RETHINKING EXCLUSIONARY ABUSE IN SOUTH AFRICA

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Following South Africa's transition to democracy in 1994, its economy was characterised by concentrated markets, and key industries were dominated by large firms that had historically enjoyed (and in some cases continue to enjoy) significant state support.[2] In this environment, one would expect instances of exclusionary behaviour by dominant firms to be prevalent and damaging. When South Africa's Competition Act[3] was drafted in the late 1990's, promoting the entry of small firms into previously inaccessible markets was therefore (and continues to be) a priority of the post-apartheid government.[4]

However, commentary by senior members of South Africa's competition enforcement bodies suggests that the abuse of dominance provisions of the Act have suffered from 'under-enforcement'. This is an unsatisfactory outcome, given South Africa's economic circumstances. Roberts[5] states:

> *[T]he record of the cases would suggest that if there is a meaningful return to a dominant firm from an exclusionary strategy… then possible antitrust enforcement is no reason to reconsider.*[6]

Lewis[7] argues that:

> *Under-enforcement… is the likely upshot even in an economy whose history and structure suggests the strong likelihood of anti-competitive unilateral conduct and whose enforcement agencies are strongly committed to enforcing the rules proscribing this type of conduct.*[8]

This paper examines one potential cause of these concerns - the Act's unusual 'rules-based' approach to exclusionary abuse of dominance. Section 8(d) of the Act contains a list of discrete 'exclusionary acts' (such as below cost pricing, refusal to supply and tying), which are prohibited if engaged in by a dominant firm, and if their anti-competitive effects are not outweighed by technological, efficiency or other pro-competitive gains. This may be contrasted with a number of major competition jurisdictions, where abuse of dominance (or monopolisation) is broadly declared unlawful by the relevant legislation,[9] while the task of defining particular acts that trigger the statute's application is left to enforcement authorities and courts, through case precedent and guidelines.

The central question addressed below is whether South Africa's 'rules-based' exclusionary abuse provisions are 'fit for purpose', or whether a single, open-textured, effects-based provision (similar to that employed in Europe and the USA) would be more appropriate? There is growing

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[2] Roberts, *'Administrability and Business Certainty in Abuse of Dominance Enforcement: An Economist's Review of the South African Record'*, World Competition 35, no. 2 (2012): 273-30; Davis and Granville, *'South Africa'*, in *'The Design of Competition Law Institutions: Global Norms, Local Choices'*, Fox and Trebilcock ed., (2013) Oxford University Press, pages 266-267; Fox, *'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia'*, 41 Harv. Int'l. L. J. 579 (2000); Organisation For Economic Co-Operation and Development (OECD) Policy Brief, July 2008: *'Economic Assessment of South Africa'*, [Available at www.oecd.org]; OECD Peer Review: *'Competition Law and Policy in South Africa'*, (2003) [Available at www.oecd.org].

[3] Act 89 of 1998

[4] Department of Trade and Industry, *'Proposed Guidelines for Competition Policy, A Framework for Competition, Competitiveness and Development*, (1997) [Available at http://www.compcom.co.za]; Competition Tribunal's *'Background note prepared for the OECD Global Forum on Competition': Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition'*, (2004) [Available at www.comptrib.co.za], page 1

[5] Dr Simon Roberts was the Chief Economist at the Competition Commission, and is the Manager of its Policy and Research Division, until 2012.

[6] Roberts (2012), page 300

[7] Dr David Lewis chaired the Competition Tribunal from its inception in 1999 until 2009.

[8] Lewis, *'Chilling Competition'* in Hawk ed. International Antitrust Law & Policy: Fordham Competition Law (2008), page 428

[9] See for example Article 102 of the Treaty on the Functioning of the European Union OJ 2010 C83/47 ('TFEU'), and Section 2 of the Sherman Act of 1890 in the US.

consensus internationally that the law should develop rules that prohibit *specific* anti-competitive practices.[10] The question is whether, in South Africa, these rules should be enshrined in legislation?

Answering this question will entail analysing the advantages and disadvantages of the relevant sections of the Act – sections 8(c) and 8(d). If only a few, weak advantages can be attributed to the present system, and the disadvantages are strong and numerous, it follows that an amendment to the Act may be desirable (provided the costs of modifying it are not inordinate). If the advantages outweigh the disadvantages, then the current construction should be maintained.

Section I explains the policy influences that would have guided rule-makers in constructing South Africa's Competition Act. Then it describes the economic circumstances that prevailed in South Africa at the time the Act was drafted. **Section II** sets out South Africa's exclusionary abuse of dominance law, contained in section 8(c) and 8(d) of the Act. The basic mechanics of both sections, as well as the relevant differences between them, are then analysed. **Section III** evaluates the advantages and disadvantages of the present formulation of sections 8(c) and 8(d), compared with an open-textured approach. These are drawn from three sources: the case law of the South African Competition Tribunal and courts, comparisons with competition laws in other jurisdictions, and commentary on the sections' enforcement by experts in South African competition law. **Section IV** examines each of section 8(d)'s individual rules in detail. It seeks to establish whether the broad advantages and disadvantages identified in Section 3 hold water in light of each subsection's wording, and its enforcement record. **Section V** draws conclusions on whether, on balance, the current system is preferable.

The main advantages of South Africa's atypical approach that have been proposed are that it allows more 'egregious' abusive practices to be treated more severely, improves administrability, promotes effective deterrence, ensures legal certainty, and provides comfort that rules based on 'international best practice' are embedded in South Africa's competition law. In short, I argue that these anticipated advantages have not been realised in practice. Fifteen years on since the Act's commencement, many of the narrow and static descriptions of exclusionary conduct now appear to frustrate effective enforcement, and contribute to the under-inclusive results observed by Lewis and Roberts. This paper argues that the provisions of the Act prohibiting exclusionary abuse of dominance are therefore no longer fit for purpose, and the South African legislature should consider replacing the relevant sections with a single, effects-based prohibition, punishable by an administrative penalty for a first-time contravention.

I. RULE-MAKING POLICY AND ECONOMIC CONTEXT

Before describing the provisions of section 8, it is necessary to consider briefly the theory on designing competition rules. This theory provides an essential analytical framework for the appraisal of sections 8(c) and 8(d) below.

A. General policy considerations in designing abuse of dominance rules

In competitive markets, every firm aims to win sales at its rival's expense. Efficient business behaviour therefore excludes and forecloses competitors. Such exclusion is *'proper and beneficial'*.[11] Competition law only prohibits dominant firms from excluding rivals by means *other than* superior performance.[12] In both cases, rivals are harmed and could be excluded from the market entirely - the line between pro-competitive and anti-competitive exclusion is therefore not easy to draw.[13]

This makes exclusionary abuse of dominance a notoriously difficult area of competition law.[14] No mechanical rule can comprehensively capture the essence of anti-competitive exclusion, and

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[10] Fox, *'Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The US / EU Divide'*, Utah Law Review no.3 725 (2006) states at page 740: *'[A]ntitrust is law; it is not economics. It requires rules that are administrable and enforceable and give business guidance'*; Vickers, *'Abuse of Market Power'*, Economic Journal Vol 115 (2005) states at page 260: '*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.'*

[11] Bork, *'The Antitrust Paradox: A Policy at War with Itself'*, 1st Edition (1978) Basic Books, page 137

[12] In the EU, anti-competitive exclusion is typically contrasted with *'normal', 'fair' or 'undistorted'* competition, or *'competition on the merits'*. See Whish and Bailey, *'Competition Law'*, 7th Edition (2012), Oxford University Press, page 192. In the US, unlawful monopolisation is distinguished from *'growth or development as a consequence of a superior product, business acumen, or historic accident'*. See *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) page 570–71.

[13] Whish and Bailey (2012), page 193; Vickers (2005), page 247; Lewis (2008), page 419.

[14] Whish and Bailey (2012), page 192; Lewis, *'Thieves at the Dinner Table: Enforcing the Competition Act'*, (2012), Jacana Publishing, page 139; Vickers (2005), page 259.

the anti-competitive and pro-competitive effects of firm conduct cannot be weighed up with scientific precision.[15] There is no 'one-size-fits-all' rule that can cover comprehensively the infinite range of potential strategies that dominant firms may employ to unmeritoriously exclude competition.[16] As a result, adjudicating abuse of dominance cases involves significant discretion, rules are imperfect, and errors are inevitable.[17]

When designing rules against exclusionary abuse, the rule-maker must therefore consider what type of error will be less damaging – wrongly prohibiting neutral and pro-competitive conduct, or allowing harmful behaviour to escape?[18] This will depend largely on the rule-maker's view of the market's ability to self-right, after anti-competitive behaviour by a dominant firm.[19]

If markets are poorly equipped to discipline the behaviour of dominant firms, then an interventionist approach may be required - competition rules should err on the side of 'over-inclusion'.[20] In other words, the rules should prevent anti-competitive practices as a priority, even if this means that the net is cast too wide, and some neutral or pro-competitive conduct is caught erroneously. These mistakes are known as 'false positives' or 'false convictions', and result in so-called 'over-deterrence' and 'over-enforcement'.[21]

Conversely, if markets are viewed as robust, and able to remedy harm caused by firm conduct, then competition law should err on the side of 'under-inclusion'.[22] This means that the law should intervene only in those cases where anti-competitive effects are conclusively evident, even if some harmful conduct mistakenly escapes prosecution (the market is deemed competent to deal with these). These errors are known as 'false negatives' or 'false acquittals', and result in 'under-deterrence' and 'under-enforcement'.[23]

A particular stigma attaches to over-inclusion in international antitrust discourse for two reasons. First, firms may be deterred from engaging in certain pro-competitive conduct for fear of unwarranted investigation and prosecution.[24] This would be a perverse result, as competition law interventions may end up 'chilling competition', and thereby harming the very process they are designed to protect.[25] Second, the market has no means to rectify false convictions.[26]

Although influential, this sentiment need not be dogmatically followed. Rules should be tailored to the particular economy to which they will apply.[27] As Fox explains:

> *In some jurisdictions, especially where there are less robust markets, the optimal rule… may be <u>more interventionist</u>, and that is not error.*[28]

Developing economies may have structural features that make them prone to abusive conduct by dominant firms, and inhibit the self-correcting powers of markets. These features are described in an

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[15] Evans and Padilla, *'Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach'*, University of Chicago Law Review, Vol 72 (1) (2005), page 75. The authors state, *'Distinguishing pro-competitive from anti-competitive actions with certainty is impossible'.*

[16] Roberts (2012), page 295

[17] Evans and Padilla (2005), page 80; Fingleton and Nikpay explain at page 4 that Errors can arise in two ways: First, competition rules could be enacted which prohibit the wrong conduct - an *ex ante* error or a 'wrong rule'. Second, decision errors may be made by authorities when enforcing the competition law - *ex post errors* where an accurate rule is wrongly applied. See Fingleton and Nikpay, *'Stimulating or chilling competition'*, in Hawk ed. International Antitrust Law & Policy: Fordham Competition Law (2008), page 4 [A copy is available at www.oft.gov.uk. Page numbers from this online version have been used here]

[18] Whish and Bailey (2012), page 194

[19] Hovenkamp, *'The Antitrust Enterprise: Principle and Execution'*, (2006), Harvard, page 31. See also Rubinfeld, *'The Economic Foundations of Antitrust'* in Hawk ed. International Antitrust Law & Policy: Fordham Competition Law (2009), page 457

[20] Fingleton and Nikpay (2008), pages 5 and 36-37

[21] Jones and Sufrin, *'EU Competition Law: Text, Cases and* Materials', 4th Edition (2010), Oxford University Press, page 59; Lewis (2008), page 419; Whish and Bailey (2012), pages 193-194

[22] Fingleton and Nikpay (2008), footnote 9; Lewis (2008), page 419.

[23] Fingleton and Nikpay (2008), pages 4-19; Lewis (2008) page 419; Jones and Sufrin (2010), page 59; Whish and Bailey (2012), pages 193-194.

[24] Whish and Bailey (2012), page 193-194

[25] Fingleton and Nikpay (2008), page 3; Whish and Bailey (2012), page 193-194 citing *Verizon Communications v Law Office of Curtis v Trinko LLP* 540 US 398 (2004), page 414.

[26] Evans and Padilla (2005), page 84. Fingleton and Nikpay (2008), state on page 5, *'the tendency to focus on [over-inclusion] errors is underpinned by the fact that competition policy is supposed to support the free market rather than replace it'.*

[27] Lewis (2008),page 421; Fox, *'What is Harm to Competition? Exclusionary Practices and Anti-competitive Effect'*, 70 Antitrust L.J. 371 (2002-2003), page 411; Sutherland and Kemp, '*Competition Law of South Africa*', Issue 13 (2010), LexisNexis, page 7-58 explain, '*It is a matter of the extent to which the community is prepared to allow market participants to engage in uninterrupted contest; where one draws the line between what is fair and what is foul – for all communities draw such a line'.*

[28] A question by Fox during the panel discussion, recorded in *'Chilling Effects of Antitrust Law'*, Chapter 21 in Hawk ed. International Antitrust Law & Policy: Fordham Competition Law (2008), page 507.

insightful article by Brusick and Evenett.[29] For example, a high degree of state involvement is common in key sectors such as energy, telecommunications, banking and transport. This makes new entry difficult or, sometimes, impossible. Alternatively, privatisation programs result in public monopolies being turned into private monopolies with little or no regulatory oversight. Poor transport and communication infrastructure means markets are fragmented and small, often with a single or few localised operators. This negatively affects the degree of inter-firm rivalry. Undeveloped capital markets reinforce the powerful positions of large firms, which can use their financial resources to deter entry.

In these circumstances, significant scope for competition law intervention may be warranted, because under-developed markets are ill-equipped to erode the market power of dominant firms.[30] Under-inclusive abuse of dominance rules may perpetuate this situation, and therefore be particularly damaging.[31] This provides a context within which we can proceed to examine the South African position.

B. South Africa's economic characteristics

The distinctive features of the South African economy are typically ascribed to the discriminatory and interventionist policies of the apartheid government.[32] During apartheid, government subsidies, strict market controls, high tariffs, low foreign direct investment and high levels of government ownership produced concentrated markets.[33] When the new democratic government was elected in 1994 it inherited an economy characterised by inequality, poverty, a number of state-owned monopolies, large conglomerates and high concentration levels.[34]

Since 1994 markets have been exposed to increased domestic and international competition. This means that incumbent firms (now faced with the threat of competition for the first time) have an incentive to thwart new entrants and exclude their smaller rivals by engaging in anti-competitive conduct.[35] Roberts argues that in South Africa, *'the ability to effectively participate in the economy without being unjustly impeded by dominant incumbents therefore has particular resonance'*.[36]

The Competition Act, which became effective in 1999, was viewed as a key policy tool to achieve a more inclusive economy.[37] Given the concentrated structure of many industries, one of the Act's primary aims was to protect markets from exclusionary behaviour by dominant firms. This is borne out by the Act's explicit list of goals in its preamble[38] and section 1, which include *'to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy'*.[39]

The apartheid government also bequeathed a lax 'competition culture'. The previous competition law, the Maintenance and Promotion of Competition Act,[40] had little bite.[41] Its prohibitions were broad and ultimately fell subject to assessment against a 'public interest' standard.[42]

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[29] Brusick and Evenett, *'Should developing countries worry about abuse of dominant power?'*, Wis. L. Rev. 269 (2008), pages 274-277; See also Roberts (2012), page 276: *'Smaller jurisdictions that 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';* Lewis (2012), page 156 states, *'we believe that in small economies with a considerable history of state participation in the economy, we are likely to encounter significant instances of dominance and abusive conduct.'*

[30] Fingleton and Nikpay (2008), page 5

[31] Fingleton and Nikpay (2008), page 36

[32] See Roberts (2012), pages 273-274; Lewis (2008), page 422*;* Fox, 41 Harv. Int'l. L. J. 579 (2000) *cited above*; OECD Policy Brief July 2008: *'Economic Assessment of South Africa*'.

[33] Kampel, *'Competition Law and SMEs: Exploring the Competitor/Competition Debate in a Developing Democracy'*, Paper No. 109 (2004) Centre on Regulation and Competition - Working Paper Series, pages 4-5; Lewis (2008), page 422; Competition Tribunal's *'Background note prepared for the OECD Global Forum on Competition'*, page 2.

[34] OECD Peer Review (2003), pages 2-3 and 11; Lewis (2008), page 421; Competition Tribunal's *'Background note prepared for the OECD Global Forum on Competition'*, page 1

[35] Kampel (2004), page 5; Roberts (2012), page 279

[36] Roberts, *'Effects-based tests for abuse of dominance in practice: the case of South Africa',* University of Johannesburg Centre for Competition Economics, Working Paper version 30 September 2011 [Available online at http://www.uj.ac.za/EN/Faculties/ecofin/departments/economics/research/cce/], page 1

[37] Davis and Granville (2013), 267-269; Roberts (2012), page 274.

[38] The Act's preamble recognises *'That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans'*.

[39] Section 1(e) Act 89 of 1998

[40] Act 96 of 1979

[41] The preamble of current Act states that the apartheid laws resulted in *'inadequate restraints against anti-competitive trade practices'.*

[42] Legh in Brassey *et al*, *'Competition Law',* 1st Edition, Juta (2002), page 75

The enforcement authority, the Competition Board, effectively only had advisory capacity, as decisions required ministerial authorisation.[43] Enforcement activity was sporadic and weak.[44] As a result, competition law compliance, awareness and enforcement were left in poor shape when the current Act was promulgated.[45]

C. Implications for abuse of dominance rules in South Africa

South Africa therefore exhibited many of the characteristics of developing countries described above. It had concentrated markets (often dominated by former or persisting state monopolies) and a permissive attitude to anti-competitive practices. In line with the theory outlined above, one would expect that in South Africa, as Roberts notes, *'abuse by dominant firms [would be] more* <u>*widespread*</u>*, more* <u>*persistent*</u> *and is more* <u>*damaging*</u>*'*,[46] and that markets would struggle to self-correct if exclusionary conduct was not detected and stopped. Indeed, the levels of concentration in South Africa are such that, as Roberts explains:

> *We are unlikely to be concerned with borderline dominance issues and instead need to pay attention to super-dominant firms in entrenched positions.* <u>*The costs of over-enforcement are relatively low in such cases*</u>*. Instead the need is to work for more effective enforcement, bringing together solid analysis of strategies of exclusion with evident effects on rivals and consumers, while allowing for efficiencies.*[47]

Under-enforcement and under-deterrence may simply propagate the unhealthy economic position which prevailed under apartheid – a substantial cost by any measure. The cost of the occasional false conviction would probably be acceptable in pursuing a culture of strong enforcement. It would also transform the conscience of dominant firms. Therefore, the cost of under-inclusive exclusionary abuse of dominance rules would be significant in South Africa (and potentially greater than the cost of over-inclusion, despite the abhorrence with which international practice views the latter).[48]

The South African statute *'reflects this apprehension that we have for abuse'*.[49] It was drafted in a prescriptive style. Lewis describes the product of the drafting process:

> *The language of the entire Act – and this includes Chapter 2 [which sets out prohibited practices, including the abuse of dominance provisions] – draws an eclectic mix of foreign statutes and case law, with restrictive practices codified at a high level of detail, certainly relative to the sparse treatment in US law and the EU Treaty.*[50]

Lewis recalls that organised labour, which was heavily involved in negotiating the content of the Act, was a catalyst for the rules-based approach adopted:

> *Labour, which viewed the pending legislation as a mechanism for disciplining business, was intent on ensuring a statute whose tone and content were sufficiently robust, sufficiently prescriptive and 'regulatory' in its approach. This generally translated into a demand for extensive codification of prohibited practices.*[51]

According to Roberts, the business interests represented during the Act's negotiation were also in favour of defining what conduct dominant firms should avoid, because it brought certainty.[52] In line with perceived 'international best practice', express allowance was also made for firms accused of exclusionary abuse to raise any countervailing pro-competitive effects in defence.[53] The result was that discrete exclusionary acts were specified in section 8(d) of the Act as worthy of condemnation, if overall they have an anti-competitive effect.

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43 *Ibid*
44 *Loc cit* at pages 71 to 81; Lewis (2008), page 422
45 Fox, *'Antitrust Institutions: Design and Change'*, Loyola University Chicago Law Journal 473 Vol 41(2010), page 475
46 Roberts (2012),page 227
47 Roberts (2011), page 35
48 Lewis (2008), page 422-423
49 Lewis in the panel discussion panel discussion, recorded in Chapter 21, Hawk ed. (2008), page 496
50 Lewis, (2012), page 141
51 Lewis (2012), page 37
52 Roberts (2012), page 274
53 *Ibid*

D. Enforcement record

Despite the dangers of under-inclusion, the result has been that the hurdles for proving abuse of dominance are high in South Africa. This is evident in the extremely small number of cases where abuse has been found and the extensive evidence that has been required for these findings.[54] Since the Act's inception in 1999, just four firms have been conclusively found guilty of an exclusionary abuse of dominance,[55] and only two have been ordered to pay an administrative penalty.[56] Only eleven cases of exclusionary abuse have been brought before the Tribunal in that time. The record has prompted suggestions (as cited in the introduction above) that, despite its particularly harmful consequences, under-enforcement has occurred in South Africa.

This poor record could be due to a number of factors. Perhaps 15 years is still a relatively short period in which to expect numerous successful abuse of dominance prosecutions.[57] Maybe the resources at the disposal of dominant firms make successful prosecution difficult for a relatively young competition agency.[58] A more trusting view of business may suggest that dominant firms substantially comply with the Act, and that widespread enforcement has been unnecessary. However, it cannot be ruled out that the reason for the low levels of enforcement relate to problems with the formulation of sections 8(c) and 8(d). This latter possibility is addressed in more detail below.

II. SOUTH AFRICA'S EXCLUSIONARY ABUSE OF DOMINANCE PROVISIONS

The scene is now set to examine South Africa's exclusionary abuse of dominance provisions. Section 7 of the Act sets out the requirements for 'dominance', and sections 8(c) and (d) explain when a firm will be considered to abuse its dominance by committing an 'exclusionary act'.

A. Dominance

Dominance is determined by reference in the Act to statutory presumptions according to market share thresholds.[59] A firm is conclusively presumed dominant if it enjoys a market share of 45% or more.[60] A firm with less than 45% market share is dominant only if it has market power, which is defined in the Act.[61]

A detailed analysis of this formalistic approach is beyond the scope of this paper. It suffices to point out that the mechanistic formula in section 7 creates a risk of over-inclusion.[62] Firms with a market share approaching 45% will tread cautiously in planning competitive strategies for fear that they may be mischaracterised as unlawful.[63] The threshold of 45% is also low relative to other jurisdictions.[64]

B. Section 8(c) – general exclusionary acts

Section 8(c) is a catch-all which ensures that potentially harmful conduct that falls outside section 8(d)'s scope does not escape scrutiny. It prohibits any 'exclusionary act' that:

[54] Roberts (2012), page 282-285 sets out in table form a useful summary of the full record of abuse of dominance enforcement in South Africa. There have been two material changes to this at the time of writing this paper: the Supreme Court of Appeal's decision in the *Senwes* case has been overturned by the Constitutional Court on 12 April 2012 (thereby upholding the Tribunal's decision finding Senwes to have contravened section 8(c) by committing a margin squeeze) – *Commission v Senwes* Case CCT 61/11 [2012] ZACC 6 and the Tribunal has found Telkom guilty of contravening sections 8(b) and 8(d)(i) on 7 August 2012 in *Commission v Telkom SA Ltd* case 11/CR/Feb04.
[55] Patensie Sitrus Beherend Beperk, South African Airways Limited, Senwes Limited and Telkom SA Limited.
[56] South African Airways and Telkom.
[57] Roberts (2012), page 297
[58] Roberts (2012), page 277
[59] Section 7
[60] Section 7(a)
[61] Section 1(1)(xiv) provides: *'market power' means the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers'*
[62] Unterhalter in Brassey (2002), page 189
[63] Bourgeois, *'The Chilling Effects of Article 82 Enforcement'*, in Hawk ed. International Antitrust Law & Policy: Fordham Competition Law (2008), page 382
[64] Unterhalter in Brassey (2002), page 190

- Is not listed in section 8(d), and

- Has an anti-competitive effect that is not outweighed by the act's technological, efficiency or other pro-competitive gains.

An 'exclusionary act' is defined as *'an act that impedes or prevents a firm entering into, or expanding within, a market'*.[65] This broad definition catches both pro-competitive and anti-competitive conduct within its ambit.[66] This explains the need to balance the harmful effects of the conduct against its pro-competitive gains to determine legality.[67] The onus to establish that the anti-competitive effects of the conduct outweigh any justifications put forward by the dominant firm lies with the complainant[68] or the Competition Commission.[69]

Conduct that is similar to the acts listed in section 8(d), but does not meet the descriptions set out in that section will often fall to be assessed under section 8(c).[70] Rather than constituting self-standing actions, allegations of contraventions of section 8(c) are therefore typically alleged in the alternative. Stipulated conduct prohibited by other sections usually forms the focus of the case. To date there has been only one finding of a contravention of section 8(c).[71]

C. Section 8(d) – specific exclusionary acts

Section 8(d) prohibits a number of specific exclusionary acts if they cannot be justified by countervailing pro-competitive effects.[72] These are said to reflect the exclusionary strategies which international experience has shown to be most common,[73] and incorporate tests based on 'international best practice' in dealing with these strategies.[74] The following acts are prohibited by section 8(d) if they cannot be justified[75]:

(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 a contract, or forcing a buyer to accept a condition unrelated to the object of a 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 blush, it would appear that once a dominant firm's conduct has been found to accord with these definitions, a presumption of anti-competitive effects arises. However, in the *South African Airways* case the Competition Tribunal held that the complainant or Commission must also show that

[65] Section 1(1)(x)
[66] *Commission v South African Airways* case 18/CR/Mar01, paragraph 108
[67] Unterhalter in Brassey (2002), page 198
[68] A complaint may be initiated by the Competition Commission or a third party. The Commission must then, following investigation, decide whether to refer the complaint to the Competition Tribunal for adjudication. If the Commission decides that a third-party-initiated complaint does not make out a contravention of the Act, the complainant may refer the complaint to the Tribunal for adjudication – effectively a private prosecution.
[69] Sutherland and Kemp (2010), page 7-56
[70] Sutherland and Kemp (2010), page 7-24
[71] *Commission v Senwes Ltd,* Tribunal case 110/CR/Dec06; Competition Appeal Court case 87/CAC/FEB09; Supreme Court of Appeal case 118/2010; Constitutional Court Case CCT 61/11 [2012] ZACC 6.
[72] Section 8(d) of the Act
[73] Lewis (2008), page 429
[74] Roberts (2012), page 274
[75] Section 8(d)

the conduct had an anti-competitive effect.[76] Only then will the onus shift onto the dominant firm to adduce evidence of efficiencies. This case therefore places 'effects' at the centre of the analysis.[77]

Perhaps a useful analogy may therefore be that the specific acts mentioned in subsections (i) to (v) must be proved as a gateway requirement, in order to progress to an analysis of the conduct's effects. The girth of this gateway depends on the construction of the particular rule in section 8(d).

D. Crucial difference between section 8(c) and 8(d)

One difference between sections 8(c) and (d) is critical to the argument presented below. Both prohibit 'exclusionary acts'. As mentioned above, section 8(c) is an effects-based 'catch-all', prohibiting any exclusionary act not listed in section 8(d) that has a net anti-competitive effect. One could therefore envisage a simple answer to the question posed by this paper – *surely there is no need to replace section 8(d) with a single effects-based provision because such a provision is already embodied in section 8(c)? This should catch any anti-competitive exclusionary strategies which section 8(d) has failed to deal with.*

This might be true in theory. However, contraventions of section 8(d) may result in an administrative penalty of up to 10% of the firm's turnover for the previous financial year.[78] By contrast, a first offence under section 8(c) does not carry an administrative penalty.[79] It is submitted that section 8(c) therefore suffers from an insurmountable practical problem. Once a firm's conduct has been found to contravene section 8(c), only *that firm* is deterred from replicating that conduct. If another dominant firm was to imitate the exclusionary strategy, after a complex investigation and protracted adjudication proceedings (possibly involving a number of appeals) the most likely remedy would be an order that the firm simply cease the impugned behaviour.[80]

In addition, there is little unanimity between the Tribunal, Competition Appeal Court, Supreme Court of Appeal and Constitutional Court regarding how the section should be interpreted. This can be exploited by respondent firms in order to obfuscate enforcement proceedings.[81]

As a result, section 8(c) has a weak deterrent value, and is therefore itself prone to under-inclusion. As Roberts eloquently puts it:

> *The construction of the… Act to specify certain conduct under 8(d) and provide a 'catch-all' effects-based test under 8(c), instead <u>appears to have had a 'catch-none' outcome</u>.*[82]

For example, after eight years since initiation of the complaint against Senwes, a dominant supplier of grain storage facilities, the Constitutional Court (the final layer of appeal following a Tribunal decision) has recently upheld a Tribunal finding that margin squeeze conduct by Senwes contravened section 8(c).[83] If Senwes was to continue or repeat this behaviour, it could be liable for an administrative penalty. However, if any other firm were to engage in a margin squeeze following the Constitutional Court's ruling, it would probably simply be ordered to stop.

In theory, a first-time lawbreaker could be sued for damages in a civil court by affected parties[84] or subjected to an order of divestiture.[85] In practice, the risk of a successful damages claim is remote. There has only been one damages claim following exclusionary abuse since the Act's inception, which was settled by the parties early on in the proceedings.[86] Although divestiture remains a legitimate and significant threat in particular circumstances, it is a severe and seldom-used intervention, and is not warranted in the majority of cases.

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[76] *South African Airways* (*supra*), paragraphs 110-111 and 132. The rationale for this interpretation, as set out in paragraph 110 of the tribunal's decision, is that by allowing for a weighing of technological, efficiency or pro-competitive benefits, the legislature must have contemplated that an anti-competitive effect must first be established, else how could a proper balancing exercise be conducted?
[77] Roberts (2012), page 297
[78] Section 59(1)(a)
[79] Section 59(1)(b)
[80] Lewis (2008), pages 424-425
[81] Roberts (2012), page 295
[82] *Ibid*
[83] *Commission v Senwes* (*supra*). Note that the Constitutional Court did not approve of the Tribunal ascribing the name, 'margin squeeze' to the conduct, but it nevertheless found that conduct to be unlawful.
[84] Section 65
[85] Section 60
[86] *Nationwide Airlines v South African Airways.* The terms of the settlement are confidential, and there was no judgment or corresponding case number.

Furthermore, investigating and litigating cases under section 8(c) is costly, and yields more limited tangible outcomes than other prohibited practice findings (which incur administrative penalties). It is therefore also possible that the primary enforcement authority, the Commission, may be disincentivised from bringing cases under this section, choosing rather to focus resources on cases that, if successful, will act as a stronger deterrent. Section 8(c) may therefore suffer further under-enforcement.

E. Onus of proof

For completeness, another difference between sections 8(c) and 8(d) warrants mention. Under section 8(c), the Commission or complainant bears the onus to show that the anti-competitive effects of the conduct outweigh any countervailing efficiency or pro-competitive gains raised by the respondent.[87] Under section 8(d), the onus instead befalls the respondent to show that the efficiency gains raised tip the balance in its favour.[88] It has been suggested that in the event of a probative deadlock (where neither the anti-competitive and pro-competitive effects conclusively outweigh the other), a dominant firm would therefore be found guilty under section 8(d) but innocent under section 8(c).[89] I submit, however, that these onus provisions are not determinative in practice. The Tribunal, which has inquisitorial powers, will in reality simply weigh the pro and anti-competitive effects and decide which is more compelling. It is difficult to see how onus plays an active role in these circumstances, where both parties in any event have to show the one outweighs the other. For this reason, the alternative structure proposed below does not contain any change in onus, and this issue is not dealt with further.

F. What is the amendment that is being proposed?

Now that the Act's exclusionary abuse provisions have been explained, it is possible to articulate in more detail the alternative construction that is being suggested, and used below as a basis for evaluating sections 8(c) and (d). Opting for a single, effects-based provision would effectively mean repealing section 8(d), and amending section 8(c) so that it no longer reads as an alternative to section 8(d) - the words *'other than an act listed in section 8(d)*' would be removed. A corresponding amendment to section 60 would also be required, to the effect that an administrative penalty could now be imposed for a first-time contravention of section 8(c). Non-binding examples could also be listed, of types of exclusionary acts that may be considered anti-competitive[90], and factors which should be considered in in evaluating potential abuse.[91]

The result would be that any 'exclusionary act' which has, on balance, the requisite anti-competitive effect would be prohibited and punishable. Potentially anti-competitive exclusionary conduct would no longer have to comply with the definitions in each subsection of section 8(d) to qualify for an effects analysis.

It would be left for the Tribunal and the relevant courts to recreate the filtering effect of the definitions in section 8(d), in order to limit the volume of complaints and ensure that only sufficiently risky conduct draws investigative and adjudicative resources. Tribunal and court decisions could also be supplemented by guidelines clarifying the types of conduct that the Commission is likely to consider worthy of investigation.

G. Costs of amendment

A detailed examination of all the potential costs of this amendment is beyond the scope of this paper. However, a brief comment on one significant aspect is necessary – would amending the Act as proposed mean 'scrapping' the body of jurisprudence that has developed around section 8(c) and 8(d) to date?

[87] *South African Airways* (*supra*), paragraph 134
[88] *South African Airways* (*supra*), paragraph 135
[89] Sutherland and Kemp page 7-56
[90] Article 102 TFEU includes such a list.
[91] For example, Roberts (2012), pages 298-300 suggests that factors such as the degree of the firm's dominance, the motivation or intent of the firm, and importance of opening up areas of the economy controlled by entrenched dominant firms to effective and dynamic rivalry,

First, it is relevant that this jurisprudence is still at a relatively early stage of development. Only a few cases of alleged exclusionary abuse have been heard and decided upon by the Tribunal. Second, and more importantly, under the proposed revised formulation, the same conduct which is currently unlawful would continue to be unlawful. It would simply no longer be spelt out in the Act. Similarly, no 'new' behaviour which is currently lawful would suddenly become unlawful, although conduct currently prohibited by section 8(c) would be subjected to a potential administrative penalty for a first-offence.

Therefore, the vast majority of the jurisprudence would continue to be relevant. In particular, rulings explaining how anti-competitive and pro-competitive effects should be determined, and weighed against each other, would endure.

An analytical framework for evaluating sections 8(c) and (d) has now been provided, and South Africa's exclusionary abuse provisions have been described. The next step is to scrutinise these provisions, to determine whether they suit South Africa's economic circumstances.

III. ANALYSIS OF THE OVERALL CONSTRUCTION OF THE EXCLUSIONARY ABUSE PROVISIONS

Previous commentary has focused on the general advantages and disadvantages of South Africa's 'rules-based' approach to exclusionary abuse. This provides a useful point of departure, but is inevitably incomplete. For a comprehensive analysis, it is also necessary to dissect the individual rules themselves, to grasp whether the broad advantages and disadvantages are likely to manifest in reality – this is done in Section 4 below.

This section evaluates the high-level issues. The claimed *advantages* of section 8(d) which have been suggested are used as a starting point for analysis. Each of the following proposed benefits will be dealt with in turn:

- Some exclusionary acts are more harmful and blameworthy than others. These should be specified separately and treated more harshly.
- Spelling out what conduct is unlawful improves the provisions' administrability.
- Firms will be deterred from contravening the law if rules state what particular conduct is prohibited.
- Legal certainty is promoted by prohibiting specific acts in legislation.
- Because the rules are based on 'international best practice' we are assured that they are as accurate as possible.

There is clearly no one-size-fits-all solution to abuse of dominance – one cannot assert that one approach is 'right' and another is 'wrong'. In evaluating South Africa's exclusionary abuse provisions, context is therefore key. The concentrated nature of markets, large firms entrenched in key industries and a weak history of competition enforcement all point towards under-inclusion presenting a significant danger. Any attribute that unnecessarily tends towards unwarranted under-inclusion should therefore be considered a disadvantage. On the other hand, an advantage would be any aspect that furthers one of the Act's principal goals – ensuring that if a dominant firm excludes a competitor by unmeritorious means without sufficient countervailing benefits accruing to consumers, it should be detected, investigated, and appropriate remedial action taken. Section 8(d)'s strengths and weaknesses are evaluated on this basis below.

A. Tougher treatment for more 'egregious' conduct?

It has been suggested that the Act's division of exclusionary acts into sections 8(c) and 8(d) allows more blameworthy or harmful conduct to be treated more severely. In the *South African Airways* case, the Tribunal opined:

> *The reason for these differences in treatment is that the exclusionary acts in 8(d) are listed, presumably evidencing the legislature's view that these are the more egregious of the exclusionary acts...*[92]

If the acts listed in section 8(d) are indeed a more pernicious type of exclusionary act, then the difference in treatment, and by implication the inclusion of section 8(d) in the Act, would have strong justification. However, Unterhalter has argued that

> *There seems no reason of principle to distinguish the treatment of these two cases. The specific exclusionary acts are not presumptively more worthy of condemnation than the residual class.*[93]

This conclusion is borne out by a number of examples (set out in Section 4 below) of conduct which has been recognised in other jurisdictions for its harmful exclusionary impact, but could not qualify for analysis under section 8(d) (or an administrative penalty). These include refusal to supply a customer who is not also a competitor,[94] refusal to supply scarce services or intellectual property rights,[95] so-called 'technical tying',[96] and predatory pricing at levels above Average Variable Cost.[97] Perhaps the best example is that of a 'margin squeeze', which has been held to infringe section 8(c)[98], but does not find recognition in section 8(d).[99]

A margin squeeze occurs when a vertically integrated firm charges a high price for key inputs to customers with which it competes in a downstream market.[100] Its downstream subsidiary then charges a low price to end consumers.[101] The vertically integrated dominant firm thereby '*prevents its non-vertically integrated downstream rivals from achieving an economically viable price-cost margin*'.[102] Properly executed, a margin squeeze is usually part of a deliberate and harmful strategy to distort competition by excluding equally efficient competitors.

In *TeliaSonera*, the European Court of Justice said of margin squeeze that:

> *[I]n the absence of any other economic and objective justification, such conduct can be explained only by the dominant undertaking's intention to prevent the development of competition in the downstream market and to strengthen its position, or even to acquire a dominant position, in that market by using means other than reliance on its own merits.*[103]

It is therefore very difficult to assert that this strategy is less malign – less 'egregious' – than, for example, a refusal to supply at the upstream level or a predatory price at the downstream level, which would both be prohibited (and punishable) under section 8(d)(ii) and (iv) respectively.[104] Therefore, the assertion that the conduct described in section 8(d) is more 'egregious' than exclusionary acts not articulated in the section appears weak. It is submitted that this would not be a sufficient basis to justify the inclusion of section 8(d)'s list of specific abuses.

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[92] *South African Airways* (*supra*), paragraph 102
[93] Unterhalter in Brassey (2002), pages 198-199
[94] Page 32 below
[95] Page 32-33 below
[96] Page 33-34 below
[97] Page 35-36 below
[98] *Commission v Senwes* (*supra*)
[99] It could be legitimately argued that margin squeeze could constitute a constructive refusal to deal, in contravention of section 8(d)(ii). However, there is no precedent in South African law to this effect. The law has, to date, only condemned margin squeeze under section 8(c).
[100] Whish and Bailey (2012), page 754
[101] *Ibid*
[102] O'Donoghue and Padilla *"The Law and Economics of Article 82 EC"*, (2006), Hart Publishing, page 304
[103] *Konkurrensverket v Teliasonera* Case C-52/09 [2011] 4 CMLR 982, paragraph 88
[104] Vickers (2005) explains at pages 250-251 that the effect of a margin squeeze may be akin to predatory pricing.

B. Administrable or 'open season' for technical defences?

One preliminary point under this subheading is important. A reason often cited for the difficulties faced in administering section 8 is that the dominant respondent is, by definition, well-resourced and has a great deal to lose if it is found guilty.[105] These firms therefore have an incentive to raise each possible defence that the law will permit, and drag out adjudicative proceedings, exhausting all conceivable avenues of appeal. For example, Lewis recounts his extensive experience of hearing abuse of dominance cases in the Tribunal:

> *[T]he overwhelming recollection is of dilatory legal stratagems and case records that must have accounted for veritable forests of paper. Because of the adversarial character of these proceedings and because the respondents' lawyers are keenly sensitised to administrative conduct that may allow for an appeal and, hence, delay, it is often difficult to truncate hearings by, for example, disallowing tangential evidence and excessive cross-examination.*[106]

Of course, this frustrates enforcement authorities who face the opposite task – proceed directly to the merits of the case and deliver a just result as quickly as reasonably possible. It is critical to distinguish this 'fact of life' (that *'abuse of dominance allegations are extremely difficult and resource consuming to investigate and to prosecute'*[107]) from the aspects of the relevant rules themselves that support or subvert administrability. Only the latter is relevant for this analysis of whether the current section 8(d) is preferable to an effects-based alternative.

Lewis has argued that recourse in the Act to 'proxies' for conduct that generally is anti-competitive, improves the section's administrability:

> *[A]ntitrust enforcers are obliged to arrive at decisions based upon statutory language and reflected in the decisions of courts of law. If antitrust laws are to be successfully administered while taking account of economic standards, administrable proxies have to be sought for these economic standards.*[108]

This is in line with recognition internationally that abuse of dominance laws should comprise clear rules based on sound economics.[109] However, it is not clear that there is any inherent advantage in embedding economic proxies in legislation, rather than in Tribunal and court decisions.

It is submitted that although Lewis' contention has intuitive appeal, it is not borne out by South Africa's enforcement record. In light of the economic circumstances set out above we would expect exclusionary conduct by dominant firms to be common. The low level of enforcement activity (not to mention *successful* enforcement activity) suggests that section 8 in its current form has not been easy to administer. According to Roberts, Section 8(d)'s construction may be partly to blame:

> *The decision to specify discrete conduct separately in the Act has certainly compounded the other factors delaying cases and opening up the scope for technical legal challenges.*[110]

In support of this point, Roberts cites the example of margin squeeze.[111] Although the effect of margin squeeze is relatively straightforward, there is significant scope for disagreement as to how it should be 'classified' - as a form of predatory pricing, refusal to deal, discrimination, or a self-standing abuse. Under South African competition law, because of the structure of sections 8(c) and (d), the outcome of this debate has important implications – in particular, it may determine whether an administrative penalty may be imposed for a first-time breach. This is therefore fertile ground for legal challenges.

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[105] Lewis (2008), page 424
[106] Lewis (2012), page 142
[107] Lewis (2008), page 424
[108] Lewis (2008), page 430
[109] Fox (2006), page 740; Vickers (2005), page 260; Kovacic and Shapiro, *'Antitrust Policy: A Century of Economic and Legal Thinking'*, Journal of Economic Perspectives, Volume 14 (1) (2000), page 58.
[110] Roberts (2012), page 298
[111] *Ibid*

As Roberts explains:

> *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.*[112]

What is suggested here is that exclusionary strategies by dominant firms will not necessarily conform to the stylised models of economics textbooks, and will not be confined to one 'type' of strategy or another.[113] Firm conduct is multifaceted and dynamic, and can seldom be pigeonholed into one of section 8(d)'s definitions.[114] By compartmentalising discrete exclusionary strategies, the Act therefore makes it difficult to fit real-world conduct into a cause of action that will pass legal muster. This negatively impacts its administrability.

Lewis has also suggested that:

> *[T]he different remedial regimes that apply to section 8(c) and section 8(d) contraventions incentivise lengthy litigation around the elements of conduct specified in the various sub-clauses of 8(d), because there is so much to be gained for the defendant getting out of 8(d) in favour of 8(c).*[115]

The lack of administrative penalty attaching to first-time contraventions of section 8(c) may thus have a detrimental effect on the administrability of section 8(d).

Therefore, far from promoting administrability, it would appear more likely that section 8(d)'s structure militates *against* effective administration (and therefore causes under-enforcement). The proposed single effects-based prohibition may well avoid the difficulties explained above by allowing greater flexibility in the way that exclusionary strategies are described in complaint proceedings. The scope for legal challenges to formal portrayals of exclusionary conduct would be curtailed. Because an administrative penalty would always be possible for a first-offence, there would also be less incentive for respondents to raise objections.

C. Effective deterrence?

Of course, the effect of antitrust rules is not completely captured by reviewing enforcement activity. An arguably more important job for competition law is to discourage firms from contravening the law in the first place.[116] It has been suggested that section 8(d)'s inclusion of specified abuses in the Act signals to dominant firms that, before engaging in certain forms of conduct, it should be aware that its conduct will likely be found to be abusive. If it is so advised it will either refrain from such conduct or undertake it fully cognisant of the risk.[117]

Evidence of effective deterrence can only really be anecdotal, but logically, the more certain the rule, the more effectively it will deter firms from contravening its terms.[118] If this intuitive conclusion is accepted, then analysis of whether section 8(d) encourages effective deterrence can be assessed in terms of how effectively it promotes certainty.

It should be borne in mind that legal certainty is only one component of effective deterrence. Firms must also believe that a credible detection, investigation and adjudication process will hold them to account for their misdemeanours. More importantly, the sanction imposed for breaking the law must outweigh the potential gains from the infringement, as well as account for the probability of the firm being caught and convicted.[119]

[112] Roberts (2012), page 299
[113] Roberts (2012), pages 279, 295, 298
[114] Roberts (2012) page 273, 295
[115] Lewis (2012), page 172
[116] Lewis (2008), page 429
[117] *Ibid*
[118] Lewis (2008) page 430
[119] See Wils, *'Optimal Antitrust Fines: Theory and Practice',* World Competition 29, no.2 (2006), page 183-208 for a more detailed discussion of the ideal components of sanctions for competition law infringements, which is outside the scope of this paper.

D. Legal certainty?

The benefits of legal certainty are undeniable. A stable legal environment allows firms to take decisions cognisant of their consequences. Predictability is conducive to investment and economic growth. However, certainty should be placed in its proper context – it is important, but not paramount. The law must prohibit the correct things, even if it means sacrificing a degree of certainty.

In support of section 8(d)'s current formulation relative to a single effects-based provision, Lewis argues:

> *Resort to pure economic reasoning provides little by way of certainty and so cannot effectively guide the actions of firms.*
>
> …
>
> *In these circumstances it would not be at all surprising if both lawyer and client were willing to accept the possibility of a degree of error as a result of the application of well-established rules as a trade-off for the certainty that the latter brings to the business of providing legal advice and guiding business decisions.*[120]

The approach in section 8(d) of specifying exclusionary acts may well create certainty. It would also be possible, however, for broader standards cast in legislation to be converted into more specific behavioural proscriptions through judicial interpretation. This is how a number of major competition jurisdictions work, including the US[121], the EU[122] and UK[123]. Guidance published by competition authorities can also supplement legislation and judicial decisions by explaining how the authority is likely to approach particular situations.[124] The European Commission's published guidance on its enforcement priorities regarding the abuse of dominance provisions of the TFEU[125] provides an excellent example.

But legislation is not easily overturned, whereas judicial decisions can be reversed and guidelines withdrawn. Therefore, it could be argued that legislation is less subject to change, and therefore by its nature *more* certain. However, it is submitted that the open-textured provisions of Europe and the USA show how judge-made abuse of dominance law provides adequate certainty. Development of the law is gradual, rather than radical, and instances of courts reversing previous decisions are uncommon. Typically, judge-made rules are only revoked *'when subsequent cases have undermined their doctrinal underpinnings'*.[126]

While the Tribunal makes a positive effort to promote certainty, it is not bound by its previous decisions.[127] It could be argued that by adopting an effects-based exclusionary abuse provision, and leaving it to the Tribunal to formulate specific rules in its decisions, there would be insufficient guarantees against rules arising in an *ad hoc,* case-by-case fashion. For example, absent a statutory stipulation, there would be nothing to prevent the Tribunal from comparing a potentially predatory price to Average Variable Cost in one case, and then inexplicably using Average Avoidable Cost in another. This is, in theory at least, a legitimate concern. However, in practice it would amount to an attack on the Tribunal's credibility as a decision-making institution. It is submitted that there is nothing in the Tribunal's jurisprudence to date that indicates it is prone to inconsistent decision-making. In any event, any capricious decisions of the Tribunal could be appealed or reviewed to the Competition Appeal Court, whose judgment would become a binding rule of law.

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[120] Lewis (2008), page 430

[121] Section 2, Sherman Act 1890

[122] Article 102 TFEU

[123] Chapter 2, Competition Act 1998

[124] Fingleton and Nikpay (2008), page 26; Freeman, *'Is the Sword Mightier than the Pen? Competition Enforcement and the Law'*, Dining Lecture for the International Bar Association for Commerce, Finance and Industry (2010) [Available at http://www.competition-commission.org.uk/], page 8.

[125] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ [2009] C 45/7

[126] *Leegin Creative Leather Products, Inc. v PSKS, Inc.* 127 S.Ct 2705 (2007), page 21, citing *Dickerson v United States*, 530 U.S. 428, 443 (2000)

[127] Lewis (2012), pages 171 and 184

On the contrary, the example of predatory pricing (as elaborated upon in Section 4 below) illustrates the harm that may result from enshrining economic proxies in legislation. As the prevailing economic consensus develops (for example, recognising that Average Avoidable Cost is a more accurate yardstick for predatory pricing determinations), the law should be able to develop accordingly.

A further point about legal certainty is that competition legislation does not need to read like a compliance manual. Dominant firms seldom adapt their behaviour based on an amateur reading of the Act's raw provisions. They obtain advice from specialist competition lawyers and economists who are versed in the applicable case-law and can provide sufficiently accurate predictions of the consequences of particular behaviour.

It is understandable that at the time of the South African Act's promulgation, there was a genuine concern that an open-textured approach may have given rise to considerable uncertainty. Firms, advisors and enforcers were not immediately familiar with what conduct prevailing economic theory would consider problematic, and the jurisprudence of the Tribunal and the Competition Appeal Court was not yet developed. It is submitted that fifteen years on, certainty probably does not need to be ensured by the Act itself. Decisions of the Tribunal and Appeal Court have provided guidance in a number of areas as to precisely what conduct can be expected to cause concern. The competition bar has grown in sophistication and experience, and economics advisory firms with significant expertise are now frequently consulted by firms that wish to comply with section 8. There is probably also sufficient awareness of problematic practices within dominant firms themselves, many of which employ specialist in-house competition lawyers.

Therefore, fifteen years since its promulgation, there is less need for the Act to guarantee certainty. If sections 8(c) and 8(d) were replaced by a single, effects-based provision, Tribunal and court decisions supplemented by official published guidelines could provide adequate legal certainty.

E. International best practice or overly static?

Section 8(d) clearly takes its lead from international practice.[128] Roberts states that the drafters of the Act *'followed what was viewed at the time as international 'best practice'.*[129] Lewis endorses this conclusion, that the potentially abusive conducts described in South African law represent the '*most frequently identified and prosecuted abusive conducts*'.[130] There are undoubted benefits to drawing on international experience when framing a new competition law. However, it is submitted the law should be able to develop contemporaneously with appropriate international advancements. Casting rules in legislation may deprive the law of its ability to adapt.

The international 'best practice' mentioned by Roberts is qualified – it was best practice at the time that the Act was drafted in the late 1990's. The behaviour prohibited by the Act that Lewis describes as 'the most frequently identified and prosecuted' requires a similar disclaimer – it was the most frequently identified and prosecuted conduct at the time that the Act was written. As Gellhorn, Kovacic and Calkins explain:

> *Economics is a dynamic discipline with rival schools of thought. Over time, the forming and testing of hypotheses spur the discovery, refinement and displacement of analytical models.*[131]

Unterhalter makes a related point:

> *The disadvantage of adopting economic theory as a legal standard is that the theory, over time, is contested.*[132]

It is submitted that there are examples which show how adopting a snapshot of international best practice in a vehicle as rigid as legislation has led to parts of section 8(d) becoming outdated.

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[128] Sutherland and Kemp (2010), page 7-6; Lewis (2008), page 428 states that the Act was *'crafted on the basis of long-standing international experience'.*
[129] Roberts (2011), page 9
[130] Lewis (2008), page 429
[131] Gellhorn, Kovacic and Calkins, *'Antitrust Law and Economics in a Nutshell'* 5th Edition (2004), Thomson West, page 60; Vickers (2005), page 245 notes, *'The practical meaning of [Article 102] has evolved over time through the case law…'*
[132] Unterhalter in Brassey (2002), page 215

Two problems have arisen: first, when economic theory refines or amends the test on which the South African rule is based, the Tribunal and Courts are bound by an outdated rule. These are elaborated upon in Section 4 below. Second, certain harmful exclusionary practices were omitted because they were not acknowledged by international best practice during the late 1990's, but have risen to the fore since. As a result, the Act is ill-equipped to deal with such practices, the most notable example of which is margin squeeze.

When the Act was drafted, there was very little reference to margin squeeze in competition law enforcement internationally.[133] However, in 2003 the European Commission found Deutsche Telekom guilty of a margin squeeze, and imposed a significant penalty.[134] The decision was upheld on appeal by the General Court[135] in 2008 and the European Court of Justice[136] in 2010. Margin squeeze has subsequently been found in two further cases against TeliaSonera[137] and Telefonica.[138]

It is submitted that margin squeeze could now legitimately be counted as an important part of mainstream abuse of dominance jurisprudence in Europe.[139] However, in South Africa it does not fit properly into the scheme of section 8. The *Senwes case*[140] provides an apt illustration. The case included allegations of a margin squeeze against Senwes, a vertically integrated firm that was found dominant in the market for grain storage services, and also participated in the grain trading market. When weighing up the evidence of the effect of Senwes' conduct, the Tribunal found:

> *The finger prints of an exclusionary practice having an effect are all over the data.*
>
> …
>
> *The evidence is also consistent with harm to consumer welfare on both the buying side from farmers who receive too little for their grain and the processors who pay too much.*[141]

Despite finding a clear-cut case margin squeeze, the Tribunal had no option but to decide:

> *…absent a pigeonhole to slot it into any other provision of 8(d), we find that the conduct falls to be considered in terms of section 8(c).*

As explained above, no administrative penalty could therefore be imposed, and the case consequently only has a deterrent effect on Senwes itself. If any other dominant firm were to carry out a margin squeeze in South Africa, the likely consequence would simply be an order to terminate the behaviour – an unsatisfactory outcome in light of the perils of under-inclusion explained above.

In Europe, the frontiers of abuse of dominance continue to expand. In *AstraZeneca*[142], providing misleading information to relevant authorities in order to extend the life of certain pharmaceutical patents (thereby preventing the entry of generic producers), and withdrawing specific patent authorisations (also to thwart the entry of generic producers) was held by the European Court of Justice to constitute an abuse. Traditionally, abuse of dominance laws have been applied only to strategic conduct by dominant firms *on the market*. This case potentially opens up the scope of the law to apply to 'non-market' conduct or 'regulatory abuse'.

The General Court held:

> *In so far as it consisted in misleading representations made deliberately in order to obtain exclusive rights to which [AstraZeneca] was not entitled or to which it was entitled for a shorter period, the first abuse of a dominant position quite clearly constitutes a serious infringement.*[143]

[133] 'Margin-squeeze-like' conduct was part of the allegations against Alcoa in a 1945 monopolisation case, although the term 'margin squeeze' was not used. *US v Alcoa* 148 F. 2d 416 (2d Cir. 1945).
[134] OJ [2003] L 263/9, [2004] 4 CMLR 982
[135] Case T-271/03 *Deutsche Telekom AG v Commission* [2008] 5 CMLR 631
[136] Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] 5 CMLR 1495
[137] Case C-52/09 *TeliaSonera Sverige v Commission*, judgment of 17 February 2011
[138] Case T-398/07 *Kingdom of Spain v Commission,* judgment of 29 March 2012
[139] Although the doctrine has recently been rejected in the US in *Pacific Bell Telephone Co v LinkLine Communications, Inc* Docket 07-512 (2009) [Available at http://www.supremecourt.gov/opinions/08pdf/07-512.pdf]
[140] *Commission v Senwes* (*supra*)
[141] *Senwes* Tribunal decision, paragraph 262-263
[142] Case C-457/10 P *AstraZeneca AB v Commission*, judgment of 6 December 2012.
[143] Case T-321/05 *AstraZeneca AB v Commission* [2010] 5 CMLR 1585, paragraph 901

The European Court of Justice, in dismissing AstraZeneca's appeal, held that AstraZeneca's approach:

> *…is manifestly not consistent with competition on the merits and the specific responsibility on such an undertaking not to prejudice, by its conduct, effective and undistorted competition within the European Union.*[144]

Under South African law, section 8(d) would probably not provide a viable avenue to prohibit such conduct.[145] The only option would be to apply section 8(c), for which no administrative penalty is payable. This is despite the conduct having been described in Europe as *'deliberate'*, *'serious'* and *'manifestly not consistent with competition on the merits'*. Therefore, it is submitted that this provides a further example of section 8's inability to adequately deal with certain intentional and harmful exclusionary conduct.

Based on the discussion above, it is submitted that cementing rules in section 8(d) has meant that South Africa's abuse law has fallen behind international best practice, and results in unnecessary under-inclusion. Further examples in support of this conclusion are set out below in Section 4. This factor ('international best practice') should therefore no longer be considered an advantage of section 8(d)'s formulation. Instead, it should more accurately be deemed a disadvantage.

A single effects-based provision would, by contrast, allow the Tribunal and courts to refine rules when understanding develops of the purpose and effect of the relevant practices.[146] Gellhorn, Kovacic and Calkins comment in relation to the US system:

> *The open texture of the foundational statutes gives the antitrust system an inherent flexibility and evolutionary quality that a fully specified statutory statement of standards and an elaborate definition of terms would lack.*[147]

Therefore, the problem of undue rigidity could be repaired by adopting a single effects-based exclusionary abuse provision. This would allow the Commission, Tribunal and courts sufficient latitude to develop the range of dominant firm conduct prohibited in South Africa in tandem with refinements in economic theory and international practice.

IV. EVALUATING SECTION 8(D)'S 'SPECIFIC RULES'

As noted above, analysing the broad advantages and disadvantages of the exclusionary abuse provisions does not paint a complete picture. It is necessary to delve into each of the individual rules contained in section 8(d).

In respect of each rule we must ask: Is it under-inclusive? How much certainty does it actually provide? How administrable is it? Is it based on sound, modern economic principles – 'international best practice'? Will it really deter dominant firms from abusing their positions? These questions are addressed below, based on Tribunal and court decisions where applicable, comparisons with abuse of dominance laws elsewhere, and commentary on the interpretation of each subsection. Where none of these are available, the wording of the subsection itself is analysed.

A. Section 8(d)(i): Requiring or inducing a supplier or customer to not deal with a competitor

What it means to 'require or induce a supplier or customer not to deal with a competitor' is not clarified by the Act. Section 8(d)(i) has previously been held to apply to a wide range of conduct:

- In *Patensie Sitrus Beherend Beperk*[148], the articles of association of a dominant company that provides packing and marketing facilities to its members (who are

[144] *AstraZeneca* (*supra*), paragraph 98.
[145] There may be some argument about whether it may fall within section 8(d)(i).
[146] Gellhorn *et al* (2004), page 39
[147] *Ibid*
[148] *Patensie Sitrus Beherend Beperk v Commission* case 16/CAC/Apr02

farmers), contravened section 8(d)(i) because it required its members to deliver their entire output to the company for packing and marketing.

- In *SA Raisins*[149], a similar clause in a shareholders agreement requiring shareholders to supply all of their produce to the dominant company induced customers not to deal with competitors.

- In the two *South African Airways* cases[150], effective loyalty inducing rebate schemes and incentive payments were held to induce travel agents not to deal with South African Airways' competitors.

- In *Senwes*[151], representations to farmers that they would lose the benefit of a cap on the daily storage tariff offered by Senwes (the dominant supplier of grain storage services in the relevant market) if they sold their grain to rivals of Senwes' downstream grain trading division was an inducement.

- In the recent *Telkom SA* case[152], the monopoly provider of fixed line telecommunications infrastructure (Telkom) prevented downstream Value Added Network Service providers (VANS) from connecting to its network in their own name. Instead, it required that access lines must be transferred into the names of end-customers and that VANS should act as agents for end customers. It also approached customers of independent VANS and suggested that they should migrate to Telkom's own VANS provider. This course of conduct was designed to induce customers not to deal with Telkom's competitors in the VANS market.

Sutherland and Kemp have suggested a further array of behaviour that could be caught.[153] This may include express contractual requirements, express inducement, pricing inducement or other practical inducement.

In *British American Tobacco* case (Batsa),[154] strategies designed to crowd out a number of 'points of sale' with Batsa's cigarettes (Batsa is the overwhelmingly dominant cigarette manufacturer in South Africa) were found *not* to induce or require retailers not to deal with its competitors. This included incentive payments to cigarette retailers in exchange for preferential placement of Batsa products at the expense of rival brands.

What the cases therefore illustrate is that, unlike the other subsections of section 8(d), section 8(d)(i) does not specify particular conduct at all. Based on the subsection's extraordinary breadth, it is difficult to say that it contributes to an '*intensely rule-focused*'[155] system. It is more akin to a second category of 'exclusionary act'.

The words of the subsection itself do not tell dominant companies what conduct they should avoid to ensure compliance. This job has been left to the Tribunal and the courts. Therefore, it is submitted that section 8(d)(i)'s construction does not support the general argument that section 8(d) enhances legal certainty. On the contrary, the Tribunal's articulation in its particular decisions of what conduct meets the section's initial threshold, and should therefore proceed to an effects analysis, appears to have provided more certainty than section 8(d)(i) itself. On this basis, it is also submitted that this subsection is unlikely to have a significant deterrent effect that could not be achieved by an open-textured prohibition.

More cases have been brought before the Tribunal under this subsection than under the narrower and more prescriptive subsections of section 8(d)(ii) to (v). Most cases brought under section 8(d)(i) have either been dismissed because the complainant or Commission has failed to establish an anti-competitive effect, or have been successful. It has been uncommon for complaints to

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[149] *South African Raisins v SAD Holdings* case 04/IR/Oct/1999
[150] *Commission v South African Airways* (*supra*) and *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd* case 80/CR/Sep06
[151] *Commission v Senwes* (*supra*), Tribunal decision, paragraph 116
[152] *Commission v Telkom SA Ltd* case 11/CR/Feb04, decided on 7 August 2012, paragraph 109.
[153] Sutherland and Kemp (2010), page 7-77
[154] *Commission v British American Tobacco South Africa (Pty) Ltd* case 05/CR/Feb05
[155] Lewis (2008), page 424

be dismissed because the complainant or Commission is unable to prove that an 'inducement or requirement not to deal with a competitor' has occurred. In *Patensie Sitrus Beherend Beperk,* both *South African Airways* cases and *Telkom*, a 'requirement or inducement' was found and the respondent firm was ruled to have contravened the Act. In the *Senwes* 'inducement complaint', an inducement was found to have been committed, but it was held not to have had an anti-competitive effect (although the Commission's case succeeded on the basis of a margin squeeze). It is only in *Batsa* that the complainant has failed to establish an inducement.

I consider that this enforcement record illustrates that it is precisely the subsection's breadth that promotes its relatively effective administration (compared to the rest of section 8(d)'s more specific 'proxies'). This supports the case that an open-textured prohibition would prove more administrable than section 8(d)'s present formulation.

B. Section 8(d)(ii): Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible

There is no general duty to deal, particularly with competitors. Firms are normally free to sell to whoever they wish. However, competition laws commonly recognise an exception to this in limited circumstances.[156] If a dominant firm provides a necessary input (be it access to a physical infrastructure, goods, or intellectual property), a refusal to supply that input may have the effect of foreclosing efficient firms from the market, thereby reducing competition.

Section 8(d)(ii), together with section 8(b) (which deals with access to essential facilities), embodies these general principles, which are also recognised in competition laws internationally (albeit to varying degrees[157]). Although the Tribunal has not yet decided any cases under this subsection, two nuances make section 8(d)(ii) unique to South Africa. First, it can only apply to a refusal to supply a *competitor*. Refusing to supply a *customer* who does not compete with the dominant firm would not fall within the section, and could only be assessed under section 8(c) if it constituted an exclusionary act as defined.[158] This is contrary to the position in Europe where, for example, in *United Brands*[159] it was unlawful for a dominant firm to refuse to supply a customer who was taking part in a competitor's advertising campaign, as a disciplining measure.

Second, the provision only applies to goods. It does not extend the duty to supply to scarce services or intellectual property rights.[160] This also does not accord with the position in Europe, where refusal to license intellectual property rights has been found abusive in a number of cases.[161] For example, Microsoft's refusal to supply to Sun Microsystems interoperability information needed to operate servers with its Windows operating system was found to be an abuse.[162] In South Africa, section 8(c) would again be left to mop up any anti-competitive refusals to supply in such circumstances.

There appears no reason in principle to treat these circumstances differently. Omitting them from section 8(d)(ii) simply compounds the problem of under-inclusion explained above. In addition, these anomalies mean that the section cannot be said to be in line with 'international best practice'. It is submitted that a single effects-based provision may remedy these concerns by prohibiting all refusals to supply by dominant firms which have an anti-competitive effect, without arbitrarily distinguishing different 'types' of refusals.

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[156] Advocate-General Jacobs explains the importance of the principle in his opinion on the *Oscar Bronner* case, the leading precedent on refusal to supply in Europe. Opinion delivered on 28 May 1998. Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG* [1999] 4 CMLR 112.

[157] In the US, the case of *United States v Colgate & Co* 250 US 300 (1919) entrenched the freedom of a firm to choose its trading partners as paramount. This has been bolstered by the Supreme Court in *Trinko (supra)*, where onerous standards to a refusal to deal were applied, significantly limiting the scope for such claims in that country. Europe, by contrast, has adopted a more inclusive approach in *Oscar Bronner (supra).*

[158] Sutherland and Kemp (2010), page 7-86

[159] Case 27/76 *United Brands v Commission*, [1978] 1 CMLR 429

[160] Sutherland and Kemp (2010), page7-86

[161] See *Magill TV Guide / ITP, BBC and RTE* [1989] 4 CMLR 757; and Case C-418//01 *IMS Health GmbH & Co v NDC Health GmbH & Co* [2004] 4 CMLR 1543

[162] *Microsoft v Commission,* OJ [2007] L 32/23

C. Section 8(d)(iii): Selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract

This provision seeks to embody the internationally recognised practice of 'tying and bundling'. A dominant firm which operates in separate markets may use its market power in one market to foreclose competition in another, thereby strengthening its position in the latter market without recourse to normal competitive methods.[163]

A case of tying has not yet been brought before the Tribunal and precious little has been written on how section 8(d)(iii) should be interpreted. This makes detailed analysis of the section difficult.

One feature warrants mention here. Both of the instances of tying described in the subsection refer to tying as a 'condition' which is 'unrelated to the object of a contract'. It therefore appears to focus exclusively on so-called 'contractual tying'. Cases of 'technical tying' – where the separate goods are sold in a physically integrated form – are difficult to fit within the section. The most famous examples of technical tying are the *Microsoft* cases, where Windows Media Player[164] and then Internet Explorer were incorporated into Microsoft's Windows operating system.[165] Such instances of tying are potentially more damaging than contractual tying, because they are irreversible.[166] Nevertheless, under South African competition law, technical tying by a dominant firm would only qualify for assessment under section 8(c) - without the possibility of an administrative penalty - for no apparent reason.

It is submitted that the lack of enforcement activity points towards problems with section 8(d)(iii)'s administrability. Significantly, the legislature has failed to follow international experience by excluding technical tying from the section's reach, or at least creating significant scope for respondent firms to credibly raise this argument. This pushes the law in the direction of under-inclusion – an objectionable outcome in the South African context. These shortcomings would probably be avoided by the proposed adoption of a single effects-based approach, which would treat different tying cases on their merits, rather than on formalistic distinctions.

D. Section 8(d)(iv): Selling goods or services below their marginal or average variable cost

The Tribunal has only decided one case of an alleged contravention of section 8(d)(iv). This was an interim relief application brought by Nationwide Airlines against South African Airways in 2000.[167] This case makes some useful remarks, but, it is submitted, is not entirely reliable as a precedent because it was decided before the *South African Airways* case (mentioned above), which declared how section 8(d) should operate.[168] The subsection therefore remains largely untested, although a case of predatory pricing is underway before the Tribunal at the time of writing.[169]

Consumers generally benefit when firms compete with each other by offering low prices.[170] However, a deep-pocketed firm may set its prices so low over a sustained period that its rivals are unable to survive, and are forced to leave the market – so-called 'predatory pricing'.[171] New entrants will also be deterred from entering the market. The firm may then, free of competitive constraints, raise its prices above competitive levels. This would harm consumers in the long run.[172]

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[163] Whish and Bailey (2012), pages 689-690
[164] Case T-201/04 *Microsoft Corporation v Commission* [2007] 5 CMLR 846
[165] Commission MEMO/08/19, 14 January 2008 and Commission Decision of 16 December 2010 (accepting commitments from Microsoft).
[166] Whish and Bailey (2012), page 694; European Commission's Article 82 Guidance document (*supra*), paragraph 53.
[167] *Nationwide Airlines v South African Airways* case 92/IR/Oct00
[168] The *Nationwide Airlines* case was therefore decided on the basis that establishing that prices are below marginal or average variable costs raises a presumption of anti-competitive effects (rather than the complainant or the Commission having to prove such effects). This was changed in *South African Airways*, where the Tribunal held that the complainant or the Commission bares the onus to prove the conduct's anti-competitive effect.
[169] Commission Press Release, 31 October 2011, *'Commission refers predatory pricing case against Media 24'* [Available at www.compcom.co.za].
[170] Hovenkamp (2006), page 159; Whish and Bailey (2012), page 740; Motta, *'Competition Policy: Theory and* Practice', Cambridge (2004), page 412
[171] Motta (2004), page 413; Gellhorn *et al* (2004), page 164.
[172] *Ibid*

Unclear or over-inclusive rules prohibiting low prices could discourage aggressive competition and harm consumers – an obvious 'own goal' for competition law.[173] Hovenkamp states:

> *An intentionally under-deterrent predatory pricing rule may do much good by reaching many instances of predation while permitting all instances of bona fide competition.*[174]

But as explained above, South Africa's economic circumstances suggest that an under-inclusive exclusionary abuse law would be particularly harmful, and, where applicable, the law should therefore err on the side of over, rather than under-inclusion.

In South Africa, to qualify for an effects analysis, an allegedly predatory price must be below the respondent firm's 'marginal or average variable costs'. The logic of this is that if a firm prices below its marginal costs, it wilfully sacrifices revenue. This does not seem to be rational, and one explanation may be that it is engaging a predatory strategy to exclude efficient competitors.[175] As an alternate for marginal cost, South African law uses Average Variable Cost (AVC).[176] Despite also including marginal cost as a potential measure, it is submitted that when section 8(d)(iv) is enforced, the focus will probably be on the more operable concept of AVC.

This is sure to result in under-inclusion, because AVC is typically lower than marginal cost at high levels of output, and predatory pricing is generally a 'high output strategy'.[177] This has invoked suggestions that using AVC as a benchmark for assessing predation is 'toothless'[178] and a 'defendant's paradise'.[179] Dominant firms in theory have leeway to embark on deliberate, damaging predatory strategies by pricing above AVC but below true marginal costs.

The test set out in section 8(d)(iv) is conceptually clear[180] and thus may meet the advantage of being 'certain'. Prices which are below a dominant firm's AVC fall to have their effects analysed, and if found to be anti-competitive, punishment may include an administrative penalty. Prices above AVC may still contravene the Act, but must be assessed under the less exacting standard of section 8(c). This has been confirmed by the Tribunal in the *Nationwide Airlines* case.[181] Therefore, it is submitted that section 8(d)(iv) does provide legal certainty.

It is difficult to calculate a firm's costs, including its AVC.[182] There can be considerable debate about how certain costs should be characterised – as fixed or variable?[183] These practical problems are, however, an unavoidable hurdle in predatory pricing cases. Although efforts to simplify costing analysis should be on-going, this is not a fair basis on which to criticise the administrability of any rule that incorporates a cost standard. The fact that no proper predatory pricing cases have been adjudicated by the Tribunal to date should not be attributed to section 8(d)(iv) being difficult to administer. The more probable explanation is that the proxy used by the Act to identify a profit sacrifice is intentionally under-inclusive.

It is submitted that the AVC standard also does not have the advantage of reflecting international best practice. Although AVC is arguably an acceptable proxy, it may not be the most accurate available, or be ideally suited to South Africa. Since the *AKZO* case 1991, European Competition law has applied AVC as a lower threshold, below which prices are presumed predatory and therefore anti-competitive.[184] The European Commission's 2009 guidance on its enforcement

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[173] Whish and Bailey (2012), page 740; Fingleton and Nikpay (2008), page 3.
[174] Hovenkamp (2006), page 161
[175] *The Department of Justice 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act' (2008)* [Available at www.usdoj.gov] (DoJ Report), page 51 and 53. This logic is based on the Areeda-Turner test for predatory pricing. See Unterhalter in Brassey (2002), page 214; Areeda and Turner, *'Predatory Pricing and Practices under Section 2 of the Sherman Act'* 88 Harvard Law Review 697 (1975).
[176] As suggested by Areeda and Turner (1975), pages 716-718. AVC is the sum of the firm's variable costs divided by the number of units produced. Variable costs are costs that vary as output increases, as opposed to fixed costs, which do not.
[177] Hovenkamp (2006) explains the economics of this in footnote 19 to page 164; Jones and Sufrin (2011), page 394
[178] Gellhorn *et al* (2004), page 170
[179] Williamson, *'Predatory Pricing: A Strategic and Welfare Analysis'*, 87 Yale Law Journal 284 (1977), cited in Hovenkamp (2006), page 164
[180] Unterhalter in Brassey (2002), page 215
[181] *Nationwide Airlines* (supra), page 10
[182] Hovenkamp (2006), page 159
[183] See Niels, Jenkins and Kavanagh, *'Economics for Competition Lawyers'*, Oxford University Press, (2011), page 191-192; DoJ Report (2008), pages 63-68.
[184] Case 62/86 *AKZO Chemie* v *Commission* [1993] 5 CMLR 215. Prices below AVC were presumed predatory, prices between AVC and Average Total Cost were presumed predatory if accompanied by a strategy to eliminate a competitor, and prices above ATC were presumed not to be anti-competitive.

priorities refers to the test in *AKZO*, but explains that (in the European Commission's view) a firm will be considered to be deliberately incurring losses or foregoing profits in the short term (sacrificing) if it charges a price below Average Avoidable Cost (AAC, as opposed to AVC).[185] The European Commission explains:

> *In most cases the [AVC] and AAC will be the same, as often only variable costs can be avoided. However, in circumstances where AVC and AAC differ, the latter better reflects possible sacrifice: for example, if the dominant undertaking had to expand capacity in order to be able to predate, then the sunk costs of that extra capacity should be taken into account in looking at the dominant undertaking's losses. Those costs would be reflected in the AAC, but not the AVC.*[186]

Therefore, the European Commission considers that AAC is a more precise benchmark against which prices should be compared to determine whether a firm is sacrificing profits. Whish and Bailey remark that:

> *[T]he suggestion that AAC, as a matter of economics, is a sounder standard than AVC in a case such as this seems compelling, and this is one of those areas where the EU Courts might, in future, be prepared to defer to the compelling logic of the Guidelines.*[187]

The US Department of Justice concludes that (although there is not unanimity on the issue):

> *The emerging consensus is that [AAC] typically is the best cost measure to evaluate predation claims.*[188]

Not only is AAC probably a more accurate yardstick, it is also arguably more administrable, as any confusion regarding whether a particular cost item is fixed or variable is negated.[189]

AAC is also a more inclusive basis for a predatory pricing rule. It would include any fixed costs incurred in order to execute the predatory strategy, in addition to relevant variable costs, whereas AVC would not. AAC is therefore either equal to AVC (if no such fixed costs are incurred) or it is higher. Coates states:

> *This recognition that sunk costs may be relevant to a predation analysis if they were incurred for the purpose of predation expands the net of the predation test in the sense that where such costs have been incurred, AAC will be higher – sometimes significantly – than AVC.*[190]

A predatory pricing rule based on AAC would therefore be able to reach more potentially predatory prices, without significantly increasing the risk of prohibiting legitimate competitive behaviour.

South Africa may therefore be stuck with a test for predatory pricing which is unduly under-inclusive, even though a more inclusive and accurate test is available and has been adopted elsewhere. Of course, anti-competitive pricing above AVC but below AAC could be assessed under section 8(c), but then no administrative penalty could be imposed for a first offence, even if the conduct was found to have an anti-competitive effect. As pointed out above, this is an unsatisfactory response to potentially deliberate and harmful exclusionary strategies.

Even if we leave aside whether AAC is in fact a preferable measure of profit sacrifice (indications are that it is), this brings into sharp focus the inability of South Africa's predatory pricing law to incorporate improvements, when economic advancement achieves '*discovery, refinement and displacement of analytical models*'.[191] The pitfalls of section 8(d)(iv) therefore provide strong support for a move to an open-textured statutory provision, which would allow the Tribunal to adopt a more appropriate benchmark for profit sacrifice.

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[185] European Commission's Article 82 Guidance document (*supra*), paragraph 64
[186] European Commission's Article 82 Guidance document (*supra*), footnote 3
[187] Whish and Bailey (2012), page 743; Jones and Sufrin (2011) appear to agree with this proposition on page 405
[188] DoJ Report (2008), page 65. See also *United States v. AMR Corp.* 335 F.3d 1109, 1115 (10th Cir. 2003) footnote 136; Canadian Competition Bureau, *'Enforcement Guidelines: Predatory Pricing'* (2008) [available at http://www.competitionbureau.gc.ca], page 13.
[189] Niels *et al* (2011), page 192; DoJ Report (2008), pages 63-68
[190] Coates, *'Competition Law and Regulation of Technology Markets'* (2011) Oxford University Press at paragraph 4.17 (pages 61-62)
[191] Gellhorn *et al* (2004), page 60, quoted at page 26 above

E. Section 8(d)(v): Buying-up a scarce supply of intermediate goods or resources required by a competitor

This section has not been the subject of a Tribunal hearing and does not appear in the mainstream theories of exclusionary abuse internationally. It is clearly aimed at dominant firms foreclosing competitors by raising their costs, as alternative sources must be found for the scarce resources[192]. It has also been likened to so-called 'predatory bidding', a concept discussed in the *Weyerhaeuser* case[193] in the USA.

The section appears relatively clear, although there may be some debate about whether the relevant inputs were 'scarce'. Its sporadic appearance in international jurisprudence indicates that it aims at a practice which is uncommon. Therefore it is difficult to draw conclusions regarding its administrability, but it clearly does not reflect international best practice.

It is submitted that this subsection therefore does not add much to the scope of conduct prohibited by section 8(d). It would be adequately covered by a single effects-based prohibition, which would also catch other means of raising rivals' costs which are currently resigned to the toothless provisions of section 8(c).

V. SUMMARY AND CONCLUSION

I have argued above that based on South Africa's economic characteristics (following conclusions of the predominant research on the topic), an under-inclusive approach to exclusionary abuse of dominance presents significant problems. On balance, the prescriptive rules contained in section 8(d), together with the weak deterrent value of section 8(c) result precisely in under-inclusion. Therefore, these sections in their present form are not suitable in South Africa's developing economy.

Each of the cited advantages of the sections' construction (treating more 'egregious' offences more harshly, administrability, deterrence, certainty and international best practice) has been shown, upon close inspection, not to hold up in practice. On the contrary, it has been argued that the exclusionary abuse provisions:

- Make unwarranted distinctions between different exclusionary acts, and then unjustifiably subject those acts to legal consequences of differing severity.

- Are difficult to administer because respondent firms are incentivised to raise technical objections to allegations against them in order to push the relevant conduct out of section 8(d) and into section 8(c), where no administrative penalty may be imposed for a first offence.

- Allow South African law to fall out of line with modern economics and international best practice. Examples of this include South Africa's rules on margin squeeze and predatory pricing, and the law's inability to deal effectively with 'new' abuses, such as the 'regulatory abuse' found by the European authorities in *AstraZeneca*.

- Often do not provide significant legal certainty, such as in the case of section 8(d)(i) – the inducement abuse.

- Are mostly unduly narrow, and therefore contribute to observed under-enforcement. Examples are found in the rules on refusal to supply, tying and predatory pricing. The subsection which has enjoyed the most robust enforcement has been section 8(d)(i) – a broad provision which prohibits a category of abusive practices rather than specifying a proxy for particular conduct.

[192] Unterhalter in Brassey (2002), pages 217-218
[193] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 27 S.Ct 1069 (2007)

It has been argued that each of these deficiencies could be remedied, or at least minimised, by amending the Act by replacing sections 8(c) and 8(d) with a single effects-based provision. This would expand the law's reach, and entrench greater flexibility. This effects-based statutory standard could be refined by the Tribunal and courts, and supplemented by guidelines from the Commission on their enforcement priorities. The successful enforcement of a number of 'inducement' cases under the broad provisions of section 8(d)(i) support this conclusion.

If the disadvantages of the Act's current formulation are as significant as appears from the discussion above, and can be remedied by a simple and relatively costless amendment, then this is something which should be taken up urgently by those responsible for shaping South Africa's competition law. It is submitted that this amendment would help to reconcile the exclusionary abuse provisions with the Act's stated objectives. By boosting the range of harmful conduct that the Act can credibly prevent, and generating greater flexibility in the enforcement process, it would allow more fruitful efforts to '*achieve a more effective and efficient economy in South Africa*'.[194]

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