Assessing the record on competition enforcement

ROUGH INCOMPLETE DRAFT FOR ESSA CONFERENCE

NOT FOR CIRCULATION

Simon Roberts

CCRED

24 August 2015

Abstract

The Competition Act's objectives encompass addressing anti-competitive conduct in the interests of broader based participation in the economy. This paper will review the enforcement of the Act by the Competition Commission, Competition Tribunal and Competition Appeal Court, with a focus on abuse of dominance. In particular, it will analyse the standards applied by the Competition Tribunal and Competition Appeal Court in their rulings and the role that economic evidence has played. In this it considers the balancing of over and under enforcement. The paper locates its assessment in the context of the challenges of developing a more inclusive South African economy.

1. Introduction

Competition is at the centre of an economy's dynamism. Competition between firms is an impetus to improve through a process of rivalry – testing oneself against others in offering goods and services to customers on an on-going basis. Critical to this process is, first, the ability of firms to upgrade and improve their productive capabilities, and, second, the possibility for new participants to bring their goods and services to market. This is particularly pertinent for South Africa in the context of the challenges facing black business.

Competition happens within a set of rules which go far beyond the Competition Act. These are all the rules that govern how firms participate in markets - putting together the necessary resources, developing their product offering and marketing it to buyers. There are also accepted values and norms (that go beyond the explicit rules) in any country about what is fair and reasonable in terms of competitive behaviour. Together with the laws they form a country's 'economic constitution'. This differs greatly across countries as can be seen from comparing countries as diverse as South Korea, Germany and the USA.

In South Africa I argue there is an urgent need to widen the debate to understand what is required for competition to be an active and inclusive process that works through the development of capabilities for improved performance. Critically, it is important to appreciate that it is a creative process that includes developing skills and opening the space for new ideas. This is at the heart of the development of the South African economy.

2. The economics of competition and implications for industrial development

Empirical studies have shown that a fall in concentration leads to a fall in prices and in price cost margins (see Schmalensee, 1989). The results with regard to profits, taking into account returns on initial investments made, are much weaker, however. Cross-industry regressions find scale economies is a strong explanatory factor for concentration (Sutton, 2006). Smaller markets relative to the minimum efficient scale of production in an industry means, other things equal, that concentration will be higher. Most empirical studies have focused on manufacturing.

Other characteristics put forward to explain concentration include the intensity of advertising and R&D, although R&D has typically been found to be uncorrelated with concentration (Sutton, 2006). In addition, these are not exogenous but are part of firms' strategies. Imperfect information and consumer brand loyalty can underpin marketing strategies linked with (exogenous) distribution scale economies to raise the costs of entrants, even where the minimum efficient scale of the actual manufacture of the product is not very large.

With regard to services, network effects have been found to be very important, depending on the industry in question. Where the value to a consumer of a network service depends on how many others are part of the same network then there are substantial first-mover advantages. The impact of these effects also depends on whether there are regulatory interventions to mandate inter-operability and inter-connection.

The features of an industry, together with market imperfections associated with imperfect information, is now recognized to provide scope for strategic behavior (Vickers, 2005). Dominant firms can lock-in advantages through a range of different strategies (Rey and Tirole, 2006; Whinston, 2006). Models can explain possible anti-competitive exclusion with either scale economies or imperfect information (although, in real world markets both may well be present). In addition, a dominant firm does not necessarily engage in a single strategy but can adopt multiple and mutually reinforcing strategies. Of course there are also possible efficiency rationales for conduct such as exclusive dealing, which means a case-by-case analysis is necessary. Whether there should be presumptions depending on considerations such as market conditions, the extent and durability of dominance and whether the position was the result of innovation is an important question to which we return below.

It is now also increasingly recognized that strategies which appear different on the surface may be equivalent. For example, targeted, individualized loyalty rebates can amount to *de facto* exclusive dealing. A vertically-integrated firm with a monopoly in an indispensable input which engages in a margin squeeze over its non-integrated rival through a higher input price is effectively refusing to supply. In the latter, the downstream firm may well lodge an accusation of predation if it perceives the downstream price to be below its costs. This has implications for attempting to 'pigeon-hole' conduct, as the South African Competition Act does.

The Chicago critique asked why a dominant firm would have the incentive to foreclose, even where they may have the ability to do so. An upstream monopolist, vertically integrated into the downstream market, can earn the one monopoly profit through its upstream pricing and does not need to foreclose downstream rivals. However, this ignores the fact that an entrant upstream – to undermine its monopoly position – may be much more likely if allied with a downstream firm which understands the product and consumer characteristics. Similarly, there may be an anti-competitive rationale for tying and bundling where entrants are likely from adjacent markets.

These theories of exclusionary conduct can explain why dominant firms may be able to protect their position. This is different from concentration, as such. Persisting dominance of the incumbent suggests that effort and creativity are not being rewarded but the legacy position. As Geroski and Jacquemin (1984: 22) caution: 'when, however, small asymmetries can be solidified into dominant positions that persist, the inequities they create become institutionalized, creating long-term problems in the performance of the economic system which cry out for policy attention'.

The likelihood of entrenched dominant firms depends on the country conditions and history. This implies a different balance in enforcement from country to country, as has been reflected in comparisons between the appropriate priorities and standards in North America and

Europe, as well as comparisons with some Asian countries such as Japan and South Korea (Evans, 2009; Vickers, 2007; Fox, 2002 & 2003; Hur, 2004). The objectives of the South Korean Fair Trade Commission (KFTC) are to encourage free and fair competition, prevent the concentration of economic power and thereby promote 'balanced development'. This is because the early stages of rapid industrialisation were viewed as 'unbalanced', requiring an active competition policy addressed at dominant firms in that country. The mandate of the KFTC therefore includes evaluating 'unreasonable' practices and 'unjustifiable' restrictions on competition (Fox 2003; KFTC, 2011). Kyu-Uck Lee (1997, as cited in Fox, 2002) observes the following regarding competition law and policy in Korea:

> 'Competition is the basic rule of the game in the economy. Nevertheless, if the outcome of competition is to be accepted by the society at large, the process of competition itself must not only be free but also conform to a social norm, explicit or implicit. In other words, it must also be fair. Otherwise, the freedom to compete loses its intrinsic value. Fair competition must go in tandem with free competition. These two concepts embody one and the same value. This may be the reason that competition laws of several countries such as Korea and Japan clearly specify 'fair and free competition' as their crown objective. . . . I believe that the abstract notion of fairness rests, inter alia, on equitable opportunities, impartial application of rules and redemption of past undue losses. . . . Fairness, then, does not imply absolute libertarianism but instead takes the form of socially redefined freedoms.
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> Viewed from this perspective, the polemic whether competition laws should aim only at enhancing economic efficiency rather than at promoting some social policy goals such as fairness may appear to be irrelevant. After all, efficiency is intrinsically not a value-free concept.
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> …[I]n a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of <u>raising the power</u>, within reasonable bounds, <u>of underprivileged economic agents to become viable participants in the process of competition on the one hand</u>, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are usually protected through import

> restrictions. This will then give rise to public dissatisfaction since the game itself has not been played in a socially acceptable, fair manner.' (emphasis added)

Fox also cites Nam-Kee Lee (2002), then Chairman of the Korea Fair Trade Commission, as follows:

> '…developing countries cannot avoid concerns about the competitiveness of domestic businesses. In this context, it would not be well advised to suggest that developing countries adopt the same level of competition policy as developed countries, when their markets are not as mature and businesses not as competitive.'

What are the implications for developing economies and African countries, in particular? There are reasons why the durability of dominance is greater. Scale economies are more significant given the smaller size of markets, information is likely to be poorer, and the costs of building brand awareness, advertising, distribution & marketing may be higher relative to sales. The first movers in many countries are likely to have gained their position either through state-support and ownership (even if now privatized) or by being a subsidiary of a multinational corporation that established its footprint under colonial rule. However, while the effect of scale economies is well established, we should be cautious about generalisations in other areas – instead seeing these issues as important ones for future research. There is a growing field of work on the appropriate competition policy for developing countries but relatively little regarding African economies (on developing countries see: Gal, 2003 & 2009; Brusick and Evenett, 2008; Dabbah, 2010).

While greenfield entry by a new investor appears less likely, the learning from models and cases suggests that entry may also be more likely from adjacent geographic markets if the market conditions are similar, and the firm can leverage its existing capabilities. This has implications for regional integration. In addition, there are links with development policies. Hausmann and collaborators find productive capabilities migrate – a firm which has developed capabilities in one product such as cutting machinery for forestry (in the case of Finland) can more readily develop capabilities in cutting machinery for other materials. This suggests that at the regional and country level we need to consider how the 'optimal level of competition' can be fostered, which links to capabilities development (Amsden and Singh, 1994; Singh, 2004).

3. Competition, political economy and inclusive growth[1]

A competitive market is typically explained in static terms as one with many firms, constant returns to scale, homogenous products and complete information. Prices are equal to marginal cost and there is allocative and productive efficiency. Leaving aside issues with the assumptions, competition can be understood in dynamic terms as a process of rivalry which rewards effort, investment and creativity. In these terms we can consider who are the participants and how they are able to bring their products and services to market. For example, Sen has argued that the competitive market mechanism should be evaluated in terms of its accomplishments in promoting individual freedoms (to produce, develop productive capabilities, and make autonomous choices), as opposed to the conventional framework of welfarist assessment (Sen, 1993). Sen distinguished the 'opportunity aspect' relating to the range of choice, and the 'process aspect' which includes decisional autonomy not restricted by interference from others (Sen, 1993).

Inclusive growth is explained by Ramos, Ranieri and Lammens (2013:4) in the following terms:

> 'Inclusive growth is both an outcome and a process. On the one hand, it ensures that everyone can participate in the growth process, both in terms of decision-making, for organising growth progression as well as in participating in the growth itself (and earning income). On the other hand, it goes some way towards ensuring that everyone equitably shares the benefits of growth. Inclusive growth implies participation and benefit sharing. Participation without benefit sharing will make growth unjust and sharing benefits without participation will make it a welfare outcome.'

Inclusive growth defined this way is about not just ensuring that the poor benefit from growth, but also that there is increased participation of the poor and disenfranchised individuals in in the process of growth. This would occur via an increase in employment and entrepreneurship, as well through entry and participation at the firm level (access to markets), whereas the benefits thereof are derived from rising incomes and increased social expenditure. Inclusive growth refers to both the pace and distribution of economic growth (Anand, Tulin and Kumar, 2014).

[1] This draws from Makhaya and Roberts, (2014).

It follows that competition is a key component of inclusive growth (in the formulation of Acemoglu and Robinson, 2012) or 'open access orders' (in North, Wallis and Weingast, NWW, 2009). But, a country does not arrive at competitive markets by magic. Indeed, it seems obvious that market power, imperfect competition and market failures which can reinforce positions of market power are intrinsic features of economic life. We therefore need to understand how the *process* of evolving competitive rivalry is related to the nature of economic opportunity and outcomes.

At the heart of the assessment of NWW is the combined importance of competition in both the economic and political spheres. Indeed, they argue (2009: 129) that '[b]y studying democracy in isolation of markets, political scientists have missed these forces [competitive markets] of political stability.' By this NWW mean that competitive markets generate long-term prosperity and allow for dynamism in terms of different social groups and interests, which feeds into politics. Conversely, according to NWW, distortions such as from rent-seeking impact on relative prices which, in an economy with competitive markets, generate a response from forces in society which recognise the economic costs that are imposed. But, why and how will such competitive markets arise?

NWW believe that progress towards an open access order (OAO) involves competition eroding rents, and that this involves liberalisation and independent institutions. However, this fails to recognise the important role that industrial policies and tariffs have played in countries industrialising and does not take us forward in understanding how interests are aligned with the policy frameworks that are adopted (see, for example, Khan, 2006). The construction of markets and the main participants reflect a country's economic history. How does competition law and policy then relate to moving towards meaningful increased access?

It has been argued that the vigorous promotion of competition law for developing countries disregards political and institutional realities – in simple terms, because institutions are weak and concentrated business interests are too strong (Rodriguez and Menon, 2010). The strength of those behind anti-competitive arrangements such as cartels will simply mean that they subvert the competition regime where enforcement is attempted (Mateus, 2010). But, a competition agenda has been supported in different countries and we need to understand where competition fits with the changing influence of different interests.

It is evident that, while economic regulations are meant to correct for market failures and natural monopolies (entrenched dominant firms), they also respond to lobbying. The balance of power between different interests in a country thus determines the regulatory arrangements which are part of the wider ‘political settlement’ (Khan, 2006). In evaluating the regulatory regime, including as it relates to competition, we can distinguish between where rents are conditional on productive investment (an implicit quid pro quo) and where short-term rents are maximized and protected. In the former situation, the elite interests have taken a longer-term view in that they recognize need for sharing returns and for the growth of public infrastructure and capabilities as this underpins the long-term sustainability of the economy and hence the value of their stake in it. An evolution towards a more rules-based and less personalized system for allocating access is part of such a trajectory. By comparison, an orientation towards extraction of maximum short-term rents means allowing the unfettered exercise of market power, not disciplined either through regulation or promoting competition, and even while it is evident that there is long-term harm to the economy.

It is perhaps more appropriate to understand these as tendencies, whose weight depends on many factors. For example, if a business can relocate with ease, then there is less need to consider the long-term effects. Similarly if elite interests are able to take rents out of the country without fear that a future regime can take action to recover them, then they will have less of a stake in the future. This is likely where personal relationships can be used by incumbents to block rivals (for example, through regulations, licence permissions, arbitrary judgments). On the other hand where buyers are important and organized interests then they will push for discipline on market power. In the case of the antitrust law in the USA a key constituency promoting its adoption was farmers who were being subject to high input and transport costs due to the power of the trusts. Urban consumers can also be an important pressure group. New entrants are also possible sources of support. Research can also play an important role in demonstrating the harm caused by concentrated interests which have been able to undermine competition.

In assessing the evolution of arrangements governing competition, we are considering competition policy and the competition regime to extend beyond the law and mandate of any competition authorities. It includes the links with the regulatory provisions as well as the host of other laws and actions that impact on entry and effective competitive rivalry (Das Nair et al., 2012). Indeed, it is unlikely that competition enforcement by a young competition authority will succeed in disciplining powerful interests. Instead, regional integration which means greater rivalry from neighbouring countries might be more effective. Entrants may come from firms in adjacent markets or in an upstream or downstream relationship. Industrial policies may support such entrants. Changing the structure of the economy requires a competition policy which actively opens up participation including through the enforcement of competition law but also through a wider set of interventions in terms of the regulatory framework, the provision of economic infrastructure, development finance and industrial policy.

How has competition law and its enforcement matched up to the need to address harm to competition and the balancing of over and under enforcement in South Africa?

4. The record of competition enforcement with regard to abuse of dominance

At the outset it is important to recognize that the progressive objectives of the Competition Act do not find reflection in the terms of the abuse of dominance provisions. While there are public interest considerations and a list of factors that must be taken into account where mergers are concerned, in both restrictive practices and abuse of dominance the stance adopted in the legislation is to limit to scope for addressing the exertion of market power and anti-competitive arrangements.

The focus on mergers and cartels identifies situations where there should be effective competition but there might not be – because the firms are planning to merge, or because they have coordinated together. This rests on competition being the default – it will exist in the absence of anti-competitive combinations of firms. It is strange in South Africa in the mid-1990s where the concentration was so extreme that a small number of conglomerate groupings effectively controlled large swathes of the economy.

The different stances in the different sections of the Act, while appearing strange, is the result of the debate between the social partners and what is, in effect, the 'political settlement' reached in 1998/99. The business constituency (which was actually the organisation of the top 50 companies, the then South Africa Foundation) adopted a stance which offered little resistance to the broadening of the merger review[2] but argued for the need for circumscribed provisions in enforcement in order to protect 'certainty' for business. It was a deliberate negotiating strategy, as discussed at the time by the business team.[3] The appeal to business confidence drew its support from the timing of the negotiation of the legislation being shortly

[2] Presumably the largest 50 businesses did not anticipate much need or opportunity for acquisitions in the South African economy, when weighed against threats to their dominance by smaller rivals.
[3] See interviews with those in the Nedlac discussions, chapter 4 of Roberts (2000).

after the sharp depreciation of the currency in 1996 and the perceived need to placate international capital markets.

The business case for certainty is a version of placing greater weight on the dangers of over-enforcement (or the probability and costs of Type 1 errors, where anti-competitive conduct is identified where it is not the case) than on the probability and costs of under-enforcement. Under-enforcement means dominant firms have been able to maintain their position over actual and potentially efficient rivals and entrants. Are these concerns trivial because the dominant firms are efficient and not exerting market power, and it is unlikely that rivals would have grown? Or, are the concerns material as the dynamism and increased economic participation that comes from smaller rivals has been stifled?

Abuse of dominance provisions

Prohibited abuses of a dominant position are set out in section 8 of the Competition Act, with separate sub-sections. Prohibited price discrimination by a dominant firm is covered in section 9. South Africa differs from most other countries in specifying separate conduct in South Africa as discrete contraventions rather than having one over-arching provision proscribing abuse of dominance, within which particular forms of conduct fall.

Under section 8(a) it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers, with such a price defined under the Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value (Section 1.(1) (ix) Definitions and interpretation). Economic value is not defined in the Act. Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying access to an essential facility. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms. However, there is no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market. Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, and for which a penalty may be imposed, as follows:

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;

(iv) selling goods or services below their marginal or average variable cost; or

(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

This section also provides that the firm concerned (the respondent) 'can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act' which means that, assuming the respondent can put up some arguments for pro-competitive gains, the anti-competitive effect must be evaluated by the Commission and found to be of significance.

Price discrimination with the effect of substantially preventing or lessening competition is prohibited under section 9, and has no penalty for first offence. A finding depends on the pricing being for equivalent transactions of products of like grade and quality. The dominant firm may establish that the differences are justified on various grounds, including reasonable allowances for cost differences and meeting competition.

In addition to the provisions under which penalties may be imposed, the Tribunal can make a range of orders including requiring a firm to supply goods or services and ordering divestiture, if there is no other adequate remedy.

The record on enforcement

Twenty abuse cases in total have been referred to the Tribunal since 1999, an average of 1.25 per year. The great majority were referred by the Commission. A further two cases that were not referred were subject to settlements, making 22 cases in total. The Tribunal made a determination on eleven while seven cases were the subject of settlements with the Commission (five after referral), one of which the Tribunal did not confirm. Of the remaining four cases, one (*Omnia v Sasol*) was been withdrawn and three (*Mittal Steel SA and others, Computicket* and *Media 24*) are at various stages in the process of hearing.

Of the eleven cases the Tribunal has decided, it has found that abuse occurred in eight (on the part of *Patensie*, *South African Airways* (twice), *Sasol*, *Mittal Steel SA*, *Senwes, Telkom and Sasol Chemical Industries*). However, in three of these the finding was overturned or set aside by higher courts (*Sasol*, *Mittal Steel SA* and *Sasol Chemical Industries*). The Tribunal dismissed the cases in *Mandla-Matla*, *BATSA* and *SAB*. In addition, four of the settlements (*GlaxoSmithKline & Boehringer Ingelheim*, *Sasol Nitro*, *Foskor* and *Telkom*) involved substantive undertakings. A further settlement in *Astral* included an admission under 8(c). On this basis, taking the findings and the substantive settlements, abuse of dominance was proscribed in ten cases (five findings and five settlements).

Table 1. Abuse of dominance cases, 1 September 1999 to 31 July 2015

Initiation	**Case (Tribunal case number)**	**Main alleged contravention**	**Status/finding**
Dec99	CC v SAFCOL, Yorkcor, CJ Rance (100/CR/Dec00)	Price discrimination in timber	26/6/02 Tribunal dismissed application to confirm consent agreement reached between CC and SAFCOL, as it went to contractual provisions, without consent of the other parties.
13/10/2000	CC v SAA (18/CR/Mar01)	Inducing customer (travel agents) not to deal with competing airlines	28/7/05 Tribunal decision Found incentive scheme with travel agents contravened 8(d)(i); R45mn penalty.
20/4/2000	CC v Patensie Sitrus (37/CR/Jun01)	Exclusive supply arrangement with packing and distribution company, contravening 8(d)(i) and 5(1).	4/8/02 Tribunal decision, upheld by CAC. Found articles of association of packing and marketing former co-op contravened 5(1) and 8(d)(i) in requiring customers/members not to deal with competitors; no penalty.
Sept 2002	CC/Hazel Tau and others v GlaxoSmithKline & Boehringer Ingelheim	Excessive pricing of ARVs	Case non-referred by the Commission following agreement in Dec 2003 to license generic manufacturers.
30/4/2003 complaint lodged (CC non-ref 12/11/03)	Nationwide Poles v Sasol Oil (72/CR/Dec03)	Price discrimination in creosote	31/3/05 Tribunal decision, found discount scheme was prohibited price discrimination 9(1). CAC decision - overturned.
May-August 2002 complaints filed by 21 companies	CC v Telkom (11/CR/Feb04)	Exclusionary practices in pricing and access to fixed lines for value-added network service providers	Appeals of referral up to Supreme Court of Appeal. 7/8/2012 Tribunal decision found exclusionary abuse under 8(b) and 8(d)(i), penalty of R449mn.
19/9/02 (CC non-ref 6/1/04)	Harmony Gold v Mittal Steel SA (13/CR/Feb04)	Excessive pricing of flat steel	27/3/07 Tribunal decision finding excessive pricing contravening 8(a) and penalty of R692mn 29/5/09 CAC overturned decision and remitted back to Tribunal to reconsider tests. Parties settled.
13/2/03 (CC non-ref 13/5/03) 24/7/03 (CC non-ref 25/5/04)	Mandla-Matla v Independent Newspapers (48/CR/Jun04)	Exclusive arrangements with distributors contravening 8(d)(i) and 5(1); and refusal to supply distribution information contravening 8(c)	6/11/06 Tribunal decision, dismissed on all counts.
3/11/03 Nutriflo Aug04 Profert	CC v Sasol Nitro (31/CR/May05 and 45/CR/May06)	Excessive pricing, refusal to supply and price discrimination in ammonia and related fertilizer products	20/07/10 Tribunal confirmed settlement.
1/10/2003	CC, JTI v BATSA (55/CR/Jun05)	Arrangements with outlets for cigarette was exclusionary abuse under 8(d)(i) and/or 8(c), as well as under 5(1) referred by JTI.	25/06/09 Tribunal decision, dismissed on all counts Appeal to CAC lodged by JTI and then withdrawn.

Oct 2003	Referred by CC in 2004. Nationwide Airlines, Comair v SAA (80/CR/Sep06)	SAA incentive schemes during the period 1 June 2001 - 31 March 2005 contravened 8(d)(i)	The Commission settled with SAA in 2006 without an admission and a penalty of R15mn. Comair and Nationwide Airlines objected and pursued a finding for the purposes of damages claims. 17 Feb 2010 Tribunal Decision, found contravened 8(d)(i), no penalty. Upheld on appeal.
Dec 2003	CC v Mittal Steel SA and others (08/CR/Jan07)	Price discrimination in low carbon wire rod	Awaiting Tribunal hearing.
2/12/2004	CC v Senwes (110/CR/Dec06)	Pricing for grain storage excluding rival traders	3/02/09 Tribunal decision found exclusion in form of margin squeeze, contravening 8(c), upheld by CAC. SCA overturned on 1 June 2011. Concourt upheld the Tribunal decision.
25/11/04	CC v SAB (134/CR/Dec07)	Inducement not to deal with a competitor; price discrimination	Tribunal decision dismissed case 7/4/11, finding it did not have jurisdiction due to differences between complaint and Commission referral. Decision partly overturned by CAC on appeal. Tribunal dismissed remaining complaint, upheld by CAC on appeal.
20/2/07	CC v Astral, Elite (74/CR/Jun08)	Exclusive arrangements regarding poultry breeding stock and feed	Settlement with admission of 8(c) contravention.
12/8/05	CC v Rooibos (129/CR/Dec08)	Exclusive contracts with rooibos packers	November 2010 Tribunal confirmed settlement.
29/6/05 and four further complaints consolidated	CC v Telkom (ref Oct/Nov09)	Excessive pricing and margin squeeze in pricing of broadband (leased lines)	Tribunal confirmed settlement, July 2013. Penalty of R200mn and price reductions amounting to R875mn as well as further commitments.
29/2/08 and four further complaints consolidated	CC v Computicket (ref 30 April 2010)	Exclusionary abuse, through exclusive contracts with inventory providers	Awaiting Tribunal hearing. Applications on various procedural grounds being heard.
2007	CC v Foskor	Excessive pricing of phosphoric acid	28/02/11, Tribunal confirmed settlement.
12/11/07 (following request from DTI)	CC v Sasol Chemical Industries (ref Aug 2010)	Excessive pricing of propylene and polypropylene	05/06/2014 Tribunal decision finding excessive pricing contravening 8(a) and penalty of R534mn. 17/06/2015 CAC overturned decision.
30/01/2009	CC v Media24 (ref Oct 2011)	Exclusionary abuse through below cost pricing under 8(c) and 8(d)(iv)	Hearing over 2013 and 2014. Tribunal decision pending.
	Omnia v Sasol	Excessive pricing	Referral withdrawn in 2013/14

Note: The Tribunal case number gives the month in which the case was referred to Tribunal.

The cases have involved price discrimination, excessive pricing, and exclusionary arrangements including vertical arrangements, and loyalty rebates. There have been no decided cases of predation, or tying and bundling. Most cases have involved former or current state owned companies (*Sasol*, *Mittal Steel*, *Telkom*, *SAA*, *Safcol*, *Foskor*). In terms of sectors, heavy industries (steel and basic chemicals) have been most important, following by four cases in agriculture and forestry, where there has historically been substantial state support (*Safcol*, *Patensie*, *Senwes* and *Rooibos*), and telecommunications and airlines (two each).

The various steps involved from referral to hearing and the scope for legal challenges have all meant that two to three years have typically elapsed from referral to ruling in the major enforcement cases, with appeals following.

All-in-all, under the abuse of dominance provisions current state-owned companies (including Telkom in this category given its substantial state shareholding) have been fined five times (SAA twice, Telkom twice, and the IDC-owned Foskor). No other companies have incurred a penalty, although Sasol Nitro made divestitures and agreed to behavioural conditions regarding its conduct in fertilizer under a settlement reached with the Commission. Senwes also had remedies imposed on it.

How should this enforcement record be rated? If the likelihood of unilateral anti-competitive conduct was low then we would not be expecting much enforcement activity in this area. This could be the case if it was rare to find markets with a dominant firm (which is presumed when market share of a single firm exceeds 45%). Instead, if markets are characterised by two or more substantial firms then anti-competitive conduct would expect to arise from collusion rather than from unilateral abuse.

Notwithstanding the far-reaching collusive conduct that has been uncovered and addressed, the concentrated nature of the South African economy and the negative impact of anti-competitive conduct on its development is one of the few things all analysts and commentators agree on (see, for example, OECD, 2013). The relatively small size of the South African economy and its distance from other industrial economies (compared to most in its peer group of other upper middle income countries), suggest that single firm dominance is a major issue. Moreover, the dominant firms generally developed under protection, regulation and support associated with the apartheid state's economic policies.

To assess the challenges of competition enforcement against abuse of dominance further I consider key abuse of dominance cases to understand better the challenges faced by the competition authorities in their investigation and determination.

In this I draw on comparisons with Chile and with Singapore, two countries with similar institutions, which are slightly younger than the South African authorities.[4]

South Africa – Chile comparison

The competition law in Chile contains an over-arching prohibition on abuse of dominance, with examples of the types of conduct. In cases, the Chile Tribunal (the TDLC) identifies two categories: abuse of dominance cases and cases involving the 'imposition of artificial barriers

[4] This is drawn from Roberts et al. 2012.

to entry'. However, a great majority of the latter are, in effect, also about abuse of dominance, so they can be considered as single category for review purposes. During the period January 2004 – December 2012, the TDLC reviewed 59 cases regarding abuse of dominance. The investigating authority, the FNE, has referred 21 of these cases, compared with 32 cases between private parties with no direct intervention from the FNE.[5]

Of the 59 cases, the TDLC has sanctioned and fined in 19.[6] Nine of those regarded exploitation practices mostly towards consumers, but in some cases also towards suppliers. The other 10 sanctions regarded exclusionary practices: one for predation; two for exclusivity clauses (one of which includes sanction for rebates); one for tying; two for refusal to deal (in one of those cases, margin squeeze was also sanctioned); and four for conducts that raised artificial barriers to entry but do not fall under any 'clear-cut' category.

The first obvious difference is that findings by the South African Tribunal are for conduct falling into defined categories, or else under the broad provision prohibiting exclusionary conduct that has an anti-competitive effect. The cases of exclusionary abuse of dominance where there has been a Tribunal finding are as follows:

- *Patensie* - Articles of association of packing and marketing former co-operative required farmers to deal only with the packing company, found that they constituted a vertical restrictive practice contravening 5(1) and required customers/members not to deal with competitors contravening 8(d)(i). No penalty even though one could have been imposed for 8(d)(i). Exclusive dealing arrangements by a dominant firm were found to be an inducement not to deal with competitors.

- *SAAI and II* – SAA's incentive schemes ('loyalty rebates') with travel agents were found to induce customers (travel agents) not to deal with competing airlines, contravening 8(d)(i); R45mn penalty in *SAAI* in *SAAII* there was a settlement with the Competition Commission for R15mn, and then a finding of a contravention by the Tribunal. *SAAI* was decided by Tribunal four years after referral and five years after complaint.

[5] See FNE: http://www.fne.gob.cl/defensa-de-la-libre-competencia/actuaciones-ante-tribunales/. Note that there are cases initiated under the previous regime and ended in the TDLC. They were not 'referred' to the tribunal, so we have not considered them. This explains the difference in numbers.
[6] Note, the finding may only have been on one aspect of the case referred. It is also somewhat difficult to classify all of the cases given the nature of the Chilean legislation.

- *Senwes* - Exclusion by Senwes of independent grain traders and favouring its own trading operation through 'squeezing' the margins of the independent traders in charging them a higher storage price. Found to contravene 8(c) and therefore no penalty could be imposed. The case was appealed to the Constitutional Court on the grounds that the Commission's referral had focused on the effect of the Senwes storage pricing on the farmers' decisions rather than the effect on the grain traders, however, the Constitutional Court upheld the Tribunal decision. Such conduct could be understood as a refusal to supply storage services although the refusal to supply provision (8(d)(ii)) refers only to goods, alternatively it could be understood as refusing to give a competitor access to an essential facility (under 8(b)) in which case a penalty could have been imposed. The ruling was confirmed 6 years after the referral and 8 years after the complaint.

- *TelkomI* – Telkom refusing access to its network to value-added network service providers (VANS) that competed with Telkom's own offerings in this area. The Tribunal found that the conduct constituted a prohibited practice in refusing access to an essential facility and inducing customers not to deal with a competitor (under section 8(b) and 8(d)(i)) and imposed penalty of R449mn.[7] This decision is more than eight years after the referral of the case and 10 years after the complaints were made.

- *TelkomII* – Telkom engaging in exclusionary conduct with regard to downstream service providers principally through the pricing and terms of access of broadband. The settlement, involving a fine, price reductions and substantial commitments, was confirmed in July 2013 some eight years after the complaint and four years after referral.

- *Foskor* – Foskor admitted to excessive pricing and reduced its prices to export prices.

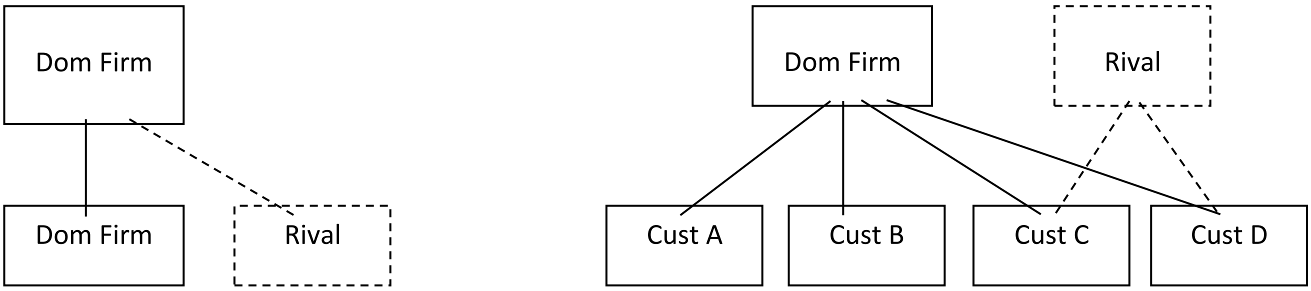
- *Astral* – Astral admitted a contravention of 8(c) relating to an exclusive supply arrangement where members of the Elite joint venture which it unilaterally controlled were required to source 90% of their poultry breeding stock from it and could not choose competing breeds. Settlement in December 2012, four years after referral and 5 and a half years after complaint.

[7] Competition Tribunal decision, *CC v Telkom SA Ltd*, case no 11/CR/Feb04, 7 August 2012.

It is helpful to distinguish between conduct where the dominant firm operates in at least two market levels, and where there is just one market involved (Figure 1). In the first (schema A), the dominant firm is both a supplier to, and a competitor of, its rivals. Because the dominant firm can set prices and other supply conditions in both the upstream and downstream markets simultaneously it can undermine its rival in various ways. It can increase the input price, reduce the output price or not provide the input supply required for the downstream firm to be able to operate effectively (such as at the scale necessary to minimise production costs). In other words the conduct could be refusing access to an essential facility (if the upstream level is about selling access to some critical infrastructure), refusal to supply, excessive pricing, or selling goods (downstream) below cost.

Figure 1. Exclusionary schemas

A. Vertically integrated ***B. Horizontal exclusion***



Where the dominant firm is not vertically integrated it may exclude a smaller rival or entrant if it is able to tie-up the customers and so prevent the rival from being able to compete. If scale economies are very large relative to the size of the market then the dominant firm need only tie-in enough customers to leave the rival unable to achieve minimum efficient scale. There are various different ways in which the dominant firm inhibits the rival from competing for customers. The firm could sign customers up under exclusive contracts. The firm could offer prices under loyalty inducing rebate arrangements which means that there is *de facto* quasi-exclusivity. If there are a few large key customers that can be targeted then prices below cost could be offered to them. If there are different market segments and with lower barriers to entry for some (where, for example, customer switching costs or brand loyalty are lower) then the more contestable segment can be targeted by the incumbent, such a through a lower priced 'fighting brand', while higher prices and margins are maintained on the less contestable portion.[8] There could well be a combination of arrangements, which also

[8] Lower effective pricing to contestable customers could also be achieved through bundled offerings if the dominant firm has a multi-product offering and the rival has only one product.

change over time. The challenge in terms of evaluation is to distinguish what is keen 'competition on the merits' from conduct that makes no economic sense absent the anti-competitive rationale.

Discriminatory conduct could be understood under both schemas, as the dominant firm seeks to differentiate between customers in order to protect its position and the supra-competitive returns from it. The real world is further complicated if there are more than two levels, and different market segments. Information asymmetries raise further scope for strategic behaviour as the dominant incumbent can establish a reputation for fighting entry.

The South African Act is structured as if the conduct can be easily separated out into readily labelled 'text-book' arrangements. This has meant long legal wrangling in trying to place complex and evolving arrangements into one or other pigeon-hole. It has also led to confusion where the complainant has brought what it is able to perceive to the Commission, but the investigation then reveals more detail and potentially a different understanding of its anti-competitive nature. More detail or a different understanding may also come to light in the hearing itself, as was the case in *Senwes*.

In *Telkom* the Tribunal found on inducement not to deal with a competitor (normally understood as a horizontal exclusion) although Telkom is vertically integrated. This finding was because Telkom had indicated to end customers that the rival VANS (at the second market level) were at risk of not being able to meet their needs (because of Telkom constraining their access to the fixed line network). The case illustrates the interaction of different arrangements as part of an exclusionary strategy, where customers have imperfect information and are concerned about the risk they may be stranded by their supplier.

Similarly, for below-cost pricing the South African Competition Act specifies the cost benchmark as below average variable cost or marginal cost, which was consistent with international precedent and economic textbooks at the time. However, as case law has evolved in response to the real world evaluation of conduct the appropriate benchmark is now framed as 'average avoidable cost' reflecting decisions that firms make between alternative options and the costs that are incurred or avoided, rather than an idealised view of how firms vary output.[9]

[9] See European Commission guidance.

The nature of the South African Act is one reason why there has been such long time taken from complaint referral to Tribunal decision as well as why there have been many further appeals. Referrals are challenged in terms of whether a case has been separately made out under each of the sub-sections identified as well as on what is required for a given sub-section. There have also been challenges regarding whether the case referred reflects the complaint made. Several appeal court decisions have indicated that this is required. For example, in dismissing the referral against SAB Ltd the Competition Tribunal found itself bound by the decision of the Supreme Court of Appeal in *Woodlands*[10] where the court observed that *"The Act presupposes that the complaint (subject to possible amendment and fleshing out) as initiated will be referred to the tribunal."* The Tribunal further referred to the CAC decision in *Yara* where a private complainant – a downstream firm - had initiated a complaint alleging that Sasol, a dominant firm, had abused its dominant position. The Commission subsequently uncovered cartel conduct, which was one of the reasons that the downstream firm was only offered product by Sasol, and included this cartel conduct and the two other cartel members, Yara and Omnia, in the referral. The CAC subsequently overturned the Tribunal decision in *SAB*. The appeal of the CAC Yara decision was dismissed by the SCA and then partially overturned by Constitutional Court. A challenge to the Commission's referral of exclusive contracts on the part of Computicket, based on the respondents right to access internal documents regarding the rationality of the Commission's referral, has led to this not being heard despite being referred in 2010.

The other main reason why the hearings have taken so long in South Africa is that the Tribunal process has been an adversarial one where the Tribunal itself has stood back from identifying the necessary evidence required to make a determination. This contrasts with the approach of Chile's TDLC in which it sets out the so-called *auto de prueba* (the resolution of proof), which identifies what it believes is the scope of the case and the relevant facts. This also guides the hearing of factual witnesses and expert witnesses, normally local economic experts. While it may be (and has been) challenged on this resolution, it makes the hearing of the case proceed more quickly than in South Africa.

The uncertainty about the appropriate tests for the different types of conduct under the South African Act would make this difficult. However, it is the case that extensive evidence has been led in matters extending over weeks (including extensive and at times esoteric economic

[10] Supreme Court of Appeal decision, Case No: 105/2010.

expert evidence and argument) when the case itself has turned on readily identifiable key pieces of evidence. Ultimately, the Chile legal framework has allowed the TDLC to apply a broad test of 'no economic sense' to much of the conduct, to assess whether the conduct is rational absent an exclusionary effect (see Roberts and Tapia, 2013). This has been applied generally in the context of super dominance, and has effectively placed the onus on the respondent to justify why it has undertaken conduct which on the face of it obviously undermines a rival.

The TDLC has also taken a similar approach to price discrimination by requiring a dominant firm to justify why it applied different, higher prices to some parties and not others. Under the South African law price discrimination is only prohibited for equivalent transactions, making provision for cost differences and have a substantial anti-competitive effect. Differential pricing which is exclusionary because separate customer groupings (that is, not equivalent) differently falls to be assessed under one of the other provisions.

By being able to interrogate the implications of dominant firm conduct for smaller rivals and place an onus on the firm to justify its conduct, the TDLC has opened up markets long controlled by a single firm.

A tale of two cases – Computicket in South Africa and SISTIC.com in Singapore

The Competition Commission of Singapore (CCS) was established in 1 January 2005 (see Guan, 2013, for a review). Up until this time Singapore had relied on sector regulations to address possible anti-competitive practices. Section 47 prohibiting firms from abusing market power in anti-competitive ways and which work against longer-term economic efficiency came into force in 2006.

In June 2010 the CCS found that ticketing company SISTIC.com had abused its dominant position by requiring venue operators and event promoters to use its services exclusively. In addition to removing the exclusive dealing requirement a penalty was imposed. The decision was upheld by Singapore's Competition Appeal Tribunal and there are now more independent ticketing companies operating in Singapore.

By comparison, the Competition Commission of South Africa referred a case of exclusive dealing against Computicket in 2010 to the Competition Tribunal (having started the investigation some two years earlier and before the CCS started its investigation). Notwithstanding that the fact of the exclusive contracts required by Computicket of inventory providers is not in question, legal challenges over the basis for the Commission's referral are still being heard in higher courts. In Singapore there is no separate Tribunal but rather decisions are taken by a panel, the Commission Members, who are largely senior government officials and professors of law or economics. The Commission is run by a chief executive who is also a Commission Member. Appeals of the CCS decisions are then heard by a specialist Competition Appeal Tribunal where evidence is led.

What explains the outcomes?

A notable and relatively novel feature of the South African Act is to specify tests in the legislation itself, and to specify possible anti-competitive conduct as discrete actions or arrangements, rather than having broad provisions proscribing anti-competitive conduct and allowing the tests to be developed through guidelines of the authorities and case decisions.

The other major emphasis in the Act is on (economic) effects-based tests. It is important to be clear that the debate is not about economics over law but whether the rules adopted are well-founded in economic principles. The principles of economics do not necessarily require complex modelling of possible effects on consumer welfare. However, if the approach adopted requires that prices would be lower and volumes higher, then it undoubtedly favours those parties that are able to hire specialist economic consultants.[11]

I focus on two important and inter-related areas in making comparisons of these approaches which flow through to the specific provisions adopted.

Does the law address harm to the competitive process or just the effect (interpreted as outcomes) of competition?

The competitive process implies valuing participation and the intensity of actual and potential competition in its own right. Hence, wording such as the lessening, prevention and distortion of competition would be used. The South African Act adopts 'substantial preventing or lessening competition' for vertical and horizontal (aside from 'hard core') restrictive practices, price discrimination, and for mergers[12]. In *Nationwide Poles* the CAC placed the emphasis on substantial lessening effects. However, as noted in Petersen's lectures on price discrimination, the *prevention* of competition could encompass exclusion of small rivals,

[11] As Wils (2014) has recently observed, the so-called 'more economic approach' serves the self-interest of the economics profession as it creates a demand for services of economic consultants. This phenomenon has been evident in South Africa while the skills are in relatively scarce supply.

[12] Including 'likely' in the case of mergers.

even where they may not have a clear effect on overall outcomes, as there are still a number of larger rivals who can compete with each other. But, the *SAB* decision effectively ruled this out. Small rivals, possibly only operating in a geographic or product segment, are not viewed as competitively significant.

This implies that the South African Act effectively privileges as complainants large rivals (likely to be multinational firms) who are able to demonstrate a significant effect. Potentially efficient smaller firms have little, if any, chance of demonstrating a significant effect. The participation of this class of rivals has no merit in itself (due to e.g. bringing different choices to consumers) and, by their nature, they will probably grow incrementally and are likely to enter through targeting a market or consumer segment and hence not be impacting across the market. They will also not achieve cost efficiencies until they reach minimum efficient scale. As *potentially efficient* competitors, the effects are speculative.

Do anti-competitive effects have to be substantial?

In examining the (possible) anti-competitive effect, is it specified as 'substantial? And, has this been interpreted as requiring demonstration that prices would be lower and quantities supplied would be higher absent the conduct? Or are the effects also understood in qualitative terms such as the range of choices on offer to consumers, and whether competition has been distorted in blocking rivals without due justification? In many other countries, the test is not subject to the additional hurdle of substantial, meaning an implied test of materiality (or at least non-trivial).

5. Concluding comments

In economies with higher levels of concentration and less robust competitive self-righting mechanisms (such as higher barriers to entry) stronger policies may be required towards abuse of dominance (Vickers, 2007; Brusick and Evenett, 2009). The balancing of the probability and costs of over and under enforcement (Type 1 and Type 2 errors) implies that different stances should be adopted across countries because of their different characteristics (Evans, 2009).

A productive and inclusive economy means that effort, innovation, and creativity are rewarded. People can form reasonable aspirations regarding economic goals, devote investments of time and resources in achieving them, and have as good prospects of achieving them as others would. Put differently, competition is fair.

Wealth trumps income in driving inequality (where the return on capital is higher than growth of GDP[13]) which means, even if employment opportunities are opened up, without addressing the control over productive activities and the return on capital from them, extreme levels of inequality will persist. While there are many dimensions to inequality, the structure of the economy and barriers to entry and growth are important.[14] Atkinson has recently argued that competition policy should explicitly take distribution into account (Atkinson, 2015).

Performance competition means competing on offerings to consumers based on production capabilities rather than 'handicap competition' where firms seek to undermine their rivals (Gerber, 2010). Improved production capabilities result in increased productivity, improved quality and design of better products. Extensive firm and industry level analysis makes clear that these capabilities are not simply about acquiring technology or skills but are to do with the internal 'know-how' of the firm including routines and working practices, and the linkages within clusters and supply chains (see, for example, Sutton, 2012). It can be argued that higher profits are part of incentivising productivity improvement, however, the evidence for South Africa, such as it exists, is that high profits are associated with lower productivity (Aghion et al. 2008; Dobreva, 2011). Certainly, as a whole South Africa has had persistent and extremely high levels of concentration and poor productivity performance over the past two decades. At the same time, it has continued to record the highest levels of inequality in the world and very little, if any, redistribution of wealth aside from the considerable system of social grants.

Competition law and policy is about setting the rules for the market economy and the rules can be changed in order to shift the balance in favour of different outcomes, such as constructively opening up markets. It is not simply limited to enforcement against egregious offences such as hard core cartels that can be compared to racketeering or fraud. It also does not mean arbitrary actions against companies. The issue is whether the current rules mean the economy rewards effort, innovation and creativity. This is evident even in the priorities of Europe such as the inquiry into Google and in the USA with actions relating to pay-for-delay in pharmaceuticals. In a related example, the UK is working to support 'challenger banks' to bring greater rivalry to the big four established banks.[15]

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[13] Picketty, T. (2014) *Capital in the 21st Century*.

[14] See North et al. (2009) on elements of creating 'open access orders', Acemoglu and Robinson (2012) on inclusive instead of extractive growth and Stiglitz (2015) on the need for more and better regulation of banks and monopolies.

[15] http://www.ft.com/intl/cms/s/0/d2520afa-8b78-11e4-ae73-00144feabdc0.html#axzz3bVko6jM8

Just as the rules of sports such as cricket and rugby have been changed to create competitions which reward different skills and strategies, so the rules for markets can be changed to support investments in capabilities by larger numbers of participants. Investment requires that the rules are changed infrequently so that decisions can be made based on an understanding of the incentive framework. It is important to recognise that there are winners and losers here, with trade-offs being made. In the sporting analogy, allowing unrestricted purchase of international players favours a few large clubs, and thus undermines the investments smaller clubs will be able to make in coaching and developing local talent. This can negatively impact on the depth available for the national team (think the English Premier League in soccer).

Alternative approaches adopted

Countries such as Malaysia and Singapore only adopted competition laws after industrialising, and after South Africa did. Chile also adopted its competition act after South Africa and has recorded notable successes in enforcement cases relating to exclusionary conduct. There are some interesting comparisons with the choices made by South Africa. South Africa made clear choices to follow a relatively narrow Anglo-centred tradition, drawing heavily from jurisdictions such as Canada. This meant that the choices made in the provisions relating to anti-competitive conduct did not reflect the objectives in the Act which emphasized the ability to participate in the economy, including by small and medium enterprises and by historically disadvantaged persons, and the need to address the legacy of apartheid in terms of concentrated ownership and control.

European competition law is expressed in broad provisions with particular arrangements and examples of conduct given in a non-exhaustive and non-exclusive list. This means the tests develop through case law and in guidelines.[16]

Horizontal and vertical agreements under Art 101(1) are agreements and concerted practices that have as their <u>object or effect</u> the <u>prevention, restriction or distortion of competition</u>. This has been criticised by economists as not paying enough attention to the economic nature of vertical agreements and being too form rather than effects based.[17] The Guidelines on Vertical Restraints assist in specifying that Article 101(1) prohibits those agreements which

[16] There are guidelines which have promoted a 'more economic approach', although they have not necessarily been followed (as in the recent Intel decision).
[17] See, for example, Bishop and Walker.

appreciably restrict or distort competition. Arrangements such as price fixing and market division are indicated as particularly problematic and generally fall within horizontal practices. Article 101(3) provides that the prohibition does not apply to agreements which confer benefits for which the arrangements are indispensable, which are shared with consumers, and which do not eliminate competition in respect of a substantial part of the products in question. The Guidelines recognise that there are generally less concerns about vertical arrangements, that market power is relevant at one or both levels and there is substantial scope for efficiencies.

Any abuse by one or more undertakings of a dominant position is prohibited under Article 102. It further provides that such abuse may, in particular, consist in: directly imposing unfair purchase or selling prices or unfair trading conditions; limiting production, markets or technical developments to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Guidance on Enforcement Priorities for abuse of dominance sets out steps in determining whether the undertaking(s) are dominant and whether the conduct represents an abuse. The undertaking is entitled to compete 'on the merits' but has a special responsibility not to allow its conduct to impair <u>genuine undistorted competition</u>. Individual competitors are not protected but rather the competitive process and dominant undertakings are burdened with additional responsibilities in this regard.

Within Europe, there are also notable differences. For example, Germany has taken action against pricing practices of large supermarket chains and has stopped selective below cost pricing on certain product lines. This 'loss-leading' impacts on specialist retailers such as bakeries or butchers. Do these rivals matter, if there is vigorous competition between supermarkets who are selling a basket of products? South Africa could not take action against such practice for a number of reasons:

a. There would likely not be unilateral dominance.

b. The effect is not substantial of specialist stores as the supermarkets carry the products in any case.

c. Independents are likely to only be concentrated in a small geographic area.

d. The pricing may not below AVC, as there are substantial overheads involved.

Regional Guidelines produced by ASEAN on competition policy adopt a similar approach to the European Union in that they emphasise the competitive process, and the pursuit of fair or effective competition to contribute to improvements in economic efficiency, welfare, growth and development (ASEAN, 2010).

With respect to horizontal and vertical agreements the guidelines recommend prohibiting those that appreciably prevent, distort or restrict competition. These terms are defined as:

> Prevent – elimination of existing or potential competitive activities
>
> Distort – the artificial alteration of competitive conditions in favour of the parties to the agreement
>
> Restrict – the reduction of competitive activities.

It is recommended that agreements are evaluated in terms of object or effect, and that hard core restrictions may be identified. The test in terms of appreciability allows for the setting of 'safe harbours'.

Abuse of dominance is defined in terms of harm to the competition process.

The two countries in ASEAN with well-established albeit young authorities, Singapore and Malaysia, follow this broad approach. Malaysia's guidelines on abuse of dominance define it as preventing efficient new competitors from entering or significantly harming existing equally efficient competitors − either by driving them out of the market or preventing them from effectively competing. The authority will thus examine the effects of the conduct on the competitive process.

Singapore's Competition Act enacted in 2004 in section 34 prohibits agreements between undertakings; decisions of associations of undertakings; and concerted practices, which have as their object or effect the appreciable prevention, restriction or distortion of competition within Singapore, unless they are excluded or exempted. Particular examples are given of types of agreements. Section 47 prohibits commercial conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore. Conduct may, in particular, constitute such an abuse if it consists in: predatory behaviour towards competitors; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

In addition to the ticketing case, the Competition Commission of Singapore has also reached a settlement with Coca-Cola Singapore Beverages (CCSB) involving undertakings made by CCSB:

- not to impose any exclusivity restrictions on its on-premise retailers for CCSB brand except in limited circumstances
- not to require its on-premise retailers who wished to sell other brands to first negotiate with CCSB
- not to grant loyalty-inducing rebates that have an effect of inducing on-premise retailers to purchase exclusively or almost exclusively from CCSB
- to allow on-premise retailers to use up to 20% of the space in coolers provided by CCSB to store other brands of beverages, where these retailers have no access to alternative cooling equipment on their premises.

These alternatives all point to options not taken by South Africa.

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