How effective is the enforcement of predatory conduct provisions in South Africa? A review of the recent Tribunal decision in the Media 24 case.

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1. Introduction

The assessment of predatory conduct is a complex area of competition enforcement, not least because, in the short-run at least, predation looks exactly like the kind of competitive conduct which should benefit consumers. Economic thinking on how to determine whether a given price is predatory or not has evolved over time. From a theoretical perspective, a profit-maximising firm should not sacrifice profits unless it expects to be able to recoup the lost returns in the long term once rivals have been driven out of the market. However, this theoretical understanding does not lend itself to an easy practical test for competition authorities to follow. Tests which have been put forward revolve around assessing whether or not the dominant firm has priced below some measure of its cost. Alternatives which have been proposed include marginal cost, variable cost, avoidable cost and incremental cost. Economists debate the appropriateness of each of these, as well as the complexities of how to accurately measure them.

In South Africa, we have had little opportunity to engage with such debates, as predatory conduct is an offence which, until 2015, had not been successfully prosecuted in South Africa. In fact, the South African Competition Act has dealt with the aforementioned complexity by being prescriptive about the acceptable measures of costs which can be used for a finding of predation under section 8 (d). However, arguably this prescription is outdated in the light of recent economic thinking and international case law. This is an issue which the Tribunal grappled with in its recent decision in the Media 24 matter, where the Tribunal found that Media24 had engaged in a predatory strategy in order to eliminate a small competitor in the community newspaper market in Welkom.[1]

Despite the Tribunal's finding that Media24 had deliberately engaged in predatory conduct with the aim of eliminating its smaller competitor, and that it had been able to recoup its losses following the exit of the competitor, the finding was made under section 8(c) of the Act, a catch-all section for exclusionary abuse, rather than under the specific section dedicated to predatory conduct, section 8 (d) (iv). As a result, Media24 escaped a financial penalty and instead will face only such remedies as the Tribunal finds necessary to prevent a repeat of the conduct. This issue of how to interpret and conduct the price-cost test prescribed by the Act was key to the Tribunal's finding.

It therefore seems to be an appropriate time to consider South Africa's approach to predatory conduct in the light of developments in economic theory and international thinking on the topic. We do so by first reviewing the available literature and international case decisions, and then going on to reflect on the recent decision by the Tribunal, and the wording of the Act. We highlight what we see as the challenges facing future enforcement in the area of predatory conduct, in the light of the Media24 decision.

2. The economic assessment of predation

Predatory conduct by a dominant firm occurs when the firm lowers prices for a limited period of time with the intention of driving a smaller rival out of the market, based on the belief that it will subsequently be able to increase prices above the competitive level and recoup any losses it has made.[2] Given that lowering prices will result in sacrificing profits or even incurring losses, predation would be irrational if the firm did not believe that it would be able to recoup the foregone profits at some point in the future. Economic theorists have provided a range of scenarios in which a firm with market power may have the incentive and ability to engage in

[1] Tribunal case number: CR/154/Oct11
[2] Motta (2004), p. 442

such conduct.[3] Common to each is the idea of a short-term sacrifice for the promise of long-term gain.

Legal tests for predation have therefore generally been based on these two pillars, as summarised by Motta (2004):

> "*Two elements should be stressed from this mechanism: (a) the sacrifice of short-run profits; and (b) the ability to increase profits in the long-run by exercising market power once predation has been successful. It is on these two elements that the legal treatment of predatory pricing should be built*".[4]

The question of sacrifice is straightforward in theory, but difficult to test for in practice. How is an investigator to show that a firm is pricing below a hypothetical profit-maximising price, when in reality such a price would be almost impossible for the investigator, or the firm itself, to calculate? For this reason, it has been suggested that a more practical alternative is to ask whether the dominant firm is making negative profits.[5] This benchmark has the advantage of making false positives (wrongly convicting a firm of predatory conduct) less likely, as there is less likely to be a rational explanation for a firm deliberately incurring losses (as opposed to lower profits).

A test based on comparing price to marginal costs has been suggested for the assessment of whether a firm is making negative profits. Economic theory suggests that a profit-maximising firm would not price a unit of output below the marginal cost of producing that unit, as this would result in it incurring losses, and it would be better off not producing the marginal unit. Therefore, if a firm is found to be charging a price which is below its marginal cost over a prolonged period, it can be inferred to be deliberately sacrificing profit, and therefore to have predatory intent.

In practice, marginal cost is difficult to measure, and so a test first proposed by Areeda and Turner (1975), suggests taking average variable cost (AVC) as a proxy for marginal cost[6]. Variable costs are those costs which vary in proportion to output. The rationale for the use of AVC is that firms remain viable when they price above or equal to AVC, whereas below AVC they would be better off closing down as they cannot even cover their variable costs of production.[7] This approach gained popularity and was adopted by the drafters of the South African Competition Act, and as a result, section 8 reads:

> "*It is prohibited for a dominant firm to –*
>
> > *(a)…*
> >
> > *(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:*
> >
> > > *(i)……*
> > >
> > > *(iv) selling goods or services below their* ***marginal or average variable cost***" [own emphasis]

Despite having been used in a number of key cases, both in the US and Europe, the AVC benchmark has been the subject of a range of criticisms. A key practical difficulty in calculating AVC is that whether or not costs are variable depends on the time horizon over which they are considered. For example, labour costs may be fixed over a period of a month or two, but variable if the period considered is longer (say one year). Hovenkamp (2015) notes that AVC

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[3] See for example: Kreps and Wilson (1982); Milgrom and Roberts (1982); Motta and Fumigalli (2013)
[4] Motta (2004), p. 442
[5] Motta (2004), p. 445
[6] Areeda, P. and Turner, F (1975)
[7] Baumol, W., J. (1996), p.56.

and MC are identical only in equilibrium. Predatory pricing is not an equilibrium strategy, however, but a "*nonsustainable high-output strategy*", and therefore output during the predatory period is typically in the upward sloping portion of the AVC curve, where MC will be higher than AVC.[8] Thus, the use of AVC as a benchmark has been described by some as a "defendant's paradise".[9] Hovenkamp notes that this is a particular problem in markets characterized by high fixed costs.[10] Critics also point out that the AVC benchmark could be "gamed" by firms over-investing so as to have spare capacity but low variable costs, and that it is not very useful in network industries where variable costs are low but sunk costs are high.[11]

In light of this, the concept of average avoidable cost (AAC) has been suggested as an alternative cost benchmark. Avoidable cost involves comparing the incremental cost of remaining in the market with the avoidable (or decremental) cost of exiting it.[12] If the firm would be better off discontinuing the line of business, then it is behaving irrationally in staying in the market.[13] Some consider AAC to be more appropriate than AVC for determining whether a firm has engaged in predatory conduct, as it measures both the variable and product-specific fixed costs which would be saved if the firm decided to exit rather than predate. Thus AAC may be a better measure of the dominant firm's profit sacrifice.[14]

It is important to note that AAC does not remove the need to define a time period over which the relevant costs are measured. Baumol (1996) suggests the following solution:

> "*The time horizon pertinent for the calculation of the AAC for an Areeda-Turner test is the time period over which the price in question prevailed or could reasonably have been expected to prevail. Where a sequence of prices is alleged to be predatory in combination the pertinent horizon is the end of all the time periods during which those prices prevailed, and the test should require that the present value of the incremental revenues for this extended period equal or exceed the present value of the avoidable costs*." [15]

The AAC test has gathered support in both literature and case law. The EC's guidelines on abuse of dominance suggest that AAC is the main benchmark it will consider in cases of predatory conduct:

> "*The Commission will take AAC as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided*".[16]

In *Cardiff Bus*, the OFT considered the conduct of the dominant firm in setting up a low-cost bus service to compete with a new entrant into the market. This low-cost service was used to drive the entrant out of the market, by charging prices that were below its cost of operating the service. In this case, the OFT determined that AAC was the most appropriate measure of cost to use as:

[8] Hovenkamp (2015), p.5.
[9] Williamson (1977), p.305.
[10] Hovenkamp (2015), pp.5-6.
[11] O'Donoghue, R. and Padilla, J. (2006), p.242.
[12] Baumol, W., J. (1996), p.58.
[13] O'Donoghue, R. and Padilla, J. (2006), p.241.
[14] O'Donoghue, R. and Padilla, J. (2006), p.242.
[15] Baumol, W., J. (1996), p.62.
[16] EC guidance note on Article 82, para 64

> "*In the medium term, pricing below AAC is not in the economic interest of an undertaking, since by not providing the relevant output it would save more in costs than it would forego in revenue."*[17]

The AAC test also has the advantage of determining whether an equally efficient competitor would be able to enter the market and compete with the dominant firm. In its decision in the *Air Canada* case, the Canadian Competition Tribunal explained this:

> "*The avoidable cost test compares the incumbent's revenue (price) with its (average) avoidable cost. As long as the former exceeds the latter, an equally-efficient entrant will be able to enter the market at a price above its avoidable cost. When the incumbent's revenue (price) is below its (average) avoidable cost, then, subject to other concerns, it may be inferred that the incumbent is predating on the entrant*."

As shown above, however, AAC does not appear explicitly in section 8 (d) (iv) of the South African Competition Act. This begs the question of how similar AVC and AAC are in practice. Baumol's (1996) view is that AAC is simply a manner of interpreting AVC. The EC's guidelines discuss the issue of where AAC and AVC differ, concluding that they will often be the same but, in cases where they diverge, AAC is the more appropriate benchmark to use:

> "*In most cases the average variable cost (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*." [18]

The OFT makes a similar statement to this in its decision in the *Cardiff Bus* case.[19]

Thus, it seems that, despite not appearing explicitly in the South African Competition Act, AAC is, at least in some cases, the more theoretically appropriate cost benchmark for determining profit sacrifice. Whether or not the Act permits the use of AAC under section 8 (d) (iv) is debated by the Tribunal in its decision in the Media24 matter, and discussed in more detail below.

3. The Media 24 decision

In September 2015, the Competition Tribunal found that Media 24 had contravened the Competition Act by engaging in a predatory strategy in order to eliminate a small competitor in the community newspaper market in Welkom.[20] Media 24 had two community titles in the Welkom area at the time that its competitor, Gold Net News (formerly Net News) entered the market. Gold Net News did well at first, winning almost 25% of the advertising market but eventually declined in size and closed down in April 2009. Following this, in January 2010, Media 24 closed down one of its titles, Forum. Up to the time of the Tribunal Hearing (in late 2013 and 2014), no other competitor had entered the market to challenge Media 24's remaining title, Vista. The Commission alleged that Media 24 had used Forum as a "fighting brand" to engage in predatory pricing in order to drive Gold Net News out of the market.

After considering the evidence before it, the Tribunal found that the prices Media 24 had charged prices for advertising in Forum were lower than its cost of producing the newspaper over a sustained period. As the newspapers were distributed for free to readers, advertising costs were the only available source of revenue, so Media 24 was operating the paper at a loss. The Tribunal moreover found that Media 24 had done so with the intention of eliminating its competitor, and that following the exit of the competitor it had raised prices in the market in

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[17] Cardiff Bus decision, para 7.160
[18] EC guidance note on Article 82, footnote 3 to para 64.
[19] Cardiff Bus decision, para 7.158
[20] Tribunal case number: CR/154/Oct11

order to recoup the earlier losses. This had harmed customers (both advertisers and readers) by reducing price competition and limiting choice.

Key issues raised in the decision

A wide range of important economic issues are raised in the Tribunal's decision. For the purposes of this paper we have focussed on the price-cost tests used and how the relevant costs have been calculated. The discussions of intent, recoupment and effects, whilst important in supporting the theory of harm and establishing the harmfulness of the conduct, are not integral to the determination of relevant costs and hence we do not discuss them further here.

Three main issues arise in relation to the definition and measurement of relevant costs in the Tribunal's decision. The first is whether or not AVC and AAC can be considered to be equivalent, both in this particular case and in terms of the South African Competition Act. The second is whether it is appropriate or desirable to include an estimate of the dominant firm's opportunity cost in the calculation of its avoidable costs. The third is the question of how to treat shared costs for a multi-product firm. We deal with each of these three in turn.

i. Are AVC and AAC the same?

As noted by the Tribunal in its decision, the Commission's fighting brand theory of harm made the use of AAC as the relevant cost standard particularly appropriate as:

> "*If that theory is correct, then the incremental costs associated with maintaining that brand in the market are considered avoidable which means that one will have to consider whether the incremental revenues, generated by the brand, exceeded those costs which otherwise could have been avoided. Thus, in the circumstances, AAC is the logical tool to utilise as the measure of cost.*"[21]

The first question the Tribunal asks in its decision is whether or not AVC and AAC can be considered to be equivalent for the purposes of the test prescribed in section 8 (d) (iv). The Tribunal is of the view that Section 8(d)(iv) does not compel one to use only AVC or MC, but "*requires that the measure of costs chosen would yield a result that would still be below at least one of them*".[22] The Tribunal acknowledges that there is a difference between AVC and AAC in that AAC includes product-specific fixed costs[23]. However, in this instance it notes that AAC is appropriate as the theory of harm concerns a fighting brand. A fighting brand is a particular product which the incumbent firm uses to drive a new entrant out of the market. This strategy usually involves targeting the particular sub-segment of the market where the entrant's products are situated, in order to lower the cost of predation and avoid having to price below cost across the whole market. In this instance, Media24 had two titles in the Welkom area, and the Commission alleged that it used one of them in particular to target the entrant. As the Tribunal notes, it is therefore appropriate to consider whether the incremental revenues generated by the fighting brand exceed the costs which could have been avoided if the brand had exited.[24]

The Tribunal explains the relevance of the AAC test, saying: "*There may be cases where one might be able to rely on another cost standard, say AAC, and demonstrate that it yields a result where the firm concerned is pricing below its AAC, but that the costs relied on for this exercise are not only avoidable but also variable*."[25] In other words, the Tribunal considers that AAC may be an appropriate test in some instances, but prices must also fall below AVC in that instance for it to be considered a contravention under section 8 (d) (iv).

[21] Competition Tribunal decision, para 106.
[22] Competition Tribunal decision, para 104.
[23] Competition Tribunal decision, para 84.
[24] Competition Tribunal decision, para 106.
[25] Competition Tribunal decision, para 111.

The Tribunal cites the same paragraph of the EC's abuse of dominance guidelines quoted above in support of this approach: *"<u>In most cases the AVC and AAC will be the same</u>, 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 in the AVC."*[26] [Tribunal's emphasis]

The Tribunal does not ultimately decide whether it would accept the AAC benchmark, as it finds the Commission has not shown that Media 24 was pricing below AAC in any event (this will be discussed further below). But it implies that it may have been inclined to do so because, in its view, AVC would have been equivalent to AAC in this case.

However, the second half of the EC quote raises a potential conundrum for the Tribunal in future cases. It sets out a clear situation where there is a better economic justification for using AAC as a benchmark than AVC, but where, according to the Tribunal, it would not be possible to make a finding under 8 (d)(iv) since AAC would likely be higher than AVC. This begs the question of why use the AAC test at all if it will only identify the same instances of predation as the AVC test and continue to exclude situations where there are important product-specific fixed costs which should be taken into account?

Ultimately, it seems to us that the Commission was correct in proposing AAC as the more relevant benchmark, whether or not pricing below AAC also amounts to pricing below AVC in this case. The Tribunal's attempts to relate AAC to AVC confuse the issue somewhat by ignoring the important differences between the two measures. An alternative approach could have been to accept AAC as an appropriate and valid proxy for marginal cost (as is the case with AVC according to the Act); or to determine that AAC could not be used as a benchmark under the current formulation of section 8 (d) (iv), in which case there may be a case for the amendment of the Act.

ii. Is opportunity cost a relevant part of AAC calculation?

One of the critical factors in the Tribunal's finding that Media 24 did not price below AAC was its decision to exclude opportunity costs from the AAC calculation. The Commission had contended that this should rightly be included as part of the AAC calculation since some of the profits that Media 24 could have made through its main title, were sacrificed to the fighting brand, as some advertisers would have chosen its main title if the fighting brand was not an option.[27] In other words, if Media 24 had closed down the fighting brand title, it would not have lost all of the revenues associated with the fighting brand, as some of its revenues would have been diverted to Media 24's other title. The Commission argued that this was relevant to the consideration of whether keeping the fighting brand in the market was a rational decision or not. The Tribunal implicitly acknowledged the rationale for this when it framed the AAC test as comparing the avoidable costs of operating the brand with the *incremental revenues* generated by doing so. The incremental revenues would not include any revenues that the incumbent would have generated regardless of whether Forum remained in the market; in other words revenues which would have gone to Vista if Forum exited.

Despite this logic, the Tribunal ultimately decided to exclude the "opportunity cost" from its AAC calculation, arguing that whilst there is support for the idea in an EC guidance document on exclusionary abuse and one UK case (Cardiff Bus), it is not a widely used approach currently. In addition, in this particular instance, there was contention around how much of advertising revenue would have been diverted to Media24's main title if the fighting brand had closed down (what the correct 'diversion ratio' was), and the Tribunal concluded that the evidence was unclear. It consequently adopted a "pragmatic approach" in excluding

[26] EC guidance note on Article 82, para 64 footnote 3.
[27] Competition Tribunal decision, para 141.

opportunity costs from the calculation.[28] Although some estimates for the possible diversion of revenue were available, the Tribunal argues that taking a conservative approach to the available evidence would not help, since: "*Once the basis to the approach is accepted to be built on unreliable foundations it does not help to construct something less ambitious but still suspect as a means of calculation on top of it*."[29] Thus, opportunity costs were excluded altogether from the calculation of AAC.

As noted by the Tribunal, the issue of opportunity cost was mentioned in the *Cardiff Bus* decision. The OFT stated that "*As the incumbent, Cardiff Bus was likely to incur an opportunity cost as a result of some customers switching from its normal services to the white services (in terms of reduced core revenues), whereas 2 Travel faced no such opportunity cost*." [30] Ultimately, however, although it acknowledged that there may have been a cannibalisation effect or sacrificed revenue from Cardiff Bus' normal services as a result of the introduction of fighting brand (the "white services"), the OFT did not include any estimate of this effect in its analysis. [31] The EC Guidelines on abuse of dominance support an approach which considers such foregone revenue. It states: "*In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided*". [32] It goes on to clarify that only economically rational and practicable alternatives which could can realistically be expected to be more profitable will be considered.

On the other hand, as the Tribunal discusses, some economists are opposed to including opportunity cost in the price-cost test. Baumol (1996) argues that it does not make sense to take into account the foregone revenue from pricing below the optimal level since the intention of an Areeda Turner test is to see whether an as-efficient rival could survive. The author argues that the higher price which could have been achieved by the dominant firm is irrelevant to this question. This argument, however, seems to have lost sight of the primary economic question relevant to the inquiry, which is whether profit sacrifice has occurred. In addition, the situation under consideration in the Media 24 case is not entirely analogous to that considered by Baumol. The Commission was not arguing that Forum could have made greater profits if it had not engaged in predatory conduct, but that Media 24 would not have lost 100% of Forum's revenues if it had not engaged in predatory conduct, as closing Forum down would have diverted some of these revenues to Vista. Thus, as per the Tribunal's own interpretation, it makes sense to compare the cost of operating Forum against only the extra, or incremental, revenue that Media 24 gained from operating Forum.

In our view, there is a clear rationale for considering the diverted revenues. The difficulty of estimating them with precision does not divert from the heavy preponderance of evidence that they in fact existed, and thus were relevant to the case. The exercise proposed by the Commission was to compare the incremental returns to keeping the fighting brand in the market to the incremental returns if it were to exit the market. The returns to staying in the market amount to the revenue made by the fighting brand minus the costs of keeping the fighting brand in the market (all the costs of operating the fighting brand). The returns to exiting include the revenue diverted from the fighting brand to the main title minus the unavoidable costs of operating the fighting brand and the costs of exit. For it to be rational to stay in the market, the returns to staying in the market must be greater than the returns from exiting. This means:

Revenue FB - all costs > diverted rev – unavoidable costs – cost of exit

[28] Competition Tribunal decision, para 161
[29] Competition Tribunal decision, para 163
[30] Cardiff Bus decision, para 7.19
[31] Cardiff Bus decision, para 7.127
[32] EC guidance note on Article 82, para 65.

Which can also be written as:

Revenue FB > avoidable costs + diverted rev – cost of exit

If the revenue of the fighting brand is greater than the avoidable costs plus the diverted revenue from the fighting brand to the main title minus the cost of exit, then the decision to continue to operate the fighting brand is rational. If not, then the fighting brand can be assumed to be in the market only to engage in the predatory strategy.

Therefore, the diverted revenues are of critical importance to the calculation of whether the observed pricing is part of a competitive or predatory strategy. In making the decision to keep the fighting brand open, Media 24 knew that if it closed the fighting brand, it would not lose 100% of its revenue. This would have weighed in the decision to keep it open or not, and therefore it is important to take this into account in evaluating the rationality of its decision. Clearly the diverted revenue would be an amount greater than zero, given that the Tribunal had found that the titles were in the same market. It is unfortunate that better evidence on the likely diverted revenue was not available, but a better approach may indeed have been to make a conservative estimate of what Media24 could have reasonably expected that number to be.

iii. Shared costs

A second issue which affected the assessment of whether Media 24 priced below AAC was the question of Media 24's shared costs. As a large multi-product firm, there were a number of shared costs from the larger operation which were partially apportioned to the fighting brand. Media 24 argued that it would not be able to re-deploy any of these shared costs if it closed down the fighting brand, making them unavoidable. The Tribunal accepted this interpretation and ruled that all shared costs should be excluded from the AAC calculation.

The Tribunal recognised that such an approach has the potential to disadvantage small firms: "*Of course this means that on an AAC standard, the large scale multiproduct firm has a greater ability to claim that costs are unavoidable because the alleged predator's costs become trivial fractions of the larger pie meaning that they make no sense to avoid when the unit is closed.*"[33] A small, single-product competitor is not able to share costs across products or business units and must cover the full cost of producing the relevant product with the price charged for that product. Thus excluding shared cost from the calculation necessarily places the small firm at a disadvantage as the price may be below its avoidable costs but not the large firm's avoidable costs. On the other hand, it may be unfair and undesirable to penalise large firms for their size and lower costs.

The Tribunal suggests as a solution that this favours the use of average total costs (ATC) as an appropriate cost standard in such cases. The less stringent approach to the price-cost test then implies a lesser finding under 8 (c) of the Act, rather than 8 (d) (iv) and consequently no penalty for a first offence. This trouble with such an approach is that in cases such as the current one, where there is clear evidence of predatory intent and significant harm to competition and consumers, the sanction ends up seeming disproportionately small in comparison with the deliberate anti-competitive behaviour. This will also reduce the extent of deterrence of such behaviour.

In this case, the argument between the Commission and Media24 was mainly around the feasibility of redeployment of the various joint costs such as HR, graphics services, office rental, accounting etc. Media24 argued that these common costs could not be avoided as Forum was too trivial in relation to its total operations; in other words, on closing Forum it would still need all the same resources to produce the rest of its titles. On the other hand, the Commission argued that the redeployment of at least some of these costs must have been possible. This point of view is intuitively appealing: surely the advertising sales agents or HR

[33] Competition Tribunal decision, para 200.

personnel would not simply sit idle during the time when they would previously have worked on Forum. Media24 would surely have found them other tasks within the operation. On the other hand, something like office rental could have been more difficult to redeploy. An analysis of which costs were realistically able to be redeployed within a reasonable period of time would therefore have been complicated, and we do not have access to all the information that the Tribunal had in coming to its decision. However, again the decision to categorise all the costs which could have potentially been redeployed as non-avoidable seems to be quite a conservative position.

Considering the numbers

Each of these key issues discussed above are important areas of policy debate; however, the several decisions taken by the Tribunal also had an impact on the outcome of this particular case. In this section, we try to assess which of the decisions was determinative in the Tribunal's conclusion that Media 24 did not price below AAC. We do not have access to the full set of cost and revenue data that the Tribunal had in coming to its decision. However, Appendix 1 and 2 to the Tribunal's decision summarise the impact of the various major differences in approach which were proposed. In Table 1 we show the net surplus/deficit (calculated as Forum's revenue minus avoidable costs) arising from these different approaches for different measures of the diverted revenue from Forum to Vista (various estimates of this diversion ratio were proposed by the Commission and Media 24's witnesses).

Table 1: Illustration of the impact of different definitions of AAC on Forum's surplus/deficit, given different levels of diverted revenue (R '000)

Diversion ratio	Media 24 costs	Commission costs, no redeployment	Commission costs, no redeployment, CC net off	CC costs with redeployment
0,0%	1014	189	188	-2342
16,0%	741	9	-240	-2236
27,0%	417	-251	-671	-2300
30,7%	308	-338	-816	-2321
38,5%	79	-522	-1121	-2366

Source: Tribunal decision

The first column presents Media 24's preferred definition of avoidable costs, the second column presents the Commission's expert's view excluding redeployment costs. The third and fourth columns present additional versions of the Commission's expert's approach using the Commission's approach to the "net off costs" issue[34] and the redeployment issue respectively. The cells shaded grey illustrate where Forum's revenue is found to be below its avoidable cost. Thus from Table 1 we can see the impact of: including diverted revenues at different estimates of the diversion ratio; using the Commission's measure of the "net off" costs associated with diverted revenues; and, including or excluding redeployment costs.

The impact of the various differences in approach are somewhat ambiguous. Even using the Commission's definition of avoidable costs, including diverted revenues at the most conservative estimate (16%) would not be enough to show Forum in deficit. However, using the higher estimates of 27%, 30% or 38.5% would have been enough to do so. On the other hand, using the Commission's definition of avoidable costs and its approach to net-off costs, the most conservative estimate of diverted revenues would have been sufficient to leave Forum in deficit. Finally, under the Commission's interpretation of which costs could have been

[34] This was an argument around which costs should be used to "net off" the cost of making the foregone or diverted profits which would go to Vista if Forum was closed down. The Commission argued that it was most appropriate to consider Vista's costs, but Media24 argued that the Commission's approach was inconsistent. The Tribunal was not required to come to a decision on the most appropriate approach, as it decided in any case to exclude opportunity costs or foregone profits from the calculation.

redeployed, Forum would be left in deficit regardless of the approach to diverted revenues. What we cannot tell from the information provided, however, is what impact the Commission's net off and redeployment approaches would have had using Media 24's definition of avoidable costs. Nor can we interrogate in detail the difference between the two approaches to defining avoidable costs. What we can tell from the table is that the decisions taken by the Tribunal had the potential, individually or cumulatively, to have changed the outcome.

In addition, there was one other issue which was not explicitly included in Appendix 1 and 2, but was discussed by the Tribunal. This is the issue of "miscellaneous costs" of printing and distribution. We do not go into the debate around these costs in detail here, as once the Tribunal had decided against including diverted revenues in the calculation, it concluded that the miscellaneous costs were not determinative of the outcome and did not discuss these further. However we note that, if the diverted revenues had been treated differently, this too could have changed the decision with regard to miscellaneous costs. The Tribunal's decision[35] suggests that under these circumstances, the inclusion of miscellaneous costs would have resulted in Forum being in deficit, even under the most conservative estimate of diverted revenues, even without taking into account redeployment costs.

The discussion above has shown that if the Tribunal had concluded differently on one or more of the key issues above, Forum may have been found to have priced below its AAC.

4. Conclusion

The fore-going discussion has highlighted the difficulty which a small entrant faces when trying to bring a complaint of predatory conduct against a large multi-product firm. According to the Tribunal's decision in this case, in order for it to find a contravention of section 8 (d) (iv), the complainant effectively needs to show that prices charged are below AVC for a sustained period with no shared costs or diverted revenue to be taken into account. It has been illustrated above that this is a relatively conservative approach from an economic point of view, at least in some cases, and that the resulting calculation does not necessarily reflect the reality and gravity of the underlying situation.

This matters all the more because, as highlighted by the Tribunal in this case, one of the main economic theories of predation emphasises the incentive of the dominant firm to engage in predatory conduct in order to create a reputation, possibly in multiple markets, for an aggressive response to entry. Thus the effects of predation can go beyond the effect of eliminating or marginalising a competitor in one market. Without competition law that can effectively deter such conduct, entry may be discouraged, especially in some highly concentrated South African markets.

When drafted, the decision to include the phrase "marginal or average variable" cost in section 8 (d) (iv) was no doubt intended to improve clarity, by providing guidance on the expected evidentiary standard. However, by doing so the section has been made excessively rigid, unable to change in accordance with best practice in economic theory, or deal with the full range of cost conditions experienced by firms. A change to the Competition Act, or at least the interpretation of it, may be necessary in order to ensure we do not err on the side of protecting dominant firms at the expense of competition.

Having said this, while the use of an AAC benchmark may be more appropriate from an economic perspective, it does not necessarily reduce the complexity of the competition assessment, as highlighted clearly in the Media 24 case.

5. References

[35] See footnote 102

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