

LOCKED IN: Corporate Exclusivity, Supplier Liquidations and the Public Interest Mandate in South Africa

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ABSTRACT

Traditional antitrust or competition enforcement routinely evaluates vertical restraints through a narrow Chicago-school lens of short-term allocative efficiency and consumer pricing effects. In transforming African economies, however, structural transformation necessitates a broader macroeconomic evaluation of how these vertical networks impact supply chain architecture and market resilience. This paper introduces the Relational Dominance Framework (RDF) to bridge the gap between Transaction Cost Economics (TCE) and the public interest mandate established in section 2 of the Competition Act 89 of 1998, as amended.

While dominant firms utilise Oliver Williamson's TCE framework to legally justify exclusivity as an efficiency-enhancing tool to protect transaction-specific asset investments and mitigate supplier opportunism, this paper demonstrates a pathological structural shift in asymmetric vertical relationships. When enforced against small, medium, and macro-enterprises (SMMEs) and firms owned by historically disadvantaged persons (HDPs), corporate buyers weaponise high asset specificity to engineer a state of acute economic dependence or relational dominance. Under these arrangements, localised suppliers bear the immense capital risk of infrastructure expansion but are contractually and legally barred from diversifying their revenue base.

Analysing the devastating 2026 liquidations of long-term localised suppliers (such as Beyers Chocolates and Grey's Marine), this paper exposes a critical statutory loophole being the Competition Act's inability to address relational dominance under sections 7 and 8(4) when a buyer's macro-market share falls below traditional dominance thresholds, despite commanding 100% of an individual supplier's operational existence. Drawing on the constitutional imperative of transformative constitutionalism (Section 39(2)) and the common-law standard of good faith in contracting, we propose a statutory amendment to introduce a "Relational Dominance Framework". This model provides clear legal-economic indices to ensure that micro-level vertical efficiencies do not result in macro-level public interest and structural failures.

I. INTRODUCTION AND BACKGROUND

South African competition law stands at a crossroads. On one hand lies the classical common-law principle of *pacta sunt servanda*, which treats contracts as private bargains voluntarily concluded between autonomous parties whose agreements should generally be enforced.¹ This conception of contractual freedom has long promoted legal certainty, commercial predictability, and market efficiency by limiting judicial interference in private commercial agreements. Individuals are bound to contracts into which they enter freely, and such contracts then exist to facilitate the ‘economic form’ of individualism, being ‘a world of traders who meet briefly on the market floor, where they engage in discrete and furtive transactions’.²

On the other hand lies the transformative constitutional project embodied in section 2 of the Competition Act 89 of 1998, as amended (the Competition Act), which expressly seeks to promote a competitive economy that advances employment, broad-based participation, industrial development, and the inclusion of HDPs. These objectives reflect the constitutional recognition that South Africa’s economy remains structurally unequal and that private market arrangements cannot be divorced from their broader social and economic consequences.³

The tension between these paradigms is fundamental. Classical contract law proceeds from assumptions of formal equality and consensual bargaining, presuming that parties possess sufficient autonomy to negotiate mutually beneficial outcomes.⁴ Competition law, by contrast, acknowledges that markets frequently operate within conditions of unequal bargaining power, economic dependence, and concentrated corporate power.⁵ Consequently, contractual freedom cannot be regarded as absolute where private agreements reinforce exclusion, entrench market concentration, or frustrate the Constitution’s commitment to substantive equality and economic transformation. In this sense, the Competition Act represents a departure from purely laissez-fair principles by requiring that private commercial conduct be evaluated not only through the lens of economic efficiency but also against broader constitutional and public-interest

¹ J Barnard-Naudé ‘Form and substance in the Constitutional Court: Wither contract law’s policy after apartheid?’ (2021) *SALJ* 138 at 574.

² A Cockrell ‘Substance and form in the South African law of contract’ (1992) *SALJ* 40 at 44-45.

³ Y Sop Choi and J Moon ‘Fairness and Equity in South African Competition Law: A new Direction’ (2025) *Journal of African Law* 69 at 352-353.

⁴⁴ PJ Cooke and DW Oughton *The Common Law of Obligations* (1993) 17 and 41-42; L Hawthorne ‘The principle of equality in the law of contract’ (1995) *THRHR* 58 at 164.

⁵ PS Munyai ‘Competition law and corporate social responsibility: a review of the special responsibility of dominant firms in competition law’ (2020) *De Jure Law Journal* 53 at 268.

objectives, representing policymakers' considerations of the historical injustice of apartheid and its effect on facilitating the exclusion of parties within the economy.⁶

The significance of this constitutional shift has become particularly evident through recent developments in South Africa's retail supply chains. The mid-2026 liquidations of Beyer's Chocolates and Grey's Marine demonstrate that the relationship between contractual autonomy and competition policy is no longer merely theoretical but presents an immediate regulatory challenge. Both businesses were longstanding domestic suppliers whose commercial viability became closely intertwined with major retail relationships. Their eventual liquidation generated consequences extending well beyond the immediate contracting parties, including substantial job losses, the erosion of local manufacturing capacity, disruption to domestic supply chains, and renewed concern regarding supplier dependence on powerful retail buyers.⁷

While the precise legal causes of each liquidation remain contested, these events illustrate a broader structural reality that private vertical contractual adjustments may produce significant public-interest harms that are ultimately borne by employees, consumers, communities, and the national economy rather than solely by the contracting firms themselves. These developments expose the limitations of analysing exclusivity arrangements solely through traditional contractual principles.

Exclusivity clauses have long been recognised as legitimate commercial mechanisms capable of promoting investment, reducing transaction costs, safeguarding quality standards, and encouraging long-term cooperation between suppliers and retailers.⁸ Yet these efficiency justifications become considerably more complex where such arrangements operate within highly asymmetric commercial relationships characterised by significant disparities in bargaining power and economic dependence.

In these circumstances, exclusivity may cease to function merely as an efficiency-enhancing contractual mechanism and instead become a means through which dominant purchasers

⁶ Y Sop Choi and J Moon (note 3 above) 353.

⁷ M Libera 'Woolworths under fire as another business closes after 30 years in South Africa' (2026) <<https://businesstech.co.za/news/business/861404/woolworths-under-fire-as-another-business-closes-after-30-years-in-south-africa/>>.

⁸ B Segal and MD Whinston 'Exclusive contracts and protection of investments' (2000) *Rand Journal of Economics* 31 at 603.

reinforce supplier dependence, constrain commercial autonomy, and limit meaningful competitive opportunities. The resulting harms are relational as much as they are structural, arising not simply from market share or pricing conduct but from the sustained exercise of economic power within enduring commercial relationships.

This paper argues that South African competition law must therefore move beyond an exclusivity market-structural conception of abuse of dominance towards a constitutionalised relational approach. It advances the concept of relational dominance to describe circumstances in which a dominant firm's economic power is exercised through relationships of dependency rather than through traditional exclusionary conduct alone. Under this framework, exclusivity clauses in asymmetric supplier-retailer relationships should not be presumed either lawful or unlawful. Instead, they should be assessed according to whether they reinforce structural dependence, foreclose competitive opportunities, or undermine the transformative objectives contained in section 2 of the Competition Act.

Such an approach recognises not only that contractual autonomy remains an important component of commercial law, but also one that must operate consistently with the Constitution's commitment to dismantling structural inequality, promoting inclusive economic participation, and ensuring that markets contribute to broader social and development objectives.

Accordingly, this paper contends that the central challenge facing modern African competition as far as policy is concerned, is no longer simply identifying market dominance in the conventional sense but regulating the exercise of relational dominance within vertically integrated commercial relationships. By constitutionalising the assessment of exclusivity clauses through the public-interest objectives of the Competition Act, competition law can more effectively reconcile commercial certainty with South Africa's transformative constitutional vision, ensuring that private contractual arrangements serve not only economic efficiency but also the broader project of creating a more equitable, inclusive and competitive economy.

II. THE ECONOMICS OF THE DEFENSE – TCE AS AN ANTITRUST SHIELD

Transaction Cost Economics (TCE) has been regarded as one of several important developments in industrial economics. Derived from the insight that the nature and characteristics of transactions influence economic organisation, this model has been used to explain horizontal and vertical boundaries of firms, the reasons for mergers and the motivations for non-standard contractual agreements between firms.⁹

The economic defence of exclusivity agreements in particular, has historically been grounded in the insights of Oliver E. Williamson's theory of TCE.¹⁰ According to Williamson, rather than viewing vertical restraints as inherently anti-competitive, he argued that firms adopt contractual mechanisms to minimise the costs associated with transacting in imperfect markets.¹¹ This theoretical basis has profoundly influenced competition law and continues to underpin the efficiency defence available under section 5(1) of the Act.

Williamson categorises transaction costs into two main factors: 'environmental factors' and 'human factors', whereby the former concerns matters of market uncertainty and the costs of finding qualified contracting partners in commercial undertakings, and the latter concerns bounded rationality coupled with the costs of opportunism.¹² Williamson theorised that firms exist due to the costly nature of markets as every commercial exchange generates a transaction cost which can include but are not limited to searching for trading partners as mentioned previously, negotiating contracts, enforcing obligations, monitoring performance, resolving disputes and adapting to unforeseen circumstances. Where these costs climb significantly, firms adopt governance mechanisms which serve to reduce uncertainty and improve co-ordination.

Competition authorities shall thus frequently recognise that exclusivity agreements may generate efficiencies by reducing contractual uncertainty, protecting intellectual property and encouraging innovation. It is in this manner that section 5(1) of the Act is relevant as a

⁹ M Holland 'Transaction Cost Economics: Applications to Competition Policy in South Africa' (Paper presented at the Competition Commission South Africa Seventh Annual Competition Law, Economics & Policy Conference, September 2013) 1.

¹⁰ SB Avdasheva and IZ Geliskhanov 'Transaction cost economics: Lessons from past reforms and the potential for the digital economy' (2025) *Russian Journal of Economics* 11 at 238.

¹¹ ACM Chen and KN Hylton 'Procompetitive Theories of Vertical Control' (1999) *Hastings Law Journal* 50 at 590-591.

¹² *Ibid* 590.

respondent may avoid liability of any anti-competitive conduct upon demonstrating that the efficiency gains of the conduct outweigh the anti-competitive effects associated with the restraint.

The cornerstone of Williamson's analysis is asset specificity, which is a term referring to the extent to which an investment is customised for a specific transaction and possesses greater value to that transaction as opposed to being redeployed for other services. TCE therefore postulates that asset-specific investments increase the hazards of opportunism and the resulting transaction costs associated with and necessary to safeguard against the risk of opportunistic expropriation.¹³ Thus based on the level of asset specificity, firms will then select an appropriate governance structure, whereby inter-firm relationship performance is expected to maximise when opportunistic behaviour incentivised by asset specificity is reduced.¹⁴ A typical way to mitigate this is by binding the party susceptible to opportunistic behaviour to an exclusivity agreement.

To provide a practical example to the aforementioned, suppose a chocolate manufacturer acquires and installs specialised equipment exclusively capable of producing a certain retailer's private-label products. Should the retailer immediately terminate the relationship while the supplier remains burdened with unrecoverable investment costs, the manufacturer would become reluctant to invest in innovation altogether. An exclusive contract in this instance would reduce investment risk by providing greater assurance that relationship-specific investments will be commercially recoverable.

On the other hand, Williamson also rejected the assumption that contracting parties possess perfect information, and thus parties to commercial relationships exhibit bounded rationality.¹⁵ This entails that although parties behave rationally, they ultimately possess limited information

¹³ JB Heide and RL Stump 'Performance implications of buyer-supplier relationships in industrial markets: a transaction cost explanation' (1995) *Journal of Marketing Research* 27 at 24-36; A Parkhe 'Strategic alliance structuring: a game theoretic and transaction cost examination of interfirm cooperation' (1993) *Academy of Management Journal* 36 at 794-829.

¹⁴ G de Vita, A Tekaya and CL Wang 'The Many Faces of Asset Specificity: A Critical Review of Key Theoretical Perspectives' (2011) *International Journal of Management Reviews* 13 at 330; RJ David and SK Han 'A systematic assessment of empirical support for transaction cost economics' (2004) *Strategic Management Journal* 25 at 39-58; SS Lui, YY Wong and W Liu 'Asset specificity roles in inter-firm cooperation: reducing opportunistic behaviour or increasing cooperative behaviour?' (2009) *Journal of Business Research* 62 at 1214-1219.

¹⁵ T Todorova 'Oliver Williamson's Opportunism, Theoretical and Practical Research in the Economic Fields' (2026) *ASERS* 17 at 62.

and foresight, as a result, future contingencies cannot be perfectly anticipated.¹⁶ Contracts in this instance remain incomplete and incomplete contracts create opportunities for opportunism, which Williamson famously described as ‘self-interest seeking with guile’.¹⁷

To this extent, examples of opportunistic conduct would include exploiting contract loopholes, supplying competitors with similar or same products free riding on another firm’s investments and appropriating confidential information. Going back to the practical example mentioned above, consider the same chocolate factory using the acquired specialised equipment to create a dupe of a certain retailer’s private-label products for a competitor at a discounted rate. In this case an exclusivity agreement would bar this from happening, creating commercial certainty and offering protection for intellectual property.

It thus remains unsurprising that Competition authorities would consequently recognise exclusivity agreements, they provide assurance that investment returns remain internalised, but also, they possess the potential to encourage greater innovation and protect intellectual property. One could argue from this perspective that exclusivity agreements correct market failures as opposed to creating them. It is in this sense that Williamson’s theory finds direct expression within section 5(1) of the Competition Act.

According to section 5(1) ‘An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect’.¹⁸ It is thus incumbent on corporate defendants to establish the identifiable efficiencies, the casual connection between exclusivity and those efficiencies, the inability to achieve comparable efficiencies through less restrictive means as well as overall consumer or market benefit.

Through the lens of exclusive supplier agreements the Competition Tribunal would typically evaluate several TCE considerations when applying the balancing test of section 5(1) such as the existence of relationship-specific investments, protection against opportunism, incentives

¹⁶ Ibid.

¹⁷ OE Williamson ‘The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting’ (1985) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496720>.

¹⁸ Competition Act 89 of 1998.

for innovation and perhaps improved production and distribution efficiency. Hence when credible evidence is demonstrated that exclusivity in this case was reasonably necessary to secure such efficiencies, the restraint may generally be upheld despite its restrictive effects.

However, this paper posits that although TCE offers a theoretically sound foundation for vertical integration and contractual governance, its application within competition law is not without limitations. Most fundamentally, Williamson assumes relatively balanced commercial relationships in agreements, whereby governance structures like exclusive agreements emerge through mutually beneficial bargaining.¹⁹

In concentrated retail markets, however, suppliers often operate under conditions of significant economic dependence where declining exclusivity may mean losing access to an indispensable route to market rather than exercising genuine contractual choice. It is under such conditions which this paper argues that efficiency-based justifications may obscure how exclusivity can reinforce structural dependence and transfer commercial risk onto weaker firms.

Moreover, the traditional TCE framework focuses predominantly on productive efficiency whilst paying insufficient attention to the constitutional and public-interest objectives embedded in South African competition law. Section 2 of the Competition Act requires that competition policy advance not only efficiency, but also employment, industrial development, the participation of small and medium enterprises, and broader economic inclusion. Thus an exclusive arrangement that is efficient in a narrow transactional sense, may nevertheless undermine these transformative goals if it entrenches concentrated buyer power or forecloses opportunities for emerging suppliers.

This limitation sets the stage for the next portion of this paper, which argues that while TCE remains an indispensable analytical tool, it cannot be the sole lens through which exclusivity clauses are assessed. This paper argues that a more complete and dynamic approach requires integrating efficiency analysis with a constitutional understanding of relational dominance, ultimately ensuring that contractual governance structures are evaluated not only for the

¹⁹ OE Williamson 'The Economics of Governance' (2005) *American Economic Review* 95 at 3,12,15,18, 36-37, 68, 117-118.

transaction costs they reduce but also for the distribution of economic power they create and sustain.

III. THE LEGAL – ECONOMIC PATHOLOGY: WEAPONISED LOCK – INS

Although competition law has developed sophisticated methods for assessing market power, barriers to entry, and anti-competitive effects, it lacks a coherent framework for evaluating supplier dependence arising from transaction-specific investments. Traditional indicators such as market share, concentration ratios, and foreclosure analysis focus predominantly on the position of the dominant firm within the broader market.²⁰ Comparatively, they reveal little about the practical ability of an individual supplier to exit an exclusive commercial relationship once substantial relationship-specific investments have been made.

Previously this paper discussed Williamson's theory of TCE in so far as its applicability as an economic defence to contractual relationships that would ordinarily on the surface be considered as restrictive exercises of relational dominance. However, we have yet to explore the explanations that TCE offers for firm behaviour that is on occasion contrary to the market power models of neo-classical and industrial organisation theories. It should be highlighted that the issue in question is not to say that the existing models for defining market power are wrong, but rather they are inadequate in providing explanations for firm behaviour which is not considered by the tests and thus cannot provide on their own, clear guidance to the development of legal rules for competition policy.²¹

It remains undisputed that market power and market structure remain important factors in understanding competition in markets, however this paper argues that sole reliance on these theories which are derived only from general and non-case specific modelling remains flawed and insufficient for sound competition analysis.²² As mentioned previously, TCE is concerned primarily with vertical relationships, thus it can be of great importance for understanding firm

²⁰ P Ferguson and GJ Ferguson *Industrial Economics: Issues and Perspectives* (1994); T Ravhugoni 'Interpretation of market shares, countervailing power, barriers to entry and innovation in a differentiated products market' (Paper presented at Fifth Annual Competition Law, Economics and Policy Conference, 2011) at 3.

²¹ M Holland (note 9 above) at 12.

²² Ibid.

behaviour within the intermediate stages of an industry's supply chain as opposed to the behaviour of firms in relation to consumers in end-user markets.²³

However, given the above, TCE has been less influential with competition authorities, in South Africa there appears to be little recognition or application of the concepts of TCE analysis to competition policy, as a review of Competition Tribunal cases according to which transaction costs are likely to be important do not reveal significant evidence of transaction cost reasoning.²⁴ Furthermore, any significant literature concerning TCE has not found relevance in South African competition law publications, despite the theory offering workable rules and analytical tools for assessing firm behaviour and possessing a large body of empirical research in support of its main propositions and conclusions.²⁵

Joskow argues that the exclusion of TCE poses problems for competition policy, in that 'failure to incorporate theoretical and empirical research in TCE makes it difficult to evaluate the kinds of trade-off between market power and efficiencies that are relevant to developing and applying good legal rules for designing efficient remedies to competitive concerns. These remedies include restrictions on contracting parties, divestiture of assets, or rejections of merger applications'.²⁶

The TCE framework presents itself as an effective framework for identifying potential lock-in practices and relational dominance in vertical agreements, because it provides a calculative logic centred on the relationship between asset specificity and opportunism. According to a study conducted by the Faculty of Business Science at the University of Hong Kong measuring instances where suppliers invest more in asset specificity than the buyer, it was found that the supplier faces greater risks of misappropriation and hold-up.²⁷ In this scenario, the supplier possesses no interest in jeopardising the contractual relationship, whereas the buyer has little to lose if the relationship goes sour, furthermore, if the supplier is opportunistic, the buyer can retaliate easily inflicting more harm to the supplier.²⁸

²³ GJ Werden 'Antitrust Analysis of Joint Ventures: An Overview' (1998) *Antitrust Law Journal* 66 at 701-735.

²⁴ M Holland (note 9 above) at 2-3.

²⁵ Ibid.

²⁶ PL Joskow 'Transaction Cost Economics, Antitrust Rules, and Remedies' (2002) *The Journal of Law, Economics & Organization* 18 at 95-116.

²⁷ F Lumineau, J Lu Jin, S Sheng and K Zheng Zhou 'Asset specificity asymmetry and supplier opportunism in buyer-supplier exchanges' (2022) *Journal of Business Research* 149 at 86.

²⁸ Ibid.

Scholars in this sense have ascertained that potential liabilities exist which are associated with asset specificity, as specific assets cannot be easily redeployed to other relationships, thus consequently creating a lock-in effect or enabling exploitative behaviour through opportunism.²⁹ A recurring limitation within competition law is its tendency to evaluate exclusive agreements as though they are static arrangements. The principal inquiry is ordinarily confined to whether exclusivity generated efficiencies at the moment of contracting,³⁰ and as mentioned previously, if a respondent demonstrates technological, productive, or distributional efficiencies, the agreement may be regarded as commercially legitimate. This static analysis however overlooks important economic realities, being that commercial relationships evolve, investments accumulate and production processes become increasingly integrated.³¹

This paper argues that the significance of these developments is that the same factors which initially justified exclusivity, may subsequently alter the distribution of bargaining power between contracting parties. TCE recognises that relationship specific investments possess the ability to create sunk costs and increase contractual dependence.³² Yet competition law has rarely considered whether these consequences should themselves become relevant to the legal assessment of exclusivity.

Therefore, this paper contends that TCE should be understood as a dynamic theory rather than a static one of contractual governance, furthermore its concepts retain legal significance throughout the life of the agreement, not merely at its conception.

At the commencement of an exclusive dealing arrangement, suppliers ordinarily retain meaningful commercial alternatives, as they may contract with competing purchasers, diversify production, or allocate investment elsewhere.³³ However once transaction-specific investments are made, these alternatives progressively diminish. For instance, specialised manufacturing equipment may produce only one retailer's products, production facilities may become technologically integrated with the buyer's logistic systems, employees may acquire retailer-

²⁹ CR Penny & JG Combs 'A transaction cost perspective of alliance portfolio diversity' (2020) *Journal of Management Studies* 57 at 1073-1105.

³⁰ N Petit, T Schrepel & B Heiden 'Situating the Dynamic Competition Approach' (2026) *The Antitrust Bulletin* 71 at 4-5.

³¹ KK Kim, SH Park, SY Ryoo & SK Park 'Inter-organizational cooperation in buyer-supplier relationships: Both perspectives' (2010) *Journal of Business Research* 63 at 865.

³² S Cheng 'The Influencing Factors of Relationship-specific Investment: A Literature Review' (2022) *BCP Business & Management* 20 at 186.

³³ M Holland (note 9 above) at 7.

specific expertise and regulatory approvals, and quality assurance systems may become tailored to a single purchaser's specifications.

These investments, though economically rational owing to the uncertainty exclusivity reduces through the encouragement of long term cooperation, also create a less appreciated consequence: they reduce the supplier's practical ability to exit the relationship.³⁴ The market as a result undergoes a qualitative transformation, as what initially resembled a competitive bargaining environment has gradually evolved into one characterised by significant economic dependence.³⁵

The supplier's ability to negotiate becomes constrained not by contractual wording alone, but also by irreversible economic commitments embedded within the relationship itself. Accordingly, competition concerns no longer arise solely from the existence of exclusivity, they arise from the interaction between exclusivity and accumulated dependency.

To capture this phenomenon, this paper proposes the concept of Asset Switching Friction (ASF). ASF is not as advanced as a mathematical index or econometric model. Rather, it is proposed as a legal-economic framework through which competition authorities may assess whether transaction-specific investments have substantially impaired a supplier's ability to redirect productive capacity to alternative customers.

The concept thus reflects a simple proposition. It depicts that not all switching costs are equal, some suppliers can diversify with relatively little disruption, whereas others face a significant financial, operational, and strategic obstacles making an exit commercially unrealistic.³⁶ ASF thus describes the cumulative practical difficulty associated with redeploying relationship-specific investments without incurring disproportionate financial harm.³⁷

Rather than applying rigid numerical thresholds, ASF requires a contextual assessment of factors such as the extent of relationship-specific physical assets, investments in specialised

³⁴ KK Kim *et al* (note 31 above).

³⁵ JT Mentzer, DJ Flint & GTM Hult 'Logistics Service Quality as a Segment Customized Process' (2001) *Journal of Marketing* 65 at 82-104.

³⁶ M Ketokivi and JT Mahoney 'Transaction Cost Economics As a Theory of Supply Chain Efficiency' (2020) *Production and Operations Management* 29 at 1015.

³⁷ *Ibid*.

human capital, interrogation into purchaser-specific production or logistics systems, the commercial feasibility of attracting alternative purchasers, the costs associated with redeploying productive assets, revenue concentration and economic dependence, and the likely financial consequences of terminating the commercial relationship.³⁸

These considerations do not create a new legal cause of action. Instead, they provide a structured method according to which existing competition law can identify when exclusivity has generated a level of dependency that warrants closer scrutiny. The principal contribution of this paper is that such considerations are already embedded within TCE. Williamson identified asset specificity as evidence supporting efficient governance.

This paper thus argues that the same evidence should also inform the assessment of economic dependence. For instance, physical asset specificity demonstrates both investment efficiency and difficulty of redeploying productive capacity, human asset specificity reflects not only specialised expertise but also workforce immobility, long-term contractual integration indicates both commercial certainty and heightened switching costs, and protection against opportunism may over time become dependence upon a single purchaser's continued cooperation.

Consequently, competition authorities should apply TCE at two distinct stages, being at the formation of the agreement, whereby TCE assists in determining whether exclusivity is objectively capable of generating efficiencies that justify restricting competition. As well as once the relationship has matured, whereby the same TCE indicators should be revisited to determine whether those efficiencies have produced supplier lock-in, reduced commercial mobility, or facilitated the exercise of disproportionate bargaining power. This paper argues that the second inquiry is underdeveloped within competition law, despite following directly from Williamson's own recognition that transaction-specific investments fundamentally reshape contractual relationships.

Thus to conclude this section, this paper proposes that where ASF becomes sufficiently pronounced, the legal significance of exclusivity changes the agreement in question, thus no longer merely protecting investment, but protecting dependence. A supplier who is unable to redirect production, recover sunk investments or secure alternative purchasers loses the

³⁸ Ibid.

practical ability to negotiate on equal terms. Although the contractual relationship remains formally voluntary, it increasingly resembles one maintained through economic necessity rather than genuine commercial choice, and this is the essence of relational dominance.

Unlike conventional dominance focusing on power exercised within a market, relational dominance concerns power exercised within a commercial relationship.³⁹ A purchaser may not dominate the market as a whole yet nevertheless possess overwhelming leverage over a supplier whose productive assets have become economically immobile.

Viewed through this lens, exclusivity is not inherently objectionable. Its legality depends upon whether it continues to perform its original efficiency-enhancing function or whether it has evolved into a mechanism for maintaining structural dependence. The same contractual provision may thus be lawful at one stage of the relationship and require closer scrutiny at another as the balance of economic power shifts.

This paper thus proposes that a dynamic application of TCE aligns more closely with constitutional purposes of the Competition Act than the prevailing static approach. Section 2, as mentioned requires competition authorities to promote not only efficiency but also employment, industrial development, the participation of small and medium enterprises, and broader economic inclusion. These objectives cannot be fully realised if exclusivity agreements are assessed solely at the moment of their formation, without regard to how they reshape economic relationships overtime.

Accordingly, competition authorities should incorporate ASF into their assessment of exclusivity under section 5(1) as a structured indicator of supplier dependence. Doing so would not displace the efficiency analysis mandated by TCE. Rather, it would ensure that the same theory is applied throughout the life of the commercial relationship, allowing authorities to distinguish between exclusivity that continues to facilitate efficient contracting and exclusivity that has evolved into a mechanism of relational dominance.

³⁹ OE Williamson *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (1985) 71.

IV. THE STATUTORY BLIND SPOT: WHY SOUTH AFRICAN COMPETITION LAW FAILS TO RECOGNISE RELATIONAL DOMINANCE

The preceding parts argued that exclusivity agreements cannot be understood solely through the traditional lens of TCE. Although TCE provides a persuasive explanation for why firms adopt exclusivity to protect transaction specific investments and reduce opportunism, its concept also reveals how long-term commercial relationships may evolve into structures of economic dependence. By reconceptualising TCE as both an efficiency defence and a diagnostic framework, this paper introduced the concept of relational dominance to describe the exercise of economic power within vertically integrated commercial relationships characterised by significant supplier dependence.

The question that follows is whether the existing framework of the Competition Act is capable of identifying and remedying this form of economic power. This paper argues the negative. The Competition Act remains concerned with structural market power, that is dominance measured through market share, barriers to entry, and the ability of a firm to act independently within the broader market. While this framework has proven effective in addressing traditional exclusionary conduct, it is considerably less effective where economic power arises not from dominance over a market, but from dominance over a commercial relationship. A purchaser may possess insufficient market share to satisfy the statutory thresholds contained in sections 7, yet nevertheless exercise overwhelming leverage over an individual supplier whose productive capacity has become economically dependent upon the purchaser.

This distinction exposes a significant statutory blind spot. The Act regulates firms that dominate markets but provides limited guidance where firms dominate trading partners. Consequently, supplier dependence arising from transaction-specific investments frequently falls outside conventional abuse-of-dominance analysis generating consequences directly affecting competition, employment, industrial development, and economic inclusion.

Section 7 of the Competition Act establishes the gateway to abuse-of-dominance liability by defining when a firm is regarded as dominant.⁴⁰ The provision employs market-share thresholds alongside an assessment of market power, reflecting orthodox competition law's

⁴⁰ S 7 of the Competition Act 89 of 1998.

concern with the ability of firms to behave independently of competitors, customers, and consumers. This approach is grounded in the traditional understanding of market power.

However, market-share analysis asks whether a firm possesses sufficient influence over the relevant market to distort competitive outcomes.⁴¹ It does not ask whether that firm possesses overwhelming leverage over particular supplier. These are analytically distinct inquiries. Consider a national retailer for instance, with a market share well below the statutory threshold ordinarily associated with dominance. From the perspective of the retail market as whole, such a retailer may continue to face vigorous competition from rival chains and thus lack the ability to behave independently of market forces. Under the conventional framework of the Act, the retailer would not ordinarily attract abuse-of-dominance scrutiny.

The analysis changes however when viewed from the perspective of an individual supplier. Where a supplier has invested in retailer-specific production lines, customised packaging, integrated logistics systems, specialised workforce training, and long-term manufacturing capacity dedicated primarily to a single purchaser, that retailer may exercise overwhelming influence over the supplier's commercial survival irrespective of its broader market position.⁴² If the supplier derives the substantial majority of its revenue from that purchaser and cannot realistically redirect production elsewhere without incurring severe financial loss, the purchaser possesses a form of economic leverage that conventional market-share analysis fails to capture.⁴³

The supplier's dependence is thus relational, as opposed to structural. This distinction demonstrates the limitations of treating market share as the exclusive indicator of economic power. Section 7 assumes that dominance exists primarily where firms occupy commanding positions within a defined market. Yet, commercial reality increasingly reveals situations in which firms exercise profound influence within individual supply relationships despite lacking market-wide dominance. The result is that economic power capable of producing substantial anti-competitive effects may remain legally invisible because it does manifest through the indicators that the statute presently recognises.

⁴¹ MJ Mauboussin and D Callahan 'Marker Share: Understanding Competitive Advantage through Market Power' (2022) <https://www.morganstanley.com/im/publication/insights/articles/article_marketshare.pdf>

⁴² OE Williamson (note 39 above).

⁴³ Ibid.

This by no means suggests that market share has become irrelevant. Market concentration remains an indispensable component of competition analysis. This paper advances however, that market share should not be regarded as exhaustive of economic power. Structural dominance and relational dominance represent different manifestations of commercial power, each capable of producing exclusionary effects, but each requiring distinct analytical tools.

The introduction of buyer-power provisions represented an important development in South African competition law by acknowledging that competition concerns may arise not only from powerful sellers but also from powerful purchasers.⁴⁴ These amendments reflect the legislature's recognition that dominant buyers may exploit suppliers through unfair purchasing practices capable of undermining competition and frustrating broader public-interest objectives.⁴⁵

However, while these provisions broaden the scope of competition enforcement, they remain directed primarily towards the regulation of conduct rather than dependency. In particular, the statutory focus is on whether a dominant purchaser imposes unfair prices or trading conditions on designated categories of suppliers. This inquiry addresses exploitative behaviour occurring within the commercial relationship. It does not examine the conditions that make such exploitation possible in the first place.

This distinction is significant as a supplier that remains commercially mobile retains the practical ability to reject unreasonable contractual demands by redirecting production to alternative purchasers. In contrast, a supplier whose productive assets have become deeply embedded within a single commercial relationship may lack any realistic capacity to refuse equivalent demands. The imbalance of bargaining power arises not solely because the purchaser behaves unfairly, but because the supplier has become economically dependent upon the continuation of the relationship.⁴⁶

⁴⁴ S 8(4) of the Competition Act 89 of 1998: prohibits dominant buyers in sectors designated by the Minister from imposing unfair prices or trading conditions on suppliers that are small and medium-sized businesses (SMEs) or owned by historically disadvantaged persons (HDPs); Eversheds Sutherland 'Buyer power provisions under South Africa's competition law' (2020) <<https://www.eversheds-sutherland.com/en/south-africa/insights/buyer-power-provisions-under-south-africas-competition-law>>.

⁴⁵ Ibid.

⁴⁶ D Prajogo, B Cooper, R Donohue & A Nair 'The Effect of Customers' Unethical Practices on Suppliers' Intentions to Continue Their Relationships' (2025) *Journal of Business Ethics* 197 at 537.

The law thus only intervenes once exploitation becomes visible through identifiable conduct. However little attention is paid to the structural dependence which enables such conduct to occur. Viewed from this perspective, relational dominance precedes abuse. Economic dependence is the condition that creates the opportunity for exploitation. Once substantial transaction-specific investments have been made and commercial alternatives substantially reduced, almost any contractual amendment, whether relating to price, exclusivity, production standards, or delivery obligations may become practically irresistible. The supplier's consent remains legally valid, albeit economically constrained.

This reveals an important limitation within the existing statutory framework. By concentrating on unfair conduct rather than supplier dependence, the Act addresses the symptoms of relational dominance without directly engaging with its underlying cause. The statutory gap identified above has significant implications for competition enforcement.

Where the legal framework fails to recognise supplier lock-in as a relevant indicator of competitive harm, enforcement authorities are often compelled to intervene only after the commercial relationship has already collapsed. Investigations therefore become retrospective exercises undertaken in response to business failures employment losses, or public complaints, rather than preventative interventions designed to preserve competitive market structures before irreversible harm occurs.

The recent financial distress experienced by long-standing South African suppliers illustrates this challenge.⁴⁷ The commercial consequences of supplier collapse extend well beyond the contracting parties. Liquidations frequently result in the loss of productive capacity, diminished supplier diversity, reduced opportunities for SMMEs, disruption of domestic manufacturing, and widespread job losses. These outcomes directly implicate the public-interest objectives contained in section 2 of the Competition Act, yet competition authorities may possess limited legal tools to intervene where the relevant concerns arise from accumulated economic dependence rather than readily identifiable exclusionary conduct.

This reactive model of enforcement sits uneasily with South Africa's transformative constitutional framework. The Competition Act is intended not merely to punish anti-

⁴⁷ M Libra (note 7 above).

competitive behaviour after the fact but to promote an inclusive and competitive economy capable of supporting employment, industrial development, and meaningful participation by SMMEs and HDPs.⁴⁸ Those objectives are more effectively advanced through regulatory approaches capable of identifying structural vulnerabilities before they culminate in commercial failure.

Thus this paper proposes that recognising ASF as a relevant legal consideration would contribute to such a preventative approach. By assessing the practical mobility of suppliers, alongside traditional indicators of market power, competition authorities would be better equipped to identify relationships characterised by severe economic dependence and to scrutinise exclusivity arrangements before supplier vulnerability translates into market exit or liquidation. The objective would not be to prohibit exclusivity as such, but to distinguish between exclusivity that continues to facilitate efficient commercial cooperation and exclusivity that has evolved into mechanism for sustaining relational dominance.

V. TOWARDS A CONSTITUTIONAL THEORY OF RELATIONAL DOMINANCE

The preceding parts demonstrated that South African competition law remains principally concerned with structural conceptions of market power. Although sections 7 and 8 of the Competition Act provide effective mechanisms for addressing traditional forms of dominance and exclusionary conduct, they do not adequately recognise economic dependence that develops within long-term vertical commercial relationships. Consequently, competition authorities may identify anti-competitive effects only after supplier dependence has matured into business failure, liquidation, or market exit.

This paper argues that the solution does not necessarily require a wholesale reconstruction of the Competition Act. Rather, it requires a constitutional reinterpretation of its existing provisions. The Constitution of the Republic of South Africa, 1996 is not merely an external limitation on competition law; it is an interpretative framework that shapes the meaning and application of every statute. Section 39(2) of the Constitution directs courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and when

⁴⁸ Competition Commission of South Africa Annual Performance Plan 2025-2030 at 17
<<https://www.thedtic.gov.za/wp-content/uploads/Competition-Commission-APP-REVISED.pdf>>.

developing the common law. The Competition Act, as legislation enacted to restructure South Africa's economy and promote equitable participation in markets, must therefore be interpreted consistently with these constitutional commitments.

Building on this constitutional mandate, this paper argues that sections 5 and 8 should be interpreted in a manner that recognises relational dominance as a legally relevant form of economic power. Such an interpretation is supported not only by the transformative objectives contained in section 2 of the Competition Act but also by the Constitutional Court's jurisprudence concerning fairness, public policy, and the constitutional regulation of private contractual power.

South African competition law occupies a distinctive position within the constitutional order. Unlike many foreign competition regimes that pursue efficiency and consumer welfare as their principal objectives, the Competition Act expressly incorporates broader social and developmental goals. Section 2 identifies among its purposes the promotion of employment, industrial development, the participation of SMMEs, the spread of ownership, and greater participation by HDPs in the economy.

The objectives of section 2 demonstrate that the Act is an instrument of transformative constitutionalism rather than merely economic regulation. Transformative constitutionalism has been described by the late Chief Justice of the Constitutional Court, Pius Langa, as an ongoing project of constitutional change aimed at restructuring the economy, institutions and social relationships in accordance with the values of dignity, equality and freedom.⁴⁹ Within the context of competition law, this project requires more than preserving rivalry between firms. It requires attention to the distribution of economic opportunity, the removal of structural barriers to participation, and the prevention of private arrangements that entrench historical patterns of exclusion.

Section 39(2) provides practical context to this constitutional vision by directing courts and tribunals to promote the spirit, purport and objects of the Bill of Rights when interpreting

⁴⁹ P Langa 'Transformative constitutionalism' (2006) *Stellenbosch Law Review* 17 at 3.

legislation.⁵⁰ The Competition Tribunal, the Competition Appeal Court, and ordinary courts applying the Competition Act are thus constitutionally obliged to interpret sections 5 and 8 in a manner consistent with the Act's transformative purposes.

Accordingly, where more than one plausible interpretation of an exclusivity agreement or abuse-of-dominance provision exists, preference should be given to the interpretation that better advances constitutional objectives of economic inclusion and substantive equality.

Although the present inquiry arises within competition law rather than contract law, the Constitutional Court's approach to private contractual relationships provides valuable guidance. Two decisions are particularly instructive: *Barkhuizen v Napier*⁵¹ and *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust*⁵².

Although neither case concerned competition law, nor did either decision suggest that courts may invalidate contractual terms merely because they appear commercially harsh. Instead, both judgements articulated an important constitutional methodology: contractual autonomy remains a foundational value of private law, but its exercise is not immune from constitutional scrutiny.⁵³ The enforceability of contractual terms must ultimately be assessed through the constitutional values informing public policy, including fairness, reasonableness, dignity, equality and freedom.

In *Barkhuizen*, the Court affirmed the continued importance of *pacta sunt servanda*, recognising that contractual certainty promotes commerce and individual autonomy.⁵⁴ Simultaneously, the Court held that contractual enforcement cannot be divorced from constitutional values. Public policy, informed by the Constitution, serves as the standard against which contractual enforcement must ultimately be measured.⁵⁵

⁵⁰ S 39(2) of the Constitution provides that 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

⁵¹ 2007 (5) SA 323 (CC).

⁵² 2020 (5) SA 247 (CC).

⁵³ *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust* 2020 (5) SA 247 (CC) para 87; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 30.

⁵⁴ 2007 (5) SA 323 (CC) para 87.

⁵⁵ *Ibid* para 70.

Similarly, in *Beadica*, the Court reaffirmed that judges may not invalidate contracts solely because they consider them unfair.⁵⁶ Nevertheless, fairness and constitutional values remain integral to the determination of public policy. The Court rejected both unqualified contractual freedom and unconstrained judicial discretion, instead requiring a careful balancing between commercial certainty and constitutional justice.⁵⁷

The significance of these decisions for the present discussion lies less in their contractual outcomes than in their interpretative methodology. They demonstrate that private commercial arrangements exist within a constitutional legal order and that apparent neutral doctrines must be interpreted consistently with constitutional values. The same reasoning finds application in competition law. Just as contractual autonomy is not absolute, neither is the freedom to structure commercial relationships through exclusivity agreements where their practical operation undermines the Competition Act.

Applying this methodology to competition law requires a shift in the way exclusivity agreements are assessed. Under the conventional approach, the principal inquiry under section 5 is whether the agreement substantially prevents or lessens competition and, if so, whether technological, efficiency or other pro-competitive gains outweigh its restrictive effects. This analysis, while economically rigorous, is often confined to questions of productive efficiency and market structure. A constitutional interpretation requires a broader inquiry.

The question should not be limited to whether exclusivity generated efficiencies when concluded. It should also encompass whether the continued operation of the exclusivity arrangement remains compatible with the constitutional purposes reflected in section 2 of the Competition Act. Where an agreement has evolved into a mechanism that entrenches supplier dependence, forecloses opportunities for smaller firms, undermines industrial development, or frustrates the meaningful participation of historically disadvantaged enterprises, those consequences are directly relevant to the statutory balancing exercise.

This does not mean that efficiency considerations lose their significance. Rather, efficiency must be understood within South Africa's constitutional framework, where competition policy serves developmental as well as economic objectives. An exclusivity clause that maximises

⁵⁶ 2020 (5) SA 247 (CC) para 59.

⁵⁷ Ibid para 71.

productive efficiency while simultaneously creating structural dependency and suppressing supplier mobility may satisfy a narrow economic conception of welfare yet remain inconsistent with the broader constitutional purposes of the Act.

The concept of ASF, introduced previously, provides one means through which competition authorities may operationalise this constitutional inquiry. By evaluating the practical mobility of suppliers and the extent of transaction-specific dependency, authorities can determine whether exclusivity continues to serve its original efficiency-enhancing function or whether it has become an instrument through which relational dominance is maintained.

While a constitutional interpretation of the existing provisions would significantly improve the operation of the Competition Act, legislative clarification would provide greater certainty for businesses, regulators and courts. Rather than adopting rigid numerical thresholds of economic dependence, the legislature could consider recognising abuse of economic dependence as a distinct category of prohibited conduct. Such a provision would complement, rather than replace, the existing abuse-of-dominance framework by addressing situations in which substantial bargaining power arises from long-term commercial dependence rather than market-wide dominance.

Any reform should remain principles-based. It should direct competition authorities to consider factors such as the degree of supplier dependence, the extent of transaction-specific investment, the feasibility of commercial diversification, the duration of the relationship, the presence of exclusivity obligations, and the practical consequences of termination. These considerations closely mirror the concept of Asset Switching Friction and would provide a coherent framework for distinguishing legitimate commercial cooperation from exploitative dependency.

Importantly, recognising economic dependence would not prohibit exclusivity agreements or long-term commercial partnerships. It would simply acknowledge that where those arrangements create relationships of profound dependency, competition law should scrutinise the exercise of private economic power with the same care that it applies to traditional forms of market dominance.

VI. CONCLUSION AND POLICY RECOMMENDATIONS

This paper has argued that South African competition law remains anchored in a structural conception of economic power that measures dominance primarily through market share and conventional exclusionary conduct. While this framework remains essential for regulating traditional abuses of dominance, it inadequately captures a distinct form of economic power that arises within long-term vertical commercial relationships. Where transaction-specific investments, exclusivity arrangements and accumulated switching costs substantially constrain a supplier's ability to diversify or exit, a purchaser may exercise overwhelming influence over that supplier despite lacking dominance in the broader market. This paper conceptualises that phenomenon as relational dominance.

Rather than rejecting Transaction Cost Economics (TCE), the paper has argued that it should be applied dynamically. The same concepts traditionally relied upon to justify exclusivity (i.e. asset specificity, bounded rationality and protection against opportunism) should not operate solely as an efficiency defence. They should also assist competition authorities in identifying when efficiency-enhancing governance structures have evolved into supplier lock-ins characterised by economic dependence. In this context, the proposed concept of Asset Switching Friction (ASF) provides a structured legal framework through which competition authorities may assess whether suppliers retain meaningful commercial mobility or have become economically captive.

The paper further contends that the existing statutory framework does not adequately recognise this form of private economic power. Sections 7 and 8 of the Competition Act remain principally concerned with structural market dominance and exploitative conduct, leaving a regulatory gap where dependency arises within individual commercial relationships. Addressing that gap does not necessarily require abandoning the existing framework. Rather, section 39(2) of the Constitution requires the Competition Act to be interpreted consistently with its transformative objectives, including the promotion of economic inclusion, industrial development and the participation of small and medium enterprises. A constitutional interpretation of competition law therefore supports recognising supplier dependence as a relevant consideration when assessing the legality of exclusivity arrangements.

From a policy perspective, South Africa should consider adopting a more explicit framework for assessing economic dependence within competition law. Such an approach would not be unprecedented. Several European jurisdictions, particularly Germany⁵⁸ and France⁵⁹, already recognise forms of abuse of economic dependence even where the alleged perpetrator is not dominant in the conventional market-share sense. Although these jurisdictions differ in their legislative design, they demonstrate an important principle: market share is not the sole manifestation of economic power worthy of legal intervention. Rather than transplanting these models wholesale, South Africa has an opportunity to develop a distinctly constitutional approach that aligns with section 2 of the Competition Act and the country's transformative constitutional project.

This question also has significance beyond South Africa. As implementation of the African Continental Free Trade Area Protocol on Competition Policy gathers momentum, resilient regional value chains will depend upon resilient domestic supply chains. Competition policy that overlooks profound supplier dependence risks weakening local manufacturing capacity, reducing supplier diversity and undermining the participation of African enterprises in continental markets. Recognising relational dominance therefore contributes not only to more effective domestic competition enforcement but also to broader continental objectives of inclusive industrialisation and sustainable economic integration.

Ultimately, this paper advances a simple proposition: competition law should measure not only who dominates markets, but also who dominates relationships. By reconceptualising Transaction Cost Economics as both an efficiency defence and a diagnostic framework, and by recognising relational dominance as a distinct form of private economic power, South African

⁵⁸ P Këllezi 'Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence' in MO Mackenrodt, BC Gallego and S Enchelmaier (Eds) *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (2008) at 61 'Germany was the first European country to adopt specific rules on the abuse of economic dependence. It was the main objective of the second modification of 1973 of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, or GWB). The underlying rationale was to prevent big oil corporations from discriminating against small independent oil stations during the oil crisis; additionally, the rule aimed at protecting other retailers from dependence on strong brands and the dependence that resulted from long-standing business relations.'

⁵⁹ Ibid at 63 'The ordinance of 1986 extended the scope of the dominant position by introducing specific rules on economic dependence (abus de dépendance économique). It was modified successively in 2001 and 2005.47 Article L 420-2 of the Commercial Code, which concerned the abuse of a dominant position, reads as follows: "Also prohibited, whenever it is susceptible to affect the functioning or structure of competition, is the abusive exploitation, by a company or group of companies, of the condition of economic dependence in which a customer company or supplier finds itself vis-à-vis such company. These abuses may consist of the refusal of sale, tied sales or the discriminatory practices mentioned in article L 442-6."

competition law can move closer to fulfilling its constitutional commitment to competitive, inclusive and transformative markets.

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