

The effects-based approach to abuse of dominance competition enquiries: the recent BATSA/JTI case.

1. Introduction

The South African Competition authorities have been making decisions on mergers, abuse of dominance practices and restrictive practices for the past ten years under the 1998 Competition Act (number 89 of 1998). It is important, from an economic perspective, to ask the question how the approach of the Competition authorities has changed, if at all. Economics, and competition economics, is a dynamic field and new academic research should find its way into policy decisions as well as specific case judgments. In this paper it will be argued that the South African competition authorities have used an economic effects-based approach in a recent abuse of dominance case. This is in line with developments in the economic literature, as well as in the applied competition law literature. There is a general sense that competition analysis should move away from a legal form based approach to an economic effects-based approach. In this paper the recently concluded abuse of dominance case against British American Tobacco South Africa ('BATSA') will be used to discuss some practical aspects around the application of such an effects-based approach.

2. Why an effects-based approach?

There is a growing realisation in the economic literature that what really matters in abuse of dominance cases are the potential effects on competition, and not simply a showing of anti-competitive behaviour or intent. While some actions by a dominant firm are considered to be prohibited *per se*¹, this prohibition does not apply to what is often called the 'exclusionary acts', listed under sections 8(c) and 8(d) of the SA Competition Act, which all require an analysis (and a weighing) of the pro-and anti-competitive effects.

This move towards an effects-based approach is well summarised in the following statement by Padilla (2007:2):

"... all these discussions, all these articles and white papers have led to what I will denote tonight as the "Brussels consensus"; this consensus involves two key propositions.

First, the goal of Article 82—or more in general, the goal of EC competition law—should be aggregate welfare. (For most, thought not for me, aggregate consumer welfare.)

¹ E.g. Competition Act sections 8(a) and 8(b)

Second, the existing form-based approach to Article 82 needs to be replaced for an effects-based or economics-based approach to the assessment of unilateral conduct.”

Padilla argued in his speech that a consensus has emerged (at least amongst economists), which can be termed the ‘Brussels Consensus’. He also explained why this new consensus is so important, when he said that:

“Existing form-based rules are likely to cause too many type I errors (false positives) since they are not properly grounded on economic theory and experience and largely neglect the potential efficiencies generated by conduct which under purely formalistic criteria looks anti-competitive” (2007:3).

These remarks were made in the context of the reform of Article 82 in the European Union, which led to the publishing of a Discussion Paper on exclusionary abuses in 2005 by the European Commission. This discussion paper reflects the views that article 82 of the EU treaty needs to be ‘modernised’, or applied with more regard to economic thinking. According to Freshfields, Bruckhaus Deringer² (2005:1) describing the ‘modernisation’ of article 82: “*This expression has become shorthand for abandoning a legalistic, form-based approach to enforcement in favour of an approach based on the economic impact of the conduct at issue*”.

As warned by Padilla (2007:2-3): “Courts and competition regulators using a simplistic form-based approach are bound to make mistakes—some practices will be found legal when they are welfare reducing and vice versa. This is because two practices which share the same form—e.g., two exclusive dealing contracts—can have very different welfare effects depending on the structure of the market, while two practices which appear to be different from a formalistic point of view may have the same adverse effects on consumer welfare.”

In the European Union specifically, this movement towards an effects based approach has now also been extended to abuse of dominance enquiries. There is an increases realisation that economic analysis is crucially important to the correct evaluation of real world cases. Economic analysis can provide a framework for thinking about complicated issues and it also has the advantage of using quantitative techniques that are often helpful in understanding market behaviour and price movements. In what follows, the role of economic analysis in one specific case will be highlighted.

² ‘Abuse of dominance: European Commission proposes way forward’. December 2005

3. The abuse of dominance case against BATSA

During 2003, Japan Tobacco International ('JTI') made a complaint against British American Tobacco ('BATSA') to the Competition authorities. This complaint specifically referred to sections 5(1), 5(2), 8(c), 8(d)(i) and 8(d)(iii) of the Competition Act. In general JTI alleged that BATSA, through its trade investment programmes with the retail trade, is preventing or lessening competition in the market. During February 2005, the Competition Commission referred the complaint to the Competition Tribunal. The referral is made on the basis that BATSA is in contravention of sections 8(d)(i) and/or 8(c) of the Act. JTI then made a referral under section 5(1) of the Act.

The abuse of dominance case is therefore primarily a case of exclusion of competitors (as indicated by the use of sections 8(d)(i) and 8(c) of the Act. As noted above, both these clauses call for an analysis of potential effects and a weighing of pro- and anti-competitive effects. The section 5(1)³ allegation refers to the fact that there is a vertical relationship between BATSA and the retailers with which it concludes agreements which can primarily be termed 'distribution agreements'.

It is important to state at the outset that there was no dispute as to the dominance and market power of BATSA. The market shares of BATSA varied during the period of the investigation, but as their market share in the relevant market for cigarette sales in South Africa consistently exceeded 85%, BATSA was deemed to be dominant and to possess market power.

The essence of the JTI complaint was that BATSA had abused its dominance by foreclosing the retail market through its distribution agreements with retailers. More specifically: "The conduct that lies at the heart of these proceedings is a wide-ranging campaign by BATSA, throughout South Africa, to foreclose JTI and other cigarette manufacturers from access to the main demand drivers for their products at retail outlets and Horeca⁴ venues and thereby to prevent them from being able to compete effectively in the market"⁵.

There is a large economic literature on foreclosure of rivals. However, the first important point to note in the BATSA case is that none of the agreements were exclusive in nature. The cigarette dispensing units used by all

³ The SA Competition Act prohibits "an agreement by parties in a vertical relationship if it has the effect of substantially preventing or lessening competition in a market" (section 5(1)). The prohibition is not applicable if there is any 'technological, efficiency or other pro-competitive, gain resulting from that agreement' that outweighs the anti-competitive effect. This is the so-called 'rule of reason' approach.

⁴ This is an industry term that refers to retail outlets comprising Hotels, Restaurants and Cafés.

⁵ Par 7.1, Intervenor's particulars of complaint. 14 October 2005

manufacturers (CDU's) were populated by the retailer and the planograms⁶ were only a guideline that in all cases also provides space for competitor's products. On the issue of exclusivity, JTI stated that: "It bears emphasis that with many forms of point-of sale signage and display mentioned above, it is not even necessary to provide for exclusivity. There is for instance often only one CDU, and one set of point-of-sale material, in any particular merchandising outlet at one time. Accordingly, if BATSA can secure that one facility for indicating the availability of its own cigarette brands, it effectively obtains exclusivity for BATSA and prevents JTI and other cigarette manufacturers from being able to indicate availability of their own brands in such stores at all".

In order to test these allegations of foreclosure, a closer analysis of the type of vertical restraints used in these agreements is important. Section 5(1) also requires a showing of anti-competitive effects. The next section will deal with the literature on vertical restraints and foreclosure, before the extent of foreclosure and the potential effects will be discussed in section 5.

4. Vertical restraints and foreclosure

4.1 Vertical restraints in the BATSA case

BATSA is a manufacturer of cigarettes, but is also involved at the retail level through the various distribution agreements it has with retailers. These agreements can be analysed as a form of vertical restraints, as BATSA is a vertical relationship with the retailers who sell its products at the retail level. The economic approach to vertical restraints differs somewhat from the legal approach. According to Church & Ware (1999:684): "*A vertical relationship in economics is one in which a product or service is supplied from one production activity to another*". In economics, where there is a serious concern about the possibility of collusion and a reduction in consumer choice as a result of horizontal agreements, the same does not apply to vertical agreements or restraints. A vertical agreement or merger between an upstream and downstream firm may not necessarily be anti-competitive, but may rather have significant pro-competitive benefits. The primary reason for this is that where firms in a horizontal relationship sell substitutes, firms in a vertical relationship sell complementary goods. There is therefore a strong incentive for vertically related firms to keep the price of products down in order to increase the quantity sold and profits gained. Where there is an incentive for firms in a horizontal relationship to increase prices, there is an incentive for firms in a vertical relationship to reduce prices. The profits of the upstream manufacturer will e.g. increase when the downstream firm lowers its price. There is an alignment of private and social interests, as both the firms and

⁶ A planogram is a suggested plan (designed by the manufacturer) setting out how the CDU should be populated by the retailer.

society as a whole wants lower prices. In more technical economic language we come closer to the point of Pareto efficiency where there is allocative efficiency (marginal cost = price). “*A vertical restraint imposed by one firm on another may well be pro-competitive*” (Weeks, Competition News, 2002:7).

The agreements BATSA has with the retailers can be classified under the broad category of ‘category management’. This concept refers to all type of activities usually associated with the practice of ‘category management’ such as listing fees, slotting fees, shelf space allocation by a category captain, inventory management, etc. Recent academic articles (see e.g. Wright & Klein, 2006) describe this new development in distribution as follows: there is an ‘*incentive incompatibility*’ between manufacturers and retailers over the supply of promotional shelf space. The retailers own the promotional shelf space and the manufactures want to buy the promotional shelf space/promotional opportunities. According to Wright & Klein (2006:8): “*Competitive manufacturer bidding for shelf space will determine which brands will be prominently displayed by retailers as well as the equilibrium value of promotional shelf space.*”

The attempts by manufacturers and retailers to solve the incentive incompatibility, result in certain vertical restraints. Sullivan & Hovenkamp (2003:427) report (referring to the USA) that: “*The law of vertical restraints has been subject to significant reconsideration over the last years*”. This reflects the changing position on vertical restraints in both the USA and the EU. In the EU, the Green Paper on Vertical Restraints in Community Competition Policy (1997) states that: “*The heated debate among economists concerning vertical restraints has calmed somewhat and a consensus is emerging. Vertical restraints are no longer regarded as per se suspicious or per se pro-competitive. Economists are less willing to make sweeping statements. Rather, they rely more on the analysis of the facts of a case in question. However, one element stands out: the importance of market structure in determining the impact of vertical restraints*” (1997:iii). In order to deal in a more systematic way with vertical restraints, the EU has adopted a policy of ‘block exemptions. “Under Council Regulation 19/65, the Commission is empowered to adopt “block exemptions”, regulations which define certain categories of agreements which generally fulfil the conditions of Article 85(3) and so are exempted. Council Regulation 19/65 requires that Commission block exemption Regulations contain lists of conditions which must be fulfilled, the types of agreements covered, restrictive clauses which are exempted and clauses which must not be included.” (1997:iv)

It is important to note that apart from the block exemptions in the EU, the approach today is to evaluate the **economic context** of each individual case properly. “*Analysis should concentrate on the impact on the market rather than the form of the agreement*”. (EU Green Paper, 1997:iii).

Where the legal approach has been more technical and clause based, the economic approach looks at the wider context. Regarding the difference between the legal and economic approaches it is interesting to note the comments of the EU in its follow-up to the Green Paper on Vertical Restraints: *“To remedy these three shortcomings and better protect competition, the primary objective of Community competition policy, a **more economics based approach** is required. Such an approach should be based on the effects on the market; vertical agreements should be analysed in their market context”* (1998:4). And later in the document: *“Most submissions believe the current system to be too legalistic and favour a more economic approach. It is felt that an economic, effects-based approach rather than a clause-based approach would be more suitable for dealing with a dynamic sector such as distribution”* (1998:7).

This shows that in addition to the move towards an effects-based approach in abuse of dominance enquiries, there is also the same change in thinking in the literature on vertical restraints. The essential enquiry as far as effects are concerned is to what extent the market has been foreclosed to competitors and what the effect of such foreclosure would be on the choices of consumers. The next section will deal with the specific issue in the BATSA case – that of exclusive dealing or limited exclusive dealing and the resulting foreclosure or partial foreclosure.

4.2 Exclusive dealing and foreclosure

Exclusive dealing might be justified in many instances, e.g. where a manufacturer wants to protect his investment from ‘free riding’ by another manufacturer. Since the manufacturer’s investment may increase sales or lower the distribution costs of the retailer, this would provide a rationale for exclusive dealing. Exclusive dealing can therefore be interpreted as promoting efficiency gains through controlling manufacturer free-riding problems, or by protecting the manufacturer’s property rights. It can also reduce transaction costs between manufacturers and dealers.

The negative aspect is that the incumbent can foreclose the market by raising entry barriers through raising rival’s costs. The focus here is usually on long-term exclusive dealing arrangements. The incumbent firm raises rival’s costs by purchasing exclusive rights to particular retailers. If for example distribution involves significant economies of scope, exclusive dealing contracts could be used to increase the entry costs of a potential competitor. A similar entry barrier might be a limited supply of high quality retailers. Long-term exclusive dealing contracts may then be used by the incumbent manufacturer to tie up the best retailers (or locations) with the result of foreclosing potential competitors.

The theoretical economic models based on this general idea of exclusive dealing assume that there is one incumbent firm in the market. It then

proceeds to analyse the entry deterrence strategies of the incumbent. The potential entrant always faces some disadvantages (such as existing brand loyalty, lower distribution costs of the incumbent, etc).

There are alternative theoretical models in which the welfare effect is ambiguous. In some models (e.g. Mathewson & Winter), a manufacturer can only sign an exclusive dealing contract with a retailer if it offers the retailer a low wholesale price. This is the classic pro-competitive argument, where consumer choice is reduced but competition is stimulated through producers competing by offering lower prices.

In all these models of exclusive dealing, complete foreclosure is the result. The equilibrium outcome is one where the rival manufacturer is excluded from the market. Such an equilibrium is usually called a miscoordination equilibrium or an exclusionary equilibrium. The point is that a market can come to a point of equilibrium where there exists a miscoordination, i.e. entry is excluded and nothing will happen to change this equilibrium situation. If there is an entry equilibrium, then entry may occur and the market may move towards a more competitive outcome, but this is not generally assumed under exclusive dealing.

The important insight here is that this general notion of 'exclusive dealing and a miscoordination equilibrium' is the theoretical framework used by economists to analyse the economic effects of exclusive dealing. It is therefore of utmost importance to distinguish the analytical framework of the BATSA case (and the approach used in category management cases) from this general theoretical framework. This 'other approach' is best described by Wright (several sources). Wright introduces the concept of 'limited exclusives', which 'grant a manufacturer shelf space but do not exclude all rivals'. According to Klein & Wright (2006:26): "*The primary contribution of our economic analysis to the antitrust treatment of category management contracts is that these arrangements are properly thought of as limited exclusives*". This is something different from exclusive dealing and should also be analysed differently.

The problem however with the literature on 'limited exclusives' and 'partial foreclosure' is that it is relatively new and there has not yet appeared a consensus in the literature as to how these should be treated. Intuitively it makes sense to argue that if rival manufacturers are present on retailer shelves, one cannot talk about foreclosure. However, a careful reading of the EU discussion paper on the treatment of exclusionary abuses (2005:18) shows that rivals present in a market can also be considered 'foreclosed': "*By foreclosure is meant that actual or potential competitors are completely or partially denied profitable access to a market. Foreclosure may discourage entry or expansion of rivals or encourage exit...Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: it is sufficient that*

the rivals are disadvantaged and consequently led to compete less aggressively. Rivals may be disadvantaged where the dominant company is able to raise rival's costs or reduce demand for the rival's products".

This is therefore a different approach: it uses a different model to exclusive dealing and introduces the concept of foreclosure even when rivals are not forced to exit. As the usual foreclosure ratio's cannot be used (since this is partial foreclosure), the concept of space-to-sales ratio's was developed to provide some benchmark for analysing the potential anti-competitive effects of such 'limited exclusives' or 'partial foreclosure'.

Where in normal foreclosure cases (especially in the US), courts would use a ratio of around 40% to indicate foreclosure, this has been adapted for cases dealing with shelf space allocation. Foreclosure levels are therefore analysed differently in pure foreclosure cases than in 'partial foreclosure' cases where the space-to-sales ratio provide a better yardstick. According to Wright: *"The fundamental economic inquiry in promotional payment cases is whether rivals are sufficiently disadvantaged by the promotional program that they are unable to achieve a minimum efficient scale for a significant period of time. These conditions must hold for a monopolist to increase barriers to entry".*

The general conclusion is therefore that one cannot use the normal economic theoretical framework of exclusive dealing and entry deterrence to analyse the promotional programs at issue in the BATSA case. There has to be an understanding that this is not only a derivative of exclusive dealing but an altogether different animal where one has to develop alternative analytical tools, such as the space-to-sales ratio. Confusing the analytical approach of promotional programs/ shelf space allocation and exclusive dealing can lead to the type of mistakes Klein & Wright (2006:27 warn were made in the well-known Conwood case: *"Conwood adopts a relatively unsophisticated economic approach which overstates the competitive threat of category management arrangements relative to fully exclusive shelf space arrangements"*. Also important is to note the comment of Hovenkamp (in Klein & Wright,2006:27) describing Conwood as *'deeply troublesome and offensive to antitrust policy'*. It is therefore important that category management should not be analysed using the same theoretical economic framework as exclusive dealing and that the difference between the two approaches should be pointed out.

5. Economic effects and the measurement of foreclosure

Having pointed out that a different approach is needed when dealing with cases of category management or the economics of distribution, in this section some indicators of foreclosure are presented. These give an overview of the market as well as provide some insight into the economic effects of the marketing programs of BATSA. In this section one method of foreclosure in category management cases is presented - the so-called space to sales ratio.

This measure can help us to understand exactly how competitors could be affected by the promotional agreements of the dominant player. The space-to-sales ratio is one common indicator of foreclosure used in prominent antitrust cases involving tobacco promotion in the United States, is. This ratio is used as a proxy of foreclosure, where “space” refers to the percentage of category shelf space allocated to a specific brand and “sales” refers to the market share of that brand. According to Wright (2006: 115; our emphasis), the space-to-sales rule “concludes that a dominant firm has achieved substantial foreclosure when it enters promotion contracts that require retailers to supply a percentage of category shelf space **exceeding** manufacturer’s market share”.

The promotion agreements included a planogram, i.e. a proposal on how the cigarette brands should be arranged on visible shelf space in outlets. The amount of shelf space proposed for a particular brand is determined by regional sales figures of that brand. Compliance with such agreements may vary. Therefore, BATSA conducts periodical surveys to assess actual visibility of BATSA brands. Consequently, in this investigation the proportion of **actual** space allocated to different cigarettes are used as indicators of the visibility. In particular, the visibility share of a particular cigarette type is measured as the number of packs of that type visible, expressed as a percentage of the total number of cigarette packs on the shelf.

In the analysis of the BATSA case, three different sources were used to analyse the space to sales ratios.

Method 1- BATSA visibility database (2003)

The first source of data on visibility was an internal BATSA database that was compiled by cigarette representatives who went to retail stores and recorded the percentage visibility of individual brands. In the analysis of the case this data was then used to investigate the relationship between the visibility of BATSA and non-BATSA cigarettes on the one hand and the market share held by BATSA and non-BATSA companies on the other. The situation was analysed in each separate channel that BATSA identified as a retail channel.

The data set used in this study was compiled in 2003 for different companies. This was a once-off exercise where BATSA identified approximately 8 000 stores which contribute a large percentage of its turnover and on which it wanted to focus its marketing activities. Of these stores, around 2000 were monitored in a manner that allowed BATSA to compile a database that indicated visibility of their brands. The database was compiled by BATSA representatives, who visited each store in the database on a regular basis (approximately every 2 weeks). This survey, as any other consumer survey, may be exposed to substantial measurement error. Measurement error can be reduced by “cleaning up” the data (e.g. removing incomplete observations) prior to analysis. Additionally, one may employ statistical exploratory

techniques to identify outliers that may bias the results. In this case we have decided not to perform such a “clean up” exercise. Instead, it was decided to focus the study on *average* visibility across all stores in a particular channel or for a particular group of companies. Statistical theory postulates that the average of a sample will converge to the true average for very large samples. Put differently, relying on averages reduces potential measurement bias. Of course, ideally, one would like to compare the visibility shares and market shares at the individual store level, but the above-mentioned measurement error as well as the lack of market share data at this disaggregated level prevents this. Fortunately, BATSA could provide overall market shares for each of the retail channels as well as for a selection of companies within each of these channels. This allows a comparison of average BATSA visibility (for a particular channel or particular group of companies) and average BATSA market share (for that channel or group of companies). The channel market shares are 2004 figures. Where available, the market shares for the selection of companies are 2003 figures. However, there are three companies (Pick ‘n Pay Family, Pick ‘n Pay Mini and BP Express) for which 2003 values were not available. Consequently, 2004 figures were used for Pick ‘n Pay Family and Mini stores, while the average of the 2002 and 2004 figures is used for BP Express outlets.

Tables 1 to 3 present a comparison of BATSA visibility and market share across the groceries, organised convenience and organised forecourts channels. Aggregate figures for each channel as well as figures for individual companies within each channel are presented. Average visibility is the simple average taken over all stores. For example, average visibility for Checkers is 86.39%. This is the average proportion of shelf space accorded to BATSA at Checkers stores for which data is available. As mentioned, average market share is simply the overall market share of BATSA in the relevant group of stores. The message from these tables is a striking one: **on average, BATSA visibility reflects BATSA market share, or less.**

Table 1: BATSA space-to-sales for the groceries channel

| | Average visibility | Average Market share |
|-------------------|--------------------|----------------------|
| Groceries Total | 84.46% | 89.53% |
| Checkers | 86.39% | 86.73% |
| Checkers Hyper | 85.56% | 88.42% |
| Shoprite | 82.65% | 87.72% |
| Pick 'n Pay Super | 84.74% | 93.04% |
| Pick 'n Pay Hyper | 85.79% | 90.34% |
| Game | 92.80% | 93.11% |

Table 2: BATSA space-to-sales for the organised convenience channel

| | Average visibility | Average Market share |
|-----------------------------|--------------------|----------------------|
| Organised Convenience Total | 82.25% | 86.29% |
| Spar | 83.09% | N.A. |
| Kwikspar | 82.23% | N.A. |
| Superspar | 82.52% | N.A. |
| Pick 'n Pay Family | 79.41% | 86.23% |
| Pick 'n Pay Mini | 83.10% | 84.94% |

Table 3: BATSA space-to-sales for the organised forecourts channel

| | Average visibility | Average Market share |
|----------------------------|--------------------|----------------------|
| Organised Forecourts Total | 87.15% | 86.40% |
| Engen Quick Shop | 87.42% | 85.23% |
| Shell | 83.26% | N.A. |
| Caltex | 86.29% | N.A. |
| Total | 88.39% | N.A. |
| BP | 90.46% | 84.71% |
| Sasol | 90.21% | N.A. |

In general, average BATSA visibility at the groceries, organised convenience and organised forecourts was in line with BATSA market share. This was also true for individual groups of companies in the groceries and organised convenience channels. For organised forecourts, there was some evidence of BATSA visibility exceeding BATSA market share. However, the measurement error and lack of market share data for the other forecourts prevented a deeper analysis based on that specific dataset.

Method 2- BATSA data (2004-2005)

The next data source was compiled from representative reports. The datasheet given to the company representatives included a column which could be filled out where visibility was measured. This was however described as a 'nice to have' and not all representatives supplied a visibility figure. This data was also collected in a similar manner to that which was described above, but was only available at a national level⁷. In table 4, which displays the average visibility of the various cigarette manufacturers, it is noted that BATSA products occupied approximately 83% of the total face-on shelf space, whilst JTI products occupied 7% of the space.

Table 4: Number of facings allocated to manufacturers over time (Source BATSA)

⁷ Unfortunately, it was not possible to obtain a longer time series as the marketing department decided to dispense with this task.

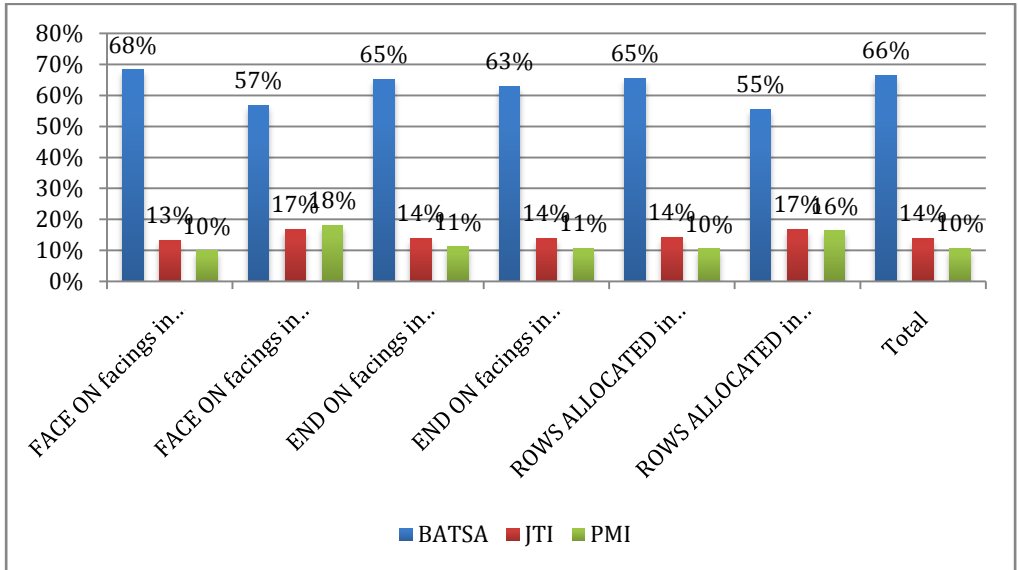
Over this period of time the market share for BATSA was estimated to be between 90.5% and 92%, (based on shipment data) and 90% to 91% (based on ACNielsen data). This would suggest that *BATSA market share was well in excess of the shelf space that it occupied*. It is also interesting to note that data that is presented in table 3 also suggest that the space occupied by JTI products was over 7%, at a time when its market share was between 4% to 5%. Similarly PMI's space allocation seems to have been more than twice its market share.

Method 3 – the RIS data

During the investigation into BATSA's abuse of dominance, BATSA instructed an independent company to visit a number of retail outlets and to compile data on cigarette brand visibility. The Retail Information Survey (RIS) considers various measures of visibility including the number of face-on packets in the primary display, face-on packets in the secondary display, number of rows in the primary display, and number of rows in the secondary display. The data was captured by representatives from an independent organization, using reliable statistical sampling techniques. The data was captured during February 2008 (during the time of the hearing).

With regards to the different methods of measuring visibility it could be seen that the national number of face-on packets in the primary display that was allocated to BATSA products was 68%, the number of rows allocated in the primary display was 65%, and the average across all measures was 66%.

Figure 1: Measures of BATSA visibility (Source: RIS survey 2008)



This data suggests that the amount of space that was allocated to BATSA products throughout South African was at most 68%, which was over 20% less than its national market share at the beginning of the period (as measured by either ACNielsen or shipment data). This would suggest that the BATSA trade marketing practices would not be considered to be anticompetitive when using the international standard of space-to-sales measures.

It is also interesting to note that these measures suggest that the shelf space of JTI products was more than two and a half times its market share. PMI also got more shelf space that its market share.

In the following section of this analysis the RIS survey data was analysed at a regional level, both across channels and per channel. In the first of these graphs and tables, the shelf space at a regional level across all channels is shown. The shelf space data is displayed in figure 2 and is compared to the respective market shares in tables 5 & 6 (using ACNielsen data for 2006), where it is noted that in the overwhelming majority of cases, the market share is well in excess of the measure of space.

Figure 2: Number of rows in primary display across all channels (Source: RIS survey 2008)

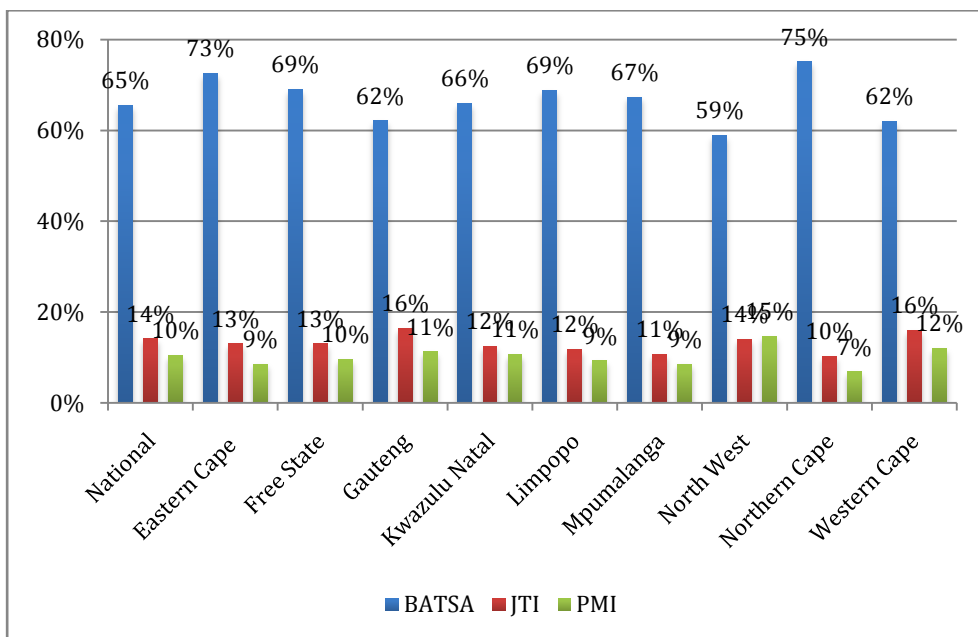


Table 5: Space-to-sales (number of rows) measures at a regional level across all channels⁸

| Market Share Region | Market Share (2007) | | | Space-to-sales (number of rows - 2008) | | | Visibility Region |
|------------------------|---------------------|--------|-------|---|--------|--------|--|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | |
| NATIONAL | 88.20% | 5.90% | 2.20% | 65.40% | 14.10% | 10.50% | National |
| EASTERN CAPE | 87.30% | 5.90% | 4.70% | 72.50% | 13.00% | 8.50% | Eastern Cape |
| EASTERN - GAUTENG | 81.20% | 9.80% | 6.80% | 67.30% | 10.70% | 8.50% | Mpumalanga |
| FREE STATE/KZN | 84.80% | 7.20% | 4.90% | 69.10% | 13.00% | 9.60% | Free State Kwazulu Natal |
| KZN COAST | 86.10% | 7.10% | 4.50% | 65.90% | 12.40% | 10.70% | |
| NORTHERN - GAUTENG | 79.10% | 11.30% | 7.60% | 68.70% | 11.70% | 9.20% | Limpopo Western Cape Northern Cape |
| PENINSULA | 83.40% | 8.50% | 6.70% | 62.00% | 16.00% | 12.00% | |
| S & N CAPE | 82.80% | 7.50% | 8.80% | 75.10% | 10.20% | 6.80% | |
| WESTERN - GAUTENG | 80.70% | 10.70% | 7.70% | 58.80% | 14.10% | 14.60% | North West |
| Average Gauteng | 81.00% | 10.40% | 6.90% | 62.10% | 16.40% | 11.20% | Gauteng |

⁸ ACNielsen data was used for national averages and EPOS data was used for the regions as regional ACNielsen data was not available. As the national BATSA ACNielsen figure is higher than the respective regions this will not prejudice JTI.

Table 6: Space-to-sales (face-on-facings) measures at a regional level across all channels⁹

| Market Share Region | Market Share (2007) | | | Space-to-sales (face-on-facings: 2008) | | | Visibility Region |
|------------------------|---------------------|--------|-------|---|--------|--------|----------------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | |
| NATIONAL | 88.20% | 5.90% | 2.20% | 65.40% | 14.10% | 10.50% | National |
| EASTERN CAPE | 87.30% | 5.90% | 4.70% | 72.50% | 13.00% | 8.50% | Eastern Cape |
| EASTERN - GAUTENG | 81.20% | 9.80% | 6.80% | 67.30% | 10.70% | 8.50% | Mpumalanga |
| FREE STATE/KZN | 84.80% | 7.20% | 4.90% | 69.10% | 13.00% | 9.60% | Free State |
| KZN COAST | 86.10% | 7.10% | 4.50% | 65.90% | 12.40% | 10.70% | Kwazulu Natal |
| NORTHERN - GAUTENG | 79.10% | 11.30% | 7.60% | 68.70% | 11.70% | 9.20% | Limpopo |
| PENINSULA | 83.40% | 8.50% | 6.70% | 62.00% | 16.00% | 12.00% | Western Cape |
| S & N CAPE | 82.80% | 7.50% | 8.80% | 75.10% | 10.20% | 6.80% | Northern Cape |
| WESTERN - GAUTENG | 80.70% | 10.70% | 7.70% | 58.80% | 14.10% | 14.60% | North West |
| Average Gauteng | 81.00% | 10.40% | 6.90% | 62.10% | 16.40% | 11.20% | Gauteng |

⁹ ACNielsen data was used for national averages and EPOS data was used for the regions as regional ACNielsen data was not available. As the national BATSA ACNielsen figure is higher than the respective regions this will not prejudice JTI.

Table 6: Space-to-sales (face-on-facings) measures at a regional level across all channels¹⁰

| Market Share Region | Market Share (2007) | | | Space-to-sales (face-on-facings - 2008) | | | Visibility Region |
|------------------------|---------------------|--------|-------|--|--------|--------|----------------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | |
| NATIONAL | 88.20% | 5.90% | 2.20% | 65.40% | 14.10% | 10.50% | National |
| EASTERN CAPE | 87.30% | 5.90% | 4.70% | 72.50% | 13.00% | 8.50% | Eastern Cape |
| EASTERN - GAUTENG | 81.20% | 9.80% | 6.80% | 67.30% | 10.70% | 8.50% | Mpumalanga |
| FREE STATE/KZN | 84.80% | 7.20% | 4.90% | 69.10% | 13.00% | 9.60% | Free State |
| KZN COAST | 86.10% | 7.10% | 4.50% | 65.90% | 12.40% | 10.70% | Kwazulu Natal |
| NORTHERN - GAUTENG | 79.10% | 11.30% | 7.60% | 68.70% | 11.70% | 9.20% | Limpopo |
| PENINSULA | 83.40% | 8.50% | 6.70% | 62.00% | 16.00% | 12.00% | Western Cape |
| S & N CAPE | 82.80% | 7.50% | 8.80% | 75.10% | 10.20% | 6.80% | Northern Cape |
| WESTERN - GAUTENG | 80.70% | 10.70% | 7.70% | 58.80% | 14.10% | 14.60% | North West |
| Average | | | | | | | |
| Gauteng | 81.00% | 10.40% | 6.90% | 62.10% | 16.40% | 11.20% | Gauteng |

Figure 3 and tables 7 & 8 describe similar measures for the grocery channel, where it is once again noted that in all cases, BATSA market share is well in excess of the measure of visibility.

¹⁰ ACNielsen data was used for national averages and EPOS data was used for the regions as regional ACNielsen data was not available. As the national BATSA ACNielsen figure is higher than the respective regions this will not prejudice JTI.

Figure 3: Number of rows grocery channel (Source: RIS survey 2008)

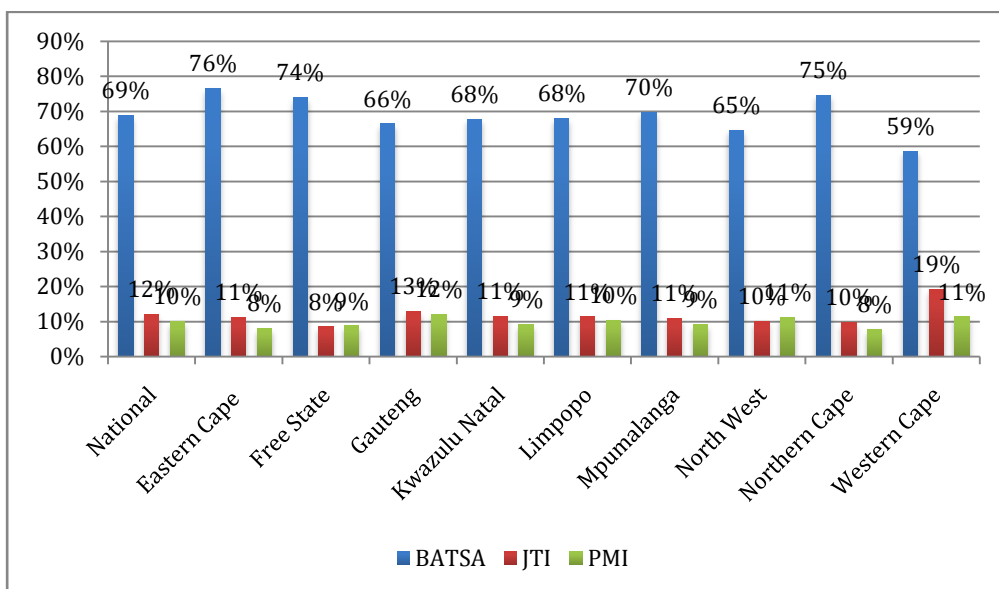


Table 7: Space-to-sales (number of rows) measures at a regional level for grocery channel¹¹

| Market Share Region | Market Share (ACN - 2007) | | | Space-to-sales (number of rows - 2008) | | | Visibility Region |
|------------------------|---------------------------|--------|-------|--|--------|--------|----------------------------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | |
| NATIONAL | 83.00% | 9.80% | 3.50% | 68.80% | 12.00% | 9.90% | National |
| EASTERN CAPE | 85.00% | 6.50% | 2.40% | 76.40% | 11.10% | 8.00% | Eastern Cape |
| EASTERN- GAUTENG | 82.30% | 10.40% | 3.30% | 69.70% | 10.80% | 9.10% | Mpumalanga |
| FREE STATE/KZN | 83.00% | 8.20% | 2.10% | 73.90% | 8.40% | 8.70% | Free State |
| KZN COAST | 84.80% | 9.60% | 2.40% | 67.70% | 11.40% | 9.10% | Kwazulu Natal |
| NORTHERN - GAUTENG | 81.00% | 11.50% | 4.30% | 68.00% | 11.30% | 10.30% | Limpopo |
| PENINSULA | 83.90% | 9.30% | 5.00% | 58.60% | 19.10% | 11.30% | Western Cape Northern Cape |
| S & N CAPE | 85.60% | 8.00% | 2.70% | 74.60% | 9.80% | 7.60% | Cape |
| WESTERN- GAUTENG | 80.60% | 13.00% | 5.00% | 64.60% | 10.10% | 11.20% | North West |
| Average Gauteng | 81.30% | 11.60% | 4.20% | 66.40% | 13.00% | 12.00% | Gauteng |

¹¹ ACNielsen data was used for market shares.

Table 8: Space-to-sales (face-on-facings) measures at a regional level for grocery channel¹²

| Market Share Region | Market Share (ACN - 2007) | | | Space-to-sales (face-on-facings : 2008) | | | Visibility |
|------------------------|---------------------------|--------|-------|---|--------|--------|---------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | Region |
| NATIONAL | 83.00% | 9.80% | 3.50% | 65.40% | 14.10% | 10.50% | National |
| EASTERN CAPE | 85.00% | 6.50% | 2.40% | 72.50% | 13.00% | 8.50% | Eastern Cape |
| EASTERN - GAUTENG | 82.30% | 10.40% | 3.30% | 67.30% | 10.70% | 8.50% | Mpumalanga |
| FREE STATE/KZN | 83.00% | 8.20% | 2.10% | 69.10% | 13.00% | 9.60% | Free State |
| KZN COAST | 84.80% | 9.60% | 2.40% | 65.90% | 12.40% | 10.70% | Kwazulu Natal |
| NORTHERN - GAUTENG | 81.00% | 11.50% | 4.30% | 68.70% | 11.70% | 9.20% | Limpopo |
| PENINSULA | 83.90% | 9.30% | 5.00% | 62.00% | 16.00% | 12.00% | Western Cape |
| S & N CAPE | 85.60% | 8.00% | 2.70% | 75.10% | 10.20% | 6.80% | Northern Cape |
| WESTERN- GAUTENG | 80.60% | 13.00% | 5.00% | 58.80% | 14.10% | 14.60% | North West |
| Average Gauteng | 81.30% | 11.60% | 4.20% | 62.10% | 16.40% | 11.20% | Gauteng |

¹² ACNielsen data was used for market shares.

Once again, figure 4 and tables 9 & 10 describe similar measures for the organised convenience channel, where it is again noted that BATSA market share is well in excess of the measure of visibility.

Figure 4: Number of rows organised convenience channel (Source: RIS survey 2008)

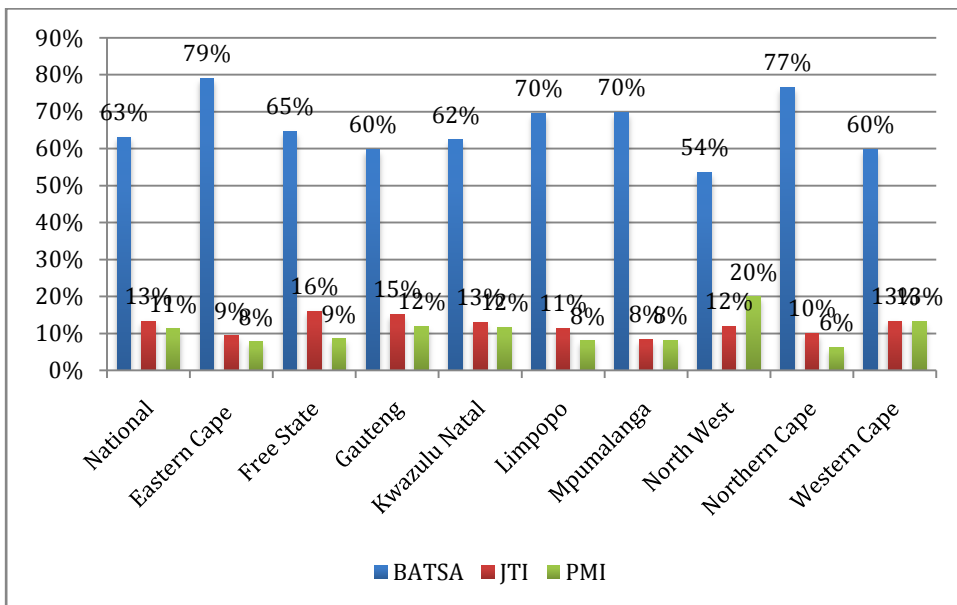


Table 9: Space-to-sales (number of rows) measures at a regional level for organised convenience channel¹³

| Market Share Region | Market Share (ACN - 2007) | | | Space-to-sales (number of rows - 2008) | | | Visibility Region |
|------------------------|---------------------------|--------|-------|--|--------|--------|----------------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | |
| NATIONAL | 82.30% | 9.50% | 5.10% | 63.10% | 13.30% | 11.20% | National |
| EASTERN CAPE | 86.40% | 6.50% | 3.50% | 79.10% | 9.30% | 7.70% | Eastern Cape |
| EASTERN - | | | | | | | |
| GAUTENG | 80.30% | 10.00% | 5.20% | 69.70% | 8.40% | 8.20% | Mpumalanga |
| FREE STATE/KZN | 82.20% | 7.60% | 4.90% | 64.60% | 16.00% | 8.50% | Free State |
| KZN COAST | 84.60% | 8.70% | 4.10% | 62.30% | 12.90% | 11.50% | Kwazulu Natal |
| NORTHERN - | | | | | | | |
| GAUTENG | 78.20% | 12.10% | 6.10% | 69.60% | 11.30% | 8.00% | Limpopo |
| PENINSULA | 82.30% | 9.90% | 5.30% | 59.90% | 13.30% | 13.10% | Western Cape |
| S & N CAPE | 85.50% | 8.40% | 4.60% | 76.50% | 10.00% | 6.20% | Northern Cape |
| WESTERN - | | | | | | | |
| GAUTENG | 80.50% | 11.20% | 6.20% | 53.50% | 12.00% | 19.90% | North West |
| Average Gauteng | 81.10% | 10.90% | 5.90% | 59.70% | 15.20% | 11.80% | Gauteng |

¹³Specific care was taken to only include those chains that were included in the visibility data, hence EPOS data was used for Pick 'n Pay Mini, whilst AC Nielsen data was used for all the Spar and Pick 'n Pay Supermarkets

Table 10: Space-to-sales (face-on-facings) measures at a regional level for organised convenience channel¹⁴

| Market Share Region | Market Share (ACN - 2007) | | | Space-to-sales (face-on-facings : 2008) | | | Visibility Region |
|------------------------|---------------------------|--------|-------|---|--------|--------|----------------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | |
| NATIONAL | 82.30% | 9.50% | 5.10% | 65.40% | 14.10% | 10.50% | National |
| EASTERN CAPE | 86.40% | 6.50% | 3.50% | 72.50% | 13.00% | 8.50% | Eastern Cape |
| EASTERN GAUTENG | 80.30% | 10.00% | 5.20% | 67.30% | 10.70% | 8.50% | Mpumalanga |
| FREE STATE/KZN | 82.20% | 7.60% | 4.90% | 69.10% | 13.00% | 9.60% | Free State |
| KZN COAST | 84.60% | 8.70% | 4.10% | 65.90% | 12.40% | 10.70% | Kwazulu Natal |
| NORTHERN GAUTENG | 78.20% | 12.10% | 6.10% | 68.70% | 11.70% | 9.20% | Limpopo |
| PENINSULA | 82.30% | 9.90% | 5.30% | 62.00% | 16.00% | 12.00% | Western Cape |
| S & N CAPE | 85.50% | 8.40% | 4.60% | 75.10% | 10.20% | 6.80% | Northern Cape |
| WESTERN GAUTENG | 80.50% | 11.20% | 6.20% | 58.80% | 14.10% | 14.60% | North West |
| Average Gauteng | 81.10% | 10.90% | 5.90% | 62.10% | 16.40% | 11.20% | Gauteng |

¹⁴Specific care was taken to only include those chains that were included in the visibility data, hence EPOS data was used for Pick 'n Pay Mini, whilst AC Nielsen data was used for all the Spar and Pick 'n Pay Supermarkets

Finally, figure 5 and tables 11 & 12 describe similar measures for the organised convenience channel, where it is again noted that in the overwhelming majority of cases, BATSA market share is well in excess of the measure of visibility.

Figure 5: Number of rows forecourts channel (Source: RIS survey 2008)

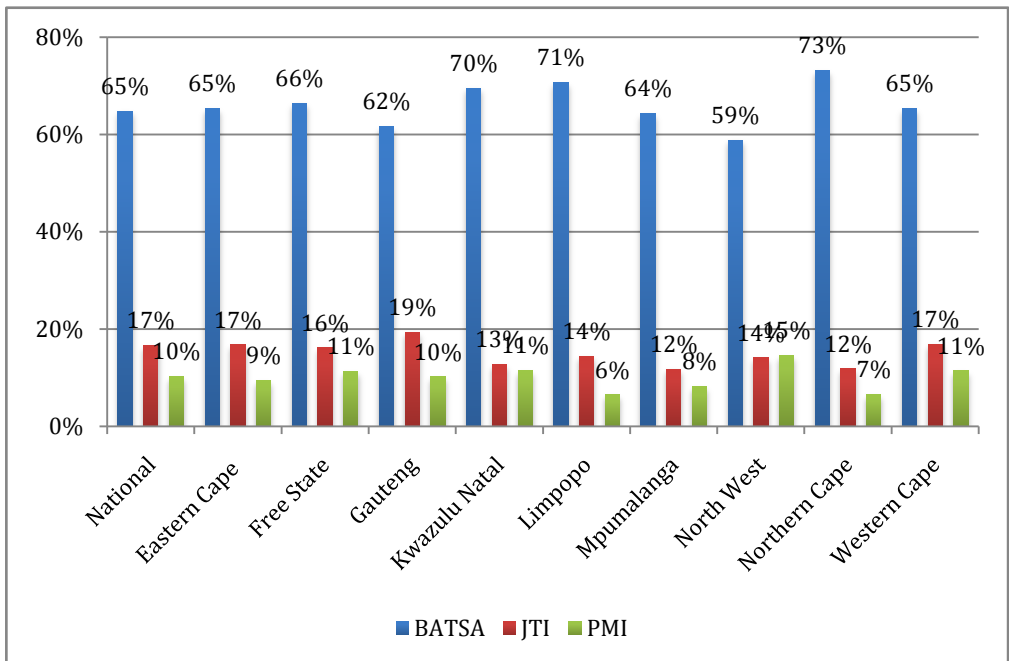


Table 11: Space-to-sales (number of rows) measures at a regional level for forecourts channel¹⁵

| Market Share Region | Market Share (ACN - 2007) | | | Space-to-sales (number of rows - 2008) | | | Visibility Region |
|---------------------|---------------------------|--------|--------|--|--------|--------|-------------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | |
| NATIONAL | 80.60% | 12.30% | 5.20% | 64.80% | 16.60% | 10.30% | National |
| EASTERN CAPE | 87.00% | 7.80% | 10.60% | 65.30% | 16.70% | 9.50% | Eastern Cape |
| EASTERN GAUTENG | 76.50% | 17.20% | 17.80% | 64.30% | 11.70% | 8.20% | Mpumalanga |
| FREE STATE/KZN | 85.10% | 9.70% | 12.00% | 66.40% | 16.10% | 11.30% | Free State |
| KZN COAST | 89.30% | 7.30% | 8.10% | 69.50% | 12.70% | 11.50% | Kwazulu Natal |
| NORTHERN GAUTENG | 74.50% | 18.20% | 18.70% | 70.70% | 14.40% | 6.50% | Limpopo |
| PENINSULA | 79.30% | 14.10% | 17.10% | 65.40% | 16.90% | 11.40% | Western Cape |
| S & N CAPE | 75.90% | 13.20% | 20.50% | 73.20% | 11.80% | 6.60% | Northern Cape |
| WESTERN GAUTENG | 75.60% | 18.00% | 18.80% | 58.80% | 14.10% | 14.60% | North West |
| Average Gauteng | 75.50% | 11.80% | 12.00% | 61.70% | 19.40% | 10.20% | Gauteng |

¹⁵ ACNielsen data was used for the national averages and EPOS data was used for the regions as ACNielsen data is not available at a regional forecourt level.

Table 12: Space-to-sales (face-on-facings) measures at a regional level for forecourts channel¹⁶

| Market Share Region | Market Share (ACN - 2007) | | | Space-to-sales (face-on-facings : 2008) | | | Visibility |
|------------------------|---------------------------|--------|--------|--|--------|--------|---------------|
| | BATSA | JTI | PMI | BATSA | JTI | PMI | Region |
| NATIONAL | 80.60% | 12.30% | 5.20% | 65.40% | 14.10% | 10.50% | National |
| EASTERN CAPE | 87.00% | 7.80% | 10.60% | 72.50% | 13.00% | 8.50% | Eastern Cape |
| EASTERN GAUTENG | 76.50% | 17.20% | 17.80% | 67.30% | 10.70% | 8.50% | Mpumalanga |
| FREE STATE/KZN | 85.10% | 9.70% | 12.00% | 69.10% | 13.00% | 9.60% | Free State |
| KZN COAST | 89.30% | 7.30% | 8.10% | 65.90% | 12.40% | 10.70% | Kwazulu Natal |
| NORTHERN GAUTENG | 74.50% | 18.20% | 18.70% | 68.70% | 11.70% | 9.20% | Limpopo |
| PENINSULA | 79.30% | 14.10% | 17.10% | 62.00% | 16.00% | 12.00% | Western Cape |
| S & N CAPE | 75.90% | 13.20% | 20.50% | 75.10% | 10.20% | 6.80% | Northern Cape |
| WESTERN GAUTENG | 75.60% | 18.00% | 18.80% | 58.80% | 14.10% | 14.60% | North West |
| Average Gauteng | 75.50% | 11.80% | 12.00% | 62.10% | 16.40% | 11.20% | Gauteng |

In the few isolated instances where BATSA face-on visibility is slightly greater than the corresponding market share, the broader measure of overall visibility was consistently less than the corresponding market share (by an amount of over 5%). Furthermore, when considering the corresponding data for JTI it was noted that visibility was almost always greater than market share.

This analysis would therefore conclude that the amount of shelf space that was occupied by BATSA was less than its market share when calculating regional space-to-sales measures for each of the respective channels.

¹⁶ ACNielsen data was used for the national averages and EPOS data was used for the regions as ACNielsen data is not available at a regional forecourt level.

Review of space-to-sales measures per outlet and region

Finally, an analysis was done using face-on visibility (primary display) data to derive space-to-sales measures for each of the respective outlets at a store level for each of the respective regions. The data used to measure market share was obtained from ACNielsen where available. Where such data was unavailable (in the case of Pick 'n Pay Mini, BP, Shell, Checkers and Shoprite), EPOS data was used. This data has been split up for each of the respective channels with a last column on the right hand side to show the amount by which BATSA market share exceeds the number of rows that were displayed in the primary display¹⁷. Due to the large size of the data, only the results for the grocery channel are shown in the next table.

¹⁷ The results in the last column might differ from the answer when the two numbers in the table are subtracted from each other, due to rounding of the percentages.

Table 17: Space-to-sales measures at a regional store level for grocery channel

| Chain | Region | BATSAs | | | JTI | | | PMI | | | BATSAs | JTI | PMI |
|----------------|---------------|-----------|------|------|-----------|------|------|-----------|------|------|------------|------------|------------|
| | | Mkt Share | ROWS | FACE | Mkt Share | ROWS | FACE | Mkt Share | ROWS | FACE | Difference | Difference | Difference |
| Checkers | Eastern Cape | 85% | 75% | 88% | 6% | 13% | 8% | 7% | 2% | 7% | 11% | -7% | 5% |
| Checkers | Free State | 84% | 70% | 88% | 6% | 11% | 3% | 6% | 7% | 10% | 14% | -4% | -1% |
| Checkers | Gauteng | 79% | 71% | 60% | 9% | 12% | 9% | 9% | 22% | 9% | 9% | -3% | -13% |
| Checkers | Kwazulu Natal | 82% | 73% | 72% | 7% | 12% | 11% | 6% | 10% | 9% | 9% | -5% | -4% |
| Checkers | Limpopo | 80% | 67% | 72% | 9% | 12% | 11% | 9% | 5% | 9% | 13% | -3% | 4% |
| Checkers | Mpumalanga | 79% | 67% | 67% | 9% | 11% | 11% | 10% | 10% | 8% | 12% | -2% | 0% |
| Checkers | National | 81% | 71% | 71% | 8% | 12% | 9% | 8% | | | 10% | -4% | |
| Checkers | Northern Cape | 84% | 76% | 80% | 6% | 9% | 8% | 7% | 6% | 6% | 8% | -4% | 1% |
| Checkers | Western Cape | 80% | 67% | 69% | 7% | 12% | 9% | 9% | 12% | 9% | 13% | -4% | -3% |
| Checkers Hyper | Free State | 83% | 71% | 83% | 8% | 4% | 1% | 2% | 0% | 10% | 12% | 4% | 2% |
| Checkers Hyper | Gauteng | 83% | 58% | 72% | 10% | 15% | 12% | 5% | 7% | 3% | 25% | -5% | -2% |
| Checkers Hyper | Kwazulu Natal | 91% | 67% | 79% | 5% | 10% | 8% | 3% | 5% | 7% | 24% | -5% | -2% |
| Checkers Hyper | National | 86% | 67% | 77% | 8% | 9% | 8% | 3% | | | 19% | -1% | |
| Checkers Hyper | Western Cape | 88% | 65% | 70% | 7% | 12% | 10% | 3% | 10% | 7% | 23% | -5% | -7% |
| PnP Hyper | Eastern Cape | 84% | 74% | 90% | 7% | 11% | 2% | 4% | 6% | 11% | 10% | -4% | -2% |
| PnP Hyper | Free State | 80% | 59% | 94% | 7% | 25% | 3% | 2% | 0% | 7% | 21% | -18% | 2% |
| PnP Hyper | Gauteng | 80% | 55% | 58% | 11% | 17% | 23% | 4% | 9% | 9% | 25% | -6% | -4% |
| PnP Hyper | Kwazulu Natal | 86% | 60% | 87% | 8% | 19% | 6% | 3% | 2% | 10% | 25% | -11% | 0% |
| PnP Hyper | National | 82% | 64% | 77% | 9% | 14% | 10% | 4% | | | 18% | -5% | |
| PnP Hyper | Western Cape | 83% | 58% | 67% | 10% | 10% | 12% | 6% | 12% | 19% | 24% | 0% | -6% |
| PnP Super | Eastern Cape | 90% | 78% | 79% | 6% | 10% | 9% | 4% | 9% | 9% | 12% | -5% | -5% |
| PnP Super | Free State | 89% | 71% | 66% | 8% | 8% | 10% | 2% | 21% | 12% | 18% | 0% | -19% |
| PnP Super | Gauteng | 83% | 68% | 67% | 11% | 13% | 17% | 6% | 9% | 10% | 15% | -2% | -3% |
| PnP Super | Kwazulu Natal | 89% | 70% | 68% | 7% | 12% | 11% | 3% | 7% | 8% | 18% | -5% | -4% |
| PnP Super | Limpopo | 82% | 68% | 70% | 11% | 10% | 10% | 6% | 10% | 12% | 15% | 1% | -4% |
| PnP Super | Mpumalanga | 85% | 69% | 73% | 10% | 11% | 11% | 5% | 9% | 9% | 16% | -2% | -5% |
| PnP Super | National | 85% | 68% | 69% | 9% | 13% | 12% | 5% | | | 17% | -4% | |
| PnP Super | North West | 81% | 58% | 58% | 11% | 18% | 18% | 7% | 14% | 14% | 24% | -6% | -8% |
| PnP Super | Northern Cape | 86% | 75% | 74% | 8% | 12% | 12% | 5% | 6% | 6% | 11% | -3% | -1% |
| PnP Super | Western Cape | 81% | 48% | 64% | 11% | 29% | 10% | 7% | 17% | 14% | 34% | -18% | -10% |
| Shoprite | Eastern Cape | 92% | 73% | 89% | 3% | 8% | 3% | 3% | 0% | 7% | 19% | -5% | 3% |
| Shoprite | Free State | 89% | 72% | 83% | 5% | 13% | 6% | 3% | 3% | 6% | 17% | -8% | 0% |
| Shoprite | Gauteng | 87% | 62% | 69% | 5% | 13% | 13% | 5% | 10% | 15% | 25% | -8% | -6% |
| Shoprite | Kwazulu Natal | 88% | 68% | 68% | 5% | 11% | 14% | 4% | 9% | 10% | 20% | -6% | -5% |
| Shoprite | Limpopo | 86% | 71% | 73% | 6% | 12% | 11% | 5% | 11% | 9% | 15% | -6% | -6% |
| Shoprite | Mpumalanga | 88% | 72% | 71% | 5% | 11% | 13% | 5% | 10% | 10% | 16% | -5% | -5% |
| Shoprite | National | 88% | 67% | 72% | 5% | 12% | 11% | 4% | | | 21% | -7% | |
| Shoprite | North West | 88% | 73% | 89% | 5% | 1% | 0% | 5% | 0% | 7% | 15% | 4% | 5% |
| Shoprite | Northern Cape | 90% | 72% | 75% | 4% | 10% | 5% | 4% | 8% | 10% | 18% | -6% | -4% |
| Shoprite | Western Cape | 87% | 64% | 72% | 4% | 14% | 11% | 5% | 7% | 11% | 23% | -10% | -2% |

In general, it is important to note that what is necessary in such cases is for the complainant to show that the practice of the dominant firm is *both* exclusive and that it occupies space in excess of its market share; and that if the dominant firm is able to show that the practice is *either* nonexclusive or that it occupies space that is not in excess of its market share then the practice is not considered to be anti-competitive (Wright, 2006)¹⁸.

From this extensive investigation into various space-to-sales measures it could be concluded that the amount of shelf space that was occupied by BATSA was not in excess of its market share. This provided some evidence that the trade marketing programmes could not be regarded as an anti-competitive practice on either this basis, as the economic effects of these programmes were not to foreclose the markets to competitors.

6. Conclusions

In this paper it was argued that what is necessary is a move towards an economic effects-based approach in abuse of dominance cases. Evidence on economic effects used in the recent BATSA case, was presented to show that there was indeed a lack of economic effects when one considered indicators of foreclosure such as the space to sales ratio. It was also pointed out that in cases of partial foreclosure or non-exclusive dealing, which are often prevalent in category management, that alternative measures are required to measure economic effects.

¹⁸ Wright (2006). *Yale Journal on Regulation*, Vol. 23, No. 2, Summer, pp. 169-208

Bibliography

BANKS, T. (2003). Antitrust Liability for Category Management and Other New Merchandising Techniques: Have You Updated Your Counselling? [Online] Available: <http://www.antitrustsource.com>

BISHOP, S. and WALKER, M. (1998). Economics of E.C. Competition Law: Concepts, Application and Measurement. London: Sweet and Maxwell.

CAREMELI, L.S. (2004). The anti-competitive effects and antitrust implications of category management and category captains of consumer products. Chicago-Kent Law Review 79: 1312-1355.

DOBSON, P.W. (2005). Vertical Restraints Policy Reform in the European Union and United Kingdom. Research Paper 2005:2

ECONOMIC ADVISORY GROUP FOR COMPETITION POLICY ON BEHALF OF EUROPEAN COMMISSION. An economic approach to Article 82. [Online]. Available: <http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf>

EUROPEAN COMMISSION. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses. [Online]. Available: <http://ec.europa.eu/comm/competition/antitrust/others/discpaper200s.pdf>

European commission. Guidelines on Vertical Restraints. (2000/C 291/01). Official Journal of the European Communities.

GUAL, J and HELLWIG, M and PERROT, A and POLO, M and REY, P and SCHMIDT, K and STENBACKA, R (2005). An economic approach to Article 82. [Online] Available: <http://ideas.repec.org/p/trf/wpaper/82.html>

KLEIN, B. (2003). Exclusive dealing as competition for distribution “on the merits”. *George Mason Law Review* 12(1): 119-162.

KLEIN, B. and LERNER, A.V. (2006). Procompetitive justifications for exclusive dealing: preventing free-riding and creating undivided dealer loyalty. [Online] Available: http://www.usdoj.gov/atr/public/hearings/single_firm/docs/219969.htm

KLEIN, B. and WRIGHT, J.D. (2006). Antitrust analysis of category management: *Conwood v. United States Tobacco*. *Supreme Court Economic Review*, Forthcoming. *George Mason Law & Economics Research Paper No. 06-38*.

MOTTA, M. (2005). *Competition Policy: Theory and Practice*. New York: Cambridge University Press,

OFFICE OF FAIR TRADING. (2001). The role of market definition in monopoly and dominance inquiries. *Economic Discussion Paper 2*. [Online]. Available: <http://www.oft.gov.uk>

PADILLA, J. (2007). “The reform of Article 82: What we agree, what we are still discussing and what will have to be discussed”. Speech delivered on the 3rd of July 2007, Paris, LECG. European Commission, DG Competition (2005). “DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.

US DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION (1992). *Horizontal Merger Guidelines*. [Online]. Available: <http://www.antitrust.org/law/mg.html>.

VICKERS, J. (2005). Abuse of market power. *The Economic Journal* 115(June): 244-261.

WRIGHT, J.D. (2006). Antitrust law and competition for distribution. *Yale Journal on Regulation* 23(2): 169-208.

WRIGHT, J.D. (2006). Antitrust analysis of category management: *Conwood v. United states tobacco co.*[Online] Available: http://ssrn.com/abstract_id=945178