THE LACK OF AN APPROPRIATE CAUSATION FRAMEWORK IN COMPETITION LAW PROCEEDINGS UNDER THE COMPETITION ACT, 1998*

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SUMMARY

Causation is one of the most under-utilised principles in public competition law. This increases the risk that defendants in competition proceedings, in particular, dominant firms in exclusionary abuse of dominance cases, may be found liable for market distortions that cannot satisfactorily be linked to their conduct. Having regard to the substantial financial penalties often levied against dominant firms found to have abused their dominant position, the central argument of this paper is that causation must be recognised and dealt with in competition proceedings as a fundamental legal principle that is central to competition liability. To this end, the paper proposes that the common-law principle of causation developed in tort law or delict can be utilised in developing an appropriate causation framework for public competition law.

1 INTRODUCTION

One of the most underdeveloped areas in public competition law is how competition authorities determine whether the conduct of the defendant "has caused" the competition injury suffered by a complainant.[1] This suggests a poorly developed causation framework in terms of which competition authorities determine whether a causal nexus exists between a firm's conduct and the competition injury suffered by competitors or consumers.

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1 Sutherland and Kemp *Competition Law of South Africa* (LexisNexis Online: last updated November 2015) par 7.11.3.2. In other jurisdictions, such as the United States and Europe, a similar problem has also been observed, see Eilmansberger "How to Distinguish Good from Bad Competition under Article 82 EC: In search of clearer and more coherent standards for Anti-competitive Abuses" 2005 42 *Common Market LR* 129 par 3.1; Berry "The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions" 2001 32 *Law and Policy in International Business* 263 317; Carrier "A Tort-Based Causation Framework for Antitrust Analysis" 2011 77 *Antitrust LJ* 991 991.

The aim of this paper is to investigate whether an appropriate causation framework exists in South African competition law in terms of which competition authorities determine whether a firm's allegedly anticompetitive conduct has caused the competition injury suffered by competitors or consumers. To this end, the abuse of dominance provisions of the Competition Act,[2] in particular, those dealing with exclusionary abuses by dominant firms will take centre stage.

The principal argument of this paper is that it is essential that the issue of causation is recognised and dealt with in competition proceedings as a fundamental legal issue that is central to competition liability.[3] The relevance and importance of causation in competition law proceedings become apparent in exclusionary abuse of dominance cases, where experience and logic have proved that it is difficult, if not impossible, to classify an action of a dominant firm as anticompetitive and illegal without having thoroughly considered its "effects" on consumers and competitors.[4] The paper observes that despite the insistence in some abuse of dominance provisions of the Competition Act and case law that the complainant must establish "anticompetitive effects" or "anticompetitive harm",[5] predominantly the principle of causation is of limited practical use in competition law proceedings.

The paper adopts the view that the introduction or invigoration of the principle of causation in public competition law may play an important role in ensuring that abuse of dominance proceedings are fair. For example, in exclusionary abuse of dominance cases, causation will ensure that only dominant firm conduct which has caused the exclusion of competitors or harm to consumers will attract competition liability. This paper, therefore, argues that the adoption of the common-law principle of causation may play an important role of guiding and shaping the development of an appropriate causation framework for public competition law in South Africa. In the ensuing discussion, I expound broadly on the issues outlined in the introduction above.

2 A REVIEW OF ABUSE OF DOMINANCE PROVISIONS IN THE COMPETITION ACT WITH SPECIFIC FOCUS ON EXCLUSIONARY ABUSES

Due to length limitations, it is not possible in a paper of a limited size such as this to provide an exhaustive discussion of all the abuse of dominance provisions of the Competition Act without losing focus. It is appropriate to observe merely that the majority of abuse of dominance provisions in the

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2 89 of 1998.

3 *Netstar (Pty) Ltd v Competition Commission South Africa* 2011 (3) SA 171 (CAC) par 31; Berry 2001 32 *Law and Policy in International Business* 314.

4 Office of Fair Trading "The Cost of Inappropriate Interventions / Non-Interventions under Article 82" September 2006 ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo_report.pdf (accessed 2016-09-10) par 1.25.

5 See s 8(c) of the Competition Act. See also *Competition Commission v South African Airways (Pty) Ltd* Case No 18/CR/Mar01 par 111.

Competition Act relates to exclusionary abuses rather than exploitative abuses.[6] This means our abuse of dominance provisions are more concerned with dominant firm practices that exclude competitors from the market, than practices that directly harm consumers. This means a thorough understanding of our abuse of dominance law will require a better understanding of the exclusionary abuse of dominance provisions of the Competition Act. Section 8 of the Competition Act, the cornerstone of our abuse of dominance law, prohibits dominant firms from engaging in various "exclusionary acts" deemed to constitute an abuse of dominance.[7]

An exclusionary act is defined in section 1 of the Act as "an act which impedes or prevents a firm from entering into or expanding within the market". In practice a complainant relying on a breach of section 8 of the Competition Act will have to show, firstly, that the defendant has engaged in one or more of the specific exclusionary acts listed in section 8[8] or any other exclusionary conduct that could fall within the broad "catch-all" grip of section 8(c).[9] Once the complainant has overcome the initial hurdle of proving that the defendant has engaged in any of the specific or general exclusionary acts under section 8, the next step is to demonstrate that the conduct complained of has "anticompetitive effect".[10] This, in the language of the Competition Act, means that the conduct in question must be shown to have "the effect of substantially preventing or lessening competition".[11]

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6 Indeed the only exploitative practice by a dominant firm, which harms customers and consumers condemned by the Competition Act, is excessive pricing, see s 8(1) of the Act. See also Lewis *Enforcing Competition Rules in South Africa* (2013) 143.

7 Such practices include, but are not limited to, refusal to give a competitor access to an essential facility when doing so is economically feasible; engaging in various exclusionary acts that include requiring or inducing a supplier or customer not to deal with a competitor; refusing to supply a competitor with scarce goods or resources when doing so is economically feasible; bundling/tying; predatory pricing; and buying-up scare goods or resources required by a competitor.

8 S 8(b) and (c) of the Act.

9 S 8(c) of the Competition Act provides as follows:

"It is prohibited for a dominant *firm* to –

…

(c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anticompetitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or …"

10 *Competition Commission v Patensie Sitrus Beherend Beperk* Case No 37/CR/Jun01 par 95; *Sappi Fine Papers (Pty) Limited v Competition Commission* Case No 62/CR/Nov01 par 40 and 52; *Competition Commission v South African Airways (Pty) Ltd supra* par 101–105; *Mandla-Matla Publishing (Pty) Ltd v Independent Newspapers (Pty) Ltd* Case No 48/CR/Jun04 par 77–78; *Competition Commission v British American Tobacco South Africa (Pty) Ltd* Case No 05/CR/Feb05 par 296; and *Competition Commission v Telkom SA Ltd* Case No 11/CR/Febr04 par 99. See also Lewis *Enforcing Competition Rules in South Africa* 143.

11 A central principle of the Competition Act that permeates all its rule of reason provisions is that the prevention and lessening of competition is prohibited only if it is "substantial". See s 5(1), 8(c), 9(1)(a) and 12A of the Act. See also *Competition Commission v South African Airways (Pty) Ltd supra* par 138; *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 28 and 31; *Phutuma Networks (Pty) Ltd v Telkom SA Ltd* Case No 108/CAC/Mar11 par 11.

The requirement that a complainant must demonstrate the "anticompetitive effect" of the impugned conduct potentially raises the question of causation.[12] The word "effect", as used in the Act in relation to the "anticompetitive effect" of the impugned conduct, refers to the "outcome" or "end product" or "consequence" of that conduct. Considered in the context of causation in competition law, the word refers to the "anticompetitive effect" or "anticompetitive harm" which can be attributed to the conduct of the defendant. One of the most vexing problems in competition law is that the phrases "anticompetitive effect" and "anticompetitive harm", which are the competition authorities' primary basis for intervention in the market, are not defined in the Competition Act. In addition, judicial pronouncements in South African competition law on the meaning of these concepts have not provided clear direction.[13] They cannot therefore, be said to have any absolute meaning.[14] This may lead to divergent views on their meaning and effect.

In *Competition Commission v South African Airways*[15] the Tribunal alluded to the problematic meaning of the concept of "anticompetitive harm" when it noted that, "one person's understanding of the concept of anticompetitive harm may mean *only* harm to consumer welfare, while for another, the meaning may *include* harm to competitors".[16] The Tribunal pointed out that it viewed the concept of anticompetitive harm as embracing harm to competitors and that harm to competitors was in itself an infringement of the Act, regardless of harm to consumers.[17] Indeed the fact that in this case the Competition Commission was unable to establish any adverse effects on consumer welfare attributable to the defendant's conduct, did not jeopardise its case as the Tribunal felt the case could be decided solely on the question of harm to competitors.[18]

Because it is difficult to prove with precision that a dominant firm's exclusionary conduct caused harm to consumers, it is widely accepted that harm to consumer welfare does not always have to be established, but can be inferred generally from the effect of the dominant firm's conduct on its competitors.[19] This means that harm to competitors is without more, equated with harm to consumers. The assumption here is that instances of harm or foreclosure to the dominant firm's competitors are almost certainly guaranteed to result in consumer harm in the form of reduced output, higher

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12 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 31. But it is appropriate to also observe here that not all exclusionary abuse of dominance provisions require the complainant or the Commission to demonstrate that the conduct complained of has anticompetitive effects. In some instances, mere proof of the existence of the exclusionary conduct is sufficient for the complainant to be successful. For example, an exclusionary act such as a refusal by a dominant firm to provide competitors access to an essential facility when doing so is economically feasible is prohibited outright, see s 8(b) of the Act. See also *Nationwide Poles v Sasol (Oil) Pty Ltd* Case No 72/CR/Dec03 par 96.

13 Sutherland and Kemp *Competition Law of South Africa* par 7.11.3.2.

14 Sutherland and Kemp *Competition Law of South Africa* par 7.11.3.1.

15 Case No 18/CR/Mar01.

16 Par 137.

17 *Ibid*.

18 *Competition Commission v South African Airways (Pty) Ltd supra* par 219 and 220.

19 *Nationwide Poles v Sasol (Oil) Pty Ltd supra* par 100–101; Sutherland and Kemp *Competition Law of South Africa* par 7.11.3.1.

prices, and lower quality products. As a result, in most exclusionary abuse of dominance cases, the duty of the complainant is generally limited to proving that the effect of the defendant's conduct has been to put competitors out of business or to restrict them access into or growth in the market. This means that the *causation enquiry* if effects analysis in competition law can be called that is limited to the link between the defendant's conduct and the exclusion or removal of rivals from the market.

Causation in relation to the link between the dominant firm's conduct and harm to consumers is generally ignored, as demonstrated by the finding of the Competition Tribunal in *Competition Commission v South African Airways*.[20] The problem with this approach is that it may lead to the outlawing of conduct which harms or excludes competitors, but which does not necessarily harm consumers, and may, in fact, benefit them. The main goal of competition law is neither the protection of competitors nor the promotion of competition for its own sake. The goal of competition law is to promote market competition as a means to enhance consumer welfare. With this in mind, one would expect that when adjudicating exclusionary abuse of dominance cases competition authorities would pay sufficient attention to the aspect of causation in relation to the link between the defendant's conduct and harm to consumers. The adoption of the common-law principle of causation could therefore, play an important role in the development of an appropriate causation framework for competition law.[21]

3 THE ROLE OF COMMON-LAW CAUSATION IN COMPETITION LAW ADJUDICATION

It is not the aim of this paper to provide a comprehensive discussion on the subject of common-law causation. For a comprehensive discussion on the subject of causation, readers are directed to appropriate sources.[22] For purposes of this work, it is appropriate merely to highlight the fundamental legal features of causation that can be useful in the development of an appropriate causation framework for competition law.

In public competition law proceedings causation could be determined in the same manner and should serve the same purpose it does under the common law.[23] At common law, as the then Appellate Division noted in the leading case of *Minister of Police v Skosana,*[24] the first question in any causation analysis is a factual one and relates to whether the respondent's act or omission has caused or contributed to the complainant's harm. If it did not, then no legal liability can arise. However, if the respondent's act or

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[20] In this case the Tribunal held that "we do not need to make a finding that there was actual harm to consumers, because despite the lack of direct evidence in this regard, it is highly likely that foreclosure of competitors has had adverse effects on consumer", *Competition Commission v South African Airways (Pty) Ltd supra* par 242. See also par 219–220 and par 297–298 of the same decision.

[21] Carrier 2011 77 *Antitrust LJ* 1004.

[22] See, *eg*, Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2014); Midgley, Loubser, Mukheibir, Perumal, and Niesing *Law of Delict in South Africa* (2013).

[23] Carrier 2011 77 *Antitrust LJ* 1004.

[24] 1977 (1) SA 31 (A).

omission has caused or contributed to the complainant's harm, then the second question becomes relevant: whether the respondent's act or omission is sufficiently close to, or is not too remote from, the complainant's harm for legal liability to ensue.[25] These two elements of common-law causation are generally referred to as factual and legal causation. In the discussion that follows, I deal with both factual and legal causation in more detail.

3 1 Factual causation

In the public competition law sphere, factual causation will be concerned with the question whether the defendant's conduct has *caused* or contributed to the anticompetitive harm suffered by competitors or consumers in the market.[26] There can be no question of competition liability if it is not established that the defendant's conduct has been a cause of the anticompetitive harm suffered by competitors or consumers in the market.[27] Courts and commentators regard the *conditio sine qua non* or the "but for" test the most important in determining whether a factual causal nexus exists between the defendant's act and the harmful consequences suffered by the complainant.[28] According to the *conditio sine qua non* theory, the defendant's conduct must have been the precondition or necessary condition[29] for the harm suffered by the complainant.[30] Simply put, the harm suffered by the complainant must have resulted from the defendant's conduct. The basic theory underlying the *conditio sine qua non* theory is that every event is the result of another prior event, which can reasonably be deemed sufficient to cause it.[31]

However, the *conditio sine qua non* or the "but for" test is not the only test for factual causation, as courts have accepted that there may be situations which warrant the development of exceptions or alternatives in accordance with common sense and flexibility.[32] This is particularly true in cases involving concurrent, supervening, or multiple causes.[33] In *Lee v Minister of Correctional Services*[34] the Constitutional Court emphasised that the process of establishing factual causation under the common law in terms of the *conditio sine qua non* or "but for" test has always been a flexible and not

25 *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34–35 and 43–44.

26 Neethling *Van Heerden-Neethling Unlawful Competition* (2008) 81.

27 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 183; Midgley *et al Law of Delict in South Africa* 69.

28 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 183 and 185.

29 A *conditio sine qua non.*

30 *Minister of Police v Skosana supra* 34–35 and 43–44; *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) 915. Midgley *et al Law of Delict in South Africa* 71; Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 186.

31 Midgley *et al Law of Delict in South Africa* 71.

32 *Minister of Police v Skosana supra* 34–5; *Siman and Co (Pty) Ltd v Barclays National Bank Ltd supra* 915; *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) par 25; *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) par 33.

33 *Siman & Co (Pty) Ltd v Barclays National Bank supra* 915.

34 2013 (2) SA 144 (CC).

a rigid one.[35] However, the Court did not jettison the *conditio sine qua non* or "but-for" test but merely emphasised the importance of flexibility when applying it.[36]

In order to determine whether a particular conduct can be regarded as a factual cause of the harm suffered by the complainant, one applies the "but for" enquiry. The essence of this "but-for" enquiry was eruditely explained by the then Appellate Division in *International Shipping Co (Pty) Ltd v Bentley.*[37] Here, the Court pointed out that the enquiry involves a number of elements: the making of a hypothetical enquiry as to what probably would have happened absent the conduct of the respondent; the mental elimination of the respondent's alleged unlawful conduct and the substitution of a hypothetical course of lawful conduct in the place of the respondent's alleged unlawful conduct; and the posing of the question whether upon such hypothesis the complainant's harm would have remained?[38] If it is shown that the complainant would have suffered the same fate absent the respondent's conduct or despite the hypothetical lawful conduct, then the respondent's conduct is not the factual cause of the complainant's harm.[39] This "but-for" test can be applied in circumstances involving both positive conduct and omissions.[40] However, as stated above, if it is shown that the respondent's act or omission has caused or contributed to the complainant's harm, then legal causation becomes relevant. Legal causation is concerned with the question whether the respondent's act or omission is sufficiently close to or is not too remote from, the complainant's harm for antitrust liability to arise.

3 2 Legal causation

Unlike the determination of factual causation, which may be relatively straightforward,[41] legal causation poses some serious problems, particularly when the course of events is not clear.[42] One particular problem that may arise when assessing the effect of dominant firm conduct on competition is that there may be a host of other factors operating to undermine competition in the market. In addition, these other factors may even be independent of, or unrelated to, the dominant firm itself or its conduct.

For example, in a competition law complaint in which a dominant firm is alleged to have engaged in an exclusionary practice, the effect of which is the removal of an effective competitor, or the prevention of a competitor's ability to grow market share, one is always confronted with the reality that even in perfectly functioning markets, businesses fail every day due to a

35 *Lee v Minister of Correctional Services supra* par 41, 43, 45, 47, 49, 50, 63 and 73.
36 Price "Factual Causation After Lee" 2014 131 *South African LJ* 491 497.
37 1990 (1) SA 680 (A).
38 *International Shipping Co (Pty) Ltd v Bentley supra* 700.
39 *Ibid.*
40 Midgley *et al Law of Delict in South Africa* 72.
41 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 85.
42 Grant "The Permissive Similarity of Legal Causation by Adequate Cause and Nova Causa Interveniens" 2005 122 *South African LJ* 896 896.

host of reasons. Such reasons may include poor planning or lack of experience, skills, or resources.[43] Other factors, such as regulatory challenges, a general decline in an industry or adverse changes in market conditions, high operating costs, and barriers to entry may affect the survival prospects of many businesses in a market. Without legal causation, it is possible that perfectly legitimate business practices by dominant firms operating in markets affected by these challenges might easily be mistaken as the cause of the exit from the market by competitors.[44] In these circumstances, the challenge facing competition authorities is to separate the alleged effects of the impugned dominant firm conduct on competition, from those of other events affecting the market.[45]

Legal causation plays an important role here, by ensuring that the respondent's conduct is sufficiently close to, or not too remote from, the anticompetitive effects complained of.[46] Although legal causation still centres on factual causation, the unique aspect of legal causation is that it creates a principle, which sets limits on liability, by establishing the legal boundary beyond which liability cannot exist.[47] This boundary is essential because in many instances legitimate dominant firm conduct can still be remotely connected to the exclusion of competitors from the market. As commentators have remarked, "even the most lawful conduct is potentially exclusionary: in each sale, there is one winner and at least one loser and the loser is to some extent excluded".[48]

Judicial experience has led to the development of various traditional theories or tests for legal causation.[49] However, given the limited individual influence of the different traditional theories for legal causation in our law, it is not necessary to provide a discussion of each one of them. This is because all the traditional theories of legal causation have been subsumed into a single flexible approach, which seeks to reconcile and balance all

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43 O'Donoghue and Padilla *The Law and Economics of Article 102 TFUE* (2013) 271; Cooper "Causation in Primary Line Price Discrimination – Section 2(a) Clayton Act" 1970 64 *Northwestern University LR* 128 142, also reprinted as "Causation in Primary Line Price Discrimination – Section 2(a) Clayton Act" 1975 6 *Journal of Reprints for Antitrust Law and Economics* 489 505.

44 This is particularly relevant for the South African domestic airline industry where the collapse of many small players in recent years, largely due to higher operating costs and non-profitable routes, has been blamed largely on South African Airways as the dominant player, see Visser and Ensor "Competition Commission Declines to Probe SAA" 12 November 2012 http://www.bdlive.co.za/national/2012/11/12/competition-commission-declines-to-probe-saa (accessed 2016-09-10).

45 Carrier 2011 77 *Antitrust LJ* 991.

46 *International Shipping Co (Pty) Ltd v Bentley supra* 700.

47 *Blaikie v The British Transport Commission* 1961 AC 44 49; *S v Mokgethi* 1990 (1) SA 32 (A) 40; *Ncoyo v Commissioner of Police, Ciskei* 1998 (1) SA 128 (CK) 138.

48 Sutherland and Kemp *Competition Law of South Africa* par 7.11.3.1.

49 The best know traditional theories for determining legal causation are the theory of adequate causation; the theory of direct consequences or proximate cause; the theory of reasonable foreseeability; the theory of *novus actus interveniens;* the *talem qualem* theory; and the fault theory of causation, see Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 203–20; Midgley *et al Law of Delict in South Africa* 94–100.

divergent approaches to legal causation.[50] Following the decision of the then Appellate Division in *S v Mokgethi*,[51] it is now generally accepted that the leading test for legal causation is a flexible one, in which factors such as reasonable foreseeability, directness, the presence or absence of a *novus actus interveniens*, legal policy, reasonableness, fairness, and justice all play a part.[52] To the extent that the flexible approach to legal causation is guided fundamentally by the principles of fairness, justice, and reasonableness, it is submitted that this test can be of great assistance in competition law proceedings. A flexible approach to legal causation will ensure that the interests of the state and complainants in competition proceedings to root out anticompetitive exclusionary conduct are evenly balanced against the interests of respondents not to be held liable for speculative antitrust breaches.

4 A REVIEW OF SOUTH AFRICAN COMPETITION LAW DECISIONS WHERE CAUSATION WAS CENTRAL TO THE DETERMINATION OF ISSUES

It is important to note that some of the prohibited practices provisions of the Competition Act do not require a complainant to prove that the act complained of having "anticompetitive effects", as certain practices are prohibited *per se*.[53] In such cases, mere proof of the existence of the alleged anticompetitive conduct is sufficient for the complainant to be successful. This means in cases involving practices that are prohibited *per se*, anticompetitive harm is based on presumptions rather than facts, as no investigation is done on the effects of the impugned conduct on the competition.[54] The final effect of this state of affairs is that causation is rendered irrelevant in *per se* prohibitions, as the complainant is never required to show that the respondent's conduct has caused harm to competitors or consumers.

However, even in cases under other provisions of the Competition Act, which require the complainant to demonstrate "anticompetitive effects", causation – as implied in effects analysis – is generally dealt with implicitly but not as a discrete and important element of competition liability. In addition, when competition authorities do investigate the effect of the

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50 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 201; Midgley *et al Law of Delict in South Africa* 91.

51 1990 (1) SA 32 (A).

52 *S v Mokgethi supra* 40–41; *International Shipping Co (Pty) Ltd v Bentley supra* 701; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 765.

53 *Eg*, an exclusionary act such as a refusal by a dominant firm to provide a competitor access to an essential facility when doing so is economically feasible is prohibited outright with no need to prove anticompetitive effects, see s 8(b) of the Competition Act. See also *Nationwide Poles v Sasol (Oil) Pty Ltd supra* par 96–97; *Competition Commission v Patensie Sitrus Beherend Beperk supra* par 95.

54 O'Donoghue and Padilla, who are familiar with our law and often appear in cases before our competition authorities as experts, have also lamented a similar problem in European competition law, see O'Donoghue and Padilla *The Law and Economics of Article 102 TFUE* 272. It is reasonable to infer that their views would remain the same as far as our law is concerned.

impugned conduct on competition, this enquiry – as stated earlier – is generally limited to the effect of the impugned conduct on competitors. The effect of the impugned conduct on consumers is seldom investigated. The result is scant case law on causation in competition law. Below I discuss selected decisions of our competition authorities in which the issue of causation was of great relevance. I start with the cases in which causation was ignored and follow this with the cases in which the principle of causation was applied.

4 1 Cases where causation was ignored

In *Nationwide Poles v Sasol (Oil) Pty Ltd*,[55] it was alleged that a dominant firm, Sasol, was involved in the practice of price discrimination which was designed to, or had the effect of, increasing the complainant's cost structure and thereby retarded growth and expansion opportunities for the complainant. There was no debate as to whether the complainant was indeed experiencing general growth and expansion challenges in the market. The debate centred rather on the question whether the respondent's price discrimination was responsible for the inability of the complainant to compete in the market and to grow its market share.[56] Although it was not framed as such, this was by implication a question of causation.

The Tribunal stated that it found it impossible to "identify what the appropriate counterfactual would be".[57] In other words, the Tribunal was unable to identify what would have been the position of the complainant in the market absent the price discrimination, in line with the "but for" or *conditio sine qua non* theory of causation. However, despite its inability to determine this, the Tribunal found that the price discrimination had disadvantaged the complainant.[58] So, the Tribunal found that the price discrimination was responsible for the deterioration in the market position of the complainant. It reached this conclusion without any robust determination as to whether the price discrimination was a *conditio sine qua non* for the complainant's predicament.

It is likely that the price discrimination might have caused or contributed materially to the complainant's troubles, and the Tribunal might have been correct in its finding against the respondent.[59] However, it is disconcerting that the finding itself was made without reliance on evidence establishing the link between the defendant's conduct and the complainant's harm. The Tribunal merely drew an inference of harm, without requiring evidence establishing the link between the defendant's conduct and the complainant's harm.

When the matter went on appeal, in *Sasol Oil (Pty) Ltd v Nationwide Poles CC*,[60] it came as no surprise that the decision of the Tribunal was

55 Case No 72/CR/Dec03.
56 *Nationwide Poles v Sasol (Oil) Pty Ltd supra* par 113–118.
57 *Nationwide Poles v Sasol (Oil) Pty Ltd supra* par 117.
58 *Ibid.*
59 Sasol.
60 Case No 49/CAC/Apr05.

reversed.[61] The Competition Appeal Court found that the determination of whether Sasol's pricing policy was likely substantially to prevent or lessen competition could not rest on "an inherent effect of Sasol's pricing policy, without any recourse to evidence demonstrating that the impugned conduct is capable of having or is likely to have an anticompetitive effect in the relevant market".[62] To support this finding, the Competition Appeal Court relied on its previous decisions in *Schumann (Sasol) (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd*[63] and *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal*,[64] where it found that the determination of whether competition is likely to be substantially prevented or lessened in the market must be based on evidence which is actually available to the competition authority and not speculation.[65]

In *Competition Commission v South African Airways*[66] the country's largest domestic airline, South African Airways (Pty) Ltd (SAA), had created incentive schemes for travel agents which, the Commission argued, had the effect of excluding the complainant, Nationwide Airlines, from the market in contravention of section 8(d)[67] of the Act.[68] SAA challenged the Commission's case on the effects of the incentive schemes, by arguing that the Commission failed to establish a causal link between the schemes and the demise of the complainant.[69] While the Tribunal agreed that a complainant under section 8(d) of the Act was required to demonstrate "anticompetitive effects",[70] the critical question on the effects issue was how far a complainant must go in establishing the anticompetitive effects required by the provision.

The Tribunal approached this question by asking "should an abuse of dominance provision proscribing exclusionary conduct by dominant firms require the existence of evidence of each chain of causation, establishing the links between the act of exclusion and competition harm"?[71] To this question, the Tribunal responded by quoting a passage from Areeda and Hovenkamp in which it is stated that "no antitrust authority which is seriously concerned about the evil of monopoly would condition its intervention strategy solely on a clear and genuine chain of causation".[72] The Tribunal then concluded that there was "respectable authority for the proposition that

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61 *Sasol Oil (Pty) Ltd v Nationwide Poles CC supra* 41.

62 *Sasol Oil (Pty) Ltd v Nationwide Poles CC supra* 38.

63 Case No 10/CAC/Aug01.

64 Case No 20/CAC/Jun02.

65 *Schumann (Sasol)(South Africa)(Pty) Ltd v Price's Daelite (Pty) Ltd supra* 18; *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal supra* par 38.

66 Case No 18/CR/Mar01.

67 In particular, for requiring or inducing a supplier or customer not to deal with a competitor under section 8(d)(i).

68 *Competition Commission v South African Airways (Pty) Ltd supra* par 28.

69 *Competition Commission v South African Airways (Pty) Ltd supra* par 30 and 229.

70 *Competition Commission v South African Airways (Pty) Ltd supra* par 110–111 and 132.

71 *Competition Commission v South African Airways (Pty) Ltd supra* par 115.

72 *Ibid*. See Areeda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and their Application* 2ed (2001) 3 par 651c. See also Kapoor "What Is the Standard of Causation of Monopoly?" 2009 23 *Antitrust* 38 40–41.

exclusionary practices should not be dealt with on a stricter test of causation".[73]

The reason behind the choice of this approach is that, from an enforcement point of view, it is difficult for the Competition Commission and complainants to establish a clear and genuine chain of causation in exclusionary abuse of dominance cases. A weaker or even non-existent test for causation may enable a finding of abuse even in circumstances where there may be no conclusive evidence or proof of foreclosure or harm to consumers. While this approach is controversial, it is appealing to competition authorities because it enhances the effective enforcement and deterrence effect of the Act.

Responding to the complainant's claim that SAA's incentive scheme was responsible for the decline in its fortunes, SAA contended that there were many other factors that might have caused, or materially contributed to, the decline in the fortunes of the complainant. These included factors such as incidents of overpricing or inappropriate price increases by the complainant,[74] the public/customers' declining confidence in the complainant as a result of bankruptcy rumours, some poor business decisions made by the complainant, poor economic conditions, and SAA's improved competitiveness.[75]

These defences or alternative explanations of possible causes of a decline in competition in the market are both important and very common in exclusionary abuse cases. They must be considered by a competition authority, especially when raised by a respondent.[76] As Carrier also notes, "the most frequent and important issue in resolving exclusionary abuse of dominance complaints is assessing the role played by alternative factors in bringing about the harm complained of".[77] As the Competition Appeal Court found in *Netstar*, "where a respondent raises or points to the possibility of the intervention or involvement of third parties or other factors that may have had a causative effect in bringing about the lessening or prevention of competition, it is necessary for a Court or competition authority to have regard to these possibilities".[78]

However, it is clear from the judgment of the Tribunal that these alternative explanations as to the possible causes of the decline in the fortunes of the complainant were not dealt with in any convincing way. If these factors were given any serious consideration as possible causes of the complainant's troubles, one would have expected the Tribunal to investigate whether the complainant's troubles would have remained absent the incentive schemes. Alternatively, the Tribunal should have considered whether the incentive schemes were, regardless of the other contributing

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73 *Competition Commission v South African Airways (Pty) Ltd supra* par 129.

74 Admitted to by the complainant.

75 *Competition Commission v South African Airways (Pty) Ltd supra* par 229–231 and 236.

76 See Cooper 1970 64 *Northwestern University LR* 128 142 and 1975 6 *Journal of Reprints for Antitrust Law and Economics* 489 505.

77 Carrier 2011 77 *Antitrust LJ* 996.

78 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 33.

factors, the most material or significant contributing factors. But the Tribunal did not consider these issues in a satisfactory manner.

The Tribunal justified its approach by stating that cases of exclusionary anticompetitive conduct generally create the dilemma that the counterfactual, namely what the market would have looked like absent the alleged prohibited practice, is impossible to construct.[79] But the Tribunal nevertheless felt confident in making the finding that the decline in the fortunes of the complainant was causally consistent with the respondent's incentives scheme with travel agents.[80] This was despite its own admission that it simply could not be sure whether the incentive scheme was indeed the most probable cause of the decline in the fortunes of the complainant.[81] In defence of its approach, the Tribunal argued that it would be a disservice to the enforcement of the Act for it to abstain from making a finding of the nature it did against the respondent, merely because it had not been conclusively proven that the respondent's conduct was the dominant cause of the anticompetitive harm suffered by the complainant.[82]

It may be argued that the Tribunal's reluctance to engage in a "but for" or counterfactual investigation in both *Nationwide Poles* and *South African Airways* deprived it of crucial facts and information which would have enabled it to make more informed decisions. Indeed, engaging in the counterfactual analysis may not be as unnecessary and impossible as the Tribunal has made it out to be. Counterfactual analysis or "but-for" tests have been traditionally applied in many areas of law, such as delict or criminal law, by asking the hypothetical question of how the situation would have been had an act or event not occurred, in order to show a causal connection between an act or event that occurred and the effects attributed to it.[83] In competition law, counterfactual investigations are already applied almost religiously in merger cases. The purpose of counterfactual investigations in merger cases is to determine whether or not the market will be worse off if the merger were to be approved. This is done by comparing the likely effect of the merger in the market, if approved, against the state of competition in the market absent the merger.[84] As Bavasso and Lindsay further observe, "in determining issues of causation in merger control antitrust lawyers and enforcement agencies increasingly engage in the counterfactual analysis to determine the situation that would have arisen in the absence of the merger which is the subject of assessment".[85]

There is no reason why counterfactual investigations cannot be applied in exclusionary abuse of dominance cases.[86] In my view, the counterfactual or

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79 *Competition Commission v South African Airways (Pty) Ltd supra* par 238.

80 *Competition Commission v South African Airways (Pty) Ltd supra* par 237.

81 *Competition Commission v South African Airways (Pty) Ltd supra* par 238.

82 *Competition Commission v South African Airways (Pty) Ltd supra* par 289.

83 Winkler "Counterfactual Analysis in Predation Cases" 2013 34 *European Competition LR* 410 410.

84 Winkler 2013 34 *European Competition LR* 419 and 421.

85 Bavasso and Lindsay "Causation in EC Merger Control" 2007 3 *Journal of Competition Law and Economics* 181 182.

86 Winkler 2013 34 *European Competition LR* 410.

"but for" enquiry is a central legal requirement implied in all exclusionary abuse of dominance provisions. In cases involving allegations of exclusionary abuse of dominance, the general rule is that the respondent's conduct ought not to be prohibited, unless it is shown that but for that conduct, competitors would have entered, remained, or expanded within the market. In such cases, an investigation into whether the general characteristics of the relevant market were also conducive to new entry and expansion by other firms would be an appropriate starting point.[87] This means the whole enquiry must not be limited to the assessment of the respondent's conduct as a sole obstacle to competition. The enquiry must also extend to all other possible alternative obstacles that would have confronted aspirant entrants to the market.[88] Issues such as the availability of capital, the need to establish an infrastructure, the availability of suitably qualified staff, and access to appropriate technology may all be relevant factors.[89] It is clear that the decisions in *Nationwide Poles* and *South African Airways* did not consider these issues satisfactorily. I move next to consider cases where the correct causation test was applied.

4 2 Cases where the correct causation test was applied

In *Competition Commission v British American Tobacco South Africa (Pty) Ltd*,[90] the Tribunal took a different and indeed the correct approach to the issue of causation. However, it is important to note that here the issue of causation was also dealt with implicitly rather than explicitly, as is common with most, if not all, decisions of the Tribunal. In this case, the Competition Commission and JT International South Africa (Pty) Ltd (JTI) laid a complaint in respect of alleged contraventions of sections 8(c)[91] and 8(d)(i)[92] of the Competition Act by British American Tobacco South Africa (Pty) Ltd[93]. BATSA and JTI competed in the South African market for the sale of manufactured cigarettes. It was alleged that certain exclusivity agreements concluded between BATSA and selected retailers incentivised retailers to promote, market, and sell BATSA brands in a manner that made it impossible for competitors to promote, market, and sell their products through these retailers and that this resulted in their foreclosure.

In terms relevant to the principle of causation, the Tribunal outlined that "not only must foreclosure of rivals or consumer harm be shown; they must also be shown to have flowed from the respondent's alleged anticompetitive conduct and not other factors".[94] This meant that where competitive harm could reasonably be found to have resulted from events or factors other than

87 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 30.
88 *Ibid.*
89 *Ibid.*
90 Case No 05/CR/Feb05.
91 See fn 9 above.
92 Which prohibits a dominant firm from requiring or inducing a supplier or customer not to deal with a competitor.
93 Hereinafter "BATSA".
94 *Competition Commission v British American Tobacco South Africa (Pty) Ltd supra* par 110.

the respondent's conduct, it could not readily be concluded that the respondent's conduct was the cause of the antitrust harm complained of. This caution was found to be particularly relevant in this case because there was an eminently reasonable possibility that harm to the structure of the cigarette market might have been caused significantly by comprehensive regulatory interventions.[95] The marketing, sale, and the consumption of cigarettes in South Africa have been highly restricted and negatively affected by the Regulations pursuant to the Tobacco Products Control Amendment Act.[96]

The critical issue for the Tribunal, in this case, was therefore to choose the most significant causal factor for the alleged anticompetitive harm, between the exclusivity agreements between BATSA and the retailers and the Regulations emanating from the Tobacco Products Control Amendment Act.[97] The Tribunal noted that where there are two or more likely sources of anticompetitive harm, it would require a demonstration that the anticompetitive harm allegedly generated by the conduct of the respondent was, on its own and independent of the second source, sufficiently significant for competition liability to follow.[98] Having considered the merits of the arguments for all the possible causes of harm to the structure of the market, the Tribunal concluded that the most significant cause of foreclosure was the Tobacco Regulations and not the conduct of the respondent.[99]

The Tribunal emphasised that having regard to the evidence before it, it would be impossible for it to conclude that the most significant cause of the alleged foreclosure was the conduct of BATSA rather than the decisions by the legislature, whose manifest intent was indeed to limit and possibly eliminate the promotion of cigarette sales.[100] Indeed, part of the complainant's business where foreclosure was more evident, that is, the marketing and promotion of cigarettes, happened coincidentally to be the one most affected industry-wide by the Tobacco Regulations.[101] The Tribunal observed that because marketing, advertising and sponsorship were overwhelmingly the most significant mode of promotion in this market, the abrupt proscription of these activities by the Regulations was bound to impact on growth in the overall market as well as on the complainant's market share.[102]

In *Competition Commission v Netstar (Pty) Ltd*[103] the central issue was whether standards set by an industry association in the stolen vehicle recovery market established barriers that prevented competitors, who were

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95 *Ibid.*

96 12 of 1999. *Competition Commission v British American Tobacco South Africa (Pty) Ltd supra* par 26.

97 *Competition Commission v British American Tobacco South Africa (Pty) Ltd supra* par 291.

98 *Competition Commission v British American Tobacco South Africa (Pty) Ltd supra* par 110.

99 *Competition Commission v British American Tobacco South Africa (Pty) Ltd supra* par 295.

100 *Competition Commission v British American Tobacco South Africa (Pty) Ltd supra* par 121, 293 and 295.

101 *Competition Commission v British American Tobacco South Africa (Pty) Ltd* par 121.

102 *Competition Commission v British American Tobacco South Africa (Pty) Ltd supra* par 289 and 293.

103 Case No 17/CR/Mar05.

not members of that association, from entering the market and competing with association members. The evidence before the Tribunal overwhelmingly suggested that it was actually insurance companies, who were themselves customers of the association members, who demanded and drove the setting of the standards.[104] Despite this evidence, the Tribunal found that the setting and implementation of the standards were the result of an agreement or concerted practice between the association members, the purpose and effect of which was to exclude competitors – who were not members of the association – from the market.[105]

When the matter went on appeal,[106] the Competition Appeal Court's major preoccupation was the issue of causation. It was concerned with the question of who, between the association members and the insurance companies, was responsible for the establishment of these standards, found by the Tribunal to have had the effect of substantially preventing and lessening competition in the stolen vehicle recovery market. This was a question of causation and the Competition Appeal Court explicitly recognised it as such.[107]

The Court adopted the "but for" or *conditio sine qua non* test.[108] It stated that the appropriate approach would be to ask whether, "but for" the respondent's conduct, the prevention and lessening of competition in the market would have occurred.[109] And, if the answer is in the affirmative, the Court further remarked, then the respondent's conduct is not the cause of the decline in competition in the market.[110] This, the Court found, is the same enquiry conducted in relation to factual causation in other areas of the law, such as the law of delict.[111] However, the Court found further that a negative answer to the "but for" question would also not finally dispose of the matter.[112] Legal causation, the Court found, would have to follow.[113]

The Court observed that a market is a complex concept with many factors capable of influencing what happens in it, with the result that factors other than the respondent's conduct may be a dominant cause of the prevention or lessening of competition.[114] In such circumstances, the duty of the Court and competition authority is to find the dominant or primary or substantial cause of the prevention or lessening of competition.[115] The Court found that liability in competition law should arise only where the substantial prevention or lessening of competition is closely connected with or is the direct and predominant consequence of, the respondent's conduct.[116] Having regard to

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104 *Competition Commission v Netstar (Pty) Ltd supra* par 10, 38, 41 and 261.
105 *Competition Commission v Netstar (Pty) Ltd supra* par 233, 247, 262 and 286.
106 *Netstar (Pty) Ltd v Competition Commission South Africa supra*.
107 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 31–32 and 63–71.
108 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 30.
109 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 31.
110 *Ibid*.
111 *Ibid*.
112 *Ibid*.
113 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 33.
114 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 32.
115 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 33 and 69.
116 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 33 and 70.

the leading or dominant role played by the insurance companies, as major customers in the stolen vehicle recovery market, in bringing about the standards complained of, the Court found that any agreement between the association members, or their conduct, could not be regarded as the legal cause of the prevention of competition in the market.[117]

This is the correct approach to causation and should be applied in all exclusionary cases where the demonstration of anticompetitive effects is essential. However, there is little evidence in practice to suggest that the principle enunciated in *British American Tobacco* and *Netstar* have become settled law. There is still a noticeable reluctance, particularly from the Competition Tribunal, to embrace the principle of causation as an important element of competition liability.

5 EFFECTS ANALYSIS IN COMPETITION LAW AS AN ALTERNATIVE TO THE CAUSATION INQUIRY

Enquiries into the effect of the alleged exclusionary conduct on competition in abuse of dominance cases are an analogy of the causation enquiry that takes place in civil claims for damages in tort law or delict. The causation enquiry in tort law or delict seeks to establish the link between the conduct of the defendant and the damage or loss suffered by the plaintiff. Similarly, effects analysis in competition law seeks to establish the link between the respondent's conduct and the prevention or lessening of competition in the market. Effects analysis plays an important role in ensuring that competition liability is based on evidence demonstrating the link between the conduct of the respondent and the prevention and lessening of competition in the market.

In this regard, the rise in prominence of "effects analysis" in modern competition law enforcement may seem like an appropriate alternative for the causation inquiry in competition law. However, effects analyses in competition law are conducted in a manner and at a level that cannot satisfactorily meet the requirements of factual and legal causation. In most cases, effects analyses are limited to asking two basic factual questions: has the conduct complained of occurred, and has there been prevention and lessening of competition in the market which is generally consistent with the impugned conduct?

There is no robust inquiry as to whether the prevention and lessening of competition are reasonably or sufficiently linked to the conduct of the respondent. The enquiry on the causal link between the conduct of the respondent and the prevention and lessening of competition in the market is considered irrelevant and unnecessary.[118] This is because causation is deemed a substantial departure from the relatively modest and settled standard for abuse of dominance adjudication, which demands far less than

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[117] *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 64–66.

[118] Narayen "Is Patent Hold-up Anticompetitive? *Rambus* and Individual Versus General Causal Claims" 2010 8 *Northwestern Journal of Technology and Intellectual Property* 307 318.

is required in the delict or tort context.[119] The argument is that, if causation were to be required, "the complainant would be put in an unfair, unenviable, and impossible position" of having to establish the counterfactual: proof that the outcome in the market would have been different absent the defendant's conduct.[120]

In the absence of counterfactual analysis, the conclusion that the respondent's conduct is responsible for the anticompetitive effects complained of is not based on proven facts, but on the assumption that the relevant conduct is generally considered capable of producing those effects.[121] As Narayen observes, "the general approach in antitrust enforcement is to require only that anticompetitive consequences are *likely* to flow from conduct as opposed to the fact that they are certain to flow from such conduct".[122] In this sense, effects analyses, as currently conducted, may not necessarily reflect facts as they are in the real world. They may at best be described as a "laboratory conclusion" arrived at through the interpretation of economic data in line with economic theories and assumptions.[123]

Competition authorities appear to be not particularly keen to undertake the arduous task of counterfactual analysis, to establish the causal link between the alleged abusive conduct and its anticompetitive effects.[124] There is apprehension among antitrust officials that engaging in the counterfactual analysis in exclusionary abuse of dominance cases would severely limit the scope of abuse of dominance provisions, potentially excluding most, if not all, types of anticompetitive conduct.[125] As an observer has remarked, "competition authorities who wish to address abuses of dominance in the market do not wish to burden themselves with the task of establishing a causal link between the conduct of the respondent and harm in the competitive process".[126] As Areeda and Hovenkamp also put it, "no antitrust authority which is seriously concerned about the evil of monopoly would condition its intervention strategy solely on a clear and genuine chain of causation".[127] As a result, various commentators have concluded that causation does not exist in competition law.[128]

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119 Narayen 2010 8 *Northwestern Journal of Technology and Intellectual Property* 318–20; and Eilmansberger 2005 42 *Common Market LR* 143.

120 Narayen 2010 8 *Northwestern Journal of Technology and Intellectual Property* 321.

121 Narayen 2010 8 *Northwestern Journal of Technology and Intellectual Property* 318.

122 Narayen 2010 8 *Northwestern Journal of Technology and Intellectual Property* 321.

123 Loozen "The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelled through the Economic Approach" 2014 39 *European LR* 91 97.

124 Whish and Bailey *Competition Law* (2012) 208; Narayen 2010 8 *Northwestern Journal of Technology and Intellectual Property* 317.

125 Whish and Bailey *Competition Law* 208; Eilmansberger 2005 42 *Common Market LR* par 3.1.

126 Berry 2001 32 *Law and Policy in International Business* 315.

127 Areeda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and their Application* par 651c.

128 Berry 2001 32 *Law and Policy in International Business* 315 and 317; Carrier 2011 77 *Antitrust LJ* 991; Eilmansberger 2005 42 *Common Market LR* par 3.1; Sutherland and Kemp *Competition Law of South Africa* par 7.11.3.2.

6 CONCLUSION

The purpose of this paper has been to investigate whether an appropriate causation framework exists in competition law. In the author's view, causation is essential and should be an important element of competition liability in exclusionary abuse of dominance cases, where the establishment of anticompetitive effects is vital. The conclusion reached here is that despite the insistence in some abuse of dominance provisions of the Competition Act and case law that the complainant must establish "anticompetitive effects" or "anticompetitive harm",[129] the principle of causation is of limited practical use in competition proceedings. In the limited instances where causation is dealt with in abuse of dominance adjudication, this generally happens implicitly or indirectly in a manner that reveals a worrying lack of robustness.[130] As a result, respondents in competition proceedings may be found liable for market distortions that cannot satisfactorily be traced back to their conduct.

To remedy this problem, I propose an approach by which the issue of causation could be dealt with in competition law. In terms of this approach, causation must be recognised and dealt with in competition proceedings as a fundamental principle that is central to competition liability.[131] To this end, the adoption of the common-law principle of causation may play an important role in guiding and shaping the development of a causation framework appropriate for competition law.

The proposal for the adoption of the common-law principle of causation in abuse of dominance adjudication may not be welcome for those involved in competition law enforcement. It raises the question of how far competition authorities or complainants must go in establishing the link between alleged exclusionary conduct and anticompetitive effects.[132] The underlying reason for the reluctance to apply the common-law principle of causation in competition law is the apprehension that the introduction of this principle would severely limit the scope of abuse of dominance provisions.[133]

On close examination, these concerns are unfounded. For many years, the common-law requirement of causation has been part of our law of delict. In delict, it has never been established that the causation requirement prevents claimants from successfully proving their claims. Experience in delict shows that the causation requirement is not a bar to the successful establishment of civil claims by plaintiffs. Indeed, plaintiffs with well-founded civil claims are able to sue successfully every day in our civil courts, despite the existence of this time-honoured principle. This is because at common-law the principle of causation is not applied rigidly, but in a flexible manner

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129 See s 8(c) of the Competition Act in fn 9 above. See also *Competition Commission v South African Airways (Pty) Ltd supra* par 111.

130 O'Donoghue and Padilla *The Law and Economics of Article 102 TFUE* 271; Berry 2001 32 *Law and Policy in International Business* 314.

131 *Netstar (Pty) Ltd v Competition Commission South Africa supra* par 31; Berry 2001 32 *Law and Policy in International Business* 314.

132 Whish and Bailey *Competition Law* 208.

133 *Ibid*. Eilmansberger 2005 42 *Common Market LR* par 3.1.

that takes into account the principles of fairness and justice.[134] A flexible application of the common-law principle of causation may, in fact, have a positive effect on the adjudication of competition disputes.

Flexibility in the application of the common-law principle of causation in competition law will ensure that a complaint is not dismissed merely because it does not meet a rigid test for causation.[135] Similarly, a flexible application of the common-law principle of causation, which espouses the principles of fairness and justice, would also ensure that liability on the part of the dominant firm would not arise unless a reasonable link between its alleged abusive conduct and the anticompetitive effects attributed to it is established.[136]

134 *Minister of Police v Skosana supra* 34–5; *Siman and Co (Pty) Ltd v Barclays National Bank supra* 915; *S v Mokgethi supra* 40–41; *International Shipping Co (Pty) Ltd v Bentley supra* 701; *Standard Chartered Bank of Canada v Nedperm Bank Ltd supra* 765; *Minister of Safety and Security v Van Duivenboden supra* par 25; *Minister of Finance v Gore supra* par 33; *Lee v Minister of Correctional Services supra* par 41, 43, 45, 47, 49, 50, 63 and 73.

135 Carrier 2011 77 *Antitrust LJ* 1007.

136 Kapoor 2009 *Antitrust* 39.