript{134} Supra n 113 at 47.
\textsuperscript{135} Supra n 111 at 19.
\textsuperscript{136} Id at 20.
Consequently, such method may only be useful to establish the lower-bound estimate of the harm.\textsuperscript{137} However, unlike comparisons over time, comparisons using geographic (and product) markets are not affected by uncertainty regarding the commencement or cessation of the infringement.\textsuperscript{138}

**Comparison with data from other product markets**

This method is very similar in approach to that of comparisons with data from other geographic markets, save that the comparison is made with a different product market with similar characteristics to the affected market. The pros and cons identified in relation to comparisons with geographic markets apply equally here. Most importantly, in selecting a comparator product, regard should be had to the nature of the products compared, the manner in which they are traded and the specific market characteristics.\textsuperscript{139}

**Combining comparisons over time and across markets**

Also known as the ‘difference-in-difference’ technique, combining comparisons over time and across markets can help to avoid some of the pitfalls of the above approaches. Specifically, the approach aims to address the assumption that any unexplained difference is solely attributable to the impugned conduct. By examining what has changed over time, the combination of the various models control for what would have happened without the infringement.\textsuperscript{140} In other words, the method "looks at the development of the relevant economic variable in the infringement market during a certain period (difference over time on the infringement market) and compares it to the development of the same variable during the same time period on an unaffected comparator market (difference over time on the non-infringement market)."\textsuperscript{141}

The combination of techniques is an improvement over the individual methods as the increased variability assists in estimating the effect of the infringement. In addition, the method incorporates the possibility of a particular factor affecting price in both markets. Importantly, the method

\textsuperscript{137} Id at 20.
\textsuperscript{138} Supra n 113 at 48.
\textsuperscript{139} Supra n 111 at 20 to 21.
\textsuperscript{140} Supra n 113 at 59.
\textsuperscript{141} Supra n 111 at 21.
still cannot account for a factor which affects the affected market but not the comparator market.\textsuperscript{142}

**Techniques for implementation of comparator-based methods**

As indicated above, each of the comparator-based methods described above has a number of inherent flaws. The extent to which such flaws impact on the overall viability of the particular model is further influenced by the method of implementation. For example, the degree to which individual or aggregate data is utilised. Where factors influence only one of the markets, consideration should be given to whether it is appropriate to make adjustments to the observed data.\textsuperscript{143}

Some of the simple techniques available to improve the quality of the analysis include the choice between individual data observations and averages, or the interpolation of the data, whereby the counterfactual price during the infringement is estimated by drawing a line between the pre- and post-infringement prices. This will to a certain extent cater for pricing trends.\textsuperscript{144}

In addition to the above, regression analysis can be utilised to investigate patterns in the relationship between economic variables. Regression analysis allows for the measurement of the influence of other variables over a particular factor by variables that are not affected by the infringement. Regression analysis also allows for the assessment of the degree to which factors other than the infringement have contributed to the observed differences between the infringement market and the comparator market. It estimates “\textit{how closely the relevant variables are correlated with each other.}”\textsuperscript{145}

In order to perform a regression analysis, a thorough knowledge of the workings of the industry is required, as well as a sufficient number and range of data observations for all of the variables to be considered.\textsuperscript{146}

In courts in the EU, there has been a tendency to use straightforward implementations of the comparator-based methods. Such courts have however also accepted simple adjustments to data where a

\textsuperscript{142} Supra n 113 at 61.
\textsuperscript{143} Supra n 111 at 22.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Supra n 111 at 29 to 30.
differentiating factor can be easily identified.\textsuperscript{147} In the US, a litigant is free to establish the counterfactual price or scenario in any “defensible manner” it desires, however, the most commonly used methods in the US tend to be before-and-after comparisons.\textsuperscript{148}

6.2.3. Simulation, Cost-Based and Finance-Based Analysis

Simulation models

Drawing from industrial organisation theory, simulation models identify the counterfactual scenario with reference to various economic models of market behaviour. The models allow for the prediction of the likely outcomes – typically in terms of price and volumes – flowing from market interaction. Unlike comparator-based models, simulation models use a combination of theoretical models, assumptions and empirical estimation.\textsuperscript{149}

The various simulation models used range from monopoly models at the one end, to perfect competition at the other. Falling between these two extremes lie the Cournot and Bertrand oligopoly models, designed originally by the economists Agustin Cournot and Joseph Bertrand respectively.\textsuperscript{150}

Each of these models and the various iterations thereof (for example, dynamic oligopoly models based on game theory), allow for the estimation of price or volumes (or other variables) that are likely to have existed in the counterfactual scenario had the infringement not occurred. The model must be built in such a manner that it replicates i) the significant factors impacting on supply, and ii) demand conditions.\textsuperscript{151}

One of the drawbacks of simulation models is that they are reliant on large amounts of data and various assumptions. (The less complex the model, the greater its reliance on assumptions that may not be easily verified.) Simulation models can be used in merger investigations, cartel cases and in cases involving exclusionary practices, although legal precedent for the use of oligopoly models is limited.\textsuperscript{152} \textsuperscript{153} However, if a

\begin{thebibliography}{9}
\bibitem{147} Id at 32
\bibitem{148} Supra n 108 at 169.
\bibitem{149} Supra n 111 at 33; Supra n 113 at 76
\bibitem{150} Supra n 111 at 33.
\bibitem{151} Id at 34.
\bibitem{152} Supra n 113 at 81.
\end{thebibliography}
comprehensive model that replicates a variety of specific characteristics of the market to be analysed can be built, which is then solved and evaluated, simulations models can be of use in providing a reasonable estimate for the counterfactual scenario. Importantly, the correct assumptions must be made. These models can be technically demanding and, as mentioned above, require significant amounts of data which are not always accessible.  

Cost-based and finance-based methods

Damages can also be estimated with cost-based and financial-based methods. Cost-based methods (also sometimes referred to as the ‘cost plus’ or ‘bottom-up costing’ methods) attempt to measure the counterfactual scenario using a measure of production costs plus a mark-up for a ‘reasonable’ profit in the non-infringement scenario.  

Financial-based methods analyse the financial position of a firm (particularly its profitability) to estimate whether it has suffered any damage, and the amount of such damage. A variety of options, (including accounting methods and the ‘net present value method’) are available to assess the profitability of a firm that is alleged to have been harmed by anticompetitive conduct. Once the actual profitability of the firm has been established, the profitability in the counterfactual must be established. This may be achieved using profitability data from a comparator market. Accordingly, the second phase of this method is quite similar to comparator-based methods mentioned above.  

A significant advantage of such methods is that much of the data necessary to perform the analysis may already be in the possession of the firm that is alleged to have suffered harm. On the other hand though, the use of financial analysis methods can create difficulties. In this regard, it is frequently difficult to differentiate between the impact of external factors and that of the infringement on financial performance.  

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153 Supra n111 at 35.
154 Id.
155 Id at 36.
156 Id at 38.
157 Id at 38.
158 Supra n 113 at 67.
6.3. **Application to the South African Situation**

The primary difficulty with all models used to estimate damages is the availability and quality of data, and in the case of comparator-based methods, the ability to select an appropriate source of comparison. For example, in *Children’s Resources Centre*, the Commission did not allege (and the Tribunal did not find) that the cartel spanned the entire country at all times. In addition, the coordination between the bread producers did not relate to the same subject matter in all regions. This particular case presents further complications when regard is had to the range of products and the regions in which such products are sold. The likely result of these circumstances is that a comparator market will be difficult to find. In addition, even where it can be established that the collusive conduct did not extend to a particular region, the proximity of such region to those where the collusive conduct did occur (and the consequent risk that it has been ‘tainted’ by the anticompetitive conduct) may complicate the damages estimation. Further, given that the same market participants were active across the affected geographies, it is likely that some external factors affected the degree to which the conditions of competition were similar.

These difficulties are highlighted by the SCA in its judgment where it states the following:

“Applying this methodology – which was not challenged - to this case, involves entirely separate exercises being undertaken in a number of small regional areas in the four provinces, in respect of widely divergent conduct taking place at differing times and affecting consumers differently depending on the actions of the retailers and resellers. In addition the exercise is to take place in relation to three different bread producers who set list prices separately in relation to the different types of bread that they produced and negotiated discounts separately and in different ways for different groups. The result was that they charged varying prices to the retailers and resellers to whom they sold bread. In turn the retailers and resellers fixed their own prices independently. The inevitable result is that there is no commonality within the suggested class in regard to harm suffered or the

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159 Supra n 10.
160 Id para 50 to 52.
161 The Tribunal determination reflects that Pioneer produced 32 different types of bread, not all of which are available throughout the country.
nature of any damage that may have been caused to individual consumers.”

While no doubt a difficult task, the above concerns should not be an impediment to claiming damages where harm has been caused. As suggested by De Coninck, courts should take a pragmatic approach to the quantification of harm and it must be accepted that there has to be a trade-off between the accuracy of a model and the ease of implementation.

None of the models claim to provide anything more than an estimation of the damage suffered, and accordingly, it is submitted that the South African courts should take a pragmatic approach to the calculation of damages in claims arising from anticompetitive behaviour.

6.4. Conclusion

Importantly, the list of methods described above must not be seen as a closed list. As indicated, each method has its advantages and disadvantages and may provide useful insights in relation to the harm caused by anticompetitive conduct. It is important to emphasise that no model can provide an exact figure of the damage sustained. Each result can be no more than an estimation. It is accordingly vital that the most correct method is selected, that being the method that is most likely to provide the best estimate having regard to the particular circumstances of the case. Some of the principal factors that will play into such decision are the availability and quality of data, and in the case of comparator-based methods, the ability to select an appropriate source of comparison. A further factor that should be considered is the costs and time involved in establishing the estimate and the proportionality to the size of the potential claim.

A final consideration should be that the courts will frequently be presented with the results of more than one model. In such circumstances it is normally not appropriate to simply take an average of the various results. Rather, the particular strengths and weakness of the models applied in the particular case should be examined and the decision regarding which result is the appropriate one should be made on that basis. The South African courts should take a pragmatic approach to the quantification of harm. Once there has been a finding of a contravention of the

162 Supra n 10, para 50 to 52.
164 Supra n 111 at 39.
165 Id at 39 to 40.
Competition Act, the evidentiary burden in relation to the quantification of damages should not be so high as to impede the harmed party’s right to compensation for harm suffered.\textsuperscript{166} As stated above, there has to be a trade-off between the accuracy of a model and the ease of implementation, however, it will ultimately be up to the courts to decide where this trade-off should lie.\textsuperscript{167}

\textsuperscript{166} Supra n 163 at 10.
\textsuperscript{167} Supra n 166 at 11.
Conclusion

Until recently, the avenue of a private claim for damages arising from a breach of the Competition Act, whether in one’s own name or on behalf of a class, had been neglected. However, the recent *Children’s Resource Centre* case, slightly modified by *Mukaddam*, has provided a path where there previously was none for those who suffer harm at the hands of firms that contravene the Competition Act. In doing so, our courts have echoed the dominant view in the EU, where numerous policy interventions have been proposed to aid private litigants in bringing claims, including the introduction of collective and representative actions.

This is particularly important in the South African context, where given the resource gap between the majority of citizens and large corporates, many of the victims of anti-competitive conduct are unlikely to have the resources to bring claims in their individual capacities. The development of our law to allow class actions in cases such as this will play a crucial role in providing access to justice to those that would often otherwise be without redress.

It is not yet clear what precise cause of action is available to a claimant in terms of section 65. However, in our view, on any interpretation, significant challenges will still present themselves in relation to the quantification of harm suffered. In this regard, the quality and general availability of data as well as the assumptions that are relied upon will play a significant and decisive role in establishing the extent of liability.
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