**The Competition Amendment Bill: addressing dominance by old and new companies?**

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**Liberty Mncube**[1]
**Chief Economist, Competition Commission South Africa**
*Visiting Associate Professor of Economics, Witwatersrand University*
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I have heard it said that, in a way, **the practice of competition regulation is a little bit like practicing medicine. The goal of the doctor is to ensure patients' overall health. But the tests needed to come to a diagnosis and a therapy must be more specific and detailed than just asking whether a person feels in good health, or urging the patient to return to good health. Yet – medicine is, or should be, all about health.** And it is so, for competition, all about markets, regulating markets for a growing and inclusive economy but the tests for assessing conduct need to be accurate and administrable.

In relation to addressing dominance, the stated purpose of the amendment bill is to clarify and improve the determination of abuse of dominance and to strengthen the penalty regime.

The stated purpose indicates clearly, that something has gone wrong in the language, interpretation or enforcement by the authorities of the abuse of dominance prohibitions that holds the law back from working towards a more inclusive, and growing economy.

I agree. Several things have not played out as intended, perhaps as a result of the interpretation of existing law, or the enforcement approach by the competition authorities but whatever the reason maybe, the outcomes have been less than optimal for South Africa.

Given my expertise and my limits, I will make my remarks on the amendments to the abuse of dominance provisions from the sight of an economist and where appropriate, a competition enforcer.

[1] Own comments, not a reflection of the views of the Commission.

Let me start by pointing out that competition law regulation is constantly changing, this means the true status of what one might consider as well settled rules is uncertain.[2]

**I will arrange my remarks under two headings: exploitative and exclusionary practices.**

**Exploitative practices**

Starting with exploitative practices, let me start by saying that a lot of the work done by competition authorities protects consumers indirectly, by keeping markets competitive.

When faced with firms engaging in an exploitative practice, the best that consumers can do is to turn to rivals for competitive outcomes. Given the high levels of concentration in our economy, we often come across cases where there is not enough competition in the market to provide a real choice.

These are situations in which dominant firms exploit their customers by charging excessive prices.

Excessive pricing is currently a hot issue in many jurisdictions of the world, and standards are developing. **In November this year, the Commission will host the ICN Unilateral Conduct Working Group workshop and one key topic will be excessive pricing. In December this year, the OECD will host a roundtable discussion on excessive prices.**

I am mindful that we have to be circumspect in the way we deal with cases of alleged excessive pricing;

(i) First, a firm may have high profits because of superior innovation and risking taking, which we must encourage.
(ii) Second, in most markets high profits encourage new firms to enter and existing ones to expand. This is an important mechanism which allows markets to restore competition.

[2] Consider for example, minimum resale price maintenance has been long considered as per se unlawful. But if you should ask an economist whether as a matter of economics this should be the case, the answer will be that it may be preferably that such conduct is assessed through an effects based approach which balances contending views. This may be due to the weight of scholarly criticism.

But markets are imperfect, Information asymmetries, entry barriers, capital-markets imperfections, and other realities such as, historic privileges all conspire against the idea that markets, in and of their own, will restore competition.

We in South Africa have been working out the standards for accessing excessive prices. This has taken place largely around 2 key cases, the Sasol and Mittal cases.

The amendment bill on excessive pricing correctly identifies excessive prices as those that are to the detriment of **customers**.[3]

I can think of two categories of excessive prices.

(i) A firm charges excessive prices to final customers [or consumers].
(ii) A firm charges excessive prices of an input to another firm downstream, [that is, its direct customer], either because it wants to exclude it or because it tries to extract as much as possible from it.

The deletion of the definition of excessive prices from the Act, is of course welcome. This United Brands test is correctly described as **"a deceptively simple approach".**

**This part of the amendment will allow the Tribunal and the Court, to have more freedom in deciding what the test should be on a case by case basis.**

There is a lot of knowledge accumulated now, from previous cases in South Africa and elsewhere.

The amendment on excessive pricing prohibition also identifies factors **which may** be taken into account when considering whether prices are excessive relative the competitive price.

The factors identified make sense as a matter of economics and are informed by the previous cases. **The list of factors identified are already part of the tools in the tool box for economists.**

In practice, situations may arise where some of the factors point in different ways, in such situations the Tribunal and the Court will have to look at the evidence in totality.

[3] There current wording focuses on consumers.

**Exclusionary practices**

Moving on to the issue of exclusionary conduct by dominant firms, the most recent cases relate the use anticompetitive exclusive contracts and tying, we await decisions from the Competition Tribunal.

The amendment introduces **uniform remedies for illegal exclusionary acts.** This for me is most important clarification made in relation to abuse of dominance.[4] All exclusionary conduct should attract a penalty when uncovered and prosecuted.

**The amendment also introduces participation, in the definition of an exclusionary act. I consider this** as a timely and welcome change.

Importantly, the amendment to predatory pricing is also very welcome. In my opinion, since marginal costs are more a theoretical category than ones which can be easily estimated and measured, by deleting "marginal cost" we do not lose much.

The amendment also uses standard definitions in stating what is a predatory price and this is stated in relation to Average Variable Costs and Average Avoidable Costs. Average avoidable cost' means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided engaging in a predatory strategy. Average variable costs is the total of all costs that vary when there is a change in the quantity of a particular good, divided by the quantity of the goods produced.

I agree with the addition of margin squeeze under section 8 d. There is, however, a need to clean up on the definition of margin squeeze.

I would like now to briefly talk about the provision that **relates to monopsony power**. Monopsony exists when there is but one buyer of a good or service. This amendment has the effect of thrusting concerns about monopsony power to the forefront of consideration by competition lawyers, economists and regulators.

Perhaps, a starting point is to acknowledge that for years, there have been complaints by small farmers that they are victims of monopsony power, as small sellers facing a monopoly buyer or limited buyers, they have limited bargaining power.

In the area of merger regulation, one common theory of harm leading to prohibiting mergers is the so called merger to monopsony. When buyers merger, they too can increase their leverage with respect of sellers.

In the area of collusive conduct, collusive monopsony or the situation where buyers fix prices is treated in the same manner as sellers fixing a price. You may recall a case that Commission pursed once against the milk producers for fixing the milk procurement prices.

The monopsony prohibition prohibits a firm with monopsony power from using its power to lower prices.

**It is understandable that the policy maker and the legislatures** when considering monopsony pricing and seeing the analogy to monopoly price setting has identified the use of buyer power to obtain a lower price as a violation of competition law.[5]

It is important to note that **practice does not exist simply in theory,** they have been allegations of such conduct taking place. In other countries for example in US, one successful case was the *American Tobacco vs. United States.* **This relates to impeding the ability of suppliers to participate effectively, especially in the agricultural sectors of the economy by firms with monopsony power.**

**I do agree with the efforts to respond directly to prices by firms with monopsony power.**

[5] Our law currently responds to monopoly pricing by a monopolist when it deals with excessive prices. Another way to think about is to consider a situation of predatory pricing. In this case, the seller lowers prices to predatory levels in order to eliminate competition and in the aftermath of their departure from the market increases prices to recoup the losses. The monopsony version of this would involve raising prices paid for inputs in order to raise the cost of rivals or deny them of access to necessary inputs. The ultimate goal is to exclude competitors from the input market. In the aftermath of their departure, the dominant firm may recoup by lowering prices for the input.

**Conclusion**

Before I conclude, let me repeat a remark I made at the start.

Looking back at the past 20 years, there have been many debates on how competition authorities in South Africa should approach allegations of abuse of dominance. The debates arise from an impression that something has gone wrong in the language, interpretation or enforcement of the abuse of dominance prohibitions and this has made it impossible to prove an abuse of dominance cases.

**Whether this is or not the case**, the competition analysis standard, [the effects based approach], we have developed in the South Africa is quite remarkable in many respects.

The amendments to the abuse of dominance prohibitions clearly reconcile accuracy and administrability even when we are faced with complex cases requiring us to gather and properly assess significant amounts of information.

We should treasure this tradition and make it grow stronger.

**And we will do this if we regulate competition for a growing and inclusive economy.**