A Review of abuse of dominance provisions of the Competition Act - is it necessary?
by I Lesofe and N Nontombana[1]

Introduction

The structure of the South African economy is largely a reflection of its apartheid past with key economic sectors characterised by high levels of concentration. The Competition Act 89 of 1998, as amended, was one of the policy instruments identified by the post-apartheid government as a mechanism to strengthen the South African competition regime so as to transform the economy. For instance, the adoption of the Competition Act sought to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.

In its more than 15 years of existence, the Competition Commission's intervention through the prosecution of abuse of dominance cases has had little impact. A lot of the abuse of dominance cases that have come before the Competition Commission have been closed after investigation, settled or simply rejected in higher courts. To date, very few abuse of dominance cases have been successfully prosecuted before the Competition Tribunal. As a result of this poor track record, a number of important sectors in the economy remain highly concentrated, untransformed and susceptible to abusive conduct by dominant firms.

One of the issues identified by policy makers and other commentators, as impeding the successful prosecution of abuse of dominance cases is the construction of the Competition Act itself and although there have been amendments to this Act in the past, these have not gone far enough to address challenges experienced in the prosecution of abuse of dominance cases. In his recent budget vote, the Minister of Economic Development expressed government's intention to make further amendments to the Competition Act with a specific focus on abuse of dominance provisions.

At the outset we must however state that the challenges of enforcing abuse of dominance is not peculiar to South Africa alone. This article is an attempt to stimulate debate in this area of enforcement.

Specifically, we propose some of the amendments that could change the current course in abuse cases by identifying some of the impediments brought about by the high threshold required to prove anticompetitive conduct in the Act. We start by tracking the origins and evolution of competition policy in South Africa. We also track decisions on specific abuse of dominance cases over the years and the approach in other jurisdictions, to substantiate recommendations made, where appropriate.

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The origins and evolution of competition policy in South Africa

Competition policy in South Africa dates back to as early as 1955 when the Regulation of Monopolies Conditions Act[2] ("RMC Act") was promulgated. Although the RMC Act sought to promote and maintain competition in South African markets, it failed to achieve this objective. The Board of Trade and Industries, a body tasked with the administration of the RMC Act, could not use this piece of legislation to prevent the creation of monopolies in different sectors of the economy. This is because the RMC Act was very lenient and had no provisions that could deter firms from engaging in anti-competitive practices.[3]

The Board of Trade and Industry had no powers to act independently as the Minister of Trade and Industry was empowered to choose and decide which investigations to pursue and the nature of relief to be sought. In consequence, while the Board existed for over twenty years, very few investigations were pursued.[4]

A review of the South African competition policy in 1976, conducted by the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, found that the RMC Act was ineffective and, in consequence, there was an exceptionally high degree of concentration of economic power in South Africa. The Mouton Commission, as it was dubbed, found the following regarding the state of competition in South Africa:

- Despite the existence of the RMC Act for more than 20 years, a number of sectors in the economy were highly concentrated. These included the beer, pulp and paper, tobacco and fertilizer sectors.[5] It bears mention that more than 40 years later, these sectors are still highly concentrated despite the changes that have taken place over the years, including the introduction of the new competition policy post-apartheid;
- The RMC Act did not have provisions aimed at regulating merger activities in South Africa. As a result, mergers between large firms occurred frequently and this had a direct impact on high concentration levels;[6]
- Government also contributed to high concentration levels in markets by creating its own monopolies, such as ISCOR (now known as ArcelorMittal) and ESCOM (now known as ESKOM). [7] It is worthwhile to note that some of the firms that held monopolistic positions in markets as a result of state support are still dominant to date. For instance, in the flat steel market ArcelorMittal holds in excess of 80% market share;[8]
- The RMC Act did not have provisions that proscribed firms from reaching joint decisions such as price fixing. Spandau (1975) observed that there was widespread cartel arrangements in South Africa because of a lack of prohibition of cartel conduct;

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[2] Act 24 of 1955. Mouton describes this Act as the first comprehensive piece of legislation adopted in South Africa for purposes of regulating harmful monopolistic conditions. See D.J. Mouton, The Behaviour of the Firm and the Problem of Restrictive Trade Practices, thesis, 1974. The RMC Act came into effect in January 1956. Prior to the RMC Act, there were other legislations that partly addressed monopolistic conditions. For a detailed discussion, see E Bekker, Monopolies and the role of the competition board, 1992 TSAR 618; and R Legh in Brassey et al, Competition Law,2002, page 61.

[3] D Davis and L Granville in Fox et al, The Design of Competition Law Institutions, 2013, page 267.

[4] D Davis and L Granville in Fox et al, The Design of Competition Law Institutions, 2013, page 267. See also A Spandau, Towards a New South African Competition Policy, 1977 SAJE 45 (3) page 300.

[5] Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955, page 33-37. See also A Spandau, Towards a New South African Competition Policy, 1977 SAJE 45 (3) page 300.

[6] Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955, page 44.

[7] Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955, page 43.

[8] Mittal Steel South Africa vs. Harmony Gold Mining 70/CAC/Apr01.

- In the period 1955-1976, only 18 investigations into suspected monopolistic conditions (i.e. anti-competitive practices) were initiated through the RMC Act. Some of the monopolistic conditions found, especially those relating to resale price maintenance, were prohibited whereas others were resolved through settlement arrangements with the parties involved;[9]
- The RMC Act was ineffective because it was not properly applied. According to the Mouton Commission, the main weakness of the RMC Act was its inability to deal effectively with the impact of economic concentrations and their effects on structure and competition;[10]

In light of these findings, the Mouton Commission proposed a new approach to the South African competition policy. In this regard, it was proposed that a new competition policy be introduced with three key features, namely the adoption of new legislation that would widen the scope of the body responsible for the enforcement of legislation by providing it with powers to initiate investigations on its own accord; the establishment of an autonomous body with wider powers and functions to implement the new legislation; and the introduction of merger control mechanisms to regulate merger activities.[11]

The recommendations of the Mouton Commission led to the adoption of a new piece of legislation in 1979, which replaced the RMC Act. The Maintenance and Promotion of Competition Act ("Promotion of Competition Act") created a new body, the Competition Board, which was appointed by the Minister of Trade and Industry.[12] Just like its predecessor, the Promotion of Competition Act was ineffective. It contained no explicit prohibitions and relied on 'public interest' as a measure for prohibitions, a concept which was not defined in the Act. In consequence, the Competition Board issued inconsistent decisions.[13] Despite the existence of the board for more than 25 years and the creation of a special court to hear cases referred by the board, no single case was prosecuted under the Promotion of Competition Act.[14] The only tangible achievement under this legislation was the issuing of a regulation in 1984 which declared practices such as resale price maintenance and horizontal collusion to be *per se* unlawful.[15] These prohibitions were subsequently carried over into the new law which replaced the Promotion of Competition Act, discussed below.

The birth of the Competition Act

When the new government came to power, one of its objectives was to restructure the South African economy.[16] Competition policy was identified as one of the instruments that could be used to achieve this goal. However, given the inadequacies of the old competition policy, the first task for the new government was to redesign this policy with new objectives.[17] The revision of competition policy in South Africa was unique in that it had to address, among other things,

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[9] Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955, page 19-22. See also A Spandau, Competition Policy in South Africa: Further Comments, 1975 SAJE 43(3) page 329.

[10] Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955, page 66.

[11] Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955, page 97-108.

[12] R Legh in Brassey et al, Competition Law,2002, page 71.

[13] T Hartzenberg, Competition Policy Review, page 8. Accessed at http://www.thepresidency.gov.za/docs/reports/15year_review/economic/competition.pdf.

[14] D Davis and L Granville in Fox et al, The Design of Competition Law Institutions, 2013, page 268.

[15] OECD Peer Review: Competition Law and Policy in South Africa, 2003, page 13.

[16] S Roberts, Effects-based Tests for Abuse of Dominance in Practice: The Case of South Africa , 4/ 2012, page 2.

[17] OECD Peer Review: Competition Law and Policy in South Africa, 2003, page 14.

economic distortions created by the apartheid government. Thus, in addition to achieving the traditional competition imperatives, the new policy had to be structured in such a way that it would contribute to the realization of socio-economic objectives. These include the opening of gates for new firms, in particular SMMEs, in sectors historically dominated by a handful of firms. As part of the restructuring process, the Promotion of Competition Act had to be replaced with a new law that would respond to the objectives of the new competition policy. This new legislation became known as the Competition Act.

The goals of the Competition Act

The Preamble

The preamble of the Competition Act sets out the circumstances that led to the promulgation of the Act and the historical context within which the Act must be understood. It recognizes, *inter alia,* that because of the discriminatory laws and other practices of the past, the South African economy is excessively concentrated, with inadequate restraints against anti-competitive practices. The preamble also states that the Competition Act was enacted to:

- provide all South Africans with equal opportunities to participate fairly in the national economy;
- achieve a more effective and efficient economy in South Africa;
- provide for markets in which consumers have access to and can freely select the quality and variety of goods and services they desire;
- create greater capability and an environment for South African firms to compete effectively in international markets;
- restrain certain practices that undermine a competitive economy;
- regulate the transfer of economic ownership in keeping with the public interest; and
- establish independent institutions to monitor economic competition and to give effect to international law obligations.

Section 2 of the Act

Section 2 of the Competition Act is probably the most important section in the Act; metaphorically, it can be described as the soul of the Act. The section states that the purpose of the Competition Act is to promote and maintain competition in South Africa in order to:

- promote the efficiency, the adaptability and development of the economy;
- provide consumers with competitive prices and product choices;
- promote employment and advance the social and economic welfare of South Africans;
- expand opportunities for South African participation in world markets and recognize the role of foreign competition in South Africa;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Sutherland asserts that it is apparent from section 2 of the Competition Act that this legislation is intended to meet multifarious goals.[18] The section clearly demonstrates that the Competition Act has socio-economic dimensions. While competition authorities, in particular the Competition Tribunal and the Competition Appeal Court, have emphasized on several occasions that the general objective of competition law in South Africa is to protect consumers, one cannot ignore its other goals which were deliberately incorporated in the Competition Act by the legislature.

[18] P Sutherland and K Kemp, Competition Law of South Africa, 2015.

Thus, it should always be appreciated that the purpose of Competition policy in South Africa is broader than the traditional international economic goals.

Fox (2000)[19] proposes that the non-competition goals of the Competition Act should be considered when explicitly mentioned in the provisions of the Act. This approach appears to accord with the approach followed by the Competition Appeal Court in Nationwide Poles.[20] However, as demonstrated below, there has been little benefit from the interpretation and application of the Competition Act in this manner. More than fifteen years after the promulgation of the Competition Act, key industries remain highly concentrated and susceptible to abuse of dominance conduct.

Abuse of dominance – track record

Since the promulgation of the Competition Act in 1999, the number of abuse of dominance cases considered by competition authorities in South Africa has also increased. At the time of writing this paper, a total of 32 abuse of dominance cases had been considered by competition authorities and courts. These cases can be divided into three categories: (1) cases considered on the merits. This category includes cases prosecuted by the Competition Commission and private litigants; (2) interim relief applications. These are cases brought by complainants who have filed complaints with the Competition Commission and seek interim relief; and (3) cases resolved through settlement agreements. The table below gives a breakdown of these cases.

Table 1: Abuse of dominance cases considered by competition authorities since their establishment[21]

Parties	Alleged conduct & section of Act	Outcome	Comment
Cases considered on the merits			
1. CC vs. Media 24	Predatory pricing: 8(d)(iv) & 8(c)	Successful under s (8(c))	On appeal
2. CC vs. Telkom	Denial of access to an essential facility & Inducement: 8(b) & 8(d)(i)	Successful under s 8(b) & 8(d)(i)	
3. CC vs. Sasol	Excessive pricing: 8(a)	Dismissed	The Tribunal ruled in favour of the Commission. On appeal, the CAC set aside the Tribunal's ruling.
4. CC vs. SAB	Price discrimination: 9(1)	Dismissed	On appeal, the CAC confirmed the Tribunal's ruling
5. Nationwide & Comair vs. SAA	Inducement: 8(d)(i)	Successful	SAA's appeal was dismissed by the CAC
6. CC vs. BATSA	Inducement: 8(d)(i)	Dismissed	
7. CC vs. Senwes	Inducement & Price discrimination: 8(d)(i), 8(d)(iii), 8(c) & 9(1)	Successful under s 8(c)	
8. Mapula Restaurant vs. Coca-Cola	Price discrimination: 9(1)	Dismissed	This complaint was self-referred after the CC declined to prosecute
9. Harmony Gold vs. Mittal Steel	Excessive pricing: 8(a)	Dismissed	On appeal, the CAC set aside the Tribunal's ruling and remitted the matter back to the Tribunal for reconsideration. Subsequently, the parties reached settlement.

[19] E Fox, Equality, discrimination and competition law: lessons from and for South Africa and Indonesia, 2000, Harvard Comparative Law Journal, 579.

[20] Sasol Oil vs. Nationwide Poles CC 49CAC Apr05.

[21] This table does not included cases that have not been considered by the Tribunal, except for the recent settlement agreement between the Commission and ArcelorMittal. These include cases such as CC vs. Computicket and CC vs. Uniplate.

10. Mandla-Matla vs. Independent Newspapers	Refusal do deal: 8(c) & 8(d)	Dismissed[22]	This complaint was self-referred after the CC declined to prosecute
11. CC vs. SAA	Inducement: 8(d)(i)	Successful	
12. Nationwide Poles vs. Sasol	Price discrimination: 9(1)	Dismissed	On appeal, the CAC set aside the Tribunal's ruling
13. Lekoa Fitment vs. Altech	Exclusionary act:8 (c) & 9(1)	Dismissed	
14. CC vs. Patensie	Inducement: 8(d)(i)	Successful	On appeal, the CAC confirmed the Tribunal's ruling
Interim relief applications			
15. JG Grant vs. Schoemanville	Price discrimination: 9(1)	Dismissed	
16. Normandien vs. Komatiland	Excessive pricing, exclusionary act, price discrimination: 8(a), 8(c) & 9(1)	Dismissed	
17. Anchor Zedo vs. Passenger Rail Agency	Exclusionary act: 8(c)	Dismissed	
18. Simba vs. Webber Wentzel	Inducement, Exclusionary act: 8(c) & 9(1)	Dismissed	
19. The Bulb Man vs. Hadeco	Exclusionary act, inducement & price discrimination: 8(c), 8(d)(i) & 9(1)	Dismissed	
20. Dumpit Waste vs. City of Johannesburg	Inducement: 8(d)(i)	Dismissed	
21. Pharmaceutical Wholesalers vs. Glaxo Wellcome	Exclusionary act & inducement: 8(c) & 8(d)(i)	Dismissed	
22. Nkosinauth vs. BATSA	Exclusionary act: 8(c)	Dismissed	
23. York Timbers vs. SAFCOL	Refusal to supply: 8(c) & 8(d)(ii)	Dismissed	
24. SA Fruit Terminals vs. Portnet	Price discrimination: 9(1)	Dismissed	
25. Nationwide vs. SAA	Predatory pricing	Dismissed	
26. Bezuidenhout vs. Patensie	Exclusionary act: 8(d)(i)	Successful	
27. DW Integrators vs. SAS Institute	Exclusionary act: 8(c)	Dismissed	
28. SA Raisins vs. SAD Holdings	Exclusionary act: 8(d)(i)	Successful	
Cases resolved through settlement agreements			
29. CC vs. ArcelorMittal	Excessive pricing, price discrimination: 8(a) & 9(1)	Settlement awaiting confirmation	
30. CC vs. Foskor	Excessive pricing: 8(a)	Settlement confirmed	
31. CC vs. Rooibos	Exclusionary acts: 8(c)	Settlement confirmed	
32. CC vs. Sasol (fertilizer)	Excessive pricing, exclusionary acts & price discrimination: 8(a), 8(c), 8(d) & 9(1)	Settlement confirmed	

As can be seen from the table above, since 1999 competition authorities have considered more than 30 abuse of dominant cases. Although this number is reasonable, it is worrying to observe that most of the cases considered were ultimately dismissed. For instance, out of the 14 interim relief applications considered by the Competition Tribunal only 2 we successful. Most of these applications were dismissed on the basis that the affected parties, most of which were SMMEs, could not establish anti-competitive effects. In the SAA matter, the Tribunal indicated that anti-competitive effect is reflected in actual harm to consumer welfare or significant foreclosure to rivals.

In the Normandien matter, an application brought by a small sawmiller against alleged abuse of dominance practices by Komatiland Forest was unsuccessful and the Competition Tribunal reasoned as follows:

> *"Viewed in the best possible light, the applicant has depicted that a single player in a market may have been negatively affected (for example by having to pay a higher price). It does not follow necessarily that this translates into a substantial prevention or lessening of competition in the market as a whole. For such a finding to be reached,... it would have to be found that because of the negative effect on the applicant and the applicant's size/ relevance in the defined market,*

[22] Failure to prove anti-competitive effects.

> *there has in fact been a substantial prevention or lessening of competition in the market as a whole. This has certainly not been shown and section 8(c) allegation is accordingly dismissed."*[23]

Similarly, in the interim relief application brought by Nationwide Poles cc against Sasol Oil (Pty) Ltd, Nationwide Poles alleged that Sasol's discount structure which was based on volumes purchased amounts to prohibited price discrimination. The complainant was one of Sasol's smaller customers and was therefore charged a higher price than larger customers of creosote.[24]

In the decision the Tribunal goes into a lengthy but useful discussion on why price discrimination in South Africa is accorded special recognition in the Act, that similar to the US.[25] Importantly, the legislature intended for this section to ensure entry and access by new entrants so that they may compete effectively against larger incumbents. This is particularly true for small businesses that are struggling to make inroads and to expand in concentrated markets because of anti-competitive conduct in input markets.

Although the Tribunal does acknowledge the tensions between ensuring competition and protecting smaller firms in competition law and policy broadly, this is squarely within the context of adopting and implementing competition law and policies that are not blind to the socio-economic circumstances of developing countries.

However, on appeal the respondents were able to make a case that there was no prohibited price discrimination if one considers the wording of section 9(1)(a) of the Act. The CAC in fact agreed with this and states that it had not been presented with sufficient evidence (on other small firms) that Sasol's pricing structure had the (likely) effect of substantially preventing or lessening competition in the market. It was only able to establish the 3.6%-4% cost burden on Nationwide Poles, despite which it was still able to compete and operate in the market. The CAC famously states that "competition law does not protect the competitor, it protects competition" but that its conclusion does not minimize the weight put by the legislature on price discrimination, the evidence on the impact was simply not taken into account in the Tribunal's decision.

The approach followed by the Tribunal and the CAC in some of these cases is slightly different from their approach in earlier decisions. In the latter decisions, it was sufficient to prove that the conduct complained of was an exclusionary act as defined in section 1 of the Competition Act. The applicant was not required to prove that the conduct also has the effect of substantially preventing or lessening competition. For example, in Bezuidenhout the Tribunal interpreted section 8(d)(i) as follows:

> *"Next we must determine whether the respondent is engaging in an exclusionary act in that it requires or induces its suppliers to not deal with a competitor. 'Exclusionary act' is defined in Section 1 of the Act as "an act that impedes or prevents a firm entering into, or expanding within, a market". The provisions in the respondent's articles of association which we highlighted above without doubt serve to induce farmers, who are shareholders in the respondent, not to deal with the respondent's competitors – in fact they go even further than that as they require exclusivity from these producers. Moreover, we are convinced that this arrangement would make it more difficult for new entrants to enter the market, as well as for existing packaging sheds to expand in the market, as they would not easily, or at all, be able to woo producers away from the*

[23] Normandien Farms vs. Komatiland Forests 018507, page 7.

[24] Creosote is a wood preservative produced by Sasol Oil and used by Nationwide Poles for the treatment of poles supplied from its Eastern Cape pole manufacturing plant to vineyards in Western Cape.

[25] Section 2(a) of the Robinson Patman Act.

respondent by offering higher prices for their produce. We consequently find that the respondent has contravened Section 8(1)(d)."[26]

In Sappi Fine Papers, delivered in April 2002, the Tribunal stated the following:

"The respondent argues that the Commission would also have to allege that the imposition of this allegedly unrelated condition is anti-competitive in its effect. However, we reject this argument. The acts described in 8(d)(i) are characterized in Section 8(d) as 'the following exclusionary acts' which in turn are defined as 'act(s) that impede(s) or prevent(s) a firm entering into, or expanding within, a market'. Thus these acts, in contrast with the general category of 'exclusionary acts' referred to in Section 8(c), are presumptively anti-competitive – a complainant is not required to allege or prove facts to this effect. <u>In other words the acts described in Section 8(d)(1)-(v) are per se anti-competitive… one does not have to do any further delving in order to establish whether or not a practice described in Section 8(d) is indeed anti-competitive – this the Act establishes for us</u>."[27](Own emphasis)

The more recent adoption of an effects based approach is in line with developments in other jurisdictions such as the US and EU. The support for an effects based approach is that it is more grounded in the use of economics to assess anti-competitive effects (consumer harm) of abusive conduct in contrast to the form based approach. The form based approach presumes an abuse once certain conditions have been met, and is equivalent to a *per se* rule. However, the form based approach has been largely abandoned for concerns over Type I (false positives) errors.[28]

Cases resolved through settlement have yielded some positive results.[29] Such outcomes, we submit, are consistent with the socio-economic goals set in the Competition Act. In the settlement between the Competition Commission and Foskor, the latter agreed to significantly reduce phosphoric acid and phosphate rock prices for the benefit of downstream markets that rely on these products as inputs.[30] In another settlement, Sasol Chemical Industries agreed to divest and dispose of its granular and liquid fertilizer blending facilities.[31] The purpose of this remedy was to open up markets and provide smaller players with the opportunity to participate equitably in the fertiliser industry.[32] Recently, the Commission concluded a settlement agreement with ArcelorMittal SA Ltd (AMSA) in terms of which the latter agreed to pay a hefty penalty and introduce some changes in its pricing of flat steel products.[33] The settlement agreement is discussed in more detail below.

However, these settlements have been too few and limited to significantly change the dynamics of the economy as intended.

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[26] Bezuidenhout vs. Patensie 66/IR/MAY 00, page 12.

[27] Sappi Fine Papers vs. Competition Commission 62/CR/Nov01, page12-13.

[28] Christiansen A. and Kerber W. Competitin Policy with Optimally Differentiated Rules Instead of "Per Se Rules v Rule of Reason" *Journal of Competition Law and Economics* 2(2) page 215-244

[29] S Roberts, Effects-based Tests for Abuse of Dominance in Practice: The Case of South Africa , 4/ 2012, page 12.

[30] Competition Commission and Foskor 43/CR/Aug10. See also Competition Commission media release: Competition Commission reaches a settlement agreement with Foskor, 04 August 2010.

[31] Competition Commission and Sasol Chemical Industries 45/CR/May06.

[32] Competition Commission media release: Sasol agree to divestiture in fertiliser case, 05 July 2010.

[33] Competition Commission vs ArcelorMittal South Africa Limited CR092Jan07/ SA090Aug16. At the time of writing this article, the settlement agreement had been filed with the Tribunal for confirmation as an order of the Tribunal.

The inability to prove anti-competitive effects is however not the only challenge highlighted in successfully prosecuting abuse cases. There are also differences in the interpretation of the Act as discussed briefly in the following case studies:

Excessive pricing[34]
Section 8(a) of the Competition Act states that:
it is prohibited for a dominant firm to –
(a) charge an excessive price to the detriment of consumers.

The Competition Act defines an excessive price as a price for a good or a service which -
(aa) bears no reasonable relation to the economic value of that good or service and
(bb) is higher than the value referred to in subparagraph a

The Competition Act however does not define what the economic value is or how it should be measured, and as reflected in various court decisions this has been subject to different interpretations. Importantly, the Commission has not been able to successfully prosecute an excessive pricing case since its inception due to these different interpretations of what constitutes excessive pricing by a dominant firm.

The courts' decisions in excessive pricing cases are briefly summarised in the case studies below.

Case study – Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd V Mittal Steel South Africa and MacSteel International BV[35]

The Tribunal defined a non-excessive price in the context of this Mittal case as one that is determined by competitive conditions in the relevant market, which is the South African market for flat steel products.[36]

The Tribunal goes on to explain that 8(a) is conceptually contradictory in its requirement for competition authorities to determine when a price is excessive (regulation of the price) and at

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[34] The Commission has considered two prominent excessive pricing cases. The first was a complaint referral against ArcelorMittal South Africa Ltd (Mittal) and Macsteel International BV[34]. The complaint had been lodged by Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd against Mittal for allegedly pricing flat steel products excessively in contravention of section 8(a) of the Act. At the time of the complaint, Mittal was a dominant supplier of flat steel accounting for about 80% of the market, the rest being held by Evraz Highveld Steel and Vanadium Ltd. More recently (2010), the Commission referred another excessive pricing case which was initiated by the Commission against Sasol Chemical Industries Ltd (Sasol). Interestingly, this complaint was initiated based on the information received from the dti regarding concerns about pricing practices within the polymers sector in relation to purified propylene and polypropylene. Sasol and Safripol (Pty) Ltd are the only producers of polypropylene in South Africa, and Sasol is also the main supplier of purified propylene other than Sapref (a joint venture between Shell SA Refining and BP Southern Africa). Purified propylene is an input into polypropylene which is in turn an input into the manufacturing of plastic products downstream. The main consumers of polypropylene are plastic converters.

[35] 13/CR/Feb04 - This complaint was referred to the Tribunal directly by the complainants in 2004 after the Commission had issued a notice of non-referral i.e. dismissing the complaints. The complainants referred the complaint in their capacity as gold mining companies which are consumers of flat steel products manufactured by Mittal and sold through various merchants in South Africa.

[36] See paragraph 47.

the same time the basic principle of competition law and economics is to leave market forces to determine the equilibrium price, which under perfect competition would be the right/correct price.

> *"…the arguments of both the complainants and Mittal SA would effectively have the competition authorities adopt, by virtue of Section 8(a), the methodologies of price regulation. This is not our approach… we do so using principles and methodologies firmly rooted in the practice of competition law and economics."* [37]

With no clear guidance from statutes or precedence, the competition authorities have the task of judging which of these approaches would pass the requirements for the conduct to be considered an abuse by a dominant firm. In its decision the Tribunal alludes to the difficulties faced by competition authorities in this regard as follows:

> *"…our interpretive efforts must surely initially focus on the language in our definition section. What did the South African legislators mean by the definition of excessive price that it inserted into statute? This enquiry must surely take precedence over an uncritical borrowing from the decisions of a foreign court. We emphasise that this is the approach that our superior courts have commended to us"* [38]

The Tribunal referred extensively to various scholars and decisions from other jurisdictions in elaborating its interpretation of when a firm would be considered to have abused its dominance by charging excessive prices.[39] Evans and Padilla specifically indicate that there are conceptual and practical difficulties in assessing excessive pricing and it is therefore not an exact science for any court or even competition authority.[40]

Despite these challenges, the Tribunal found Mittal's pricing was tantamount to a pure exercise of monopoly power as it could not be reasonably explained by competitive forces but market structure which translates into ability to price independently. In its decision the Tribunal goes into some detail about Mittal's history (formally Iscor[41]) of being a state owned company receiving protection and support from the government. Therefore there was no need for it to determine whether the price charged by Mittal bears any reasonable relationship to economic value, as by its very nature it was a monopoly price. The Tribunal did not determine what an excessive pricing is citing difficulties and various benchmarks and measures in this regard.

In its decision, the Tribunal considered whether the structure of the market was conducive to a firm/s charging excessive prices. It is worth noting that the Tribunal referred to a concept of "super dominance" than "mere dominance" which is not in the Act in its current form as a higher hurdle for a firm to pass and ancillary conduct – and that the market should be uncontested and incontestable.

On appeal, the CAC found the Tribunal's approach to be fundamentally flawed and remitted the matter back the Tribunal and one of the criticisms to the Tribunal was that there was no explicit finding of an excessive pricing conduct or even a determination of an excessive price and therefore no jurisdiction to grant relief (remedies). According to the CAC, the Tribunal had failed to consider actual prices and costs and their relation to economic value and that the economic

[37] Paragraph 37 of the decision in Mittal case number 13/CR/Feb04
[38] Paragraph 139 of the decision in Mittal case number 13/CR/Feb04.
[39] See 13/CR/Feb04
[40] Paragraph 98-99 of the decision in Mittal case -13/CR/Feb04.
[41] South African Iron and Steel Corporation incorporated in June 1928 and subsequently listed in 1989.

value is that which would prevail under conditions of long –run competitive equilibrium not in the short-run.
In fact the CAC states that the Tribunal took a conceptual approach when it is bound to apply the law within the meaning of the Act.

Case study – Competition Commission v Sasol Chemical Industries Ltd[42]

The approach taken in this case was to use price-cost analysis [and other methods/benchmarks] to determine economic value and therefore deal with the shortcomings that had been identified in the Mittal case by the CAC.

However, there remained interpretation difficulties and technical difficulties in making this case as well. The testimony given at the Tribunal confirms the difficulties that competition authorities would face in prosecuting excessive pricing just taking into account firstly the disputes/disagreements in the nature of economic and financial data to be considered for the price-cost tests; the quantification of the data; the relevant data points and the actual assessment/interpretation of the data. Some of the difficult questions that the Tribunal grappled with relate to the valuation of assets, allocation of common costs and transfer pricing, which all require experts in their field.

The Commission and the Tribunal again made a case similar to that made in the Mittal case regarding the advantages enjoyed by entities whose history is that of having benefited from state support and therefore a cost advantage not brought about by innovation or risk taking, which should be considered in quantifying the economic value of purified propylene.

In the end the Tribunal found that Sasol had engaged in excessive pricing in contravention of section 8(a) of the Act. Sadly, this excessive pricing case also suffered a similar fate to that in Mittal, as it was subsequently appealed successfully by the respondents.

Again, the CAC levied heavy criticism against the Tribunal and the Commission in the case. The criticism was not only in the interpretation of law but also in the use of financial and economic evidence as well as experts. However, with this judgement there has been more clarity in some but not all aspects regarding how excessive pricing should be assessed by competition authorities.

Predation
The Act states that :
It is prohibited for a dominant firm to –

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –
    (iv) selling goods or services below their marginal or average variable cost

The Act defines an exclusionary act as an act that impedes or prevents a firm from entering into, or expanding within, a market.

[42] 48/CR/Aug10 and 131CACJun14.

The Commission has only been able to successfully prosecute a predation case as recently as 2015 following a complaint filed by Berkina Twintig (Pty) Ltd, a small community newspaper based in Welkom. Importantly, the complaint had initially been filed by the owner before but was not pursued by the Commission.

The complaint was against Media24 Ltd and referred to the Tribunal alleging predatory pricing in its advertising rates in relation to Media24's Welkom publications, Forum and Vista, conduct which ultimately led to the exit of the complainant's Gold Net News publication in the same area.

Case study - Competition Commission v Media24 Ltd

The Commission had referred a complaint alleging that between January 2004 and February 2009, Media24 had used one of its publications, Forum, as a fighting brand upon the entry of Gold Net News, by charging advertising rates that were below Average Variable Cost and Average Total Cost, in the Welkom market. Gold Net News exited in April 2009 and Media24 closed down Forum in January 2010 so that Vista became the only community newspaper in circulation in Welkom. The Commission had found that the conduct is exclusionary and anti-competitive, with no pro-competitive justification.

In its decision the Tribunal considered various cost measures which are not in the Act such as Average Avoidable Costs and Average Total Costs, these being widely accepted cost measures in various jurisdictions on predation. However, even these were not without fault, as reflected in the differing views between the parties regarding the quantification and allocation of costs e.g. opportunity costs, redeployment costs and common costs.

Ultimately, the Tribunal dismissed this complaint under section 8(d)(iv) of the Act as it was not convinced that the Commission had made a case that Forum's revenues were below even the alternative cost measure, AAC – and the onus was on the Commission to do so. By extension, the Commission could not then establish that Forum's revenues were below AVC, which is in the Act and had been considered to be equivalent to AAC. Instead the Tribunal found that Media24 had engaged in predation but within the meaning of section 8(c), with the intent to exclude competitors and subsequently recoup its losses. On effects, the Tribunal found that competitors had been excluded as a result of the alleged conduct and that consumers (readers and advertisers) had been denied choice after the exit of Forum and Gold Net News.

At the time of writing the Tribunal's decision stood, i.e. the parties had indicated that they would appeal this decision.

Margin squeeze, inducement, and price discrimination

In more recent cases, the concept of margin squeeze has come to the fore from literature and case law on abuse of dominance. Interestingly, this concept is not to be found in the Competition Act's wording but finds application in various cases before the courts, e.g. in the *Senwes* and *Telkom*[43] cases. It has also been generally accepted as a form of an exclusionary act to be condemned under section 8(c) of the Act.

O' Donoghue and Padilla define a margin squeeze as a situation where a vertically integrated dominant firm not only engages in self-supply of an input used in a downstream market, but also supplies independent third parties active in the downstream market, which are in competition

[43] 110/CR/Dec06 and 11/CR/Feb04, respectively.

with its own business. In the process the vertically integrated dominant firm prevents non-vertically integrated downstream rivals (completely or partially) from achieving an economically viable price-cost margin i.e. raising rivals' costs.[44]

In the *Senwes*[45] case, the Tribunal states that for a margin squeeze case, the following preconditions must exist:

- The (dominant) supplier of the input is vertically integrated
- The input in question is in some sense essential for downstream competition
- The vertically integrated dominant firm's prices would render the activities of an efficient rival uneconomic
- There is no objective justification for the dominant firm's pricing arrangements

In the above case, the Tribunal found that the conduct alleged against Senwes was better characterized as a margin squeeze under section 8(c) than an inducement under section 8(d)(i). Although customers of Senwes were induced to not deal with other silo traders (with no storage facilities) the anti-competitive effect was not established. A similar conclusion was reached in the *JTI/BATSA* matter.

In the *Telkom* case, the Tribunal clarified this point stating that, in order to show harm for purposes of section 8(d) of the Act, it is not necessary to show that competitors have exited or have lost market share before the harm. All that is required is to show that Telkom's conduct was <u>likely</u> to result in substantially preventing or lessening competition, including impeding competition.[46]

The courts also seem to have now accepted that price discrimination could occur where an incumbent firm is vertically integrated but this would take the form of a margin squeeze instead of prohibited price discrimination.

In the above cases the courts have also set out the different requirements for establishing an abuse of dominance case under section 8(c) as opposed to 8(d).

Conclusions and recommendations

Competition law and policy has an integral part to play in the South African economy to ensure equitable participation as well as other benefits that accrue to consumers, as envisaged by the legislature. It is incontrovertible that the current competition authorities are more effective than their predecessors. For instance, the Commission has been very successful in dismantling and prosecuting collusive practices in various important sectors of the economy, including the construction, plastic pipes, steel and agro-processing sectors. This success may be attributed to the independence of the competition authorities and the sharper provisions of the Competition Act, at least to the extent that they apply to cartel conduct.

In the case of effective enforcement for abuse of dominance cases, below we discuss some of the recommendations for consideration in the effective enforcement of abuse cases. These recommendations are not exhaustive and require further research as well as ongoing debates among the relevant stakeholders for purposes of better enforcing the Competition Act in the abuse of dominance cases.

[44] The Law and Economics of Article 82 EC. 2006. Page 303.
[45] 110CRDec06 – see paragraph 139.
[46] 11/CR/Feb04 – see paragraph 99.

Amendments given the structure of the economy

As highlighted above, one of the challenges faced in South Africa is the high levels of concentration in various markets e.g. steel, chemicals and others. Some of these markets are highly concentrated as a result of a history of state ownership and not innovation or investments made. Despite the high levels of concentration, the history of successfully prosecuting abuse of dominance is limited. One of the considerations is the dominance threshold in section 7 of the Act. In comparison with other countries, particularly the BRICS[47] countries, there is some flexibility in terms of this threshold depending on the market involved.[48] Although generally, the threshold is lower in the BRICS countries than the EU for example. In Russia and China dominance is presumed at 50%, this is 45% in the case of South Africa and 20% in Brazil. Notably CADE can modify the 20% for specific economic sectors. Furthermore, in South Africa and Russia market power becomes a consideration if the market share is below the threshold for dominance.

Additional safe harbours are in place where the market share of a company may be below 35% but exceeds the market share held by other companies, and (ii) the company has a "decisive influence" over market conditions. These apply specifically to financial institutions. Other countries also have regulations that take into account collective dominance, and this is not the case in South Africa.

This flexibility in assessing dominance, particularly in Russia is said to be specific to the historic specificities of that country where the presence of firms that have acquired their market position as a result of the privatization processes and not competition on the merits, has led the legislator and the authorities to adopt a firm position *vis-à-vis* their unilateral conduct. For example, key economic sectors, such as pharmaceutical industry, energy or telecommunications, are subject to specific attention. Attention is also paid to non-dominant firms in important sectors such as food.

The Act as an enabler in enforcement of abusive conduct

If the competition authorities are to successfully prosecute abuse of dominance cases, the law could also be amended so that it can be clearer in certain respects to avoid different interpretations by different courts and therefore lengthy appeal/litigation processes which do not ultimately serve the country well in terms of what the Act was intended to achieve.

This point is easily made when one considers our track record in excessive pricing and predation cases, in particular. These cases are complex and take a lot of time and resources, however achieve nothing in the end when they are dismissed due to technical points, different interpretations of the law and insufficient evidence, among others.

For example, in theory, predation does not make business sense and it has been argued that it should be presumed anti-competitive and exclusionary.[49] The difficulty is in the evidence

[47] Brazil, Russia, India, China and South Africa.

[48] Rincazaux P. in Emch A., Regazzini J. and Rudomino V. 2012. Competition Law in the Brics countries. Kluwer Law International.

[49] Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697 (1975).

required to prove predation – which depends on various cost measures which can be contentious and quite cumbersome, as demonstrated in the Media 24 predation case. Given the difficulty in easily quantifying cost measures in predation (marginal cost or average variable cost), the wording of the Act could be less onerous in this regard.

Similarly, in prosecuting excessive pricing cases the competition authorities grapple with the definition of various concepts in section 8(a) of the Act – reasonable; economic value – what do they all mean?

Given the inability to successfully prosecute excessive pricing cases, questions remain. What was the point of including this provision in the Act? How should exploitative conduct which does not meet the excessive pricing evidence threshold be dealt with by competition authorities with similar dynamics as South Africa?

In one of its decisions, the Tribunal states that the intention for 8(a) is to apply to markets that are monopolised, characterised by insurmountable barriers to entry and not subject to regulation. This requirement fits the Mittal and Sasol cases however what has transpired from these cases subsequently, suggests that initial complaints/concerns in industries/sectors which require steel and polymers as inputs, remain.

Effects based analysis
In many of the abuse cases in South Africa, the Tribunal and the other courts have clearly followed an effects based approach. This is consistent with the approach in many other jurisdictions. However, there are tensions between complex economic and legal rules, and effective enforcement as reflected in various decisions of the courts in relation to abuse of dominance. Of particular relevance is the high threshold for successfully prosecuting abuse of dominance cases as set out in the Act as well as in case law that has been developed through jurisprudence on abuse cases.

In a number of cases anti-competitive conduct is established, but the complainant/s would probably fail to prove effects and ultimately a case with merit is dismissed because there is no significant effect or evidence is insufficient to show significant effects.

Although the effects approach has its benefits in terms of preventing over or under enforcement, it seems there has been limited success in enforcement in abuse of dominance cases with this approach in South Africa. This is not to suggest that there are no concentrated markets or abusive conduct, but competition authorities may make a case as set out in the Act, when evidence for each element to be proven usually does not support these cases.

We argue that there should be a middle ground for this approach, taking into account dynamics in each jurisdiction and intentions of the legislature. For example, instead of showing actual harm, likely harm could also be considered sufficient, as in the Telkom case on assessing harm under 8(d).

This is most obvious in the Nationwide Poles case where the CAC decision made it clear that a successful prosecution of section 9 is only possible if there is harm to consumer welfare (assuming one passes the initial hurdle of dominance by the respondent and equivalence in transactions). What this means is that even if small firms are exiting, as long as they do not constitute a large proportion of that relevant market the effect is unlikely to substantially prevent or lessen competition – and so would not amount to prohibited price discrimination.

In the meantime dominant firms can charge higher prices to small firms because they do not meet the volume thresholds that competing bigger firms would have, simply due to them operating in concentrated markets. Obviously, those small firms are likely to remain small if they do not eventually exit. Needless to say, there has not been a price discrimination case prosecuted successfully since Nationwide Poles.

A consideration could be the approach stated above, where specific markets of concern are identified upfront for purposes of establishing substantiality of effects. This approach makes sense for an economy such as ours where most of the key sectors are concentrated and remain as such, while a few markets might be considered fairly competitive and subject to low barriers of entry.

A similar approach which seems to suggest a middle ground is argued in Christiansen and Kerber (2006)[50] as well as in Fox (2002).[51] They make the point that although convergence in competition law seems obvious on certain respects, contextual differences do not necessarily harm competition policy overall.

Deterrence

If one considers the cases prosecuted, whether successfully or not, the picture painted is that some of them, where successful it has been because they are argued under general exclusionary conduct (section 8(c)) which has a relatively lower evidence threshold than the other sections of the Act, such as 8(a) and 8(d).

However, section 8(c) may not be a sufficient deterrent for abuse of dominance conduct as there is no penalty for a first time offence. A firm that engages in anti-competitive harm e.g. predation, but evidence only leads to a finding under 8(c) reaps the rewards for its conduct and pays no penalty because of technical issues in the investigation and litigation process that respondents are able to take advantage of.

This may mean that the case itself does not change the competitive landscape even after the finding unless there are e.g. behavioural remedies agreed to by the respondents, through a settlement.

Settlements

There may be instances where the Commission is better off settling than litigating, and perhaps this is the route to consider. The challenge is that in terms of building jurisprudence on cases, such as in excessive pricing, there might have to be a balancing act and a consideration of each case on the merits.

One of the most recent and important settlements is that which has been referred to the Tribunal in August 2016 by the Commission, involving AMSA where AMSA settled on the basis that all complaints against it are considered finalized. The magnitude of the fine is precedent setting at R1.5 billion, however interestingly, AMSA admits that all the allegations in the collusive complaints constitute a contravention of the Act but makes no admission on conduct

[50] Christiansen A. and Kerber W. Competitin Policy with Optimally Differentiated Rules Instead of "Per Se Rules v Rule of Reason" *Journal of Competition Law and Economics* 2(2) page 215-244.

[51] Fox EM. 2002. What is harm to competition? Exclusionary practices and anticompetitive effect. *Antitrust Law Journal* vol 70 no 2 2002.

relating to a contravention of section 8(a) and 9(1).[52] Instead it has agreed to a behavioural (pricing) remedy to address competition concerns arising from its pricing policy in relation to 8(a). The remedy limits the EBIT margin that AMSA may earn for a period of 5 years. There is however an allowance for the variation of the EBIT margin upwards should the raw materials basket cost and price (the spread) exceed USD350/ton. AMSA also (conditionally) committed to industrial support remedies.

Commentary on the settlement seems to suggest that the settlement is not necessarily going to change the steel market significantly because there is better room for Mittal to negotiate tariffs with the settlement and the investment commitments are non-committal. One goes as far as to say, this is a settlement of a "long-drawn out and low-intensity battle" with the Commission. [53]

A more conservative and optimistic view is that the settlement will have some positive impact on the steel value chain and the ability of downstream firms to compete effectively, at least for the duration of the settlement agreement. This is something which might not have been achieved through prosecution, given that there is no guarantee that such an exercise would have resulted in successfully prosecuting the excessive pricing case. It is in fact another example where a settlement is perhaps a better outcome than costly litigation where respondents can win an appeal on technical points, and given that there was no finding under excessive pricing by the Commission.

Market Inquiries

The introduction of the market inquiry provisions in the Act has enabled the competition authorities to put the spotlight on certain industries. Through the market inquiries, government may be able to identify certain sectors which should rather be regulated for the benefit of new entry and expansion. This is on the basis that when market forces are not able to correct for market distortions, some regulation could be more appropriate.

This is nothing new, as there is recognition that competition law and policy may not be enough to achieve some of the objectives and government intervention through some other form, may be more appropriate e.g. industrial policy and price regulation.

Advocacy

There is also a big role for advocacy in competition law enforcement. The move from being protected to embracing competition policy and law requires a change in the corporate culture from cooperating to competing, among firms, something which has been evident especially in South Africa's cartel enforcement. In those markets where abuse of dominance is likely to prevail but successful prosecution eludes the competition authorities, targeted advocacy could also be more effective.

[52] The Commission had not made any finding on 8(a) at the time of reaching the settlement with Mittal/AMSA and the 9(1) allegation had been referred to the Tribunal for adjudication.

[53] See Nick Wilson of BDFM in article titled "Market not Fooled by ArcelorMittal Deal" dated 24 August 2016, page 12 of Business Day.