

# **Administrability and business certainty in abuse of dominance enforcement: an economist's review of the South African record**

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## **1. Introduction**

One of the motivations for the new Competition Act in South Africa in 1998 was the need to effectively address anti-competitive practices to achieve a more efficient economy as part of the government's programme of microeconomic reforms. The existing legislation and Competition Board was not seen as up to the task (DTI, 1997). Competitive rivalry, or the weakness thereof, remains a very important concern given the widely reported persisting high levels of concentration and the historical dominance of a small number of conglomerates (Chabane et al., 2006; Aghion et al., 2008; OECD, 2010). In addition, former state-owned enterprises occupy dominant positions in key sectors such as petroleum, basic chemicals, steel, telecommunications and air travel. Given the incumbency advantages, ensuring effective rivalry is particularly important in terms of rewarding effort and entrepreneurship rather than historically bequeathed market positions.

New competition legislation was viewed by the first democratic government as an important part of dealing with the apartheid legacy (Roberts, 2004). After an extended process of negotiation and consultation (including with big business), the new Competition Act was passed in 1998, and came into effect in 1999. While the objectives of the Act emphasize the ability to participate in the economy, including by small and medium enterprises and by historically disadvantaged persons, the provisions of the Act set specific effects-based tests for exclusionary abuse of dominance as well as for merger review.

Two main pressures influenced the abuse of dominance provisions that were adopted. The first was international debates and perceived 'best practice', embodied in the 'more economic approach' and the explicit provision for pro-competitive defences. This drew on other recent legislation and jurisprudence in jurisdictions such as Australia and Canada (Roberts, 2004). The second was a strong emphasis by business on the need for 'certainty' which under-pinned the specification of discrete conduct under different sub-sections of the Act, along with particular tests in some areas (Roberts, 2000). It is also reflected in the establishment of separate independent institutions, with a Commission responsible for investigating complaints and referring them to a specialist Tribunal for hearing and adjudication, and a Competition Appeal Court, a division of the High Court.

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## ***Provisions of South African Competition Act***

The South African Competition Act (Act 89 of 1998 as amended) addresses abuse of dominance in section 8. Under section 8(a) it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers. An excessive price is defined under the Competition Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value (Section 1.(1) (ix) Definitions and interpretation). Economic value is not defined in the Act.

Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying a competitor access to an essential facility. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms, with no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market.

Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, and where a penalty may be imposed for a first contravention. The types of conduct specified under section 8(d) are as follows:

- (i) *requiring or inducing a supplier or customer to not deal with a competitor;*
- (ii) *refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
- (iii) *selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;*
- (iv) *selling goods or services below their marginal or average variable cost; or*
- (v) *buying-up a scarce supply of intermediate goods or resources required by a competitor.*

At first sight 8(d) does not appear to require finding a substantial anti-competitive effect. However, this section also provides that the firm concerned (the respondent) ‘can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act’. Assuming at least some arguments can be mounted for such gains, this implies that the anti-competitive effect must be evaluated by the complainant and found to be more than trivial.

Price discrimination with the effect of substantially preventing or lessening competition is prohibited under section 9, and has no penalty for first offence. A finding depends on the pricing being for equivalent transactions of products of like grade and quality. The dominant firm may establish that the differences are justified on various grounds, including reasonable allowances for cost differences and meeting competition.

## **2. The ‘more economic’ approach and developing countries**

The more economic approach has been characterised as an emerging ‘post-Chicago’ consensus (Vickers, 2005, 2007). This is based on economic models demonstrating that with imperfect information and/or scale economies dominant firms can have both the incentive and ability to exclude actual or potentially efficient competitors. While economists on both sides of the north Atlantic appear to be converging, as Vickers (2007) notes, “there should be transatlantic differences in policies towards abuse of dominance. The European economy has historically been more monopolised than

that of the US, and its competitive self-righting mechanisms may be less robust.” And, notwithstanding the important differences between them, Europe and North America are real outliers as huge open markets when viewed from much of the rest of the world. It is evident that smaller jurisdictions than those of the EU and USA, and those with more entrenched dominant firms due to their economic history, have a greater likelihood of anti-competitive abuse and greater harm from it (Fox, 2003; Gal, 2003 and 2009; Fingleton and Nikpay, 2009).

Developing countries are obviously a very diverse group. While there have been extensive debates about what is meant by small and/or developing countries, some key features which go to the application of competition tests in practice and the likelihood and costs of under and over-enforcement are simply highlighted here to emphasise are ways in which they differ substantially from the EU and USA.

The economies of developing countries are, with some notable exceptions, relatively small. Due to poor transport infrastructure, there are also likely to be localised markets within the larger economies where there would be much wider markets in Europe or North America (Brusick and Evenett, 2008; Gal, 2009). Scale economies are that much more important, as are dynamic issues to do with the process of competitive rivalry in building production capabilities and accessing inputs and markets (Gal 2003, 2009; Hur, 2004).

State support and access to government in the past has commonly enabled many dominant companies to entrench their position through favourable treatment including licences, regulatory provisions, and privileged energy and transport infrastructure provision. And, these companies may often now be in the hands of multinationals (Brusick and Evenett, 2008). The effects of prior lobbying and patronage, often linking local elites and multinationals, are quite different from the operation of a coherent industrial policy. The latter looks to provide temporary support to build capabilities and is consistent with rivalry. In the example of South Korea rivalrous contests were central to the allocation of industrial policy support, as well as maintaining rivalry between large businesses to ensure competitive discipline (Singh, 2004; Amsden and Singh, 1994).

On top of more entrenched quasi-monopolies in developing countries, there are generally higher barriers to entry. These include weaker and shallower financial systems and other obstacles to new entrants like the difficulties in establishing distribution networks and ensuring supply of inputs, as well as factors already identified such as the relationship of scale economies to market size, and less developed transport infrastructure. When one considers under what conditions a venture capitalist would finance an entrant, then real world entry barriers are likely to be greater than at first sight (Stelzer, 2008).

These factors imply that abuse by dominant firms is more widespread, more persistent and is more damaging in many countries like South Africa (see also Dabbah, 2010; Fingleton and Nikpay, 2009). On the other side, it could be argued that the greater need to incentivise investment means there are greater risks from over-enforcement, in chilling incentives to invest to achieve a leading position. However, the focus here is on firms who have already attained an entrenched position and held it for many years and are also mainly in mature industries, not ones characterised by high levels of innovation. It is investment by entrants and much smaller rivals that is more likely to be required, as part of the competitive process (Fox, 2008).

Alongside the factors affecting the likelihood of abuse, and its costs, developing countries generally have weaker and less mature institutions, at least in terms of skills and technical capacity, which

should be taken into account in the regime adopted (Mateus, 2010).<sup>2</sup> But, this does not imply a minimalist approach to enforcement. Rather, it implies a careful country by country evaluation against what is required for clear and administrable standards. Using the same analytical framework may mean a different weighing-up of considerations forming the appropriate tests because of the different conditions, as well as different levels of investment in detection and punishment (Evans, 2009).<sup>3</sup> This is precisely where insights from South Africa's experience over the past twelve years are useful.

### ***Ability to exercise market power and earn monopoly returns***

Consider a quasi-monopoly in a mature industry, with relatively static local demand. It has two essential concerns, to be able to continue to charge the monopoly price and to deter entry.

It may be thought that by charging the monopoly price the firm is more likely to attract entry. But, the entrant is not considering the current price, but the price post-entry and the obstacles it will face to establish production, build a customer base and attain scale and productive efficiency (Ezrachi and Gilo, 2009). The entrant likely has imperfect information as to the costs and efficiency of the incumbent, with the incumbent having an incentive to signal it is efficient and low cost. Moreover, the state may have paid for the incumbent's sunk costs under state-ownership and/or provided state support through privileged access to transport infrastructure, energy supply and investment incentives, while the entrant may be uncertain as to how long and costly it will be to set-up.

The main issues in terms of current pricing for the monopolist are to segment customers to maximise prices depending on the customers' alternatives, and to address any bargaining power customers may have. In terms of the first, there are likely to be some consumers who have some (imperfect) alternatives and others that do not. These alternatives could include poor substitutes, imports or sponsoring entry.

Buyers can threaten to by-pass the monopolist by turning to an inferior alternative (such as an imported product). If this alternative is much more expensive for the buyers (because of transport costs and other related disadvantages) then the monopolist knows the buyers are making an empty threat and can stick to its price. But, if the monopolist is unsure about the alternative and the buyers know that they can impose a cost on the monopolist in terms of foregone profits as the monopolist has low costs and no alternative sales opportunities, then the monopolist's commitment to stick to its price is very weak (see Corbett et al., 2011, for an example of this). Exclusionary conduct, such as exclusive dealing or inducement arrangements, may be employed to weaken buyers' ability to turn to alternatives.

In addition, under certain conditions a firm may not be able to make the 'one monopoly profit' with linear pricing at the upstream level if there is imperfect competition downstream (Motta, 2004). Under these circumstances not all rents can be extracted without exerting market power downstream.

Exclusionary strategies targeted at entrants and rivals will generally involve some costs (or sacrifice of profits foregone) on the part of the incumbent. This is most obvious in predatory pricing where in the simply textbook case prices are reduced today in order to be able to recoup tomorrow. There is a wide range of varied conduct which can have the same objective depending on market and industry conditions. For example, if entry is easier in one customer and/or product segment then the conduct

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<sup>2</sup> For a strong critique of the vigorous promotion of competition law for developing countries without regard to the political and institutional realities see also Rodriguez and Menon (2010)

<sup>3</sup> Evans highlights the high level of investment in detection & punishment of unlawful conduct in the USA due to private actions and treble damages.

can be addressed there – whether it is a lower priced ‘fighting brand’, bundling this product, or inducing the customers in this segment not to deal with competitors through loyalty rebate schemes. While these involve a cost on the part of the dominant firm, it is much lower by being targeted, and the recoupment is on-going in terms of the protection of profits in the main market. It is still necessary to understand whether the conduct is likely to have an exclusionary effect and why it is not vigorous competition on the merits, such that an efficient competitor could match the incentives on offer from the dominant firm and/or enter across the whole market.

Most theories for the incentives for exclusion have drawn on market failures and incomplete markets due to imperfect information. This is behind imperfect financial markets which explain why an entrant may not have the same ability to run losses as the incumbent. It also explains the returns to an incumbent from signalling that it is low cost, when it may not be. And, information imperfections underlie the possible benefit to an incumbent from developing a reputation for fighting entry which, under perfect information, the entrant would identify as not credible. Importantly, in the real world these are not mutually exclusive theories but are likely to be reinforcing.

When there are significant economies of scale, it has been demonstrated that an incumbent firm may have the ability and incentive to exclude actual and potential smaller rivals (Fumagalli and Motta, 2008 and 2010). Scale economies imply that an entrant has to be able to build a sufficient customer base to be competitive. In circumstances where the customer base is sufficiently fragmented and there is sequential contracting or different market segments, by geography or a product dimension, the incumbent is able to exclude even a more efficient competitor by bidding to tie down enough customers in the first round. In sequential bidding this is the early customer, as only by securing it can the entrant seek to contract for the later customers from which it will make money. The incumbent knows that it can protect its profits on later sales by pricing to exclude the rival. In the application of this rationale it is important to understand the range of factors which may lead to scale economies, including fixed and sunk costs (including where advertising is important to build brand awareness), learning effects, and the importance of building a platform in two-sided markets.

It is also important to understand that in markets which can be segmented, or products which are related, the incumbent may be most likely to face rivalry through an entrant targeting customers in segments which are initially easier to supply. The entrant will then be better able to migrate to supplying the wider, or related, markets. This underpins the theories of harm in the *Microsoft* cases relating to web browsers and servers, as well as in *Intel* and *Cardiff Buses*.<sup>4</sup> In each of these cases an entrant able to develop a customer base will be able to challenge the incumbent over a wider area, whether in the computer operating system, more bus routes, or by achieving scale to compete across chip customers.

Again, these theories and strategies can co-exist with ones based in imperfect information. Together they provide tools for understanding firm behaviour in real markets, where entry is a matter of building capacity and capabilities, establishing brands and distribution networks, and targeting customer groups. This is in stark contrast with the possibility for hit-and-run entry posited by the Chicago school.

Ultimately, the relevance of different analytical frameworks depends on the facts of a specific market and firm conduct in it. The features of an industry where there is more likely to be predation, or other exclusionary abuse, include: scale economies; incumbency advantage, such as an entrenched

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<sup>4</sup> Case COMP/C-3/37.990—Intel, Commission Decision of 13 May 2009; Cardiff Buses, decision of the Office of Fair Trading No. CA98/01/2008 of 18 November 2008.

dominant position; the possibility to engage in differential pricing over time (and/or space); absence of strong buyer power; mature markets (otherwise there will be a substantial number of new consumers coming to the market available to the entrant); imperfect downstream competition (including segmented markets) such that an entrant cannot attract a small customer base which is able then to grow its own market share quickly (and thereby indirectly grow the entrant's upstream share); and, poor buyer coordination, so that the buyers cannot sponsor the entrant, and where buyers are unlikely to switch unless others do as they do not want to back a brand that is unlikely to succeed.

The incumbent can, with some short-term profit sacrifice, stifle competitive rivalry and protect profits in the longer term through different exclusionary strategies, which may be to an extent substitutable or mutually reinforcing. The theories suggest paying attention to different cost measures, such as incremental costs, identifying the contestable market in question, and what is required for an effective rival.

These considerations at the core of the economic analysis provide the basis for the rules to be applied. As argued by Vickers (2005):

*'To say that the law on abuse of dominance should develop a stronger economic foundation is not to say that rules of law should be replaced by discretionary decision making based on whatever is thought to be desirable in economic terms case by case. There must be rules of law in this area of competition policy, not least for reasons of predictability and accountability. So the issue is not rules versus discretion, but how well the rules are grounded in economics.'*

The appropriate competition rules, including the balancing of the important factors as reflected, for example, in the EC's recent Guidance Paper, if they are properly grounded in economic theory, should be cognisant of the economy in question (EC, 2009; Evans, 2009; Christiansen and Kerber, 2006).

### **3. Overview of the South African record on abuse of dominance**

The hurdles for proving abuse of dominance are high in South Africa, evident in the extremely small number of cases where abuse has been found and the extensive evidence that has been required for these findings. The Competition Tribunal has only decided on nine dominance cases over the past eleven years, finding that abuse occurred in six (on the part of Patensie, South African Airways (twice), Sasol, Mittal Steel SA and Senwes). However, in three of these the finding was overturned (against Sasol and Senwes) or set aside and remitted by the Competition Appeal Court (against Mittal Steel SA). Nor has the Commission been an aggressive enforcer, only referring five of the cases on which the Tribunal has ruled, the other four having been referred by private parties after the Commission declined to pursue them. (In the second SAA case the Commission settled without an admission and the complainants subsequently launched their own case on which they got a favourable Tribunal decision).

This means that over the twelve years under review, only two firms, Patensie and South African Airways, have conclusively been found guilty of abusing a dominant position. And, only SAA has been subject to a penalty imposed by the Tribunal.

There are 18 abuse cases in all that have been referred to the Tribunal, meaning an average of approximately 1.5 per year. A further two cases that were not referred were subject to settlements, making 20 cases in total in Table 1. Other than the nine on which the Tribunal has made a

determination, a further six have been referred and are awaiting a Tribunal hearing or the hearing is underway. The further five cases that make up the 20 were the subject of settlements with the Commission, one of which the Tribunal did not confirm.

**Table 1. Abuse of dominance cases, 1 September 1999 to 31 August 2011**

Initiation	Case (Tribunal case number)	Main alleged contravention	Status/finding
Dec99	CC v SAFCOL, Yorkcor, CJ Rance (100/CR/Dec00)	Price discrimination in timber	26/6/02 Tribunal dismissed application to confirm consent agreement reached between CC and SAFCOL, as it went to contractual provisions, without consent of the other parties
13/10/2000	CC v SAA (18/CR/Mar01)	Inducing customer (travel agents) not to deal with competing airlines	28/7/05 Tribunal decision Found incentive scheme with travel agents contravened 8(d)(i); R45mn penalty
20/4/2000	CC v Patensie Sitrus (37/CR/Jun01)	Exclusive supply arrangement with packing and distribution company, contravening 8(d)(i) and 5(1).	4/8/02 Tribunal decision, upheld by CAC. Found articles of association of packing and marketing former co-op contravened 5(10 and 8(d)(i) in requiring customers/members not to deal with competitors; no penalty
Sept 2002	CC/Hazel Tau and others v GlaxoSmithKline & Boehringer Ingelheim	Excessive pricing of ARVs	Case non-referred by the Commission following agreement in Dec 2003 to license generic manufacturers
30/4/2003 complaint lodged (CC non-ref 12/11/03)	Nationwide Poles v Sasol Oil (72/CR/Dec03)	Price discrimination in creosote	31/3/05 Tribunal decision, found discount scheme was prohibited price discrimination 9(1). CAC decision - overturned.
May-August 2002 complaints filed by 21 companies	CC v Telkom (11/CR/Feb04)	Exclusionary practices in pricing and access to fixed lines for value-added network service providers	Appeals of referral up to Supreme Court of Appeal. Now returned back to Tribunal and awaiting hearing.
19/9/02 (CC non-ref 6/1/04)	Harmony Gold v Mittal Steel SA (13/CR/Feb04)	Excessive pricing of flat steel	27/3/07 Tribunal decision finding excessive pricing contravening 8(a) and penalty of R692mn 29/5/09 CAC overturned decision and remitted back to Tribunal to reconsider tests. Parties settled.
13/2/03 (CC non-ref 13/5/03) 24/7/03 (CC non-ref 25/5/04)	Mandla-Matla v Independent Newspapers (48/CR/Jun04)	Exclusive arrangements with distributors contravening 8(d)(i) and 5(1); and refusal to supply distribution information contravening 8(c)	6/11/06 Tribunal decision, dismissed on all counts
3/11/03 Nutriflo Aug04 Profert	CC v Sasol Nitro (31/CR/May05 and 45/CR/May06)	Excessive pricing, refusal to supply and price discrimination in ammonia and related fertilizer products	20/07/10 Tribunal confirmed settlement.
1/10/2003	CC, JTI v BATSA (55/CR/Jun05)	Arrangements with outlets for cigarette was exclusionary abuse under 8(d)(i) and/or 8(c), as well as under 5(1) referred by JTI.	25/06/09 Tribunal decision, dismissed on all counts Appeal to CAC lodged by JTI and then withdrawn
Oct 2003	Referred by CC in 2004. Nationwide Airlines, Comair v SAA (80/CR/Sep06)	SAA incentive schemes during the period 1 June 2001 - 31 March 2005 contravened 8(d)(i)	The Commission settled with SAA in 2006 without an admission and a penalty of R15mn. Comair and Nationwide Airlines objected and pursued a finding for the purposes of damages claims. 17 Feb 2010 Tribunal Decision, found contravened 8(d)(i), no penalty. Under appeal
Dec 2003	CC v Mittal Steel SA and others (08/CR/Jan07)	Price discrimination in low carbon wire rod	Awaiting Tribunal hearing.
2/12/2004	CC v Senwes (110/CR/Dec06)	Pricing for grain storage excluding rival traders	3/02/09 Tribunal found exclusion in form of margin squeeze, contravening 8(c), upheld by CAC. SCA overturned on 1 June 2011.
25/11/04	CC v SAB	Inducement not to deal with a	Tribunal dismissed 7/4/11, finding it did not have

	(134/CR/Dec07)	competitor; price discrimination	jurisdiction due to differences between complaint and Commission referral.
20/2/07	CC v Astral, Elite (74/CR/Jun08)	Exclusive arrangements regarding poultry breeding stock and feed	Awaiting Tribunal hearing; application to dismiss being decided by Tribunal.
12/8/05	CC v Rooibos (129/CR/Dec08)	Exclusive contracts with rooibos packers	November 2010 Tribunal confirmed settlement.
29/6/05 and four further complaints consolidated	CC v Telkom (ref Oct/Nov09)	Excessive pricing and margin squeeze in pricing of broadband (leased lines)	Awaiting Tribunal hearing.
29/2/08 and four further complaints consolidated	CC v Computicket (ref 30 April 2010)	Exclusionary abuse, through exclusive contracts with inventory providers	Awaiting Tribunal hearing. Application to dismiss awaiting hearing.
2007	CC v Foskor	Excessive pricing of phosphoric acid	28/02/11, Tribunal confirmed settlement.
12/11/07 (following request from DTI)	CC v Sasol Chemical Industries (Ref Aug 2010)	Excessive pricing of propylene and polypropylene	Awaiting Tribunal hearing.

Note: The Tribunal case number gives the month in which the case was referred to Tribunal.

Arguably in three of the settlements respondents agreed to substantive remedies. The settlement with Sasol regarding its Sasol Nitro division included an agreement to divest downstream fertilizer blending operations and behavioural conditions governing pricing (largely to do with non-discrimination). The settlement of the Commission with GlaxoSmithKline and Boehringer Ingelheim involved the Commission non-referring a complaint on excessive pricing of ARVs in exchange for the licencing of generic manufacturers (which led to substantial price reductions). The settlement with Foskor involved commitments regarding lower prices, which Foskor had already undertaken from August 2008 when the Commission raised its preliminary concerns with Foskor.

It was perhaps understandable that the Commission was conservative in the early years, when it was engaged largely in merger evaluation (Roberts, 2004; Black and Roberts, 2009). And, private parties brought important cases in these years, notably in *Nationwide Poles v Sasol* and *Harmony Gold v Mittal Steel* where in both cases the Tribunal found there had been abuse, both subsequently overturned by the CAC.

But, there has been little increase in referrals over time. Up to August 2005 the Commission had referred or run eight cases (including the ARV matter). Since then there have been nine Commission cases (including confirmation of the Foskor settlement without a referral).

In addition, many sections of the Act relating to abuse of dominance are yet to be properly tested. These include access to essential facilities, refusal to supply, predation and tying and bundling. There are referrals relating to some of these, but the cases are still to be heard.

The legalistic procedure which has evolved in practice in the Tribunal has played a part in the time from referral to hearing and decision being as much as four to five years (as in *BATSA*, *Sasol Nitro*, and the *SAA* cases). The first *Telkom* matter is already over seven years from referral and hearings have yet to commence.

In the matters which have been heard and determined by the Tribunal, two overall features stand out.

First, the effects-based tests stipulated in the Act for most of the abuse of dominance provisions have been applied through the hearing of extensive economic evidence and analysis, as well as related experts such as accountants, marketing specialists, and industry experts. There can be no danger that firms simply by being dominant are at risk of being found in contravention. Indeed, economists indicate that the South African regime probably allows for the fullest presentation and interrogation of

economic evidence, written and oral, in the world. In most of the cases there have been international economists from some of the leading competition consultancies giving evidence, sometimes on the side of both the complainant and respondent, as in the SAA cases and BATSA. This has also made for very lengthy hearings, running to around 50 days in the longest case to date, being BATSA.

Second, the cases referred and decided almost all involved firms who owe their position to prior state ownership and/or support. Former agricultural co-operatives, such as Senwes and Patensie, received very extensive state support and subsidies under apartheid. SAA is state-owned, notwithstanding a brief interlude as privatised entity to the now defunct Swissair. Telkom is the former state fixed-line monopolist. Sasol and Mittal Steel were both state-owned until the very end of the 1980s and continued to receive extensive support under industrial policies over the next decade at least, and in Sasol's case it still benefits hugely from the regulatory framework for fuel (Roberts and Rustomjee, 2009). The dominant cigarette and beer companies (in the order of 85-90% market share to this day) had close relationships with the apartheid state.<sup>5</sup> SAFCOL is the state-owned forestry company, while Foskor is majority owned by the state's Industrial Development Corporation.

To further assess South Africa's abuse of dominance regime in theory and practice we examine the major exclusionary abuse cases.<sup>6</sup> We then return to the discussion of how important abuse of dominance is likely to be for a country such as South Africa, to place the enforcement record in its proper context.

#### **4. Standards for exclusionary abuse**

The majority of substantive cases of exclusionary abuse have fallen under 8(d)(i) inducement not to deal with a competitor, as well as under the broad prohibition of exclusionary abuse under 8(c). This is consistent with the main theory of harm being about a dominant firm seeking to undermine actual or potential rivals through preventing them from being able to attract the customers necessary to be an effective competitor.

The Tribunal established the main steps in the effects-based analysis required for a finding of exclusionary abuse of dominance in the first SAA decision in July 2005.<sup>7</sup> Following the referral by the Commission in March 2001 of a complaint lodged by Nationwide Airlines the Tribunal found that SAA had contravened section 8(d)(i). The effects-based approach was reinforced in the Mandla-Matla and JTI-BATSA decisions in November 2006 and June 2009 respectively (in both of which the Tribunal did not find a contravention).

In the SAA case the Tribunal established that the anti-competitive effect can be shown either through evidence of direct harm to consumer welfare and/or that the conduct forecloses a substantial part of the market to a rival. The substantial foreclosure test has subsequently been used by the Tribunal in most of its decisions. It is necessary to assess whether the firm has the ability to foreclose a market to rivals and whether foreclosure has occurred. The Tribunal has emphasised that the respondent does not need to be dominant in the market in which the effects of its conduct are felt, but it must have the ability to foreclose, generally by being dominant in the upstream market.

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<sup>5</sup> See the Competition Tribunal decision (2003) in the large merger between Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd, Case No. 08/LM/Feb02, for a description of the beer and liquor industry. BATSA was part of one of the main conglomerate groupings, Richemont/Rembrandt (see Chabane et al., 2006).

<sup>6</sup> The decided cases have been described in more detail in Competition Commission and Tribunal (2009).

<sup>7</sup> This followed the earlier Patensie decision, where the arrangements were found to contravene both 8(d)(i) and 5(1), where the effects of the exclusive supply arrangements were relatively clear once it was decided that such arrangements fell within these sections of the Act and that the relevant market was the local area in question.

Once substantial foreclosure has been determined, evidence of the effects should be demonstrated. While the Tribunal has allowed that anti-competitive effect can be inferred from substantial foreclosure, representations have been made in specific cases showing how rival businesses have performed relative to the respondents.<sup>8</sup> Full foreclosure is not required for a firm to be subject to exclusionary conduct. If this were the case, investigations would only be conducted on the part of firms that had already exited.

In the SAA matter the Commission referred a complaint in March 2001 relating to two restrictive practices involving SAA's override scheme for travel agents and the Explorer scheme for travel agent employees.<sup>9</sup> The Commission identified the relevant markets as the market for domestic scheduled airline travel and the market for South African travel agency sales of domestic scheduled air travel in South Africa.

In its referral, the Commission argued that the override and Explorer schemes had the effect of inducing travel agents to sell more SAA tickets and fewer of those of its rivals, even when agents had an opportunity to do so. This was because the incentive scheme's rewards to travel agents increased sharply as the travel agents met and exceeded their SAA sales targets, with incremental commissions increasing from 14 percent for exceeding the target by 15 percent, to 31 percent for exceeding the target by 35 percent. On the other hand, the base commission rate would also increase by 0.5 percent for sales above a set target for certain contracts, while it would continually increase as travel exceeded the target in other contracts. With the base commission being paid on a "back-to-rand-one" basis, the more a travel agent exceeded the target, the more they would earn from *all* sales of SAA tickets. The incentives were thus individualised and retroactive, meaning very high-powered and non-linear incentives. The Explorer scheme rewarded individual travel agent consultants with a free international air ticket based on their achieving SAA's sales targets. The Explorer scheme also earned points for the travel agents to which the consultants belonged.

The Tribunal ruled that it was not the existence of these schemes that raised competition concerns, as they were a market-wide norm, but it was the nature of SAA's schemes in particular, given SAA's position.<sup>10</sup> Specifically, the Tribunal required evidence to show that travel agents had a financial incentive and the ability to move ticket-purchasing customers from rival airlines towards SAA. It found that it had been shown that the marginal commission rates rate were substantially increased by the override schemes, and that it had affected the behaviour of travel agents who had the ability to divert customers from rival airlines. The Tribunal also ruled that these exclusionary effects were reinforced by the Explorer scheme. The foreclosure was substantial in that during the relevant period domestic airline ticket sales by travel agents accounted for 75 percent of all ticket sales and, by the end of March 2001, SAA had 19 override schemes covering all the four major travel agent groups, as well as smaller ones, with a total of 683 agencies being covered.

The Tribunal also considered the effect of SAA's conduct on the businesses of rival airlines. Specifically, the Tribunal considered evidence of declines in Nationwide's flown passengers after the inception of the override and Explorer schemes. The other rival at the time, British Airways (BA)/Comair, also experienced an impact with its growth in volume terms halted in 2000 to 2001 at a

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<sup>8</sup> In Senwes Tribunal case number 110/CR/Dec06 and SAA Tribunal case number 18/CR/Mar01 the Tribunal noted the rivals' relatively poor performance, while in JTI-BATSA the Tribunal found that the rivals' performance had not been poor, at least not due to the alleged conduct.

<sup>9</sup> See the Tribunal judgment and Jenkins et al. (2009) for further detail.

<sup>10</sup> See SAA, Case Number 18/CR/Mar01, paragraph 141, page 34

time of growing overall volumes going disproportionately to SAA. The Tribunal subsequently ruled that SAA's conduct inhibited rivals from expanding in the market, at the same time reinforcing SAA's dominant position.

The effect on consumer welfare was only inferred, with the Tribunal finding that it was likely that SAA's conduct had an adverse effect on consumers through leading consumers into making the wrong choices of airlines (and the prices of their services).<sup>11</sup>

In evaluating SAA's claimed efficiencies the Tribunal found that justifications should either result in benefits that are passed through to consumers or that expand output and that it is necessary to determine whether there are other means of reaping the claimed pro-competitive gains with lesser exclusionary effects. In other words, is exclusionary conduct required for the pro-competitive gains to be realised.<sup>12</sup> After the provision of objective justifications by the respondents, it remains for the Tribunal to weigh or balance such pro-competitive effects against the anti-competitive effects arising from the conduct.

The Tribunal rejected SAA's pro-competitive justification of its conduct, ruling that SAA could have achieved its claimed efficiencies via other less exclusionary means and that the rebates were not passed on to consumers. The Tribunal ruled that SAA's conduct contravened section 8(d)(i) of the Act and imposed a penalty of R45 million (2.25 percent of turnover).<sup>13</sup>

In 2004, exclusive arrangements between a newspaper publisher and distributors were evaluated in the complaint brought by Mandla Matla against Independent Newspapers under sections 5(1), 8(c) and/or 8(d)(i) of the Act.<sup>14</sup> Mandla-Matla moved the printing of its Zulu language newspaper (Ilanga) to another group and Independent Newspapers established its own Zulu language newspaper, Isolezwe, and refused to provide the details to Mandla Matla of the agents that had formed the sales network for Ilanga or allowing its distributors, now distributing Isolezwe, to also distribute for Mandla-Matla. The Tribunal found that foreclosure was not substantial or sustained, and barriers to entry were also not significant. Mandla-Matla had successfully established its own distribution operations and competition had led to greatly increased sales of Zulu language newspapers. Indeed, in this case it was the incumbent that was complaining about the conduct of the entrant in terms of newspapers (albeit a sizeable printing and publishing business in general).

Following SAA, the exclusionary effects of incentive programmes were again evaluated in the complaint brought by Japan Tobacco International (JTI) against British American Tobacco South Africa (BATSA), and referred by the Commission (JTI also intervening).<sup>15</sup> BATSA's share was above 85% of the South African cigarette market. The complaint focused on the effects of agreements between BATSA and selected cigarette retailers and certain of BATSA's retailer incentive programmes. It was alleged that these induced retailers to give preference to BATSA products over those of competitors, regardless of their prices and/or quality, alternatively effectively giving BATSA exclusive access to the point of sale for promotional purposes. The Tribunal rejected the complaint on

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<sup>11</sup> This suggests a related point (made by Eleanor Fox) which is whether agents, as agents of consumers not airlines, are guilty of mis-selling by being influenced by the incentive programmes of SAA.

<sup>12</sup> SAA decision Case Number 18/CR/Mar01, paragraph 252, page 57

<sup>13</sup> In 2004, BA/Comair brought a similar complaint to the Commission against SAA relating to the period from 1999 to 2004. The BA/Comair complaint resulted in a settlement agreement with the Commission which was confirmed by the Tribunal in December 2006. SAA agreed to pay an administrative fine of R15 million and refrain from future incentive agreements with travel agents, although did not make an admission. BA/Comair then pursued a finding on the contravention, for the purposes of pursuing damages, and the Tribunal found in their favour.

<sup>14</sup> Case number 48/CR/Jun04.

<sup>15</sup> Case number 05/CR/Feb05.

the grounds that the extent of foreclosure was minimal and that there was no consumer harm or harm to competitors from the allegedly anti-competitive conduct. The Tribunal also concluded that there were other reasons why JTI and other BATSA competitors failed to make substantial in-roads into BATSA's market share and that whenever they intended to gain access to certain channels like hotels, restaurants and catering venues, JTI and Philip Morris International (PMI), the owner of Marlboro, had fought and won significant battles against BATSA.

These three cases were all largely about drawing in customers to inhibit a rival from effectively accessing an important market or market segment (although in the case of Mandla-Matla dominance itself was very doubtful).

The other sub-section of 8(d) under which there have been several important cases, although none subject to a full Tribunal ruling, is 8(d)(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible. This subsection deals with where the dominant firm is vertically integrated (as its customer is also its competitor) and it is undermining a downstream competitor through denying it an input which is scarce (also implying that it is an indispensable input, otherwise the scarcity would be of no import). The denial need not be outright; if the dominant firm offered the input at such a price that the downstream firm is not viable (in a form of margin squeeze) then this would be a constructive refusal to supply.

The Chicago school questioned why a firm with upstream market power would need to engage in conduct to limit competition downstream. Rather, it would benefit from cut-throat downstream competition to ensure it could obtain the full 'one monopoly profit' in its upstream pricing. But, as we have seen, this is to miss the point. The harm we are primarily concerned with is from conduct in order to protect the dominant firm's upstream position and its ability to exercise its market power.

This was a major concern in the only case concluded to date which included 8(d)(ii), involving Sasol's ammonia and fertilizer chemicals business housed in its Sasol Nitro division.<sup>16</sup> This case was settled in mid-2010 through a mix of behavioural and structural conditions. The case involved Sasol as effectively the sole local producer of ammonia in southern Africa. According to the Commission's case, this is a position it purchased by paying AECI to close down its ammonia plant in 1999, earlier than AECI had been contemplating doing, and following the Competition Board blocking the merger of Sasol and AECI in 1998.<sup>17</sup>

At the core of the conduct covered in the Commission's referrals was the pricing by Sasol of ammonia, ammonium nitrate and derivative products at supra-competitive prices. Sasol priced ammonia at inland import parity levels, as if the ammonia was imported from the Ukraine or Middle East all the way to Secunda. The ammonia is produced as a by-product of Sasol's fuel from coal operations at Secunda and from natural gas at Sasolburg. The price of natural gas, where Sasol sells the gas on to third parties, is subject to a maximum cap set at the average of prices in selected Western European countries. The ammonia is used in ammonium nitrate form in explosives and fertilizer, which are sold locally and exported.

The Commission's referral alleged Sasol's pricing and supply contravened the Act in being excessive and a (constructive) refusal to supply, and discriminatory in that Sasol supplied its own downstream subsidiary and two other downstream firms on more favourable terms than the complainants. The

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<sup>16</sup> The following is drawn from the written submissions made at the Tribunal hearing to confirm the settlement.

<sup>17</sup> See also Swan and Das Nair (2008).

Commission had separately found (and Sasol admitted) that the two other downstream firms were in a fertilizer cartel with Sasol.

While Sasol is the sole local supplier of ammonia, it also needed to dispose of the ammonia which is produced at more or less fixed volumes in large scale capital-intensive plants. In addition to its own downstream operations in fertilizer and explosives, the other major customers were Omnia and AECI's operations in fertilizer and explosives (AECI's fertilizer operation, Kynoch, was sold in 2001 and is now owned by Yara). Both firms could threaten to turn to alternatives in the form of imports of the ammonia derivative products, or of the ammonia itself (although this required special railcars).

The Commission's findings were that the ability of Sasol to charge excessive prices for ammonia and ammonium nitrate is based on the network of arrangements with Omnia, AECI/AEL<sup>18</sup> and Yara, and the differential treatment in terms of pricing and supply with regard to rivals, including NutriFlo and Profert. The alleged exclusionary conduct maintained Sasol's position and its exercise of market power.

The conditions involve Sasol divesting from all but one of its downstream fertilizer blending operations and committing to non-discriminatory pricing practices while maintaining supplies and investment. While Sasol remains the upstream monopolist, the principle underlying the remedy is to undermine Sasol's incentive and ability to engage in exclusionary conduct to protect the exercise of its market power.

A combined case of excessive pricing and exclusionary conduct resulting from this pricing has also been referred by the Commission against Telkom, the former state-owned fixed line monopolist. The case involves the pricing of leased lines to providers of network services who require these lines to offer services in competition with Telkom's own downstream operations. The case comes at a time when a second national operator, Neotel, had been licenced. This case has still to be heard.

While these cases clearly differ from the inducement cases under 8(d)(i), there are also important similarities in the underlying theory of harm. In the inducement cases the entrant or competitor(s) are being inhibited from accessing the market through various mechanisms, which could include long-term exclusive contracts or rebate arrangements operating on buyers. In the refusal to supply case, the incumbent is vertically integrated and the mechanism is the downstream competitor not obtaining an input in order to undermine the ability of independent downstream firms to grow and counter the upstream monopoly's market power. These are not insignificant differences, but at the heart of each is protection of market power and the ability to exert it in the core (upstream) market.

As has been widely noted, tying and bundling can be viewed as a similar type of exclusionary conduct to inducement, though operating across complementary products rather than vertically related ones. The key is still the impact on competition in the complementary products in order to protect market power in the core market. South Africa has not had any tying or bundling cases (which fall under 8(d)(iii)).

Neither has there been a predation case. The hurdle for predation in the South African Act is high. Falling under 8(d)(iv), price must be below marginal or average variable cost, with the pro-competitive defences available to respondents as for the other sections. The inclusion of these standards in the legislative provision itself means what is defined as 'variable' is crucial. This compares with other jurisdictions such as the European Union (European Commission, 2009) where

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<sup>18</sup> AECI's explosives operation is called AEL.

recent guidance discusses the employment of a range of cost measures such as average avoidable cost and long-run average incremental cost that go to different circumstances under which costs may vary or be avoided by a firm. These can be applied on a case-by-case basis as the law does not tie the authority and the courts, in contrast to the situation in South Africa. A bigger point perhaps is that in the real world there are much more sophisticated ways to run a predatory type of strategy than the simple (and perhaps simplistic) below cost pricing apparently anticipated in the Act. And, it is also important to recognise that there is no reason why only one exclusionary lever will be used by a dominant firm seeking to exclude or undermine an entrant or small rival.

### ***General prohibition on exclusionary conduct under 8(c)***

As noted above, there is also a general prohibition on exclusionary acts other than those specified under 8(d) if the anti-competitive effect outweighs its technological, efficiency or other pro-competitive gain. There is no penalty for a first contravention of this section.

The Tribunal found a contravention of 8(c) in the case of Senwes, later over-turned by the SCA on appeal. Senwes was a former agricultural co-operative whose dominant position in grain storage (in concrete silos) in a sizable geographic area (known as the ‘Senwes area’) derived from government policy under apartheid to support co-operatives who were regional monopolies in the context of extensive regulation through marketing boards.<sup>19</sup> The case involved differential storage pricing for farmers and for traders, where independent traders competed with Senwes’ own substantial trading business.

Senwes charged a daily storage tariff, capped at 100 days (and thereafter storage was effectively free), recognising the fact that the silos filled up with grain at harvest and stocks were then drawn down over the year.<sup>20</sup> In May 2003 Senwes removed the capped tariff from traders, only offering it to farmers. An independent trader lodged a complaint with the Commission in December 2004 and two years later the Commission referred a case to the Tribunal of inducement not to deal with a competitor, under 8(d)(i), alternatively tying or bundling, under 8(d)(iii), alternatively exclusion under 8(c), and price discrimination under s9. In the economic analysis led by the Commission in the Tribunal the differential and higher tariff charged to independent traders was characterised as exerting a margin squeeze on these firms. The Commission also found that Senwes made representations to farmers that they would pay a different storage charge depending on whether the farmer sold the grain to Senwes or to a third party.

Senwes admitted that there were a few instances of discounting storage in the pre-100 day period on condition that farmers sold the grain to Senwes. A Senwes witness also admitted giving incorrect information to farmers about it being cheaper to sell to Senwes than to third parties, in terms of whether the cap would apply.<sup>21</sup> While the Tribunal found that the mis-representations were likely to be widespread they did not find that any farmer had actually been denied the cap because he sold to a third party instead of to Senwes, nor were the mis-representations specific to whether the cap would apply. The Tribunal therefore did not find that the evidence established an anti-competitive effect in terms of the inducement not to deal with rivals falling within section 8(d)(i).

The Tribunal also found that there had not been prohibited price discrimination as the difference in the application of the cap between farmers and traders was not the essence of the anti-competitive

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<sup>19</sup> The grain co-operatives were also appointed as agents of the boards.

<sup>20</sup> See Tribunal decision, Competition Commission v Senwes, case no 110/CR/Dec06.

<sup>21</sup> The witness had denied this initially in testimony until confronted with tape-recordings of his own conversations at which point he admitted perjury, but claimed the instances of mis-representation were limited.

conduct (and farmers and traders would have to be understood to be competitors). Rather, the essence of the conduct was the anti-competitive effect it had on traders in comparison with Senwes' own vertically integrated trading operation.

With regard to the margin squeeze case the Tribunal found that the pricing in the futures market did not reflect the full carrying costs to a third party trader because the spread reflected that not all traders (in particular, Senwes itself) and not all areas were subject to the daily storage costs. The Tribunal also found that Senwes could not operate its own trading division profitably if it passed on the same input cost for storage that it charged independent traders.<sup>22</sup> Instead, as Senwes quotes farmers a net price for the purchase of their grain (with no separate breakdown for handling, storage and commission), they made offers which in effect meant storage was charged at less than cost.<sup>23</sup> The Tribunal concluded that the differential application of the cap such that independent traders faced higher prices in the post 100 day period than farmers and, the Tribunal implied, Senwes own trading arm, meant that independent traders had been excluded through a margin squeeze and was associated with a decline in their volumes in the Senwes area. Senwes share of the crop in the Senwes area had increased from 44.6% in 2001/2 to 75.8% in 2006/7 and international traders with substantial volumes in other parts of the country had very small volumes in the Senwes area.<sup>24</sup>

Senwes appealed to the CAC and then the SCA on the grounds that the margin squeeze case had not been pleaded and, even if it had, no case had been made out for it on the evidence. That is, there had been no referral of a case resting on the relative storage costs to independent traders and to Senwes own trading arm.

While the CAC upheld the Tribunal decision, the SCA over-turned it in its decision delivered on 1 June 2011. The SCA found that the relevant comparison was of independent traders to Senwes own trading arm, and not the comparison of costs to traders and farmers. While this comparison had been broadly reflected in the complaint and in the factual witness statements, the SCA found that it had not been properly covered by the referral under 8(c) of exclusionary abuse but was rather made in support of the 8(d)(i) charge which the Tribunal found had not been established.<sup>25</sup> And, some of the evidence of Senwes favouring its own trading arm by not levying charges for silo fees and information, as well as conditions on the provision of finance to farmers, had not been covered in the referral.<sup>26</sup> In whether the Tribunal was entitled to go beyond the terms of the referral in performing its inquisitorial role the SCA found that the Tribunal has no power to enquire into and decide any matter not referred to it.<sup>27</sup>

The fundamental issue raised by this case is whether it makes sense to view exclusionary abuse on the part of a dominant firm as somehow composed of separate and discrete types of conduct individually having an anti-competitive effect. A narrower question within this is whether the Tribunal was enquiring into separate matters not referred to it, or whether these were additional dimensions of the exclusionary conduct complained of, and which became clearer in the course of interrogating the conduct through the hearings, as witnesses testified under oath.

It is evident that the core of the behaviour complained of and as referred was the exclusionary nature of Senwes conduct in relation to independent traders. The Commission had identified that making storage 'more expensive' for traders than producers was part of the conduct by which Senwes created

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<sup>22</sup> Tribunal decision para 149.

<sup>23</sup> Tribunal decision para 111.

<sup>24</sup> Tribunal decision para 240.

<sup>25</sup> SCA decision in *Senwes v Competition Commission of South Africa*, case no 118/2010, para 42 and 43.

<sup>26</sup> SCA decision para 40.

<sup>27</sup> SCA decision para 51. The SCA also criticized the Commission for not amending its referral.

an advantage for itself in grain trading, and that the differential tariff (that is, the removal of the cap) was alleged to impede independent traders in competing with Senwes. This was developed more fully in the form of a margin squeeze in the report of the expert economist for the Commission.

The commercial viability of these traders relates directly to the margins they make, as is the case for all commercial entities, engaging in activities which add value and for which they charge. Describing the conduct as having the effect of a ‘margin squeeze’ is not to identify a new and different conduct. Rather it is simply to employ a turn of phrase that seeks to capture the exclusionary mechanism where the dominant firm is both a supplier and competitor of the firms being excluded. In these circumstances a margin squeeze can be viewed as a refusal to supply scarce goods to a competitor, as the input (storage in this case) is being charged at a price to a competitor that makes it impossible to purchase. The Commission had, however, not included 8(d)(ii) addressing refusing to supply scarce goods to a competitor in its referral, although there might also have been a contention as to whether storage was a good or a service (as 8(d)(ii) only refers to goods).

The nature of economic activity is more complex than described in textbooks in which one-dimensional conduct can be readily pigeon-holed. In reality there are various ways in which suppliers generate returns through prices and charges, as well as in altering these over time. The point is that the effect is necessarily a result of all of the things that are happening – it is unrealistic to think a dominant firm uses only one tool at a time, or that the effect on a rival comes from just one of the ways in which it is being disadvantaged, although obviously some will be more significant than others. To read the South African Act in the way the SCA has would be to suggest that it was written for an idealised economy and not for application to the real world. This cannot have been the intention of Parliament, even given the unusual separation of the specifically proscribed abuses in 8(d) from a general exclusionary abuse provision in 8(c).

As for Senwes’s possible anti-competitive rationale, this was not explored in any detail. It appears that while there was considerable market power over farmers demand for storage due to the local nature of markets at this level, larger traders are able to exert some countervailing power by playing off different geographic sources of grain in order to meet the demand of processors (millers). This would bring indirect competition also on storage charges. The possibility of competition at this level is reinforced by subsequent admissions of coordination on the part of several silo companies to fix storage tariffs.<sup>28</sup>

#### *Price discrimination*

There has also been only one substantive case decided on price discrimination, that of Nationwide Poles.<sup>29</sup> Price discrimination falls under a separate section from the abuse of dominance, but the provisions of section 9 explicitly identify it as an action of a dominant firm which may be prohibited, if it has the effect of substantially preventing or lessening competition. As described above, there are further conditions which must hold for discrimination to be a contravention, essentially reflecting the fact that price discrimination is generally a normal part of commercial pricing practices. And, there is no penalty for a first offence.

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<sup>28</sup> See Commission press release, 6 June 2011, ‘Commission reaches settlement agreements with grain storage and trading companies’.

<sup>29</sup> In Yorkcor the Tribunal made clear it was not going to rule against the respondent in what it viewed as essentially matters of contractual dispute. The case against SAB was dismissed by the Tribunal on a legal point relating to the framing of the referral when compared to the original complaint.

The complaint was brought by a private complainant, Mr Jim Foot the owner of Nationwide Poles cc, after the Commission investigated and decided not to refer it. Nationwide Poles was a small pine pole treatment plant operating in the Eastern Cape. It sourced pine poles from sawmills and treated them with creosote, purchased from Sasol Oil. In 2002, Mr Foot became aware that Sasol was charging Nationwide Poles a higher price for creosote than its competitors. After obtaining a copy of the price list from Sasol, Mr. Foot confirmed that the price Sasol charged his firm for creosote was higher than that levied on Woodline, a large pole manufacturer that competed with Nationwide Poles.

At the heart of the case was the way in which Sasol set discounts for each three-month period based on a customer's purchases over the preceding 12 months (apparently as an indicator of the purchaser's future demand). Nationwide Poles claimed that the different discounts to itself compared with larger buyers added between three and four percent to its total cost structure and that the higher cost it paid for its inputs lessened its ability to compete in the market, because of the higher variable costs of production. Despite Sasol providing some justifications, it ultimately acknowledged that the structure had simply been continued over many years.<sup>30</sup>

With regard to effect, the Tribunal stated that the phrase "likely to have the effect of substantially preventing or lessening competition" should be interpreted in accordance with considerations of equity and the participation of small and medium enterprises (SMEs) in the economy. The Tribunal concluded that it was likely that Nationwide Poles and firms similarly situated in the market as well as new entrants would be less effective competitors as a result of this practice, particularly in such a market where small firms could be effective competitors to their largest rivals.

The CAC found the evidence had been limited to Nationwide Poles and therefore had not established whether competition rather than an individual competitor had been harmed. While the Tribunal had essentially placed the onus on a dominant firm to justify its conduct in such a case where the effect on the competitor had been shown, the CAC placed a heavy onus on the complainant in terms of demonstrating the effect on competition, on top of the requirement to demonstrate the transactions are equivalent and notwithstanding the absence of a penalty for a first offence and explicit provisions in the Competition Act for defences.

## **5. A weighing-up?**

South Africa anticipated the move to more economics-based standards in the Competition Act, indeed, we were something of a pioneer in this regard. The growing international consensus on the importance of a sound economics foundation for competition rules has, however, not yet been matched by similar common ground on how to implement in practice, especially taking into account different economic conditions. The South African experience is therefore a useful 'reality check', especially given the huge expansion of competition law in developing countries over the past decade or so.

The abuse of dominance cases pursued mostly relate to quasi-monopolies, earning returns from a position derived from former (and current) state-ownership and/or support. These range from Sasol, SAA, Mittal and Telkom, to Patensie Citrus and Senwes who both benefitted from the far-reaching state support for agricultural co-operatives under apartheid. Such firms have an obvious interest in maintaining their position and the ability to exercise the market power that comes with it.

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<sup>30</sup> See Tribunal decision, *Nationwide Poles v Sasol Oil*, Case no 72/CR/Dec03

The South African rulings of both the Tribunal and the CAC have placed the competitive effects at the centre of the analysis. In terms of the exclusionary theories of harm, scale economies and incumbency advantages are well reflected coupled with arrangements that segment and influence customer groupings to impede rivals. In some of the cases the rivals have been large multinational firms such as BA/Comair, JTI, and major grain traders. The ‘as efficient competitor’ consideration has thus not been as substantive a consideration as might have been expected if the cases had focused on the ability of smaller firms to challenge the incumbents. Similarly, if smaller firms had been more represented among those excluded then we might have expected information asymmetries to play a bigger role in theories of harm. These are relevant for theories of harm where an incumbent seeks to establish a reputation and/or signal its costs and willingness to deter entrants who may not have the same ‘deep pockets’ but are actual or potential effective competitors.

There have, however, been very few findings of abuse of dominance. Only the state, as the owner of SAA and Foskor, has paid a penalty for abuse, while Sasol has accepted behavioural and structural conditions. In addition, many of the sub-sections of the Act dealing with abuse of dominance have not been the subject of determined cases.

This may be because 12 years is still quite short, although the record suggests that it is also because of the scope for extensive legal challenges on procedural grounds and that cases take a long time to be heard by the Tribunal, generally following a lengthy Commission investigation and leaving aside the appeals that may follow.

The decision to specify discrete conduct separately in the Act has certainly compounded the other factors delaying cases and opening up opportunities for technical legal challenges. Perhaps the best example is the treatment of ‘margin squeeze’ which could be seen as a form of predation, or as a constructive refusal to supply, or as a separate form of conduct. While this should be merely an academic debate, under the South African Act it is of huge significance as the predation and refusal to supply provisions attract penalties for a first offence while the general exclusion provision does not. The scope for confusion does not end there, however, as it is not clear how ‘constructive’ refusal will be dealt with, nor how the costs should be measured for understanding the margin squeeze in terms of predation. All of this while the conduct itself, in terms of its potential for anti-competitive harm, is relatively clear.

The scope for stymying the substantive evaluation of firm conduct may be what business was seeking in arguing for ‘certainty’. If this was the real objective, then they have been successful. In general, the provisions of the Act, with the specification of separate and discrete conduct, are attractive if such conduct is viewed from the perspective of textbook models, where single product firms with easy to identify end consumers engage in one readily identifiable conduct. When evaluated against the real world of firms engaging in inter-linked and evolving conduct, often with layers of intermediate goods or services and diverse and overlapping segments of buyers, the record suggests that the provisions appear to undermine the administrability of abuse enforcement.

As well as being administrable the rules or standards should also reflect an appropriate balancing of the risks of over-enforcement with the costs of anti-competitive conduct going unchecked. Would a firm with the rationale (the incentive and ability) to engage in exclusionary conduct be deterred? Assuming that its position and profits are at risk from a rival/entrant and the conduct contemplated will be effective, then on balance the answer has to be ‘no’. It may be argued that reputational harm must also be taken into account, but the rife collusion uncovered in recent years gives the lie to this. On top of the confusion created by the way conduct has been specified and the law interpreted by the

courts, the delays are simply longer than the terms of many CEOs. The manager contemplating the conduct will likely have long gone (together with their bonus) by the time there is a determination by the competition regime.

More specifically, I suggest there are appropriate considerations which should be taken into account in the evaluation of abuse cases, whether in terms of rulings by the Tribunal and higher courts or in amendments to the legislation if required.<sup>31</sup>

First, the degree of dominance, how it was acquired, the extent to which it is entrenched, and the maturity of the market are extremely important for the weighing of effects in abuse of dominance assessments. The Tribunal did address these to an extent in the Mittal Steel excessive pricing case, but the CAC indicated they were not part of the evaluation required under the law. This is to misunderstand the fact that they are part of the balance of evidence and weight of onus.

Second, it is very important to understand the competitive process as a whole. The separation of the different types of conduct in the South African legislation can mistakenly suggest that the conduct somehow consists of discrete events, rather than the more likely inter-related, evolving and ongoing strategies of firms.<sup>32</sup> This is reflected in the fact that typically referrals have been made under several sections, including excessive pricing alongside exclusion (reflecting the monopoly power being protected through exclusion). The need to identify and support each alleged contravention separately rather than as outcomes of a core of behaviour has led to legal challenges of referrals and their amendment, in some cases several times. Ultimately this is also the product of the adversarial and highly litigious process, where the Commission is merely one party in front of the Tribunal, rather than the inquisitorial and administrative process which had been envisaged.

Third is the treatment of motivation and intent. It is a kind of mantra in the antitrust community that evidence of intent is neither necessary nor sufficient, having little or no value. This is because competition is a rough and tumble process in which firms try to beat their rivals, and would be expected to express these objectives in their documents. However, it would be a mistake not to pay attention to detailed internal calculations about how a dominant firm may use its special position to impose costs on its rivals, or to undermine the rival's ability to effectively challenge the dominant firm and undermine its high profits. Even if it fails to exclude the rivals, a dominant firm that calculated the beneficial effect (to it) of an exclusionary strategy is still likely to weaken the rivals' ability to be effective competitors by the implementation of the strategy. The incumbent may fail to recoup, but, unlike in predation where the strategy involves lower prices, the other exclusionary strategies may have imposed costs on the rivals, and involved the incumbent in costs itself, likely weakening effective competition and raising prices to consumers.

It seems reasonable to believe that the dominant firm knows its business well, and has an incentive to protect supra-competitive profits with whatever tools it can muster. For firms bequeathed with quasi-monopolies this is the only game in town. And, where these are mature industries, their strategies are not going to be about how to more rapidly develop the next generation of products. Documents which set out how such firms are going to protect their position and undermine the competitive threat of their rivals are important evidence. It may be argued that such firms will become wise and will not compile documents of this nature anymore. But, large and administratively 'heavy' firms (such as large former

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<sup>31</sup> The South African Act under mergers does list factors to be taken into account.

<sup>32</sup> The South African approach contrasts with that in the EU legislation (adopted by several other jurisdictions) in having a broad prohibition of abuse before setting out what such abusive conduct may be, in a non-exhaustive list.

SOEs) have to put together and plan the implementation of such strategies across their organisation which means instructions and measurements will be required.

Closely linked is the evaluation of a possible pro-competitive rationale and objective economic justifications, including whether they find reflection in decision-making documentation or were inferred by economic consultants after the fact, as in Nationwide Poles.

Fourth, the balance between the presumption in favour of firms reaping the just rewards of their investments, innovation and efforts, and the importance of opening up areas of the economy largely controlled by entrenched dominant firms to effective and dynamic rivalry, has been loaded in favour of the former. The presumption must be applied with open eyes, and recognising that rivalry often spurs innovation.

The greatest enforcement successes in South Africa have been in the air travel market, where active enforcement has bolstered rivalry, bringing undoubtedly huge benefits for the whole economy including consumers.

On the other side must be weighed the ability of firms to exploit interpretative differences between the Tribunal and CAC, take procedural points allowed by the separate Tribunal referral and hearing process and, such as with Telkom, to almost interminably stall cases. This even though Telkom's motives have apparently been clearly set out in its own strategy documents as, for example, cited by the Tribunal in its ruling when it prohibited the Telkom/BCX merger in 2007:<sup>33</sup>

“We aim to counter arbitrage opportunities, defend fixed to mobile revenue stream and counter revenue erosion to the SNO and other competitors such as VoIP providers, through strategies including long term contracts, bundled discount packages, calling plans as well as volume and term discounts.”

Aside from the SAA and Patensie decisions, the other cases which can be seen as enforcement successes are related to settlements. These raise interesting questions about the influence brought to bear to achieve the settlement. Sasol had taken the route of successive legal challenges to the fertilizer referrals. The situation changed when it woke up to the risks of cartel findings after being heavily penalised by the European Commission relating to a subsidiary it had acquired which had been involved in a wax cartel. When Sasol uncovered further conduct related to the cartel contravention referred by the Commission along with the abuse of dominance (in the Nutriflo referral) Sasol's stance abruptly changed. It has since filed several corporate leniency applications.

The other major success is the Hazel Tau case which was actually non-referred by the Commission as part of the agreement with the parties. Rather than being evidence of effective abuse of dominance enforcement, it points to other factors at work such as the popular pressure regarding a particularly high profile product, in South Africa and internationally.

Together with the Foskor settlement, these are the only cases where there has been any direct and explicit effect from abuse of dominance work by the competition authorities. There has likely been some effect on company decision-making deterring firms from abusive conduct. However, the record of the cases would suggest that if there is a meaningful return to a dominant firm from an exclusionary strategy in terms of protecting its position and the returns from it, then possible competition enforcement is no reason to reconsider. The probability of detection and punishment,

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<sup>33</sup> Competition Tribunal decision in the matter between Telkom SA Limited and Business Connexion Group Ltd., case number 51/LM/Jun06 (paragraph 80).

when weighed against the high likelihood of harm given the nature of the economy, need to be taken into account in the differentiation of competition/antitrust rules in South Africa, as elsewhere (Evans, 2009).

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