

**A CRITICAL REVIEW OF THE TREATMENT OF
DOMINANT FIRMS IN COMPETITION LAW - A
COMPARATIVE STUDY**

by

PHUMUDZO S. MUNYAI

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Supervisor: Prof RA Kelbrick

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DECLARATION

Student No: 44617879

I, **Phumudzo S. Munyai**, hereby declare that “**A CRITICAL REVIEW OF THE TREATMENT OF DOMINANT FIRMS IN COMPETITION LAW - A COMPARATIVE STUDY**” is my own work and that all sources used have been appropriately acknowledged by making use of the reference methods approved for the College of Law, University of South Africa.

I declare further that this thesis or any part of it has not been submitted to another university or any other organisation for any other purpose.

.....
Signature
Phumudzo S. Munyai

.....
Date:

SUMMARY

In South Africa compliance with competition law has become a major concern for firms that achieve and maintain certain levels of success and growth in the market, as their actions are often a source of complaints and litigation by rivals and competition authorities. With substantial financial penalties often levied against them for a variety of conduct deemed to constitute an abuse of their market position, dominant firms must constantly be aware of the likely impact of their business strategies and actions on both rivals and consumers. What were once thought to be normal and economically sound business practices and decisions, such as cutting prices to attract customers, have now acquired new meanings, with devastating consequences for dominant firms. So, are dominant firms under attack from competition law? In this study I aim to determine this.

I track the historical development of competition law in three jurisdictions: South Africa, America, and the EU, with the aim of identifying traces, if any, of hostility towards dominant firms in the origins of competition law. I further investigate whether the formulation and enforcement of certain aspects of existing abuse of dominance provisions manifest as hostility towards dominant firms. While acknowledging the important role that competition law enforcement plays in promoting competition and enhancing consumer welfare, I conclude that significant unjustified economic and legal prejudice is suffered by dominant firms as a result of the way in which certain abuse of dominance provisions have been formulated and applied. I also offer appropriate recommendations.

KEY TERMS

Abuse of dominance, exclusionary conduct, unilateral conduct, dominant firms, super-dominant, monopoly, anti-monopoly, competition law, antitrust law, hostility, consumer welfare, consumer harm, anticompetitive harm, anticompetitive effects, causation, counterfactual, Competition Commission, Competition Tribunal, Competition Appeal Court

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1.1 Background to the Study

I conceived the idea of writing this thesis some time in 2007. At that time, I was working as a researcher at the Competition Tribunal. During my time there, my duties included assisting members of the Tribunal with research on cases before them, attending hearings, and helping to draft the Tribunal's decisions. In pleadings and oral arguments during hearings, particularly in abuse of dominance cases, I was struck by the lengths to which complainants went to prove that the defendant was dominant in the relevant market. Equally, defendants would also devote considerable time and effort contesting claims that they were in fact dominant in that market.

A review of the abuse of dominance provisions in the Competition Act¹ reveals that this enforcement approach, to the extent that it may be undesirable, cannot be the sole fault of litigants. Abuse of dominance provisions themselves provide the basis for litigants to approach proceedings in a manner that renders the identity of the defendant (a firm enjoying the position of dominance in the market) an indispensable element of the concept of infringement.² But why is the identity or market position or status of the defendant such an issue of great importance in abuse of dominance cases? Why has

¹ 89 of 1998.

² Section 8 of our Competition Act prohibits a *dominant firm* from engaging in a number of practices that it considers an 'abuse of dominance'. Because the provision provides a description of its intended target, ie dominant firms, it is essential that the complainant must show that the defendant meets the description of a firm against which the provision was specifically designed.

competition law not developed a neutral infringement concept for unilateral conduct which places its primary emphasis on the quality of the conduct of a firm rather than its market size? I found it strange that primary importance was not accorded to the existence of the conduct complained of and whether that conduct was contrary to competition rules. These questions troubled me in the early days of my introduction to competition law and abuse of dominance enforcement. However, I soon discovered that these concerns are shared by competition law commentators and practitioners in other jurisdictions.³

1.2 Problem Statement

The main object of abuse of dominance law is to protect the market from distortions stemming from or associated with market power. Thus, in abuse of dominance cases, market power or dominance is a central element of the concept of infringement.⁴ In other jurisdictions, the mere presence of a dominant undertaking in a market is treated as an indication that the degree of competition in that market has been compromised.⁵ In South African law it has also been observed that competition law is primarily

³ Kathryn McMahon 'Interoperability: "Indispensability" and "Special Responsibility" in High Technology Markets' (2007) 9 *Tulane Journal of Technology & Intellectual Property* 123-72 at 162 and Office of Fair Trading *The Cost of Inappropriate Interventions/Non Interventions Under Article 82* (September 2006) Economic Discussion Paper OFT 864 at 15 accessed at ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo_report.pdf (date of last use: 6 July 2016).

⁴ Thomas Eilmansberger 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses' (2005) 42 *Common Market Law Review* 129-78 at 142.

⁵ Cases C-85/76 *Hoffmann-La Roche & Co AG v Commission* at par 91; 322/81 *Michelin v Commission* at par 70; T-210/01 *General Electric v Commission* at par 549; C-95/04P *British Airways v Commission* at par 66; and T-155/06 *Tomra Systems ASA and Others v Commission* at pars 38 and 206.

'concerned with giving "special attention" to dominant firms, by regulating and controlling their market power'.⁶

This fascination with market power and dominance may result in attention being deflected away from the real issues: assessing the anticompetitive nature of the allegedly abusive conduct by the dominant firm. This may lead to a situation where mere proof of dominance is in effect sufficient to establish infringement of the Act.⁷ This may unwittingly have the effect of discouraging firms from striving to achieve the level of commercial success that leads to dominance.⁸

This can be seen to suggest that the philosophy underpinning abuse of dominance law and its enforcement is one of hostility towards the acquisition and maintenance of dominance in the market.⁹ It may appear as though competition law in general, and abuse of dominance provisions in particular, are intended to punish efficient firms for becoming dominant. Similar observations have been made about competition law in

⁶ Carina Smit 'The Rationale for Competition Policy: A South African Perspective' (paper presented at the biennial ESSA Conference, 7-9 September 2005, Elangeni Holiday Inn Hotel, Durban, South Africa) at 8 accessed at http://econex.co.za/wp-content/uploads/2015/04/econex_researcharticle_10.pdf (date of last use: 6 July 2016).

⁷ Rafael Allendesalazar 'Can We Finally Say Farewell to the "Special Responsibility" of Dominant Companies?' (paper presented at the 12th Annual Competition Law and Policy Workshop, Robert Schuman Centre 8-9 June 2007, EUI, Florence) at 4 accessed at [http://www.eui.eu/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Allendesalazar.pdf](http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Allendesalazar.pdf) (date of last use: 6 July 2016); Miguel de la Mano 'The Dominance Concept: New Wine in Old Bottles' (March 2007) FTC/DOJ Hearings on Single-Firm Conduct, Washington DC accessed at <http://www.justice.gov/atr/dominance-concept-new-wine-old-bottles> (date of last use: 6 July 2016); and Dieter De Smet 'The Diametrically Opposed Principles of US and EU Antitrust Policy' (2008) 29 *European Competition Law Review* 356-62 at 362.

⁸ Robert H. Bork *The Antitrust Paradox: A Policy at War With Itself* (Basic Books Inc 1978) at 57.

⁹ Robert L. Bradley, Jr. 'On the Origins of the Sherman Act' (1990) 9 *Cato Journal* 737-42 at 737-8; Heike Schweitzer 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (paper presented at the 12th Annual Competition Law and Policy Workshop, Robert Schuman Centre, 8-9 June 2007 EUI, Florence) at 2 accessed at <http://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Schweitzer.pdf> (date of last use: 6 July 2016); and Smit supra n 6.

general, and abuse of dominance provisions in particular, by a number of observers in other jurisdictions.¹⁰ As Bork candidly remarked, “antitrust laws ‘harass’ successful and dominant undertakings” .¹¹

Understanding the implications that observations and perceptions such as these may have on the legitimacy of competition law and its enforcement, the Competition Tribunal has attempted to allay fears or perceptions that the main aim of competition law is to eliminate dominant corporations from markets.¹² Along with this assurance, is the often recited mantra in competition law and abuse of dominance enforcement that “no prohibition or punishment attaches to a firm by reason only of its dominance”.¹³ But few in our law have had the interest to investigate or challenge the validity of these claims.

To challenge the status quo by suggesting that abuse of dominance law and its enforcement inherently prejudice dominant firms, one needs to accept the possibility of appearing to be pandering to monopoly. It is taboo in our society openly to position oneself as a champion or defender of dominant firms and monopoly rights or interests. There is a longstanding perception that industrial giants, particularly those which are

¹⁰ Oluseye Arowolo ‘Application of the Concept of Barriers to Entry Under Article 82 of the EC Treaty: Is There a Case for Review?’ (2005) 26 *European Competition Law Review* 247-57 at 251; Per Jebsen and Robert Stevens ‘Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union’ (1996) 64 *Antitrust Law Journal* 443-516 at 504; and Nicolas Petit and Norman Neyrink ‘Industrial Policy and Competition enforcement: Is There, Could There and Should There Be a Nexus?’ (paper prepared for the 2012 Global Competition Law Centre’s Eighth Annual Conference, 8-9 November 2012, Residence Palace, Brussels) at 10 accessed at SSRN: <http://ssrn.com/abstract=2225903> and <http://dx.doi.org/10.2139/ssrn.2225903> (date of last use: 6 July 2016).

¹¹ Bork supra n 8 at 4.

¹² *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* Case No 13/CR/FEB04 at par 124. See also Martin Brassey et al *Competition Law* (Juta 2002) at 197.

¹³ Brassey supra n 12.

privately owned, do not serve the common interest of the majority of citizens.¹⁴ The concentration of economic power in the hands of private corporations owned and controlled by a minority has been singled out as a major source of the inequality in wealth and income distribution in South Africa. Competition policy and law in South Africa arose precisely as part of government efforts to counter the excessive concentration of economic power in the hands of a few.¹⁵

While the noble ideal of regulating the process of market competition through the law in order to enhance consumer welfare is not faulted, the process and mechanism through which competition rules, in particular abuse of dominance rules, are enforced do, however, raise significant economic and legal problems. The recent flurry of legal challenges to competition proceedings and decisions in superior courts illustrates this point.¹⁶

1.3 Research Objective

¹⁴ Bork, *supra* n 8 at 5, also observed a similar trend in American society, when he noted that there always existed in America a 'populist' hostility to big business, reinforced by the perception that major corporations are somehow to blame for society's hardships.

¹⁵ Simon Roberts 'The Role for Competition Policy in Economic Development: The South African Experience' (2004) Trade and Industrial Policy Strategies, Working Paper 8 at 7. See also Australian Competition and Consumer Commission 'Better Regulation of Economic Infrastructure: Country-Based Review' (2013) Working Paper No. 8, at 10.

¹⁶ *Competition Commission v Yara South Africa (Pty) Ltd and Others* 2012 (9) BCLR 923 (CC); *Competition Commission v Senwes Ltd* 2012 (7) BCLR 667 (CC); and *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA), [2011] 3 All SA 192 (SCA). For more details on this point see Phumudzo S Munyai 'The Interface Between Competition and Constitutional Law: Integrating Constitutional Norms in South African Competition Law Proceedings' (2013) 25 *South African Mercantile Law Journal* 323-41 at 325 footnote 10.

The purpose of this study is to investigate whether the way in which the abuse of dominance provisions in the Competition Act have been formulated and are enforced supports the proposition that the law is hostile towards dominant firms. The study also involves a comparative review of section 2 of the Sherman Act¹⁷ in American antitrust law and Article 102¹⁸ of the Treaty of Europe in European competition law. The aim of this comparative study is to place us in a position to extrapolate lessons from these two jurisdictions on cases of unilateral conduct or abuse of dominance relevant to the understanding and enforcement of the abuse of dominance provisions in the Competition Act.

I show that not only can the origin of competition law be traced to an historical philosophy of hostility towards dominant undertakings, but also that its current enforcement continues, to a large extent, to be influenced by the same philosophy. I also show that despite efforts in modern competition enforcement to refine and modernise the law to ensure fair outcomes, particularly in cases involving allegations of abuse of dominance, this has not significantly shaken off traces of the law's original philosophy of hostility towards dominant undertakings.¹⁹

¹⁷ Section 2 of the Sherman Act provides that:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...”

¹⁸ Article 102 provides as follows:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States...”

¹⁹ Bradley supra n 9.

1.4 Why Emphasis on Abuse of Dominance?

The majority of the provisions of our Competition Act are directly or indirectly concerned with the phenomenon of market domination and its impact on competition. Even provisions that are not formally recognised as being concerned with abuse of dominance still echo concerns about dominance and its likely effect on competition. For example, in their consideration of mergers, competition authorities invariably enquire whether the proposed merger is likely to create a dominant firm in the relevant market. And if the authorities are convinced that this is likely, they may prohibit the merger on that basis, on the assumption that the newly established dominant firm may thwart competition in the market. Other provisions dealing with a range of prohibited practices, such as retail price maintenance and price discrimination, which fall outside the Act's formal framework for dealing with abuse of dominance, are also predominantly concerned with the actions of dominant firms. In cases involving these practices, proof that the defendant firm has market power plays an important role in establishing the potential anticompetitive effect of the practices.

Because the eradication of anticompetitive conduct associated with market power is a fundamental aspect of South African competition law, provisions dealing with the abuse of dominance assume special importance in our law and in this study. Another reason justifying the special attention given in this study to abuse of dominance law is that its enforcement is very controversial, providing ample room for competition authorities to

make decisions that are open to challenge.²⁰ As Whish and Bailey remark, “it is not controversial to say that Article 102 of the Treaty of Europe, which prohibits the abuse of a dominant position, is controversial”.²¹ As former chairperson of the Competition Tribunal, David Lewis, has also remarked, ‘abuse of dominance provisions are the most notable area of competition law in which dominant firms are more likely to suffer prejudice, as a result of erroneous decisions by competition authorities’.²² For these reasons, abuse of dominance will be the central focus of this study. To ensure a more focused study, merger and other provisions in which the issue of dominance and its potential impact on competition may still arise, will not be dealt with independently but will be considered only to the extent that they raise issues relevant to the abuse of dominance discourse.

1.5 Hypothesis and Points of Departure

The thesis that I develop through structured arguments across the chapters of the study hinges significantly on the following assumptions and points of departure:

- (a) The origin of competition law can be traced to an historical philosophy of hostility towards monopoly and dominant undertakings across the three jurisdictions under review.

²⁰ Richard Whish and David Bailey *Competition Law* (Oxford University Press 2012) at 174 and David Lewis *Enforcing Competition Rules in South Africa* (Edward Elgar Publishing 2013) at 157.

²¹ Whish and Bailey supra n 20 at 192.

²² David Lewis ‘Chilling Competition’ at 1 accessed at <http://www.comptrib.co.za/assets/Uploads/Speeches/lewis13.pdf> (date of last use: 6 July 2016).

- (b)** Abuse of dominance provisions in the three jurisdictions have been formulated in a manner that reflects the law's underlying philosophy of hostility towards dominant firms.
- (c)** The vague and open-ended descriptions or definitions of some dominant firm practices considered anticompetitive and exclusionary, create a real possibility that perfectly legitimate dominant firm conduct may erroneously be declared anticompetitive and illegal. This may result in dominant firms being unable to compete freely and effectively in the market.
- (d)** Despite efforts in recent years by competition authorities and the courts across the three jurisdictions under review to refine the law of abuse of dominance in order to reduce errors and potential prejudice to dominant firms, competition rules and their enforcement are still fundamentally premised on an anti-monopoly and anti-dominance philosophy.
- (e)** The persistent preoccupation with dominance and market power in some jurisdictions, at times with insufficient assessment of the anticompetitive effect of the allegedly abusive conduct, is indicative of the anti-monopoly and anti-dominance policy of the law of abuse of dominance.

- (f) The general absence of an appropriate causation framework in abuse of dominance proceedings by which to determine whether the anticompetitive harm complained of can be reliably attributed to the conduct of the dominant firm, adds to an already hostile environment in which dominant firms are compelled to operate.

- (g) The fact that certain practices are only actionable when performed by firms enjoying a position of dominance, but attract no consequences when performed by non-dominant firms, reveals a lack of impartiality and exposes the discriminatory nature of the law

- (h) The overall hostile and potentially unfair nature of abuse of dominance provisions and their enforcement as regards dominant firms may raise significant economic and legal concerns. The recent spate of appeals against and reviews of the decisions of competition authorities on competition and constitutional grounds illustrates this point.

1.6 Significance of the Study

Considerable economic and legal problems arise because the formulation and enforcement of competition rules generally, and abuse of dominance provisions in particular, appear inherently hostile towards dominant firms. While orthodox competition economic theory and law enforcement philosophy may seem oblivious to this, there are significant economic and legal factors that call us to rethink our approach

to the treatment of dominant firms in designing and enforcing our competition rules. Although economic theories and arguments will not feature prominently in this study (which is conducted primarily from a legal perspective), where relevant significant economic problems arising from the formulation and enforcement of competition rules will be highlighted to ensure that the legal arguments made and conclusions reached are informed by the economic realities of the market. The policy of hostility towards dominant firms inherent in the formulation and enforcement of competition rules raises the following economic and legal concerns.

1.6.1 Economic Concerns

In orthodox economics the general assumption is that dominant firms are able to make monopoly profits by constraining supply and raising prices above marginal (and average) costs.²³ In the same vein, there is an assumption that where markets are comprised of a small number of firms, they may collude rather than compete so as collectively to generate monopoly profits.²⁴ It is not the aim of my study to either dismiss or challenge the validity of these assumptions.

However, it is appropriate to point out that economic theory and experience have also shown that in certain circumstances monopolies and oligopolies can have various benefits for consumer welfare and economic development. These benefits include

²³ Roberts *supra* n 15 at 3.

²⁴ *Id.*

economies of scale,²⁵ international competitiveness,²⁶ research and development,²⁷ and efficiency.²⁸ And some of these monopoly and oligopoly benefits may be of particular relevance to our economy. South Africa's domestic economy is relatively small and many of our markets can be served by one or a few firms operating on a globally efficient scale.²⁹ These globally-efficient domestic monopolies and oligopolies may provide economies of scale benefits to the local market, while also competing effectively in global markets.

It is important to note that one of the objects of our Competition Act is 'to expand opportunities for South African firms in world markets'.³⁰ With domestic and global markets increasingly dominated by multinational corporations, it may be essential for a firm to have a monopoly or a certain level of dominance in the domestic market in order to become globally competitive.

²⁵ Because most monopolies and dominant firms are able to produce greater quantity of goods at a lower average cost, the benefit of lower production costs can be passed on to consumers in the form of lower prices. As Djolov observed, if a firm increases in size it may be able to benefit from economies of scale, which is a cost advantage based on size. This is because when a firm becomes large it will have a lower cost per unit of output than a smaller firm, which should translate into lower product prices, see Djolov G 'Competition in the South African Manufacturing Sector: An Empirical Probe' (2015) 46 *South African Journal of Business Management* 21-30 at 24.

²⁶ A local firm may be dominant in the domestic market but face effective competition in global markets. With markets increasingly globalised, it may be necessary for a firm to be dominant in the local market in order to become competitive internationally.

²⁷ For example, the opportunity to enjoy monopoly benefits arising out of protection conferred by certain intellectual property rights would encourage more business people to undertake research and innovate. Without the monopoly power that an intellectual property right such as a patent may confer, society may be deprived of much needed innovation essential for development.

²⁸ While this issue is often ignored in competition economics and law enforcement, most successful firms become dominant through being innovative, efficient and dynamic. As Djolov, supra n 25 at 23-4, observes: monopoly can occur when incumbents maintain or gain competitive position according to the innovations they bring to the market. For example, it is well recognised that companies such as Microsoft, Google and Apple have become dominant in their respective markets through their successful innovations.

²⁹ Organisation for Economic Co-operation and Development (OECD) *Competition Law and Policy in South Africa, An OECD Peer Review* (2003) at 10 accessed at <http://www.oecd.org/southafrica/34823812.pdf> (date of last use: 6 July 2016).

³⁰ Section 2(d) of the Act.

A few of our firms have followed this path with great success. For example, South African Breweries Limited, which has recently been acquired by Anheuser-Busch InBev, is a virtual monopoly in the domestic beer market.³¹ Few can doubt its efficiency and economies of scale benefits in the local beer market, reflected in high quality beer at relatively cheap prices. It is also one of the dominant players in the global beer market, with a presence in more than 80 countries.³² The same could also be said of our four major banks which have established an oligopoly in the domestic banking sector.³³ Despite the concentrated nature of our banking sector, it is considered to be highly competitive,³⁴ while our banks have expanded their operations exponentially into global markets.³⁵ There are many more firms whose domination of the South African market has enabled them to compete effectively in international markets.³⁶ In this regard, it may be argued that a dominant position in a South African market may be an important step towards the realisation of the Competition Act's objective of expanding opportunities for South African firms in global markets.

1.6.2 Legal Concerns

³¹ *Competition Commission v South African Breweries Limited and Others* 2015 (3) SA 329 (CAC) at pars 1 and 54. OECD supra n 29.

³² For example in the American domestic beer market South African Breweries is one of two firms controlling 80% of the market. See Carl T Bogus 'The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust' (2015) 49 *University of Michigan Journal of Law Reform* 1-120 at 9 and SABMiller PLC 'Who we are' accessed at <http://www.sabmiller.com/about-us/who-we-are> (date of last use: 6 July 2016).

³³ These are Standard Bank, ABSA, FNB, and Nedbank. See Grietjie Verhoef 'Concentration and Competition: The Changing Landscape of the Banking Sector in South Africa 1970-2007' (2009) 24 *South African Journal of Economic History* 157-97 at 184 and 188-90.

³⁴ Id at 184, 194, 196 and 197.

³⁵ Id at 191-2.

³⁶ These would include MTN, Shoprite, MultiChoice, and a number of mining and construction companies.

To the extent that abuse of dominance provisions and their enforcement may indeed be generally hostile towards dominant firms, they may restrict the firms' ability and freedom to compete freely and effectively in the market.³⁷ Because most competition law provisions are not concerned with the actions of firms with low or no market power,³⁸ the restricted ability of dominant firms to compete freely and effectively in markets – as a result of this selective application and the enforcement of competition rules – raises significant legal and constitutional concerns. The majority of basic rights and freedoms to which juristic persons are entitled under the Constitution of the Republic of South Africa, 1996, ('the Constitution') and the law, may be invoked by firms affected by competition law.³⁹ Indeed, the Bill of Rights applies to all law, including competition law.⁴⁰

In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*,⁴¹ the Supreme Court of Appeal emphasised that 'the Competition Act must be applied in a manner that least impinges on the fundamental rights of affected firms'.⁴² As other observers note, "the fundamental rights relevant to the field of competition law include, but are not

³⁷ Arowolo supra n 10.

³⁸ The assumption here is that the actions of firms that are not dominant are incapable of resulting in any substantial prevention and lessening of competition. A central principle of the Competition Act that permeates all its rule of reason provisions, is that the prevention and lessening of competition is prohibited only if it is 'substantial'. See sections 5 (1), 8(c), 9(1)(a) and 12A of the Act.

³⁹ See sections 8(4) of the Constitution and 1(2)(a) of the Competition Act. See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at par 57.

⁴⁰ Section 8(1) of the Constitution.

⁴¹ Supra n 16.

⁴² Id at par 10.

limited to, the right to fairness, freedom of trade, equality, and non-discrimination”.⁴³ In *AK Entertainment CC v Minister of Safety and Security*⁴⁴ the Court held that “it is difficult to appreciate why a corporation should not be entitled to enforce the Bill of Rights, in particular the equality clause, where an executive or administrative functionary blatantly treats it unequally from all other persons”.⁴⁵

1.6.3 Summary

Should the formulation and enforcement of competition rules be found to be inherently hostile towards dominant firms, in a way that raises the economic and legal concerns highlighted above, this study would be of considerable significance for the enforcement of the Competition Act and the development of our economy. It is essential that the rules governing market competition are economically and legally fair. The prevailing economic theory underpinning competition law and the enforcement of abuse of dominance provisions seems to overstate the dangers of monopoly and market dominance. The economic and social benefits of monopoly appear to have been undervalued disproportionately. The result is that innovative firms that become successful and dominant through lawful means, may be unable freely to enjoy the fruits of their commercial success. Some of these firms start small in backyards and garages and become dominant through their skill and diligence. A fair system should encourage and reward their spirit rather than stifle it.

⁴³ J Neethling and BR Rutherford ‘The Law of Competition and the Bill of Rights’ in JA Faris *Law of South Africa*, Annual Cumulative Supplement 2 ed Vol 2(2) (Lexis Nexis Online 2014) at par 233. J Neethling *Van Heerden-Neethling Unlawful Competition* 2 ed (Lexis Nexis 2008) at 12-13.

⁴⁴ 1994 (4) BCLR 31 (E); 1995 (1) SA 783 (E).

⁴⁵ Id at 38; 790.

1.7 Nature and Scope of the Study

Given the inevitable interplay between law and economics in competition law, it is important to caution that this study is conducted primarily from a legal perspective. To the extent that fundamental economic issues or questions that are germane to competition law may arise, these will be highlighted (without being dealt with in great detail) in order to retain the focus of this study as a legal one. As a legal study, primary sources of law such as legislation, case law, rules, and regulations are an important point of reference and analysis. Secondary sources of law such as books, journal articles, reports, and conference papers also provide a rich source of knowledge and legal analysis.

As I have said, the study is also comparative. Discussions of aspects of section 2 of the Sherman Act in American antitrust law and Article 102 in European competition law relevant to the enforcement of the abuse of dominance provisions in the Competition Act are included across the chapters. This comparative study aims to facilitate the extrapolation of lessons from the two jurisdictions on cases of unilateral conduct or abuse of dominance relevant to the assessment of the abuse of dominance provisions in the South African Competition Act.

1.8 The Choice of America and Europe as Comparators

The majority of the provisions of our Competition Act have been influenced largely by foreign law. As an observer has remarked, “our Act owes a considerable debt” to the competition laws from other jurisdictions.⁴⁶ The day-to-day enforcement of the South African Act has also retained the umbilical cord connecting our law with its foreign counterparts. Indeed, our case law is replete with generous quotations from foreign competition law decisions, particularly those of American and European law. In seeking to understand the principles of our own law and situate them in their proper context, it is helpful to determine how these principles actually developed in the jurisdictions that have influenced our law.

1.8.1 America

What we today known in South Africa as competition law originated in the United States of America more than 120 years ago, through the Sherman Act of 1890.⁴⁷ When South Africa adopted its first comprehensive competition legislation, the Regulation of Monopolistic Conditions Act,⁴⁸ considerable lessons were drawn from American antitrust law. Prior to the adoption of the Regulation of Monopolistic Conditions Act, the Minister of Economic Affairs observed in parliament that there was a growing feeling that South Africa should follow the example of the United States by introducing legislation along the lines of the Sherman Act, to counter the emergence of monopolies in the economy.⁴⁹ He instructed the Board of Trade and Industries to investigate the

⁴⁶ Brasseley supra n 12 at 180.

⁴⁷ 15 USC ch 1.

⁴⁸ 24 of 1955.

⁴⁹ D V Cowen ‘A Survey of the Law Relating to the Control of Monopoly in South Africa’ (1950) 8 *South African Journal of Economics* 124-47 at 124-5.

possibility of South Africa enacting legislation modeled on the Sherman Act.⁵⁰ In its investigation, the Board of Trade and Industries surveyed modern thinking on the control of monopolies in America and other parts of the world and recommended completely new legislation for the regulation of monopolies in South Africa.⁵¹ This led to the enactment of the Regulation of Monopolistic Conditions Act.⁵²

When the idea of enacting our current Competition Act was mooted, American antitrust law continued to serve as a model. The ANC's Reconstruction and Development Programme ('RDP') policy document, for example, proposed that strict 'antitrust' legislation was needed in the country, systematically to eliminate the high market concentration levels that existed in South Africa.⁵³ The expression 'antitrust' originates from North America and the United States in particular. Most importantly, the philosophy underpinning the South African Competition Act is substantially the same as that on which the Sherman Act was premised. Both laws were founded on concerns about the perceived dangers of monopolies to the economy and society in general. In *Competition Commission v South African Breweries Limited and Others*⁵⁴ our Competition Appeal Court noted that "the Sherman Act and judicial decisions

⁵⁰ Id at 125. See also EE Bekker *Monopolies: Review of the Role of the Competition Board* (Rand Afrikaans University 1992) at 13 and EE Bekker 'Monopolies and the Role of the Competition Board' 1992 *Journal of South African Law* 618-44 at 625.

⁵¹ Bekker *Monopolies: Review of the Role of the Competition Board* supra n 50 and Bekker 'Monopolies and the Role of the Competition Board' supra n 50 at 626.

⁵² Bekker *Monopolies: Review of the Role of the Competition Board* supra n 50; Brassey supra n 12 at 63; OECD supra n 29 at 12-13; JV Tregenna-Piggott 'An Assessment of Competition Policy in South Africa' (1980) Occasional Paper No. 8, Economic Research Unit, Department of Economics, University of Natal at 24; and Neo Chabane 'An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa' (2003) Trade & Industrial Policy Strategies (TIPS); CSID Research Project at 4 accessed at <http://www.tips.org.za/files/732.pdf> (date of last use: 6 July 2016).

⁵³ ANC 'RDP White Paper: Discussion Document' at par 3.8.1 accessed at <http://www.anc.org.za/show.php?id=232> (date of last use: 6 July 2016).

⁵⁴ Supra n 31.

interpreting it were based upon the assumption that the public interest is best protected from the evils of monopoly by the maintenance of competition”.⁵⁵ With more than a century of jurisprudence behind it, American antitrust law continues to play a pivotal role in guiding the enforcement and development of our own competition rules. This is particularly true of cases involving the abuse of dominance.

1.8.2 Europe

In recent times there has been a growing feeling that European competition law has begun to exert greater influence in our law. As the Competition Appeal Court found in *Senwes Limited v Competition Commission*,⁵⁶ the theoretical underpinnings of European competition law “are more congruent with those of our own Competition Act”.⁵⁷ This can be attributed to the fact that many smaller national economies in the European Economic Community are, like South Africa, not yet fully developed and still characterised by market structures that may be perceived not to be conducive to effective competition. Such market structures include the prevalence of firms wielding considerable market power. As a result, the enforcement of competition rules in Europe is driven by concerns about addressing market structure conditions that may hinder effective competition and allow anticompetitive conduct to thrive. Having regard to the similarities in the market structure conditions characterising the two jurisdictions, South African competition authorities feel more comfortable adopting European competition principles when adjudicating disputes under the Competition Act.

⁵⁵ Id at par 30.

⁵⁶ 87/CAC/Feb09.

⁵⁷ Id at par 54. See also Munyai supra n 16 at 326-7.

1.8.3 Summary

It is virtually impossible to find an important decision by our competition authorities, particularly in abuse of dominance cases, in which there is no recourse to the decisions and writings of American or European courts, competition authorities, and commentators. An assessment of some aspects of South African competition law would, therefore, be incomplete without reviewing the position under American and/or European law. As stated earlier, any effort to gain a sound understanding of the principles of our competition law also requires an understanding of how these principles actually developed in the jurisdictions that have so greatly influenced our law.

1.9 Structure of the Thesis

The thesis is presented in six chapters which seek individually and collectively to identify traces of hostility towards dominant firms in various aspects of abuse of dominance law and its enforcement in the three jurisdictions under review. These are structured as follows:

1.9.1 Chapter 1

As is customary, in Chapter 1 I provide a synopsis of the study. I identify the problem that the study seeks to address and further outline its main

objective. Here, I also set out the key assumptions underpinning the study and show its significance to competition law enforcement and society in general.

1.9.2 Chapter 2

In this Chapter I trace the historical contexts in which competition laws originated and developed in the three jurisdictions under review, focusing on their treatment of dominant firms. A study of the historical development of competition law will help identify formative influences in the evolution of the law, which may also have a bearing on its current enforcement and future development.⁵⁸ Because American antitrust law is the oldest of the three jurisdictions, a review of the historical development of American antitrust law is presented first, followed by European competition law as the second oldest, and South African competition law as the ‘newcomer’.

The Chapter reveals that the origins of competition laws in the three jurisdictions can be traced to an historical philosophy of hostility towards dominant undertakings. I also show that, given how the law developed, the historical philosophy of hostility towards dominant undertakings has in some instances been carried over into modern competition law.

⁵⁸ WE Kovacic ‘Modern US Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act’ at 2 accessed at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf> (date of last use: 6 July 2016).

1.9.3 Chapter 3

In this Chapter I review the abuse of dominance provisions in the South African Competition Act with particular focus on section 8(c).⁵⁹ The aim of the Chapter is to investigate whether the formulation and enforcement of the abuse of dominance provisions in the Competition Act reinforce perceptions of hostility towards dominant firms. The Chapter concludes that indeed the formulation and enforcement of the abuse of dominance provisions in the Act, and in particular section 8(c), reinforce perceptions of the hostility of the law towards dominant firms.

1.9.4 Chapter 4

Here I consider whether an appropriate causation framework exists in abuse of dominance adjudication to help determine whether the anticompetitive harm the complainant alleges can be attributed to the conduct of the dominant firm. The argument advanced is that causation should be an important element in antitrust liability, particularly in some

⁵⁹ Section 8(c) of the Competition Act provides as follows:

“8. Abuse of dominance prohibited

It is prohibited for a dominant *firm* to –

...

(c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or...”.

exclusionary abuse of dominance cases where the establishment of anticompetitive effects may be vital. I conclude that the issue of causation is not sufficiently addressed in abuse of dominance proceedings. As a result, firms facing abuse of dominance complaints may be found liable for market distortions which cannot satisfactorily be traced back to their conduct.

1.9.5 Chapter 5

In this Chapter I critically evaluate the unique nature of obligations imposed on dominant firms by the so-called principle of 'special responsibility' and the doctrine of 'super-dominance' in European competition law. Particular attention will be given to constraints on the market conduct of dominant firms occasioned by the principle of special responsibility and the doctrine of super-dominance. The ultimate goal of this Chapter is to establish whether such constraints perpetuate the historical philosophy and practice of hostility towards dominant firms in modern competition law enforcement. I conclude that the principle of special responsibility and the doctrine of super-dominance are in keeping with the philosophy of hostility towards dominant firms which has dominated European competition law and its enforcement from its inception.

I further review attempts to introduce the principle of special responsibility and the doctrine of super-dominance into South African competition law and the legal implications this holds. Because neither American competition authorities nor courts have expressly recognised the existence of any special responsibility or obligation on the part of dominant firms, the position under American antitrust law will not be considered in this Chapter.

1.9.6 Chapter 6

Chapter 6 is a conclusion, reflecting the main arguments and findings in the preceding chapters. I emphasise that the formulation and enforcement of abuse of dominance rules are inherently hostile towards dominant firms. I also make recommendations on the appropriate structure and content of unilateral conduct rules and propose a suitable approach to their enforcement.

**HISTORICAL DEVELOPMENT OF COMPETITION LAW: A POLICY BORN OUT OF
HOSTILITY TOWARDS DOMINANT FIRMS**

2.1 Introduction

Why is it essential to torment readers with old tales of the historical development of competition law as well as the original economic philosophy behind it? Given the important role that lessons from economic and legal history play in the functioning of modern economies and societies, it is helpful, for purposes of this study, to delve into the origins and development of competition policy and law.¹ Indeed, “the seed of future development can often be found in the past”.² A review of the historical development of competition policy and law, it is submitted, can provide “a helpful platform from which to understand formative influences in their evolution, which may also have a bearing on future development”.³

As Kovacic observed, “significant developments in antitrust doctrine hinge on interpretations of distant episodes in antitrust experience, which is why recent shifts in

¹ Nicola Giocoli ‘Competition versus Property Rights Advance: American Antitrust Law, The Freiburg School and the Early Years of European Competition Policy’ (2009) 5 *Journal of Competition Law & Economics* 747-86 at 747.

² Roman Tomasic ‘The Challenge of Corporate Law Enforcement: Corporate Law Reform in Australia and Beyond’ (2006) 10 *University of Western Sydney Law Review* 1-23 at 1.

³ William E. Kovacic ‘Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act’ at 2 accessed at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf> (date of last use: 6 July 2016).

enforcement activity have been motivated substantially by commentary on historical records to identify perceived and longstanding flaws in antitrust policy”.⁴ According to Bork, not only does an historical study of competition law’s development allow us to understand how “the law’s grand ideas actually took root and grew, it also helps free us from a falsely imagined past”.⁵ Without its appeal to history, Kovacic further observes, Bork’s seminal work, *The Antitrust Paradox*, would probably have not played so extraordinary a role in molding competition law doctrine and determining the agenda for modern debate.⁶

Before proceeding to the substance of this Chapter, it is appropriate to note that the majority of modern academic works and court decisions in competition law have appeared to adopt an interpretation and enforcement approach to competition rules that are generally tolerant and welcoming towards dominant firms. This is encapsulated by the often stated mantra in competition law enforcement that “no prohibition or punishment attaches to a firm by reason only of its dominance”.⁷ But, this is more apparent than real.

Historically, antitrust enforcers did not exactly roll out the red carpet for dominant firms. A study of the historical development of competition law overwhelmingly reveals that the origin and development of the law had its roots in the widespread hostility that existed

⁴ William E. Kovacic ‘The Sherman Act: The First Century – Comments and Observations’ (1990) 59 *Antitrust Law Journal* 119-30 at 119.

⁵ Robert H. Bork *The Antitrust Paradox: A Policy at War With Itself* (Basic Books Inc 1978) at 15.

⁶ Kovacic supra n 4.

⁷ Martin Brassey et al *Competition Law* (Juta 2002) at 197.

towards dominant firms.⁸ The domination of markets by one or a few enterprises was, and to a large extent still is, considered incompatible with the ideal of free and effective competition. Connected to this view was a long held assumption in competition policy and law, prevalent to this day, that market domination enables dominant firms to harm consumer welfare, for example by reducing output, raising prices, degrading product quality, suppressing innovation, and depriving consumers of choice.⁹

As opposed to market domination, policy and law makers preferred a market or industrial structure characterised by a plurality of firms, the general assumption being that the level of competition between these firms and the welfare benefits to consumers would be high.¹⁰ In markets where there were numerous firms, each with proportionate

⁸ Robert L. Bradley, Jr. 'On the Origins of the Sherman Act' (1990) 9 *Cato Journal* 737-42 at 737-38; Heike Schweitzer 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' paper presented at the 12th Annual Competition Law and Policy Workshop, Robert Schuman Centre, 8-9 June 2007, EUI, Florence at 2 accessed at <http://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Schweitzer.pdf> (date of last use: 6 July 2016). As the Federal Trade Commission observed:

"With one company controlling an entire industry, there was no competition, and smaller businesses and people had no choices about from whom to buy. Prices went through the roof, and quality didn't have to be a priority. This caused hardship and threatened the new American prosperity. The public got angry and demanded the government take action. President Theodore Roosevelt busted or broke up many trusts by enforcing what came to be known as antitrust laws".

See Federal Trade Commission 'Antitrust Laws: A Brief History' accessed at http://www.ftc.gov/bcp/edu/microsites/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf (date of last use: 6 July 2016).

⁹ William Duncan Reekie 'A View on the Treatment of Collusive and Restrictive Practices in Competition Policy' (1998) 1 *South African Journal of Economic Management and Science (Suid-Afrikaanse tydskrif vir ekonomiese en bestuurswetenskappe)* 8-35 at 22. Indeed monopoly has long been associated with harmful effects such as higher prices, reduced output, lowered quality and innovation, see *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) at 52. See also Richard Whish and David Bailey *Competition Law* 7 ed (Oxford University Press 2012) at 1-2.

¹⁰ Richard A. Posner and Frank H. Easterbrook *Antitrust: Cases, Economic Notes and Other Materials* 2 ed (West Publishing Co 1981) at 903; Carina Smit 'The Rationale for Competition Policy: A South African Perspective' paper presented at the biennial ESSA Conference, 7-9 September 2005, Elangeni Holiday Inn Hotel, Durban, South Africa at 4 accessed at http://econex.co.za/wp-content/uploads/2015/04/econex_researcharticle_10.pdf (date of last use: 6 July 2016); and Bork supra n 5 at 54-5. The history of section 2 of the Sherman Act, it has been observed, reveals an antitrust

market share, no single firm was deemed to have sufficient power on its own to exert significant influence over price and output.¹¹

It is possible that these assumptions may have been and remain correct in certain instances. But a considerable number of studies have also found that the absence of dominant firms and the prevalence of multiple firms competing in a market, offer no guarantees that competition levels and welfare benefits to consumers will be higher than in a market with few competitors.¹² In some instances, the most productive way of meeting consumer needs, it is submitted, could be through fewer suppliers, particularly when economies of scale are great.¹³ The exclusion of an inefficient competitor from a market would then not harm consumer welfare, if that competitor was unable to guarantee consumer welfare in the form of lower prices, better quality, and quantity.¹⁴

Nevertheless, anti-dominance concerns and preference for a market structure comprising multiple competitors, among them many small businesses, have provided a strong theoretical foundation for the development of the entire concept of competition regulation. In this regard, it is no surprise that the majority of the world's competition

jurisprudence dominated by political concerns, in particular, the preoccupation with maintaining a market structure in which a significant number of competitors and small and medium-sized enterprises could compete, see Schweitzer *supra* n 8. With this in mind, Unterhalter questions whether in South Africa competitive markets can also be brought about by merely ensuring that there is commercial rivalry between a significant number of competitors or there is more to the concept of competition than mere rivalry, see Brassey *supra* n 7 at 200.

¹¹ Posner and Easterbrook *supra* n 10.

¹² Massimo Motta *Competition Policy: Theory and Practice* (Cambridge University Press 2004) at 51 and Liza Lovdahl Gormsen 'The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 *European Competition Journal* 329-44 at 330. See also Paul W. McCracken and Thomas Gale Moore *Competition and Market Concentration in the American Economy* (American Enterprise Institute 1974) at 1-9.

¹³ Gormsen *supra* n 12 at 331.

¹⁴ *Id.*

legislation contains express and implied provisions designed to curtail the market power of dominant firms. By contrast, corresponding provisions aimed specifically at eliminating or punishing inefficient and anticompetitive non-dominant firms remain conspicuous by their absence.

The original objective of competition policy was “to give ‘special attention’ to dominant firms by regulating and controlling their market power”.¹⁵ To this end, antitrust remedies such as requiring some dominant firms to divest themselves of their assets, to modify their contractual relationships with other businesses, and to oblige them to deal with or grant other businesses access to their own facilities, were thought to be appropriate.¹⁶ In addition, the whole merger control enterprise significantly evinces intent on the part of antitrust policy makers and enforcers to prevent and control the acquisition and maintenance of a dominant status in the market.

It is clear, therefore, that competition laws were by design and effect never initially intended to be dominant firm or monopoly friendly. A prime example of this is the ordinary term used for competition laws across several jurisdictions: in the United States of America competition laws are referred to as ‘ANTI’-trust laws, which has the same meaning as anti-monopoly; whereas in several other jurisdictions (particularly in Asia) the law is also unashamedly referred to as ‘ANTI’-monopoly law.¹⁷ Although modern antitrust enforcers across jurisdictions have worked hard to rebut suggestions of the

¹⁵ Smit supra n 10 at 8.

¹⁶ Posner and Easterbrook supra n 10 at 909.

¹⁷ Competition law is generally referred to as ‘Anti’-monopoly law in Japan, China, Hong Kong and Russia.

perceived bias of the law against dominant firms, explaining that mere possession of a dominant status is not prohibited but rather the abuse of such status,¹⁸ accusations of bias have not completely disappeared. As an observer remarks, 'even a supposedly modern and refined practice of competition law enforcement, particularly in abuse of dominance cases, has not rescued the law from its questionable original motives'.¹⁹

One of the unintended effects of a competition policy primarily focused on the structure of the market and limiting the market power of dominant firms in order to foster competitive rivalry through plural actors in markets, is that it may unwittingly discourage the acquisition and maintenance of dominance, which should not be prohibited by law.²⁰ And this opposition to the acquisition and maintenance of dominance in a market may occur regardless of the actual or proven impact of the dominant firm's pricing and other actions on consumer welfare, which should be the ultimate focus of competition law.²¹ Indeed, such policy positions have historically provided fertile ground for competition legislation and enforcement actions which have tended to be inherently and unfairly biased towards dominant firms.

For example, in early American antitrust jurisprudence under section 2 of the Sherman Act similar policies led to calls for the break-up of large firms in the expectation that competition in the market would increase.²² In American antitrust law it was widely

¹⁸ No prohibition attaches to a firm, it is submitted, by reason only of the fact that it is dominant, Brassey supra n 7.

¹⁹ Bradley supra n 8.

²⁰ Bork supra n 5 at 57.

²¹ Id.

²² Whish and Bailey supra n 9 at 21; Bork supra n 5 at 67 and 163; and Thomas J. Dilorenzo 'The Origins of Antitrust: An Interest-Group Perspective' (1985) 5 *International Review of Law and Economics* 73-90 at

understood that the purpose of competition laws was to preserve and perpetuate, for its own sake, an industrial structure in which small enterprises could effectively compete with each other.²³ As Fox has remarked, “since their inception American antitrust laws reflected a pervasive distrust of concentrated economic power”.²⁴

Similarly, in European competition law a pluralist market structure comprising several independent entities was thought to guarantee what was termed, in the literature of ordoliberal philosophy, ‘complete competition’: that is competition in which no firm in a market has the power to coerce other firms.²⁵ This market structure view or industrial organisation theory was deemed to guarantee greater prospects of welfare benefits to consumers than would be found under conditions of market domination.²⁶ Like America, Europe underwent a period in the enforcement of its competition rules when significant hostility was exhibited towards dominant firms, particularly in the application of Article 102²⁷ of the Treaty on the Functioning of the European Union (formerly Article 82 of the Treaty of Rome or the Treaty establishing the European Economic Community). In general, it has been observed that European courts have replicated the

74. See also generally Bruno S. Frey et al ‘Consensus and Dissension among Economists: An Empirical Inquiry’ (1984) 74 *American Economic Review* 986-94.

²³ *United States v Aluminium Company of America* 148 F 2d 416 (2d Cir 1945) at 428-9; and Bork supra n 5 at 51-2.

²⁴ Eleanor M. Fox ‘Monopolization and Dominance in the United States and the European Community: Efficiency Opportunity and Fairness’ (1986) 61 *Notre Dame Law Review* 981-1020 at 983.

²⁵ David J Gerber ‘Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe’ (1994) 42 *American Journal of Comparative Law* 25-84 at 43 and Pinar Akman ‘Searching for the Long-Lost Soul of Article 82EC’ (2009) 29 *Oxford Journal of Legal Studies* 267-303 at 274.

²⁶ This is evident when one looks at the history of section 2 of the Sherman Act.

²⁷ Article 102 of the Treaty of the European Union, in part, provides generally as follows:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States”.

trend seen in America during the early enforcement stage of section 2 of the Sherman Act, by interpreting Article 102 in a manner that exhibited considerable hostility towards dominant firms.²⁸

In South Africa, competition policy and law arose in the context of the history of monopoly and industrial concentration. Prior to the adoption of the Competition Act,²⁹ there was little doubt that the South African economy was characterised by high levels of industrial concentration. By the time South Africa undertook the process of political transition in 1994, the new government inherited an economy characterised by state-owned monopolies, conglomerates, and high market concentration levels.³⁰ As an observer has noted, “not more than five conglomerate groupings controlled the majority of economic activity in the country”.³¹ The ANC’s Reconstruction and Development Programme policy proposed that “strict antitrust legislation was needed to systematically eliminate the high market concentration levels”.³² In particular, the new ANC government wanted “to restructure the economy by, among others, breaking up the economic power of large conglomerates, lowering concentration levels, and spreading corporate ownership and control more equally”.³³

²⁸ Schweitzer supra n 8.

²⁹ 89 of 1998.

³⁰ Smit supra n 10 at 1.

³¹ Simon Roberts ‘The Role for Competition Policy in Economic Development? The Effects of Competition Policy in South Africa, and Selected International Comparisons’ Trade and Industrial Policy Strategies’ (TIPS), Working Paper 8-2004, at 1 - 2 accessed at http://www.tips.org.za/events/event_details/papers/forum2003/ppp_roberts.pdf. (date of last use: 6 July 2016).

³² ANC ‘RDP White Paper: Discussion Document’ at par 3.8.1 accessed at <http://www.anc.org.za/show.php?id=232> (date of last use: 6 July 2016).

³³ Smit supra n 10 at 13.

When the Competition Act was adopted it represented an important part of broader economic reforms designed to correct the historical economic structure characterised by market concentration and anticompetitive practices.³⁴ One of the stated purposes of the Competition Act is to create an environment in which small and medium-sized enterprises and historically disadvantaged persons have an equitable opportunity to participate in the economy.³⁵

In the opening discussion above, I highlighted in general terms the backgrounds and contexts in which competition laws evolved in relation to their approach to the treatment of dominant firms in the three jurisdictions under review. In the discussion that follows, part 2.2 provides a focused examination and analysis of the historical development of American antitrust law. Parts 2.3 and 2.4 further provide a review of the historical development of competition law in the European Union and South Africa, respectively. Part 2.5 provides the main findings and conclusions of this Chapter.

It is appropriate to point out that competition policy and law in the jurisdictions under review have been subjected to different philosophical, economic, political, and social influences leading over time to different enforcement patterns. In a limited study such as the present, it is not possible exhaustively to cover all the issues in the evolution of competition rules in the jurisdictions under review. Therefore, I have had to make a delicate selection in order to retain the focus of the study. This study focuses primarily

³⁴ Roberts *supra* n 31 at 1.

³⁵ Section 2(e) and (f) of the Competition Act.

on investigating evidence of hostility and bias towards dominant firms from the law's history to its current practice.

2.2 Historical Development of American Antitrust Law

According to Orbach: “American competition laws are aptly described ‘anti’-trust laws primarily because they were chiefly intended to counter the emergence of big businesses called trusts in the nineteenth century”.³⁶ As also noted by other observers, “the term ‘antitrust’ generally refers to a fluid set of American national competition policies designed in response to the threat posed by the emergence of monopolies”,³⁷ and “the excessive concentrations of economic power in the hands of a few”.³⁸

The most significant American federal antitrust statute is the Sherman Act of 1890.³⁹ Although other supplementary antitrust legislation has been enacted in America from time to time, Thorelli observes that “the Sherman Act has prevailed as a seemingly timeless expression of public policy in relation to economic life and remains by far the most important legislation in the field”.⁴⁰ The US Supreme Court, too, has termed the Sherman Act “the Magna Carta of our free enterprise economy”.⁴¹ It therefore goes

³⁶ Barak Orbach ‘How Antitrust Lost its Goal’ (2013) 81 *Fordham Law Review* 2253-77 at 2254.

³⁷ Jeffrey L. Cotter ‘Extraterritorial Jurisdiction: The Application of US Antitrust Laws to Acts Outside the United States – Hart Ford Fire Insurance Co v California 113 S Ct 2891 (1993)’ (1994) 20 *William Mitchell Law Review* 1109-41 at 1114.

³⁸ Eleanor M. Fox ‘US and EU competition Law: A Comparison’ in Edward M. Graham and J. David Richardson (eds) *Global Competition Policy* (Peterson Institute 1997) at 340.

³⁹ Washington State - Office of the Attorney General ‘Guide to Antitrust Laws’ accessed at <http://www.atg.wa.gov/guide-antitrust-laws> (date of last use: 6 July 2016).

⁴⁰ Hans B. Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (Johns Hopkins University Press 1954) at 1.

⁴¹ *United States v Topco Associates Inc* 405 US 596 (1972) at 610.

without saying that a study of the origin of American antitrust policy should properly focus on the history of the Sherman Act.⁴²

2.2.1 The American Historical Economic Structure and the Problem of Trusts/Monopoly

When the United States Congress passed the Sherman Act the American economy was experiencing a period of turbulent industrial change. As observers have noted, new mass production technology for various goods, and a rapidly expanding distribution network associated with the railroad industry boom, gave birth to some of the country's earliest big businesses called 'trusts'.⁴³ Technological developments also made the emergence of big business possible and indeed inevitable.⁴⁴ As Thorelli further observes, "the heavy investments needed to secure the efficient use of the technical means of production in growing enterprises were beginning to create a demand for capital that could not be met by a single or even a minor group of investors".⁴⁵

While these industrial developments brought greater economic efficiency than had been seen in the past, they also created a situation where industries were increasingly becoming concentrated.⁴⁶ In the decade preceding the enactment of the Sherman Act industrial combinations or trusts proved an almost indispensable vehicle for the smooth

⁴² Thorelli supra n 40 at 164.

⁴³ Id at 63-4; William Letwin *Law and Economic Policy in America* (Edinburg University Press 1967) at 74; and Rudolph J.R. Peritz 'The Sherman Anti-Trust Act of 1890 – A More Dynamic and Open American Economic System' accessed at <http://iipdigital.usembassy.gov/st/english/publication/2008/04/20080423212813eaifas0.42149.html#axzz3gX5vJ1HA> (date of last use: 6 July 2016).

⁴⁴ Thorelli supra n 40 at 64.

⁴⁵ Id.

⁴⁶ Peritz supra n 43.

rearrangement of capital.⁴⁷ As two of the popular industrialists of the time remarked, “the day of combination and trusts was there to stay while individualism was gone and would never to return”⁴⁸ because “combination and trusts had become the tendency of the time”.⁴⁹ The combinations took a variety of forms, including associations between competitors in the form of gentlemen’s agreements or pools as well as outright combinations in the form of mergers.⁵⁰

Because of these developments, the number of competitors tended to decrease in many industries, while the average size of the combination or trust grew.⁵¹ This affected the competitive positions and livelihoods of remaining individual firms, particularly small local firms, as emerging trusts, it has been observed, “had expanded from local to national and even international markets”.⁵²

The American public, and small businesses in particular, deeply resented the trusts as they were widely regarded a new form of monopoly.⁵³ The concept of monopoly was used in America at first to denote a “special legal privilege granted to a person by the state”, but it was later extended to include “any acquisition of exclusive control that a few persons achieved by their own efforts”.⁵⁴ In both instances the term has always had

⁴⁷ Id. Thorelli supra n 40 at 65 and Letwin supra n 43 at 70.

⁴⁸ Ron Chernow *Titan: The Life of John D. Rockefeller, Sr* (Random House 1999) 149 at footnote 82.

⁴⁹ Letwin supra n 47.

⁵⁰ Thorelli supra n 40 at 72.

⁵¹ Id at 63.

⁵² Gary D. Libecap ‘The Rise of the Chicago Packers and the Origins of Meat Inspections and Antitrust’ (1992) Vol XXX *Economic Inquiry* 242-62 at 243.

⁵³ Letwin supra n 43 at 59.

⁵⁴ Id.

connotations of unjustified power which created obstacles to equal opportunity.⁵⁵ The most common problems generally associated with trusts and monopoly were the restraint of trade, high prices, limited production, low wages, losses to small businesses, and other forms of perceived economic oppression.⁵⁶

2.2.2 The Sherman Act as Solution to the Trust/Monopoly Problem

American public opinion and feeling about trusts or monopoly has always been clear. Prior to the adoption of the Sherman Act, it has been observed, “there were few who doubted that the American public hated trusts or monopolies fervently”.⁵⁷ Indeed, the hatred of monopoly was considered to be deeply ingrained in the American social fabric.⁵⁸

In response to the higher levels of industrial concentration that developed in the pre-Sherman Act era, small businesses affected by the combinations and trusts, as well as members of the public, appealed to the federal government to introduce legislation to mold and control the trusts.⁵⁹ As Troesken observed, small businesses were the biggest lobby group to send Senator John Sherman complaint letters raising their concern about growing trusts and encouraging him to introduce antitrust laws to deal with them.⁶⁰ In Congress debates relating to the Sherman Bill, Libecap observes, “most

⁵⁵ Id.

⁵⁶ Orbach supra n 36 at 2262.

⁵⁷ Letwin supra n 43 at 15 and 54.

⁵⁸ Id at 59. Thorelli supra n 40.

⁵⁹ Libecap supra n 52.

⁶⁰ Werner Troesken ‘The Letters of John Sherman and the Origins of Antitrust’ (2002) 15 *The Review of Austrian Economics* 275-95 at 276. Phillip Areeda and Herbert Hovenkamp *Antitrust Law: An Analysis of*

commentators also emphasised the protection of small businesses that were being crushed by the trusts”.⁶¹

The Sherman Act was eventually passed in response to small-business driven public protests against the trusts.⁶² As Thorelli observed, “that the Sherman Act was actually, if not formally, intended as a weapon against monopoly cannot be doubted”.⁶³ Antitrust law, and the Sherman Act in particular, were seen as being in harmony with long-cherished ideas of equality of opportunity and freedom of enterprise and other concepts of liberalism and capitalist democracy.⁶⁴ The Sherman Act was designed to restore a naturally harmonious economic, moral, political, and social order that the emergence of trusts and dominant firms had disrupted.⁶⁵

Section 2 of the Sherman Act, the cornerstone of American antitrust law, specifically provides that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

Antitrust Principles and Their Application 4 ed Vol 1 (Wolters Kluwer Law & Business 2013) at 100b and 101.

⁶¹ Libecap supra n 52 at 259.

⁶² Letwin supra n 57.

⁶³ Thorelli supra n 40 at 5.

⁶⁴ Id at 1.

⁶⁵ Kovacic supra n 4 at 121.

From a literal reading of section 2, one is inclined to deduce that the purpose of the provision is actually the prohibition of market domination per se. Indeed, as observers have noted, 'relying on section 2 of the Sherman Act, the American government has since 1890, the year in which the Act was enacted, attacked various forms of market domination in courtrooms across the country'.⁶⁶ As Kovacic further observes, "the Department of Justice and the Federal Trade Commission have throughout the history of the Sherman Act mounted an ambitious monopolisation agenda through which they have sought to curtail the market power of dominant firms in several industries".⁶⁷ Trust-busting, he continues, "became section 2 of the Sherman Act's most alluring and enduring image as federal antitrust enforcement officials relied on this provision to mount campaigns to disassemble leviathans of American business".⁶⁸ As Bork puts it, "there always existed in America a 'populist' hostility to big business reinforced by the perception that major corporations are somehow to blame for society's hardships".⁶⁹

2.2.3 Manifestation of Hostility Towards Dominant Firms in Early Monopolisation Cases: The Development of Jurisprudence Under Section 2 of The Sherman Act

The majority of early and historically-significant decisions in American antitrust law exhibited considerable hostility towards dominant firms. This is because historically antitrust laws in America were in the main viewed as instruments designed to curb the

⁶⁶ Walter Adams and James W Brock *The Bigness Complex* (Knopf Doubleday Publishing Group 1986) at 198.

⁶⁷ William E. Kovacic 'Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration' (1988-1989) 74 *Iowa Law Review* 1105-50 at 1106-08.

⁶⁸ *Id* at 1105.

⁶⁹ Bork *supra* n 5 at 5.

market power of larger corporations and to protect small businesses.⁷⁰ In other words, American antitrust laws were seen as a device to protect competitors rather than competition. This is confirmed in several antitrust decisions of historic significance.

In one of the earliest decisions, *United States v Trans-Missouri Freight Association*,⁷¹ in applying section 2 of the Sherman Act, Justice Peckham expressed concern about the plight of 'small dealers and other worthy men' whom he feared could face extinction from the market as a result of fierce competition from their much bigger rivals, against whom he felt they deserved protection.⁷² He found that it would be unfortunate for the American economy to lose the services of a large number of small and independent dealers who had spent their lives developing their own businesses, becoming experts in their trade, and supported themselves and their families from the small profits realised from their business.⁷³ He believed that bigger corporations were against American national interests because they increased the likelihood that some essential commodities could fall within the exclusive control of a single corporation.⁷⁴ These remarks by Justice Peckham in *Trans-Missouri Freight Association* reveal a sharp focus on protecting competitors rather than competition.

⁷⁰ Robert H. Lande 'Wealth Transfers as the Original and Primary concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 *Hastings Law Journal* 65-151 at 65. See also Areeda and Hovenkamp supra n 60 at 100b and Douglas H Ginsberg 'Judge Bork, Consumer Welfare and Antitrust Law' (2008) 31 *Harvard Journal of Law and Public Policy* 449-55 at 453.

⁷¹ 166 US 290 (1897).

⁷² Id at 323. See also Thomas W. Hazlett 'The Legislative History of the Sherman Act Re-Examined' (1992) Vol XXX *Economic Inquiry* 263-76 at 264.

⁷³ *United States v Trans-Missouri Freight Association* supra n 71 at 324.

⁷⁴ Id.

A short while later, in *Northern Securities Co v United States*,⁷⁵ Justice Holmes crucially observed that ‘maintaining competition was not the expressed object of the Sherman Act as the Act did not even mention the word “competition”’.⁷⁶ His observation took full cognisance of the exact wording of section 2 of the Sherman Act.⁷⁷ According to Troesken, who conducted an extensive survey of the historical letters received by John Sherman from groups lobbying for antitrust legislation to stem the rising tide of trusts, it is clear that the Sherman Act was born out of concern to protect the interest of small competitors.⁷⁸

The tendency to apply section 2 of the Sherman Act to protect smaller competitors and to encourage an industrial structure comprising several small and independent dealers, probably reached its climax in *Standard Oil Co of New Jersey v United States*.⁷⁹ Here, the American Supreme Court broke a large corporation into more than 30 separate units, consistent with the notion that the Sherman Act was founded on the philosophy of hostility towards big corporations.⁸⁰ The following year, in *United States v Terminal Railroad Association of St. Louis*,⁸¹ a ruling considered to have continuing significance, the Court ordered various major railroad companies to desist from using their control of terminal facilities at the main crossing of the Mississippi River in a manner that

⁷⁵ 193 US 197 (1904).

⁷⁶ *Id* at 403. See also Thorelli *supra* n 40 at 473.

⁷⁷ Section 2 of the Sherman Act specifically provides that:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...”.

⁷⁸ Troesken *supra* n 60 at 275.

⁷⁹ *Supra* n 9.

⁸⁰ *Id* at 77-82. William E Kovacic and Carl Shapiro ‘Antitrust Policy: A Century of Economic and Legal Thinking’ (2000) 14 *Journal of Economic Perspectives* 43-60 at 45.

⁸¹ 224 US 383 (1912).

discriminated against smaller rivals.⁸² Failure to comply with this directive, the Court warned, would leave it with no choice but to dissolve the Terminal Railroad Association.⁸³

In *United States v Aluminium Company of America*⁸⁴ ('Alcoa') Justice Hand observed that "throughout the history of the Sherman Act the purpose of the law was to discourage monopoly at all costs and to encourage the existence and preservation of several small independent operators".⁸⁵ He found that "possession of unchallenged economic power invariably killed initiative and discouraged thrift and for that reason the Sherman Act outlawed monopoly in all its manifestations in favour of an industrial structure in which small enterprises could effectively operate".⁸⁶ According to Waller, Justice Hand used 'ringing words' that resonated well among those who believed that possession of monopoly power is the source of all evils the Sherman Act was intended to cure.⁸⁷

The principle that emerged from *Alcoa*⁸⁸ – that high levels of market domination are a violation of section 2 – became central to the Supreme Court's understanding of the Sherman Act.⁸⁹ For several decades afterwards, the Supreme Court of the United

⁸² Id at 411-12. Kovacic and Shapiro supra n 80 at 46.

⁸³ *United States v Terminal Railroad Association of St Louis* supra n 81 at 409 and 412-13.

⁸⁴ Supra n 23.

⁸⁵ Id at 429.

⁸⁶ Id at 427. Bork supra n 5 at 51-2 and Spencer Weber Waller 'The Story of Alcoa: Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases' in Eleanor M Fox and Daniel A Crane (eds) *Antitrust Stories* (Foundation Press 2007) at 132-3.

⁸⁷ Waller supra n 86 at 132.

⁸⁸ Supra n 84.

⁸⁹ Harold Demsetz 'How Many Cheers for Antitrust's 100 Years?' (1992) Vol XXX *Economic Inquiry* 207-17 at 210.

States applied antitrust laws, in particular section 2 of the Sherman Act, to protect the viability of small and middle-sized businesses.⁹⁰ As Waller observed, Justice Hand's interpretation of section 2 of the Sherman Act "was rapidly endorsed by the Supreme Court and set the ground rules for section 2 litigation for a generation".⁹¹

In *United States v Columbia Steel Co*⁹² the Court noted that "the philosophy of the Sherman Act was that monopoly should not be allowed to exist because the Act was founded on a theory of hostility to the concentration of economic power in the private hands of a few".⁹³ In this case a bigger firm size was seen as a curse which had the potential to turn into both an industrial menace (because of the firm's ability to create inequalities in relation to its competitors) and a social menace (because of the firm's ability to control prices).⁹⁴

In *Brown Shoe Co Inc v United States*⁹⁵ Chief Justice Warren stated that "we cannot fail to recognise Congress's desire to promote competition through the protection of viable, small, and locally owned businesses".⁹⁶ Although *Brown Shoe* was a merger decision and was not decided under section 2 of the Sherman Act, it nevertheless raised a principle of fundamental importance under section 2. Indeed *Brown Shoe*, although decided more than 60 years later, confirmed and was in line with the principle established in an earlier monopolization case decided under section 2, *Trans-Missouri*

⁹⁰ Fox supra n 24.

⁹¹ Waller supra n 86 at 132.

⁹² 334 US 495 (1948).

⁹³ Id at 536. Eleanor M. Fox 'The Sherman Antitrust Act and the World – Let Freedom Ring' (1900-1991) 59 *Antitrust Law Journal* 109-18 at 116-17.

⁹⁴ *United States v Columbia Steel* supra n 92 at 535-6.

⁹⁵ *Brown Shoe Co v United States* 370 US 294 (1962).

⁹⁶ Id at 344.

Freight Association,⁹⁷ where Justice Peckham expressed concern about the need “to protect small dealers and other worthy men” whom he feared could face extinction from the market as a result of fierce competition waged against them by their much bigger rivals.⁹⁸

In *United States v Von's Grocery Co*⁹⁹ the Supreme Court observed, per Justice Black, that “from the birth of the United States there has been an abiding and widespread fear of the evils which flow from monopoly and that it was in response to this fear that the US Congress passed the Sherman Act”.¹⁰⁰ Justice Black further observed that when enacting the antitrust laws: “Congress sought to arrest a trend toward concentration by preserving competition among small independent businesses”.¹⁰¹ He felt that courts had a duty always to be ready to carry out this particular intent of Congress.¹⁰² In his dissent in *Von's Grocery*, Justice Stewart could not have been more apt when he observed that in Supreme Court antitrust cases where market domination concerns were an issue the sole consistency he could find was that “the government always won”.¹⁰³ This demonstrates the extent to which bias against dominant firms was entrenched in Supreme Court antitrust decisions, as the majority of the decisions favored the state.

⁹⁷ Supra n 71.

⁹⁸ Hazlett supra n 72.

⁹⁹ 384 US 270 (1966).

¹⁰⁰ Id at 274.

¹⁰¹ Id at 277.

¹⁰² Id.

¹⁰³ Id at 301. Kovacic and Shapiro supra n 80 at 51.

Perhaps the most hostile views by a judge against large corporations were those held and expressed by Louis D. Brandeis, who was associate justice of the Supreme Court of the United States between 1916 and 1939. In his view “a big firm size is indicative of past transgressions by the firm against the economy, the political process, and consumers”.¹⁰⁴ He argued that “no monopoly could be attained by efficiency alone as no business could be superior to its competitors in the process of manufacture and distribution in a manner that enabled it to control the market”.¹⁰⁵

As McGraw has observed, early in his career Brandeis decided that business could become big only through illegitimate means and by his frequent references to the ‘curse of bigness’ he meant that a big firm size was ‘a sign of prior sinning’.¹⁰⁶ He was greatly concerned about small competitors and the way they were treated in the marketplace and saw the concentration of power in the hands of a few individuals as unfairly choking off opportunity for them.¹⁰⁷ From the 1930s the mistrust of big business, influenced by the Brandeis philosophy, grew in relevance to an extent that it became the dominant viewpoint and would remain at the centre of American antitrust policy until well into the 1960s.¹⁰⁸

¹⁰⁴ Darren Bush ‘Too Big to Bail: The Role of Antitrust in Distressed Industries’ (2010) 77 *Antitrust Law Journal* 277-312 at 281.

¹⁰⁵ Louis Dembitz Brandeis *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* Osmond K. Fraenkel (ed) (Viking Press 1934) at 114-15. Cited also in *United States v Columbia Steel* supra n 92 at 540.

¹⁰⁶ Thomas K. McGraw *Prophets of Regulation: Charles Francis Adam, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Harvard University Press 1986) at 108.

¹⁰⁷ Mary Murphy Schroeder ‘The Brandeis Legacy’ (2000) 37 *San Diego Law Review* 711-23 at 711-15.

¹⁰⁸ David P. Ramsey ‘The Role of the Supreme Court in Antitrust Enforcement’ (2010) LLD Dissertation, Graduate Faculty of Baylor University at 108; Bork supra n 5 at 17; and Hazlett supra n 72.

2.2.4 Current Law on Section 2 of the Sherman Act and the Position of Dominant Firms in American Antitrust Law

While American antitrust policy of the 20th century was defined by the philosophy of hostility towards dominant firms, modern antitrust policy has appeared to be more welcoming towards dominant undertakings.¹⁰⁹ The historic emphasis on using antitrust law as a tool to structure markets and protect small businesses has been replaced by a spirited emphasis on consumer welfare as a policy standard and the ultimate goal of antitrust law.¹¹⁰ Consequently, consumer welfare is today generally accepted as the goal of US antitrust law.¹¹¹

Even the US Supreme Court, which has handed down many historic judgments in which the philosophy of hostility towards dominant undertakings and the protection of small businesses have been placed above any other antitrust goal, had by the end of the 1970s declared its support for the view that: “Congress designed the Sherman Act primarily as a consumer welfare prescript”.¹¹² That the purpose of American antitrust laws is to advance consumer welfare by protecting competition and not competitors, it is submitted, “has now become so central to American antitrust jurisprudence that it is sometimes taken for granted”.¹¹³

¹⁰⁹ George B. Shepherd, Joanna M. Shepherd and William G. Shepherd ‘Antitrust and Market Dominance’ (2001) *Winter Antitrust Bulletin* 835-78 at 835.

¹¹⁰ Stephen Martin ‘The Goals of Antitrust and Competition Policy’ (2007) Purdue University, Ciber Working Papers, Report Number 2007-003 at 1.

¹¹¹ See Barak Orbach ‘The Antitrust Consumer Welfare Paradox’ (2011) 7 *Journal of Competition Law & Economics* 133-64 at 133-4 and Orbach *supra* n 36 at 2254.

¹¹² *Reiter v Sonotone Corp* 442 US 330 343 (1979).

¹¹³ William J. Kolasky ‘What is Competition? A Comparison of US and European Perspectives’ (2004) 49 *The Antitrust Bulletin* 29-53 at 30.

The greater value attached to consumer welfare in modern American antitrust policy has created a strong perception that dominant firms have finally been ‘left alone’ and that their freedom to compete will not be tampered with, unless there is clear evidence that their conduct has caused or is likely to result in significant consumer harm.¹¹⁴ As former Chairman of the Federal Trade Commission, William Kovacic, notes, “developments in U.S. antitrust doctrine and enforcement policy since the 1970s have narrowed significantly the range of dominant firm conduct that is subject to condemnation, meaning dominant firms today have relatively broad freedom to choose pricing, product development, and marketing strategies as they please”.¹¹⁵

The flexibility and tolerance towards dominance and market power in modern American antitrust law has led to court decisions that, in recognition of the right of dominant firms to compete aggressively, make it clear that industrial success leading to dominance is not a violation of antitrust laws.¹¹⁶ In *Verizon Communications Inc v Law Offices of Curtis V. Trinko LLP*¹¹⁷ (*Trinko*) the US Supreme Court found that “mere possession of monopoly power and the consequential charging of monopoly prices is not unlawful but an important part of the free market system”.¹¹⁸ The Court further held that “the opportunity to charge monopoly prices, at least for a short period, is what attracts business acumen and risk-taking in the first place, and that in order to safeguard the

¹¹⁴ See George, Joanna and William Shepherd supra n 109 at 836 and Eleanor M. Fox ‘Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act’ (2005) 73 *Antitrust Law Journal* 153-69 at 155.

¹¹⁵ William E. Kovacic and Marc Winerman ‘Competition Policy and the Application of Section 5 of the Federal Trade Commission Act’ (2009) 76 *Antitrust Law Journal* 929-50 at 929. See also Kovacic supra n 3 at 2-3.

¹¹⁶ Gordon B. Spivack ‘Monopolization Under the Sherman Act, Section 2’ (1981) 50 *Antitrust Law Journal* 285-318 at 285-6.

¹¹⁷ 540 US 398 (2004).

¹¹⁸ *Id* at 407.

incentive to innovate the possession of monopoly power will not be found unlawful, unless it is accompanied by anticompetitive conduct”.¹¹⁹

An interesting question is whether this new romance between the Supreme Court and dominant firms, demonstrated by the decision in *Trinko*,¹²⁰ is broadly shared or endorsed by American antitrust enforcement agencies and commentators? Put differently, has the historic hostility towards dominant firms completely or significantly disappeared in modern American antitrust discourse? The answer to this question depends largely on whom you ask. In my view, the philosophy of hostility towards monopoly and market dominance that has long been considered deeply ingrained into the American social fabric has not completely or even significantly disappeared.

In his review of the *Trinko*¹²¹ decision, a highly critical Waller stated “this is the first time that I am aware that any court, let alone the Supreme Court, has chosen to characterise the possession and exercise of monopoly power as an important element of the free-market system”.¹²² Expressing his disapproval of the reasoning in *Trinko*, Waller further pointed out “if the point of antitrust law is to encourage the acquisition and retention of long term monopoly power then we might as well abandon the entire enterprise of regulating competition by law”.¹²³ It is one thing, he continued, to say that we tolerate the existence of monopoly power (if not illegally acquired) but it is quite another to

¹¹⁹ *Id.*

¹²⁰ *Supra* n 117.

¹²¹ *Id.*

¹²² Spencer Weber Waller ‘Microsoft and Trinko: A Tale of Two Courts’ (2006) 901 *Utah Law Review* 741-59 at 748-9.

¹²³ *Id.* at 749.

“worship at the altar of monopoly power”.¹²⁴ From the debates that preceded the passage of the Sherman Act until the decision in *Trinko*, he concluded, “one can search long and hard before finding anything close to this love affair with monopoly either in Congress or in the majority of concurring or dissenting opinions of the Supreme Court in section 2 cases”.¹²⁵

Waller is not a lone voice in modern American antitrust law, counselling against what he sees as the misguided love for monopoly by those entrusted with enforcing antitrust laws, classically demonstrated in *Trinko*. Indeed, in modern American antitrust law, where consumer welfare is regarded the main goal of the law, the Brandeis-inspired dislike of monopoly power and market dominance has continued to have some relevance.¹²⁶ There are those who still hold Brandeis in great esteem, as they regard him as an energetic proponent of fair trade who has contributed immensely to the antitrust movement.¹²⁷ Thus, to find evidence of hostility towards dominant firms in American antitrust law, one does not only have to look at the anti-monopoly concerns that dominated American public life and antitrust enforcement in the late 19th and early 20th centuries, as recourse to modern American antitrust law may also yield interesting results.¹²⁸

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Adams and Brock *supra* n 66 at 142-3.

¹²⁷ Albert A Foer ‘Small Business and Antitrust’ (2001) 16 *Small Business Economics* 3-20 at 3.

¹²⁸ James May ‘The Story of Standard Oil Company v United States’ in Eleanor M. Fox and Daniel A. Crane (eds) *Antitrust Stories* (Foundation Press 2007) at 7.

The US Department of Justice's decision in 2009¹²⁹ to withdraw its 2008 *Report on Single-Firm Conduct Under Section 2 of the Sherman Act*,¹³⁰ which proposed a more cautious antitrust enforcement approach in dealing with unilateral conduct by dominant firms – because overzealous enforcement was seen as undermining legitimate competition in the market,¹³¹ signalled an intent to return to the old policy of aggressive and vigorous enforcement action against dominant firms.¹³² The *Report on Single-Firm Conduct*, the Justice Department said in a statement announcing its withdrawal, raised too many hurdles to government antitrust enforcement action against dominant firms.¹³³ The withdrawal of the Report was a clear statement that the Justice Department's Antitrust Division would no longer allow dominant firms the free pass they had enjoyed as a result of the passive monitoring of markets associated with the *Report on Single-Firm Conduct*.¹³⁴

In modern American antitrust law there are those who still hold the view that market dominance is generally incompatible with the ideal of free and effective competition and have advocated for the revival of the old antitrust policy of discouraging the domination

¹²⁹ US Department of Justice 'Justice Department Withdraws Report on Antitrust Monopoly Law' accessed at http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm (date of last use: 6 July 2016).

¹³⁰ US Department of Justice 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act' (2008) accessed at <http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act> (date of last use: 6 July 2016).

¹³¹ *Id* at vii and 14.

¹³² *Supra* n 129. See also Herbert Hovenkamp 'The Obama Administration and Section 2 of the Sherman Act' 90 *Boston University Law Review* 1611-65 at 1613. For more information on the Single-Firm Report and circumstances surrounding its withdrawal see discussion in Chapter 3 at 139-43.

¹³³ *Supra* n 129. Christine A. Varney 'Vigorous Antitrust Enforcement in this Challenging Era' Remarks as Prepared for the United States Chamber of Commerce 12 May 2009 at 6-7 accessed at <http://www.justice.gov/atr/public/speeches/245777.pdf> (date of last use: 6 July 2016).

¹³⁴ Varney *supra* n 133 at 14 and Barbara S Steiner et al 'Assistant Attorney General Varney Withdraws DOJ Single-Firm Conduct Report' 13 May 2009; Jenner & Block Client Advisory at 2-3 accessed at http://jenner.com/system/assets/publications/1901/original/Assistant_Attorney_General_Varney_Withdraws_DOJ_Single-Firm_Conduct_Report_05.13.09.pdf?1319753620 (date of last use: 6 July 2016).

of markets by a few corporations.¹³⁵ As Carstensen argues, “antitrust intervention and remedies aimed at the elimination of monopoly should again be the primary goal in monopoly cases, the fundamental insight being that the elimination of monopoly would obviate the need for detailed oversight and analysis of complex monopoly conduct”.¹³⁶ If section 2 of the Sherman Act is to retain its commitment to the view articulated in *Standard Oil* – that possession of monopoly is unlawful – he argues further, “then antitrust authorities should impose remedies aimed at the termination of the monopoly itself rather than mere regulation of its conduct”.¹³⁷

In a recent article, Bogus, inspired by Brandeis’ *Curse of Bigness* theory,¹³⁸ calls for a radical change in antitrust policy to tackle “behemoth corporations, consolidated industries, and enormous wealth flowing into the hands of a few”.¹³⁹ He argues that antitrust law should be used to break-up large financial institutions, whose failure may cause significant economic turmoil, as witnessed in the 2008 global financial crisis.¹⁴⁰ Failed Democratic contender for party nomination to contest the American Presidency in November 2016, Bernie Sanders, gained popularity through his proposals to break-up the country’s largest financial institutions, because they have acquired too much economic and political power, which he felt risked endangering the American economy

¹³⁵ George, Joanna and William Shepherd supra n 109 at 837.

¹³⁶ Peter C. Carstensen ‘Remedies for Monopolization from Standard Oil to Microsoft and Intel: the Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of its Use’ (2012) 85 *Southern California Law Review* 815-42 at 817-18.

¹³⁷ Id at 841.

¹³⁸ Supra nn 105 and 106.

¹³⁹ Carl T. Bogus ‘The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust’ (2015) 49 *University of Michigan Journal of Law Reform* 1-120 at 2-3.

¹⁴⁰ Id at 115.

and political process.¹⁴¹ In her campaign, Hillary Clinton also promised that if elected President she will “beef up the antitrust enforcement arms of the Department of Justice and the Federal Trade Commission,” and hire “aggressive regulators”.¹⁴²

While monopolization cases by public enforcement agencies have in recent times become fewer than in the past,¹⁴³ there have been some recent antitrust decisions that made findings that, arguably, are consistent with the historical philosophy of hostility towards dominant undertakings. In *LePage's Inc v Minnesota Mining and Manufacturing Company (3M)*¹⁴⁴ the United States Court of Appeals, Third Circuit, stated that the principles enunciated in *Alcoa*¹⁴⁵ “remain fully applicable today.”¹⁴⁶ To remind ourselves, one of the important principles to emerge from *Alcoa* was that “the Sherman Act outlawed monopoly in all its manifestations, meaning that once monopoly power was proven it was difficult for any defendant to avoid condemnation under section 2”.¹⁴⁷ As Dorsey and Jacobson recently observed, ‘many of the traditional theories and assumptions associated with the philosophy of hostility towards dominant

¹⁴¹ Bernie Sanders ‘Reforming Wall Street’ accessed at <https://berniesanders.com/issues/reforming-wall-street/> (date of last use: 6 July 2016). In May 2015, he had previously introduced a Bill in Senate making similar proposals, see S.1206 – ‘Too Big To Fail, Too Big To Exist Act’ — 114th Congress (2015-2016). See also Donna Borak ‘Bernie Sanders Outlines Plan to Pare Down Big Banks’ (6 April 2016) *The Wall Street Journal* accessed at <http://www.wsj.com/articles/bernie-sanders-outlines-plan-to-pare-down-big-banks-1459981915> (date of last use: 6 July 2016).

¹⁴² James J. O’Connell ‘Seven Years On: Antitrust Enforcement during the Obama Administration’ (2015-2016) 30 *Antitrust* 5-13 at 5. Stephen Moore ‘Google Alert: the Government is After you’ (24 April 2016) *The Washington Times* accessed at <http://www.washingtontimes.com/news/2016/apr/24/stephen-moore-google-under-government-siege/#.Vx536NwDaV4> (date of last use: 6 July 2016).

¹⁴³ This is largely because of complainants’ preference of private enforcement, where a plaintiff, if successful, may recover threefold the damages suffered and counsel fees. See *LePage's Inc v Minnesota Mining and Manufacturing Company (3M)* 324 F 3d 141 (3d Cir 2003) at 146 and Carstensen supra n 136 at 817.

¹⁴⁴ Supra n 143.

¹⁴⁵ Supra n 23.

¹⁴⁶ *LePage's Inc v Minnesota Mining and Manufacturing Company* supra n 143 at 148-9.

¹⁴⁷ Supra n 84-6; Elyse Dorsey and Jonathan M Jacobson ‘Exclusionary Conduct in Antitrust’ (2015) 89 *St John's Law Review* 101-42 at 105.

undertakings, made popular in historic cases such as *Alcoa*, have survived the antitrust revolution that began in the 1970s and reached its climax in *Trinko*.¹⁴⁸ In *West Penn Allegheny Health System v University of Pittsburgh Medical Centre (UPMC) and Highmark Inc*¹⁴⁹ the United States Court of Appeals, Third Circuit, found that poaching by a dominant firm of a rival's employees and offering them better salaries may amount to an unlawful attempt to monopolize the market under section 2 of the Sherman Act.¹⁵⁰

In 2014 and 2015 the Federal Trade Commission, in *McWane Inc v Star Pipe Products Ltd*,¹⁵¹ and the Court of Appeals for the Eleventh Circuit, in *McWane Inc v Federal Trade Commission*,¹⁵² made decisions relying on outdated theories for dealing with exclusionary conduct by dominant firms, imputing antitrust liability to dominant firms in the absence of evidence of consumer harm.¹⁵³ In his dissenting opinion in the Federal Trade Commission's *McWane Inc* decision, Commissioner Wright, holding that foreclosure in modern exclusionary practice analysis is not in itself the end but rather a starting point for understanding whether the exclusionary practice complained of is capable of harming competition, expressed dismay that what was strikingly absent from the Commission's analysis was evidence establishing the link between foreclosure and harm to competition, in the form of increased prices and reduced output.¹⁵⁴ He observed that by inferring anticompetitive harm from the exclusion of rivals without direct evidence of antitrust injury in the form of increased prices and reduced output, the

¹⁴⁸ Dorsey and Jacobson supra n 147 at 121.

¹⁴⁹ 627 F 3d 85 (3d Cir 2010).

¹⁵⁰ Id at 41-3.

¹⁵¹ Docket No 9351 (FTC 6 February 2014).

¹⁵² Case No 14-11363 (11th Cir 15 April 2015).

¹⁵³ Dorsey and Jacobson supra n 147 at 121, footnote 134.

¹⁵⁴ *McWane Inc et al* Docket No 9351, Dissenting Statement of Commissioner Joshua D Wright at 33-5 and 46.

Commission's majority decision in effect amounts to the application of section 2 of the Sherman Act to protect competitors and not competition.¹⁵⁵

There are also a number of proposed and ongoing antitrust cases against dominant firms, particularly in the high technology sector, that have been construed by some as reinforcing the old-school anti-big business philosophy. To paraphrase a commentator, the recent 'string of trumped-up antitrust charges, harassment, lawsuits, and fines against major technology companies, such as Google, Apple, Facebook and Microsoft, is part of the 19th century antitrust *mumbo jumbo*, which enables the government to raid successful firms for their huge profits, great products, and market share deemed to be too much'.¹⁵⁶

2.2.5 Summary

There are a number of crucial observations that can be made from the assessment of the historical development of American antitrust law. But the most important one, for purposes of this study, is that American antitrust law, and the Sherman Act in particular, were born out of the philosophy of hostility towards monopoly and dominant undertakings. This is evident when one looks at the dominant role that anti-monopoly concerns and small business interests have played in the lobbying and debates that preceded the enactment of the Sherman Act. It is also clear from the actual text and

¹⁵⁵ Id at 37.

¹⁵⁶ Stephen Moore supra n 142.

provisions of section 2 of the Sherman Act which, when taken literally, makes market domination illegal.

The philosophy of hostility towards dominant undertakings has also greatly influenced the interpretation of section 2 of the Sherman Act by American courts, and the Supreme Court in particular, in the majority of early monopolization cases. This philosophy has also underpinned the decisions of American courts in other early and historically significant cases concerning the application and interpretation of other antitrust legislation complementing the Sherman Act.¹⁵⁷

However, in modern American antitrust law the expressed philosophy and policy standard driving antitrust enforcement is consumer welfare. This means the philosophy of hostility towards dominant firms is no longer regarded as the official or expressed goal of American antitrust law. Some recent decisions, like *Trinko*,¹⁵⁸ have explicitly abandoned the traditional policy of hostility towards market power and rolled out the red carpet for dominant firms in markets in unprecedented fashion in American antitrust history. But the rise of consumer welfare as a guiding principle in modern American antitrust enforcement has not meant that anti market dominance concerns have completely or even significantly disappeared. The reality is that the actions of antitrust enforcement agencies, some recent court decisions, and the remarks by some influential commentators show that a deep mistrust, and perhaps resentment, of dominant undertakings is alive and well in modern American antitrust law.

¹⁵⁷ The Clayton Act, 1914, 15 USCA § 12 is a perfect example of such legislation and cases such as *Brown Shoe* supra n 95 and *Von's Grocery* supra n 99 are good examples.

¹⁵⁸ Supra n 117.

2.3 Historical Development of European Competition Law with Special Focus on Article 102 of the Treaty of the European Union

While American antitrust lawyers and economists have made a tremendous effort to investigate the historical origins of their antitrust law, the origins of European competition law have been relatively under-investigated.¹⁵⁹ Existing reports on the origins of European competition law have produced differing accounts of how European competition law developed. There are three major versions or viewpoints about the true origin of European competition law.

The first viewpoint is that initial European competition rules originated in Germany.¹⁶⁰ In this regard, an understanding of German competition law background is helpful in shedding some light on the perspective from which Germans contributed to the development of European competition law. The development of German competition law can be divided into two periods: pre- and post- 1945.¹⁶¹ Germany is believed to have conceived the idea of competition law as early as the end of the eighteenth century, when a group of intellectuals met in Vienna to explore the possibility of using the law to protect the process of competition.¹⁶² When the first anti-cartel law was

¹⁵⁹ Giocoli supra n 1 at 748.

¹⁶⁰ Ian Rose and Cynthia Ngwe 'The Ordoliberal tradition in the European Union, its influence on Article 82 EC and the IBA's Comments on the Article 82 EC' (2007) 3 *Competition Law International* 8-12 at 8 and David J Gerber 'Law and the Abuse of Economic Power in Europe' (1987) 62 *Tulane Law Review* 57-108 at 85.

¹⁶¹ Wilfried Feldenkirchen 'Competition Policy in Germany' (1992) 21 *Business and Economic History* 257-69 at 257 and 261.

¹⁶² Massimiliano Vatiere 'The Ordoliberal Notion of Market Power: An Institutional Reassessment' (2010) 6 *European Competition Journal* 689-710 at 689; Gerber supra n 160 at 107; and David J Gerber 'Europe and the Globalization of Antitrust Law' (1999) 14 *Connecticut Journal of International Law* 15-26 at 26.

enacted in Germany in 1923,¹⁶³ it had traces of some of the ideas canvassed in Vienna.¹⁶⁴ In the pre-1945 era the 1923 anti-cartel law is regarded as the most significant competition statute in Germany.¹⁶⁵ The 1923 anti-cartel law shows that Germany had an existing competition law system long before any other country in Europe.

The German anti-cartel law of 1923 is believed to have influenced the competition rules included in the 1957 Treaty of Rome, which is credited with establishing the first truly supranational competition policy for Europe.¹⁶⁶ But there are those who challenge the extent of German influence on European competition law. They contend that the drafting of European competition rules was the subject of fierce negotiation between the various delegates involved in the establishment of the European Union, and that the final competition rules were a compromise between the various proposals made by the delegates.¹⁶⁷

In the post-1945 era German competition law was significantly shaped by the influences of the occupying forces, led by America, at the end of the Second World War.¹⁶⁸ This leads us to the second viewpoint on the origin of European competition law, which is that European competition law has some American roots. It has been suggested that

¹⁶³ Feldenkirchen *supra* n 161 at 258-9.

¹⁶⁴ Vatiéro *supra* n 162.

¹⁶⁵ Feldenkirchen *supra* n 161 at 257-61.

¹⁶⁶ Vatiéro *supra* n 162 at 691. Tuna Baskoy 'The Political Economy of European Union Competition Policy: A Case Study of the Telecommunications Industry' (2006). Thesis submitted to the Faculty of Graduate Studies in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy, York University, Toronto at IV and 3.

¹⁶⁷ Akman *supra* n 25 at 269, 283 and 286. Laurent Warlouzet 'The Rise of European Competition Policy 1950 – 1991: A Cross-Disciplinary Survey of Contested Policy' (2010) Robert Schuman Centre for Advanced Studies, European University Institute, Working Paper RSCAS 2010/80 at 8-9.

¹⁶⁸ Feldenkirchen *supra* n 161 at 261.

between 1945 and 1952, following the American-led Allied occupation of Germany after the Second World War, Germans adopted US antitrust rules contained in the Sherman Act and subsequently transmitted these rules to Europe.¹⁶⁹ However, as Giocoli argues, the American antitrust tradition has had less influence over the foundations of European competition policy than is commonly claimed.¹⁷⁰ European competition law is thus considered by some to have developed separately from the US economic policy contained in the Sherman Act.¹⁷¹

The third viewpoint is that the origins of European competition law dates back to a series of measures adopted by France, Germany, Italy, Belgium, Luxembourg, and the Netherlands under the 1951 Treaty of Paris, which established the European Coal and Steel Community.¹⁷² The European Coal and Steel Community is credited by some with creating the first competition rules in Europe.¹⁷³

An important breakthrough in the development of European competition rules, it has been argued, was achieved by the European Coal and Steel Community when the Foreign Ministers of the member states held a meeting in Brussels in 1956.¹⁷⁴ At this meeting, former Belgian Foreign Minister, Paul-Henri Spaak, introduced a report,

¹⁶⁹ Hannah L. Buxbaum 'German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement' (2005) 23 *Berkeley Journal of International Law* 474-95 at 476-83; Laura Parret 'Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy' (2010) 6 *European Competition Law Journal* 339-76 at 343; Giocoli supra n 1 at 748; and Vatiero supra n 162 at 690.

¹⁷⁰ Giocoli supra n 1 at 747 and 749.

¹⁷¹ Rose and Ngwe supra n 160 and Gerber supra n 160.

¹⁷² Warlouzet supra n 167 at 7 and Akman supra n 25 at 277.

¹⁷³ Warlouzet supra n 172.

¹⁷⁴ Akman supra n 172.

commonly known today as the *Spaak Report*, which is considered by some to have laid the foundation for European competition law.¹⁷⁵ As Akman has observed, “the *Spaak Report* suggested measures to preclude the creation of monopolies and the domination of markets by single enterprises”.¹⁷⁶ The policy of the *Spaak Report*, Akman observed further, “was actually the prohibition of monopoly and market domination per se”.¹⁷⁷

Therefore, the *Spaak Report* proposed the prohibition of monopoly and market domination in terms that were substantially similar to those of section 2 of the Sherman Act in American antitrust law. Like the Americans, Europeans historically had considerable experience with monopolies in a variety of sectors such as energy, transportation, broadcasting, telecommunications, and medicine.¹⁷⁸ In particular, post-war European economies were characterised by monopolies.¹⁷⁹ The discussions relating to the establishment of the European Common Market and accompanying preparatory documents alluded to this problem of monopoly.¹⁸⁰ In this regard, European competition rules that emanated from the European Coal and Steel Community are seen as having responded to Europe’s socio-economic conditions of the time.¹⁸¹

¹⁷⁵ Id.

¹⁷⁶ Id at 281.

¹⁷⁷ Id.

¹⁷⁸ Donald I. Baker ‘An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists’ (2009) 5 *European Competition Journal* 145-200 at 167.

¹⁷⁹ Organisation for Economic Co-operation and Development (OECD) ‘Competition Law and Policy in the European Union’ (2005) at 9 accessed at <http://www.oecd.org/eu/35908641.pdf> (date of last use: 6 July 2016)

¹⁸⁰ Id at 10.

¹⁸¹ Id at 8.

The European Coal and Steel Community is also regarded by many to have substantially influenced the competition provisions of the Treaty of Rome.¹⁸² Some concepts and institutions which appeared first in the European Coal and Steel Community are deemed to have served as a model for the European competition system contained in the Treaty of Rome.¹⁸³ This has prompted some to suggest that the true history of European competition policy starts with the history of European integration.¹⁸⁴

On closer inspection, the three viewpoints on the origin of European competition law may not be irreconcilable. Firstly, there is no doubt that by at least 1923 Germany was the first country in Europe to have had a system of competition law in place. America's leading role in the Allied occupation of Germany after the Second World War, and its attempt to control the German economy and install competition rules is a matter of undisputed historical record.¹⁸⁵ Before the establishment of the European Union and European competition rules, America and Germany were regarded as two of the few, if not the only, countries in the world to have well-developed competition systems.¹⁸⁶

¹⁸² Andrew Schupanitz 'Creating Europe: The History of European Integration and the Changing Role of EU Competition Law' (2013) European Union Law Working Paper No. 11 (a joint initiative of Stanford Law School and the University of Vienna School of Law) at 5.

¹⁸³ OECD supra n 179 at 9-10.

¹⁸⁴ Baskoy supra n 166.

¹⁸⁵ Piet Jan Slot 'A View from The Mountain: 40 Years Of Development in EC Competition Law' (2004) 41 *Common Market Law Review* 443-74 at 443; Feldenkirchen supra n 161 at 261.

¹⁸⁶ Dennis C Mueller 'Lessons from the United States' Antitrust History' (1996) 14 *International Journal of Industrial Organization* 415-45 at 415; David E.M. Sappington and J. Gregory Sidak 'Competition Law For State Owned Enterprises' (2003) 71 *Antitrust Law Journal* 479-524 at 480; William E. Kovacic 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (2008) Bates White Fifth Annual Antitrust Conference, Washington DC 2 June at 1; Alberto Pera 'Changing Views of Competition, Economic Analysis and EC Antitrust Law' (2008) 4 *European Competition Journal* 127-68 at 145; and Gormsen supra n 12 at 331.

Furthermore, the contribution of Germans in the drafting of European competition rules is a general truism that cannot be gainsaid. Of the original six member states of the European Union, only Germany had an existing competition law and experience in the area.¹⁸⁷ By the time the European Union was being established and the competition rules were being put in place, it is likely that Germans brought experience from both their 1923 cartel law and the competition rules that developed during the American-led Allied occupation period of 1945 and 1952. The result was negotiated European competition rules, but with a significant Germano-American flavour.

The cornerstone of European competition law is Article 102 of the Treaty on the Functioning of the European Union.¹⁸⁸ Article 102 provides as follows:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;

¹⁸⁷ Slot supra n 185.

¹⁸⁸ John Vickers 'Abuse of Market Power' (2005) 115 *The Economic Journal* F244–F261 at F245.

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) 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.

In short, Article 102 prohibits the abuse of a dominant position by dominant firms within the European common market or any substantial part of it. Such abuse may include, but is not limited to, anticompetitive practices by dominant firms such as unfair pricing or unfair trading conditions, limiting production, markets or technical development to the prejudice of consumers; discriminatory practices, and tying, among others.

2.3.1 Influence of Ordoliberal Philosophy in Article 102

The process of the establishment of European competition rules was largely dominated by Germans, who had the most interest and experience in competition law.¹⁸⁹ Many of the key German figures involved in the establishment of the European Union, including Walter Hallstein – who became the first President of the Commission of the European Economic Community – were closely associated with the philosophy of ordoliberalism.¹⁹⁰

¹⁸⁹ Baker *supra* n 178 at 149-50.

¹⁹⁰ Rose and Ngwe *supra* n 160 and Giocoli *supra* n 1 at 767 and 776.

At the time of the drafting of the Treaty of Rome, ordoliberalism was the leading economic philosophy in Germany, which was the strongest continental European economy and the only state with a modern competition law in place.¹⁹¹ Inevitably ordoliberal perspectives influenced the way in which European competition rules were drafted.¹⁹² Indeed, there is general consensus among commentators that the policy behind Article 102 drew considerable inspiration from ordoliberal philosophy.¹⁹³

The ideas of ordoliberalism were developed by the Freiburg School¹⁹⁴ as a response to the economic, political, and social crises that followed the fall of the Weimar Republic in 1933 and the rise of Nazi Germany.¹⁹⁵ In the sphere of competition, ordoliberal philosophy emphasised the protection of the structure of the market to prevent a situation where one or a few undertakings dominated the market, something that was considered incompatible with a competitive market system.¹⁹⁶

In general, ordoliberalism was in line with other conceptions of liberalism by regarding competition as essential for a prosperous, free and equal society.¹⁹⁷ In particular, ordoliberalism shared some characteristics of classical liberalism by placing a

¹⁹¹ Gormsen supra n 12 at 331 and Pera supra n 186.

¹⁹² Pera supra n 186 at 144-6.

¹⁹³ Whish and Bailey supra n 9 at 21-2; Thomas Eilmansberger 'How to Distinguish Good from Bad Competition under Article 82 EC: in Search of Clearer and More Coherent Standards for Anti-competitive Abuses' (2005) 42 *Common Market Law Review* 129-78 at 130; Rose and Ngwe supra n 160; Akman supra n 25 at 267-303; David J Gerber *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001) at 264; Liza Lovdahl Gormsen 'Article 82 EC: Where Are We Coming From and Where Are We Going To?' (2005) 2 *The Competition Law Review* 5-25 at 5; Schweitzer supra n 8 at 13; and Rossella Incardona 'Modernisation of Article 82 EC and Refusal to Supply: Any Real Change in Sight' (2006) 2 *European Competition Law Journal* 337-69 at 341footnote 31.

¹⁹⁴ A school of economic thought founded in the 1930s at the University of Freiburg in Germany.

¹⁹⁵ Gormsen supra n 12 at 332.

¹⁹⁶ Gerber supra n 193 at 251-2; Pera supra n 186 at 145-6.

¹⁹⁷ Giocoli supra n 1 at 769 and Gerber supra n 25.

competitive market at the center of an economic system in which all market participants interacted freely and as equals.¹⁹⁸

However, ordoliberals went further than other concepts of liberalism by arguing that a prosperous, free, and equal society could only be achieved through state intervention in the market and the establishment of legal rules aimed at protecting the process of competition from distortion and abuse by dominant entities.¹⁹⁹ Therefore, ordoliberals differed from traditional liberalists in that they believed that an unregulated free market (or a market regulated by the 'invisible-hand' as advocated by Adam Smith)²⁰⁰ was not the most reliable or effective way of achieving a prosperous, free and equal society.²⁰¹ They felt that an unregulated free market was likely to breed monopolies which in turn would inevitably thwart individual economic freedom.²⁰² In fact, ordoliberals criticised Adam Smith for positing the economy as autonomous, disregarding the role of the state, and believing in the capacity of the free economy to regulate itself by means of the 'invisible-hand'.²⁰³

Ordoliberals strongly believed that competition law had to be applied vigorously to prevent the creation of monopoly power, to abolish existing monopoly positions where

¹⁹⁸ Barry J. Rodger 'Competition Policy, Liberalism and Globalisation: A European Perspective' (2000) 6 *Columbia Journal of European Law* 289-320 at 293 and Pera supra n 186.

¹⁹⁹ Giocoli supra n 1 at 769 and Rodger supra n 198.

²⁰⁰ Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan (ed)) Vol 1 5 ed (Methuen & Co Ltd 1904) at 421. Adam Smith's 'invisible-hand' theory has come to be understood to refer to market factors that influence the demand and supply of goods in a free market where there are no regulations or restrictions imposed by the government on traders.

²⁰¹ Gormsen supra n 12 at 334 and Rodger supra n 198.

²⁰² Id.

²⁰³ Werner Bonefeld 'Adam Smith and Ordoliberalism: On the Political Form of Market Liberty' (2013) 39 *Review of International Studies* 233-50 at 238.

possible, and where not possible to control the conduct of monopolists.²⁰⁴ As one of the leading proponents of ordoliberalism, Walter Eucken, proposed “avoidable monopolies were to be broken up and unavoidable ones were to be regulated”.²⁰⁵ Ordoliberals thought that concentrated industries would eventually evolve into a collective monopoly and as an alternative they preferred a market structure comprising several smaller and independent competitors as these were thought to carry the greatest promise that markets would remain competitive.²⁰⁶ Ordoliberal ideas about the use of competition law as a means to protect the structure of the market or the competitive process by discouraging the attainment, maintenance, and enhancement of market power are reflected in the majority of European competition decisions.²⁰⁷

In *Europemballage Corporation and Continental Can Company Inc v Commission*²⁰⁸ the Court observed that when regard is had to the spirit, general scheme, and wording of Article 102, and the entire system and objectives of the Treaty of the European Union, a number of measures or actions taken by a firm in a dominant position which increase its size and market power may have negative implications for competition.²⁰⁹ The Court then confirmed that an abuse of dominance may indeed be found to have occurred if an undertaking in a dominant position ‘strengthens its position in the market to such an

²⁰⁴ Philip Marsden and Liza Lovdahl Gormsen ‘Guidance on abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure’ (2010) 55 *The Antitrust Bulletin* 875-914 at 880 and Rodger supra n 198 at 294.

²⁰⁵ Walter Eucken ‘The Competitive Order and Its Implementation’ (translated by C Ahlborn and C Grave) reprinted in (2006) 2 *Competition Policy International* 219-45 at 241 and Giocoli supra n 1 at 774.

²⁰⁶ Pera supra n 186 at 146.

²⁰⁷ Anca Daniela Chirita ‘The Analysis of Market Dominance and Restrictive Practices Under German Antitrust Law in Light of EC Antitrust Law’ (2008) 4 *European Competition Journal* 415-42 at 440.

²⁰⁸ Case C-6/72.

²⁰⁹ Id at pars 21-22.

extent that the degree of dominance achieved makes it impossible for other firms to survive in the market'.²¹⁰

In *Hoffmann-La Roche & Co AG v Commission*²¹¹ the Court suggested that the 'mere presence of a dominant undertaking in a market automatically means that the degree of competition in that market has been weakened'.²¹² This idea has also been endorsed in other important cases such as *Michelin v Commission*.²¹³ In classic ordoliberal fashion, European competition decisions have shown considerable distaste for dominance and have sought to protect smaller competitors which, because of their limited financial resources, would be unable to withstand the competition waged against them by their bigger rivals.²¹⁴ As Marsden and Gormsen have observed, "when applying Article 102 the European Competition Commission and the courts rely largely on the ordoliberal assumption that the existence of dominance triggers the presumption that there is harm to competition in the market".²¹⁵

2.3.2 Current Law on Article 102

In recent years the European Competition Commission has declared its intention to modernise its approach to abuse of dominance enforcement. It has shown an interest in adopting an economic and effects-based approach to the assessment of dominant

²¹⁰ Id at par 26. This view was also endorsed in joined cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission* at par 1262.

²¹¹ Case C-85/76.

²¹² Id at par 91.

²¹³ Case 322/81 at par 70.

²¹⁴ See Case C-62/86 *AKZO Chemie BV v Commission* at par 72.

²¹⁵ Gormsen supra n 12 at 339 and Marsden and Gormsen supra n 204 at 876 and 881.

firm conduct.²¹⁶ Unlike a form-based or structural approach to competition enforcement, which is based on the assumption that dominance triggers the presumption of harm to the structure of the market and the competitive process, an economic and effects-based approach focuses more on the proven economic effects of conduct in the market and prioritises the protection of consumer welfare over the protection of competitors.²¹⁷ Indeed, it has become common in recent years for the European competition authorities to emphasise in policy documents and speeches that their enforcement of Article 102 will be informed by an effects-based approach in which consumer welfare will be the ultimate yardstick.²¹⁸

For example, the European Director General for Competition has stated that the main objective of Article 102 is consumer welfare.²¹⁹ In its 2009 *Guidance Paper on the Enforcement Priorities in Applying Article 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, the European Competition Commission also indicated that its abuse of dominance enforcement will be guided by the question, and indeed the principle, whether the impugned dominant firm conduct has had any harmful effects on consumers.²²⁰ The Commission recognised in the *Guidance Paper* that dominant firms are also entitled to compete vigorously on merit and as a general rule

²¹⁶ Akman *supra* n 25 at 267

²¹⁷ Jordi Gual et al 'An Economic Approach to Article 82' (2005) Report by the Economic Advisory Group for Competition Policy (EAGCP), at 2 accessed at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf (date of last use: 6 July 2016).

²¹⁸ Parret *supra* n 169 at 357.

²¹⁹ European Commission - DG Competition 'Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (2005) at par 4 accessed at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (date of last use: 6 July 2016).

²²⁰ European Commission 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (2009/C 45/02) at par 5 accessed at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224(01)) (date of last use: 6 July 2016).

they will tolerate competitive dominant firm conduct, even if such conduct leads to the removal of some inefficient competitors from the market.²²¹

The statements by the European Competition Commission have been taken by some as a sign that the application of European competition law is now inspired by the same principles that currently govern American antitrust enforcement.²²² This has been termed the: “Americanisation of European Competition law”, a reference to the perception that European competition law has now reached a greater level of convergence or uniformity with its American counterpart.²²³ The European Commission’s public commitment to follow an effects-based approach to the assessment of dominant firm conduct suggests that European competition law is finally shaking off its ordoliberal history and embracing a modern way of antitrust thinking in abuse of dominance enforcement.²²⁴

However, no straightforward conclusions may be drawn from the statements made by the European Competition Commission that they now follow an effects-based approach in their abuse of dominance enforcement in which consumer welfare has become the main goal of Article 102.²²⁵ While the Commission’s abuse of dominance enforcement philosophy in speeches and the *Guidance Paper* may favor effects analyses and consumer welfare, the reality is that in practice there has not been any radical policy

²²¹ Id at pars 1 and 6. European Commission ‘Report on Competition Policy’ (2010) at par 17 accessed at http://ec.europa.eu/competition/publications/annual_report/2010/part1_en.pdf (date of last use: 6 July 2016).

²²² Pera supra n 186 at 160.

²²³ Parret supra n 169 at 358.

²²⁴ Chirita supra n 207 at 441.

²²⁵ Parret supra n 223.

shift and the past is, therefore, still a big part of the present.²²⁶ Thus, despite claims that European competition law has undergone a process of modernisation, ordoliberal thoughts and market structure ideas are still part and parcel of modern European competition law.²²⁷ Even the *Guidance Paper*, it is submitted, “relies largely on ordoliberal presumptions”.²²⁸

Accordingly, European competition policy and law on abuse of market power have seen less development in recent years than is claimed.²²⁹ The main criticism of the application of Article 102 remains that effects analyses of dominant firm conduct are not common, as ordoliberal economics still hold sway.²³⁰ Even the Commission has admitted that its much vaunted new focus on consumer welfare does not mean that market structure imperatives and other common market ideals will fall by the wayside.²³¹ Indeed, according to recent European competition case law, consumer welfare or direct injury to consumers ‘is not the main objective of Article 102 as dominant firm conduct which interferes with the competitive freedom of competitors is also the target of the provision’.²³²

In the *T-Mobile Netherlands* and *GlaxoSmithKline* decisions the European Court of Justice found that competition rules laid down in the Treaty of the European Union are

²²⁶ Id at 358-9 and Marsden and Gormsen supra n 204 at 886.

²²⁷ Parret supra n 169 at 348.

²²⁸ Marsden and Gormsen supra n 204 at 888.

²²⁹ Vickers supra n 188.

²³⁰ Rose and Ngwe supra n 160 at 9.

²³¹ European Commission ‘Report on Competition Policy’ supra n 221 at 18.

²³² Cases C-209/10 *Post Danmark A/S v Konkurrencerådet* at par 20 and C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* at par 2. See also Ioannis Lianos ‘Some Reflections on the Question of the Goals of EU Competition Law’ (2013) University College London, Centre for Law, Economics and Society, Working Paper Series 3/2013 at 15.

aimed at protecting the interests of competitors and the structure of the market, among others.²³³ Recently, in *General Electric v Commission*,²³⁴ *British Airways v Commission*,²³⁵ and *Tomra Systems ASA and Others v European Commission*,²³⁶ the courts regurgitated the old and form-based *Hoffmann-La Roche*²³⁷ and *Michelin*²³⁸ dictum that “the very presence of a dominant undertaking in a market means that the degree of competition in that market is weakened”.²³⁹ The Court in *Tomra Systems* further observed that the purpose of Article 102 is to prohibit a dominant undertaking from eliminating its competitors.²⁴⁰ In *Tomra Systems* the Court generally treated consumer harm or consumer welfare in a manner that suggested that it did not regard this issue as a key requirement under Article 102, but rather saw it as merely one of many factors that might be taken into account by a court.

Indeed, European competition law enforcement appears, in practice, to be primarily focused on objectives other than consumer welfare, such as promoting European market integration which still serves as both a political and an economic objective of European competition policy.²⁴¹ As former European Competition Commissioner, Karel Van Miert, once remarked ‘European competition policy is not only concerned with efficiency but also with achieving the political and social aims of the Treaty of the European Union, such as establishing a common market and bringing Member States

²³³ Cases C-8/08 *T-Mobile Netherlands and Others v Commission of the European Communities* at pars 38-39 and C-501/06 *GlaxoSmithKline Servs v Commission of the European Communities* at par 63.

²³⁴ Case T-210/01 *General Electric v Commission* at par 549.

²³⁵ Case C-95/04P *British Airways v Commission* at par 66.

²³⁶ Case T-155/06 *Tomra Systems ASA and Others v Commission* at pars 38 and 206.

²³⁷ *Supra* n 211.

²³⁸ *Supra* n 213.

²³⁹ *Hoffmann-La Roche supra* 211 at par 91 and *Michelin supra* n 213 at par 70.

²⁴⁰ *Tomra Systems supra* n 236 at par 206.

²⁴¹ *Parret supra* n 169 at 346; *Baker supra* n 178 at 150; and *Marsden and Gormsen supra* n 204 at 886.

together'.²⁴² Because Article 102 exists as part of the Treaty of the European Union, it has been developed by the courts within the broader context of the Treaty by making continuous reference to the Treaty's objectives of integration and other economic, political and social aspirations of the European Union.²⁴³ The European Court of Justice, it has been observed, also regards Article 102 as an extension of the general objectives of the European Community.²⁴⁴

2.3.3 Summary

There are different views on the true origins of European competition law. As observed earlier, three major views emerge in this regard. The first is that initial European competition rules originated in Germany at the end of the eighteenth century when a group of intellectuals met in Vienna to explore the idea of using the law to protect the process of competition. When the first anti-cartel law was enacted in Germany in 1923 it is said to have had traces of the ideas initially canvassed in Vienna. The 1923 German anti-cartel law is in turn believed to have influenced the competition rules included in the 1957 Treaty of Rome.

The second viewpoint is that European competition law has American roots. According to this view, Germans are believed to have adopted US antitrust rules contained in the Sherman Act following an America-led Allied occupation of Germany after the Second

²⁴² Per Jebsen and Robert Stevens 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union' (1996) 64 *Antitrust Law Journal* 443-516 at 450.

²⁴³ *Id* at 458.

²⁴⁴ Thomas Eilmansberger 'Dominance-The Lost Child? How Effects Based Rules Could and Should Change Dominance Analysis' (2006) 2 *European Competition Journal* 15-29 at 18.

World War. Germans are then said to have transmitted these American antitrust rules to Europe. The third viewpoint is that the origins of European competition law date back to the 1951 Treaty of Paris, which established the European Coal and Steel Community. The Coal and Steel Community is credited by some with creating the first competition rules in Europe, which are also said to have been adopted by the Treaty of Rome.

On examination, the three viewpoints on the origin of European competition law can be reconciled. To this end, it is appropriate to first note that in some respects the history of European competition law is inextricably intertwined with German competition history. This is because Germany is widely regarded the first country in Europe to have had a system of competition law. Given their experience and knowledge in the area, Germans are also credited with playing an active role in the establishment of European competition law. When the European Union was being established and the competition rules were being put in place between 1951 and 1957, it is likely that Germans brought along experiences from both their earlier 1923 anti-cartel law and the competition rules that developed during the America led Allied occupation period of 1945-1952. The result was European competition rules as negotiated, but with a significant German and American flavour.

The German and American influences on European competition law are most clearly evident in Article 102. While German ordoliberal philosophy postulated that the presence of dominant firms in markets was incompatible with a competitive market system, section 2 of the Sherman Act in American antitrust law was founded on the

philosophy of hostility towards dominant firms. The policy of hostility towards dominant firms which has been central in a number of seminal American antitrust decisions under section 2 of the Sherman Act, has been equally integral to a number of European competition decisions decided under Article 102. The flaw of an enforcement approach to Article 102 inspired by this philosophy has been exposed in a number of studies.²⁴⁵ The main criticism against the European competition authorities and the courts is that they follow an abuse of dominance enforcement approach based on form (that dominance presupposes a decline in competition) and does not value substance (the actual economic effects of the impugned conduct on competition and consumers).²⁴⁶

This has prompted the European Competition Commission to reconsider its approach to the enforcement of Article 102. The Commission has stated that it is committed to adopting a new enforcement approach to Article 102, based primarily on the assessment of the economic effects of the impugned conduct on consumers. Despite these guarantees, many observers have found that effects analyses and consumer welfare as guiding principles are uncommon in European abuse of dominance enforcement.²⁴⁷ Instead, ordoliberal ideas have been found to dominate abuse of dominance enforcement in European competition law.

2.4 Historical Development of South African Competition Law

²⁴⁵ See discussion and sources cited under part 2.3.2 generally.

²⁴⁶ Rose and Ngwe *supra* n 160 at 9.

²⁴⁷ Parret *supra* n 169 at 348 and 358; Pera *supra* n 186 at 160; Vickers *supra* n 188; and Marsden and Gormsen *supra* n 204 at 886-8.

Under Roman law the *Lex Julia de Annona* declared certain monopolistic practices illegal as early as 50 BC – around the time of Julius Caesar’s dictatorship.²⁴⁸ From a South African perspective Roman law is of particular interest because it forms a major part of Roman-Dutch law, which is an important part of the common-law in South Africa.²⁴⁹ After the fall of the Roman Empire, Charles V promulgated an Edict for the Netherlands in October 1540 – itself a re-enactment of the old Roman law against monopolies – which became the main pillar of Roman-Dutch law on monopolies.²⁵⁰

However, there is no evidence that Roman and Roman-Dutch law against monopolies became part of South African law. As Cowen observes, “there is no record of anyone ever being prosecuted in South Africa for the crime of monopoly under Roman-Dutch law”.²⁵¹ In the main, Cowen further observes, the burden of controlling monopolistic and unfair trade practices was left to the common-law, particularly the laws of contract and delict, which proved to be ill-equipped to deal with the problems to which these practices gave rise.²⁵² And after a lengthy period of reliance on the common-law, it became clear that legislation was needed to deal with the monopoly problem in South Africa.

Competition legislation in South Africa, therefore, arose primarily as part of government’s efforts to fight the excessive concentration of economic power and the

²⁴⁸ D V Cowen ‘A Survey of the Law Relating to the Control of Monopoly in South Africa’ (1950) 8 *South African Journal of Economics* 124-47 at 126; EE Bekker *Monopolies: Review of the Role of the Competition Board* (Rand Afrikaans University 1992) at 2; and EE Bekker ‘Monopolies and the Role of the Competition Board’ 1992 *Journal of South African Law* 618-44 at 618.

²⁴⁹ Cowen supra n 248 at 125.

²⁵⁰ Id at 128-9; Bekker supra n 248 at 4; and Bekker supra n 248 at 620.

²⁵¹ Cowen supra n 248 at 132; Bekker supra n 248 at 7; and Bekker supra n 248 at 621.

²⁵² Id.

abuse of market power.²⁵³ In the period between 1907 and 1955 attempts to control the monopoly problem were made in piecemeal fashion through various pieces of legislation, which generally proved inadequate.²⁵⁴ In 1949, during a parliamentary reading of the Bill which resulted in the enactment of the Undue Restraint of Trade Act,²⁵⁵ an anti-monopoly law intended only as a temporary measure while a long term solution was being investigated, the Minister of Economic Affairs observed that “there was an undoubted tendency towards the creation of monopolies in South Africa”.²⁵⁶

The Minister further observed that there was a growing feeling that South Africa should follow the example of the United States by introducing legislation along the lines of the Sherman Act.²⁵⁷ The Board of Trade and Industries, which had been created by previous competition legislation,²⁵⁸ was instructed to investigate the possibility of the enactment in South Africa of legislation modelled on the Sherman Act.²⁵⁹ In its investigation, the Board of Trade and Industries surveyed modern thinking on monopolies around the world and recommended completely new legislation for the

²⁵³ Simon Roberts ‘The Role for Competition Policy in Economic Development: The South African Experience’ (2004) Trade and Industrial Policy Strategies Working Paper 8 at 7. Australian Competition and Consumer Commission ‘Better Regulation of Economic Infrastructure: Country-Based Review’ (2013) Working Paper No. 8 at 10.

²⁵⁴ Such legislation includes the Cape Meat Trade Act 15 of 1907; the Post Office Administration and Shipping Combinations Discouragement Act 10 of 1911; the Patents, Designs, Trade Mark and Copyright Act 9 of 1916; The Profiteering Act 27 of 1920; the Board of Trade and Industries Act 28 of 1923; the Board of Trade and Industries Act 33 of 1924; the Customs Tariff and Excise Duties Act 36 of 1925; the Unlawful Determination of Prices Act 24 of 1931; the Board of Trade and Industries Act 19 of 1944; the Customs Act 35 of 1944; and the Undue Restraint of Trade Act 59 of 1949. See also Brassey supra n 7 at 63; Cowen supra n 248 at 125; Bekker supra n 248 at 8-13; and Bekker supra n 248 at 622-6.

²⁵⁵ 59 of 1949.

²⁵⁶ Cowen supra n 248 at 124. See also Bekker supra n 248 at 13 and Bekker supra n 248 at 625.

²⁵⁷ Cowen supra n 248 at 124-5

²⁵⁸ The Board of Trade and Industries Act 28 of 1923; the Board of Trade and Industries Act 33 of 1924; and the Board of Trade and Industries Act 19 of 1944.

²⁵⁹ Cowen supra n 248 at 125. See also Bekker supra n 248 at 13 and Bekker supra n 248 at 625.

regulation of monopolies in South Africa.²⁶⁰ This led to the enactment of the Regulation of Monopolistic Conditions Act,²⁶¹ which is widely regarded as the first comprehensive legislation for the control and regulation of monopolies in South African.²⁶² It is not within the scope of this work to discuss the provisions of this Act in detail.

It is sufficient to state that the Regulation of Monopolistic Conditions Act was not the success it was hoped it would be.²⁶³ The Act did not result in any decline in the high rate of industrial concentrations and monopolies that were characteristic of the South African economy.²⁶⁴ Its principal weakness was that it did not forbid any particular type of defined conduct, but merely established a framework enabling the Board of Trade and Industries to investigate suspicious conduct in the public interest.²⁶⁵ Another weakness of the Act was that it applied only to existing monopolistic conditions and not to those which might arise in the future.²⁶⁶ This meant the Act had no preventative function. The Board of Trade and Industries had no power to commence investigations on its own initiative but had to function under the direction and control of the Minister of Economic Affairs, who was also not bound by the Board's recommendations resulting

²⁶⁰ Bekker supra n 248 at 13 and Bekker supra n 248 at 626.

²⁶¹ 24 of 1955. Bekker supra n 248 at 13; Brassey supra n 7 at 63; JV Tregenna-Piggott 'An Assessment of Competition Policy in South Africa' (1980) Occasional Paper No. 8 Economic Research Unit Department of Economics, University of Natal at 24; Organisation for Economic Co-operation and Development (OECD) 'Competition Law and Policy in South Africa' An OECD Peer Review (2003) at 12-13 accessed at <http://www.oecd.org/southafrica/34823812.pdf> (date of last use: 6 July 2016); and Neo Chabane 'An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa' Trade & Industrial Policy Strategies (TIPS) (2003) CSID Research Project at 4 accessed at <http://www.tips.org.za/files/732.pdf> (date of last use: 6 July 2016).

²⁶² Bekker supra n 248 at 13 and Bekker supra n 248 at 626. See also Brassey supra n 7 at 63; Tregenna-Piggott supra n 261; OECD supra n 261; and Chabane supra n 261.

²⁶³ Tregenna-Piggott supra n 261 at 26-7. Louise Jordaan and Phumudzo S Munyai 'The Constitutional Implication of the New Section 73A of the Competition Act 89 of 1998' (2011) 23 *South African Mercantile Law Journal* 197-213 at 198.

²⁶⁴ OECD supra n 261 and Australian Competition and Consumer Commission supra n 253 at 8.

²⁶⁵ Tregenna-Piggott supra n 261; Brassey supra n 7 at 64 and 68; Bekker supra n 248 at 19; and Bekker supra n 248 at 629.

²⁶⁶ Brassey supra n 7 at 64.

from its investigations.²⁶⁷ This impacted negatively on the independence and effectiveness of the Board. The Board was also severely under-staffed, which further impacted on its capacity to enforce the Act.²⁶⁸

In 1975 the then President of South Africa appointed a Commission, originally under the chairmanship of retired Chief Justice LC Steyn who died before the completion of his brief and was replaced by Dr DJ Mouton, to investigate – among other things – the efficacy of the Regulation of Monopolistic Conditions Act as an instrument to deal with South Africa’s monopoly problems and to report on any new legislation necessary.²⁶⁹ Under the chairmanship of Dr Mouton the Commission published its report in March 1977. As a general approach, it adopted the view that a new competition policy based on free enterprise and embracing the total economy was essential for South Africa.²⁷⁰ As a result of the Commission’s report, the Maintenance and Promotion of Competition Act²⁷¹ was enacted. This Act created the Competition Board as a new body tasked with administering the Act.²⁷²

It is also not necessary to discuss in great detail the provisions of the Maintenance and Promotion of Competition Act, which also turned out to be a failure, as the economy showed no sign of ridding itself of monopolies and industrial concentrations. The Act was riddled with technical flaws which prevented its effective application on both

²⁶⁷ Tregenna-Piggott supra n 261 at 25-6 and Brassey supra n 7 at 67.

²⁶⁸ Bekker supra n 248 at 19 and Bekker supra n 248 at 629. See also Brassey supra n 7 at 67.

²⁶⁹ Bekker supra n 248 at 19-20 and Bekker supra n 248 at 630. See also Brassey supra n 7 at 66-7.

²⁷⁰ Bekker supra n 248 at 20 and Bekker supra n 248 at 630. See also Brassey supra n 269.

²⁷¹ 96 of 1979. Brassey supra n 7 at 71; Bekker supra n 248 at 20; and Bekker supra n 248 at 630.

²⁷² OECD supra n 261 at 13 and Australian Competition and Consumer Commission supra n 253 at 9.

substantive and logistical grounds.²⁷³ It is sufficient to observe here that many of the challenges that affected the previous Regulation of Monopolistic Conditions Act also continued to afflict the Maintenance and Promotion of Competition Act.²⁷⁴ The Act was amended in 1986 to introduce a number of specific and defined prohibited restrictive practices so as to give the Competition Board more clarity in its enforcement.²⁷⁵ The defined prohibited practices were resale price maintenance, horizontal price collusion, horizontal collusion on conditions of supply, horizontal collusion on market share, and collusive tendering.²⁷⁶

The amendment was a positive and major development. Prior to the amendment, the Act, like its predecessor, did not prohibit any specific conduct. The relevant Minister could only prohibit conduct following a long and time consuming investigation and on the recommendation of the Board.²⁷⁷ But after several years it became clear that despite these amendments, the Act could no longer effectively serve the needs of a modern economy characterised by complex business practices and transactions. A new competition regime was needed for democratic South Africa with its multifarious economic challenges.

At the time of political reforms in 1994, the new ANC-led government signaled its intention to review the South African competition law regime in the *White Paper on*

²⁷³ Australian Competition and Consumer Commission supra n 253.

²⁷⁴ Brassey supra n 7 at 64. See also Bekker supra n 248 at 66-7; and EE Bekker 'Monopolies. Review of the Role of the Competition Board' 1993 *Journal of South African Law* 77-90 at 88-9.

²⁷⁵ Government Notice R 801 of 2 May 1986. See also Australian Competition and Consumer Commission supra n 253.

²⁷⁶ Brassey supra n 7 at 79; Bekker supra n 248 at 51-6; and Bekker supra n 274 at 80-2.

²⁷⁷ Brassey supra n 7 at 79; Bekker supra n 248 at 51-2; and Bekker supra n 274 at 80.

Reconstruction and Development.²⁷⁸ The Trade and Industry Department also initiated a process of consultation with experts and stakeholders about a new competition policy framework for South Africa. This culminated in the release in 1997 of a Competition Policy Guideline document entitled *A Framework for Competition, Competitiveness and Development*.²⁷⁹

The public consultation process and the resultant Competition Policy Guideline document led to the enactment of the current Competition Act.²⁸⁰ Against the background of poor enforcement of past anti-monopoly legislation, it was hoped that the new competition authorities would send out a strong signal to dominant firms by adopting a tough stance against abuses of dominance.²⁸¹ The competition authorities also had the daunting task of developing new antitrust jurisprudence. Indeed, no cognisable system of formal antitrust jurisprudence ever developed under any of the competition legislation that preceded the current Competition Act, as the processes prescribed by the legislation were largely political.²⁸²

2.4.1 The South African Historical Economic Structure: Monopoly, Industrial Concentration and Unequal Wealth Distribution

Prior to the adoption of the Competition Act, as highlighted earlier, several key industries in the South African economy were characterised by monopolies and

²⁷⁸ Government Notice 1954 *Government Gazette* 16085 of 23 November 1994; OECD supra n 261 at 14-15.

²⁷⁹ OECD supra n 261 at 16.

²⁸⁰ 89 of 1998. OECD supra n 261 at 17.

²⁸¹ Kenneth Creamer 'The Political Economy of Competition Law' *Trade & Industrial Policy Strategies (TIPS)* (1998) at 12 and 17-18 accessed at <http://www.tips.org.za/files/272.pdf> (date of last use: 6 July 2016).

²⁸² Brassey supra n 7 at 58.

industrial concentration.²⁸³ Some of the roots of monopolies in South Africa can be traced back to state intervention in the economy, as a considerable number of conglomerates came into being either as creatures of statutes or through the granting of concessions.²⁸⁴

Corporate ownership and control were concentrated in the conglomerate groups that dominated economic activity in strategic sectors of the economy such as mining, manufacturing and financial services. For example, in 1994 five investment conglomerates (Anglo-American, Sanlam, Liberty Life, Rembrandt/Remgro and Old Mutual) accounted for 84 per cent of the capitalisation of the stock exchange and one of them, Anglo-American, accounted for 43 per cent by itself.²⁸⁵ Anglo-American's domination of the South African economy for over a century ensured that it was a consistently top-ranked company in terms of JSE market capitalisation.²⁸⁶

Studies have also shown that manufacturing was one of the South African industries with a long history of concentration.²⁸⁷ The entire production chain of staple food such

²⁸³ Tregenna-Piggott supra n 261 at 6 and Roberts supra n 31.

²⁸⁴ Bekker supra n 248 at 1 and Bekker supra n 248 at 618.

²⁸⁵ OECD supra n 261 at 10 and Roberts supra n 31.

²⁸⁶ Competition Commission 'Review of Changes in Industrial Structure and Competition: Input Paper for 15 Year Review' (2008) at 20 accessed at www.thepresidency.gov.za/docs/reports/15year.../industrial_structure.pdf (date of last use: 6 July 2016) and Neo Chabane et al '10 Year Review: Industrial Structure and Competition Policy' (2003) Corporate Strategy and Industrial Development Research Project, School of Economic and Business Sciences, University of the Witwatersrand at 6 and 18.

²⁸⁷ OECD supra n 261 at 10. Gauteng Provincial Government 'Implications of Industrial Concentration on Employment, Investment and Productivity in the Manufacturing Sector' 2009/10 *Quarterly Bulletin* Quarter 2 at 13-14 accessed at <http://www.treasury.gpg.gov.za/Documents/Quarterly%20Bulletin%20-%20September%202009.pdf> (date of last use: 6 July 2016).

as bread (from wheat production, storage, milling, baking and retail) was also characterised by abnormal levels of concentration of ownership and control.²⁸⁸

The South African banking sector has historically also been marked by a high degree of concentration.²⁸⁹ Despite the changes in ownership patterns in the banking sector brought by mergers and acquisitions over the years, only a handful of banks have consistently held a combined market share of at least 80 per cent.²⁹⁰ The functions of banks are deemed to have a significant impact on all aspects of the economy and are therefore considered to be central to the overall performance and development of the economy.²⁹¹ For this reason, the highly concentrated nature of the South African banking sector had long been a source of political concern.²⁹²

Policy makers were concerned that high levels of industrial concentration in the South African economy would result in inefficiencies and reduced competition. This was seen as undesirable not only from the perspective of consumer harm likely to flow from higher prices and inferior products, but also from the perspective of their overall impact on

²⁸⁸ See Jacklyn Cock 'Declining Food Security in South Africa: Monopolies on the Bread Market' (2009) *Rosa Luxemburg Stiftung Conference: The Global Crisis and Africa: Struggles for Alternatives* at 1-4 accessed at http://www.rosalux.co.za/wp-content/files_mf/monopoliesbreadmarketjcock.pdf (date of last use: 6 July 2016).

²⁸⁹ Grietjie Verhoef 'Concentration and Competition: The Changing Landscape of the Banking Sector in South Africa 1970-2007' (2009) 24 *South African Journal of Economic History* 157-97 at 159 and 163. See generally also Charles C Okeahalam 'Structure and Conduct in the Commercial Banking Sector of South Africa' (2001) paper presented at the Trade and Industrial Policy Strategies (TIPS) Annual Forum 2001 accessed at <http://www.tips.org.za/files/499.pdf> (date of last use: 6 July 2016).

²⁹⁰ Jordaan and Munyai supra n 263 at 197 and Okeahalam supra n 289.

²⁹¹ Hans Falkena et al *Competition in South African Banking*, Task Group Report for The National Treasury & the South African Reserve Bank (2004) at 2 accessed at <http://finforum.co.za/fininsts/ciball.pdf> (date of last use: 6 July 2016).

²⁹² Verhoef supra n 289 at 159 and 168.

economic growth.²⁹³ Thus, balanced ownership and control patterns in the economy were considered to be among the most important factors in fostering competition in the market. Industrial concentration or an unbalanced ownership and control structure was seen as the antithesis of competitive and healthy markets.²⁹⁴ These are some of the general considerations which played an important role in the development of South African competition policy and law.²⁹⁵

2.4.2 Competition Law as a Solution to the Problem of Monopoly, Industrial Concentration and Unequal Wealth Distribution

The extent of control over economic activity enjoyed by a small group of companies in South Africa was one of the main reasons for the prominence of competition policy in the ANC's *Reconstruction and Development Programme*.²⁹⁶ The new ANC government proposed to use competition policy to correct the faults of the old system.²⁹⁷ Indeed, the current Competition Act outlines the Act's motivations, which include policies of equity and distribution.²⁹⁸ As Chabane has observed, "the Competition Act specifically seeks to address the problem of excessive concentration of ownership and control in the economy".²⁹⁹

²⁹³ Jordaan and Munyai supra n 263 at 197; Falkena supra n 291; Verhoef supra n 289 at 159 and 165; and Tregenna-Piggott supra n 261 at 9.

²⁹⁴ Gauteng Provincial Government supra n 287 at 2.

²⁹⁵ Id. Roberts supra n 31 at 3.

²⁹⁶ Chabane supra n 286 at 6.

²⁹⁷ Brassey supra n 7 at 82; Kasturi Moodaliyar and Simon Roberts *The Development of Competition Law and Economics in South Africa* (HSRC Press 2012) at ix; and OECD supra n 261 at 7.

²⁹⁸ OECD supra n 261 at 18 and Brassey supra n 7 at 82-3.

²⁹⁹ Chabane supra n 261 at 1.

As part of its attempt to eliminate industrial concentration, the Act declares that the establishment of an environment in which small and medium-sized enterprises can flourish is one of its main priorities.³⁰⁰ The achievement of the small business agenda of the Competition Act requires carefully designed policy and enforcement actions in which small businesses interest are prioritised over those of their more established counterparts. Indeed, as I shall show, in some cases the competition authorities have applied the Act in a manner that seemed to unduly favour small businesses, while exhibiting a considerable bias against dominant firms. This is controversial. It amounts to protecting competitors rather than competition and goes against good practice in antitrust enforcement. Indeed, the use of competition law as a tool to promote small business interests is generally considered incompatible with the ultimate goal of competition law: the advancement of consumer interest.³⁰¹

However, given our peculiar history, drafters of the Competition Act found themselves in a position where – perhaps as a result of an appeal to populism – they had to incorporate into the Act objectives that are not necessarily in line with standard competition policy goals.³⁰² As Hartzenberg observed, “it was clear that a new competition policy would only be politically acceptable if the law specifically addressed

³⁰⁰ Section 2(e) and (f) of the Competition Act.

³⁰¹ Chabane supra n 261 at 5. Trudi Hartzenberg ‘Competition Policy Review’ Trade Law Centre (TRALAC) at 2 accessed at http://www.thepresidency.gov.za/docs/reports/15year_review/economic/competition.pdf (date of last use: 6 July 2016)

³⁰² Brassey supra n 7 at 84 and 87.

public interest concerns”.³⁰³ As a result, she observed further, “economic efficiency had to be tempered with by a strong emphasis on public interest issues”.³⁰⁴.

Public interest, in particular small business interests, are widely recognised and promoted in the Act’s provisions protecting them against abuse of dominance by large firms,³⁰⁵ as well as in the exemption, and merger provisions.³⁰⁶ Indeed, the Competition Act allows for exemptions from the prohibitive provisions on anticompetitive practices where these practices promote the ability of small and medium-sized enterprises to become competitive.³⁰⁷ In other words, the Act goes to the extent of using anticompetitive means to promote small business interests.

A good merger, one which may not necessarily prevent or lessen competition or harm consumers, may nonetheless be declined if it does not satisfy some public interest requirements, including the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive.³⁰⁸ The *Walmart/Massmart*³⁰⁹ merger decision of the Competition Appeal Court has been described by some as ‘taking public interest too far’ for, among others, approving the merger subject to public interest conditions relating to local procurement for the benefit of small locally-owned

³⁰³ Hartzenberg supra n 301 at 5.

³⁰⁴ Id.

³⁰⁵ See sections 8 and 9 of the Competition Act. See also OECD supra n 261 at 19.

³⁰⁶ *Nationwide Poles v Sasol Oil (Pty) Ltd* Case No 72/CR/Dec03 at par 83.

³⁰⁷ Chabane supra n 261 at 1.

³⁰⁸ Section 12A(1) and (3) of the Competition Act. See also Brassey supra n 7 at 275-8 and Chabane supra n 307.

³⁰⁹ *Minister of Economic Development and Others v Competition Tribunal and Others; South African Commercial, Catering and Allied Workers Union v Walmart Stores Inc and Another* 2012 (1) CPLR 6 (CAC).

enterprises.³¹⁰ Small businesses are seen in South Africa to serve best the public interest because they, unlike dominant firms, are considered an important catalyst for employment creation, equitable income distribution, and market competition.³¹¹ For these reasons, they appear to enjoy special protection under the Act.

2.4.3 Trends in the Application of the Competition Act against Dominant Firms

As no system of meaningful competition law jurisprudence can be said to have existed in South Africa before the coming into force of the Competition Act,³¹² it is not possible to provide a systematic discussion of our historical competition law decisions. This is also because the current Competition Act is relatively new. It is, however, necessary to investigate established trends in the enforcement of the Act in abuse of dominance cases to date. In line with the main theme of this study, competition decisions and principles that appear to exhibit hostility towards and bias against dominant firms are prioritised.

The main attention is given to the decisions of the Competition Tribunal, which is the primary adjudicative body under the Competition Act. Functioning like a court of first instance, the Tribunal has the unique role of shaping the development of competition law jurisprudence in South Africa. Its makeup of lawyers and economists, coupled with its ability to hear and interrogate expert economic witnesses, gives it an opportunity, at

³¹⁰ Jessica Staples, Mike Holland and Jannie Rossouw 'Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd' (2013) 25 *South African Mercantile Law Journal* 94-106 at 97.

³¹¹ Chabane supra n 261 at 7.

³¹² Brassey supra n 7 at 58.

least in theory, to make decisions that take into account the economic realities of the market in which the dispute arose. The decisions of the Competition Appeal Court – which hears appeals and reviews from the Competition Tribunal – are also considered.

It is generally accepted that our competition authorities apply the Competition Act primarily to “promote and protect competition”.³¹³ The assumption is that the enforcement of the South African Competition Act is generally geared towards the achievement of standard competition law goals, such as efficiency and consumer welfare. However, the idea that the South African Competition Act is applied primarily to “promote and protect competition” requires closer investigation and further elucidation. This is because people’s understanding of the concept of ‘competition’ and the process through which competition is to be ‘promoted and protected’ may differ.

The unique local circumstances which led to the adoption of our Competition Act have had a bearing on the competition authorities’ understanding of the manner or process through which they must promote and protect competition.³¹⁴ One of the fascinating features of South African competition law, as already indicated, is that standard competition policy goals have been combined with public interest objectives. While competition officials are reluctant to regard themselves as champions of the public interest movement, the reality is that they understand that when adjudicating competition disputes they are bound by law to apply their minds to public interest

³¹³ Hartzenberg supra n 301 at 5; Brassey supra n 7 at 2.

³¹⁴ Ádám Török ‘Competition Policy Reform in South Africa: Towards the Mainstream CP Model for “Transition” Economies in the Third World?’ (2005) Research Group on Micro-integration and Regional Development Studies University of Veszprém and Hungarian Academy of Sciences, Working Paper for the Centre of Economic Policy Research, London at 4.

issues. As former Chairperson of the Competition Tribunal, David Lewis, remarked, ‘public interest issues in the Competition Act are like the mad old uncle who comes knocking on the door when there are visitors and you have nowhere to hide him except to find some way to accommodate him’.³¹⁵

The incompatibility of standard competition policy goals and public interest issues has been pointed out.³¹⁶ Indeed, the inclusion of broader developmental objectives in our competition policy poses significant challenges to effective enforcement of the Competition Act in both theory and practice.³¹⁷ There seems to be a considerable disconnect between the theory underpinning our competition law and its practical enforcement.³¹⁸ While our competition authorities view the enforcement of the Competition Act as guided fundamentally by efficiency and consumer welfare, others have found that in practice efficiency and consumer welfare are trumped by public interest issues.³¹⁹ In abuse of dominance cases the most notable public interest issue is the protection of the structure of the market from distortions by dominant firms in order to preserve economic opportunities for other enterprises, especially small and medium-sized enterprises. This, essentially, has been the Competition Tribunal’s most consistent approach towards the realisation of the Act’s general object to ‘promote and protect competition’.

³¹⁵ David Lewis ‘The Role of Public Interest in Merger Evaluation’ International Competition Network, Merger Working Group, Naples (2002) at 1-2.

³¹⁶ Chabane supra n 261 at 5 and Hartzenberg supra n 301 at 2

³¹⁷ Hartzenberg supra n 301 at 2. Jessica Staples and Magalie Masamba ‘Fourteen Years Later: An Assessment of the Realisation of the Objectives of the Competition Act 89 of 1998’ (2012) 3 *Competition Law Sibergramme* 1-30 at 2.

³¹⁸ Chabane supra n 261 at 1.

³¹⁹ Reekie supra n 9 at 8-10. Staples and Masamba supra n 317.

For example, in *Nationwide Poles v Sasol Oil (Pty) Ltd*,³²⁰ a price discrimination complaint against a dominant firm, the Tribunal found that “the purpose of the Competition Act is to maintain accessible, competitively structured markets which accommodate smaller businesses, and enable them to compete effectively against larger and well-established incumbents”.³²¹ The legislature, the Tribunal further pointed out, is concerned with problems confronting small and medium-sized enterprises which, in the absence of a ‘level playing field’, may find it difficult to enter new markets and compete effectively on merit.³²²

In defence of this approach, the Tribunal reasoned that those who deem competition law’s mandate to extend to the securing of competitive market structures, may be less troubled by the use of competition enforcement to secure conditions favourable to entry into markets and the strengthening of small businesses.³²³ In a clear statement of support for the idea that competition can also be promoted and protected by protecting competitors, the Tribunal argued that “an obvious rejoinder to the ‘protect competition and not competitors’ mantra is that if there are no competitors there is no competition”.³²⁴ The Tribunal’s ruling in *Nationwide Poles* is considered a landmark decision in the competition authorities’ history as regards how the conflicting interests of small and big business are dealt with generally.³²⁵

³²⁰ Supra n 306.

³²¹ Id at pars 81 and 89.

³²² Id at par 81.

³²³ Id at par 86.

³²⁴ Id.

³²⁵ Kim Kampel ‘Competition Law and SMEs: Exploring the Competitor/Competition Debate in a Developing Democracy’ (2004) Centre on Regulation and Competition Working Paper Series, Paper No. 109, Institute for Development Policy and Management, University of Manchester at par 3.

Although the Tribunal's *Nationwide Poles* decision was overturned on appeal by the Competition Appeal Court due to lack of evidence of a substantial prevention and lessening of competition in the market,³²⁶ it is important to note that the Appeal Court did not interfere with the Tribunal's reasoning and findings on the importance attached to the protection of small business interests under the Act. Indeed, the Competition Appeal Court emphasised that its decision did not seek to minimise the weight which the legislature has given to the need to ensure that small and medium-sized businesses are protected under the Act.³²⁷

In *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*³²⁸ the Competition Tribunal found that the fundamental task of competition law is to "promote and defend competitive market structures" and to guard against the conduct of market participants, in particular dominant firms, which seek to undermine the promise of those competitive market structures.³²⁹ Holding that Mittal had abused its dominant position, the Tribunal observed that lack of competition in the flat steel market had allowed Mittal to evolve into a 'super-dominant' firm, leaving competition authorities with no choice but to impose a remedy that would address the underlying market structure conditions that made the offending conduct possible.³³⁰

The Tribunal further observed that at the core of competition law enforcement is the recognition that the benefits of competitively structured markets may be wiped out by

³²⁶ *Sasol Oil (Pty) Ltd v Nationwide Poles* CC Case No 49/CAC/APRIL05 at 38-41.

³²⁷ *Id* at 41.

³²⁸ Case No 13/CR/FEB04.

³²⁹ *Id* at pars 74 and 75.

³³⁰ *Id* at pars 84 and 108.

the conduct of dominant firms.³³¹ According to the Tribunal a ‘competitively structured market’ or a ‘perfectly competitive market structure’ is one comprising price-taking producers, usually firms that are not dominant, as opposed to price-setting monopolists – against which the Competition Act was adopted.³³² While the Tribunal cautioned that competition law is not necessarily directed at eliminating dominant firms from the market, it surprisingly went on to state in the same paragraph that “dominant firms are beasts” - against whom competition regulators must remain vigilant in enforcing competition rules to prevent them from eliminating rivals.³³³

It is possible that the Tribunal may have referred to dominant firms as ‘beasts’ jokingly and that its finding that Mittal had abused its dominance was correct. But it is the manner in which the Tribunal arrived at its conclusion in this case which raises questions about its impartiality when dominant firms are concerned. Firstly, it attached alien antitrust labels such as ‘super-dominance’ to the position held by Mittal in the relevant market, which appeared to create additional legal responsibility for and constraints on Mittal’s conduct. Secondly, the concept of ‘super-dominance’ has no legal basis in our law and offends against the principle of legality.³³⁴ Indeed, the Constitutional Court and the Competition Appeal Court have both cautioned the Tribunal and the Competition Commission against using alien substantive terms and language in their proceedings.³³⁵

³³¹ Id at par 75.

³³² Id at par 122.

³³³ Id at pars 124 and 127.

³³⁴ *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* Case No 70/CAC/Apr07 at pars 30 and 32.

³³⁵ *Competition Commission of South Africa v Senwes Limited* 2012 (7) BCLR 667 (CC) at pars 29 and 44 and *Mittal Steel South Africa Limited* supra n 334 at pars 28 and 32.

When regard is had to the Tribunal's decision in *Mittal*, it once again becomes clear that competitive rivalry is pursued as an end in itself, and that consumer welfare is not the immediate goal of our competition law. Indeed, consumer welfare as a guiding principle for assessing allegedly abusive conduct is very scant in this decision. And the Tribunal has admitted this, by stating that its reasoning in *Mittal* placed too much emphasis on the structure of the market.³³⁶ The Tribunal saw the structure of the market, ie the absence of an effective competitor, as the basis for explaining Mittal's anticompetitive conduct and its primary concern. The Tribunal paid almost no attention to the impact of Mittal's excessive prices on customers.

As the Competition Appeal Court found on appeal, the approach of the Tribunal in *Mittal* was fundamentally flawed.³³⁷ In its analysis the Tribunal asked how a competition authority should approach the question of excessive pricing and in reply stated that "by asking ourselves whether the structure of the market in question enables those who participate in it to charge excessive prices".³³⁸ This is definitely not an economics or effects-based approach, but – as the Competition Appeal Court found – a 'structural test'.³³⁹ The Competition Appeal Court found the Tribunal's preoccupation with the "protection of competitive market structures" rather than the real economic issues at

³³⁶ *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* supra n 328 at par 216.

³³⁷ *Mittal Steel South Africa Limited* supra n 334 at par 75.

³³⁸ *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* supra n 328 at pars 83 and 84.

³³⁹ *Mittal Steel South Africa Limited* supra n 334 at pars 16, 19 and 31.

play – in particular price levels in the relevant market as indicator of the extent of consumer harm occasioned by Mittal’s alleged excessive pricing, to be ill-founded.³⁴⁰

It is appropriate to emphasise here that there is an important distinction in competition law discourse between the ‘protection of competitive market structures’, sometimes styled as the ‘protection of the competitive process’, and the ‘protection of competition as a means to enhance consumer welfare’. In my view, where the goal of competition law enforcement is the advancement of consumer welfare by protecting competition, the key, if not the sole, question in abuse of dominance cases, is whether the conduct complained of results in consumer harm? Under this approach it is unnecessary, and indeed inappropriate, to enquire, as a primary basis for competition intervention, into whether the conduct complained of leads to the removal of a competitor from the market.

But where the goal of competition law enforcement is the protection of ‘competitive market structures’ or ‘the competitive process’, consumer welfare is not taken into account or, at best, takes second stage. The main obsession of this enforcement approach is the preservation of economic opportunities for individual market participants in the hope that this will translate into benefit for consumers. This approach amounts to the protection of competitors in the short term in the hope that consumers will gain in the long term.³⁴¹ In *Competition Commission and South African Airways (Pty) Ltd*³⁴² the Tribunal accepted that this enforcement approach, to which it subscribes, is open to an

³⁴⁰ Id at par 28.

³⁴¹ Areeda and Hovenkamp supra n 60 at 100b.

³⁴² Case No 18/CR/Mar01.

interpretation which may suggest that authorities are more concerned with protecting competitors than competition.³⁴³

In that decision,³⁴⁴ the Tribunal alluded to the distinction between the protection of competitive market structures and the protection of competition as a means to enhance consumer welfare. Here the Tribunal observed that one person's understanding of 'anticompetitive harm' may mean harm only to consumer welfare, whilst another's may embrace harm to the structure of markets.³⁴⁵ The Tribunal confirmed that it viewed 'anticompetitive harm' from the perspective of harm to the structure of markets by stating that "harm to the market structure is in itself an infringement of the Act, regardless of harm to consumer welfare".³⁴⁶ In other words, the Tribunal views the removal of a rival from the market as sufficient primary reason for competition intervention, regardless of the absence of consumer harm.

Indeed, the fact that in this case³⁴⁷ the Competition Commission was unable to establish any adverse effect on consumers, did not weaken its case, as the Tribunal felt the case could be decided solely on the question of whether the exclusionary conduct complained of had caused harm to the structure of the market by foreclosing or limiting opportunities for rivals.³⁴⁸ Consequently, the Tribunal found that the effect of the conduct complained of on the structure of the market was to inhibit rivals from

³⁴³ Id at pars 118, 131 and 137.

³⁴⁴ Supra n 342.

³⁴⁵ Id at par 137.

³⁴⁶ Id.

³⁴⁷ Supra n 342.

³⁴⁸ The Tribunal admitted that there was no evidence that consumers were paying more or had experienced limited choice, supra n 342 at par 220.

expanding within the market and decided the matter on this point, while notably also holding that it did not need to make any finding on whether there had been harm to consumers.³⁴⁹

A similar approach was followed in a related case, *Nationwide Airlines Pty Ltd and Comair Limited v South African Airways Pty Ltd*,³⁵⁰ where the Tribunal found that SAA had again contravened the Competition Act by engaging in conduct that resulted in or had the potential to foreclose its rivals.³⁵¹ Here too, the Tribunal found that there was 'no need' for it to determine whether SAA's conduct had resulted in any harm to consumer welfare.³⁵² Some commentators have criticised this approach, arguing that blaming and punishing dominant firms for the decline in competition in the market which is not accompanied by evidence of consumer harm is too formalistic and unfair towards dominant firms.³⁵³

Indeed, when SAA appealed the Tribunal's *Nationwide Airlines* decision to the Competition Appeal Court, in *South Africa Airways Pty Ltd v Comair Limited and Nationwide Airlines Pty Ltd*,³⁵⁴ counsel for SAA castigated the Tribunal for adopting a formalistic approach to antitrust enforcement encapsulated in its finding that 'it was unnecessary for it to determine whether there was any harm to consumers' in the

³⁴⁹ Id at pars 241-242.

³⁵⁰ Case No 80/CR/Sept06.

³⁵¹ Id at par 248.

³⁵² Id.

³⁵³ Simon Roberts, Jonathan Klaaren and Kasturi Moodaliyar 'Introduction to Special Section of Competition Law and Economics' (2008) 11 *South African Journal of Economic Management and Science* 247-8 at 248.

³⁵⁴ 2012 (1) SA 20 (CAC).

market.³⁵⁵ It was contended on behalf of SAA that absent consumer harm in the form of an increase in prices or a reduction in output there had been no breach by SAA of the Competition Act.³⁵⁶

However, the Competition Appeal Court dismissed SAA's appeal and upheld the Tribunal's decision. After an extensive quotation of the decision of the European General Court in *Tomra Systems ASA and Others v European Commission*,³⁵⁷ the Competition Appeal Court declared that the Competition Act was designed "to protect the competitive process".³⁵⁸ The idea of the use of competition law as a tool to 'protect the competitive process' is very popular in European competition law and, when relied upon, has generally produced results which amounted to the protection of competitors at the expense of consumers, as demonstrated by *Tomra Systems ASA and Others v European Commission*.³⁵⁹

2.4.4 Summary

Competition policy and law in South Africa arose in response to the historic trend towards the creation of monopoly and industrial concentration. Prior to the adoption of the Competition Act, various legislative attempts had been made to regulate monopoly and other restrictive trade practices. However, all these legislative interventions proved inadequate. At the time of political reforms in 1994, the South African economy was still

³⁵⁵ Id at pars 3.6 and 109-110.

³⁵⁶ Id at par 110.

³⁵⁷ Supra n 236.

³⁵⁸ Supra n 354 at par 136.

³⁵⁹ Supra n 236.

characterised by high levels of industrial concentration. The new ANC government identified a robust competition policy and law as one of the cornerstones for the radical transformation of the South African economy in general, and the elimination of high levels of industrial concentration in particular. To this end, it was deemed necessary that the new Competition Act must incorporate policies of equity and distribution in the public interest. As a result, the Competition Act includes in its stated objects the creation of an enabling environment for small and medium-sized enterprises to participate in the economy, as well as the promotion of a greater spread of corporate ownership by historically disadvantaged persons.

South African competition authorities generally view their task as that of applying the Competition Act to promote and protect competition. And they have a genuine belief that this is exactly what they do. However, a review of the decisions of South African competition authorities has revealed that the process through which they have sought to promote and protect competition has tended to have the general effect of protecting competitors rather than competition. This is so because effects analyses of impugned conduct have been generally found to be limited, while consumer welfare has also not truly found recognition in the decisions of South African competition authorities. For these reasons, the decisions of South African competition authorities have attracted considerable criticism.³⁶⁰

2.5 Conclusion

³⁶⁰ Roberts, Klaaren and Moodaliyar *supra* n 353.

The purpose of this Chapter has been to expose the historical contexts in which competition or antitrust laws have evolved in the United States of America, Europe and South Africa. The Chapter shows that in all three jurisdictions the origins of competition laws can be traced to legislative measures designed to prevent and control incidents of monopoly, industrial concentration, and market domination. The philosophy underpinning all these legislative measures was that, if uncontrolled, monopoly, industrial concentration, and market domination would result in negative economic consequences, such as reduced competition, higher prices, output limitation, inferior products, and lack of innovation. As a result, policy and law makers favoured an industrial or market structure comprising several independent and moderately-sized enterprises in which no enterprise would possess the ability to control the market to the detriment of competitors and consumers.

This philosophy of hostility towards monopoly, industrial concentration, and market domination has also received considerable support in the decisions of competition authorities and the courts. For example, in American antitrust law this philosophy has led to some court decisions in which dominant corporations were branded an “economic and social menace”,³⁶¹ while in other cases such corporations were broken up.³⁶² As Bork has remarked, “American antitrust laws ‘harassed’ successful businesses”.³⁶³

³⁶¹ *United States v Columbia Steel Co* supra n 92 at 535-6.

³⁶² *United States v American Tel and Tel Co* 552 F Supp 131 Dist Court Dist of Columbia (1982) and *Standard Oil Co of New Jersey v United States* supra n 9 at 77-82.

³⁶³ Bork supra n 5 at 4.

In European competition law the philosophy of hostility towards market domination, encapsulated in ordoliberal philosophy, has been responsible for several decisions in which the courts have found that the “mere presence of a dominant undertaking in a market automatically meant that the degree of competition in that market had been weakened”.³⁶⁴ In South African competition law dominant undertakings “are viewed as beasts” - against whom competition authorities must forever be vigilant to prevent them from impairing the structure of the market by eliminating rivals.³⁶⁵

However, proposals and some efforts have been made in recent law across the three jurisdictions to re-align the goal and focus of competition law enforcement. In particular, there has been a renewed commitment to the adoption of an economic or effects-based approach to competition enforcement which places significant emphasis on the protection of consumers rather than the protection of competitors. This means the philosophy of hostility towards monopolies and dominant firms can no longer be regarded as the ‘official’ or ‘expressed’ goal of modern competition law.

America leads the way in this re-alignment of the goals of competition law, by shifting emphasis from hostility towards market domination to consumer welfare. Some American decisions, like *Trinko*,³⁶⁶ have embraced monopoly and even declared it an essential part of the free market system whose right of existence will not be challenged

³⁶⁴ *Hoffmann-La Roche* supra n 211 at par 91; *Michelin v Commission* supra n 213 at par 70; *General Electric* supra n 234 at par 549; *British Airways* supra n 235 at par 66; and *Tomra Systems* supra n 236 at pars 38 and 206.

³⁶⁵ *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* supra n 328 at pars 124 and 127.

³⁶⁶ Supra n 117.

unless accompanied by consumer harm attributable to its conduct.³⁶⁷ However, *Trinko* cannot be relied upon for a general conclusion that anti-monopoly sentiments have entirely or even significantly disappeared from American antitrust law. The reality is that the actions of antitrust enforcement agencies, some recent court decisions, and the remarks of some influential commentators have shown that a deep mistrust, and perhaps resentment, for dominant undertakings subsists in modern American antitrust law.

And despite suggestions that the current practice of competition enforcement in European and South African law also follows an economic or effects-based approach in which consumer welfare is the guiding principle, the opposite has been found to be generally true. No noticeable change in enforcement philosophy or direction can be said to exist in practice in these two jurisdictions. The preservation of economic opportunities for individual market participants, encapsulated in the concepts of the ‘protection of the competitive process’ and ‘protection of competitive market structures’, remains the dominant enforcement philosophy in European and South African law. How else does one explain the principle that is so entrenched even in recent European competition law decisions, that the ‘presence of a dominant firm in a market is bad for competition’?³⁶⁸ And further, how does one also explain the description in South African competition law of dominant undertakings as ‘beasts’, over whom competition

³⁶⁷ Id at 407.

³⁶⁸ *General Electric* supra n 234 at par 549; *British Airways* supra n 235 at par 66; and *Tomra Systems* supra n 236 at pars 38 and 206.

authorities must forever be watchful to prevent them from impairing the structure of the market by eliminating rivals?³⁶⁹

In this Chapter, I have shown that the philosophical origins of competition or antitrust law can be traced back to the historical policy of hostility towards dominant undertakings and the protection of small businesses. I have also shown that attempts in modern competition law to refine the practice of competition enforcement, particularly in abuse of dominance cases, have not completely succeeded in altering the law's original, and perhaps questionable, motives.³⁷⁰ It is therefore a strong possibility, as the next chapters will show, that dominant undertakings may continue to endure biased and discriminatory enforcement of competition rules in the modern era.

³⁶⁹ *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* supra n 328 at pars 124 and 127.

³⁷⁰ Bradley supra n 8.

**A REVIEW OF ABUSE OF DOMINANCE PROVISIONS IN THE SOUTH AFRICAN
COMPETITION ACT WITH SPECIFIC FOCUS ON SECTION 8(C)**

3.1 Introduction

In this Chapter, I investigate whether the formulation and enforcement of abuse of dominance provisions in the South African Competition Act reinforces perceptions of bias or prejudice towards dominant firms. Provisions dealing with exclusionary acts by dominant firms under section 8 of the Competition Act are perhaps the most notable area in which the likelihood of prejudice towards dominant firms emerges most clearly.¹

Of special interest in this Chapter are the exclusionary acts by dominant firms covered by section 8(c)² of the Act. Section 8(c) has attracted significant commentary from a number of observers. Some authors consider that section 8(c) complaints of exclusionary conduct by dominant firms are treated more leniently than other

¹ As former chairperson of the Competition Tribunal, David Lewis, remarked, the prospect of errors in the decisions of competition authorities is most powerfully asserted and most strenuously cautioned against in the context of enforcement action against dominant firm conduct. The proffered reason for this, he continued, is that it is in the unilateral actions of dominant firms that the line between conduct that has pro-competitive impact or anti-competitive impact is said to be most blurred, David Lewis 'Chilling Competition' at 1 accessed at <http://www.comptrib.co.za/assets/Uploads/Speeches/lewis13.pdf> (date of last use: 6 July 2016).

² Section 8(c) of the Competition Act provides as follows:

"8. Abuse of dominance prohibited

It is prohibited for a dominant *firm* to –

...

(c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or..."

exclusionary abuses under section 8 of the Act.³ But I argue that section 8(c) of the Competition Act potentially disadvantages dominant firms in a number of ways. One of these is the manner in which section 8(c) has been formulated, which increases the possibility that almost all dominant firm conduct, including perfectly legitimate conduct, will be caught by the provision. This phenomenon is described in antitrust literature as ‘over-inclusiveness’.⁴

A notable problem related to over-inclusiveness is over-enforcement, where competition authorities overzealously prosecute and prohibit types of market conduct in the belief that the conduct is anticompetitive. The problem of overzealous enforcement is that it may result in the outlawing of conduct that is competitive and legal. The erroneous prohibition of competitive market conduct in the mistaken belief that it is anticompetitive is described in antitrust discourse as a ‘false positive’ error.⁵

The problems of over-inclusiveness and potential false positives are further exacerbated by the fact that section 8(c) leaves considerable discretion in the hands of competition authorities to determine the kind of conduct that fits into the broad and catch-all grip of the provision.⁶ There is very little guidance in the Act as to how competition authorities must exercise their discretion in determining what conduct falls within the ambit of section 8(c).

³ Martin Brassey et al *Competition Law* (Juta 2002) at 198.

⁴ Richard Whish and David Bailey *Competition Law* 7 ed (Oxford University Press 2012) at 193-4 and Lewis supra n 1 at 2.

⁵ Id.

⁶ *Nationwide Airlines (Proprietary) Limited and Others v South African Airways (Proprietary) Limited and Others* Case No 92/IR/Oct00 at 10.

As far as the enforcement of section 8(c) is concerned, affected dominant firms are therefore at the mercy of competition authorities. This is because the exact nature and description of conduct that falls within the ambit of the provision is generally unknown. It is only when the competition authorities, after the conduct has occurred, make a determination that a particular conduct falls foul of the provision that the legal implications of the conduct are fully understood. The provision is so vague that it deprives affected dominant firms of the opportunity to know beforehand that they are engaging in potentially risky behaviour. With this in mind, affected dominant firms may feel entitled to expect that competition authorities will, when enforcing section 8(c), be more cautious of the risk of outlawing lawful conduct.

However, given the longstanding and prevailing philosophy of hostility towards dominant undertakings in South African competition law, the adjudication of competition disputes rarely displays a satisfactory level of caution and impartiality when exclusionary conduct is concerned. Indeed, in our society some of those who pursue a career in competition enforcement appear to be motivated by a deep seated desire to 'go to work every day driven by the passion to get the bad guys' in the market, who invariably are represented by dominant firms.⁷ And those who lack such passion or subscribe to a different enforcement philosophy are advised to either 'stay at home' or 'go work for *the other side*'.⁸ So, in the world of abuse of dominance law enforcement there are sides to be taken. You are either for or against dominant firms. In this sense, it is not too farfetched to suggest that in South Africa competition law enforcement does not

⁷ David Lewis *Enforcing Competition Rules in South Africa* (Edward Elgar Publishing 2013) at 130-1.

⁸ *Id.*

proceed from an entirely neutral premise. This increases the prospect that legitimate and competitive conduct by dominant firms may be chilled.

In South Africa the problem of chilling competition as a result of inappropriate intervention in the market by competition authorities has not received sufficient attention. The few studies that have sought to address this issue have unanimously concluded that the prospect of chilling competition in South African competition law is remote, given the considerable latitude which dominant firms are given in abuse of dominance proceedings, particularly under section 8(c).⁹ Indeed, some have even contended that certain abuse of dominance provisions, in particular section 8(c), are so weak in preventing exclusionary conduct by dominant firms that they need further strengthening through appropriate amendment.¹⁰ Although I agree that in many respects our abuse of dominance provisions are not a perfect model of good legislative drafting, I contend that in its present form section 8(c) already increases the prospect of chilling competition.

In my assessment of abuse of dominance under section 8 in general, and exclusionary acts under section 8(c) in particular, I include a comparative study of section 2 of the Sherman Act in American antitrust law and Article 102 of the Treaty of Europe in European competition law. These two jurisdictions offer valuable lessons on cases of

⁹ Brassey *supra* n 3 at 197-9; Lewis *supra* n 7 at 160; Neil Mackenzie 'Replacing Section 8(d) of the South African Competition Act with an "Effects-Based" Exclusionary Abuse of Dominance Provision' Centre for Competition Economics, University of Johannesburg, Working Paper 7/2012 at 9; Anne Njoroge 'Regulation of dominant firms in South Africa' (2011) MBA dissertation, University of Pretoria at 3; and Simon Roberts 'Administrability and Business Certainty in Abuse of Dominance Enforcement: An Economist's Review of the South African Record' (2012) 35 *World Competition* 273-300 at 281-2, 286 and 288.

¹⁰ Lewis *supra* n 7 at 160. See also Mackenzie *supra* n 9 at 13.

exclusionary abuse of dominance that may be relevant and helpful to the enforcement of exclusionary abuse of dominance provisions under the South African Competition Act. In American antitrust law, problems with the enforcement of section 2 of the Sherman Act on allegedly exclusionary conduct by dominant firms have led to research by legal and economic experts that revealed that some dominant firm conduct presumed exclusionary and anticompetitive, would in fact lead to efficiencies and benefit consumers.¹¹ Similarly, in European competition law there has been an acknowledgement that the enforcement of Article 102 may result in instances where competition authorities erroneously decide that dominant firm conduct is exclusionary and illegal in circumstances where it should not be.¹²

To outline the structure of my discussion in this Chapter, part 3.2 starts with a general review of the structure and content of abuse of dominance provisions in the South African Competition Act. Although the main aim of this Chapter is to conduct a focused review of exclusionary acts under section 8(c) rather than a general discussion of abuse of dominance provisions, an initial general overview of the structure and content of some abuse of dominance provisions in the Act is essential in order to place exclusionary acts proscribed by section 8(c) in their proper context, before I deal with them more specifically. In part 3.3 I deal with enforcement problems with exclusionary abuse of dominance in foreign law. Part 3.4 provides the Chapter's conclusion.

¹¹ US Department of Justice, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* at 1 accessed at <http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act> (date of last use: 6 July 2016).

¹² Office of Fair Trading *The Cost of Inappropriate Interventions/Non Interventions Under Article 82* (September 2006) Economic Discussion Paper, OFT 864 at par S.3 accessed at ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo_report.pdf (date of last use: 6 July 2016).

3.2 Abuse of Dominance Provisions in the South African Competition Act

As stated in the introduction, an initial general review of the structure and content of the abuse of dominance provisions in the Act is essential in order to place exclusionary acts proscribed by section 8(c) in their proper context before dealing with them in detail. In particular, the general review of section 8 and its abuse of dominance provisions highlights some inherent structural and substantive problems raised by the section generally, and further provides an holistic perspective from which section 8(c) and challenges facing it can be viewed.

Because section 8(c) is intended to serve as a backup or alternative to other abuse of dominance provisions, particularly section 8(d), its review and analysis will constantly include references to other abuse of dominance provisions of the Act. This requires that some background regarding other abuse of dominance provisions be provided at the outset. I may also add that the general review of the abuse of dominance provisions in the Act will be conducted primarily (though not exclusively) in the order of their appearance in the Act rather than on the basis of their substantive or formal classification.

3.2.1 A General Review of the Abuse of Dominance Provisions in the Competition Act

The majority of abuse of dominance provisions in the South African Competition Act relate to exclusionary abuses rather than exploitative abuses. This means our abuse of

dominance provisions are more concerned with dominant firm practices that harm competitors, than practices that harm consumers. The only exploitative practice by a dominant firm condemned by the Competition Act is 'excessive pricing'.¹³

A major problem afflicting the Competition Act and its abuse of dominance provisions is their structure and overlap. For example, price discrimination is somehow dealt with in a section that by its location appears removed from the place where the Act formally describes and prohibits other related abusive practices such as excessive pricing.¹⁴ As Roberts observes, "price discrimination falls under a separate section from the abuse of dominance provisions".¹⁵ There is absolutely no reason in practice not to classify price discrimination as a form of abuse of dominance. Although price discrimination may in some instances constitute an exclusionary abuse of dominance, it generally has close affinity with an exploitative practice such as excessive pricing and should generally be treated as such in practice.

When price discrimination occurs, the central issue in the complaint is generally the allegation that the complainant is paying '*more*' than others in equivalent transactions for goods or services of like grade or quality. In this sense, price discrimination appears to be just another species of excessive pricing, the only distinguishing factor being that in the case of price discrimination there is also the issue of '*others paying less*'. The relationship between excessive pricing and price discrimination was at play in

¹³ Section 8(1) of the Act. Lewis supra n 7 at 143.

¹⁴ Section 9(1) of the Act.

¹⁵ Roberts supra n 9 at 296.

Competition Commission and Senwes Limited.¹⁶ Here a vertically integrated dominant firm, which provided grain storage services to grain farmers and traders (the upstream market) while also engaging in the business of grain trading (the downstream market), was alleged to have abused its dominance over the supply of storage to distort competition, by raising storage prices (excessively pricing storage) to a level which its downstream rivals could not afford, while also charging a significantly lower price to its own downstream grain-trading business and farmers (price discrimination). Another example of the link between excessive pricing and price discrimination can be seen in *Competition Commission v Telkom SA Ltd*¹⁷ where Telkom was alleged to have engaged in excessive pricing and price discrimination, by charging customers who did business with its rivals *an excessive price* for access to essential facilities, while charging a discounted price to customers who did not do business with its rivals.¹⁸

The link between price discrimination and excessive pricing can be demonstrated if one takes the scenario of '*others paying less*' in price discrimination and applies it to excessive pricing. The lower price being paid by others may be a useful indicator of the price which bears a close resemblance to the economic value of the goods or services in question in an excessive pricing complaint.¹⁹ Indeed in arguments before the Tribunal and the Courts, Senwes's downstream competitors argued that they would be better able to trade normally if they were charged the same price that Senwes charged

¹⁶ *Competition Commission of South Africa v Senwes Limited* Case No 110/CR/Dec06.

¹⁷ Case No 11/CR/Feb04.

¹⁸ Id at par 2.

¹⁹ *Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd v Mittal Steel South Africa Ltd and Macsteel International BV* Case No 13/CR/FEB04 at pars 136-137 and 140-147.

its own integrated downstream business and farmers.²⁰ Distilled to its essence, the argument by Senwes's downstream competitors was that the price Senwes charged its own integrated downstream business and farmers was the one that, in excessive pricing discourse, bore a close resemblance to the economic value of the storage services Senwes provided.

So, if there is evidence that the higher of at least the two prices in a price discrimination complaint is unreasonable, it would be appropriate to approach such a case as one of exploitation and excessive pricing. This approach may lead to enhanced customer and consumer protection, because the Act treats excessive pricing more seriously and attaches greater consequences for the offending firm than price discrimination.²¹ Excessive pricing is automatically considered anticompetitive, meaning that no amount of haggling or justification can save the practice from condemnation. A first excessive pricing offence may be accompanied by an administrative penalty. By contrast, price discrimination is not automatically considered anticompetitive, as the Competition Commission or the complainant is still required to prove that the practice has the effect of substantially preventing or lessening competition. But even if the price discrimination may be found substantially to prevent or lessen competition, it may still be condoned if the dominant firm advances acceptable reasons or justification for the practice.²² And there is no administrative penalty for a first price discrimination offence.

²⁰ See *Senwes Ltd v Competition Commission of South Africa* (118/2010) [2011] ZASCA 99 (1 June 2011) at par 27.

²¹ See sections 8(a), 9(1)(a) and 59(1)(b).

²² Section 9(2) of the Act.

The separation of price discrimination and excessive pricing in terms of their classification and positioning in the Act not only creates problems from a structural point of view, but also creates an unnecessary substantive and enforcement gap between two almost identical practices.²³ And some firms may exploit that gap. For example, a firm that may wish to engage in excessive pricing, but feels uncomfortable with the legal consequences of this practice, may disguise it as price discrimination, knowing that the latter practice is not prohibited outright and does not carry an administrative penalty for a first time offender.

To achieve this, the firm would carefully select both its target customers for an excessive price and target customers for a lower price, to make the practice appear more like price discrimination. When one looks at the price discrimination aspects of the *Senwes*²⁴ and *Telkom*²⁵ cases, for example, it is clear that the excessive prices charged to the complaining customers were not accidental: they were planned and deliberate acts of exploitation and bullying. But the fact that in both cases there were other customers who paid a lower price than the complainants provided the necessary distraction and escape from excessive pricing. In this way, the two firms were able to avoid the obvious consequence that befalls firms that engage in excessive pricing.

The same problem observed above with regard to price discrimination and excessive pricing appear to present a common theme when dealing with exclusionary practices by dominant firms. For example, section 8(b) of the Act provides, on the one hand, that a

²³ Lewis supra n 7 at 144.

²⁴ Supra n 16.

²⁵ Supra n 17.

dominant firm is prohibited from refusing to give a competitor access to an essential facility, “when it is economically feasible to do so” – whatever that may mean! In terms of section 8(b) refusal to give access to an essential facility when it is economically feasible to do so is prohibited outright and no pro-competitive justification is required or entertained.

On the other hand, section 8(d) of the Act also lists and prohibits certain exclusionary practices, among them a refusal to deal.²⁶ In strange contrast, a refusal to deal is not prohibited outright. A refusal to deal can escape condemnation if the respondent firm can show that technological, efficiency or other pro-competitive gains attendant on the refusal outweigh its anticompetitive effect. But in practice one might wonder: what is the real difference between a refusal to grant competitors access to an essential facility and a refusal to deal? Commentators have lamented the difference in treatment between what they view as essentially exclusionary practices having the same effect in the market.²⁷

Another important provision in the area of exclusionary abuse, and the central focus of this Chapter and which I analyse in greater detail below, is section 8(c). Structurally, section 8(c) would have looked more coherent had it been the last provision under section 8. This means that in the order of appearance, the contents of section 8(c) should have been in the place of the current section 8(d), and vice versa. In his order of discussion and analysis of the Act’s abuse of dominance provisions, Unterhalter starts

²⁶ Section 8(d)(iii) of the Act.

²⁷ Brassey supra n 3 at 197-9 and Lewis supra n 7 at 160.

off with section 8(d) and then rounds off with section 8(c), signaling where he too in all likelihood feels the provision should have been located in the scheme of section 8.²⁸ In my view, when outlining legal rules or prohibitions, it appears more logical to start by outlining the more specific ones and end with the general ones. The more general ones will serve an important backup role to the specific ones, by closing loopholes that may arise in cases where a practice or conduct does not fit perfectly into predefined or specified prohibited conduct.

There are important indications that section 8(c) was intended to serve that important backup role to section 8(d). Section 8(c) clearly refers to and prohibits exclusionary acts “other than those listed in section 8(d)”. It is a bit odd that the words “exclusionary acts other than those listed in section 8(d)” appear in section 8(c) in its present form at a point where, logically speaking, the contents of section 8(d) are not yet revealed and therefore unknown to the reader. Drafters of the Competition Act envisaged that the first provision on which to rely when certain exclusionary acts are alleged to have occurred is section 8(d). Only when the alleged prohibited practice does not fit into the list provided in section 8(d), does section 8(c) kick in.²⁹ Indeed, this was the view of the Constitutional Court in *Competition Commission v Senwes Limited*.³⁰ Here the Constitutional Court confirmed that one of the preconditions for the application of section 8(c) is that the act which the dominant firm engaged in must fall outside the scope of section 8(d).³¹

²⁸ Brassey supra n 3 at 197.

²⁹ Mackenzie supra n 9 at 10.

³⁰ 2012 (7) BCLR 667 (CC).

³¹ Id at pars 26-28.

As with several other provisions in the Act, the location and outlook of section 8(c) and (d) suggest different enforcement philosophies for the two provisions. For example, with regard to the enforcement of section 8(c), the Competition Commission or the private complainant bears the onus of establishing that the conduct complained of is exclusionary and has anticompetitive effects. The complainant must also show that there are no pro-competitive benefits attendant upon the conduct. The Tribunal may not impose an administrative penalty for a first time contravention of section 8(c).³² Section 8(c) contraventions are only punishable with an administrative penalty if the Tribunal is satisfied that the contravention is substantially a repetition by the same firm of conduct previously found to have been a prohibited practice.³³

With regard to the enforcement of section 8(d), the plain language of the legislature clearly suggests that harm to the competitive process is, as a matter of law, generally presumed once the complainant proves that the conduct complained of has occurred.³⁴ In *Competition Commission v South African Airways (Pty) Limited*³⁵ the Tribunal found that it would seem from the manner in which section 8 is drafted, that conduct in section 8(d) is presumed to be exclusionary, whereas conduct not on the list – which may fall under section 8(c) – would still have to be proved to be exclusionary.³⁶ And in *Sappi Fine Papers (Pty) Limited v The Competition Commission*³⁷ the Tribunal also found that

³² Section 59(1)(a) and (b).

³³ Section 59(1)(b).

³⁴ Lewis supra n 7 at 143.

³⁵ Case No 18/CR/Mar01.

³⁶ Id at pars 101-105. See also *Competition Commission v Patensie Sitrus Beherend Beperk* Case No 37/CR/Jun01 at par 95.

³⁷ Case No 62/CR/Nov01.

exclusionary acts listed in section 8(d), in contrast with the general category of ‘exclusionary acts’ referred to in section 8(c), are presumptively anticompetitive with the result that a complainant is not required to allege or prove facts to this effect.³⁸ Section 8(d), the Tribunal went further, describes acts whose anticompetitive consequences have been established by a century of antitrust jurisprudence.³⁹

However, in *Competition Commission v South African Airways (Pty) Limited*⁴⁰ the Tribunal also observed that adhering strictly to the language used by the legislature in section 8(d), by presuming anticompetitive effects once the occurrence of an exclusionary act has been proved, may lead to the outlawing of conduct that has no anticompetitive effect because the Act’s definition of an exclusionary act is very broad.⁴¹ The Tribunal then concluded that it is also essential under section 8(d) that the complainant not only establish that there has been an exclusionary act, but also that the act has an anticompetitive effect.⁴² Once the complainant establishes anticompetitive effects, the burden to show that there are technological, efficiency or other pro-competitive gains attendant upon the conduct shifts onto the shoulders of the respondent firm. The Tribunal may impose an administrative penalty for a first time contravention of section 8(d).⁴³

³⁸ Id at par 40.

³⁹ Id at par 52.

⁴⁰ Supra n 35.

⁴¹ Id at pars 107-108. Section 1(1)X of the Act provides that an ‘exclusionary act’ “means an act that impedes or prevents a firm entering into, or expanding within, a market”.

⁴² Supra n 35 at par 111. Subsequent Tribunal decisions have also followed this approach: *Competition Commission v Telkom SA Ltd* supra n 17 at par 99; *Mandla-Matla Publishing (Pty) Ltd v Independent Newspapers (Pty) Ltd* Case No 48/CR/Jun04 at pars 77-78; and *Competition Commission and JT International South Africa (Pty) Ltd v British American Tobacco South Africa (Pty) Ltd* Case No 05/CR/Feb05 at par 296. See also Mackenzie supra n 9 at 11.

⁴³ Section 59(1)(a).

There are two practical differences in the enforcement of section 8(c) and (d). Firstly, in the case of section 8(c) the complainant must prove both anticompetitive effects and lack of efficiency justification for the alleged exclusionary conduct, whereas in the case of section 8(d), once the complainant proves anticompetitive effects the respondent firm must show that there is efficiency justification for the conduct. Secondly, under section 8(c) the Tribunal may not impose an administrative penalty for a first time contravention, whereas it may do so for a first time contravention of section 8(d). Concerns have been raised that exclusionary practices under section 8(c) are unjustifiably dealt with more leniently than those under section 8(d).⁴⁴ I shall address these concerns when I deal more specifically with section 8(c).

The general review of section 8 and its abuse of dominance provisions above, has highlighted some structural and substantive inconsistencies in the formulation and enforcement of a number of provisions. It will be with this background in mind that I now review section 8(c).

3.2.2 A Review of Exclusionary Acts under Section 8(c) of the Competition Act: The Meaning and Scope of Exclusion.

The main aspects of section 8(c) have already been highlighted in the general overview of abuse of dominance provisions in part 3.2.1 above and will not be repeated. It is appropriate merely to state here that section 8(c) prohibits a dominant firm from engaging in an exclusionary act, other than an exclusionary act listed in paragraph (d), if

⁴⁴ Brassey supra n 3.

the anticompetitive effect of that conduct outweighs its technological, efficiency or other pro-competitive gains. The provision imposes on the Competition Commission or complainant the duty to establish the anticompetitiveness of the alleged exclusionary act and to show that the anticompetitive effect of that act outweighs any technological, efficiency or other pro-competitive gains that may accompany the conduct.⁴⁵ Below I consider reasons justifying the placing of a heavier burden of proof on the complainant under section 8(c), in a slightly different manner than under section 8(d).

It cannot be disputed that prior to engaging in the exclusionary acts listed under section 8(d) the dominant firm is already forewarned and aware of the implications of its conduct. This is because the legislature, relying on antitrust experience, has decided that the exclusionary acts listed under section 8(d) are more likely to produce anticompetitive results. As the Tribunal found in *Competition Commission v South African Airways (Pty) Limited*⁴⁶ “the reason for the differences in treatment between exclusionary acts in section 8(c) and (d) is that the exclusionary acts in 8(d) are listed, evidencing the legislature’s view that these are the more egregious of the exclusionary acts and that firms that are dominant are on notice that they must behave with due caution in relation to the listed conduct”.⁴⁷

Armed with massive financial resources, dominant firms generally have the means to engage top experts in the field of antitrust economics and law to advise them on the

⁴⁵ As the Competition Tribunal found in *York Timbers*, section 8(c) places a considerably heavier burden on the complainant than does section 8(d), see *York Timbers Limited v South African Forestry Company Limited* Case No 15/IR/Feb01 at par 100.

⁴⁶ *Supra* n 35.

⁴⁷ *Id* at par 102.

antitrust implications of their proposed action. Should the dominant firm choose to continue with its planned conduct, which is also listed in section 8(d), it is reasonable, given the stand the legislature has taken regarding those listed exclusionary acts, for competition authorities to require the dominant firm to explain the benefit, if any, of such conduct to the competitive process.

However, unlike in the case of section 8(d), the dominant firm is not warned about the possible antitrust implications of its planned conduct under section 8(c). As the Tribunal observed in *Competition Commission v South African Airways (Pty) Limited*⁴⁸ in the case of section 8(c) the dominant firm has no advance notice that the conduct is deemed exclusionary in nature, which explains the legislature's decision to place the onus in section 8(c) on the complainant.⁴⁹ When regard is had to conduct that falls to be considered under section 8(c), even the advice of competent antitrust counsel may not be reliable for dominant firms, given that the provision is supremely vague in its description of dominant firm conduct it proscribes. The only guidance a dominant firm has on the scope of section 8(c) is that the provision prohibits 'exclusionary acts' other than those listed in paragraph (d). But what in the world are "exclusionary acts other than those listed in paragraph (d)"?

The definition of an 'exclusionary act' does not help matters. An exclusionary act is defined in section 1 of the Act as "an act which impedes or prevents a firm from entering into or expanding within the market". But even competitive conduct can have this effect.

⁴⁸ Supra n 35.

⁴⁹ Id at par 102.

As commentators have remarked, “even the most lawful competition is exclusionary: in each sale there is one winner and at least one loser and the loser is to some extent excluded”.⁵⁰ In *Competition Commission v South African Airways (Pty) Limited* the Tribunal admitted that the definition of an exclusionary act is very broad and can lead to the outlawing of conduct that has no anticompetitive effect.⁵¹ The term ‘exclusionary act’, the Tribunal found further, “is therefore not a useful filter for determining whether conduct is competitive or anticompetitive, as both sets of conduct can sensibly be included in the definition”.⁵²

To avoid engaging in potentially exclusionary conduct under section 8(c), the most reliable advice a dominant firm could find would be by seeking an advisory opinion or guidance from the Competition Commission on the competition implications of the conduct.⁵³ However, this platform may not be a comfortable one for most businesses. This is because it risks, despite guarantees of confidentiality, exposing sensitive business plans and secrets in an environment where there is no legal obligation to divulge them. In this context, dominant firms may find themselves with no choice but to proceed to engage in conduct that may later be deemed exclusionary by competition authorities.

⁵⁰ Brassey supra n 3. Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (Online Version, LexisNexis, Last Updated: November 2015) at par 7.11.3.1.

⁵¹ Supra n 35 at par 108.

⁵² Id at par 109.

⁵³ Competition Commission ‘Advisory Opinions and Clarifications’ accessed at <http://www.compcom.co.za/advisory-opinions-and-clarifications/> (date of last use: 6 July 2016). Provisions that can be relied upon for this procedure are section 79(1) of the Competition Act read together with sections 9(1)(d) and 10(4) of the Rules of the Competition Commission.

In this regard, the allocation of the burden of proof under section 8(c) to the competition commission or complainant rather than the dominant firm serves a legitimate purpose of ensuring that competition proceedings are fair and just. It also takes into account the fact that section 8(c) is in general an imperfect provision. Exclusionary acts covered by section 8(c) can take many forms and this increases the likelihood that prohibition under the provision may potentially cover conduct not initially envisaged by drafters of the Act.⁵⁴

A 'widely couched' and 'open-ended provision',⁵⁵ section 8(c) may, if applied without caution or restriction, potentially allow competition authorities considerable powers arbitrarily to introduce new concepts of infringement.⁵⁶ In this regard, the introduction of 'margin squeeze' into our section 8(c) discourse, which the Constitutional Court found was unwarranted,⁵⁷ is a classic example. Margin squeeze abuse was not originally identified in the Act as a form of prohibited conduct through the kind of characterisation seen in section 8(d) because this particular form of conduct was not initially understood as such.⁵⁸

It is also appropriate to make some remarks here about section 59(1) of the Competition Act, which does not allow the Tribunal to impose an administrative penalty on a first

⁵⁴ *Senwes Ltd v The Competition Commission of South Africa* Case No 87/CAC/FEB09 at par 53.

⁵⁵ *Id* at pars 51 and 54.

⁵⁶ Discretionary powers have sometimes been considered arbitrary powers, see Cora Hoexter *Administrative Law in South Africa* (Juta 2012) at 46. Evidence of arbitrary introduction of new concepts of infringement can be seen in the introduction of the 'margin squeeze' concept into our exclusionary abuse of dominance discourse in the *Senwes* case, *supra* n 16.

⁵⁷ *Supra* n 30 at pars 29 and 44.

⁵⁸ Simon Roberts, Javier Tapia & Mario Ybar 'The Same and the Other: A comparative study of abuses of dominance in Chile and South Africa' Centre for Competition, Regulation and Economic Development, University of Johannesburg, Working Paper 2/2013 at 21.

time offender in the case of section 8(c).⁵⁹ Some writers contend that sections 8(c) and 59(1) should be amended to allow the Tribunal to impose an administrative penalty even in the case of first time contravention of section 8(c), because as it stands the provision has weak deterrent value.⁶⁰

However, a counter argument can also be made to the effect that in enacting section 8(c) the legislature might have realised that it was writing into the Act a complicated provision which held the potential to wreak significant havoc on dominant firms, unless that possibility was ameliorated by giving dominant firms some grace in the case of a first time offender.⁶¹ It is also pertinent to state that while an administrative penalty may in theory hold greater deterrent promise, in practice there is no evidence that the majority of companies are deterred from engaging in prohibited conduct by the prospect of facing an administrative penalty. It is a known fact that some of the most egregious competition violations have continued to occur in our economy, despite much publicised record fines being imposed on some offenders.

Some firms may indeed be unfazed by the prospect of facing an administrative penalty, if they have to make a choice between engaging in a profitable prohibited practice while facing an administrative penalty, or foregoing a profitable prohibited practice and avoiding the penalty. Indeed, many elect to engage in a prohibited practice and accept the administrative penalty as a normal cost of trading, subsequently passing it on to the

⁵⁹ Section 59(1)(a) and (b) of the Act.

⁶⁰ Mackenzie supra n 9 at 160.

⁶¹ In *South African Airways* the Tribunal found that the reason for these differences in treatment between section 8(c) and (d) is that the exclusionary acts in 8(d) appears to reveal the legislature's view that the latter are the more egregious of the exclusionary acts, supra n 35 at par 102.

consumer. This has forced policy makers and the legislature to reconsider the effectiveness of administrative penalties in preventing anticompetitive practices. The introduction of personal criminal liability and imprisonment in South African competition law for business executives who cause, or knowingly acquiesce in, their firms' participation in a prohibited practice,⁶² is a classic example of declining confidence in administrative penalties.

There may indeed be other factors relevant to the enforcement of section 8(c) in its current form, which could have a greater deterrent and punitive effect than an administrative penalty. For example, the costs of foregoing a revenue generating opportunity, as a result of an inappropriate order or directive by a competition authority, may by far outstrip an administrative penalty. And this is particularly an issue of great relevance in section 8(c) situations, where there is no reliable science in establishing the competitiveness or anticompetitiveness of the impugned conduct. As stated earlier, this is because the phrase 'exclusionary act', which is intended to serve as a guiding principle under section 8(c), "is not a useful guide for determining whether conduct is competitive or anticompetitive".⁶³ In addition, negative publicity associated with so-called 'penalty-free' section 8(c) litigation, for first time offenders, may not only cause corporate and brand damage to the firm concerned, but may also negatively affect the share price for listed companies. And the cost of protracted litigation, a common occurrence in abuse of dominance litigation, may also add to the aggregate losses a company facing a section 8(c) complaint may have to endure.

⁶² See section 73A of the Competition Act.

⁶³ *Supra* n 35 at par 109.

The margin squeeze case between the *Competition Commission and Senwes Limited*,⁶⁴ a case I discuss in greater detail below, illustrates these concerns. It suffices to state that eight years of litigation ranging from the Competition Tribunal, Competition Appeal Court, Supreme Court of Appeal and eventually the Constitutional Court must have resulted in enormous litigation costs. But the litigation also revealed the firm's concern over the possibility of revenue loss if the relevant commercial practice was stopped or successfully interdicted. If a complaint under section 8(c) was as untroubling for the dominant firm as some observers have suggested,⁶⁵ Senwes would have simply accepted the complaint and apologised. Apart from the rare chance of a civil suit by firms or persons who suffered harm as a result of the prohibited practice, that would have been the end of the matter, as no administrative penalty is levied against a first time offender. However, Senwes's view of the matter was different. The option of accepting the complaint and settling the matter, even without payment of a fine, was not an attractive one, weighed against losing what they believed was a lawful revenue generating commercial practice.

3.2.3 Potential Problems in the Enforcement of Section 8(c) of the Competition Act

The process of prosecuting exclusionary abuse of dominance cases encompasses a significant amount of discretion wielded by competition authorities, as the relevant rules

⁶⁴ Supra n 16.

⁶⁵ Brassey supra n 3 and Lewis supra n 7 at 160. See also generally Mackenzie supra n 9.

are unclear.⁶⁶ Discretionary powers of administrators or administrative agencies, it has been observed, “arise when there is no clear legal answer to a problem and the administrator is free to make a choice among possible courses of action or inaction”.⁶⁷ That is exactly what happens under section 8(c). For some observers, a competition enforcement regime where abuse of dominance is declared unlawful in broad and open-ended terms, leaving the task of defining the boundaries of the relevant law to the discretion of enforcement agencies, is welcome because it guarantees easy and effective enforcement.⁶⁸ Under such a regime allegations or complaints of an abuse of dominance are customarily couched in broad and unspecific terms, to ensure that the impugned dominant firm conduct falls within the catch-all grip of the relevant provision.⁶⁹

But this is unacceptable, and possibly illegal, as it grants antitrust administrators uncircumscribed and arbitrary powers, the exercise of which may offend against the legality principle. Accordingly, section 8(c) may, strictly speaking, not be entirely consistent with the constitutional principle of legality in that it does not unambiguously establish a universally intelligible contravention. It merely gives competition authorities the discretion and power to create a contravention after the fact. As an observer remarked, ‘this vagueness of competition law provisions may raise serious constitutional law questions because they deny affected companies the ability to know beforehand

⁶⁶ Mackenzie supra n 9 at 5 and David S. Evans and A. Jorge Padilla ‘Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach’ (2005) 72 *University of Chicago Law Review* 73-98 at 80.

⁶⁷ Hoexter supra n 56.

⁶⁸ Mackenzie supra n 9 at 3.

⁶⁹ *Nationwide Airlines v South African Airways* supra n 6.

when the law is being violated.’⁷⁰ There is an increasing level of convergence internationally that competition law should use rules that are able to pertinently identify and prohibit specific anticompetitive acts, rather than using open-ended and unintelligible provisions.⁷¹

As the Competition Appeal Court found in *Sappi*, the Competition Commission has no power to prosecute anticompetitive behaviour generally but must prosecute a specific contravention in terms of a specific applicable provision of the Act.⁷² The generic nature of exclusionary acts under section 8(c) potentially allows competition authorities to use their powers and discretion to craft the law for a particular case, having regard to the specific outcome or principle they may wish to emphasise. In the *Netstar* decision, the Competition Appeal Court warned the Competition Tribunal against initially deciding that a particular conduct is anticompetitive and then subsequently formulating reasons for that finding.⁷³ The Competition Appeal Court observed that the Competition Tribunal appeared to be concerned with moulding evidence before it to fit its theory of harm and the legal principles it was seeking to emphasise, rather than adjudicating the case before it on its facts and in accordance with the law.⁷⁴

⁷⁰ Harold Demsetz ‘How Many Cheers for Antitrust’s 100 Years?’ (1992) Vol XXX *Economic Inquiry* 207-17 at 208.

⁷¹ Eleanor Fox ‘Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The US / EU Divide’ 2006 *Utah Law Review* 725-40 at 740; John Vickers ‘Abuse of Market Power’ (2005) 115 *The Economic Journal* F244–F261 at F260; and Mackenzie supra n 9 at 3-4.

⁷² *Sappi Fine Paper (Pty) Ltd v Competition Commission of South Africa* 2003 (2) CPLR 272 (CAC) at par 39. See also *Seven Eleven Corporation SA (Proprietary) Limited and Another v Simelane NO and Other* 2002 (1) SA 118 (T).

⁷³ *Netstar (Pty) Ltd and Others v Competition Commission South Africa* 2011 (3) SA 171 (CAC) at par 61.

⁷⁴ *Id.*

In a democratic society based on the rule of law, such as ours, over-inclusive legal prohibitions and unfettered administrative discretion with no guidelines on how that discretion is to be exercised create considerable problems. As Hoexter remarks, “the idea of unfettered, uncontrolled or unguided discretion is hopelessly at odds with modern constitutionalism”,⁷⁵ as our Constitution requires that there must be some control over or guidelines on broad discretionary powers. Constraints on administrative discretion exist not only for the sake of minimising the violation of rights but also, as the Constitutional Court has held, “to ensure that those who are affected by the exercise of broad discretionary powers will know the legal considerations relevant to the exercise of such powers and in what circumstances they are entitled to seek relief from an adverse decision”.⁷⁶

It is worth remembering that our old competition regime was routinely lambasted for the enormous discretionary powers it granted to the relevant Minister in the enforcement of the legislation.⁷⁷ In the current dispensation, in particular with regard to the enforcement of section 8(c), considerable discretion has now been placed in the hands of competition authorities. But, in line with the rule of law, it is essential that the discretion granted to competition authorities under section 8(c) must be guided and circumscribed. This is to balance the public interest sought to be achieved by the Competition Act and the interests and rights of firms likely to be affected by competition proceedings. As an observer has noted, “the discretion granted to competition

⁷⁵ Hoexter supra n 56 at 47-8.

⁷⁶ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at par 54; *Janse Van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) at par 24; and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at par 32. See also Hoexter supra n 56 at 48.

⁷⁷ Mackenzie supra n 9 at 7.

authorities in enforcing section 8(c) may need to be supplemented by guidelines”, clarifying the types of conduct that are likely to be considered exclusionary.⁷⁸

Such guidelines can be of enormous assistance to administrators in ensuring consistency and predictability in the application of policy or law, especially when the relevant administrative decision is a complex one, requiring the weighing or balancing of many different factors.⁷⁹ In *Armbruster and Another v Minister of Finance and Others*⁸⁰ the Constitutional Court, per Mokgoro J, cautioned that where broad discretionary powers are conferred upon an administrative official or agency by law or regulation, “it would be prudent for the appropriate authority to formulate guidelines as best as they can to give as much assistance to the officials as possible to ensure that the discretion is exercised consistently in a way which reduces error”.⁸¹ Guidelines dealing with section 8(c) would eliminate the risk of prejudice against dominant firms, which might arise from errors in the enforcement of the abuse of dominance provisions of the Act, drafted primarily from a pro-SME and anti-dominant firm perspective.

3.2.4 Significant Exclusionary Abuse of Dominance Cases Considered under Section 8(c)

Section 8(c) has proved in practice to be a popular provision to rely upon in the alternative for the Competition Commission and complainants in exclusionary abuse of

⁷⁸ Id at 13.

⁷⁹ *Sasol Oil Pty Ltd v Metcalfe NO* 2004 (5) SA 161 (W) at 13; *MEC for Agriculture, Conservation, Environmental and Land Affairs v Sasol Oil Pty Ltd* 2006 (5) SA 483 (SCA) at par 19; and *BP Southern Africa Pty Ltd v MEC for Agriculture, Conservation, Environmental and Land Affairs* 2004 (5) SA 124 (W) at 159-60.

⁸⁰ 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283 (CC).

⁸¹ Id at par 80.

dominance complaints before the Competition Tribunal and the Appeal Court. The provision has seldom been relied upon as a stand-alone provision in proceedings. In consequence, where it has been invoked in the alternative, it is not fully considered once authorities find that infringement of the main provision relied upon has occurred.⁸² This accounts, in some respects, for the dearth of jurisprudence on section 8(c).

The leading case at this stage of the development of our section 8(c) jurisprudence is *Competition Commission v Senwes Limited*,⁸³ and this will be my main focus. Senwes is a vertically integrated firm that was found to be dominant in the upstream market of grain storage through its ownership of concrete silos. It also participated or competed in the downstream market for grain trading. Senwes supplied an essential input, grain storage, to its competitors who operated in the downstream market of grain trading. It was alleged that Senwes abused its dominant position through the differential storage tariff it applied in favour of its grain trading business and farmers, to the disadvantage of grain traders against whom it competed in the downstream market.

The most contentious issue in the matter was that rather than at the outset, but at some later stage during the course of the proceedings, the Competition Commission alleged that the different tariffs Senwes charged its own trading arm, farmers, and rival grain traders, constituted a so-called “margin squeeze”.⁸⁴ According to Whish and Bailey, a margin squeeze can occur where a firm is dominant in an upstream market and

⁸² *Competition Commission v South African Airways* supra n 35 at par 218 and *Nationwide Airlines (Pty) Limited and Another v South African Airways (Pty) Limited* Case No 80/CR/Sep06 at par 181.

⁸³ Supra n 16.

⁸⁴ Id at par 45.

supplies a key input to undertakings that compete with it in a downstream market. In such a situation, they add, the dominant firm may have discretion as to the price it charges for the input, and this could have an effect on the ability of other firms to compete with it in the downstream market.⁸⁵ As the Tribunal observed, margin squeeze is a relatively new concept in abuse of dominance literature and case law.⁸⁶

Senwes's conduct, the margin squeeze, was alleged to have contravened section 8(c) of the Competition Act. The Competition Tribunal found,⁸⁷ and the Competition Appeal Court⁸⁸ and the Constitutional Court⁸⁹ confirmed on appeal, that Senwes's conduct contravened section 8(c) of the Competition Act. It is important to state here that section 8(c) neither refers specifically in its language to a 'margin squeeze' nor provides a description of conduct that might be called a margin squeeze. The provision only refers to and prohibits "an exclusionary act".

Difficulties around the meaning and effect of the phrase 'exclusionary act' have already been highlighted above. The phrase is too broad and may result in the outlawing of competitive conduct. The same may also be said of the margin squeeze concept. Its reliability as an infringement concept has been questioned.⁹⁰ As Sidak remarks, "the margin squeeze theory of antitrust liability should be abolished, as it is incompatible with

⁸⁵ Whish and Bailey supra n 4 at 754-5.

⁸⁶ *Competition Commission of South Africa v Senwes Limited* supra n 16 at par 117.

⁸⁷ Id at pars 151 and 305.

⁸⁸ Supra n 54.

⁸⁹ Supra n 30.

⁹⁰ Supra n 54 at par 45.

contemporary antitrust jurisprudence and discourages competition and innovation”.⁹¹ A few weeks after the Tribunal’s decision in *Senwes*, the United States Supreme Court delivered a judgment in *Pacific Bell Telephone Co v linkLine Communications Inc*,⁹² unanimously rejecting the idea that a margin squeeze constituted an abuse of a dominant position under section 2 of the Sherman Act.⁹³

The fact that section 8(c) does not unambiguously disclose an intelligible prohibited practice also affects the manner in which the Competition Commission has to formulate its complaints under the provision. As seen in the *Senwes* matter, the terse motivation advanced in the referral for the section 8(c) complaint was so devoid of detail as to verge on the unconvincing. The Supreme Court of Appeal was indeed unconvinced with the manner in which the complaint was formulated and did not agree with the findings of the other courts and accordingly ruled that a proper complaint under section 8(c) was not made.⁹⁴

As Froneman J also remarked in his separate judgment in the *Senwes* Constitutional Court matter, “the majority judgment has found, *without more*, that the complaint referral covered the conduct found to violate section 8(c) of the Competition Act”.⁹⁵ The complaint referral, in his opinion, did not clearly disclose the conduct complained of, and

⁹¹ J Gregory Sidak ‘Abolishing the Price Squeeze as a Theory of Antitrust Liability’ (2008) 4 *Journal of Competition Law & Economics* 279-309 at 279.

⁹² 555 US 438 (2009).

⁹³ *Id* at 9-12 and 17. See also Luke Kelly and Tjarda van der Vijver ‘Less is More: *Senwes* and the Concept of “Margin Squeeze” in South African Competition Law’ (2009) 126 *South African Law Journal* 246-55 at 246.

⁹⁴ *Supra* n 20 at pars 25 and 38.

⁹⁵ *Supra* n 30 at par 71.

was open to more than one reasonable interpretation.⁹⁶ A similar problem arose in *Competition Commission v Media24 (Pty) Ltd*,⁹⁷ where objections were raised that the Commission's case on section 8(c) was vague and embarrassing because it was lacking in detail.⁹⁸ And the Tribunal agreed that the Commission's case on section 8(c) was indeed vague and embarrassing.⁹⁹

What is beyond doubt is that when the drafters of the South African Competition Act felt confident that a particular conduct generally produces anticompetitive effects, they did not shy away from listing and prohibiting that conduct outright, or subject to some rule of reason assessment. This approach is not only recommended for ease of administration of the relevant provision, but is also a constitutionally sound approach. When a legal provision, such as section 8(c), is of an uncertain meaning and may negatively affect rights, it is necessary that if such provision is not struck down completely on constitutional grounds, its interpretation and application must be restricted in a manner that favors the defendant. That is clearly the approach the legislature envisaged with regard to the enforcement of section 8(c). This is because the burden of proving anticompetitive effects, as well as the absence of any efficiency justification for the impugned conduct, rests on the complainant.¹⁰⁰ In addition, there is no administrative penalty for a first time contravention of section 8(c).¹⁰¹

⁹⁶ Id at par 75.

⁹⁷ Case No 92/CR/Oct11.

⁹⁸ Id at par 15.

⁹⁹ Id at pars 37 and 52.

¹⁰⁰ Section 8(c) of the Act.

¹⁰¹ Section 59(1)(a) and (b) of the Act.

An important principle that emerges is that section 8(c) should be applied in a manner that favours the defendant and not the complainant. It is in this sense that reading a margin squeeze into a section 8(c) complaint in the course of proceedings, as the commission did in *Senwes*, becomes problematic. The respondent had not been sufficiently warned about the true nature and implications of its conduct well in advance in pleadings, in order to enable it to prepare an adequate defence. Indeed, throughout the proceedings before the Tribunal, *Senwes* adopted the stance that it did not have to answer the margin squeeze complaint, as it felt this was not the case made by the Commission at the outset.¹⁰²

A fundamental question that arises from the *Senwes* case is, therefore, whether it is appropriate to view exclusionary abuse allegations against a dominant firm under section 8(c) as concerning, generally, any conduct imaginable by a dominant firm, or only conduct that can be identified from the outset with some degree of clarity?¹⁰³ In my view, an administrative system operating subject to the Constitution, which emphasises the principles of justice and fairness, may not permit the former approach. There is no doubt that the Competition Act and its exclusionary abuse of dominance provisions must be applied in a manner that respects affected firms' fundamental right to just administrative action, enshrined in section 33 of the Constitution and in the Promotion of Administrative Justice Act.¹⁰⁴ This is not to say margin squeeze and other unidentified conduct can never fall foul of section 8(c). If the Commission can develop useful

¹⁰² Supra n 16 at par 279.

¹⁰³ Roberts supra n 9 at 295.

¹⁰⁴ Act 3 of 2000. The Competition Appeal Court has held that the Competition Commission has no power to prosecute anticompetitive behaviour generally but must prosecute a specific contravention in terms of a specific applicable provision of the Act, see *Sappi Fine Paper (Pty) Ltd v Competition Commission of South Africa* supra n 72.

guidelines on how margin squeeze and other unidentified conduct could be brought under the ambit of section 8(c), complaints concerning such conduct would be less controversial and in line with the constitutional imperatives of administrative lawfulness and fairness.

The Commission needs to conduct research on corporate practices that could potentially fall foul of section 8(c) and ensure that these practices are identified and publicised. This way firms will be put on notice about the potential dangers of engaging in such conduct, as is the case under section 8(d). Indeed, competition authorities in other jurisdictions have already developed and published useful guidelines on how a number of exclusionary practices are to be assessed by the relevant competition authority.¹⁰⁵ These guidelines have proved useful in some cases.¹⁰⁶ The Competition Commission could follow this example, by developing guidelines that can be useful in section 8(c) enforcement.

In terms of section 79(1) of the Competition Act, the Competition Commission may prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act. The Act also empowers the Commission to review the

¹⁰⁵ European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (2009/C 45/02) accessed at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224(01)) (date of last use: 6 July 2016). Office of Fair Trading, *Assessment of Conduct, Draft Competition Law Guidelines for Consultation* (April 2004) OFT 441a accessed at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/business_letters/competition_law/oft414a.pdf;jsessionid=03752C1C6A824428EAC844D34327089D (date of last use: 6 July 2016).

¹⁰⁶ *Genzyme Ltd v Office of Fair Trading* [2004] CAT 4 and *Albion Water Ltd v Director General of Water Services* [2006] CAT 36. See also Kelly and van der Vijver *supra* n 93 at 247.

Act and report to the relevant Minister on any anticompetitive conduct that may occur,¹⁰⁷ and to ensure that there is public awareness on matters related to the application and enforcement of the Act.¹⁰⁸ In addition, the Competition Act further empowers the Commission to conduct general research on any matter concerning the purpose of the Competition Act,¹⁰⁹ and to report to the relevant Minister on any matter concerning the application of the Act.¹¹⁰ Therefore, there is sufficient legal authority in the Act for the Commission to conduct research that would lead to the publication of guidelines indicating its policy approach on the enforcement of section 8(c).

The guidelines proposed here would greatly enhance the administration and enforcement of section 8(c). The guidelines will also prevent a situation where it takes years of actual litigation before dominant firms fully understand the antitrust implications of a particular conduct under section 8(c). Where guidelines have been provided, outlining possible conduct that could fall foul of section 8(c), it suffices to say that an administrative penalty for a first time offender may be acceptable, given that the Commission would have sufficiently warned the offender.

3.2.5 Summary

A review of the abuse of dominance and exclusionary abuse provisions in the Competition Act has revealed a number of structural and substantive problems. The manner in which section 8, and section 8(c) in particular, has been formulated increases

¹⁰⁷ In terms of section 21(1)(k).

¹⁰⁸ In terms of section 21(1)(b).

¹⁰⁹ In terms of section 21(2)(b).

¹¹⁰ In terms of section 21(2)(a).

possibilities that almost all dominant firm conduct, including perfectly legitimate conduct, may be found to be exclusionary and anticompetitive. The prospect of wrongful prohibition of legitimate conduct is enhanced by the open-ended definition of an exclusionary act in section 1 of the Act. Indeed, the Tribunal has admitted that the definition of an exclusionary act is very broad and can lead to the outlawing of conduct that has no anticompetitive effect.¹¹¹ The term exclusionary act, the Tribunal also found, “is not a useful filter for determining whether conduct is competitive or anticompetitive, in view of the fact that both competitive and anticompetitive conduct can sensibly be included in the definition”.¹¹² Therefore the prospect of chilling competition in South African competition law, through inappropriate intervention, is far greater than many are willing to acknowledge.

Another source of concern in abuse of dominance adjudication is that exclusionary abuse cases often involve the exercise of considerable discretion by competition authorities. Such discretion arises largely because abuse of dominance provisions, and section 8(c) in particular, do not establish a sufficiently clear contravention, leaving competition authorities with unlimited discretion and power to decide whether a particular dominant firm conduct constitutes a prohibited practice. In a competition law enforcement environment where the mistrust, and even dislike, of big business is prevalent, it is not too far-fetched to suggest that perfectly legitimate dominant firm conduct may become the target of inappropriate intervention.

¹¹¹ *Competition Commission v South African Airways (Pty) Limited* supra n 35 at par 108.

¹¹² *Id* at par 109.

The enormous discretion enjoyed by the Competition Commission under section 8(c) may be welcome for those who hold the view that the presence of dominant firms in markets is a sign of the decline of the state of competition in such markets and favour a culture of vigorous antitrust enforcement against suspected abuses of market power. However, a system where abuse of dominance is declared unlawful in broad and open-ended terms and grants unlimited discretionary powers to competition authorities arbitrarily to determine the elements of conduct which triggers a prosecution or intervention may be contrary to established constitutional principles. Indeed, “the idea of unfettered, uncontrolled or unguided discretion is considered to be at odds with modern constitutionalism”,¹¹³ as our own Constitution requires that there must be some control or guidelines on broad discretionary powers.

It is recommended that the Competition Commission develop guidelines on what type of conduct is likely to fall under section 8(c) and how complaints related to such conduct will be assessed by the Commission. These guidelines will ensure the efficient enforcement of the provision. The guidelines will also prevent a trial and error situation where it takes years of litigation before dominant firms discover the competition implications of particular conduct under section 8(c). If guidelines have been provided, outlining what conduct could fall under section 8(c), an administrative penalty for a first time contravention of section 8(c) might also be appropriate.

Unless the Commission takes the initiative and develops such guidelines, the enforcement of section 8(c) remains fraught with controversy and uncertainty. This is

¹¹³ Hoexter supra n 56 at 47-8.

because precedents on our abuse of dominance law emanating from the decisions of the Tribunal, which is not bound by its previous decisions, have largely been inconsistent and contradictory. The proposed guidelines can therefore play an important role in ensuring legal certainty in an area of law marked by inconsistency. Although the Competition Commission and the Tribunal are independent bodies, and the Tribunal is consequently not bound by the Commission's guidelines, these guidelines will nevertheless be useful for dominant firms. They will provide some indication as to the types of conduct the Commission views as anticompetitive and will refer to the Tribunal for adjudication. Should the Commission decide, in line with its guidelines, not to refer the conduct to the Tribunal for adjudication, because it does not view the conduct as anticompetitive, the guidelines will, save in the case of private referral to the Tribunal, serve as the final word in the individual cases concerned.

3.3 Enforcement Problems with Exclusionary Abuse of Dominance in Foreign Law

3.3.1 Section 2 of the Sherman Act in American Antitrust Law

The philosophy of hostility towards dominant firms has greatly influenced the formulation and enforcement of section 2 of the Sherman Act. In the early development of section 2 jurisprudence, antitrust enforcement agencies brought numerous monopolization suits and took aggressive positions on a number of alleged exclusionary

practices by dominant firms.¹¹⁴ As Fox observed, “the problem with historical American antitrust enforcement was that it had no guiding principle” that restrained the aggressive enforcement of the law.¹¹⁵

The original and unchanged wording of section 2 of the Sherman Act reveals the US Congress’s pervasive discomfort with the domination of markets by a few firms and the exclusion from markets of smaller rivals. Section 2 of the Sherman Act makes it unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations”. Section 2, therefore, establishes three offences, commonly referred to as ‘monopolization’, ‘attempted monopolization’, and ‘conspiracy to monopolize’.¹¹⁶ However, despite the centrality and potentially wide implications of the term ‘monopolization’ in section 2, the term is not defined in the Act.

The language of section 2 has been described in terms such as ‘broad’, ‘deceptive’, and ‘unqualified’.¹¹⁷ The Sherman Act does not offer any guidance in identifying conduct

¹¹⁴ Herbert Hovenkamp ‘The Obama Administration and Section 2 of the Sherman Act’ (2010) 90 *Boston University Law Review* 1611-65 at 1614.

¹¹⁵ Eleanor M Fox ‘What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect’ (2002) 70 *Antitrust Law Journal* 371-411 at 372.

¹¹⁶ *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* supra n 11 at 5 and Antitrust Modernization Commission ‘Exclusionary Conduct Discussion Memorandum’ (11 July 2006) at 4 accessed at <http://govinfo.library.unt.edu/amc/pdf/meetings/ExclCond%20DiscMemo060711fin.pdf> (date of last use: 6 July 2016).

¹¹⁷ Bonny E. Sweeney ‘An Overview of Section 2 Enforcement and Development’ (2008) 2 *Wisconsin Law Review* 231-60 at 232.

prohibited under section 2.¹¹⁸ As Bork puts it, “the bare language of section 2 of the Sherman Act conveys very little”.¹¹⁹ As a result, section 2 leaves a considerable amount of discretion to enforcement agencies and the courts in determining whether or not a particular dominant firm conduct is exclusionary and anticompetitive.¹²⁰ It is arguable that the vague language of the Sherman Act amounted to a delegation of authority to the courts, to develop the law in accordance with the evolving understanding of the concept of competition.¹²¹ For over a century, antitrust enforcement agencies and the courts have grappled with the meaning and scope of the monopolization offence, particularly in the area of exclusionary abuse.¹²² Different kinds of conduct have been found to violate section 2, sometimes in questionable circumstances which raised concerns about over-deterrence and chilling competition.

Indeed the seminal 1945 decision in *Alcoa*, a case which dealt with a dominant firm’s decision to increase production capacity in response to increased demand, seemed to establish a dangerous precedent, implying that almost every conduct actively undertaken by a dominant firm to create a competitive advantage for itself would attract antitrust action.¹²³ Following *Alcoa*, some subsequent cases articulated an extremely expansive view on the types of conduct that could be deemed unlawful under section

¹¹⁸ Frank H. Easterbrook ‘Vertical Arrangements and the Rule of Reason’ (1984) 53 *Antitrust Law Journal* 135-73 at 135-6 and Thomas E Kauper ‘Section Two of the Sherman Act: The Search for Standards’ (2005) 93 *Georgetown Law Journal* 1623-44 at 1623.

¹¹⁹ Robert H. Bork *The Antitrust Paradox: A Policy at War With Itself* (Basic Books Inc 1978) at 57.

¹²⁰ Antitrust Modernization Commission *supra* n 116 at 7.

¹²¹ Thomas A. Lambert and Joshua D. Wright ‘Response to the Antitrust Marathon: Antitrust (Over-?) Confidence’ (2008) 20 *Loyola Consumer Law Review* 219-31 at 222.

¹²² *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* *supra* n 11 at 12.

¹²³ *United States v Aluminium Company of America* 148 F 2d 416 (2d Cir 1945).

2.¹²⁴ For example, it was held that “monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil that stands to be condemned under section 2 even though it remains unexercised”, and further that “the use of monopoly power, however lawfully acquired, to gain a competitive advantage may be unlawful”.¹²⁵ In general, courts have condemned a number of alleged exclusionary practices that in retrospect appear not to have been anticompetitive.¹²⁶

The most vexing problem in section 2 discourse has always been distinguishing between aggressive but lawful competition and anticompetitive exclusionary conduct.¹²⁷ This problem was articulated by the US Court of Appeals for the District of Columbia when it remarked in *Microsoft*¹²⁸ that “whether any particular act of a dominant firm is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern and the challenge for antitrust is establishing a general rule to distinguish between exclusionary acts, which reduce social welfare, and competitive acts, which increase it”.¹²⁹

As the United States Department of Justice noted in its 2008 *Report on Single-Firm Conduct Under Section 2 of the Sherman Act*,¹³⁰ the enforcement of section 2,

¹²⁴ Karen L. Grimm ‘General Standards for Exclusionary Conduct’ Federal Trade Commission Working Paper 3 November 2008 at 4-5 and William E. Kovacic ‘The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: the Chicago/Harvard Double Helix’ (2007) 1 *Columbia Business Law Review* 1-82 at 17.

¹²⁵ *United States v Griffith* 334 US 100, 107 (1948). See also Grimm supra n 124 at 5.

¹²⁶ Timothy J. Muris ‘The FTC and the Law of Monopolization’ (2000) 67 *Antitrust Law Journal* 693-724 at 695.

¹²⁷ *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* supra n 11 at 12 and Grimm supra n 124 at 1.

¹²⁸ *United States v Microsoft Corporation* 253 F 3d 34 (DC Cir 2001).

¹²⁹ *Id* at 58.

¹³⁰ *Supra* n 11.

particularly in cases involving allegations of exclusionary conduct by dominant firms, has caused great concern among legal and economic commentators.¹³¹ This followed research that revealed that some dominant firm conduct, presumed exclusionary and anticompetitive, would in fact lead to efficiencies and consumer benefit.¹³² The Report made a number of observations, including that: antitrust's historic hostility to the practice of tying is unjustified, as such hostility is inconsistent with modern decisions of the US Supreme Court; bundling is a common practice in the market which frequently benefits consumers; unilateral and unconditional refusals to deal with rivals should no longer play a meaningful role in section 2 enforcement; and some exclusive dealing arrangements should not be illegal.¹³³

As far as the application of section 2 to exclusionary abuses is concerned, the Report created the impression that American antitrust law had come to embrace and recognise the role of dominant firms in a modern and globalised economy. The report also suggested that, given the potential pro-competitive and consumer benefits of some conduct alleged to be exclusionary, the Department of Justice's Antitrust division would adopt a more cautious approach to future enforcement actions against dominant firms in alleged exclusionary abuse cases.¹³⁴

¹³¹ Id at 1.

¹³² Id.

¹³³ Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and Its Practice* 3 ed (West Group 2005) at 299; Einer Elhauge 'Defining Better Monopolization Standards' (2003) 56 *Stanford Law Review* 253-344 at 253 and 294-305; Antitrust Modernization Commission supra n 116 at 15-17 and Kelly Everett 'Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?' (2009) 29 *Journal of the National Association of Administrative Law Judiciary* 727-71 at 758-9.

¹³⁴ Hovenkamp supra n 114 at 1613.

So, the Justice Department appeared to warm to the emerging sentiment that big is not always bad, as classically demonstrated by the 2004 Supreme Court decision in *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*.¹³⁵ Here, the Supreme Court required an antitrust plaintiff to present a much stronger case to persuade the Court that a dominant firm violated section 2, by unilaterally refusing to deal with a rival.¹³⁶ The Report recognised that while the policy of section 2 of the Sherman Act should remain the prevention of conduct that harms competition, it remained essential to guard against overly broad antitrust prohibitions and overzealous enforcement that would eventually suppress legitimate competition.¹³⁷

However, at the end of the Bush administration's second term and the beginning of the Obama administration's first term in 2009, the new officials at the Justice Department's Antitrust Division swiftly made an about-turn on the Single-Firm Conduct Report, and immediately withdrew it.¹³⁸ In its statement announcing the withdrawal of the Report, the Department of Justice said that it raised too many hurdles for government antitrust enforcement policy, by favouring extreme caution when pursuing exclusionary abuses by dominant firms.¹³⁹ The withdrawal of the Report, it has been observed, "was a shift in philosophy, consistent with Obama's own presidential campaign, and the clearest

¹³⁵ 540 US 398 (2004).

¹³⁶ The Court found that mere possession of monopoly power, and the concomitant charging of monopoly prices, is not unlawful, unless the complainant can also prove the existence of anticompetitive conduct, id at 407. See also Hovenkamp supra n 114 at 1630.

¹³⁷ *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* supra n 11 at vii and 14.

¹³⁸ US Department of Justice, *Justice Department Withdraws Report on Antitrust Monopoly Law* (05/11/2009) accessed at http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm (date of last use: 6 July 2016) and Hovenkamp supra n 114 at 1612.

¹³⁹ *Justice Department Withdraws Report on Antitrust Monopoly Law* supra n 138 and Christine A. Varney 'Vigorous Antitrust Enforcement in this Challenging Era' Remarks as Prepared for the United States Chamber of Commerce 12 May 2009 at 6-7 accessed at <http://www.justice.gov/atr/public/speeches/245777.pdf> (date of last use: 6 July 2016).

indication that the Antitrust Division would aggressively be pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition by excluding rivals and potentially harming consumers”.¹⁴⁰

The Justice Department noted that while recognising the right of firms with market power to continue to compete, they could not allow them a free pass to undertake exclusionary acts as a result of the passive monitoring of market participants espoused by the Department’s earlier Report on Single-Firm Conduct.¹⁴¹ Dominant firms were accordingly placed on high alert to carefully analyse their practices in light of the Department’s new plan to aggressively pursue exclusionary abuses under section 2.¹⁴²

In support of its decision to pursue a more vigorous enforcement policy towards exclusionary practices by dominant firms, the Department relied on some previous section 2 cases that highlighted the harmful effects of monopolists’ exclusionary and predatory conduct on competition and consumers. Reliance on such cases was evident in a speech prepared for the United States Chamber of Commerce by former Assistant Attorney General, Christine A. Varney.¹⁴³ In her speech, Varney noted that in *Lorain Journal Co v United States*¹⁴⁴ the Court had expressly rejected the idea that a newspaper publisher had a right as a private business concern to select its preferred

¹⁴⁰ *Justice Department Withdraws Report on Antitrust Monopoly Law* supra n 138 and Hovenkamp supra n 114 at 1613.

¹⁴¹ Varney supra n 139 at 14 and Barbara S Steiner et al ‘Assistant Attorney General Varney Withdraws DOJ Single-Firm Conduct Report’ 13 May 2009, Jenner & Block, Client Advisory at 2-3 accessed at http://jenner.com/system/assets/publications/1901/original/Assistant_Attorney_General_Varney_Withdraws_DOJ_Single-Firm_Conduct_Report_05.13.09.pdf?1319753620 (date of last use: 6 July 2016).

¹⁴² Steiner supra n 141 at 2.

¹⁴³ Varney supra n 139 at 9.

¹⁴⁴ 342 US 143 (1951).

customers and refuse to accept advertisements from whomever it pleased.¹⁴⁵ In *Aspen Skiing Co v Aspen Highlands Skiing Corp*¹⁴⁶ the Court remarked that “any right of a monopolist to refuse to deal with other firms is not unqualified”.¹⁴⁷ The vigorous enforcement approach proposed in the statement withdrawing the Report on Single-Firm Conduct,¹⁴⁸ as well as in Varney’s speech,¹⁴⁹ appeared overly-aggressive and arguably created a fear of over-deterrence and chilling competition.¹⁵⁰

This, of course, is not to say that dominant firms must be allowed a free rein in which every aspect of their conduct goes unscrutinised. The contention here is that there must be a reliable principle in terms of which some dominant firm conduct could fall into safe harbours and not risk antitrust interference, because such conduct is generally competitive and benefits consumers.¹⁵¹ There may be, on the one hand, some instances where a more expansive and vigorous enforcement of section 2 is warranted, for example in cases where time and experience have shown unequivocally that a particular dominant firm conduct distorts competition and harms consumers. On the other hand, there may be other instances where a more cautious and restricted enforcement approach is warranted, for example in cases where considerable doubt and uncertainty exist as to the competitiveness or otherwise of the impugned conduct.

¹⁴⁵ Id at 153-5.

¹⁴⁶ 472 US 585 (1985).

¹⁴⁷ Id at 605-11.

¹⁴⁸ *Justice Department Withdraws Report on Antitrust Monopoly Law* supra n 138 and Hovenkamp supra n 114 at 1612.

¹⁴⁹ Varney supra n 139 at 9.

¹⁵⁰ Everett supra n 133 at 770.

¹⁵¹ In order to improve predictability, efficiency, and effective enforcement, it is submitted, the use of safe harbours for conduct that is not abusive rather than using presumptions of abuse is essential, Competition Law Forum’s Article 82 Review Group ‘The Reform of Article 82: Comments on the DG-Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses’ (2006) 2 *European Competition Journal* 169-75 at 170. See also Damien Geradin ‘A Proposed Test for Separating Pro-competitive Conditional Rebates from Anti-competitive Ones’ (2009) 32 *World Competition* 41-70 at 66-7.

The latter scenario is substantially true of a number of forms of dominant firm conduct deemed to be exclusionary.

There has never been a satisfactory level of consensus, even within the antitrust enforcement community, over what constitutes unlawful exclusionary conduct. The public disagreement between the Federal Trade Commission and the Antitrust Division of the Justice Department on the norms governing exclusionary conduct illustrates this point.¹⁵² The decisions of the Courts in *Lorain Journal*,¹⁵³ *Aspen Skiing*¹⁵⁴ and *Trinko*¹⁵⁵ also point the monopolization law on exclusionary practices in diametrically opposing directions: while *Lorain Journal* and *Aspen* held that the right of a monopolist to refuse to deal is not unqualified; *Trinko*, in contrast, celebrates the right of the monopolist to exclude its rivals in the interest of encouraging innovation.¹⁵⁶ This suggests that abuse of dominance law on exclusionary practices is not settled. This means a more cautious approach in the enforcement of section 2 to a number of dominant firm practices considered exclusionary may be appropriate, given the lack of generally accepted wisdom in this area.

As Muris convincingly argues, “when we lack confidence that certain practices are always or almost always anticompetitive, we should not automatically assume that there

¹⁵² Jonathan B Baker ‘Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement’ (2010) 76 *Antitrust Law Journal* 605-52 at 606.

¹⁵³ *Supra* n 144.

¹⁵⁴ *Supra* n 146.

¹⁵⁵ *Supra* n 135.

¹⁵⁶ Peter C. Carstensen ‘False Positives in Identifying Liability for Exclusionary Conduct: Conceptual Error, Business Reality, and Aspen’ 2008 *Wisconsin Law Review* 295-330 at 295.

is an anticompetitive impact from the practice”.¹⁵⁷ And, as Muris further observes, “there are serious questions as to whether a number of allegedly exclusionary practices are in fact exclusionary and anticompetitive”.¹⁵⁸ In his opinion anticompetitive single-firm exclusionary conduct is ‘rare’, or rarely produces tangible results for the monopolist.¹⁵⁹

The risk of under-enforcement and under-deterrence as a result of a more cautious enforcement approach (where the anticompetitiveness of an alleged exclusionary act is in doubt) is tolerable and justifiable. In a society founded on a constitution which guarantees due process, the choice, in my view, by antitrust enforcement agencies to err on the side of under-enforcement and under-deterrence (where the anticompetitiveness of an alleged exclusionary act is in doubt) serves a legitimate purpose and is legally and constitutionally defensible. By contrast, erring on the side of over-enforcement and over-deterrence (where the anticompetitiveness of an alleged exclusionary act is in doubt) may destroy competition and offend against the principle of due process, common in many legal traditions that embrace the rule of law, such as the United States. However, modern American antitrust law enforcement attempts to avoid these problems by insisting that alleged exclusionary conduct by dominant firms will only be prohibited if it results in consumer harm.¹⁶⁰ This means the exclusion of rivals, which can also result from lawful conduct, is not a more decisive factor than harm to consumers. This approach has narrowed down the number of dominant firm conduct

¹⁵⁷ Muris supra n 126 at 715.

¹⁵⁸ Id. Fox supra n 115 at 382-3.

¹⁵⁹ Muris supra n 126 at 693.

¹⁶⁰ See discussion in Chapter 2 at 2.2.4. See also Fox supra n 115 at 372 and 378-80.

which would be subjected to antitrust intervention and condemnation,¹⁶¹ creating safe harbours for lawful conduct.

3.3.2 Article 102 in European Competition Law

Unlike section 2 of the Sherman Act, Article 102 is more explicit about the types and nature of dominant firm conduct it considers abusive. However, despite the provision going to some length in giving examples of conduct that might constitute an abuse of dominance, the practice in European competition law is to treat the provision as non-exhaustive in its description of dominant firm conduct it proscribes.¹⁶² As in the case of section 8(c) of the South African Competition Act and section 2 of the Sherman Act, competition authorities in Europe have the authority and discretion to incorporate unlimited numbers of dominant firm conduct that they may consider to be abusive and exclusionary into the broad framework of Article 102.¹⁶³ Indeed, a great deal of the dominant firm practices that are considered exclusionary in Europe today, are not explicitly listed in Article 102, although they fall within the provision's broad framework through interpretation.

With regard to the application of Article 102 to abusive practices generally and exclusionary conduct in particular, European competition officials have stated that the

¹⁶¹ Kovacic supra n 124 at 3 and 20.

¹⁶² Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* at par 26. See also Whish and Bailey supra n 4 at 193.

¹⁶³ Article 102 of the Treaty of Europe, it is submitted, provides a general prohibition against any abuse of a dominant position within the Common Market and to this extent there is some similarity between section 2 of the Sherman Act and Article 102, see Mark N. Berry 'The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions' (2001) 32 *Law and Policy in International Business* 263-330 at 283.

provision is applied to protect competition for the benefit of consumers and not to protect competitors.¹⁶⁴ However, their argument that Article 102 is applied to protect consumers and not competitors does not accurately reflect the reality on the ground. European competition authorities and the courts are generally intolerant of market conduct that excludes competitors. Consumer welfare does not appear to be the primary or direct focus of European competition law enforcement, particularly in exclusionary abuse cases.

The central concern of Article 102 with regard to exclusionary conduct is market foreclosure.¹⁶⁵ In the much celebrated and often cited *Hoffmann-La Roche*¹⁶⁶ decision, the European Court of Justice stated that “a dominant firm commits an exclusionary act of the kind prohibited under Article 102 when it engages in behavior designed to, or having the effect of, influencing the structure of the market where, as a result of the very presence of the undertaking in question in the market, the degree of competition is already weakened”.¹⁶⁷ This decision, it is submitted, makes it clear that the impugned conduct is judged primarily against its ability or potential to foreclose competitors from the market rather than its impact on consumers.¹⁶⁸

It is clear that the protection of the market structure and the preservation of market opportunities for competitors are more important, and indeed the central concern of

¹⁶⁴ See discussion in Chapter 2 at 2.3.2 and DG Competition, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (December 2005) at 17-18 accessed at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (last date of use: 6 July 2016).

¹⁶⁵ *Guidance on the Commission's Enforcement Priorities in Applying Article 82* supra n 104 at par 6.

¹⁶⁶ Case 85/76 *Hoffmann-La Roche & Co AG v Commission*.

¹⁶⁷ *Id* at pars 39 and 90.

¹⁶⁸ *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* supra n 164 at 18.

European abuse of dominance law on exclusionary practices. Indeed, a dominant firm practice is only considered to be exclusionary because, as the name suggests, it excludes the dominant firm's rivals from the market.¹⁶⁹ Put differently, exclusionary practices by dominant firms do not always or automatically harm consumers, which is why dominant firm practices that directly harm consumers are not called 'exclusionary' but rather 'exploitative' practices.¹⁷⁰ In exclusionary abuse of dominance cases, European competition authorities and the courts hardly ever consider directly, that is not through drawing inferences or presumptions, the possibility of consumer exploitation or harm.

Consumer welfare is, therefore, not a primary but an ancillary or secondary goal of European competition law enforcement on exclusionary practices. Indeed, recent case law on Article 102 suggests that the main concern of the provision is not the direct impact of dominant firm conduct on consumers, but the impact of such conduct on competitors, which in turn may affect consumers.¹⁷¹ As Marsden and Gormsen remark, "if, by protecting competitors or rivalry, consumers are indirectly protected, then that is a bonus because consumer welfare is not the main aim of European competition law on abuse of dominance".¹⁷² Indeed, if consumer welfare was the primary focus of

¹⁶⁹ Pinar Akman 'Exploitative Abuse in Article 82 EC: Back to Basics?' (2009) *Cambridge Yearbook of European Legal Studies* Working Paper 09-1 at 11 accessed at http://www.uea.ac.uk/polopoly-fs/1.105848!wp091_exploitative_abuse_in_article82EC_PA.pdf (date of last use: 6 July 2016).

¹⁷⁰ Id. Eugene Buttigieg 'Consumer Interests and the Antitrust Approach to Abusive Practices by Dominant Firms' (2005) 16 *European Business Law Review* 1191-1285 at 1196.

¹⁷¹ Cases C-209/10 *Post Danmark A/S v Konkurrencerådet* at par 20 and C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* at par 24. Philip Marsden and Liza Lovdahl Gormsen 'Guidance on abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure' (2010) 55 *The Antitrust Bulletin* 875-914 at 885.

¹⁷² Marsden and Gormsen supra n 171 at 878 and Buttigieg supra 170.

European exclusionary abuse of dominance law, the assessment of the alleged exclusionary conduct would be conducted in reverse. This means instead of initially determining whether the conduct forecloses rivals, the first and most important step would be to ask whether the conduct harms consumers, similar to how the inquiry is conducted in American antitrust law under section 2 of the Sherman Act.¹⁷³

Evaluating the competitiveness of alleged exclusionary conduct by initially determining whether the conduct harms consumers, is clearly more consistent with the philosophy of applying the law to protect competition for the benefit of consumers and not competitors. This approach recognises consumer welfare as the central and guiding principle of competition law and its enforcement. It also ensures that the correct type of exclusionary and abusive conduct by a dominant firm is eradicated: that is only conduct which results in consumer harm. To achieve this outcome some hard choices would have to be made. This includes deciding to tolerate conduct which may exclude rivals, provided there are clear and tangible consumer benefits flowing from the conduct. The reverse option is a regrettable one, and one which, unfortunately, is very common in European competition law: that is outlawing conduct that excludes rivals, but which may benefit consumers.

The problem of outlawing conduct that excludes rivals but benefits consumers stems from the choice of a flawed or inappropriate standard or approach for the assessment of unilateral conduct. Such standard or approach may use 'triggering facts' that may be present even when the behavior is competitive, resulting in it being declared

¹⁷³ See discussion in Chapter 2 at 2.2.4.

anticompetitive.¹⁷⁴ An example of such a flawed approach is one which uses rival or competitor foreclosure as a primary and dominant triggering fact, potentially bringing competitive conduct within the firing line, as competitive conduct has the effect of excluding inefficient rivals. For example, a decision by a dominant firm to reduce the price of its product can be a competitive action determined by a reduction in its costs, thereby allowing it to increase its market share and profit while also benefiting consumers. However, the same decision can also be deemed to constitute predatory pricing designed to eliminate or exclude a major rival.¹⁷⁵

When regard is had to the approach for dealing with exclusionary practices in European abuse of dominance law under Article 102, it has been established that the risk of prohibiting conduct that is beneficial to consumers is high.¹⁷⁶ This is because in Europe the practice of competition enforcement on exclusionary practices does not draw a clear distinction between harm to competitors and harm to consumers. When applying Article 102, the European Commission and the courts rely on the assumption that the mere existence of dominance creates a presumption of harm to the market structure and by extension consumers.¹⁷⁷

Indeed, dominant firm conduct which harms competitors is generally regarded as injurious to consumers and will be prohibited without seriously and independently

¹⁷⁴ *The Cost of Inappropriate Interventions/Non Interventions* supra n 12 at 11.

¹⁷⁵ *Id* at 8.

¹⁷⁶ Neelie Kroes 'The European Commission's Enforcement Priorities as Regards Exclusionary Abuses of Dominance - Current Thinking' (2008) 4 *Competition Law International* 4-7 at 4-5.

¹⁷⁷ Marsden and Gormsen supra n 171 at 875.

interrogating the aspect of consumer harm.¹⁷⁸ In *British Airways* it was held that there is no requirement, when applying Article 102, to prove direct harm to consumers.¹⁷⁹

This lack of a clear distinction between harm to competitors (or the interests of competitors) and harm to consumers (or the interests of consumers) may lead to the prohibition of dominant firm practices which exclude rivals, but which also benefits consumers. In practice, consumer and competitor interests do not always mean the same thing and in many instances they clash.¹⁸⁰ In the event of a clash between the interests of consumers and business competitors, it is for the competition authority to choose one interest which is more worthy of protection than the other. It is well recognised in competition law that consumer interests will always supersede competitors' interests, because the purpose of competition law is not to protect competitors but to promote competition as a means to enhance consumer welfare. It follows, therefore, that in some instances consumer interest can best be served by the removal of an inefficient competitor from the market.¹⁸¹ Indeed, the market would be better off if competitors who deliver nothing to consumers in terms of price, choice, quality, and innovation were to exit the market.¹⁸²

3.3.3 Summary

¹⁷⁸ *Guidance on the Commission's Enforcement Priorities in Applying Article 82* supra n 105 at par 22 and Marsden and Gormsen supra n 171 at 884.

¹⁷⁹ Case C-95/04P *British Airways v. Commission* at par 107.

¹⁸⁰ Marsden and Gormsen supra n 171 at 878.

¹⁸¹ *Id.* See also Kroes supra n 176 at 5.

¹⁸² *Guidance on the Commission's Enforcement Priorities in Applying Article 82* supra n 105 at par 6.

A review of European competition law on abuse of dominance and exclusionary practices has revealed that there is a real risk of the prohibition of competitive and perfectly legitimate dominant firm conduct. This is because Article 102 in European competition law has been applied primarily to protect market opportunities for rivals. Consumer welfare is treated as a secondary or indirect goal of European abuse of dominance law. The result is a high likelihood that dominant firm practices that might benefit consumers but excludes inefficient rivals runs the risk of prohibition.

In this regard the European enforcement approach to exclusionary abuses under Article 102 is very similar to that under section 8(c), read together with the definition of an exclusionary act in section 1 of the South African Competition Act. In both these jurisdictions, the exclusion of rivals is an important triggering factor for prosecution or intervention, than harm to consumers. Indeed, some decisions in South Africa and Europe have suggested that it is possible to find harm to competition, even when harm to consumers has neither been considered nor established.

However, a study of the application of section 2 of the Sherman Act to unilateral and exclusionary practices by dominant firms in American antitrust law has revealed some important lessons that South Africa can adopt in the future. In American antitrust law, the relentless reliance on consumer welfare as a guiding and central principle in monopolization cases in general and exclusionary practices in particular ensures that only dominant firm practices which harm consumers are outlawed. This means the exclusion of rivals, which can also result from lawful conduct, is not a decisive factor.

This approach has narrowed down the number of dominant firm conduct which would be subjected to antitrust intervention and condemnation,¹⁸³ creating safe harbours for lawful conduct.

3.4 Conclusion

This Chapter has highlighted some structural problems relating to the manner in which several abuse of dominance provisions in the Competition Act have been positioned. The Chapter has also revealed substantive problems relating to the open-ended nature of section 8(c), which creates the risk that almost all dominant firm conduct may be deemed to be exclusionary. This is because the definition of an exclusionary act in section 1 of the Act is not helpful in distinguishing between competitive and anticompetitive dominant firm conduct. This may result in competitive dominant firm conduct being prohibited as anticompetitive and exclusionary. The solution to this problem could be the adoption of an enforcement approach to section 8(c) that is consumer centered, similar to that followed in America. This approach will ensure that the exclusion of rivals, which can also result from lawful conduct, is not a more decisive factor than harm to consumers.

I have also shown that the broad and open-ended nature of section 8(c) confers uncircumscribed discretionary powers on competition authorities in determining whether a particular dominant firm conduct is competitive or anticompetitive. The provision is so

¹⁸³ Kovacic supra n 124 at 3 and 20.

vague that it deprives dominant firms affected by it of the ability to know beforehand that their planned action is exclusionary and illegal. The open-ended and vague nature of section 8(c) coupled with its conferral of uncircumscribed discretion on competition authorities may be contrary to the Constitution and the rule of law. Modern constitutional traditions eschew the conferral of unfettered discretion to administrative bodies and prefer the use of intelligible legal provisions, to ensure that those affected by the law are able to consider and plan their actions appropriately.

Given the problems that have occurred and are likely to continue when regard is had to the application and enforcement of section 8(c), I recommend that the Competition Commission use its powers under the Competition Act to develop guidelines that will outline its enforcement policy under the provision. Indeed, competition authorities in other jurisdictions, such as the United States, Europe and the UK, have developed similar guidelines outlining their enforcement policy or approach to different exclusionary practices by dominant firms.

It is recommended that the Commission's guidelines on its enforcement policy or approach to exclusionary conduct under section 8(c) must provide clarity on the nature or types of conduct it is likely to consider anticompetitive under the provision. The guidelines must further indicate the criteria the Commission will use to assess or determine the anticompetitiveness of the relevant practices. These guidelines are further necessitated by the inconsistency in the decisions of the Tribunal on the proper approach for the treatment of dominant firm conduct in abuse of dominance

proceedings. So, the guidelines will play an important role in enhancing the effective enforcement and administration of section 8(c).

4.1 Introduction

In most jurisdictions, the enforcement of competition law rules is conducted through two established channels: either public or private enforcement. In a public enforcement scenario, a competition authority, for example the Competition Commission in our law, the Federal Trade Commission in American antitrust law and the European Competition Commission in European competition law, assumes responsibility for taking legal action against firms that violate competition rules.

In a private enforcement scenario, in some jurisdictions firms directly affected by competition law transgressions will institute legal action against the defendant in the civil courts and seek damages without the involvement of, or any prior finding by, a competition authority that the defendant has engaged in anticompetitive conduct. It is appropriate to observe here that, in South African competition law, a prior finding by a competition authority that the defendant has engaged in anticompetitive conduct is essential before private enforcement, by the pursuit of damages in the civil courts, is instituted.¹

¹ This is because the civil courts in South Africa have no jurisdiction to pronounce on the merits of a competition dispute, including the question of whether a transgression of the Competition Act has occurred. See section 65(2) of the Competition Act.

In most jurisdictions, the relevance and importance of causation in competition law proceedings vary depending on the enforcement channel taken. Where the route of private enforcement is taken and the complainant seeks damages for antitrust injury, causation is invariably required.² However, in the three jurisdictions under review (that is, South Africa, Europe and America), where the route of public enforcement is taken, the requirement of causation is virtually nonexistent.³ It is this absence of causation in public competition law enforcement which is the central focus of this Chapter. Causation in private competition law enforcement is therefore not the subject of discussion in this Chapter.

It is appropriate to observe at the outset that in different jurisdictions the concept of causation has been invoked in public competition law proceedings in different circumstances, which suggests that there may be conceptual differences in the understanding of this concept.⁴ For example, in European competition law the concept of causation is understood to mean that the complainant must show that a firm has used its dominant position as a means or instrument for engaging in anticompetitive conduct.⁵ In other words, in European competition law causation refers to the role that a dominant position has played in enabling or causing anticompetitive conduct. However, in American antitrust law the concept of causation is understood to mean that the complainant must show that anticompetitive conduct has been used as an instrument to

² Mark N. Berry 'The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions' (2001) 32 *Law and Policy in International Business* 263-330 at 315 and 320.

³ *Id* at 315 and 317.

⁴ Luke Meier 'Using Tort Law to Understand the Causation Prong of Standing' (2011) 80 *Fordham Law Review* 1241-99 at 1241.

⁵ Berry *supra* n 2 at 314.

attain or enhance or protect a dominant position.⁶ Thus, in contrast to European competition law, the concept of causation in American antitrust law refers not to the role that a dominant position has played in enabling or causing anticompetitive conduct, but to the role that anticompetitive conduct has played in the attainment or enhancement or protection of a dominant position.

In South African common-law (in particular civil and criminal law) the concept of causation is understood to refer to the causal link between the defendant's conduct and the harmful or unlawful consequences suffered by the complainant or victim. In the context of our competition law causation is relevant when assessing the effect of the dominant firm's conduct on consumers or competitors in the market. The relevance and importance of causation becomes more obvious in those competition cases where experience and logic have proved that it is difficult, if not impossible, to classify the action of a dominant firm as anticompetitive and illegal, without having thoroughly considered its effect on consumers and competitors.⁷ In this regard, the insistence in some of our abuse of dominance provisions and case law that the complainant must establish 'anticompetitive effects' in order to succeed in a competition complaint, may

⁶ *Rambus Inc v Federal Trade Commission* 522 F 3d 456 (DC Cir 2008) at 462-4; *Broadcom Corp v Qualcomm Inc* 501 F 3d 297 (3d Cir 2007) at 314; and *United States v Microsoft* 253 F 3d 34 (DC Cir 2001) at 61-2. Michael A Carrier 'A Tort-Based Causation Framework for Antitrust Analysis' (2011) 77 *Antitrust Law Journal* 991-1016 at 993-6. See also Ankur Kapoor 'What Is the Standard of Causation of Monopoly?' (2009) 23 *Antitrust* at 38-41.

⁷ Office of Fair Trading *The Cost of Inappropriate Interventions/Non Interventions under Article 82* (September 2006) Economic Discussion Paper, OFT 864 at par 1.25 accessed at ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo_report.pdf (date of last use: 6 July 2016).

appear to be a step in the right direction towards the development of an appropriate causation framework for our competition law.⁸

In this Chapter I observe that despite the insistence in some abuse of dominance provisions that the complainant must establish ‘anticompetitive effects’ (the so-called ‘effects approach’), in practice the issue of causation remains of limited importance in competition law. To the extent that causation is considered in abuse of dominance proceedings, this usually happens implicitly or indirectly and in a manner that reveals a worrying lack of robustness.⁹ This leads to the absence of a clear and consistent framework of causation for competition law. As Sutherland and Kemp observe, “one of the underdeveloped areas of South African competition law concerns how the competition authorities determine whether the conduct in question has caused the anticompetitive effect complained of”.¹⁰ There also appears to be near unanimous agreement in European competition law that causation is of limited importance in the adjudication of competition disputes.¹¹ An American observer has also noted that in American antitrust law “causation is one of the most underexplored areas”.¹²

In this Chapter I argue that it is necessary from both a theoretical and a practical point of view that the issue of causation is recognised and dealt with in competition

⁸ See section 8(c) of the Competition Act. See also *Competition Commission v South African Airways (Pty) Ltd* Case No 18/CR/Mar01 at par 111.

⁹ Robert O’Donoghue and Jorge Padilla *The Law and Economics of Article 102 TFUE* 2 ed (Hart Publishing 2013) at 271 and Berry supra n 2 at 314.

¹⁰ Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (Online Version, LexisNexis, last updated November 2015) at par 7.11.3.2.

¹¹ Thomas Eilmansberger ‘How to Distinguish Good from Bad Competition under Article 82 EC: in Search of Clearer and More Coherent Standards for Anti-competitive Abuses’ (2005) 42 *Common Market Law Review* 129-78 at par 3.1. Berry supra n 2 at 317.

¹² Carrier supra n 6 at 991.

proceedings as a fundamental legal issue that is central to antitrust liability.¹³ The introduction of causation in competition law will ensure that there is fairness in abuse of dominance proceedings. Causation will ensure that only dominant firm conduct which has caused the exclusion of competitors or harm to consumers and is sufficiently close to, or is not too remote from, this consequence will attract antitrust liability. In particular, the view taken here is that the adoption of common-law principles of causation may play an important role in guiding and shaping the development of an appropriate causation framework for competition law in South Africa.

In the discussion that follows, part 4.2 addresses the initial issue that arises in the adjudication of all competition disputes, which is evidence showing that the respondent has engaged in prohibited conduct, here conduct constituting an abuse of dominance, and in particular an exclusionary abuse of dominance. In part 4.3 I examine some challenges that may arise when determining the effect of the alleged abusive dominant firm conduct on competition. Relevant to the determination of the effect of the alleged abusive dominant firm conduct on competition is the issue of causation, which I consider subsequently in part 4.4. Here, I outline the principles of common-law causation, which, in my view, can play an important role in guiding and shaping the development of an appropriate causation framework for competition law.

In part 4.5 I review South African case law on abuse of dominance in which the question of causation has been central to the determination of issues. Here, cases where an

¹³ *Netstar (Pty) Ltd and Others v Competition Commission South Africa* 2011 (3) SA 171 (CAC) at par 31. Berry supra n 2 at 314.

incorrect causation approach was adopted are contrasted with cases where the correct causation approach was adopted. Part 4.6 reviews the application of causation principles in foreign competition law. Part 4.7 considers the rise of the ‘effects approach’ in modern competition law enforcement and its implications for causation. Part 4.8 outlines the main findings and conclusions reached in this Chapter.

4.2 ‘Engagement’ in an Exclusionary Act as an Analytical Concept

The initial hurdle that every complainant or the Competition Commission must deal with in the adjudication of competition disputes, is evidence showing that the respondent has ‘engaged’ in the prohibited conduct complained of.¹⁴ As the Competition Appeal Court noted in *Netstar (Pty) Ltd v Competition Commission*¹⁵ proof of the existence of a prohibited conduct is the first issue to be determined in an inquiry into an alleged contravention of the Competition Act.¹⁶ In competition disputes, the Competition Tribunal regards evidence that an abuse of dominance has occurred as the legal basis upon which a complainant may be afforded legal standing in proceedings relating to such disputes.¹⁷ Where such evidence is lacking, the Tribunal has reiterated in a number of cases that it will not entertain the complaint.¹⁸

¹⁴ *Competition Commission v South African Airways* supra n 8 at par 138 and *Phutuma Networks (Pty) Ltd v Telkom SA Ltd* Case No 108/CAC/Mar11 at par 11.

¹⁵ *Netstar (Pty) Ltd v Competition Commission* supra n 13.

¹⁶ *Id* at par 28.

¹⁷ This may include the right to interim relief, see Phumudzo S Munyai ‘Interim Relief Jurisprudence in South African Competition Law: A Critical Review of the Competition Tribunal’s Approach’ (2011) 23 *South African Mercantile Law Journal* 432-47 at 445.

¹⁸ *Id*.

Section 8, particularly section 8(c) and (d), requires proof that the dominant firm has 'engaged' in an exclusionary act. While the meaning or definition of an 'exclusionary act' is dealt with elsewhere in this work,¹⁹ the meaning and implications of the word 'engage' is considered here. Logically speaking, 'engaging' in something connotes actively taking part in, or becoming involved in, a particular activity. Put differently, it generally involves a positive act. In this regard, an omission would ordinarily not fit in this narrow concept of 'engagement'.

However, the various kinds of exclusionary act recognised under section 8 of the Competition Act suggest a much broader meaning for the word 'engage'. It seems that an omission or inaction may be brought within the ambit of the engagement concept. For example, a dominant firm is prohibited from refusing to give a competitor access to an essential facility, when it is economically feasible to do so.²⁰ A dominant firm is also prohibited from refusing to supply scarce goods to a competitor when supplying those goods is economically feasible.²¹ In both these scenarios, the Act places a positive obligation on dominant firms to act in a particular way; failure to do so may attract a complaint on the ground that the firm has 'engaged' in an exclusionary act.

4.3 An Act that 'Impedes or Prevents' other Firms from Entering Into or Expanding Within a Market: The Effects Question

Once the complainant has overcome the initial hurdle of proving that exclusionary conduct has occurred, the next step is to demonstrate that the conduct complained of

¹⁹ See Chapter 3 at 3.2.2.

²⁰ Section 8(b) of the Competition Act.

²¹ Section 8(d)(ii) of the Competition Act.

has, in the language of the Competition Act, “the effect of substantially preventing or lessening competition”.²² This raises the question of causation embodied in the word ‘effect’.²³ The word effect, as used in the Act in relation to alleged anticompetitive conduct, refers to the ‘outcome’ or ‘end product’ or ‘consequence’ of that conduct. Considered in the context of causation in the public competition law sphere, the word refers to the ‘anticompetitive effect’ or ‘anticompetitive harm’ which can be attributed to the conduct of the respondent.

One of the most vexing problems in South African competition law is that the phrases ‘anticompetitive effect’ and ‘anticompetitive harm’, which are the competition authorities’ primary basis for intervention, are not defined in the Competition Act. And judicial pronouncements in South African competition law on the meaning of these concepts have not always provided clear direction.²⁴ They cannot, therefore, be said to have any absolute meaning.²⁵

²² A central principle of the Competition Act that permeates all its rule of reason provisions is that the prevention and lessening of competition is prohibited only if it is ‘substantial’. See sections 5 (1), 8(c), 9(1)(a) and 12A of the Act. See also *Competition Commission v South African Airways* supra n 8 at par 138; *Netstar (Pty) Ltd v Competition Commission* supra n 13 at pars 28 and 31; and *Phutuma Networks (Pty) Ltd vs Telkom SA Ltd* supra n 14.

²³ *Netstar (Pty) Ltd v Competition Commission* supra n 13 at par 31. But it is appropriate to also observe here that not all exclusionary abuse of dominance provisions require the complainant or the Commission to demonstrate that the conduct complained of has anticompetitive effects. In some instances, mere proof of the existence of the exclusionary conduct is sufficient for the complainant to be successful. For example, an exclusionary act such as a refusal by a dominant firm to provide competitors with access to an essential facility is prohibited outright, see section 8(b) of the Act. See also *Nationwide Poles v Sasol (Oil) Pty Ltd* Case No 72/CR/Dec03 at par 96.

²⁴ Sutherland and Kemp supra n 10.

²⁵ Id at par 7.11.3.1.

This may lead to different individuals and institutions having conflicting views on their meaning. In *Competition Commission v South African Airways*²⁶ the Tribunal alluded to the problematic meaning of the concept of ‘anticompetitive harm’ when it noted that, “one person’s understanding of the concept of anticompetitive harm may mean *only* harm to consumer welfare, whilst for another the meaning may *include* harm to competitors”.²⁷ The Tribunal pointed out that it viewed the concept of anticompetitive harm as embracing harm to competitors and that harm to competitors was in itself an infringement of the Act, regardless of harm to consumers.²⁸ Indeed the fact that in this case the Competition Commission was unable to establish any adverse effects on consumer welfare attributable to the defendant’s conduct, did not jeopardise its case as the Tribunal felt the case could be decided on the question of harm to competitors.²⁹

Because it is difficult to prove factually that a dominant firm’s conduct actually caused harm to consumers, it is widely accepted that harm to consumer welfare does not have to be established, but can be inferred from the impact of the dominant firm’s conduct on its competitors.³⁰ This means that harm to competitors is, without more, equated with harm to consumers. The assumption here is that instances of harm or foreclosure to the dominant firm’s competitors are almost certainly guaranteed to result in consumer harm in the form of reduced output, higher prices, and lower quality products. As a result, in most of our exclusionary abuse of dominance cases the duty of the complainant is generally limited to proving that competitors have been put out of

²⁶ *Competition Commission v South African Airways* supra n 8.

²⁷ Id at par 137.

²⁸ Id.

²⁹ Id at pars 219 and 220.

³⁰ *Nationwide Poles v Sasol (Oil) Pty Ltd* supra n 23 at pars 100-101. Sutherland and Kemp supra n 10 at par 7.11.3.1.

business or restricted in their growth by the defendant's conduct. This means that the causation enquiry is limited to the link between the dominant firm's conduct and the exclusion or removal of rivals from the market.

Causation in relation to the link between the dominant firm's conduct and harm to consumers is generally ignored, as demonstrated by the finding of the Competition Tribunal in *Competition Commission v South African Airways*.³¹ The problem with this approach is that it may lead to the outlawing of conduct which harms or excludes competitors, but which does not necessarily harm consumers, and may in fact benefit them. In a competition law enforcement regime where the protection of consumer welfare is the main goal of the law, one would expect that the aspect of causation in relation to the link between the defendant's conduct and harm to consumer welfare would be a non-negotiable requirement.

A further issue that warrants consideration on the subject of causation, arising from the requirement to establish the anticompetitive effects of alleged exclusionary conduct, is the question: 'Which anticompetitive effect suffices to attract antitrust action'? Is it only actual effects or are potential or likely effects also included? One view is that our abuse of dominance provisions under section 8 of the Competition Act require a clear demonstration of actual anticompetitive effects, as opposed to a mere allegation that the conduct is likely to produce anticompetitive effects.³²

³¹ *Competition Commission v South African Airways* supra n 8 at pars 137, 219, 220 and 298.

³² *Id* at pars 110-111 and 132. Martin Brassey et al *Competition Law* (Juta 2002) at 35-6 and 198 and Neil Mackenzie 'Replacing Section 8(d) of the South African Competition Act with an "Effects-Based"

This view finds support in the text of the Competition Act. Exclusionary practices prohibited under section 8 are, in terms of the exact words used in the definition of an exclusionary act in section 1, “acts which impede or prevent other firms from entering into or expanding within the market”. Section 8, read together with the definition of an exclusionary act in section 1 of the Act, makes a glaring omission of the word *likely* in its description of conduct it considers exclusionary and anticompetitive. With the exception of section 9(1) of the Act (which prohibits price discrimination by a dominant firm) and our merger provisions, the majority of our prohibited practices and abuse of dominance provisions similarly omit any reference to acts which are *likely* to prevent or lessen competition.³³ This gives impetus to the argument that most of our prohibited practices and abuse of dominance provisions only deal with effects that have actually resulted.³⁴

The legislature’s deliberate omission of the word *likely* in abuse of dominance provisions, under section 8, and its use of the word in other sections, such as section 9(1) and the merger provisions, probably signals that the legislature intended that different approaches should be applied under these different provisions. This implies that whereas the *likely* effects of alleged anticompetitive conduct may be relevant under section 9(1) and our merger provisions, the same cannot be true of our abuse of

Exclusionary Abuse of Dominance Provision’, Centre for Competition Economics, University of Johannesburg, Working Paper 7/2012 at 11.

³³ Brassey supra n 32 at 35-6.

³⁴ Id at 36.

dominance provisions. The latter provisions appear to cover, as already stated, only effects that have actually resulted.³⁵

The omission of the word *likely* in our abuse of dominance provisions distinguishes our Act from the Canadian Competition Act,³⁶ where section 79(1)(c) of their Act expressly provides that an abuse of dominance by a dominant firm is prohibited if “the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market”.³⁷ In *Canada (Commissioner of Competition) v Canada Pipe Co*³⁸ it was found that in terms of section 79(1)(c) of the Canadian Competition Act, the effect of a practice on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future.³⁹

Despite the glaring omission of the word *likely* in the formulation of our abuse of dominance provisions, some observers and decisions suggest that our abuse of dominance provisions must not only cover actual exclusion or foreclosure, but that threatened or potential foreclosure of rivals should also attract antitrust intervention.⁴⁰ It would be incorrect, they contend, to insist on a demonstration of actual anticompetitive effects in each and every case, as this will force competition authorities to wait for obvious anticompetitive effects to arise before they can act, which would in many cases

³⁵ Id.

³⁶ RSC 1985, c C-34.

³⁷ See section 79(1)(c) of the Canadian Competition Act.

³⁸ (FCA) 2006 FCA 233.

³⁹ Id at par 36.

⁴⁰ *Competition Commission v South African Airways* supra n 8 at par 129. Sutherland and Kemp supra n 10 at par 7.11.3.1 and O'Donoghue and Padilla supra n 9 at 269.

be ineffective and too late.⁴¹ In *Competition Commission v South African Airways (Pty) Ltd*⁴² the Tribunal stated that a finding of abuse could be arrived at even on the basis of evidence of *potential* foreclosure of rivals in the market.⁴³ In *Competition Commission v Telkom SA Ltd*⁴⁴ the Tribunal held that, in order to show anticompetitive harm, it is not necessary to show that competitors have actually exited the market or that they lost market share before harm can be inferred.⁴⁵ All that is required, the Tribunal found, is that the respondent or dominant firm's conduct is *likely* to result in the prevention or lessening of competition.⁴⁶

Can the above contrasting views, that section 8 requires a clear demonstration of actual anticompetitive effects and that threatened or potential foreclosure of rivals can be the basis of antitrust intervention, be reconciled? Can potential, and therefore non-existent, anticompetitive effects be sensibly treated as if they are *actual* or in existence? Brassey addresses this question by resorting to the hypothetical scenario that "an illness contracted today might have the effect that I actually cannot go to work the following day".⁴⁷ He contends that where an act generally has certain immanent consequences, the consequences should be treated seriously notwithstanding the fact that their manifestation is postponed.⁴⁸

⁴¹ O'Donoghue and Padilla supra n 9 at 269.

⁴² Supra n 8.

⁴³ Id at par 129. See also *Nationwide Airlines (Pty) Ltd and Comair Ltd v South African Airways (Pty) Ltd* Case No 80/CR/Sep06 at pars 184 and 190.

⁴⁴ Case No 11/CR/Feb04.

⁴⁵ Id at par 99.

⁴⁶ Id.

⁴⁷ Brassey supra n 32 at 36.

⁴⁸ Id.

But if Brassey’s argument that the postponed or future consequences of an alleged exclusionary act can attract antitrust action is valid, another important question that has to be asked is how serious or significant must the possibility of foreclosure linked to the alleged exclusionary act be to warrant such action? It is important to note that the Competition Tribunal and Appeal Court have expressed the view that an exclusionary act has to be “substantially significant in terms of its effect in foreclosing the market to rivals”.⁴⁹ Indeed, the central principle of the Competition Act is that any prevention and lessening of competition will only be prohibited if it is ‘substantial’. But how does one reliably measure the substantiality of a potential, but currently non-existent, exclusion or foreclosure in the market?

In *Medicross Healthcare Group (Pty) Ltd, Prime Cure Holdings (Pty) Ltd v Competition Commission*⁵⁰ the Competition Appeal Court found that the word ‘substantial’ means “material or considerable in amount or duration”.⁵¹ In *Netstar*, the Competition Appeal Court again expressed the view that the requirement of ‘substantiality’ demonstrates that what is required is something that is “neither speculative nor trivial”.⁵² This shows that antitrust intervention on the basis of likely or potential anticompetitive effects can be a controversial process, requiring competition authorities to tread with due caution to avoid errors.

⁴⁹ *Competition Commission v South African Airways* supra n 8 at par 132 and *South African Airways (Pty) Ltd v Comair Ltd* Case No 92/CAC/Mar10 at par 112.

⁵⁰ Case No 55/CAC/Sept05.

⁵¹ *Id* at par 19.

⁵² *Netstar (Pty) Ltd v Competition Commission* supra n 13 at par 30.

Competition decisions prohibiting dominant firm conduct where the actual effects of the conduct have not yet been felt in the market may be less controversial when the nature of the relief sought is interim. Here the risk of competition authorities wrongly forbidding potentially lawful conduct or conduct which might not have adverse effects on competition may be ameliorated by the fact that the decision is only a provisional or interim measure. However, in some instances the inconvenience suffered by the dominant firm as a result of an incorrect interim decision may have lasting or irreversible effects.

Where final relief is sought, competition decisions prohibiting dominant firm conduct although the actual effects of such conduct have not yet manifested in the market can indeed be controversial. In such instances, the risk of authorities forbidding conduct which might not have adverse effects on the market in the future is exacerbated by the fact that such decision is final with permanent implications, unless an appeal is made to the next eligible authority or court. This reinforces concerns about the absence of a proper causation framework in competition law. This is because a competition law enforcement regime in which likely or potential anticompetitive effects can easily form the basis of a complaint in which final relief is sought and may be granted exhibits all the signs of a system with a weak or no causation framework.

I suggest that where the complaint is based on likely rather than actual impact of the conduct on competition and final relief is sought by the complainant, competition authorities must demand a strong causal link between the impugned conduct and its

possible anticompetitive effects. Indeed, in *Schumann (Sasol)(South Africa)(Pty) Ltd v Price's Daelite (Pty) Ltd*⁵³ and *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal*⁵⁴ the Competition Appeal Court pointed out that whenever the competition authorities conduct an enquiry into whether competition is *likely* to be substantially prevented or lessened in the market, the decision must be based on evidence which is actually available before them and not speculation.⁵⁵ Although these decisions concerned mergers, they have relevance here, as the Competition Appeal Court has relied on them in abuse of dominance cases.⁵⁶ These decisions show that there can be a role for common-law causation in competition law adjudications, particularly when the anticompetitive effects of alleged exclusionary conduct by dominant firms are assessed. I consider the role of common-law causation in competition law adjudications next.

4.4 The Role of Common-law Causation in Competition Law Adjudication

It is not the aim of this Chapter to provide a comprehensive discussion on the subject of common-law causation. For a comprehensive discussion on the subject of causation readers are directed to appropriate sources.⁵⁷ For purposes of this work, it is appropriate merely to highlight the fundamental legal principles of causation at common-law. The underlying assumption of this Chapter is that public competition law lacks an appropriate causation framework. I believe that the adoption of common-law

⁵³ Case No 10/CAC/01.

⁵⁴ Case No 20/CAC/Jun02.

⁵⁵ *Schumann (Sasol) (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd* supra n 53 at 18 and *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal* supra n 54 at par 38.

⁵⁶ *Sasol Oil (Pty) Ltd v Nationwide Poles* CC Case No 49/CAC/Apr05 at 38.

⁵⁷ See for example, J Neethling and JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7 ed (LexisNexis 2014) and Max Loubser et al *Law of Delict in South Africa* 2 ed (Oxford University Press 2013).

principles of causation can play an important role in the development of an appropriate causation framework for competition law. It is appropriate to note that common-law causation is already applied extensively in the South African law of unlawful competition,⁵⁸ a branch of law with the closest ties to public competition law. Indeed, the law of unlawful competition seeks to achieve fair competition in the market by making use of common-law rules, whereas public competition law seeks to achieve a similar result through a statute, the Competition Act.⁵⁹

It is clear that drafters of the South African Competition Act anticipated that our competition authorities would, when enforcing the Act and developing competition rules, rely on some common-law principles.⁶⁰ An important example in this regard is that all proceedings under the Competition Act are conducted in terms of the common-law standard of proof, namely 'balance of probabilities'.⁶¹ Equally, interim relief proceedings under the Competition Act are also dealt with in terms of the standard of proof applicable to a common-law application for an interim interdict in the High Court.⁶²

Causation in competition proceedings could be determined in the same manner and should serve the same purpose it does under the common-law.⁶³ At common-law, as the then Appellate Division noted in the leading case of *Minister of Police v Skosana*,⁶⁴ the first question in any causation analysis is a factual one and relates to whether the

⁵⁸ J Neethling *Van Heerden-Neethling Unlawful Competition* 2 ed (2008 LexisNexis) at 81-2.

⁵⁹ Act 89 of 1998.

⁶⁰ Carrier makes a similar argument with regard to the enforcement of the Sherman Act, see Carrier *supra* n 6 at 1004.

⁶¹ Section 68 of the Competition Act.

⁶² Section 49C(3) of the Competition Act.

⁶³ Carrier *supra* n 6 at 1004.

⁶⁴ 1977 (1) SA 31 (A).

respondent's act or omission has caused or contributed to the complainant's harm. If it did not, then no legal liability can arise. But if the respondent's act or omission has caused or contributed to the complainant's harm, then the second question becomes relevant: whether the respondent's act or omission is sufficiently close to, or is not too remote from, the complainant's harm for legal liability to ensue.⁶⁵ These two elements of common-law causation are generally referred to as factual and legal causation.

Both factual and legal causation can serve an important function in competition law generally, and abuse of dominance adjudication in particular. For example, factual causation will ensure that it is demonstrated that the challenged dominant firm conduct is responsible for the anticompetitive harm suffered by consumers or competitors in the market, whereas legal causation will ensure that the respondent's act or omission is sufficiently close to, or is not too remote from, the complainant's harm for legal liability to ensue.⁶⁶

4.4.1 Factual Causation

As highlighted above, factual causation is concerned with the question whether the defendant's conduct has *caused* or contributed to the anticompetitive harm suffered by competitors or consumers in the market.⁶⁷ There can be no question of legal liability if it

⁶⁵ Id at 34-5 and 43-4.

⁶⁶ Carrier supra n 6 at 1004.

⁶⁷ Neethling supra n 58 at 81.

is not established that the defendant's conduct has been a cause of the anticompetitive harm in question.⁶⁸

Courts and commentators regard the *conditio sine qua non* or the 'but-for' test the most important in determining whether a factual causal nexus exists between the defendant's act and the harmful consequences suffered by the complainant.⁶⁹ However, this is not the only test for factual causation, as courts have accepted that there may be situations which warrant the development of exceptions or alternatives in accordance with common sense and flexibility.⁷⁰ This is particularly true in cases involving concurrent, supervening, or multiple causes.⁷¹ In *Lee v Minister of Correctional Services*⁷² the Constitutional Court emphasised that the process of establishing factual causation under the common-law in terms of the *conditio sine qua non* or 'but-for' test has always been a flexible and not a rigid one.⁷³ However, the Court did not jettison the *conditio sine qua non* or 'but-for' test, but merely emphasised the importance of flexibility when applying it.⁷⁴ Indeed, even those who have advocated the use of other tests for factual causation, have tended to use the *conditio sine qua non* as their point of departure.⁷⁵

According to the *conditio sine qua non* theory, the defendant's conduct must have been the precondition or necessary condition (a *conditio sine qua non*) of the harm suffered

⁶⁸ Neethling and Potgieter supra n 57 at 183 and Loubser supra n 57 at 69.

⁶⁹ Neethling and Potgieter supra n 57 at 183 and 185.

⁷⁰ *Minister of Police v Skosana* supra n 64 at 34-5; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 915; *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at par 25; and *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) at par 33.

⁷¹ *Siman & Co (Pty) Ltd v Barclays National Bank* supra n 70.

⁷² 2013 (2) SA 144 (CC).

⁷³ Id at pars 41, 43, 45, 47, 49, 50, 63 and 73. Neethling and Potgieter supra n 57 at 193-4.

⁷⁴ Alistair Price 'Factual Causation After Lee' (2014) 131 *South African Law Journal* 491-500 at 497.

⁷⁵ Neethling and Potgieter supra n 57 at 183.

by the complainant.⁷⁶ Simply put, the harm suffered by the complainant must have resulted from the defendant's conduct. The basic theory underlying the *conditio sine qua non* theory is that every event is the result of another prior event, which can reasonably be deemed sufficient to cause it.⁷⁷

In order to determine whether a particular conduct can be regarded as a factual cause of the harm suffered by the complainant one applies the 'but-for' enquiry. The essence of this 'but-for' enquiry was eruditely explained by the then Appellate Division in *International Shipping Co (Pty) Ltd v Bentley*.⁷⁸ Here, the Court pointed out that the enquiry involves a number of elements: the making of a hypothetical enquiry as to what probably would have happened absent the conduct of the respondent; the mental elimination of the respondent's alleged unlawful conduct and the substitution of a hypothetical course of lawful conduct in the place of the respondent's alleged unlawful conduct; and the posing of the question whether upon such hypothesis the complainant's harm would have remained?⁷⁹ If it is shown that the complainant would have suffered the same fate absent the respondent's conduct or despite the hypothetical lawful conduct, then the respondent's conduct is not the factual cause of the complainant's harm.⁸⁰ This 'but-for' test can be applied in circumstances involving both positive conduct and omissions.⁸¹

⁷⁶ *Minister of Police v Skosana* supra n 64 and *Siman & Co (Pty) Ltd v Barclays National Bank* supra n 70. Loubser supra n 57 at 71 and Neethling and Potgieter supra n 57 at 186.

⁷⁷ Loubser supra n 57 at 71.

⁷⁸ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A).

⁷⁹ *Id* at 700.

⁸⁰ *Id*.

⁸¹ Loubser supra n 57 at 72.

Where positive conduct is involved, a process of elimination is applied, which involves, as stated in *International Shipping Co*,⁸² mentally eliminating the respondent's conduct from conditions that led to the complainant's harm and asking whether the complainant's harm would still have occurred. If the harm would still have occurred then the respondent's conduct was not a necessary condition (*conditio sine qua non*) for the complainant's harm.⁸³ In exclusionary abuse of dominance complaints, for example where the dominant firm is alleged to have engaged in predatory pricing and in so doing eliminated competitors unable to match those prices, the process would involve mentally eliminating the predatory practice. Then the next step is to ask the question whether the complainant would have remained in the market absent the predatory practice. If the complainant would still have exited the market absent the predatory practice, then the practice cannot be regarded as a necessary condition (*conditio sine qua non*) for the exclusion.

Where omissions are involved, a process of substitution is applied, which involves mentally substituting or inserting a hypothetical lawful course of conduct as a substitute for the omission.⁸⁴ And if the hypothetically substituted conduct would have prevented the harm suffered by the complainant, then the omission was a necessary condition (*conditio sine qua non*) for the complainant's harm.⁸⁵ For example, in abuse of dominance cases involving refusal to deal – the effect of which is the effective removal or exit from the market of a competitor – the process would involve mentally or

⁸² *International Shipping Co (Pty) Ltd v Bentley* supra n 78 at 700.

⁸³ Loubser supra n 57 at 72 and Price supra n 74 at 492.

⁸⁴ *Siman & Co (Pty) Ltd v Barclays National Bank* supra n 70 and *S v Van As* 1967 4 SA 495 (A).

⁸⁵ Loubser supra n 57 at 72.

hypothetically incorporating or introducing positive lawful conduct, such as compliance with the obligation to deal, as a substitute for the omission or the refusal to deal. If the hypothetical compliance with the obligation to deal would have contributed to the retention of competitors, then the refusal to deal was a necessary condition (*conditio sine qua non*) for the exit from the market by the competitor. Having expounded on the elements of factual causation, I turn next to legal causation.

4.4.2 Legal Causation

Unlike the determination of factual causation, which may be relatively straightforward,⁸⁶ legal causation poses some serious problems, particularly when the course of events is not clear.⁸⁷ One particular problem that may arise when assessing the effect of dominant firm conduct on competition is that there may be a host of other factors operating to undermine competition in the market. And these other factors may even be independent of, or unrelated to, the dominant firm itself or its conduct.

For example, in a competition law complaint in which a dominant firm is alleged to have engaged in an exclusionary practice, the effect of which is the removal of an effective competitor, or the prevention of a competitor's ability to grow market share, one is always confronted with the reality that even in perfectly functioning markets businesses fail every day due to a host of reasons. Such reasons may include poor planning or

⁸⁶ Neethling and Potgieter *supra* n 57 at 85.

⁸⁷ James Grant 'The Permissive Similarity of Legal Causation By Adequate Cause and Nova Causa Interveniens' (2005) 122 *South African Law Journal* 896-906 at 896.

lack of experience, skills, or resources.⁸⁸ Other factors, such as regulatory challenges, general decline in an industry or changing market conditions adversely affecting incumbents, high operating costs, and barriers to entry may affect the survival prospects of many businesses in a market. Without legal causation, it is possible that perfectly legitimate business practices by dominant firms operating in markets affected by these challenges may easily be mistaken as the cause of the exit from the market by competitors.⁸⁹ In these circumstances, the challenge facing competition authorities is to separate the alleged effects of the impugned dominant firm conduct on competition, from those of other events affecting the market.⁹⁰

Legal causation plays an important role here, by ensuring that the respondent's conduct is sufficiently close to, or not too remote from, the anticompetitive effects complained of.⁹¹ Although legal causation still involves aspects of factual causation, the unique part of legal causation is that it creates a rule which sets limits on liability, by establishing the legal boundary beyond which liability cannot exist.⁹²

⁸⁸ O'Donoghue and Padilla supra n 9. Bertrand M. Cooper (ed) 'Causation in Primary Line Price Discrimination - Section 2(a) Clayton Act' (1970) 64 *Northwestern University Law Review* 128-42 at 142; also reprinted as 'Causation in Primary Line Price Discrimination - Section 2(a) Clayton Act' (1975) 6 *Journal of Reprints for Antitrust Law and Economics* 489-506 at 505.

⁸⁹ This is particularly relevant for the South African domestic airline industry where the collapse of many small players in recent years, largely due to higher operating costs and non-profitable routes, has been blamed largely on South African Airways as the dominant player. See Amanda Visser and Linda Ensor 'Competition Commission Declines to Probe SAA' (12 November 2012) accessed at <http://www.bdlive.co.za/national/2012/11/12/competition-commission-declines-to-probe-saa> (date of last use: 6 July 2016).

⁹⁰ Carrier supra n 6 at 991.

⁹¹ *International Shipping Co (Pty) Ltd v Bentley* supra n 78 at 700.

⁹² *Blaikie v The British Transport Commission* 1961 AC 44 at 49; *S v Mokgethi* 1990 (1) SA 32 (A) at 40; and *Ncoyo v Commissioner of Police, Ciskei* 1998 (1) SA 128 (CK) at 138.

This boundary is essential because in many instances legitimate dominant firm conduct can still be remotely connected to the exclusion of competitors from the market. As commentators have remarked, “even the most lawful conduct is potentially exclusionary: in each sale there is one winner and at least one loser and the loser is to some extent excluded”.⁹³ Legal causation ensures that the defendant’s conduct was the material or significant or substantial or dominant cause of the anticompetitive harm suffered by the complainant. Therefore, legal causation involves the delicate act of striking a balance between the competing interests of the complainant and respondent. Judicial experience in balancing these competing interests has led to the development of various traditional theories or tests for legal causation.⁹⁴

Given the limited individual influence of the traditional theories for legal causation in our law, it is not necessary to provide a comprehensive discussion of all of them. This is because all the traditional theories of legal causation have been subsumed into a flexible approach, which seeks to reconcile and balance all divergent approaches to legal causation.⁹⁵ Following the decision of the then Appellate Division in *S v Mokgethi*,⁹⁶ it is now generally accepted that the leading test for legal causation is a flexible one, in which factors such as reasonable foreseeability, directness, the

⁹³ Sutherland and Kemp supra n 10 at par 7.11.3.1.

⁹⁴ The best know traditional theories for determining legal causation are the theory of adequate causation; the theory of direct consequences or proximate cause; the theory of reasonable foreseeability; the theory of *novus actus interveniens*; the *talem qualem* theory; and the fault theory of causation, see Neethling and Potgieter supra n 57 at 203-20 and Loubser supra n 57 at 94-100.

⁹⁵ Neethling and Potgieter supra n 57 at 201 and Loubser supra n 57 at 91.

⁹⁶ Supra n 92.

presence or absence of a *novus actus interveniens*, legal policy, reasonableness, fairness, and justice all play a part.⁹⁷

To the extent that the flexible approach to legal causation is guided fundamentally by the principles of fairness, justice, and reasonableness, it is submitted that this test can be of great assistance in competition law proceedings. Having regard to the dangers, highlighted above, of a weak or non-existent causation framework in our competition law, it can be argued that this branch of law requires a causation framework guided by the principles of fairness, justice, and reasonableness. Such a framework will ensure that the interests of the state and complainants in competition proceedings to root out anticompetitive exclusionary conduct are evenly balanced against the interests of respondents not to be held liable for speculative antitrust breaches.

4.4.3 Summary

The introduction of common-law causation principles can play an important role in the development of an appropriate causation framework for competition law.⁹⁸ Common-law causation principles in competition law proceedings will ensure that only dominant firm conduct which has caused the exclusion of competitors or harm to consumers and is sufficiently close to, or not too remote from, this effect will attract legal consequences. For example, factual causation will help determine whether absent the respondent's

⁹⁷ Id at 40-1. *International Shipping Co (Pty) Ltd v Bentley* supra n 78 at 701 and *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765.

⁹⁸ Carrier supra n 6 at 104.

conduct anticompetitive harm would have occurred. The enquiry will not, however, end there in the event of a positive answer. Legal causation will follow.

Legal causation will determine whether the respondent's act or omission is sufficiently close to the anticompetitive harm suffered by the complainant for legal liability to arise. In cases involving concurrent or multiple or intervening causes, legal causation will play an important role in determining whether the conduct of the respondent was a material or dominant or primary or substantial or significant cause of the anticompetitive harm suffered by the complainant. If the answer to this second question is in the affirmative, antitrust liability has been established. The incorporation of common-law causation principles into our competition law will not be unusual or controversial. Many other legal fields have already successfully borrowed their causation framework directly from the common-law in general, and the law of delict in particular, without compromising the application and enforcement of the relevant law.⁹⁹

The introduction of common-law principles of causation into our competition law will not have a negative effect on the application and enforcement of our abuse of dominance provisions. On the contrary, as I will demonstrate in my conclusion to this Chapter, I envisage that a flexible application of the common-law principles of causation may have a positive effect on the adjudication of competition disputes. Having outlined the proposed causation framework that I consider appropriate for competition law, in the discussion that follows I consider cases in which causation was central to the

⁹⁹ Id at 105. In South Africa, our criminal law has borrowed extensively from the causation principles of our law of delict. The seminal case of *State v Mokgethi*, supra n 92, is a prime example in this regard.

determination issues and how it was dealt with by competition authorities and the courts.

4.5 A Review of South African Competition Law Decisions where Causation was Central to the Determination of Issues

The structural and form-based approach to competition law enforcement in South Africa can generally be attributed to the manner in which some of our abuse of dominance provisions have been framed. These provisions do not require the complainant to prove that the act complained of has anticompetitive effects, as certain practices are prohibited *per se*.¹⁰⁰ In such cases, mere proof of the existence of the alleged exclusionary conduct is sufficient for the complainant to be successful. This means in cases involving practices that are prohibited *per se*, anticompetitive harm is based on presumptions rather than facts, as no investigation is made on the effects of the impugned conduct on competition.¹⁰¹ The final effect of this state of affairs is that causation is rendered irrelevant in *per se* prohibitions, as the complainant is never required to show that the respondent's conduct has caused harm to competitors and/or consumers.

Even in those other cases under provisions which require the complainant to demonstrate anticompetitive effects, causation is generally dealt with implicitly but not

¹⁰⁰ For example, an exclusionary act such as a refusal by a dominant firm to provide a competitor with access to an essential facility is prohibited outright with no need to prove anticompetitive effects, see section 8(b) of the Competition Act. See also *Nationwide Poles v Sasol (Oil) Pty Ltd* supra n 23 at pars 96-97 and *Competition Commission v Patensie Sitrus Beherend Beperk* Case No 37/CR/Jun01 at par 95.

¹⁰¹ O'Donoghue and Padilla, who are familiar with our law and often appear in cases before our competition authorities as experts, have also lamented a similar problem in European competition law, see O'Donoghue and Padilla supra n 9 at 272. It is reasonable to infer that their views would remain the same as far as our law is concerned.

as a discrete and important element of antitrust liability. In addition, when competition authorities do investigate the effects of the impugned conduct on competition, this enquiry is generally limited to the effects of the impugned conduct on competitors. The effects of the impugned conduct on consumers are seldom investigated. The result is scant case law on causation in competition law.

Below I discuss some of the important decisions of our competition authorities in which the issue of causation was of great relevance. I start with the cases in which an incorrect causation test was applied and follow this with the cases in which the correct causation test was applied.

4.5.1 Cases where an Incorrect Causation Test was Applied

In *Nationwide Poles v Sasol (Oil) Pty Ltd*,¹⁰² it was alleged that a dominant firm, Sasol, was involved in the practice of price discrimination which was designed to, or had the effect of, increasing the complainant's cost structure and thereby retarded growth and expansion opportunities for the complainant. There was no debate as to whether the complainant was indeed experiencing general growth and expansion challenges in the market. The debate centered rather on the question whether the respondent's price discrimination was responsible for the alleged inability of the complainant to compete in the market and to grow its market share.¹⁰³ Although it was not framed as such, this was by implication a question of causation.

¹⁰² *Supra* n 23.

¹⁰³ *Id* at pars 113-118.

The Tribunal stated that it found it impossible to “identify what the appropriate counterfactual would be”.¹⁰⁴ In other words, the Tribunal was unable to identify what would have been the position of the complainant absent the price discrimination, in line with the common-law ‘but-for’ or *conditio sine qua non* theory of causation. However, despite its inability to determine this, the Tribunal found that the price discrimination had disadvantaged the complainant.¹⁰⁵ So, the Tribunal found that the price discrimination was responsible for the deterioration in the market position of the complainant. It reached this conclusion without any robust determination as to whether the price discrimination was a *conditio sine qua non* for the complainant’s predicament.

It is likely that the price discrimination might have caused or contributed materially to the complainant’s troubles, and the Tribunal might have been correct in its finding against the respondent. However, it is disconcerting that the finding itself was made without reliance on solid evidence establishing the link between the defendant’s conduct and the complainant’s harm. The Tribunal merely drew an inference of harm, without requiring evidence establishing the link between the defendant’s conduct and the complainant’s harm.

When the matter went on appeal, in *Sasol Oil (Pty) Ltd vs Nationwide Poles CC*,¹⁰⁶ it came as no surprise that the decision of the Tribunal was reversed.¹⁰⁷ The Competition

¹⁰⁴ Id at par 117.

¹⁰⁵ Id.

¹⁰⁶ Supra n 56.

¹⁰⁷ Id at 41.

Appeal Court found that the determination on whether Sasol's pricing policy was likely substantially to prevent or lessen competition could not rest on 'an inherent effect of Sasol's pricing policy, without any recourse to evidence demonstrating that the impugned conduct is capable of having or is likely to have an anticompetitive effect in the relevant market'.¹⁰⁸ To support this finding, the Competition Appeal Court relied on its previous decisions in *Schumann (Sasol) (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd*¹⁰⁹ and *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal*,¹¹⁰ where it found that the determination of whether competition is likely to be substantially prevented or lessened in the market must be based on evidence which is actually available to the competition authority and not speculation.¹¹¹

In *Competition Commission v South African Airways*¹¹² the country's largest domestic airline, South African Airways (Pty) Ltd (SAA), had created incentive schemes for travel agents which, the Commission argued, had the effect of excluding the complainant, Nationwide Airlines, from the market.¹¹³ SAA challenged the Commission's case on the effects of the incentive schemes, by arguing that the Commission failed to establish a causal link between the schemes and the demise of the complainant.¹¹⁴ While the Tribunal agreed that a complainant under section 8(d) of the Act was required to demonstrate anticompetitive effects,¹¹⁵ the critical question on the effects issue was

¹⁰⁸ Id at 38.

¹⁰⁹ Supra n 53.

¹¹⁰ Supra n 54.

¹¹¹ *Schumann (Sasol)(South Africa)(Pty) Ltd v Price's Daelite (Pty) Ltd* supra n 53 at 18 and *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal* supra n 54 at par 38.

¹¹² Supra n 8.

¹¹³ Id at par 28.

¹¹⁴ Id at pars 30 and 229.

¹¹⁵ Id at pars 110-111 and 132.

how far a complainant must go in establishing the anticompetitive effects required by the provision.

The Tribunal approached this question by asking “should an abuse of dominance provision proscribing exclusionary conduct by dominant firms require the existence of evidence of each chain of causation, establishing the links between the act of exclusion and competitive harm”?¹¹⁶ To this question, the Tribunal responded by quoting a passage from Areeda and Hovenkamp in which it is stated that “no antitrust authority which is seriously concerned about the evil of monopoly would condition its intervention strategy solely on a clear and genuine chain of causation”.¹¹⁷ The Tribunal then concluded that there was respectable authority for the proposition that exclusionary practices should not be dealt with on a stricter test of causation.¹¹⁸

The reason behind the choice of this approach is that, from an enforcement point of view, it is difficult for the Competition Commission and complainants to establish a clear and genuine chain of causation in exclusionary abuse of dominance cases. A less strict or weaker test for causation may enable a finding of abuse even in circumstances where there may be no conclusive evidence or proof of foreclosure or harm to consumers. While this approach is controversial, it is appealing to competition authorities because it enhances the effective enforcement and deterrence effect of the Act.

¹¹⁶ Id at par 115.

¹¹⁷ Id. Phillip Areeda and Herbert Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 2 ed Vol 3 (Aspen Law & Business 2001) at par 651c. See also Kapoor supra n 6 at 40-41.

¹¹⁸ Supra n 8 at par 129.

Responding to the complainant's claim that SAA's incentive scheme was responsible for the decline in its fortunes, SAA contended that there were many other factors that might have caused, or materially contributed to, the decline in the fortunes of the complainant. These included factors such as incidents of overpricing or inappropriate price increases by the complainant (admitted to by the complainant), the public/customers' declining confidence in the complainant as a result of bankruptcy rumours, some poor business decisions made by the complainant, poor economic conditions, and the SAA's improved competitiveness.¹¹⁹

These defences or alternative explanations of possible causes of a decline in competition in the market are both important and very common in exclusionary abuse cases. They must be considered by a competition authority, especially when raised by a respondent.¹²⁰ As Carrier also notes, "the most frequent and important issue in resolving exclusionary abuse of dominance complaints is assessing the role played by alternative factors in bringing about the harm complained of".¹²¹ As the Competition Appeal Court found in *Netstar*, "where a respondent raises or points to the possibility of the intervention or involvement of third parties or other factors that may have had a causative effect in bringing about the lessening or prevention of competition, it is necessary for a court or competition authority to have regard to these possibilities".¹²²

¹¹⁹ Id at pars 229-231 and 236.

¹²⁰ 'Causation in Primary Line Price Discrimination - Section 2(a) Clayton Act' supra n 88.

¹²¹ Carrier supra n 6 at 996.

¹²² *Netstar (Pty) Ltd and Others v Competition Commission* supra n 13 at par 33.

However, it is clear from the judgment of the Tribunal that these alternative explanations as to the possible causes of the decline in the fortunes of the complainant were not dealt with in any convincing way. If these factors were given any serious consideration as possible causes of the complainant's troubles, one would have expected the Tribunal to investigate whether the complainant's troubles would have remained absent the incentive schemes. Alternatively, the tribunal should have considered whether the incentive schemes were, regardless of the other contributing factors, the most material or significant contributing factors. But the Tribunal did not consider these issues in a satisfactory manner.

The Tribunal justified its approach by stating that cases of exclusionary anticompetitive conduct generally create the dilemma that the counterfactual, namely what the market would have looked like absent the alleged prohibited practice, is impossible to construct.¹²³ But the Tribunal nevertheless felt confident in making the finding that the decline in the fortunes of the complainant was causally consistent with the respondent's incentives scheme with travel agents.¹²⁴ This was despite its own admission that it simply could not be sure whether the incentive scheme was indeed the most probable cause of the decline in the fortunes of the complainant.¹²⁵ In defence of its approach, the Tribunal argued that it would be a disservice to the enforcement of the Act for it to abstain from making a finding of the nature it did against the respondent, merely

¹²³ *Supra* n 8 at par 238.

¹²⁴ *Id* at par 237.

¹²⁵ *Id* at par 238.

because it had not been conclusively proven that the respondent's conduct was the dominant cause of the anticompetitive harm complained of.¹²⁶

It may be argued that the Tribunal's reluctance to engage in a 'but-for' or counterfactual investigations in both *Nationwide Poles* and *South African Airways* deprived it of crucial facts and information which would have enabled it to make better decisions. Indeed, engaging in counterfactual analysis may not be as unnecessary and impossible as the Tribunal has made it out to be. Counterfactual analysis or 'but-for' tests have been traditionally applied in many areas of law, such as delict or criminal law, by asking the hypothetical question of how the situation would have been had an act or event not occurred, in order to show a causal connection between an act or event that occurred and the effects attributed to it.¹²⁷

In competition law, counterfactual investigations are already applied almost religiously in merger cases in all jurisdictions. The purpose of counterfactual investigations in merger cases is to determine whether or not the market will be worse off if the merger were to be approved. This is done by comparing the likely effect of the merger in the market, if approved, against the state of competition in the market absent the merger.¹²⁸ As Bavasso and Lindsay further observe, "in determining issues of causation in merger control antitrust lawyers and enforcement agencies increasingly engage in

¹²⁶ Id at par 289.

¹²⁷ Kay E. Winkler 'Counterfactual Analysis in Predation Cases' (2013) 34 *European Competition Law Review* 410-21 at 410.

¹²⁸ Id at 419 and 421.

counterfactual analysis to determine the situation that would have arisen in the absence of the merger which is the subject of assessment”.¹²⁹

There is no reason why counterfactual investigations cannot be applied in exclusionary abuse of dominance cases.¹³⁰ In my view, the counterfactual or ‘but-for’ enquiry is a central legal requirement implied in all exclusionary abuse of dominance provisions. In cases involving allegations of exclusionary abuse of dominance, the general rule is that the respondent’s conduct ought not to be prohibited, unless it is shown that but for that conduct competitors would have entered, remained, or expanded within the market.¹³¹ In such cases, an investigation into whether the general characteristics of the relevant market were also conducive to new entry and expansion by other firms would be an appropriate starting point.¹³² This means the whole enquiry must not be limited to the assessment of the respondent’s conduct as a sole obstacle to competition. The enquiry must also extend to all other possible alternative obstacles that would have confronted aspirant entrants to the market.¹³³ Issues such as the availability of capital, the need to establish an infrastructure, the availability of suitably qualified staff, and access to appropriate technology may all be relevant factors.¹³⁴

An assessment of the causal role of alternative factors in the prevention and elimination of competition is essential not only to ensure that justice is done, but also to ensure that

¹²⁹ Antonio Bavasso and Alistair Lindsay ‘Causation in EC Merger Control’ (2007) 3 *Journal of Competition Law and Economics* 181-202 at 182.

¹³⁰ Winkler supra n 127.

¹³¹ Id.

¹³² *Netstar (Pty) Ltd and Others v Competition Commission* supra n 13 at par 30.

¹³³ Id.

¹³⁴ Id.

justice is seen to be done. Competition authorities must guard against appearing to have prejudged a case, by failing genuinely to consider – apart from respondent’s conduct – all reasonable alternative causes of the prevention and elimination of competition. It is the duty of a competition authority to consider these alternative causes to determine what role, if any, they have had in bringing about the anticompetitive effects complained of. If, for example, a competition authority in its determination finds that the alternative factors proffered by the respondent had no role or only a limited role in preventing or eliminating competition, it must then rule that the respondent’s conduct is either the sole or dominant or material or significant cause of the loss of competition.

Where a competition authority finds that the alternative causes were the dominant or material or significant cause of the loss of competition, it must absolve the respondent of antitrust liability, because the causal link between the respondent’s conduct and the loss of competition in the market is either too weak or nonexistent. This is the appropriate causation approach for competition law and was followed by the Competition Tribunal in *Competition Commission and JT International South Africa (Pty) Ltd v British American Tobacco South Africa (Pty) Ltd*¹³⁵ and the Competition Appeal Court in *Netstar (Pty) Ltd v Competition Commission*.¹³⁶ I shall now discuss these two cases in greater detail.

4.5.2 Cases where the Correct Causation Test was Applied

¹³⁵ Case No 05/CR/Feb05.

¹³⁶ *Supra* n 13.

In *British American Tobacco South Africa*,¹³⁷ the Tribunal took a different and indeed the correct approach to the issue of causation. However, it is important to note that here the issue of causation was also dealt with implicitly rather than explicitly, as is common with most, if not all, decisions of the Tribunal. In this case the Competition Commission and JT International South Africa (Pty) Ltd (JTI) laid a complaint in respect of alleged contraventions of sections 8(c) and 8(d)(i) of the Competition Act by British American Tobacco South Africa (Pty) Ltd (BATSA). BATSA and JTI competed in the South African market for the sale of manufactured cigarettes. It was alleged that certain exclusivity agreements concluded between BATSA and selected retailers incentivised retailers to promote, market, and sell BATSA brands in a manner that made it impossible for competitors to promote, market, and sell their products through these retailers and that this resulted in their foreclosure.

In terms relevant to the principle of causation, the Tribunal outlined that “not only must foreclosure of rivals or consumer harm be shown, they must also be shown to have flowed from the respondent’s alleged anticompetitive conduct and not other factors”.¹³⁸ This meant that where competitive harm could reasonably be found to have resulted from events or factors other than the respondent’s conduct, it could not readily be concluded that the respondent’s conduct was the cause of the antitrust harm complained of. This caution was found to be particularly relevant in this case because there was an eminently reasonable possibility that harm to the structure of the cigarette

¹³⁷ *Supra* n 135.

¹³⁸ *Id* at par 110.

market might have been caused significantly by comprehensive regulatory interventions.¹³⁹ The marketing, sale, and the consumption of cigarettes in South Africa has been highly restricted and negatively affected by the Regulations pursuant to the Tobacco Products Control Amendment Act.¹⁴⁰

The critical issue for the Tribunal in this case was therefore to choose the most significant causal factor for the alleged anticompetitive harm, between the exclusivity agreements between BATSA and the retailers and the Regulations emanating from the Tobacco Products Control Amendment Act.¹⁴¹ The Tribunal noted that where there are two or more likely sources of anticompetitive harm, it would require a demonstration that the anticompetitive harm allegedly generated by the conduct of the respondent was, on its own and independent of the second source, sufficiently significant for antitrust liability to follow.¹⁴² Having considered the merits of the arguments for all the possible causes of harm to the structure of the market, the Tribunal concluded that the most significant cause of foreclosure was the Tobacco Regulations and not the conduct of the respondent.¹⁴³

The Tribunal emphasised that, having regard to the evidence before it, it would be impossible for it to conclude that the most significant cause of the alleged foreclosure was the conduct of BATSA rather than the decisions by the legislature, whose manifest

¹³⁹ *Id.*

¹⁴⁰ 12 of 1999. *Id.* at par 26.

¹⁴¹ *Supra* n 135 at par 291.

¹⁴² *Id.* at par 110.

¹⁴³ *Id.* at par 295.

intent was indeed to limit and possibly eliminate the promotion of cigarette sales.¹⁴⁴ Indeed, part of the complainant's business where foreclosure was more evident, ie the marketing and promotion of cigarettes, happened coincidentally to be the one most affected industry-wide by the Tobacco Regulations.¹⁴⁵ The Tribunal observed that because marketing, advertising and sponsorship were overwhelmingly the most significant mode of promotion in this market, the abrupt proscription of these activities by the Regulations was bound to impact on growth in the overall market as well as on the complainant's market share.¹⁴⁶

In *Competition Commission v Netstar (Pty) Ltd & Others*¹⁴⁷ the central issue was whether standards set by an industry association in the stolen vehicle recovery market established barriers that prevented competitors, who were not members of that association, from entering the market and competing with association members. The evidence before the Tribunal overwhelmingly suggested that it was actually insurance companies, who were themselves customers of the association members, who demanded and drove the setting of the standards.¹⁴⁸ Despite this evidence, the Tribunal found that the setting and implementation of the standards was the result of an agreement or concerted practice between the association members, the purpose and effect of which was to prevent competition from non-members.¹⁴⁹

¹⁴⁴ Id at pars 121, 293 and 295.

¹⁴⁵ Id at par 121.

¹⁴⁶ Id at pars 289 and 293.

¹⁴⁷ Case No 17/CR/Mar05.

¹⁴⁸ Id at pars 10, 38, 41 and 261.

¹⁴⁹ Id at pars 233, 247, 262 and 286.

When the matter went on appeal,¹⁵⁰ the Competition Appeal Court's major preoccupation was the issue of causation. It was concerned with the question of who, between the association members and the insurance companies, was responsible for the establishment of these standards, found by the Tribunal to have had the effect of substantially preventing and lessening competition in the stolen vehicle recovery market. This was a question of causation and the Competition Appeal Court explicitly recognised it as such.¹⁵¹

The Court adopted the 'but-for' or *conditio sine qua non* test.¹⁵² It stated that the appropriate approach would be to ask whether, 'but-for' the respondent's conduct, the prevention and lessening of competition in the market would have occurred.¹⁵³ And, if the answer is in the affirmative, the Court further remarked, then the respondent's conduct is not the cause of the decline in competition in the market.¹⁵⁴ This, the Court found, is the same enquiry conducted in relation to factual causation in other areas of the law, such as the law of delict.¹⁵⁵ However, the Court found further that a negative answer to the 'but-for' question would also not finally dispose of the matter.¹⁵⁶ Legal causation, the Court found, would have to follow.¹⁵⁷

The Court observed that a market is a complex concept with many factors capable of influencing what happens in it, with the result that factors other than the respondent's

¹⁵⁰ *Netstar (Pty) Ltd and Others v Competition Commission* supra n 13.

¹⁵¹ Id at pars 31- 32 and 63-71.

¹⁵² Id at par 30.

¹⁵³ Id at par 31.

¹⁵⁴ Id.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ Id at par 33.

conduct may be a dominant cause of the prevention or lessening of competition.¹⁵⁸ In such circumstances, the duty of the court and the competition authority is to find the dominant or primary or substantial cause of the prevention or lessening of competition.¹⁵⁹ The Court found that liability in competition law should arise only where the substantial prevention or lessening of competition is closely connected with, or is the direct and predominant consequence of, the respondent's conduct.¹⁶⁰ Having regard to the leading or dominant role played by the insurance companies, as major customers in the stolen vehicle recovery market, in bringing about the standards complained of, the Court found that any agreement between the association members, or their conduct, could not be regarded as the legal cause of the prevention of competition in the market.¹⁶¹ This is the correct approach to causation and should be applied in all exclusionary abuse of dominance cases where the demonstration of anticompetitive effects is essential. However, there is little evidence in practice to suggest that the Appeal Court's *Netstar* decision has been fully embraced by the Tribunal and Commission.

4.5.3 Summary

The enforcement of some of our abuse of dominance provisions is based on form rather than substance. This is because some of these provisions do not require the complainant to establish anticompetitive effects, because certain practices are

¹⁵⁸ Id at par 32.

¹⁵⁹ Id at pars 33 and 69.

¹⁶⁰ Id at pars 33 and 70.

¹⁶¹ Id at pars 64-66.

prohibited *per se*. Here, prohibition is based on a general theory of harm which is in turn based on presumptions rather than proven facts. In cases involving the infringement of *per se* provisions, causation is, therefore, nonexistent. In addition, in cases under other provisions requiring a complainant to demonstrate anticompetitive effects, causation is generally dealt with implicitly and not as a discrete and important element of antitrust liability. For these reasons, causation is one of the most underdeveloped areas of South African competition law. Some of the decisions of the Tribunal, such as *Nationwide Poles* and *South African Airways*, have further negated the role of causation in competition law, by failing to engage in 'but for' or counterfactual investigations, in order to determine whether the respondent's conduct is the cause of the anticompetitive effects complained of.

However, recent decisions of the Tribunal in *British American Tobacco South Africa* and the Competition Appeal Court in *Netstar* espouse the correct approach to the issue of causation in competition law and should be followed. It, however, remains to be seen whether any important legal principle will emerge from these cases, as there is little evidence in practice to suggest that the decisions are being consistently followed. It must be emphasised that the importance of these two decisions does not lie so much in their eventual outcomes, which saw the dismissal of complaints against dominant firms, but in their emphasis on common-law principles of causation. These principles ensure fairness and justice, by requiring that in prohibited practices and abuse of dominance cases where the demonstration of anticompetitive effects is essential, respondent firms

should not be found liable in the absence of a causal link between their conduct and the anticompetitive effects complained of.

4.6 The Role of Causation in Foreign Competition Law

As stated earlier, in different jurisdictions the concept of causation has been invoked in different legal contexts in public competition law proceedings. This suggests that there may be conceptual differences in the understanding of this concept in different jurisdictions. For example, in European competition law the causation requirement is understood to mean that a complainant must show that a firm has used its dominant position as a means or instrument of engaging in anticompetitive conduct. In American antitrust law this requirement is applied in a somewhat reverse fashion, requiring a complainant to show that anticompetitive conduct has been used as a means to attain, enhance or protect market power. In both jurisdictions, the intention of the dominant firm appears to be a relevant factor in their causation analyses.

4.6.1 Causation in European Competition Law

In European abuse of dominance law some cases and commentators have suggested that, because abuse of dominance presupposes the initial existence of dominance and dominant firm conduct amounting to an abuse of such position, a causal link between

the dominant position and conduct constituting the abuse must be established.¹⁶² In *Continental Can v Commission*¹⁶³ it was argued that the expression ‘abuse of a dominant position’ suggests that the position of dominance in the market is used as an instrument to inflict the abuse.¹⁶⁴ In *Tetra Park International v Commission II*¹⁶⁵ the European Court of Justice found that Article 102 presupposes “a link between the dominant position and the alleged abusive conduct”.¹⁶⁶ In *United Brands Company and United Brands Continental BV v Commission*¹⁶⁷ a similar view was expressed.¹⁶⁸

O’Donoghue and Padilla consider this to be an essential principle in abuse of dominance adjudication. They contend that it fulfils the important requirement of legal causation under Article 102 of European competition law.¹⁶⁹ They argue that certain abusive conduct, such as excessive or predatory pricing, depends expressly or implicitly on the connection between the dominant position and the abusive conduct, as non-dominant firms cannot successfully carry out such practices.¹⁷⁰ Eilmansberger also contends that ‘because the central objective of Article 102 is to safeguard the competitive process from distortions stemming from, or associated with, market power, market dominance should be a constitutive, or at least a formative, element of the concept of abuse’.¹⁷¹ He supports this contention by making reference to the definition

¹⁶² Case C-333/94 P *Tetra Pak International SA v Commission* at par 27. O’Donoghue and Padilla supra n 9 at 263 and Richard Whish and David Bailey *Competition Law* 7 ed (Oxford University Press 2012) at 203-04.

¹⁶³ Case 6/72 *Europemballage Corporation and Continental Can Company v Commission*.

¹⁶⁴ Id at 254. Whish and Bailey supra n 162 at 203 and O’Donoghue and Padilla supra n 9 at 263.

¹⁶⁵ *Tetra Park International v Commission* supra n 162.

¹⁶⁶ Id at par 27.

¹⁶⁷ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission*.

¹⁶⁸ Id at par 249.

¹⁶⁹ O’Donoghue and Padilla supra n 9 at 263 and 265.

¹⁷⁰ Id at 264-5.

¹⁷¹ Eilmansberger supra n 11 at 142.

of dominance proffered by the Court in *Hoffmann-La Roche & Co. AG v Commission*,¹⁷² which placed emphasis on the role of dominance in *enabling* a dominant firm to prevent effective competition in the market.¹⁷³

However, the majority of European competition law decisions and commentators have rejected this proposition.¹⁷⁴ As Whish and Bailey argue, “the scope of abuse of dominance provisions would be severely reduced if the authorities could only apply such provisions to practices which can constitute the instrumental use of dominance as a tool to perpetrate the abuse”.¹⁷⁵ They contend that ‘abuse of dominance’ is an objective concept and the conduct of an undertaking in a dominant position may be regarded as abusive in the absence of any fault on its part and irrespective of the intentions of the undertaking.¹⁷⁶ Put differently, their argument, which I support, is that abusive conduct must be judged by its effect on competition rather than on the intention of the dominant firm.

4.6.2 Causation in American Antitrust Law

In American monopolization law a slightly different approach is followed. The causation requirement is understood to mean that a complainant must show that anticompetitive conduct has been used as a means to attain, enhance or protect market power. In

¹⁷² Case 85/76 *Hoffmann-La Roche & Co AG v Commission*.

¹⁷³ *Id* at par 138. See also Eilmansberger *supra* n 11 at 142.

¹⁷⁴ *Europemballage and Continental Can v Commission* *supra* n 163 at par 27 and *Hoffmann-La Roche & Co AG v Commission* *supra* n 172 at par 91. O’Donoghue and Padilla *supra* n 9 at 263 and Whish and Bailey *supra* n 162.

¹⁷⁵ Whish and Bailey *supra* n 162.

¹⁷⁶ *Id* at 203.

terms of this requirement, intent is a central element of the concept of causation. Indeed, in American antitrust law liability for monopolization requires the ‘*willful*’ acquisition or maintenance of monopoly power in the relevant market, as distinguished from growth or development as a consequence of superior product, business acumen or historical accident.¹⁷⁷

In *United States v Microsoft*¹⁷⁸ the Court accepted that there must be a reasonable connection between the defendant's monopolizing conduct and the resulting monopoly power.¹⁷⁹ In its *Rambus* opinion, the Federal Trade Commission adopted this principle, holding that Rambus’s conduct “significantly contributed to its acquisition of monopoly power”.¹⁸⁰ However, the Federal Trade Commission’s *Rambus* opinion was reversed on appeal by the United States Court of Appeals for the District of Columbia, because the Commission did not show the Court that Rambus engaged in exclusionary conduct, and thereby acquired its monopoly power in the relevant markets unlawfully.¹⁸¹ In *Broadcom Corp v Qualcomm Inc*¹⁸² the Court found that conduct will fall foul of antitrust laws, if there is an increased likelihood that the conduct will confer monopoly power on the defendant.¹⁸³

¹⁷⁷ *Rambus Inc v Federal Trade Commission* supra n 6 at 463; *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) at 407; and *United States v Microsoft Corporation* supra n 6 at 50. Joel M. Wallace ‘Rambus v FTC in the Context of Standard-Setting Organizations, Antitrust, and the Patent Hold-Up Problem’ (2009) 24 *Berkeley Technology Law Journal* 661-93 at 681.

¹⁷⁸ *United States v Microsoft* supra n 6.

¹⁷⁹ *Id* at 61-2. *Carrier* supra n 6 at 993.

¹⁸⁰ Federal Trade Commission, Opinion of the Commission, *Rambus Inc*, Docket No 9302 2 August 2006 at 7 accessed at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf> (date of last use: 6 July 2016).

¹⁸¹ *Rambus Inc v Federal Trade Commission* supra n 6 463-4. Kapoor supra n 6 at 38-9.

¹⁸² *Broadcom Corp v Qualcomm Inc* supra n 6. .

¹⁸³ *Id* at 314.

However, it is also appropriate to state here that this causation requirement has proved to be of limited importance in the majority of American monopolization cases. As the United States Court of Appeals for the District of Columbia noted in *United States v Microsoft*,¹⁸⁴ “there is limited authority, if any, supporting the proposition that a plaintiff in a monopolization case must show that a defendant’s monopoly power is precisely attributable to anticompetitive conduct”.¹⁸⁵ There are, as a result, a limited number of monopolization cases in which American courts and competition authorities have insisted on this requirement.

4.6.3 Summary

The proposition, supported by some courts, competition authorities and commentators in European competition and American antitrust law, that there must be a relationship between dominance and anticompetitive conduct and between anticompetitive conduct and monopoly power, respectively, places significant emphasis on the firm’s motives or intentions when engaging in such conduct. It does not really relate to the common-law concept of causation, as it is generally known and applied in our law of delict in South Africa. Common-law causation deals with the causal link between the respondent’s conduct and the complainant’s harm. It is not concerned with the question whether the social or economic position of the respondent made the successful engagement in wrongful conduct possible. Neither is it influenced or affected by the defendant’s intentions or motive for engaging in wrongful conduct. But these differing contexts and

¹⁸⁴ *United States v Microsoft* supra n 6.

¹⁸⁵ *Id* at 79. *Carrier* supra n 6 at 993.

the manner in which the concept of causation may be invoked in competition proceedings show that causation is a ubiquitous term whose conceptual understanding varies in different legal fields and jurisdictions.¹⁸⁶

It is possible that where it is clear that a firm has purposefully relied on or used its dominance to commit an abuse, this could be a relevant factor when determining an appropriate penalty. However, from an 'effects-based' antitrust enforcement point of view, the role of intent in determining liability should be of limited importance. Conduct should be judged primarily on its effect on competition rather than its intended outcome. As Brassey has contended, 'good intentions cannot rescue conduct whose effect is demonstrably bad, in much the same way that bad intentions cannot condemn conduct whose effect is inherently and intrinsically good'.¹⁸⁷ Indeed, the dominant view in modern antitrust enforcement is that the quality of dominant firm conduct should not be judged by the intentions or motives of the firm, but by its effect on competition.¹⁸⁸ I turn next to consider the implications of effects analyses on causation, having regard to the rise of the 'effects approach' in modern competition law enforcement.

4.7 The Rise of the Effects Approach in Modern Competition Law Enforcement and its Implications for Causation

Enquiries into the effects of the alleged abusive conduct on competition in abuse of dominance and monopolization cases are a perfect analogy of the causation enquiry that takes place in civil claims for damages in tort or delict law. The causation enquiry

¹⁸⁶ Meier *supra* n 4.

¹⁸⁷ Brassey *supra* n 32 at 37.

¹⁸⁸ Eilmansberger *supra* n 11 at 146.

in tort or delict law seeks to establish the link between the conduct of the defendant and the damage or loss suffered by the plaintiff. Similarly, effects analysis in competition law seeks to establish the link between the respondent's conduct and the prevention or lessening of competition in the market. Effects analysis plays an important role in ensuring that antitrust liability is based on evidence demonstrating the link between the conduct of the respondent and the prevention and lessening of competition in the market. In this regard, the rise in prominence of the 'effects approach' in modern competition law enforcement may appear like a step in the right direction towards the development of an appropriate causation framework for competition law.

While causation is clearly implied in effects analysis, there is, however, a lack of a clear and consistent framework for causation in effects analysis.¹⁸⁹ Effects analyses in competition law are conducted in a manner and at a level that cannot satisfactorily meet the requirements of factual and legal causation. In most cases, effects analyses are limited to asking two basic factual questions: has the conduct complained of occurred; and has there been prevention and lessening of competition in the market?

There is no robust inquiry as to whether the prevention and lessening of competition is reasonably or sufficiently linked to the conduct of the respondent. The enquiry on the causal link between the conduct of the respondent and the prevention and lessening of competition in the market is considered irrelevant and unnecessary.¹⁹⁰ This is because

¹⁸⁹ 'Causation in Primary Line Price Discrimination - Section 2(a) Clayton Act' supra n 88 at 128 and 139; 489 and 502.

¹⁹⁰ Vishesh Narayan 'Is Patent Hold-up Anticompetitive? *Rambus* and Individual Versus General Causal Claims' (2010) 8 *Northwestern Journal of Technology and Intellectual Property* 307-22 at 318.

causation is deemed a substantial departure from the relatively modest and settled standard for abuse of dominance adjudication, which demands far less than is required in the delict or tort context.¹⁹¹ The argument is that, if causation were to be required, “the complainant would be put in an unfair, unenviable, and impossible position” of having to establish the counterfactual: proof that the outcome in the market would have been different absent the defendant's conduct.¹⁹²

In the absence of counterfactual analysis, the conclusion that the respondent's conduct is responsible for the anticompetitive effects complained of is not based on proven facts, but on the assumption that the relevant conduct is considered capable of producing those effects.¹⁹³ As Narayen observes, “the general approach in antitrust enforcement is to require only that anticompetitive consequences are *likely* to flow from conduct as opposed to the fact that they are certain to flow from such conduct”.¹⁹⁴ In this sense, effects analyses, as currently conducted, may not necessarily reflect facts as they are in the real world. They may at best be described as a ‘laboratory conclusion’ arrived at through the interpretation of economic data in line with economic theories and assumptions.¹⁹⁵

In all jurisdictions under review, competition authorities appear to be not particularly keen to undertake the arduous task of counterfactual analysis, to establish the causal

¹⁹¹ Id at 318-20. Eilmansberger supra n 11 at 143.

¹⁹² Narayen supra n 190 at 321.

¹⁹³ Id at 318.

¹⁹⁴ Id at 321.

¹⁹⁵ Edith Maria Hendrika Loozen ‘The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelling Through the Economic Approach’ (2014) 39 *European Law Review* 91-110 at 97.

link between the alleged abusive conduct and anticompetitive effects.¹⁹⁶ There is apprehension among antitrust officials that engaging in counterfactual analysis in exclusionary abuse of dominance cases would severely limit the scope of abuse of dominance provisions, potentially excluding most, if not all, types of anticompetitive conduct.¹⁹⁷ As an observer has remarked, ‘competition authorities who wish to address abuses of dominance in the market do not wish to burden themselves with the task of establishing a causal link between the conduct of the respondent and harm in the competitive process’.¹⁹⁸ As Areeda and Hovenkamp put it, “no antitrust authority which is seriously concerned about the evil of monopoly would condition its intervention strategy solely on a clear and genuine chain of causation”.¹⁹⁹ As a result, other commentators have concluded that causation does not exist in competition law.²⁰⁰

4.8 Conclusion

The purpose of this Chapter has been to investigate whether an appropriate causation framework exists in competition law. In my view, causation is essential and should be an important element of antitrust liability, particularly in those exclusionary abuse of dominance cases where the establishment of anticompetitive effects is vital. The conclusion reached here is that, despite the rise in prominence of the ‘effects approach’ in modern abuse of dominance adjudication, the issue of causation has not been

¹⁹⁶ Whish and Bailey supra n 162 at 208 and Narayen supra n 190 at 317.

¹⁹⁷ Whish and Bailey supra n 196 and Eilmansberger supra n 11.

¹⁹⁸ Berry supra n 2 at 315.

¹⁹⁹ Areeda and Hovenkamp supra n 117.

²⁰⁰ Berry supra n 2 at 315 and 317; Carrier supra n 6 at 991; Eilmansberger supra n 11; and Sutherland and Kemp supra n 10.

sufficiently addressed. To the extent that causation is dealt with in abuse of dominance adjudication, this generally happens implicitly or indirectly in a manner that reveals a worrying lack of robustness.²⁰¹ As a result, respondents in competition proceedings may be found liable for market distortions which cannot satisfactorily be traced back to their conduct.

To remedy this problem, I propose an approach by which the issue of causation could be dealt with in competition law. In terms of this approach, causation must be recognised and dealt with in competition proceedings as a fundamental principle that is central to antitrust liability.²⁰² I submit that the adoption of common-law principles of causation may play an important role in guiding and shaping the development of a causation framework appropriate for competition law.

The proposal for the adoption of common-law causation principles in abuse of dominance adjudication may not be welcome from an enforcement perspective. It raises the question of how far competition authorities or complainants must go in establishing the link between alleged exclusionary conduct and anticompetitive effects.²⁰³ The underlying reason for the reluctance to apply common-law causation principles in competition law is the apprehension that the introduction of such principles would severely limit the scope of abuse of dominance provisions.²⁰⁴

²⁰¹ O'Donoghue and Padilla supra n 9 and Berry supra n 2 at 314.

²⁰² *Netstar (Pty) Ltd and Others v Competition Commission* supra n 13 and Berry supra n 2 at 314.

²⁰³ Whish and Bailey supra n 162 at 208.

²⁰⁴ *Id.* Eilmansberger supra n 11.

On close examination, these concerns are unfounded. For many years, the common-law requirement of causation has been part of our law of delict. In delict, it has never been established that the causation requirement prevents claimants from successfully proving their claims. Experience in delict shows that the causation requirement is not a bar to the successful establishment of civil claims by plaintiffs. Indeed, plaintiffs with well-founded civil claims are able to sue successfully every day in our civil courts, despite the existence of this time-honoured principle. This is because at common-law the principle of causation is not applied rigidly, but in a flexible manner that takes into account the principles of fairness and justice.²⁰⁵ Its introduction in competition law is therefore not likely to prevent effective enforcement of the Act and its abuse of dominance provisions. A flexible application of the common-law principles of causation may in fact have a positive effect on the adjudication of competition disputes.

Flexibility in the application of common-law principles of causation in competition law will ensure that a complaint is not dismissed merely because it does not meet a rigid test for causation.²⁰⁶ By the same token, a flexible application of the common-law principles of causation, which espouses the principles of fairness and justice, would also ensure that liability on the part of the dominant firm would not arise, unless a reasonable link between its alleged abusive conduct and the anticompetitive effects attributed to it is

²⁰⁵ *Minister of Police v Skosana* supra n 64 at 34-5; *Siman & Co (Pty) Ltd v Barclays National Bank* supra n 70; *S v Mokgethi* supra n 92 at 40-1; *International Shipping Co (Pty) Ltd v Bentley* supra n 78 at 701; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* supra n 97; *Minister of Safety & Security v Van Duivenboden* supra n 70; *Minister of Finance v Gore NO* supra n 70; and *Lee v Minister of Correctional Services* supra n 72 at pars 41, 43, 45, 47, 49, 50, 63 and 73. See also Neethling and Potgieter supra n 57 at 193-4 and 203.

²⁰⁶ *Carrier* supra n 6 at 1007.

established.²⁰⁷ This means causation should be applied in a manner that balances the interests of the complainant and respondent, in line with the principles of fairness and justice. Accordingly, where fairness and justice become the guiding standards in the application of common-law principles of causation in competition proceedings, it is difficult to conceive of the possibility that the enforcement of our abuse of dominance provisions will be significantly compromised.

²⁰⁷ Kapoor *supra* n 6 at 39.

**THE PRINCIPLE OF 'SPECIAL RESPONSIBILITY' AND THE DOCTRINE OF
'SUPER-DOMINANCE' IN THE LAW OF ABUSE OF DOMINANCE: A CRITICAL
REVIEW**

5.1 Introduction

The general purpose of this Chapter is to evaluate critically the unique nature of some obligations imposed on dominant firms in modern competition law. Particular attention will be given to the constraints on the market conduct of dominant firms occasioned by the principle of special responsibility and the doctrine of super-dominance. The ultimate goal of this Chapter is to establish whether such constraints perpetuate the historical philosophy and practice of hostility towards dominant firms in modern competition law enforcement.

My general point of departure is that, by its very nature, abuse of dominance law involves at its core the selective application of competition rules to the market conduct of firms on the basis of their market share or market power. The bigger the firm's market share or market power, the higher the likelihood that its market conduct will attract antitrust action. This becomes more apparent when regard is had to the fact that the same market conduct will not be actionable under abuse of dominance law or competition law in general, if performed by a firm whose market share or market power is below the average required for dominance.

As far as the concept of 'abuse of dominance' is concerned, an issue that remains puzzling is that competition law has not as yet found a neutral infringement concept that places emphasis on the quality of the conduct of a firm rather than its size. The need for such a neutral infringement concept has long been apparent because antitrust observers have recognised that it is ultimately the firm's conduct that matters, not its market size or identity. Lack of will to develop the law in this regard has meant that in all cases involving allegations of abuse of dominance, proof that the defendant firm is dominant in the relevant market is invariably a non-negotiable pre-condition for any abuse of dominance complaint to be sustainable. As a result, attention is unnecessarily deflected away from the conduct of the firm, because in most cases the complainant's ability to establish dominance is almost sufficient to prove wrongdoing on the part of the dominant firm.

This singling out of dominant firms for special treatment under abuse of dominance law may, at the very least, suggest that dominant firms have an implied special responsibility or duty under the law to act or not act in a particular manner. However, in some instances this special responsibility of dominant firms has also been recognised expressly in the decisions of competition authorities and the courts.

This Chapter proceeds from the general premise that abuse of dominance law, by its very nature, involves the giving of special attention to the actions of dominant firms because of their special position in the market, suggesting that dominant undertakings have an implied special responsibility of some sort under the law. However, the specific

focus of the Chapter is on the special responsibility of dominant firms expressly recognised in the law and/or in the decisions of competition authorities and the courts. The reason for this selection is practicality and ease of research, because in the case of express recognition there is no ambiguity or uncertainty about the existence of such a special responsibility resting on dominant firms.

Having regard to the selection made above, American law will not play an important role in this Chapter. Although it may be argued that the special responsibility or duty of dominant firms is implied in section 2 of the Sherman Act, particularly in cases involving the 'willful' acquisition or maintenance of monopoly,¹ American competition authorities and the courts have not expressly recognised the existence of any special responsibility or obligation on the part of dominant firms. As observers have noted, 'courts in the United States have held that a monopolist has no special duties under section 2 of the Sherman Act with respect to other market participants'.² The high regard in which

¹ In American antitrust law the willful and intentional acquisition or maintenance of an overwhelming market share, even by means of perfectly legitimate business conduct that does not involve exclusionary practices, may be deemed unlawful under section 2 of the Sherman Act, unless the firm concerned can show that the high market share was an accidental consequence of its superior product, business acumen or historical accident. See *United States v Aluminium Company of America* 148 F2d 416 (2d Ci.1945) at 428-32; *United States v Microsoft Corp* 253 F 3d 34 (DC Cir 2001) at 50; *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) at 407; and *Rambus Inc v FTC* 522 F 3d 456 (DC Cir 2008) at 463. See also Joel M. Wallace 'Rambus v FTC. in the Context of Standard-Setting Organizations, Antitrust, and the Patent Hold-Up Problem' (2009) 24 *Berkeley Technology Law Journal* 661-93 at 681 and Heike Schweitzer 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' paper presented at the 12th Annual Competition Law and Policy Workshop, Robert Schuman Centre, 8-9 June 2007, EUI, Florence at 6 accessed at <http://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Schweitzer.pdf> (date of last use: 6 July 2016).

² Dieter De Smet 'The Diametrically Opposed Principles of US and EU Antitrust Policy' (2008) 29 *European Competition Law Review* 356-62 at 357; Jochem Apon 'Cases Against Microsoft: Similar Cases, Different Remedies' (2007) 28 *European Competition Law Review* 327-36 at 333; David Howarth and Kathryn McMahon 'Windows Has Performed an Illegal Operation: The Court of First Instance's Judgment in Microsoft v Commission' (2008) 29 *European Competition Law Review* 117-34 at 130 and Kathryn McMahon 'Interoperability: "Indispensability" and "Special Responsibility" in High Technology Markets' (2007) 9 *Tulane Journal of Technology & Intellectual Property* 123-72 at 167.

freedom of trade, efficiency, and consumer welfare are held in American antitrust law discourages ill-conceived constraints on the ability of dominant firms to compete on merit.³ In *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*⁴ the US Supreme Court found that possession of monopoly power is an important part of the free market system and will not be tampered with unless accompanied by harm to consumer welfare.⁵

European competition law will feature prominently in this Chapter because, more than in any other jurisdiction, the special responsibility of dominant firms has been recognised expressly in the decisions of competition authorities and the courts. Because the existence of the special responsibility of dominant firms is dependent upon the size of the firm, a related concept that also developed in European competition law alongside the principle of special responsibility and merits consideration here is the doctrine of super-dominance.

The doctrine of super-dominance emerged in the context or as an extension of the principle of special responsibility where the more dominant the firm, the more obligations or responsibilities are imposed on it. The development of the doctrine of super-dominance in European competition law was based on the logic that if a firm that barely meets the minimum requirements for dominance has a special responsibility, it

³ Per Jebsen and Robert Stevens 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union' (1996) 64 *Antitrust Law Journal* 443-516 at 491.

⁴ *Supra* n 1.

⁵ *Id* at 407. Although this Supreme Court decision is not universally accepted in the United States, as some writers, antitrust enforcement agencies, and lower courts have criticised it and advocated a different approach, it remains of great significance in American monopolization law given the higher ranking of the Supreme Court in the United States judicial system, see discussion in Chapter 2 at 2.2.4.

goes without saying that a firm that enjoys a near monopoly degree of dominance must have much more onerous responsibilities.

The principle of special responsibility and the doctrine of super-dominance, as applied in European competition law, appear consistent with their traditional form-based and structural approach to competition law enforcement. This enforcement approach places significant emphasis on achieving a market structure where no undertaking has sufficient market power to influence and control the market unilaterally. The principle of special responsibility and the doctrine of super-dominance are also in line with the traditional European ordoliberal philosophy. In terms of this philosophy, dominant firms were viewed as undesirable in markets, because their presence was seen as indicative of the decline of competition in the market.⁶ To secure competitive market structures or competitively structured markets, where opportunities for other enterprises are also preserved, the principle of special responsibility and the doctrine of super-dominance impose constraints on the market conduct of dominant firms. This has the effect of limiting the ability of dominant firms to compete freely and to maintain and grow their market shares.

The operation of the principle of special responsibility and the doctrine of super-dominance may be inconsistent with an effects-based approach to competition law enforcement, where consumer welfare is the main priority.⁷ Indeed, under the effects approach dominant firms are allowed to compete vigorously on merit, without overly

⁶ Jebsen and Stevens *supra* n 3 at 503.

⁷ McMahon *supra* n 2 at 165.

constraining their market conduct in the manner in which the principle of special responsibility and the doctrine of super-dominance seem intended to achieve. Restrictions on dominant firm conduct are considered rational and necessary only if the conduct in question produces harmful effects for consumers. An effects-based approach to competition law enforcement embraces the important role that large corporations can play in enhancing consumer welfare and economic development.⁸

South African competition authorities have attempted to follow the European approach by adopting the principle of special responsibility and the doctrine of super-dominance in some decisions. As well as the competition concerns that may generally arise with regard to the operation of the principle of special responsibility and the doctrine of super-dominance in European law, the adoption of these concepts in South African law may evoke other significant legal and constitutional concerns.

Given that neither of these concepts forms part of the legal vocabulary of our Competition Act, it can be argued that there is no legal basis for introducing them into our law, as doing so may offend against the principle of legality. Because the principle of special responsibility and the doctrine of super-dominance may constrain the ability of dominant firms to compete freely and effectively in markets, whereas non-dominant firms are not affected by the same constraints, this may also offend against the constitutional principles of fairness, freedom of trade, equality, and non-discrimination.

⁸ Indeed, economic experience has shown over the years that competitive dynamics can function very well even if the market has some very large players. See James Kavanagh, Niel Marshall and Gunnar Niels 'Reform of Article 82 EC-Can the Law and Economics Be Reconciled?' in Ariel Ezrachi (ed) *Article 82 EC: Reflections on its Recent Evolution* (Hart Publishing 2009) at 3. See also Schweitzer *supra* n 1 at 16.

In the discussion that follows, part 5.2 explores in detail the development of the principle of special responsibility and the doctrine of super-dominance in European competition law as well as their competition implications. Attempts by South African competition authorities to introduce the principle of special responsibility and the doctrine of super-dominance in our law will also be discussed in part 5.3. In part 5.4 I shall highlight some potential legal and constitutional problems that may result from the adoption of these concepts in our law, although an in-depth discussion of the constitutional issues is beyond the scope of this work. For readers with a greater appetite for constitutional law, appropriate sources, which will be provided as the discussion progresses and issues are raised, will need to be consulted. In part 5.5 I highlight the exceptional circumstances that may justify the application of the principle of special responsibility and the doctrine of super-dominance. Part 5.6 considers the feasibility of using the principle of special responsibility and the doctrine of super-dominance as a corporate social responsibility policy. Part 5.7 provides a summary of the main findings and conclusions of the Chapter.

5.2 The Principle of Special Responsibility and the Doctrine of Super-Dominance in European Competition Law

The most fundamental legal principle that has emerged in the application and enforcement of Article 102 of the Treaty of the European Union is that a dominant

undertaking has a special responsibility to the market.⁹ Article 102 does not define the concept of dominance. In practice, as case law suggests, a firm is considered to be dominant when it enjoys a position of economic strength in a market enabling it “to act anticompetitively to an appreciable extent independent of its competitors, customers, and consumers”.¹⁰ A firm with a market share of at least 50 per cent is, in the absence of exceptional circumstances pointing to the contrary, presumed to be in such position of economic strength and therefore dominant.¹¹

Connected to the concept of dominance and the principle of special responsibility, is the notion that some dominant firms can be super-dominant.¹² The super-dominance doctrine developed as a supplementary concept to the principle of special responsibility, where the more dominant the firm the more obligations or responsibilities are imposed on it. As a result of this interconnection between the two concepts, a proper understanding of the doctrine of super-dominance may be gleaned from cases that deal generally with the principle of special responsibility. A key characteristic of these two concepts is that their application has the potential to hamstring the ability of dominant

⁹ David Wood ‘EU Competition Law and the Internet: Present and Past Cases’ (2011) 7 *Competition Law International* 44-9 at 44 and Erika Szyszczak ‘Controlling Dominance in European Markets’ (2010) 33 *Fordham International Law Journal* 1738-75 at 1755.

¹⁰ Cases 27/76 *United Brands Company and United Brands Continentaal BV v Commission* at par 65 and 85/76 *Hoffmann-La Roche & Co AG v Commission* at par 39.

¹¹ Cases 62/86 *AKZO Chemie BV v Commission* at par 60; T-57/01 *Solvay SA v Commission* at par 279; T-340/03 *France Télécom SA v Commission* at par 100; and T-321/05 *AstraZeneca AB v Commission* at par 243. See also Whish and Bailey *Competition Law* 7 ed (Oxford University Press 2012) at 182-3.

¹² Giuliano Amato *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) at 70-1; Heike Schweitzer ‘The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC’ in Claus-Dieter Ehlermann and Mel Marquis (eds) *European Competition Law Annual 2007 - A Reformed Approach to Article 82 EC* (Hart Publishing 2008) at 141; and Szyszczak *supra* n 9 at 1756.

firms to engage in standard market conduct, despite the fact that such conduct would be unobjectionable when adopted by non-dominant firms.¹³

The combined effect of the principle of special responsibility and the doctrine of super-dominance is that a dominant firm is treated as ‘the proverbial bull in the china shop’, whose actions must be restricted to prevent it from inflicting further damage on its already fragile surroundings.¹⁴ These concepts are in keeping with the ordoliberal tradition that has dominated the application of Article 102 from its inception. They continue the European competition law tradition of protecting competitors at the expense of competition.¹⁵

5.2.1 The Principle of Special Responsibility

It is important to observe that Article 102 of the Treaty of the European Union, unlike section 2 of the Sherman Act, is very explicit about the types and nature of dominant firm conduct it proscribes. By the same token, a first read of Article 102 clearly reveals the basic obligations or legal responsibilities it imposes upon dominant undertakings. However, it is also important to note that the practice in European competition law

¹³ Christian Ahlborn, David S Evans and A Jorge Padilla ‘Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?’ (2001) 22 *European Competition Law Review* 156-67 at 162.

¹⁴ Gunnar Niels and Helen Jenkins ‘Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down’ (2005) 26 *European Competition Law Review* 605-10 at 605 and Duncan Sinclair ‘Abuse of Dominance at a Crossroads - Potential Effect, Object and Appreciability Under Article 82 EC’ (2004) 25 *European Competition Law Review* 491-501 at 493.

¹⁵ Szyszczak *supra* n 9 and Ian Rose and Cynthia Ngwe ‘The Ordoliberal tradition in the European Union, its influence on Article 82 EC and the IBA’s Comments on the Article 82 EC’ (2007) 3 *Competition Law International* 8-12 at 8.

enforcement is that Article 102 is not regarded as exhaustive in its description of the dominant firm conduct it proscribes and, by extension, the legal obligations or responsibilities it imposes upon dominant undertakings.

An expansive or non-exhaustive reading of the provision may, on the one hand, enable competition authorities to apply and enforce Article 102 against conduct that, though not directly contravening the letter of the law, nevertheless fundamentally offends against its spirit and purport. Indeed, as Subiotto observed, 'new practices which may not have been adequately covered by Article 102, but which European competition authorities felt needed to be regulated, have prompted the European Court of Justice to rule that such practices must be covered by the provision'.¹⁶

Undeniably, conduct and practices which, though not explicitly covered by the regulation, nevertheless offend against its spirit and purport may in some instances constitute a more serious violation of competition principles than specifically prohibited conduct. For example, though predatory pricing, price discrimination, and tying may contravene the letter of the law, these practices have been proven to benefit rather than harm consumers in some instances. And competition authorities have found a backhand strategy to accommodate these practices, by insisting that they be tolerated if they do not substantially prevent or lessen competition, or if they have certain procompetitive gains or benefits.¹⁷ Therefore, the possibility that originally unimagined

¹⁶ Romano Subiotto 'The Special Responsibility of Dominant Undertakings Not to Impair Genuine Undistorted Competition' (1994) 18 *World Competition* 5-30 at 5.

¹⁷ European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (2009/C 45/02) at pars 28-31

anticompetitive practices are also covered by Article 102 may be taken as a positive aspect of European abuse of dominance enforcement, as this prevents anticompetitive conduct from escaping prohibition, merely because the drafters of this legislative provision did not stretch their imaginations sufficiently far ahead.

However, an expansive reading of Article 102 may, on the other hand, also have the unintended effect of creating unlimited and excessive constraints on the market conduct of dominant firms. It is important to state here that Article 102 does not even refer to or mention the issue of ‘special responsibility’ that may attach to dominant undertakings. The first European competition law decision which stressed the importance of the special responsibility of dominant undertakings was *Michelin v Commission*.¹⁸ In this decision, the Court found that “a dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition on the market”.¹⁹ The *Michelin* decision has been followed by numerous subsequent decisions, to such an extent that the special responsibility of dominant firms has become an important principle in European abuse of dominance law.²⁰

accessed at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224(01)) (date of last use: 6 July 2016). See also Whish and Bailey supra n 11 at 210-12.

¹⁸ Case C-322/81 *Michelin v Commission*.

¹⁹ Id at par 57.

²⁰ Cases T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* at par 67; Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports SA and Others v Commission* at pars 19 and 106; C-333/94 P *Tetra Pak International SA v Commission* at par 24; Joined cases C-395/96 P and C-396/96 P. *Compagnie Maritime Belge Transports SA and Dafra-Lines A/S v Commission* at pars 37 and 85; T-228/97 *Irish Sugar plc v. European Commission* at pars 5 and 112 ; C-280/08 P *Duetsche Telekom AG v Commission* at par 176 and C-52/09 *Konkurrensverket v TeliaSonera Sverige* at par 24.

It is the expansive reading of Article 102 which has resulted in the special responsibility of dominant firms becoming an important part of the provision. It is common in most jurisdictions, particularly in the common-law world, when applying and interpreting a complex legislative provision such as Article 102, to develop some ancillary rules and principles in order to provide clarity on its proper meaning and effect. However, the development of the principle of special responsibility in Article 102 discourse appears to raise more questions than it answers.

The first question is: To whom is the dominant firm responsible?²¹ Other questions that may be asked include whether the principle of special responsibility creates new species of prohibited conduct and additional responsibility for dominant firms?²² If it does so, what are the guidelines to determine when a company is subject to this special responsibility?²³ For example, does the special responsibility principle apply to all dominant firms or only dominant firms with certain attributes?

If the principle does not create new species of prohibited conduct and additional responsibility for dominant firms, does this mean then that the principle is mere rhetoric

²¹ Maher M. Al-Dabbah 'Conduct, Dominance and Abuse in "Market Relationship": Analysis of Some Conceptual Issues under Article 82 EC' (2000) 21 *European Competition Law Review* 45-9 at 46.

²² Once a firm is deemed dominant it finds itself subject to some extra duties under the principle of special responsibility, see Oluseye Arowolo 'Application of the Concept of Barriers to Entry Under Article 82 of the EC Treaty: Is There a Case for Review?' (2005) 26 *European Competition Law Review* 247-57 at 251. The special responsibility principle creates an obligation for a dominant firm to behave in a certain way towards its competitors, see Burton Ong 'Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to Licence Intellectual Property Rights' (2005) 26 *European Competition Law Review* 215-24 at 216. See also Pinar Akman 'To Abuse, or Not to Abuse: Discrimination Between Consumers' (2007) 32 *European Law Review* 492-512 at 493.

²³ Rafael Allendesalazar 'Can we finally say farewell to the "special responsibility" of dominant companies?' paper presented at the 12th Annual Competition Law and Policy Workshop, Robert Schuman Centre, 8-9 June 2007, EUI, Florence, at 4 accessed at [http://www.eui.eu/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Allendesalazar.pdf](http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Allendesalazar.pdf) (date of last use: 6 July 2016).

that refers to nothing more than the original duties imposed on all dominant firms by Article 102?²⁴ And if the principle amounts to nothing more than ‘ambiguous rhetoric’, as a commentator has described it,²⁵ why was its development found essential if it adds nothing but uncertainty to the proper understanding of Article 102?²⁶

In the modern antitrust climate, where antitrust violations may be visited with mind-boggling fines, it is essential for dominant undertakings to know in advance the extent of their legal responsibilities and obligations so as to minimise their exposure to liability. However, the special responsibility principle has far reaching implications, as it potentially covers endless situations in which competition authorities may instinctively feel that a firm should be restrained from acting in a particular manner.²⁷

The flexibility gained by European competition authorities in pursuing all possible abuses of dominance, perhaps even in the most trivial of cases, under Article 102 may be outweighed by the legal uncertainty created by the principle of special responsibility.²⁸ As one observer has remarked, “the principle of special responsibility neither helps in determining when conduct will be considered abusive, nor explains why

²⁴ Indeed, in a narrow sense, it is argued, the principle of special responsibility can be interpreted as reiterating the same obligations that Article 102 already imposes on dominant firms, which by contrast are not imposed on non-dominant firms, see Christian Ahlborn and Jorge Padilla ‘From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law’ in Claus-Dieter Ehlermann and Mel Marquis (eds) *European Competition Law Annual 2007 - A Reformed Approach to Article 82 EC* (Hart Publishing 2008) at 71.

²⁵ Reza Dibadjt ‘Article 82: Gestalt, Myths, Questions’ (2006-2007) 23 *Santa Clara Computer & High Tech Law Journal* 615-42 at 622 footnote 38.

²⁶ Indeed, some have questioned its continued relevance in European competition law as, they contend, it provides no reliable standard for determining essential competition law questions under Article 102, Howarth and McMahon supra n 2.

²⁷ Subiotto supra n 16 at 6 and Donald I. Baker ‘An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists’ (2009) 5 *European Competition Journal* 145-200 at 171.

²⁸ Subiotto supra n 27.

it will be prohibited".²⁹ A well-functioning system of competition law enforcement requires legal certainty in order to deter anticompetitive conduct and encourage competitive practices.³⁰

A review of the principle of special responsibility reveals that it is in keeping with the ordoliberal big-business bias that has been part of European competition law since its inception.³¹ Viewed and understood from the context of ordoliberalism, the principle of special responsibility may constrain the ability of dominant firms to engage in a wide range of competitive actions, even if such actions would generally be unobjectionable if adopted by non-dominant firms.³² The fact that dominant firms are not allowed to act in the same manner as other non-dominant market participants means that there is effectively one law for dominant firms and another for non-dominant rivals.³³ However, the special responsibility principle fails spectacularly to provide a rational explanation for this discriminatory and unequal treatment of firms, where sound commercial practices that are common in the marketplace become illegal only when adopted by dominant firms.³⁴ As a result, the special responsibility principle has been variously described as

²⁹ Allendesalazar supra n 23 at 5.

³⁰ Ahlborn and Padilla supra n 24 at 83.

³¹ Id at 56, 70 and 72. Rose and Ngwe supra n 15 at 8-9 and Philip Marsden and Liza Lovdahl Gormsen 'Guidance on abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure' (2010) 55 *The Antitrust Bulletin* 875-914 at 892.

³² Marsden and Gormsen supra n 31 and Robert E. Bloch et al 'A Comparative Analysis of Article 82 and Section 2 of the Sherman Act' (2006) 7 *Business Law International* 136-83 at 142.

³³ John Vickers 'Abuse of Market Power' (2005) 115 *The Economic Journal* F244-F261 at F246.

³⁴ Ioannis Lianos 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) University College London, Centre for Law, Economics and Society, Working Paper Series 3/2013 at 34 and Allendesalazar supra n 23.

'a burden on dominant firms',³⁵ 'a political choice',³⁶ and 'an unhelpful and unclear concept which prevents competition on merit'.³⁷

Accordingly, calls have been made for the special responsibility principle to be toned down or even abandoned altogether.³⁸ Indeed, it is submitted, if European competition law is to fulfill its aim of following a truly consumer welfare oriented standard in its application and enforcement of Article 102, this will require abandoning the special responsibility principle.³⁹

5.2.2 The Doctrine of Super-Dominance

The doctrine of super-dominance first appeared in European competition law in *Compagnie Maritime Belge Transports SA v Commission*,⁴⁰ in the written opinion of the Advocate General.⁴¹ Although the Court in *Compagnie Maritime Belge* did not itself use the term, other variations of it such as 'quasi-monopoly', 'overwhelming dominance', 'dominance approaching monopoly', 'dominance verging on monopoly' and 'extensive

³⁵ Fernando Diez Estella 'Abusive Practices in the Postal Services? Part 1' (2006) 27 *European Competition Law Review* 184-96 at 188.

³⁶ Smet supra n 2 at 358.

³⁷ Adrian Majumdar 'Whither Dominance?' (2006) 27 *European Competition Law Review* 161-5 at 163.

³⁸ Rossella Incardona 'Modernisation of Article 82 EC and Refusal to Supply: Any Real Change in Sight' (2006) 2 *European Competition Law Journal* 337-69 at 367.

³⁹ See discussion in Chapter 2 at 2.3.2 and Ahlborn and Padilla supra n 24 at 57.

⁴⁰ Joined cases C-395/96 P and C-396/96 P supra n 20. Szyszczak supra n 9 at 1757.

⁴¹ Opinion of Advocate General Fennelly, Joined cases C-395/96 P and C-396/96 P supra n 20 at par 137.

dominance' have been used on various occasions by European competition authorities, the courts, and commentators.⁴²

However, in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading*⁴³ the UK Competition Appeal Tribunal cited the *Compagnie Maritime Belge* case and explicitly referred with approval to the doctrine of super-dominance, when it found that “super-dominant firms may have particularly more onerous responsibilities than other dominant undertakings”.⁴⁴ In *Konkurrensverket v TeliaSonera Sverige*⁴⁵ the European Court of Justice acknowledged that the doctrine of super-dominance has become part of European abuse of dominance law, adding that “an undertaking’s degree of dominance in the market is relevant to the assessment of the lawfulness of its conduct”.⁴⁶

It is important to note that Article 102 does not distinguish between the behavior of super-dominant and other dominant undertakings. The provision does not refer to degrees of dominance or different responsibilities for dominant undertakings.⁴⁷ But the doctrine of super-dominance and other concepts associated with it clearly suggest that there may be varying degrees of dominance and, as a consequence, possibly different

⁴² *Tetra Pak v Commission* supra n 20 at pars 28, 31 and 48; *Irish Sugar plc v Commission* supra n 20 at par 185; and European Commission Decision on Microsoft of 24 March 2004 (Case COMP/C-3/37.792 Microsoft) at pars 435, 526, 770 and 1065. See also Szyszczak supra n 9 at 1757; Stephen Kon and Sarah Turnbull ‘Pricing and the Dominant Firm: Implications of the Competition Commission Appeal Tribunal’s Judgment in the Napp Case’ (2003) 24 *European Competition Law Review* 70-86 at 76; Mark Furse ‘On a Darkling Plain: the Confused Alarms of Article 82 EC’ (2004) 25 *European Competition Law Review* 317-19 at 317 and Whish and Bailey supra n 11 at 188.

⁴³ Case No 1001/1/1/01 [2002] CAT 1.

⁴⁴ Id at par 219.

⁴⁵ Supra n 20.

⁴⁶ Id at par 81. See also Whish and Bailey supra n 11 at 189.

⁴⁷ Szyszczak supra n 9 at 1758.

legal obligations for super-dominant and other dominant firms. Whish and Bailey allude to this potential distinction in legal responsibilities and obligations between super-dominant and other dominant firms when they observe that “if an ordinarily dominant undertaking has a special responsibility, a super-dominant firm should have an even greater responsibility”.⁴⁸ Indeed, as Geradin has argued, the definition of dominance developed by the courts does not necessarily preclude the existence of different levels or degrees of dominance and accompanying obligations.⁴⁹ An interesting question that arises is how many species of dominant firms may exist?

As Whish and Bailey further observe, there may be differing degrees of dominance: “a monopolist, at one end of the spectrum, and a firm with no or only imperceptible market power, at the other”.⁵⁰ But between these two extremes, they submit further, “there could also be firms with ‘some’ or ‘appreciable’ or ‘significant’ or ‘substantial’ market power”.⁵¹ While a dominant firm can generally be viewed as a firm with ‘substantial’ or ‘significant’ market power, it is not illogical, another observer has argued, to suggest that there may be different levels of ‘substantial’ or ‘significant’ market power.⁵² A firm may be regarded as super-dominant whenever it has unconstrained or near monopoly market power, enabling it to adopt unilateral commercial practices capable of producing

⁴⁸ Whish and Bailey *supra* n 11 at 189. See also Jennifer Skilbeck ‘Carter Holt Harvey Building Products Group Ltd v Commerce Commission [2004] UKPC 37; [2005] 2 LRC 320’ (2005) 31 *Commonwealth Law Bulletin* 187-96 at 191

⁴⁹ Damien Geradin et al ‘The Concept of Dominance in EC Competition Law’ (July 2005) at 7 accessed at SSRN: <http://ssrn.com/abstract=770144> and <http://dx.doi.org/10.2139/ssrn.770144> (date of last use: 6 July 2016). For the definition of dominance as developed by the courts see nn 10 and 11 in this Chapter.

⁵⁰ Whish and Bailey *supra* n 11 at 180.

⁵¹ *Id.*

⁵² Geradin *supra* n 49.

anticompetitive effects.⁵³ The rationale behind super-dominance is that if a firm with a 50 per cent market share is dominant, as is standard practice in European competition law,⁵⁴ then a firm with a 90 per cent market share is likely to be even more dominant.⁵⁵ It is possibly for this reason that European competition authorities and courts have developed a term over and above dominance, which they call ‘super-dominance’.⁵⁶

While identifying a super-dominant firm in any market may not pose significant challenges in practice, it may be a complicated process to identify, and distinguish between, all other possible kinds or levels of dominance. This is particularly true when regard is had to Article 102, which does not refer to degrees of dominance or distinguish between the behavior of different dominant firms. What is the threshold for separating all potential species of dominant firm from each other, in order to allocate to each a responsibility commensurate with its size? In describing an ordinary or normal dominant firm, that is a firm that barely meets the requirements for dominance,⁵⁷ should we call it “a firm with substantial market power with an ability to adopt unilateral commercial practices capable of producing anticompetitive effects, but not to the same extent as a super-dominant firm”? But if such a firm has substantial market power with an ability to adopt unilateral commercial decisions capable of producing anticompetitive effects, would such anticompetitive effects not have nearly the same harmful impact on consumers as in the case of a super-dominant firm?

⁵³ Whish and Bailey supra n 11 at 187 and Geradin supra n 49. See also Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA* supra n 20 at par 136.

⁵⁴ See all sources at n 11 above.

⁵⁵ Geradin supra n 49.

⁵⁶ Whish and Bailey supra n 11 at 189.

⁵⁷ Carl Wetter, Olle Rislund and E Pitt ‘Geographical Pricing in the Postal Sector - the Swedish Zone Price Case’ (1999) 20 *European Competition Law Review* 240-4 at 242.

And in describing types of dominant firm, other than the types discussed above, should we call them ‘firms with substantial market share but with no ability to adopt unilateral commercial decisions capable of producing anticompetitive effects’? But then, the latter species of dominant firm is in effect a non-dominant firm, given that despite its substantial market share it does not have *the ability to act unilaterally and to cause any harm to competitors, customers, and consumers*. Indeed, at the heart of the legal definition of dominance is the undertaking’s ability to behave independently of competitors, customers, and consumers.⁵⁸ However, this basic legal definition of the concept of dominance in European competition law has become unreliable, due largely to the emergence of the concept of super-dominance and the various possible levels of dominance that this concept suggests may exist.⁵⁹

This, in turn, highlights the superfluous nature of the concept of super-dominance, as it potentially causes blurring of the lines between the actions not only of various dominant firms, but non-dominant firms as well. By creating various levels of dominance, a thin dividing line is created not only between different dominant firms among themselves, but also between dominant firms that barely meet the minimum requirements for dominance and non-dominant firms. This increases the possibility that non-dominant undertakings may be treated as if they are dominant, when in fact they are not.⁶⁰ This is what happened in *Tetra Pak*.⁶¹ Here, the actions of a firm which was clearly not

⁵⁸ Arowolo supra n 22.

⁵⁹ Dibadjt supra n 25 at 622-3 and Al-Dabbahb supra n 21 at 45.

⁶⁰ Szyszczak supra n 9 at 1756.

⁶¹ Supra n 20. See also Subiotto supra n 16 at 7 and 9.

dominant in the relevant market were dealt with under Article 102, as if the firm was dominant in that market.⁶² The Court adopted this approach because it felt that, although Tetra Pak was not dominant in the relevant market, it was nevertheless dominant in a separate but associated market.⁶³

It is controversial to suggest that a firm's actions in a market in which it is clearly not dominant can be dealt with under Article 102.⁶⁴ This is because Article 102 is specifically limited to firms that are dominant in the relevant market. As Whish and Bailey point out, the legal expression 'dominant position' "is a binary term: either an undertaking is dominant in the relevant market and therefore subject to Article 102 or it is not dominant, in which case its unilateral actions are not subject to the Article 102 scrutiny at all".⁶⁵ The decision in *Tetra Pak*, therefore, demonstrates a regrettably poor grasp and application of this fundamental principle of abuse of dominance adjudication.

The notion that some dominant firms may be super-dominant also offers no tangible assistance in determining whether the unilateral actions of a dominant firm may lead to consumer harm, in line with the effects-based approach to abuse of dominance enforcement.⁶⁶ Neither does it establish a reliable standard for treating dominant firms in a fair and impartial manner that recognises their role in the economy.⁶⁷ The

⁶² *Tetra Pak* supra n 20 at pars 28-31.

⁶³ *Id* at pars 29-31.

⁶⁴ Subiotto supra n 16 at 10.

⁶⁵ Whish and Bailey supra n 11 at 180.

⁶⁶ Ahlborn and Padilla supra n 24 at 56 and Rafael Allendesalazar 'Can We Finally Say Farewell to the "Special Responsibility" of Dominant Companies?' in Claus-Dieter Ehlermann and Mel Marquis (eds) *European Competition Law Annual 2007 - A Reformed Approach to Article 82 EC* (Hart Publishing 2008) at 319.

⁶⁷ McMahon supra n 2 at 170.

obsession with dominance by European competition authorities has resulted in their complete disregard or lack of interest in an enforcement regime which emphasises consumer welfare as a fundamental or controlling principle.⁶⁸

A classic example of this obsession with dominance is *United Brands*.⁶⁹ Instead of enquiring, as a basic point of departure, whether the dominant firm conduct complained of had any anticompetitive effects, the European Court of Justice entertained irrelevant questions. The Court asked whether United Brands “made use of the opportunities arising out of its dominant position”, as a primary means through which it abused its dominance.⁷⁰ Had the Court simply enquired whether the conduct complained of had any anticompetitive effect, the issue of dominance would have become a mere formality and less central to the determination of liability.⁷¹ As the UK’s former Office of Fair Trading (now the Competition and Markets Authority) had remarked, if the enforcement of competition law was more effects-based, with consumer welfare as its main priority, the relevance of the concept of dominance could seriously be questioned.⁷²

The doctrine of super-dominance, like the principle of special responsibility, is manifestly more aligned with the traditional European ordoliberal and form-based approach to competition law enforcement, which places considerable emphasis on the

⁶⁸ Szyszczak supra n 9 at 1773.

⁶⁹ Supra n 10.

⁷⁰ Id at par 249.

⁷¹ McMahon supra n 2 at 162.

⁷² Office of Fair Trading, *The Cost of Inappropriate Interventions/Non Interventions Under Article 82* (September 2006) Economic Discussion Paper, OFT 864 at 15 accessed at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/economic_research/offt864.pdf (date of last use: 6 July 2016).

preservation of 'competitive market structures'.⁷³ In terms of the current framework of Article 102, firms with substantial market shares are considered inimical to the ideal of free and effective competition, as their mere presence in markets is seen as preventing the entry into and expansion within such markets by competitors.⁷⁴

As Niels and Jenkins observe, "the notion that the mere existence of dominant firms is dangerous for competition is still deeply embedded in European competition law".⁷⁵ Under this enforcement approach, the more a firm enjoys significant market share the higher the likelihood that some aspect of its conduct may be deemed anticompetitive.⁷⁶ The doctrine of super-dominance therefore suggests that the identity of the firm and not the quality of its conduct is more important in the evaluation of abuse of dominance cases.⁷⁷

In *Michelin*,⁷⁸ Allendesalazar observed, the Court appeared generally to have been more focused on Michelin's dominant status in the market and less so on the alleged abusive conduct that was at issue and its impact on consumers.⁷⁹ As Appeldoorn

⁷³ Julia Heit 'The Justifiability of the ECJ's Wide Approach to the Concept of "Barriers to Entry"' (2006) 27 *European Competition Law Review* 117-23 at 123 and McMahon supra n 2 at 164 and 170. However, Bavasso argues that the notion of a dominant undertaking having a special responsibility is not inconsistent with the principle that efficient behavior ought to be promoted and only prevented when it gives rise to exclusion of a competitor which is likely to produce consumer harm, see Antonio Bavasso 'The Role of Intent Under Article 82 EC: From "Flushing the Turkeys" to "Spotting Lionesses" in Regent's Park' (2005) 26 *European Competition Law Review* 616-23 at 620.

⁷⁴ Sinclair supra n 14 and Lianos supra n 34 at 27.

⁷⁵ Niels and Jenkins supra n 14.

⁷⁶ European Commission's Guidance on the Enforcement Priorities in Applying Article 82 supra n 17 at par 10

⁷⁷ Robert O'Donoghue and Jorge Padilla *The Law and Economics of Article 102 TFUE* 2 ed (Hart Publishing 2013) at 207-08. See also Robert O'Donoghue and Jorge Padilla *The Law and Economics of Article 82 EC* (Hart Publishing 2006) at 168.

⁷⁸ Supra n 18.

⁷⁹ Allendesalazar supra n 23 at 1.

further observes, in other major abuse of dominance cases such as *Microsoft*,⁸⁰ where large market shares were identified, the European Competition Commission imposed duties on the undertaking based on its dominance and not its behavior.⁸¹

This appears to suggest that dominance and super-dominance on their own are illustrative of the extent of the firm's transgression in the market.⁸² This fascination with size increases the possibility that in abuse of dominance cases proof of dominance or super-dominance is almost sufficient to establish an abuse.⁸³ Remarking on the European Commission's *Microsoft*⁸⁴ decision, a commentator struck a chord when he observed that "it was generally predictable that once Microsoft was found to have enjoyed some position of dominance, a finding of abuse of dominance was most likely to occur".⁸⁵

Because of the implications that a finding of dominance or super-dominance may have, it has become customary for defence counsel appearing for defendant firms in abuse of dominance proceedings to deny vehemently that the firm is dominant in the relevant market.⁸⁶ This is because once a firm's dominance or super-dominance is established, its scope of market conduct is threatened by endless constraints, while non-dominant

⁸⁰ European Commission Decision on Microsoft supra n 42.

⁸¹ J F Appeldoorn 'He Who Spareth his Rod, Hateth his Son? Microsoft, Super-dominance and Article 82 EC' (2005) 26 *European Competition Law Review* 653-58 at 656-58.

⁸² Allendesalazar supra n 23 at 5.

⁸³ Id at 4. Miguel de la Mano 'The dominance concept: new wine in old bottles' (March 2007) FTC/DOJ Hearings on single-firm conduct, Washington DC accessed at <http://www.justice.gov/atr/dominance-concept-new-wine-old-bottles> (date of last use: 6 July 2016).

⁸⁴ European Commission Decision on Microsoft supra n 42.

⁸⁵ Smet supra n 2 at 362.

⁸⁶ Mark Furse 'Caught Napping: DGFT and Napp Pharmaceutical Holdings Ltd' (2001) 22 *European Competition Law Review* 477-81 at 481.

firms are not restricted in a similar manner.⁸⁷ In this regard, the enforcement of Article 102, it is submitted, has been fashioned in a manner that creates a market advantage for non-dominant firms and conversely a disadvantage for dominant and super-dominant firms.⁸⁸

This hostile treatment of dominant undertakings has made dominance distinctly unenjoyable for successful corporations, even in instances where such success may have been achieved legitimately without breaking the law.⁸⁹ As Arowolo observes, “there are serious disincentives to the acquisition and maintenance of dominance”, in view of the manner in which Article 102 rules have been applied by European competition authorities.⁹⁰ Indeed, the market disadvantage with which dominant firms are confronted as a result of the doctrine of super-dominance may equate to punishing businesses for their commercial success.⁹¹ Therefore, the assurances given by European competition authorities that dominant firms will not be punished for their success, but will be allowed to compete vigorously on merit,⁹² can be viewed as nothing more than empty rhetoric.⁹³

⁸⁷ Heit supra n 73 at 122.

⁸⁸ Id. See also Giuliano Amato and Valentine Korah ‘Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market’ (1998) 19 *European Competition Law Review* 263-4 at 264; Smet supra n 2 at 360 and McMahon supra n 2 at 165.

⁸⁹ Subiotto supra n 16 at 6.

⁹⁰ Arowolo supra n 22.

⁹¹ Nicolas Petit and Norman Neyrink ‘Industrial Policy and Competition enforcement: Is There, Could There and Should There Be a Nexus?’ (February 2013) Paper prepared for the 2012 GCLC Annual Conference at 10 accessed at SSRN: <http://ssrn.com/abstract=2225903> and <http://dx.doi.org/10.2139/ssrn.2225903> (date of last use: 6 July 2016). See too Jebesen and Stevens supra n 3 at 504.

⁹² European Commission’s Guidance on the Enforcement Priorities in Applying Article 82 supra n 17 at pars 1 and 6.

⁹³ Subiotto supra n 16 at 6.

As Allendesalazar observes, European competition authorities have declared perfectly sound commercial practices by dominant firms illegal without even establishing their anticompetitive effects.⁹⁴ European courts have also made decisions the effect of which has been to prevent dominant firms from pursuing commercial practices that are perfectly standard in the market.⁹⁵ Other decisions have also precluded dominant firms from aligning their prices to meet competition from their non-dominant competitors.⁹⁶ As Gal contends, 'if the rights of dominant firms to protect their commercial interests when threatened are not properly recognised, dominant firms would have to compete with their hands tied to their back, limiting their ability to compete, thereby harming the very process that competition law is meant to protect'.⁹⁷

5.2.3 Summary

The principle of special responsibility can be divided into two crucial parts. The first is clear and uncontroversial and amounts to stating the obvious: dominant firms are prohibited from distorting competition by engaging in anticompetitive conduct. The first part is therefore a restatement of the basic principle embodied in Article 102, in terms of which dominant firms are proscribed from engaging in conduct deemed to constitute an

⁹⁴ Allendesalazar supra n 23 at 5.

⁹⁵ See Joined cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission* at pars 1105-1127. Other standard market practices that may be prohibited if adopted by a dominant firm include loyalty discounts and rebates, see generally *Hoffman-La Roche v Commission* supra n 10; *Michelin v Commission* supra n 18; and *BPB Industries Plc and British Gypsum Ltd v Commission* supra n 20.

⁹⁶ *AKZO v Commission* supra n 11 at pars 70-71 and 133 – 134; *France Télécom SA v. Commission* supra n 11 at pars 171, 179, 182 and 187; and *Tetra Pak International SA v Commission* supra n 20 at par 41. See also European Commission DG Competition, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (2005) at pars 82-83 accessed at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (date of last use: 6 July 2016).

⁹⁷ Michal S Gal 'Below-cost Price Alignment: Meeting or Beating Competition? The France Télécom Case' (2007) 28 *European Competition Law Review* 382-91 at 382-3.

abuse of dominance and therefore illegal. The second is the unwritten and controversial part, which encompasses the essence of the 'special' obligations imposed on dominant firms: dominant firms are required to be always careful and to some extent refrain from engaging in standard market conduct, even if such conduct would be unobjectionable when adopted by non-dominant firms. The second part is in line with the well-established principle of European competition law, that the presence of a dominant firm in a market is incompatible with the ideal of free and effective competition. Whenever dominance is found to exist in a market it triggers the presumption that competition in that market has been weakened.⁹⁸

The doctrine of super-dominance strengthens the principle of special responsibility, by adding that the more dominant the firm the more onerous will be the obligations imposed on it. The combined effect of the principle of special responsibility and the doctrine of super-dominance is that the ability of dominant firms to engage in standard market conduct and to compete effectively on merit is severely compromised. Constraints on the market conduct of dominant firms occasioned by the principle of special responsibility and the doctrine of super-dominance are consistent with the ordoliberal philosophy of hostility towards dominant undertakings that has been part of European competition law from its inception.

5.3 The Principle of Special Responsibility and the Doctrine of Super-Dominance in South African Competition Law

⁹⁸ *Hoffmann-La Roche & Co AG v Commission* supra n 10 at par 91; *Michelin v Commission* supra n 18 at par 70; Case T-210/01 *General Electric v Commission* at par 549; Case C-95/04P *British Airways v Commission* at par 66; and Case T-155/06 *Tomra Systems ASA and Others v Commission* at pars 38 and 206.

While some provisions of the South African Competition Act have an undeniably local flavor, others have been largely influenced by foreign law. As Unterhalter puts it, “our legislature doffs its cap to the very considerable debt our Act owes to the competition laws from other jurisdictions”.⁹⁹ But this borrowing from other jurisdictions has not been limited to the drafting stage of our Competition Act, it is also evident in the day-to-day enforcement of the Act. Indeed, our case law is replete with generous quotations from foreign, particularly European, competition law decisions. As our Competition Appeal Court found in *Senwes Limited v Competition Commission*,¹⁰⁰ the theoretical foundations of European competition law “are more congruent with those of our own Competition Act”.¹⁰¹ This has enabled our competition authorities to borrow from principles and concepts of European origin, such as ‘special responsibility’ and ‘super-dominance’, which were previously unknown in South African competition law.

The legal basis for importing foreign principles into our law stems from section 1(3) of our Competition Act, which permits any person applying and interpreting the Act to consider ‘*appropriate*’ foreign and international law. The recognition by our legislature that foreign and international law may be turned to for guidance when interpreting the Act and developing our competition jurisprudence accords with the general understanding that South African economic and competition challenges may not

⁹⁹ Martin Brassey et al *Competition Law* (Juta 2002) at 180.

¹⁰⁰ 87/CAC/Feb09.

¹⁰¹ Id par 54. See also Phumudzo S Munyai ‘The Interface Between Competition and Constitutional Law: Integrating Constitutional Norms in South African Competition Law Proceedings’ (2013) 25 *South African Mercantile Law Journal* 323-41 at 326-7.

necessarily be unique, but part of global commercial trends for which reliable solutions may have been found elsewhere.

However, it is also important to note that section 1(3) does not permit our competition authorities to copy foreign competition principles slavishly.¹⁰² This is the implication of the word ‘*appropriate*’ in section 1(3) of the Competition Act. It sets limits on the foreign and international competition principles that can be consulted, by suggesting that ‘*inappropriate*’ foreign and international principles should not be consulted. In view of the fact that some foreign competition principles and the theories that underpin them may have developed from unique and country-specific economic and historical settings,¹⁰³ any slavish copying of such foreign principles may be *inappropriate*. In this Chapter,¹⁰⁴ I argue that the importation of the principle of special responsibility and the doctrine of super-dominance into our law is *inappropriate*, because it violates the principle of legality and the equality clause in section 9 of our Constitution. As section 1(2)(a) of the Competition Act requires, the Act must be interpreted in a manner that is consistent with the Constitution.

5.3.1 The Principle of Special Responsibility

As in the case of Article 102 of the Treaty of the European Union, none of the provisions in Part B of the South African Competition Act, which deal with abuse of a dominant

¹⁰² Brassey *supra* n 99.

¹⁰³ *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) at pars 26-27.

¹⁰⁴ See par 5.4 below.

position, make any reference to a 'special responsibility' that may attach to a dominant firm. But the abuse of dominance provisions of the Act clearly impose legal obligations on dominant firms that are absent on non-dominant firms. So, can these obligations or responsibilities imposed on dominant firms be termed 'special' simply because dominant firms have responsibilities that do not exist for non-dominant firms?

For example, it may be argued that there is something special or unique about a rule that prohibits a firm with substantial market share from charging excessive prices to the detriment of its customers, whereas no such prohibition applies to the pricing decisions of a non-dominant firm, regardless of possible customer exploitation.¹⁰⁵ However, the principle of special responsibility encompasses far more than a rule that prohibits a dominant firm from engaging in conduct in which non-dominant firms may easily engage. Rather, the operation of this principle suggests even stricter constraints on the actions of dominant firms than those allowed under the Act. As stated earlier, the effect of the principle of special responsibility is to limit the ability of dominant firms to compete effectively in the market and to maintain or grow their market share, beyond the standard obligations or constraints imposed by the Act.

The operation of the principle of special responsibility may fit into the historical and philosophical reasons for which competition law was originally conceived in South Africa. In South Africa, competition policy and law developed in response to the

¹⁰⁵ Brassey *supra* n 99 at 181.

historical trend towards industrial concentration and the creation of monopoly.¹⁰⁶ There is a longstanding perception in South African society that industrial giants, particularly those which are privately owned, are against the common interest of the majority of citizens.¹⁰⁷ For this reason, the concentration of economic power in the hands of private corporations owned and controlled by a minority has been singled out as a major example of the prevailing inequality in wealth and income distribution in South African society. And in the discussion papers and policy documents that preceded the adoption of the Competition Act, it was also clear that these factors were among the most important socio-economic ills the legislation was intended to cure.

Since the coming into force of the Competition Act, South African competition authorities have on several occasions made decisions that, while not explicitly referring to the special responsibility of dominant firms, have had an effect similar to that observed under the principle of special responsibility in European law. In particular, the effect of such decisions has been to discriminate against dominant firms, by overly constraining their ability or right to compete freely and unhindered. As commentators observe, some of the decisions of the South African competition authorities in abuse of dominance cases have appeared to be unfairly biased against dominant firms.¹⁰⁸

¹⁰⁶ D V Cowen 'A Survey of the Law Relating to the Control of Monopoly in South Africa' (1950) 8 *South African Journal of Economics* 124-47 at 124. See also EE Bekker *Monopolies: Review of the Role of the Competition Board* (Rand Afrikaans University 1992) at 13 and EE Bekker 'Monopolies and the Role of the Competition Board' 1992 *Journal of South African Law* 618-44 at 625.

¹⁰⁷ Bork also observed a similar problem in American society, Robert H. Bork *The Antitrust Paradox: A Policy at War With Itself* (Basic Books Inc 1978) at 5.

¹⁰⁸ Simon Roberts, Jonathan Klaaren and Kasturi Moodaliyar 'Introduction to Special Section of Competition Law and Economics' (2008) 11 *South African Journal of Economic Management and Science* 247-8 at 248.

The decision of the Competition Tribunal in *Nationwide Poles v Sasol Oil (Pty) Ltd*¹⁰⁹ clearly suggests that the presence of dominant firms in markets is inconsistent with the ideal of a 'level playing field', in which small firms can also compete freely as required by the Competition Act.¹¹⁰ Although the Tribunal's *Nationwide Poles* decision was overturned on appeal by the Competition Appeal Court due to lack of evidence of a substantial prevention and lessening of competition in the market,¹¹¹ it is important to note that the Appeal Court did not interfere with the Tribunal's reasoning and findings on the importance attached to the protection of small business interests under the Act. Indeed, the Competition Appeal Court emphasised that its decision did not seek to minimise the weight which the legislature has given to the need to ensure that small and medium-sized enterprises are protected under the Act.¹¹² In *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*,¹¹³ a case which dealt with a complaint of excessive pricing against a dominant firm, the Tribunal described dominant firms in less than flattering terms: as 'beasts'.¹¹⁴ This description of dominant firms aptly sums up the prevailing hostility towards them, perhaps not only in South African competition law circles, but also in South African society at large.

It is important to state here that the principle of special responsibility has not been explicitly recognised in the majority of the decisions of our competition authorities. But this is neither surprising nor unusual, given the limited number of abuse of dominance cases that have been decided to date. The first South African competition decision to

¹⁰⁹ Case No 72/CR/Dec03.

¹¹⁰ Id at pars 81 and 89.

¹¹¹ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* Case No 49/CAC/APRIL05 at 38-41.

¹¹² Id at 41.

¹¹³ Case No 13/CR/FEB04.

¹¹⁴ Id at pars 124 and 127.

explicitly refer to the special responsibility of dominant firms is that of the Tribunal in *Competition Commission v South African Airways (Pty) Ltd*.¹¹⁵

In this case, the Tribunal cited with approval a passage from the European decision in *Michelin*,¹¹⁶ in which it was found that “a dominant firm had a special responsibility not to allow its conduct to impair genuine undistorted competition in the market”.¹¹⁷ Following *Michelin*, the Tribunal found that South African Airways bore this ‘special responsibility’ towards the market.¹¹⁸ It is interesting to note that in this particular case South African Airways, as the Tribunal observed,¹¹⁹ appeared to be unsure of its status as a dominant firm in the relevant market at the time the impugned conduct took place and as a result lacked an appreciation of its ‘special responsibility’ towards the market.¹²⁰ However, the Tribunal insisted that South African Airways ought nevertheless to have been alert to any possible dangers inherent in its conduct as a dominant firm having this special responsibility.¹²¹

The Tribunal’s stance against South African Airways sent a strong message that it will be uncompromising in enforcing this special responsibility against dominant undertakings. It may be argued that in this case the Tribunal was very harsh or

¹¹⁵ *Competition Commission v South African Airways (Pty) Ltd* Case No 18/CR/Mar01.

¹¹⁶ *Supra* n 18.

¹¹⁷ *Id* at par 57. *Competition Commission v South African Airways (Pty) Ltd* *supra* n 115 at par 302.

¹¹⁸ *Competition Commission v South African Airways (Pty) Ltd* *supra* n 115 at par 303. Ryan Hawthorne ‘Has the Conduct-based Approach to Competition Law in South Africa Led to Consistent Interpretations of Harm to Competition?’ (2008) 11 *South African Journal of Economic Management and Science* 292-305 at 303.

¹¹⁹ *Competition Commission v South African Airways (Pty) Ltd* *supra* n 115 at par 303. Part of this confusion had to do with the approach the Competition Commission adopted in defining the relevant market which South African Airways disputed, see pars 50, 51 and 57 of the decision.

¹²⁰ *Id* at par 303.

¹²¹ *Id*.

unreasonable towards South African Airways, in view of the fact that South African Airways was unaware that it was subject to any special responsibility. And it would be unfair to characterise South African Airways's claim that it lacked an appreciation of its 'special responsibility' towards the market as disingenuous for two reasons.

Firstly, the South African Competition Act makes no mention of a special responsibility that attaches to dominant firms. Secondly, at the time the South African Airways decision was made, no other competition decision in South Africa had referred to this special responsibility. In this context, South African Airways was justified to argue not only that it was unaware of this special responsibility, but also that, when the responsibility was spelled out to it, compliance with it essentially required it 'irresponsibly' to desist from commercial activities which were standard practice in the market, in which its competitors also freely engaged.¹²²

Another South African Competition decision, and perhaps the most prominent, which has explicitly recognised the special responsibility of dominant undertakings towards the market is *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*.¹²³ In this case the Tribunal observed that the principle of special responsibility, which applies to the 'privileged status' of dominance, is well recognised in scholarly work and in the decisions of foreign competition adjudicators.¹²⁴ The Tribunal then cited with approval the UK competition decision in *Napp Pharmaceutical Holdings*

¹²² Id at pars 303-304.

¹²³ Supra n 113.

¹²⁴ Id at par 96.

*Limited*¹²⁵ where the Competition Appeal Tribunal emphasised the principle that “the more dominant the firm the more onerous responsibilities it attracts”.¹²⁶

There is a decided lack of academic commentary on the application of the principle of special responsibility in South African competition law. What does exist appears to be sympathetic to its introduction into our law.¹²⁷ As one has commentator remarked, ‘the imposition of a special responsibility on dominant firms in South African competition law is justified, as it is consistent with the idea that in the presence of dominant firms competition in the market is already weakened and that any interference by the dominant firm with the market structure may eliminate all competition’.¹²⁸

Another observer has gone so far as to suggest that “the South African Competition Act may need to be amended in order to ensure that it explicitly imposes a special responsibility on dominant firms to maintain genuine undistorted competition in the market”.¹²⁹ She further submits that this is particularly necessary when regard is had to the historical South African market context and prevailing hostile market structures that are not conducive to free and effective participation in the economy by small and medium-sized enterprises.¹³⁰

¹²⁵ Supra n 43.

¹²⁶ Id at par 219.

¹²⁷ Hawthorne supra n 118.

¹²⁸ Anne Njoroge ‘Regulation of dominant firms in South Africa’ (2011) MBA dissertation, University of Pretoria at 3 accessed at <http://repository.up.ac.za/handle/2263/25618> (date of last use: 6 July 2016).

¹²⁹ Kim Kempel ‘Competition Law and SMEs: Exploring the Competitor/Competition Debate in a Developing Democracy’ (2004) Centre on Regulation and Competition, Working Paper Series, Paper No. 109, Institute for Development Policy and Management, University of Manchester at 25.

¹³⁰ Id.

5.3.2 The Doctrine of Super-Dominance

Like Article 102 of the Treaty of the European Union, the South African Competition Act does not explicitly or directly define the concept of dominance. However, in an attempt to achieve certainty, the Competition Act improves on Article 102 by providing guidance in the determination of dominance. The Act does so by providing a simple description of the various circumstances in which dominance may exist in a market.¹³¹ The most central factors in the determination of dominance under the Act are market share and market power. Market power is defined in the Act as “the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”.¹³²

The definition of market power in our Act borrows significantly from the definition of dominance provided by the European Court of Justice in the *United Brands*¹³³ and *Hoffmann-La Roche*¹³⁴ decisions, where dominance was defined as “a position of economic strength in a market enabling an undertaking to act anticompetitively to an appreciable extent independent of its competitors, customers, and consumers”.¹³⁵ In this regard, it becomes clear that the definition of market power effectively refers to or describes the state or condition of dominance. For this reason, market power and dominance are sometimes used in practice as synonyms. But, strictly speaking, the two

¹³¹ See section 7 of the Competition Act generally. See also Minette Neuhoff et al *A Practical Guide to the South African Competition Act* (Lexis Nexis 2006) at 107.

¹³² Section 1(1)(Xiv) of the Act.

¹³³ *Supra* n 10.

¹³⁴ *Id.*

¹³⁵ Brassey *supra* n 99 at 188-9.

terms do not necessarily have identical meanings. For example, some firms are considered to be dominant purely on the basis of their market share,¹³⁶ without any reference to their market power. But, generally, where a presumption of dominance is made purely on the basis of market share, the assumption is also that the firm already has market power. It is, therefore, safe to conclude that no firm can be considered to be dominant unless it has been legally presumed or factually proven that it has market power.

Section 7 of the Competition Act tells us that a firm is dominant if “it has at least 45% market share”.¹³⁷ It states further that, a firm can also be dominant if “it has between 35% - 45% market share, unless the firm concerned can show that it does not have market power”.¹³⁸ Lastly, section 7 further provides that a firm can be deemed to be dominant if “it has less than 35% market share, but has market power”.¹³⁹

What emerges from the provisions of section 7 of the Competition Act is that a firm with at least a 45 per cent market share is regarded as automatically or statutorily dominant and no amount of argument to demonstrate that it lacks market power will assist it.¹⁴⁰ However, a firm with a market share of between 35 and 45 per cent attracts a rebuttable presumption of dominance. If the firm can adduce evidence to show that it lacks market

¹³⁶ This is in the case of firms which satisfy the minimum requirement for market share based dominance. In South African competition law that is 45% market share according to section 7(a) of the Competition Act.

¹³⁷ Section 7(a) of the Competition Act.

¹³⁸ Section 7(b) of the Competition Act.

¹³⁹ Section 7(c) of the Competition Act.

¹⁴⁰ Brassey supra 99 at 189; Neuhoff supra n 131 at 108 and Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (LexisNexis, Online Version, Last Updated: November 2015) at par 7.7.6.1.

power, the presumption of dominance falls away.¹⁴¹ Similarly, a firm with a market share of less than 35 per cent may attract a rebuttable presumption of dominance. However, in this scenario, in order for the presumption of dominance to stand, it is the complainant or the Competition Commission that must adduce evidence to show that the firm concerned has market power.¹⁴²

The concept of dominance adopted by the South African Competition Act is somewhat unusual, when compared with the practice in other jurisdictions.¹⁴³ The Competition Act's approach for establishing dominance has been criticised and labeled 'mechanical'.¹⁴⁴ Indeed, some problems and inconsistencies may arise from this approach. To start with, the Act's use of what in general appears to be a low market share as evidence of dominance is quite unusual.¹⁴⁵ Other jurisdictions, such as America and Europe, have generally adopted the sensible approach that a market share of at least 50 per cent is essential for a finding of dominance.¹⁴⁶ In this regard, the Act's classification of a firm with at least a 45 per cent market share as outright or automatically dominant is puzzling.

The classification of a firm with at least a 45 per cent market share as outright dominant is also contrary to the Act's own definition of dominance, echoed in the definition of market power in section 1 of the Act. For example, the definition of market power, and

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id at par 7.7.6.5 and Brassey supra n 99 at 189.

¹⁴⁴ Brassey supra n 99 at 143.

¹⁴⁵ Id at 190. Sutherland and Kemp supra n 140 at par 7.7.6.5.

¹⁴⁶ Sutherland and Kemp supra n 145 and Brassey supra n 99 at 190.

by extension dominance,¹⁴⁷ places considerable emphasis on “the ability or power of a firm to control prices or exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”.¹⁴⁸ Unlike the description of dominance in section 7(a) of the Act, section 1 clearly does not elevate ‘market share’ to the point where it becomes the sole deciding factor in determining dominance. And there are good reasons for this.

Market share, in particular a 45 per cent market share, does not reliably prove dominance, although it is an important part of the enquiry.¹⁴⁹ This is particularly true of the South African economy, characterised by many markets dominated by a few large firms. In markets dominated by a few firms, when one firm has a 45 per cent market share there is still a reasonable possibility that a significant portion of the remaining 55 per cent market share balance could be held by one or two other firms. In this context, the ability or power of a firm with a 45 per cent market share to control prices or exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers is severely compromised. For this reason, it is always important to take into account the size and number of other firms in the market as well as their market power before rushing to conclude that one firm is dominant purely on the basis of its market share.¹⁵⁰

¹⁴⁷ This is because dominance and market power essentially mean the same thing: a dominant firm is basically a firm that has market power.

¹⁴⁸ Section 1 xiv.

¹⁴⁹ Whish and Bailey supra n 11 at 180-1 and Brassey supra n 99 at 189.

¹⁵⁰ Brassey supra n 149 and Sutherland and Kemp supra n 140 at par 7.7.6.5.

The statutory classification of a firm with at least a 45 per cent market share as dominant is also inconsistent with the formula used in defining dominance in the case of two other species of dominant firm in terms of section 7(b) and (c): these are firms with market shares of between 35 and 45 per cent and below 35 per cent.¹⁵¹ Dominance in these two instances is inseparably linked to market power.¹⁵² However section 7(a) breaks away from this tradition, by discounting the relevance of market power in its definition of dominance.

My contention is not that a firm with a 45 per cent market share can never be dominant simply because such market share is low. The argument is that such a low market share, by general standards, would without an element of market power be unreliable and even unfair to the firm concerned. For this reason, competition authorities and courts in other jurisdictions have adopted definitions of dominance based on actual market power and avoided making irrebuttable presumptions of dominance based on percentage market share.¹⁵³

The simplicity and certainty which the South African legislature sought to achieve through section 7(a), by creating an irrebuttable presumption of market power for companies with a market share of at least 45 per cent, has come at the cost of accuracy and fairness.¹⁵⁴ This state of affairs increases the possibility of non-dominant firms or firms without market power being found to be dominant when in fact they may not be.

¹⁵¹ See section 7(b) and (c) of the Competition Act.

¹⁵² *Id.*

¹⁵³ Sutherland and Kemp *supra* n 140 at par 7.7.6.5.

¹⁵⁴ *Id.* at par 7.7.6.1. Brassey *supra* n 99 at 189.

This may have a negative impact on competition, because firms with significant market share, but without sufficient market power, may be forced to cut back on perfectly competitive business practices for fear of attracting the attention of competition authorities.¹⁵⁵

The reliance in section 7(a) on market share, as low as 45 per cent, as the sole indicator of dominance is, however, consistent with the historical and philosophical reasons for which our law of competition was born: to control and eliminate market domination. This reliance on market share is also in line with the form-based and structural approach to competition law enforcement in South Africa, where companies with large market shares are considered a threat to the maintenance of genuine and undistorted competition.¹⁵⁶ This approach contradicts the widely-held view that competition law must serve consumer interest as its primary and ultimate goal.¹⁵⁷ Regardless of the repercussions for consumers, a central theme that runs through the core of this approach is that dominant firms are singled out for special treatment, designed to weaken their position of strength in the market.¹⁵⁸

And, to limit the power of firms with substantial market share, the law and those tasked with enforcing it must be vigilant and act decisively to prevent such firms from inflicting

¹⁵⁵ Sutherland and Kemp supra n 140 at par 7.7.6.5 and Brassey supra n 154.

¹⁵⁶ Sutherland and Kemp supra n 140 at par 7.7.7 and Brassey supra n 155.

¹⁵⁷ Sutherland and Kemp supra n 156.

¹⁵⁸ Carina Smit 'The Rationale for Competition Policy: A South African Perspective' paper presented at the biennial ESSA Conference, 7-9 September 2005, Elangeni Holiday Inn Hotel, Durban, South Africa at 8 accessed at http://econex.co.za/wp-content/uploads/2015/04/econex_researcharticle_10.pdf (date of last use: 6 July 2016).

further damage to what is perceived to be an already fragile business environment.¹⁵⁹ Indeed, that is what an exaggerated definition of dominance seeks to achieve. If a firm with a 45 per cent market share is outright or automatically dominant, and no amount of persuasion can rebut this presumption, what then of a firm with a market share of 90 per cent? This is, in terms of section 7(a) of the South African Competition Act, a firm which sits in the higher echelons of industrial domination, for whom a concept over and above dominance would have to be found.¹⁶⁰ And what of ‘super-dominance’ or ‘overwhelming dominance’? Most South African competition decisions in which substantial market shares have been involved have adopted the concept of ‘overwhelming dominance’,¹⁶¹ which has the same meaning as super-dominance.

The concept of ‘super-dominance’ entered the annals of South African competition law jurisprudence through the decision of the Competition Tribunal in *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*.¹⁶² The Tribunal found Mittal Steel South Africa to be not only dominant, but – as stated earlier – also a ‘beast’¹⁶³ that had become ‘super-dominant’.¹⁶⁴ Referring to the obligation imposed on Mittal Steel South Africa as a super-dominant firm not to charge excessive prices to its customers, the Tribunal found that when devising its pricing policies, Mittal Steel South

¹⁵⁹ Id. See also *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* supra n 113 at par 124.

¹⁶⁰ Whish and Bailey supra n 11 at 189.

¹⁶¹ *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* supra n 113 at pars 96 and 109; *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) at pars 4 and 38; *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited* supra n 103 at par 77; and *Competition Commission v South African Breweries Limited and Others* 2015 (3) SA 329 (CAC) at pars 1, 52 and 53.

¹⁶² Supra n 113.

¹⁶³ Id at pars 124 and 127.

¹⁶⁴ Id at pars 121 and 164.

Africa was to “leave a certain amount of money on the table” by keeping its prices reasonable.¹⁶⁵

To demonstrate the extent to which the Tribunal embraced the concept of super-dominance, it used the term more than 40 times in this decision.¹⁶⁶ When this is taken into account, it is clear that the introduction of the doctrine of super-dominance into South African competition law did not occur through some casual remarks of the Tribunal made in passing. It was based on a genuine belief on the part of the Tribunal that the doctrine is of fundamental relevance and importance to South African abuse of dominance law.

On appeal, in *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*,¹⁶⁷ the Competition Appeal Court observed that section 8 of the Competition Act makes no reference to the term ‘super-dominance’ and discouraged the use of the term.¹⁶⁸ However, the Court also appeared to be sympathetic to why the Tribunal used the term. The Competition Appeal Court found that “in holding that a firm is ‘super-dominant’, the Tribunal was indicating that the firm concerned was able to exercise market power as if it were a monopolist”.¹⁶⁹ The Appeal Court also found that Mittal Steel South Africa had failed to adduce any evidence to show that it was not ‘super-dominant’ or ‘overwhelmingly dominant’.¹⁷⁰

¹⁶⁵ Id at par 131.

¹⁶⁶ Id at pars 37, 47, 61, 84, 106, 108, 112, 117, 121, 126, 129, 131, 132, 133, 143, 152, 154, 163, 164, 175, 189, 194, 195 and 196.

¹⁶⁷ Supra n 103.

¹⁶⁸ Id at par 30.

¹⁶⁹ Id at par 19.

¹⁷⁰ Id at par 77.

Crucially, the central point on which the Competition Appeal Court eventually overturned the Tribunal's decision was not the use of the concept of 'super-dominance' by the Tribunal, but the Tribunal's own failure to evaluate Mittal Steel South Africa's pricing, in order to determine whether there had been excessive pricing.¹⁷¹ Having regard to the above, it can be argued that the concept of 'super-dominance', which means the same thing as 'overwhelming dominance', remains part of South African competition law. This argument is also fortified by the fact that the doctrine of super-dominance does not stand alone but is an extension of, and gives effect to, the principle of special responsibility, which enjoys significant support in our competition law.

5.3.3 Summary

The majority of observations made with regard to the principle of special responsibility and the doctrine of super-dominance under European competition law will equally be true, *mutatis mutandis*, of their application in South African competition law. But an issue that requires special emphasis as far as South African competition law is concerned, is that the operation of the principle of special responsibility and the doctrine of super-dominance impacts negatively on the ability of dominant firms to compete freely and effectively in the market. Dominant firms are viewed as beasts, whose range of competitive conduct must be restricted to prevent them from maintaining and growing their market share, as a means to create and open up market opportunities for small and medium-sized enterprises.

¹⁷¹ Id at pars 28 and 75.

While the objective of the Competition Act to promote opportunities for small and medium-sized enterprises is laudable and cannot, without more, be faulted, the problem arises when other market participants, dominant firms in particular, are treated as if they are less worthy of protection by law. In a society such as ours, which is committed to the rule of law and guarantees certain fundamental freedoms to all persons, including juristic persons, the adoption of the principle of special responsibility and the doctrine of super-dominance may raise considerable legal and constitutional concerns. I consider this issue next.

5.4 Legal and Constitutional Problems Associated with the Principle of Special Responsibility and the Doctrine of Super-Dominance: A South African Perspective

From a South African legal point of view, the principle of special responsibility and the doctrine of super-dominance raise a number of legal and constitutional concerns. One of the most striking issues to have emerged in the evaluation of the principle of special responsibility and the doctrine of super-dominance is that once a firm is found to be dominant, it finds itself subject to additional obligations, the effect of which is to restrict its ability to compete freely and effectively in the market.¹⁷² And the more dominant the firm, the more restricted are its actions and the more limited are its options in the market.

Yet nothing in the Competition Act justifies the imposition of 'additional responsibility' on dominant firms on the basis of their superior market share or market power. Although

¹⁷² Arowolo supra n 22.

the Act refers to different instances where dominance may exist, a close examination of the scheme of the Act clearly demonstrates that it mandates a unified distribution of duties or obligations to all dominant firms, no matter how overwhelming the degree of one firm's dominance might be in comparison with others. The Act does not refer to the 'special responsibility' of dominant firms or the concept of 'super-dominance'. In this context, the adoption of the principle of special responsibility and the doctrine of super-dominance in South African competition law may run contrary to the principle of legality and rule of law.

Another disconcerting issue is that the operation of the principle of special responsibility and the doctrine of super-dominance may have the effect of restricting the ability of dominant firms to engage in conduct that is common or normal among all other market participants. In this regard, the principle of special responsibility and the doctrine of super-dominance can be seen as creating an advantage for smaller or non-dominant firms and a disadvantage for dominant firms.¹⁷³ This is clearly contrary to the constitutional principles of fairness, freedom of trade, equality, and non-discrimination, to which dominant firms are also entitled.¹⁷⁴ This makes the importation of the principle of special responsibility and the doctrine of super-dominance into our law *inappropriate* in terms of section 1(3) of the Competition Act.

5.4.1 The Principle of Legality

¹⁷³ Smet supra n 2 at 360; Heit supra n 73 at 122; Amato and Korah supra n 88; and McMahon supra n 2 at 165.

¹⁷⁴ Section 8(4) of the Constitution. *AK Entertainment CC v Minister of Safety and Security* 1994 (4) BCLR 31 (E) at 38; 1995 (1) SA 783 (E) at 790; and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at par 57.

In the first ten years of the enforcement of the Competition Act there was little constitutional scrutiny of competition proceedings. This enabled our competition law to evolve with scant regard for some of the fundamental constitutional principles applicable to the resolution of disputes through the application of law.¹⁷⁵ It was during this moment of constitutional ‘off-guard’, so to speak, that the principle of special responsibility and the doctrine of super-dominance entered our case law. However, there is recognition among observers that if our competition law enforcement is to withstand constitutional scrutiny, much needs to change.¹⁷⁶

The fact that our competition authorities have adopted alien principles and doctrines that are not, or should not, form part of our law clearly raises legal concerns related to the principle of legality or lawfulness. The principle of legality or lawfulness requires that those exercising public power or authority must act in accordance with and within the limits of the law and must not overextend their authority or act ultra vires.¹⁷⁷ In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*¹⁷⁸ the Constitutional Court emphasised these principles, holding that “public institutions are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law”.¹⁷⁹ Indeed, in the case of

¹⁷⁵ Munyai supra n 101 at 324.

¹⁷⁶ Id. Heathrow Romeo Kariga ‘Between a Rock and a Hard Place? A Closer Look at the Competition Appeal Court’ paper prepared for the Fifth Annual Competition Law, Economics and Policy in South Africa Conference, 04-05 October 2011, University of Johannesburg, Auckland Park at 24 accessed at <http://www.compcor.co.za/assets/Uploads/events/Fifth-Annual-Conference/Between-a-rock-and-a-hard-place-PAPERfinal-Submitted-version.pdf> (date of last use: 6 July 2016).

¹⁷⁷ Cora Hoexter *Administrative Law in South Africa* (Juta 2012) at 253.

¹⁷⁸ 1999 (1) SA 374.

¹⁷⁹ Id at par 58.

competition authorities, who are themselves creatures of statute without any inherent powers to develop the law, but must operate within the strict confines of their empowering legislation, the principle of legality becomes even more important.

The principle of legality affirms the rule of law, which is a fundamental principle of our constitutional democracy.¹⁸⁰ Section 2 of the Constitution states that the Constitution is the supreme law of the Republic and that any law or conduct inconsistent with it is invalid. Indeed, our courts have been unanimous and unambiguous in affirming this principle. In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*¹⁸¹ the Supreme Court of Appeal confirmed that the Competition Act must be interpreted in a manner that is consistent with section 2 of the Constitution and the rule of law.¹⁸²

Section 33 of the Constitution, amplified by the Promotion of Administrative Justice Act,¹⁸³ provides that everyone has the right to administrative action that is lawful, among others. It is common cause that competition proceedings are administrative proceedings. The constitutional right to an administrative action which is lawful is therefore applicable to competition proceedings and obliges competition authorities to respect the rights of firms in such proceedings.¹⁸⁴ In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South*

¹⁸⁰ Hoexter supra n 177 at 254.

¹⁸¹ 2010 (6) SA 108 (SCA).

¹⁸² Id at par 10.

¹⁸³ Act 3 of 2003.

¹⁸⁴ Section 8(1), (2) and (4) of the Constitution.

*Africa*¹⁸⁵ the Constitutional Court held that “many universally accepted fundamental rights will only be fully realised if also afforded to juristic persons”.¹⁸⁶

In order to comply with the principle of legality or lawfulness and the rule of law, it is imperative for competition authorities to stop using language and concepts that do not have a basis in the Competition Act. In *Competition Commission of South Africa v Senwes Limited* the Constitutional Court warned competition authorities against inventing or using alien substantive terms or language, in this case the term ‘margin squeeze’, as a basis for establishing infringement of the Act.¹⁸⁷ In *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*¹⁸⁸ the Competition Appeal Court also observed that section 8 of the Competition Act did not use the term ‘super-dominance’ and that the Tribunal’s use of this term may therefore go against the principles of statutory interpretation.¹⁸⁹ Sutherland and Kemp also contend that “there is no reason to adopt the language or concept of super-dominance in South African competition law”, as the concept is not found anywhere in the Competition Act.¹⁹⁰

5.4.2 The Principle of Equality

¹⁸⁵ Supra n 174.

¹⁸⁶ Id at par 57.

¹⁸⁷ *Competition Commission v Senwes Limited* 2012 (7) BCLR 667 (CC) at pars 29 and 44.

¹⁸⁸ Supra n 103.

¹⁸⁹ Id at par 30.

¹⁹⁰ Sutherland and Kemp supra n 140 at 7.7.7. See also *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* supra n 103 at par 30.

The main goal of competition law is to secure free and competitive markets as a means to promote consumer welfare.¹⁹¹ Free markets are secured by imposing constraints on the conduct of market participants. However, these constraints are aimed almost exclusively at dominant firms, while non-dominant firms are ignored. Now, if the goal of competition law remains to secure free and competitive markets, the relevant question is for whose benefit are such free markets sought? It is clearly not for the benefit of the most innovative and successful firms, whose investment and industry may set a standard that may be hard to follow by competitors and thereby set them apart from the rest of other market participants.

Neither are consumers the true beneficiaries of this system. In some instances, consumers are in fact losers. This usually happens when conduct by a dominant firm that enhances consumer welfare is declared anticompetitive and illegal due to its exclusionary effect on rivals. Another instance of consumer welfare loss would be when a non-dominant firm charges an excessive price to its customers but such conduct is not prohibited, as it would have been had the firm been dominant. Indeed, as Tor observes, there are many types of conduct by non-dominant firms which may cause significant consumer harm.¹⁹²

¹⁹¹ Section 2 of the South African Competition Act provides that the purpose of the Act is, among others, to expand opportunities for domestic and international competition for South African companies and to promote the participation of historically disadvantaged persons in the economy, by increasing their corporate ownership stakes.

¹⁹² Avishakom Tor 'Unilateral Anticompetitive Acquisitions of Dominance or Monopoly Power' (2010) 76 *Antitrust Law Journal* 847-72 at 849-50. See also generally Susan A Creighton et al 'Cheap Exclusion' (2005) 72 *Antitrust Law Journal* 975-95.

But the structure of the Competition Act makes the scenario of competitive harm and consumer exploitation arising from the actions of non-dominant firms appear a non-issue, as the scheme of the Act does not cater for this eventuality. It is only the unilateral conduct of dominant firms that falls to be considered under the Act's abuse provisions. However, by contrast, other comparable consumer protection legislation protects consumers against exploitation, such as excessive pricing, on the basis of general rules that apply regardless of the identity of the exploiter and exploited.¹⁹³

An economist might feel the urge to inform us, as lawyers with limited knowledge of economics, that it would be suicide for a non-dominant firm to engage in the practice of excessive pricing because of the prospect of customers switching to other producers. Although this economic argument may be persuasive, it fails to take into account the plight of customers of a non-dominant firm who, while having some ability to switch to other producers or sellers, nevertheless decide to stay with the non-dominant firm for various reasons, such as the financial and time costs, as well as the general inconvenience of switching to other producers. To illustrate this point, a factory employee working in a plant that is located only a few kilometers or minutes away from a local town or shopping center and who regularly takes smoking breaks, may still opt to buy his cigarette pack from the factory's only tobacco point of sale, the vending machine, at nearly twice the standard price. He might pay more for his cigarette pack, despite the fact he could still purchase it from a nearby town or supermarket at a much

¹⁹³ See section 100(2) of the National Credit Act 34 of 2005 and section 48(1)(a) of the Consumer Protection Act 68 of 2008.

lower price, merely to save time and petrol and to avoid the inconvenience of driving or walking to a nearby town or supermarket.

An antitrust economist may argue that the exploitation of the factory employee in the above scenario is too insignificant or insubstantial to warrant antitrust concern or action. Indeed, a fundamental principle of the Competition Act, in terms of which competition authorities will intervene to restore normal market conduct, is that the impugned conduct must have 'substantial' or 'significant' anticompetitive effects.¹⁹⁴ This, by implication, is a statement to the effect that antitrust is incapable of devising a rule that, in accordance with the dictates of fairness and equality, will protect all consumers against all exploitation, by consistently prohibiting the actions of all sellers or producers, not only some, which impacts negatively on consumer welfare, regardless of whether that impact is substantial or insubstantial.

For, what is the meaning of 'insubstantial' or 'insignificant' consumer harm in a country where the majority of consumers are living below the poverty line and source most of their consumer goods from small and isolated supermarkets, tuck-shops, and *spaza-shops*, that would generally escape antitrust scrutiny of their actions due to their inferior market size? The uneducated and uninformed consumer will, without recourse to antitrust law's protection, have to live with these unscrupulous operators who may, as a block, constitute the biggest distribution channel for most consumer products, dispelling the myth that consumer harm in this segment of the market is insignificant. Indeed,

¹⁹⁴ 'Substantiality' in the prevention and lessening of competition is one of the core threads pervading almost every aspect of the South African Competition Act, from horizontal restrictive practices, vertical restrictive practices, abuse of dominance, and merger control provisions, see Brassey *supra* n 99 at 259.

some manufacturers of popular consumer goods have come to understand and define this particular market segment as the 'main market'.¹⁹⁵ This is consistent with the general view that there are more small and informal businesses in South Africa than there are dominant and multinational corporations. In this regard, the overall level of consumer harm at the hands of these small-time operators may be too great to ignore.

Even when one accepts the argument of the antitrust economist, in the example above, that it would be suicide for a smaller or non-dominant firm to engage in excessive pricing, the conspicuous omission of a legal provision from our Competition Act dealing with the possibility of consumer exploitation at the hands of non-dominant firms is legally indefensible. Perhaps in economic theory one may get away with this omission. But law is different. While technical economic assumptions may have helped inform the provisions of the Act, the law must avoid replicating economic theories which may offend against fundamental constitutional principles, such as the right of legal subjects to fairness, equal treatment, and non-discrimination.¹⁹⁶ For, unlike economic theory, legal rules can only be legitimate if they are of general application and are fair and just.¹⁹⁷

Legal provisions must, while avoiding the risk of being vague, endeavor to root out the ills they were designed to cure in all or a variety of contexts, for the sake of

¹⁹⁵ *Competition Commission and Another v British American Tobacco South Africa* supra n 161 at pars 216 and 260.

¹⁹⁶ See Richard A. Posner *Antitrust Law* 2 ed (University Of Chicago Press 2001) at vii–x and US Department of Justice, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* at 15 accessed at <http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act> (date of last use: 6 July 2016).

¹⁹⁷ *Id.*

completeness and inclusivity. This generic and inclusive character of the law is also essential in order to avoid the unfairness and naivety of a rule which penalises particular conduct in one situation but does not follow through by penalising the same conduct in another. This problem is particularly perplexing when the effect of the impugned conduct remains the same under different circumstances, regardless of a slight change in the facts of the matter.

In this regard, the principle developed by the Constitutional Court in *Masiya v Director of Public Prosecutions and Another*¹⁹⁸ may be of relevance here. In this case, the Court found that the common-law definition of rape, which only included non-consensual penile penetration of a vagina but excluded non-consensual anal penetration, was not in complete harmony with the spirit, purport, and objects of the Constitution.¹⁹⁹ Extending the common-law definition of rape to include non-consensual female anal penile penetration, the Court found that there were no rational grounds on which this act should not be regarded as rape.²⁰⁰

The principle emanating from *Masiya* is that where the same conduct produces identical or substantially similar results in different but related circumstances, the law must uniformly prohibit and punish the conduct in both situations to avoid injustice. There is no reason to think that the victim of non-consensual anal penetration experiences less pain, trauma, and health risk than the victim of non-consensual vaginal penetration.²⁰¹

¹⁹⁸ 2007 (5) SA 30 (CC); 2007 (8) BCLR 827.

¹⁹⁹ Id at pars 27 and 39.

²⁰⁰ Id at pars 39, 45 and 74(5).

²⁰¹ Id at par 39.

Equally, the extent of exploitation suffered by the factory worker, in the example above, at the hands of a non-dominant cigarette seller in the relevant geographic market, the vending machine operator, may not be less significant than that suffered by another cigarette buyer in a different situation, where the excessive cigarette price is charged by a large or dominant supermarket chain.

Although the hypothetical scenario of the factory worker used above may look too trivial to drive any significant antitrust message home, the scenario may also have relevance in complex and larger commercial transactions, where the economic impact and extent of customer exploitation could be substantial. For example, a local customer of a locally based manufacturer of industrial equipment or machinery operating in a globally competitive market may, despite the higher local costs, still opt to buy the machinery or equipment from the local manufacture in light of time constraints, shipment and insurance costs, and other logistical and bureaucratic issues associated with sourcing the cheaper overseas equipment or product.

Indeed in *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*,²⁰² the cornerstone of Mittal's defence was that the prospect of import competition constrained its pricing power in the South African market.²⁰³ The Tribunal also admitted that there were a number of instances where Mittal's local flat steel customers could have sourced flat steel products and other end products for which steel

²⁰² *Supra* n 113.

²⁰³ *Id* at par 55.

is an essential input from producers in other parts of the world.²⁰⁴ However, the Tribunal crucially observed that Mittal was severely protected from international price competition by its considerable distance from other international competing producers of flat steel products.²⁰⁵ The Tribunal also found that the scale of transport costs involved in the importation of a commodity like steel into South Africa, with estimated transportation costs as high as 47 per cent of the cost of the imported product, were prohibitively too high to make it an attractive option for Mittal's local customers.²⁰⁶ Ultimately, Mittal's South African customers were stuck with its prices, despite the fact that there might have been other options available to them.

The omission from our Act of provisions dealing with the unilateral actions of non-dominant firms, such as excessive pricing, which might result in the exploitation of their customers, while focusing attention exclusively on the same conduct when performed by dominant firms, might result in inequality and amount to discrimination from the perspective of customers exploited by non-dominant firms. Inequality is evident from the viewpoint that customers that are exploited by non-dominant firms are not afforded the same legal protection offered to customers exploited by dominant firms.

It is also discriminatory that dominant firms are prevented from engaging in conduct that non-dominant firms can easily engage in without restriction or fear of attracting antitrust attention. This may raise serious constitutional problems. Clearly, several fundamental

²⁰⁴ Id at pars 64 and 68.

²⁰⁵ Id at pars 55 and 60.

²⁰⁶ Id at par 59.

rights to which juristic persons are also entitled are applicable in competition law.²⁰⁷ Indeed, Chapter 2 of the Constitution, the Bill of Rights, applies to all law, including competition law.²⁰⁸ In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*²⁰⁹ the Supreme Court of Appeal emphasised that the Competition Act must be interpreted in a manner that least impinges on the fundamental rights of affected firms.²¹⁰ The fundamental rights relevant to the field of competition law may include, but are not limited to, the right to fairness, freedom of trade, equality, and non-discrimination.²¹¹ In *AK Entertainment CC v Minister of Safety and Security*²¹² the Court held that “it is difficult to appreciate why a corporation should not be entitled to enforce the Bill of Rights, in particular the equality clause, where an executive or administrative functionary blatantly treats it unequally from all other persons”.²¹³

5.4.3 Summary

The Competition Act does not impose any ‘additional responsibility’ on dominant firms, other than that expressly spelled out in the Act, on the basis of their superior market share or super-dominance. On the contrary, the Act mandates a unified distribution of legal obligations to all dominant firms, regardless of the degree of one firm’s dominance in comparison with that of others. In this sense, the ‘additional responsibility’ that

²⁰⁷ See section 1(2)(a) of the Competition Act. See also J Neethling *Van Heerden-Neethling Unlawful Competition* 2 ed (Lexis Nexis 2008) at 12-13.

²⁰⁸ Section 8(1) of the Constitution.

²⁰⁹ *Supra* n 181.

²¹⁰ *Id* at par 10.

²¹¹ J Neethling and BR Rutherford ‘The Law of Competition and the Bill of Rights’ in JA Faris *Law of South Africa*, Annual Cumulative Supplement, Second Edition, Vol 2(2) (Lexis Nexis Online 2015) at par 233 and Neethling *supra* n 203.

²¹² *Supra* n 174.

²¹³ *Id* at 38; 790.

attaches to dominant firms as a consequence of the adoption of the principle of special responsibility and the doctrine of super-dominance in South African competition law runs contrary to the principle of legality and rule of law. Constraints imposed selectively on the market conduct of dominant firms by operation of the principle of special responsibility and the doctrine of super-dominance, to which non-dominant firms are not subject, are also contrary to the constitutional principles of fairness, freedom of trade, equality, and non-discrimination. Overall, this makes the importation of the principle of special responsibility and the doctrine of super-dominance into our law *inappropriate* in terms of section 1(3) of the Competition Act.

5.5 Exceptional Circumstances that may Justify the Application of the Principle of Special Responsibility and the Doctrine of Super-Dominance

There may be exceptional circumstances where the application of the principle of special responsibility and the doctrine of super-dominance are justified. This may particularly be the case where state-owned or public enterprises are involved. Most of these enterprises are largely funded by the state as main or sole shareholder with money coming directly from public coffers. In theory, taxes collected by the state from taxpayers, including rival private enterprises that are in direct competition with the state-owned enterprise, may also end up funding the operations of the latter to compete against the former. Backed by these massive public resources, many state-owned corporations also own or control massive facilities and infrastructure that may be indispensable to existing and potential competitors in their respective markets.

In the era where there is greater recognition of the role of competition and a strong private sector in driving economic development, it has become normal for governments to expect or require state-owned enterprises to allow competitors access to the facilities under their control. State-owned enterprises are sometimes required to sacrifice profit maximisation in order to pursue the state's social, industrial, and developmental objectives. Indeed, public enterprises in the transport, telecommunication, and energy sectors in Europe and South Africa have long been required by their governments to undertake activities in which they would not engage were they guided solely by commercial considerations. Given the broader mandate of some state-owned enterprises to facilitate economic growth in their respective industries, one might expect them to act less aggressively toward their competitors than would private profit maximising firms.²¹⁴

The origin of the principle of special responsibility and the doctrine of super-dominance can be traced to a time in Europe when governments had an increased role to play in the economy, through state-owned enterprises, which controlled most of the national markets.²¹⁵ The need to grow economies necessitated encouraging the development of private enterprises, whose participation in the economy was to be enhanced by placing an obligation on state-owned enterprises to allow these private enterprises access to the public facilities or infrastructures under their control on reasonable commercial terms.

²¹⁴ David E.M. Sappington and J. Gregory Sidak 'Competition Law For State Owned Enterprises' (2003-2004) 71 *Antitrust Law Journal* 479-523 at 479.

²¹⁵ Eleanor M. Fox 'What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect' (2002) 70 *Antitrust Law Journal* 371-411 at 393.

In European competition law, most cases in which access to essential facilities has been ordered by competition authorities and the courts have been instances where the facility was owned or controlled by a state-owned enterprise. Dominant firms have been ordered to grant competitors access to essential facilities and infrastructures such as ports, airports, rail networks, telecommunication infrastructure, gas pipelines, and postal networks.²¹⁶ These are undoubtedly areas of the economy largely controlled or dominated by state-owned enterprises. An order directing the relevant state-owned enterprise to give a private competitor access to these public facilities becomes more appropriate in instances where regulatory issues make it impossible for a privately owned enterprise to establish its own facility. For example, as Whish and Bailey observed, “there may be only one point on the coastline of a country where a deep sea port can be established or planning and environmental reasons may make it impossible for a private entity to build a new airport or rail network”.²¹⁷

In South Africa, public enterprises continue to play an important role in the pursuit of the state’s developmental objectives. They are expected to sacrifice profit and take a lead in the provision of modern infrastructure that will provide support for the growth of the South African economy.²¹⁸ Against the background of several key infrastructures in the country being controlled by state-owned enterprises, section 8(b) of the Competition Act

²¹⁶ Whish and Bailey supra n 11 at 703-05.

²¹⁷ Id at 703.

²¹⁸ Thabo Mokwena, Presidential Review Committee, *Restructuring of State Owned Enterprise in South Africa* (May 2012) at 5 accessed at http://www.thepresidency.gov.za/electronicreport/downloads/volume_3/discussion_papers-edited_by_expert_writer/Draft_Restructuring%20of%20SOE%20in%20South%20Africa.pdf (date of last use: 6 July 2016).

places a special or more onerous responsibility or obligation on 'all' dominant firms to allow competitors access to, or the use of, their facilities or infrastructures, unless there are sound economic reasons justifying the refusal.²¹⁹

While section 8(b) of the Competition Act is addressed to all dominant firms in general and not state-owned enterprises in particular, it is clear, given the stranglehold which state-owned enterprises have on key infrastructure, that the most likely target of this provision will be state-owned enterprises. Many of the facilities or infrastructures that come to mind when reference is made to the term 'essential facility' in South African competition law are owned predominantly by state-owned enterprises. With well over 130 companies and institutions officially classified as state-owned enterprises, the stranglehold which public enterprises and institutions have on the economy is significant.²²⁰ State-owned companies such as Transnet, Eskom, ACSA, Telkom, SABC and SANRAL, to name but a few, own or control a significant chunk of facilities or infrastructure that is indispensable to private enterprises in their respective markets or industries.

The special responsibility of state-owned enterprises, as the most likely target of section 8(b), is demonstrated by the fact that a refusal to grant competitors access to an essential facility is treated in much stronger and perhaps harsher terms than any other species of refusal to deal. For example, a refusal by a dominant firm to grant a

²¹⁹ Section 8(b) of the Competition Act.

²²⁰ Republic of South Africa, Department of Government Communications and Information Systems, 'State-owned Enterprises' accessed at <http://www.gcis.gov.za/content/resourcecentre/contactdirectory/government-structures-and-parastatals> (date of last use: 6 July 2016).

competitor access to an essential facility when it is economically feasible to do so is prohibited outright.²²¹ As the Competition Tribunal found in *Competition Commission v Telkom SA Limited*,²²² a refusal to supply an essential facility is prohibited outright or *per se* as there is no requirement in section 8(b) of the Competition Act to demonstrate anticompetitive or procompetitive effects.²²³ If the elements of section 8(b) are proved, the Tribunal held further, then anticompetitive harm is presumed.²²⁴ By contrast, other species of refusal to deal, for example a refusal to sell or supply scarce goods to a competitor, are dealt with more leniently in that in such instances the refusal to deal can be overlooked if the dominant firm demonstrates that there are efficiency and other pro-competitive gains attendant upon the refusal.²²⁵

Clearly the principle of special responsibility and the doctrine of super-dominance, when applied to dominant state-owned enterprises, may be more acceptable than when applied to private enterprises. When applied to private enterprises, the principle of special responsibility and the doctrine of super-dominance may, in the context of essential facilities, have the effect of removing incentives for private investors or owners of private undertakings to invest in infrastructure, as they will be forced to share with their rivals. In this regard, it is regrettable that in *Phutuma Networks Pty Ltd v Telkom SA Limited*²²⁶ the Tribunal found that even a privately owned firm, operating with no special state privileges in terms of any legislation or international conventions, will be

²²¹ Section 8(b) of the Competition Act. See also Brassey supra n 99 at 203-04.

²²² Case No 11/CR/Feb04.

²²³ Id at par 86.

²²⁴ Id.

²²⁵ Section 8(d)(ii) of the Competition Act. See also Brassey supra n 99 at 203-04.

²²⁶ Case No 37/CR/July10.

judged by the same criteria as a state-owned enterprise.²²⁷ This means the principle of special responsibility and the doctrine of super-dominance may, if their application is not halted, continue to bedevil private and state-owned enterprises alike.

5.6 The Principle of Special Responsibility and the Doctrine of Super-Dominance as a Corporate Social Responsibility Policy

It must be accepted that from a strictly commercial and profit maximisation point of view, it hardly seems sensible to require dominant firms to act in a manner that shows sensitivity to the commercial interests of competitors.²²⁸ In this sense, the principle of special responsibility and the doctrine of super-dominance may appear to be contrary to pure competition law principles in that they impose a responsibility or duty on dominant undertakings to exercise a certain degree of self-restraint when competing in the market.²²⁹

However, from a corporate social responsibility point of view, it may be essential for large corporations to engage in some profit sacrificing social responsibility actions.²³⁰ These profit sacrificing actions, it is submitted, may, while having the initial appearance of being cost and time wasting, lead to an increase in profitability in the long term associated with a good corporate public image among customers and society at

²²⁷ Id at par 24.

²²⁸ Didem Kurtoglu and Togan Turan 'With Great Power Comes Great Responsibility' (2005) 24 *International Financial Law Review* 77-9 at 77.

²²⁹ Amato supra n 12 at 65-6.

²³⁰ Irene-marié Esser and Adriette Dekker 'The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles' (2008) 3 *Journal of International Commercial Law and Technology* 157-69 at 158.

large.²³¹ The use of the special responsibility of dominant firms and the doctrine of super-dominance as part of dominant firm's corporate social responsibility may fit appropriately into the South African economic and political contexts. Dominant firms are encouraged, in competition law and beyond, to help facilitate the participation of small and medium-sized enterprises and firms owned by previously disadvantaged persons in the economy, in order to achieve government's equity goals.²³²

Indeed, the Competition Act and other legislation, most notably the Broad Based Black Economic Empowerment Act,²³³ contain provisions designed to encourage larger undertakings to take into account or be more sensitive to the economic needs and interests of small and medium-sized enterprises and firms owned by previously disadvantaged persons. In *Nationwide Poles v Sasol Oil (Pty) Ltd*²³⁴ the Tribunal observed that an important function of the Competition Act is to bring about accessible markets in order to accommodate smaller businesses and enable them to compete effectively against larger and well-established incumbents.²³⁵ Accordingly, dominant undertakings are expected to make some sacrifices to ensure that small and medium-sized enterprises and firms owned by previously disadvantaged persons can enjoy the benefits of a competitive and inclusive economy. As the Tribunal found in *Harmony*

²³¹ *Id.*

²³² *Id.* at 157. Judith Geldenhuys 'Corporate Social Responsibility in Small and Medium Enterprises in South Africa' in Guler Aras, David Crowther and Stella Vettori (eds) *Corporate Social Responsibility in SMEs* (Social Responsibility Research Network 2009) at 199.

²³³ Act 53 of 2003.

²³⁴ *Supra* n 109.

²³⁵ *Id.* at pars 81 and 89.

Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another,²³⁶
dominant firms are expected to “leave a certain amount of money on the table”.²³⁷

5.7 Conclusion

The general purpose of this Chapter has been to evaluate critically the unique nature of some obligations imposed on dominant firms in modern competition law. Particular attention was paid to constraints on the market conduct of dominant firms occasioned by the principle of special responsibility and the doctrine of super-dominance in European and South African competition law. The ultimate aim was to establish whether such constraints perpetuate the historical philosophy and practice of hostility towards dominant firms in modern competition law enforcement.

I proceeded from the general point of view that abuse of dominance law, by its very nature, involves the selective application of competition rules to the market conduct of firms on the basis of their market share or market power. This is demonstrated by the fact that the same market conduct is generally not actionable when performed by a firm whose market share or market power is below the average required for dominance.

One of the key observations in this Chapter is that singling out dominant firm conduct for special treatment under abuse of dominance law suggests, at the very least, that dominant firms have an implied special responsibility or duty under the law to act or not

²³⁶ *Supra* n 113.

²³⁷ *Id* at par 131.

act in a particular manner. In some instances, this special responsibility on dominant firms has also been recognised expressly in the decisions of competition authorities and the courts. This has particularly been the case in European and South African competition law, where the competition authorities and the courts have held that dominant firms have a special responsibility towards the market, and that this responsibility increases in accordance with the superiority of the firm's dominance.

The operation of the principle of special responsibility requires dominant firms always to be cautious and to some extent refrain from engaging in standard market conduct, even if such conduct would be unobjectionable when adopted by non-dominant firms. The doctrine of super-dominance strengthens the principle of special responsibility, by adding that the more dominant the firm the more onerous will be the obligations imposed on it. The combined effect of the principle of special responsibility and the doctrine of super-dominance is that the ability of dominant firms to compete effectively on merit is severely curtailed.

From a European competition law point of view, the obligations imposed on dominant firms by operation of the principle of special responsibility and the doctrine of super-dominance are consistent with the ordoliberal tradition of hostility towards dominant undertakings that has been part of the law from its inception. This tradition is grounded in the belief that the presence of a dominant firm in a market is incompatible with the ideal of free and effective competition. This means that whenever dominance is found to exist in a market it triggers the presumption that competition in that market has been

weakened and that this calls for corrective antitrust action. Constraints on the market conduct of dominant firms occasioned by the principle of special responsibility and the doctrine of super-dominance are an important part of that corrective action.

From a South African competition law point of view, the operation of the principle of special responsibility and the doctrine of super-dominance also appears quite consistent with the historical and philosophical reasons for which competition law arose in the country. Competition policy and law in South Africa developed in response to the historical trend towards industrial concentration and the creation of monopoly. There is a longstanding perception in South African society that corporate giants, particularly those which are privately owned, are against the common interest of the majority of citizens. The concentration of economic power in the hands of private corporations owned and controlled by a minority has been singled out as a major example of the prevailing inequality in wealth and income distribution in South Africa. In this sense, constraints on the market conduct of dominant firms by operation of the principle of special responsibility and the doctrine of super-dominance may seem to serve an important political and economic purpose.

The general conclusion arrived at in this Chapter is that, in their current form, the principle of special responsibility and the doctrine of super-dominance are unhelpful and may need to be modified or abandoned altogether. Their main problem is that they unfairly limit the ability of dominant firms to engage in standard market conduct and therefore to compete effectively on merit. This is contrary to the principle of free

competition.²³⁸ In societies, such as South Africa, which subscribes to the principles of fairness and justice and guarantees the rights to freedom of trade, equality, and nondiscrimination to all persons, including corporate citizens, the principle of special responsibility and the doctrine of super-dominance raise insurmountable legal and constitutional problems. In this sense, the adoption of the principle of special responsibility and the doctrine of super-dominance in some South African competition law decisions may have been *inappropriate*.

However, among the exceptional circumstances in which the obligations imposed on dominant firms by operation of the principle of special responsibility and the doctrine of super-dominance may serve an important economic purpose could be cases involving state-owned enterprises. Indeed, some state-owned enterprises control indispensable public facilities and infrastructures, which give them the distinct advantage of being gatekeepers to the participation in the relevant market by new entrants and potential competitors. In this context, it may seem reasonable and necessary to compel such state-owned enterprises to grant new entrants access to the facilities and infrastructure under their control, in order to promote competition.

Another instance in which the special obligations imposed on dominant firms by the principle of special responsibility and the doctrine of super-dominance may seem acceptable could be where dominant firms are encouraged to embrace the obligations as part of their corporate social responsibility exercises. This implies that the obligations would have to be embraced by dominant firms on an optional basis. This is

²³⁸ Burton Ong supra n 22 at 216-17.

because, as it stands, there is no sufficient legal basis for imposing such obligations on a compulsory basis.²³⁹ It would therefore be appropriate to allow dominant firms the freedom to make a choice as to whether and to what extent they will comply with such obligations. It is likely that peer and social pressure and the desire to cultivate a good corporate public image may spur on some dominant firms to comply with the obligations, as opposed to the standard rejection with which the special responsibility of dominant firms is met under the current system of compulsory enforcement.

²³⁹ O'Donoghue and Padilla *The Law and Economics of Article 102 TFUE* 2 ed supra n 77 at 208.

CONCLUSION

6.1 Introduction

The opposite of laissez-faire economics¹ and Adam Smith's 'invisible-hand' theory,² competition policy and law are part of the well-established orthodoxy in economic theory, which recognises the important role that governments have to play in establishing and enforcing rules regulating market conduct.³ This study accepted and proceeded from the same point of view, that the regulation of market conduct through appropriate policy and legislative measures is essential in order to ensure fair competition among market participants, which, in turn, could lead to efficiency and benefit consumers. But is this regulation too onerous, and does it discriminate unfairly against certain enterprises?

The purpose of this study has been to investigate whether the formulation and enforcement of competition rules in general, and abuse of dominance provisions in

¹ According to the Oxford English Dictionary laissez-faire is defined as a phrase expressive of the principle that government should not interfere with the action of individuals, especially in industrial affairs and trade, see Oxford English Dictionary Online (Oxford University Press December 2015) accessed at <http://www.oed.com/view/Entry/105152?rskey=PPucpt&result=116188> (date of last use: 6 July 2016).

² Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan (ed)) Volume 1 5 ed (Methuen & Co Ltd 1904) at 421. Adam Smith's 'invisible-hand' theory has come to be understood in economics to refer to market factors that influence the demand and supply of goods in a free market, where there is no regulation or restriction on the actions of traders by the government.

³ Simon Roberts 'The Role for Competition Policy in Economic Development: The South African Experience' (2004) Trade and Industrial Policy Strategies, Working Paper 8 at 1.

particular, may impact negatively on the economic and legal rights of enterprises, and more specifically dominant firms, to trade freely and unhindered.

6.2 Conclusions

The conclusions of this study can be summarised by the following broad observations: The origin of competition law can be traced back to an historical philosophy of hostility towards monopoly and dominant undertakings across the three jurisdictions under review. This philosophy of hostility towards dominant firms is, with the limited exception of American antitrust law,⁴ still reflected in current competition law and its enforcement.

Some abuse of dominance provisions are too vague and open-ended to the extent that they fail to disclose accurately what conduct is prohibited. This leaves competition authorities with an unfettered discretion, assuming almost a legislative role to determine, after the fact, conduct that they may deem anticompetitive and illegal. The vague and open-ended nature of abuse of dominance provisions, coupled with the lack of universal agreement on whether certain practices are anticompetitive, may result in legitimate and competitive dominant firm conduct being declared illegal.⁵

⁴ American antitrust law is a limited exception, as it depends on the extent to which the Supreme Court decision in *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) at 407, which proposed a more tolerant approach towards dominant firms, is followed.

⁵ As the US Department of Justice noted in its *Single-Firm Conduct Report*, “many single-firm practices once presumed to violate section 2 can create efficiencies and benefit consumers”, US Department of Justice, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* at 1 accessed at <http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act> (last date of use: 6 July 2016).

While competition authorities and the courts have in some instances noted the potential unfairness inherent in some abuse of dominance provisions and their enforcement and undertaken to introduce appropriate changes to their enforcement approach, there has been no marked change in practice. The lack of an appropriate causation framework in abuse of dominance adjudication by which to determine whether the anticompetitive harm complained of can reliably be attributed to the conduct of the dominant firm further adds to an already hostile environment in which dominant firms must operate. The fact that certain practices are only actionable when performed by firms enjoying a position of dominance, but attract no consequences when performed by non-dominant firms, reveals the discriminatory nature of the law. Having regard to these observations, it can fairly be concluded that the treatment of dominant firms in competition law in general, and abuse of dominance proceedings in particular, raises profound economic and legal concerns.

Firstly, the philosophy of hostility towards dominant undertakings may have negative implications for competition and economic development. Economic theory and experience have shown that in certain circumstances dominant firms may hold specific benefits for consumers and the economy in general. These benefits include economies of scale,⁶ international competitiveness,⁷ research and development,⁸ and efficiency.⁹

⁶ Because most monopolies and dominant firms are able to produce a greater quantity of goods at lower average costs, the benefit of lower production costs can be passed on to consumers in the form of lower prices. As Djolov observes, if a firm increases in size it may be able to benefit from economies of scale, which is a cost advantage due to size. This is because when a firm becomes large it will have a lower cost per unit of output than a smaller firm, which should translate into lower product prices, Djolov G 'Competition in the South African Manufacturing Sector: An Empirical Probe' (2015) 46 *South African Journal of Business Management* 21-30 at 24.

Some of the benefits that may flow from market domination have particular relevance for the South African economy. Although the South African economy has over the years been consistently rated the most advanced in Africa, the reality is that our economy is not the largest, because of a relatively smaller population size compared to countries such as Nigeria, and many of our domestic markets can be served by one or a few firms operating on a globally efficient scale.¹⁰ These globally efficient domestic firms may provide economies of scale benefits to the local market, while also competing effectively in global markets.

One of the stated objects of our Competition Act is 'to expand opportunities for South African firms in world markets'.¹¹ With many markets increasingly being dominated by multinational corporations, it may be essential for a firm to have a monopoly or a certain level of dominance in the domestic market in order to be globally competitive. Indeed, there are many firms whose domination of the South African market has enabled them

⁷ A local firm may be dominant in the domestic market but face effective competition from multinational corporations operating globally. With markets increasingly globalised, it may be necessary for a firm to be dominant in the local market in order to become competitive internationally.

⁸ For example, the opportunity to enjoy monopoly benefits arising out of protection conferred by certain intellectual property rights would encourage more businesses to undertake research and innovate. Without the monopoly power that an intellectual property right such as a patent may confer, society may be deprived of much needed innovation essential for development.

⁹ While this issue is often ignored in competition economics and law enforcement, most successful firms become dominant through being innovative, efficient, and dynamic. As Djolov, *supra* n 6 at 23-4, observes: monopoly can occur when incumbents maintain or gain competitive position according to the innovations they bring to the market. For example, it is well recognised that companies such as Microsoft, Google and Apple have become dominant in their respective markets through their successful innovations.

¹⁰ Organisation for Economic Co-operation and Development (OECD) *Competition Law and Policy in South Africa, An OECD Peer Review* (2003) at 10 accessed at <http://www.oecd.org/southafrica/34823812.pdf> (date of last use: 6 July 2016).

¹¹ Section 2(d) of the Act.

to compete effectively in international markets.¹² This is not only good for the firms concerned and their shareholders, but also for the global competitiveness of our economy and its development.

Secondly, our society has an unwavering commitment to the rule of law and constitutionalism, in which the fundamental rights of all persons, including corporate citizens and dominant firms, are guaranteed. Indeed in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,¹³ the Constitutional Court held that “many universally accepted fundamental rights will only be fully realised if also afforded to juristic persons”.¹⁴ The fundamental rights relevant to competition law include the rights to fairness, freedom of trade, equality, and non-discrimination.¹⁵ In *AK Entertainment CC v Minister of Safety and Security*¹⁶ the Court held that “it is difficult to appreciate why a corporation should not be entitled to enforce the Bill of Rights, in particular the equality clause, where an executive or administrative functionary blatantly treats it unequally from all other persons”.¹⁷ In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*¹⁸ the Supreme

¹² These would include South African Breweries Ltd; the four major banks (Standard Bank, ABSA, FNB, and Nedbank); MTN; Shoprite; MultiChoice and a number of our mining and construction companies. See Carl T Bogus ‘The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust’ (2015) 49 *University of Michigan Journal of Law Reform* 1-120 at 9 and Grietjie Verhoef ‘Concentration and Competition: The Changing Landscape of the Banking Sector in South Africa 1970-2007’ (2009) 24 *South African Journal of Economic History* 157-97 at 184-92.

¹³ 1996 (4) SA 744 (CC).

¹⁴ *Id* at par 57.

¹⁵ J Neethling and BR Rutherford ‘The Law of Competition and the Bill of Rights’ in JA Faris *Law of South Africa*, Annual Cumulative Supplement, Second Edition, Vol 2(2) (Lexis Nexis Online 2015) at par 233 and J Neethling *Van Heerden-Neethling Unlawful Competition* 2 ed (2008 Lexis Nexis) at 12-13.

¹⁶ 1994 (4) BCLR 31 (E); 1995 (1) SA 783 (E).

¹⁷ *Id* at 38; 790.

¹⁸ 2010 (6) SA 108 (SCA).

Court of Appeal emphasised that the Competition Act must be applied in a manner that least impinges on the fundamental rights of affected firms.¹⁹

In this light, the structure and content of some of the provisions of our Competition Act as well as the philosophy underpinning their enforcement may need a serious re-think. In the next paragraph, I suggest and recommend action that I believe will help remedy defects identified in the law and its enforcement.

6.3 Recommendations

This study has revealed that the challenges faced by dominant firms in competition law and abuse of dominance adjudication can be attributed to three main factors: (a) the philosophy underpinning competition law and its abuse of dominance provisions; (b) the structure and content of the abuse of dominance provisions; and (c) the manner or approach through which abuse of dominance provisions are enforced by competition authorities. The solution to these problems may therefore lie in the following proposed changes:

- (a) the shifting of our mind-set with regard to how competition law and its objectives are viewed;
- (b) reviewing the structure and content of abuse of dominance provisions; and

¹⁹ Id at par 10.

- (c) developing a fair and consistent enforcement strategy, which fully recognises the right of dominant firms to compete vigorously like all other enterprises.

6.3.1 Shifting the Mind-set

The philosophy of hostility towards and mistrust of dominant undertakings must make way for one in which competition law is viewed as nothing more than a set of market rules designed to ensure a fair competitive process in which the most efficient and innovative trader is recognised and encouraged. Competition law should, therefore, not be viewed as a tool to address issues of market concentration, equity, and wealth distribution. This is because evidence suggests that competition law is incapable of effectively addressing these problems, which in some cases have increased despite or as a result of the application of competition rules.²⁰ Competition law must be seen as primarily concerned with the promotion of efficiency and the protection of consumers.

6.3.2 Reviewing the Structure and Content of Abuse of Dominance Provisions

As stated above, some of the challenges faced by dominant firms in competition law and abuse of dominance adjudication can be directly attributed to the structure and content of the relevant rules. It is of course neither necessary nor possible to rewrite every aspect of the provisions of the Act found to have been problematic in this study.

²⁰ Bogus supra n 12 at 85-106.

My proposals for legislative amendments are limited to the core abuse of dominance provisions, whose formulation provides the legal basis for hostility and potential prejudice towards dominant firms in enforcement. Section 8 of the Competition Act, which prohibits the abuse of a dominant position by a dominant firm, will be the focus of proposed amendments.

Figure 1: Underlining indicates amendments to the current provision

Section 8 as is	Section 8 as I suggest it should be
<p>“8. Abuse of dominance prohibited</p> <p>It is prohibited for a dominant firm to –</p> <p>(a) charge an excessive price to the detriment of consumers;</p> <p>(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;</p> <p>(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anticompetitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or</p> <p>(d) engage in any of the following exclusionary acts...[list omitted]”</p>	<p>8. <u>The following unilateral conduct is prohibited</u></p> <p>It is prohibited for any firm to –</p> <p>(a) charge an excessive price to the detriment of consumers;</p> <p>(b) <u>discriminate between different purchasers or consumers, without a rational economic justification;</u></p> <p>(c) <u>refuse to deal with or allow a competitor access to an essential facility when it is economically feasible to do so and to the detriment of consumers;</u></p> <p>(d) <u>engage in any of the following exclusionary acts, to the detriment of consumers ...[see original list]; or</u></p> <p>(e) <u>engage in any exclusionary act, other</u></p>

	<p><u>than those listed in paragraph (d), to the detriment of consumers, as determined from time to time in Guidelines issued by the Competition Commission pursuant to section 79 of this Act.</u></p>
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NOTES: The new section 8, which prohibits unilateral anticompetitive conduct by any firm, de-emphasises the importance of dominance as a constituent element of infringement and focuses more on the effect of the impugned conduct on consumer welfare. Under the new provision, it will therefore no longer be necessary to prove that the defendant is dominant. Focus will shift significantly to the anticompetitive nature of the challenged conduct and its impact on consumers. This means that the definition of an exclusionary act in section 1 of the Act will also need to be amended so that it can reflect the new policy: that exclusionary acts are prohibited only to the extent that they may result in consumer harm.

The new section 8 will include discrimination in its framework in order to deal effectively with instances of trade discrimination,²¹ which are not adequately dealt with under the current section 9.²² The entire content of the current section 9 will disappear and its

²¹ This is a much broader provision on discrimination, which is not limited to price discrimination but includes other instances of commercial discrimination, such as unfair contract terms, unequal services, etc.

²² Elsewhere I have shown that price discrimination has many traits and effects similar to those of excessive pricing, yet it is dealt with differently and far more leniently. See Chapter 3 at par 3.2.1.

substance will form part of the new section 8(b), which will be broader in scope and effect.

For the sake of coherence, the contents of the current section 8(d) will appear in a new section 8(d), ahead of the current section 8(c), which will become the new section 8(e), in view of the fact that the application of the current section 8(c) is dependent upon the exhaustion of section 8(d). The new section 8(e) will make the prohibition of exclusionary acts, other than those listed in section 8(d), subject to their disclosure or identification in guidelines that must be published by the Competition Commission in the *Government Gazette* pursuant to section 79 of the Act. These guidelines will play an important role, by giving firms advance warning of the competition implications of their conduct and so enable them to adjust their conduct accordingly, as opposed to the current system where firms may literally be taken by surprise.²³ Once the Commission has issued its guidelines identifying types of conduct likely to fall foul of the provision and outlining its enforcement approach, an administrative penalty for a first time offence may be appropriate.

6.3.3 Developing a Fair and Consistent Enforcement Strategy

Consistent with the shift in mind-set in terms of which competition law and its objects are understood and the revised content of abuse of dominance rules, competition

²³ Although other commentators hold the view that the current section 8(c) is too lenient on dominant firms, citing the heavy burden of proof placed on a complainant under the provision and the absence of an administrative penalty for a first time contravention, I hold the view that the application of the provision is prone to errors, which may cost firms affected by it far more than would an administrative penalty. See Chapter 3 at par 3.2.2.

authorities must, when enforcing the Act, prioritise efficiency and consumer welfare over the exclusion of rivals. They must consistently require complainants to demonstrate that the conduct complained of is inefficient and causes significant consumer harm, as opposed to harm to their own selfish business interest. This will eliminate the undesirable scenarios, common in abuse of dominance litigation, where a competitor selfishly takes its dominant rival to the authorities to force the latter to relinquish legitimate business conduct or even to give it part of its business.²⁴ They must ensure that they apply the law in a manner that recognises the right of all firms to engage in trade freely without undue restriction.

6.4 Final Remarks

This study has found that the formulation and enforcement of competition rules in general, and abuse of dominance provisions in particular, may in some instances impact negatively on the economic and constitutional rights of dominant firms. However, the study makes recommendations aimed at not only ensuring that dominant firms are treated fairly, but also that where their conduct is anticompetitive and causes harm to consumer welfare, decisive action can be taken against them by competition authorities. In this sense, I trust that the study makes a meaningful contribution towards the fair and effective enforcement of the Competition Act.

²⁴ See *Phutuma Networks (Pty) Ltd v Telkom SA Ltd* Case No 37/CR/July10. Here a small business, Phutuma Networks (Pty) Ltd, initiated a complaint in the Competition Tribunal against Telkom SA Ltd, the basis of the complaint being that Telkom outsourced certain services to a third party, Network Telex, without subjecting the services to a tender process. Despite the fact that the complainant had no proven track record or history in the provision of the relevant services, it was contended that not outsourcing the services to the complainant was contrary to the Competition Act and BEE legislation. The Tribunal, at par 29, correctly dismissed the case, holding that a dominant firm is under no obligation to put services to it to tender.

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