REDI3x3 Working paper 27 February 2017

Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth

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Abstract

The Competition Act's objectives encompass addressing anti-competitive conduct in the interests of broader based participation in the economy. This paper considers literature on competition and inclusive growth. The enforcement of the Act by the Competition Commission, Competition Tribunal and Competition Appeal Court is reviewed, with a particular focus on abuse of dominance. In particular, it analyses the standards applied by the Competition Tribunal and Competition Appeal Court in their rulings and the implications of the institutional structure and practices for hearings. The paper locates its assessment in the context of the challenges of developing a more inclusive South African economy.

The **Research Project on Employment, Income Distribution and Inclusive Growth** is based at SALDRU at the University of Cape Town and supported by the National Treasury. Views expressed in REDI3x3 Working Papers are those of the authors and are not to be attributed to any of these institutions.

Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth

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1. Introduction

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

Competition happens within a set of rules which go far beyond the Competition Act. These are all the rules that govern how firms participate in markets - putting together the necessary resources, developing their product offering and marketing it to buyers. There are also accepted values and norms (that go beyond the explicit rules) in any country about what is fair and reasonable in terms of competitive behaviour. Together with the laws they form a country's 'economic constitution' (Gerber, 2010). This differs greatly across countries as can be seen from comparing countries as diverse as South Korea, Germany and the USA.

A number of recent assessments have identified the need to change the rules for competition given the rising inequality which has been observed in many economies. Market power can simply contribute to inequality as the returns from the exertion of market power go disproportionately to the wealthy and, on balance, market power discourages innovation and reduces productivity (Baker and Salop, 2015). Focusing on the antitrust record in the USA, Baker and Salop argue that more permissive antitrust rules over the last 25 years have contributed to increases in market power. Their proposals include changing the standards employed, increasing the capacity of the institutions to investigate and enforce, and prioritising markets and remedies which positively impact on lower income groups. Others, such as Stiglitz, have argued for a 're-writing of the rules' governing markets including a broadening of the antitrust agenda with reference to the USA (Stiglitz, 2015a and b) and for South Africa (Stiglitz, 2016). Atkinson (2015) has argued for distribution to be taken into account in competition law enforcement.

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

The paper is structured as follows. Section 2 examines the relationship between competition, inclusive growth and industrial development. Section 3 provides an overview of competition enforcement in South Africa. Section 4 analyses the record on abuse of dominance, focusing on exclusionary abuse and reviewing the tests applied. Section 5 concludes.

2. Competition, inclusive growth and industrial development

A competitive market is typically explained in static terms as one with many firms, constant returns to scale, homogenous products and complete information. Prices are equal to marginal cost and there is allocative and productive efficiency. The assumptions rarely, if ever, hold and it is more helpful to think about whether markets are effectively competitive in that the market power of firms is disciplined by competitive rivalry. Competition should also be understood in dynamic terms as a process of rivalry which rewards effort, investment and creativity. In these terms we can consider who are the participants and how they are able to bring their products and services to market. For example, Sen has argued that the competitive market mechanism should be evaluated in terms of its accomplishments in promoting individual freedoms (to produce, develop productive capabilities, and make autonomous choices), as opposed to the conventional framework of welfarist assessment (Sen, 1993). The development of productive capabilities may also be a collective rather than individualist activity. Sen distinguished the ‘opportunity aspect’ relating to the range of choice, and the ‘process aspect’ which includes decisional autonomy not restricted by interference from others (Sen, 1993).

I consider the relationships between competition and the balance of interests which underpins why different competition regimes are adopted, the debates on competition and inequality, and then discuss competition and industrial development.

In assessing the evolution of arrangements governing competition, I am considering competition policy and the competition regime to extend beyond the law and mandate of any competition authorities. It includes the links with the regulatory provisions as well as the host of other laws and actions that impact on entry and effective competitive rivalry (Makhaya and Roberts, 2013; Das Nair et al., 2015). Indeed, it is unlikely that simply enforcing competition law by a young competition authority will succeed in disciplining powerful interests. Changing the structure of the economy requires a competition policy which actively opens up participation including through a wider set of interventions beyond competition enforcement, including in terms of the regulatory framework, the provision of economic infrastructure, development finance and industrial policy.

2.1 Competition, political economy and inclusive growth

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

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

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

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

At the heart of the assessment of NWW is the combined importance of competition in both the economic and political spheres. Indeed, they argue (2009: 129) that '[b]y studying democracy in isolation of markets, political scientists have missed these forces [competitive markets] of political stability.' By this NWW mean that competitive markets generate long-term prosperity and allow for dynamism in terms of different social groups and interests, which feeds into politics. However, powerful interests with excessive concentrations of wealth can capture the agenda and pursue rent-seeking in ways which undermine growth and competitive markets. But, why and how will such competitive markets arise?

NWW believe that progress towards an open access order (OAO) involves competition eroding rents, and that this involves liberalisation and independent institutions. However, this supposes competition simply arises in the absence of obstacles and it fails to recognise the need to address entrenched inequality and economic power (Makhaya and Roberts, 2014). It also fails to recognise the important role that industrial policies and tariffs have played in countries industrialising and does not take us forward in understanding how interests are aligned with the policy frameworks that are adopted (see, for example, Khan, 2006). The construction of markets and the main participants reflect a country's economic history. How does competition law and policy then relate to moving towards meaningful increased access?

It has been argued that because institutions are weak and concentrated business interests are too strong in many developing countries, it is naïve to put our faith in competition law in these circumstances (Rodriguez and Menon, 2010). The strength of those behind anti-competitive arrangements such as cartels will simply mean that they subvert the competition regime where enforcement is attempted (Mateus, 2010). But, a competition agenda has been supported in different countries, including South Africa, and we need to understand where competition fits with the changing influence of different interests.

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

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

It is therefore important to understand that the competition regime is not simply about whether provisions can be enforced or not but about how the particular legal provisions adopted and the tests employed reflect the balancing of the rights of different groups. As I discuss in more detail below, the South African Competition Law which came into force in 1999 reflected just such a balancing of concerns and, indeed, was the product of negotiation and consultation. Especially when it comes to abuse of dominance, I argue there is a need to revisit this ‘settlement’ reached in the late 1990s.

2.2 A note on competition and inequality

Inequality is mainly influenced by wealth and taxation. However, while there are many dimensions to inequality, the structure of the economy and barriers to entry and growth are important. A lack of competition means entrenched incumbent interests can continue to earn high profits with low levels of investment and little effort and innovation.

Dominant firms may be able to entrench their positions and the supra-competitive rents being earned, creating long-term problems in the performance of the economic system (Geroski and Jacquemin, 1984: 22). As noted above, Baker and Salop (2015) have argued that a more permissive stance to dominant firms (specifically in the USA) has increased the prevalence of market power and its exertion, with the returns going largely to the wealthy.

In South Africa, it bears emphasising that inequality in wealth is more extreme than in most countries with the top 10% owning 90-95% of the wealth (Orthofer, 2016). And, there has been very little transfer of wealth over the past 22 years. Inequality in wealth is much greater than inequality in income (in which South Africa is commonly rated the worst in the world on the Gini coefficient). High rates of return on capital clearly exacerbate the effect of wealth. This relates to real interest rates and returns on property ownership, however, it is also due to rents from ownership of businesses due to market power. There are complex methodological issues in measuring these returns, however, it is evident that, even while the significance of the large conglomerates in the JSE has declined, concentration within sectors remains very high (see Roberts, 2013b). The increase in foreign ownership, and base erosion and profit shifting which has been observed to result, also implies higher returns to the owners of equity. It bears emphasising that the change in the apparent domicile of ownership may not mean any change in the identity of the ultimate owner.

In addition to the simple equity effects of tax avoidance there are also issues about unfair competition. Where two competitors (a local firm and foreign owned competitor) pay quite different effective tax rates then this can impact on their investment decisions and rewards, especially given financial market imperfections. In effect, one company receives a form of state-aid.[1]

Barriers to the entry and expansion of smaller businesses and younger firms prevent markets from rewarding effort and creativity (Banda et al. 2015a and b). A very narrow view can be taken of what constitutes entry barriers as being the costs that an entrant has to incur which were not incurred by the incumbent (see, for example, Carlton and Perloff, 2004, following Stigler, 1968). This, however, allows for substantial incumbent advantages where the incumbent was able to recoup its investment costs while the prospective rival incurring the same costs is likely to be deterred, including because of possible strategic behaviour by the incumbent. In other words, incumbency advantages can be 'locked in'. Some sunk costs and network effects are exogenous, incurred due to the nature of the product and the set-up costs required to produce at minimum efficient scale. Other sunk costs are influenced by the incumbent such as the level of spending on advertising.

Recent studies have highlighted that, in practice, there are a range of barriers to entry relating to the ability to reach consumers which are not well appreciated.[2] These barriers are due to the fact that manufacture of the good or supply of the service is often only the first step. It is critical that the business must be able to distribute and retail to consumers where many obstacles may exist. Studies of consumer behaviour have highlighted the importance of perceptions and brand awareness, as well as the (in)convenience in switching (see Mehta, 2013). The behaviour of consumers provides the justification for advertising which can be a very large and sunk cost which needs to be incurred in order to enter effectively, building the necessary brand awareness. Consumer inertia is substantial, including due to information asymmetries and convenience. Recognising the knock-on costs this implies in terms of weaker competition (and the potential exploitation by incumbents) is to realise the potential benefits from proactive interventions. Related to consumer behaviour and advertising are the costs associated with packaging, promotions and display.

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[1] This has been raised in the EU with regard to the tax dispensation that applies to Apple as its EU business is domiciled in Ireland where there is a very favourable tax regime.

[2] The Centre for Competition, Regulation and Economic Development has undertaken a number of studies of different markets and firm experience (see http://www.competition.org.za/barriers-to-entry/).

The range of barriers reinforce the advantage of inherited incumbency and, in the context of very unequal ownership and the ability to exert market power, reinforce and exacerbate inequality. Competition law is one tool which is meant to address the conduct of dominant firms in excluding rivals, however, exclusionary conduct by dominant firms is the area in which the choices made in the South African Competition Act were the most conservative, guarding against possible over-reach by the competition authorities and placing greater weight on the productivity and efficiency of incumbents and their incentives to invest and innovate.

Along with persistent and extremely high levels of concentration South Africa has had low levels of investment and poor productivity performance over the past two decades. While it can be argued that higher profits are part of incentivising productivity improvement, the evidence for South Africa, such as it exists, is that high profits are associated with lower productivity (Aghion et al. 2008; Dobreva, 2011). At the same time, South Africa has continued to record the highest levels of inequality in the world. It is appropriate to consider alternatives including changes to competition law along with other possible measures to open up the economy to greater participation.

Competition law and policy is about setting the rules for the market economy and the rules can be changed in order to shift the balance in favour of different outcomes, such as constructively opening up markets. It is not simply limited to enforcement against egregious offences such as hard core cartels that can be compared to racketeering or fraud. It also does not mean arbitrary actions against companies. The issue is whether the current rules mean the economy rewards effort, innovation and creativity. In economies with higher levels of concentration and less robust competitive self-righting mechanisms (such as higher barriers to entry) stronger policies may be required towards abuse of dominance (Vickers, 2007; Brusick and Evenett, 2009). The balancing of the probability and costs of over and under enforcement (Type 1 and Type 2 errors) implies that different stances should be adopted across countries because of their different characteristics (Evans, 2009). As Baker and Salop (2015) propose for the USA, standards can be rebalanced for the judgement dominance and its abuse, along with consideration of inequality as a goal of antitrust (and not just in merger review where there is public interest criteria).

2.3 Economics of competition and industrial development

A productive and inclusive economy means that effort, innovation, and creativity are rewarded. Put differently, competition is fair. Performance competition means competing on offerings to consumers based on production capabilities rather than ‘handicap competition’ where firms seek to undermine their rivals (Gerber, 2010). Improved production capabilities result in increased productivity, improved quality and design of better products.

Empirical studies have shown that a fall in concentration leads to a fall in prices and in price-cost margins (see Schmalensee, 1989). The results with regard to profits, taking into account returns on initial investments made, are much weaker, however. Cross-industry regressions find scale economies is a strong explanatory factor for concentration (Sutton, 2006). Smaller markets relative to the minimum efficient scale of production in an industry means, other things equal, that concentration will be higher. Other characteristics put forward to explain concentration include the intensity of advertising and R&D, although R&D has typically been found to be uncorrelated with concentration (Sutton, 2006). In addition, these are not exogenous but are part of firms' strategies. Imperfect information and consumer brand loyalty can underpin marketing strategies linked with (exogenous) distribution scale economies to raise the costs of entrants, even where the minimum efficient scale of the actual manufacture of the product is not very large.

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

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

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

There is a well-developed set of theories of exclusionary conduct which explain why dominant firms may have the ability and incentive to protect their position (see, for example, Rey and Tirole, 2006; Motta, 2004; Whinston, 2006; Vickers, 2005). While it is necessary to consider the counter-arguments put forward by the so-called 'Chicago school' critique which questions why dominant firms need to exclude rivals in order to maximize profits, it is also necessary to understand the scope for strategic behavior and the negative impact this can have on potentially competitive businesses which can disrupt incumbents. Persisting dominance of the incumbent suggests that effort and creativity are not being rewarded but the legacy position. As Geroski and Jacquemin (1984: 22) caution: 'when, however, small asymmetries can be solidified into dominant positions that persist, the inequities they create become institutionalized, creating long-term problems in the performance of the economic system which cry out for policy attention'.

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

> 'Competition is the basic rule of the game in the economy. Nevertheless, if the outcome of competition is to be accepted by the society at large, the process of competition itself must not only be free but also conform to a social norm, explicit or implicit. In other words, it must also be fair. Otherwise, the freedom to compete loses its intrinsic value. Fair competition must go in tandem with free competition. These two concepts embody one and the same value. This may be the reason that competition laws of several countries such as Korea and Japan clearly specify 'fair and free competition' as their crown objective. . . . I believe that the abstract notion of fairness rests, inter alia, on equitable opportunities, impartial application of rules and redemption of past undue losses. . . . Fairness, then, does not imply absolute libertarianism but instead takes the form of socially redefined freedoms.

> Viewed from this perspective, the polemic whether competition laws should aim only at enhancing economic efficiency rather than at promoting some social policy goals such as fairness may appear to be irrelevant. After all, efficiency is intrinsically not a value-free concept.
>
> …[I]n a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of <u>raising the power</u>, within reasonable bounds, <u>of underprivileged economic agents to become viable participants in the process of competition on the one hand</u>, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are usually protected through import restrictions. This will then give rise to public dissatisfaction since the game itself has not been played in a socially acceptable, fair manner.' (emphasis added)

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

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

What are the implications for developing economies and African countries, in particular? There are reasons why the durability of dominance is greater. Scale economies are more significant given the smaller size of markets, information is likely to be poorer, and the costs of building brand awareness, advertising, distribution & marketing may be higher relative to sales. The first-movers in many countries are likely to have gained their position either through state-support and ownership (even if now privatized) or by being a subsidiary of a multinational corporation that established its footprint under colonial rule. However, while the effect of scale economies is well established, we should be cautious about generalisations in other areas – instead seeing these issues as important ones for future research. There is a growing field of work on the appropriate competition policy for developing countries but relatively little regarding African economies (on developing countries see: Gal, 2003 & 2009; Gal et al., 2015; Brusick and Evenett, 2008; Dabbah, 2010; Jenny and Katsoulacos, 2016).

The learning from models and cases suggests that entry may also be more likely from adjacent geographic markets if the market conditions are similar, and the firm can leverage its existing capabilities. This has implications for regional integration. In addition, there are links with development policies. Hausmann and collaborators find productive capabilities migrate – a firm which has developed capabilities in one product such as cutting machinery for forestry (in the case of Finland) can more readily develop capabilities in cutting machinery for other materials (Hausmann and Hidalgo, 2010; Hausmann et al., 2007). This suggests that at the regional and country level we need to consider how the 'optimal level of competition' can be fostered, which links to capabilities development (Amsden and Singh, 1994; Singh, 2004).

Regional integration which means greater rivalry from neighbouring countries might be more effective. Entrants may come from firms in adjacent markets or in an upstream or downstream relationship. Industrial policies may support such entrants.

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

3. Overview of competition enforcement

The main areas of competition enforcement in South Africa relate to agreements and arrangements between firms, both horizontal and vertical, and unilateral abuse of dominance. Restrictive horizontal practices are addressed in section 4 of the Competition Act and restrictive vertical practices are addressed in section 5. Sections 8 and 9 address abuse of a dominant position. The Competition Act also provides for merger review. And, under the amendment to the Act which came into force in 2013 the Competition Commission has the power to conduct market inquiries.[3] As of September 2016, there were three inquiries underway, in healthcare, LPG gas, and supermarkets. The Commission did also conduct an inquiry into banking but without the formal powers under the Act.

3.1 Horizontal restrictive practices

The Act distinguishes restrictive arrangements between competitors into those which have the effect of substantially preventing or lessening competition (in 4(1)(a) where there is no penalty for a first offence and provision for a set of defences) and those more egregious forms of conduct (under 4(1)(b) where there is a penalty up to 10% of turnover) which involve directly or indirectly fixing prices, dividing markets, or collusive tendering. The latter are commonly referred to as forms of 'hard core cartel' conduct.

The harm of cartel conduct is well understood, with several studies of South African cartels demonstrating that mark-ups are substantial (Khumalo et al. 2014; Mncube 2013a and 2014; World Bank, 2016). The effect of cartels in undermining entrants to protect collusive margins has further been highlighted by Mncube (2013b). The Commission has been very successful in using leniency and settlements to uncover the wide ranging existence of cartels, including in

[3] The Act was formally amended in 2009 but the provision on market inquiries came into force on 1 April 2013.

the construction sector (Mkhwanazi et al. 2012; Roberts, 2014). There have been continued 'dawn raids' on companies and initiations of new investigations, including those of international cartels such as the 119 investigations initiated into the car parts sector in 2015/16.[4]

Does this mean that strong action against cartels is all that is required, along with merger control? While cartel enforcement is undoubtedly important, tight oligopolies will continue to find ways in which to they can maintain higher margins by dampening rivalry between each other while keeping potential rivals out. These arrangements will not necessarily involve meetings and explicit cartel agreements and may just involve information exchange which may only fall under 4(1)(a) and require the demonstration of effects.[5]

On the other hand, there are genuine requirements for collective action by firms in industries to address coordination failures in areas such as investment and marketing by co-operatives, and shared facilities for research, development and testing of new products. A binary view of the world where co-operation is bad and the absence of such arrangement means competition (good) is at best naïve and undermines measures required to support investment in productive capabilities. For example, where the firms cooperating account for only a small part of the market and the cooperation reduces their costs then competition may well be intensified rather than weakened. It can be argued that in these circumstances firms can apply for an exemption but this has been a relatively slow process which involves accepting that the conduct is a contravention and the risk that the exemption will not be granted. The exemption is also time bound.

Where other jurisdictions consider arrangements which undermine competition by object or effect (allowing for arrangements which lessen or distort competition) the South African Act separately picks out price fixing, market division and bid-rigging. The perverse consequence is that an innocent agreement by a few small suppliers (for example, as part of a co-operative arrangement) where they compete with many other suppliers is subject to severe sanction, while a sophisticated coordinated arrangement not falling into a neat box, and which is *proven* to have had a substantial anti-competitive effect, faces no sanction under 4(1)(a) as a first offence. In addition, collusion often involves a combination of price fixing and market division and, indeed, it does not make sense to identify them as separate conduct.

[4] See Competition Commission Annual report 2016, page 34. This represents 119 of the 133 new cases initiated in the year. Five dawn raids were also conducted during the year.

[5] This contrasts with European decisions where information exchanges have been found to be infringements by object as it can be inferred that they are anti-competitive. Other jurisdictions can sanction horizontal arrangements which simply lessen or distort competition.

3.2 Vertical restrictive practices

The record with regard to vertical restrictive practices is perhaps where the orientation of the South African Competition Act is most evident. Vertical arrangements internalise transactions costs and generally have efficiency benefits. Large corporations will have structured arrangements to lower costs and improve coordination and *also* to strengthen their position, raising barriers to entry by non-integrated firms. It is entirely consistent for both effects to be present. It is also likely that in a market with several large integrated firms they would have similar arrangements while not necessarily competing vigorously with each other. Competitive pressures would come from non-integrated rivals but, if there is no weight given to non-integrated firms, the trade-off between efficiency and competition will always be won by efficiency.

If access to distribution networks, key customers or key inputs matter for competition, without necessarily having unilateral dominance, then there is a purpose to circumscribing vertical agreements. Smaller firms may also be competitively significant where a few incumbents have recognised their mutual interdependence and tacitly coordinate. In addition, new business models are likely to come from outsiders, but may never have a chance to be developed and improved if those pioneering the models cannot get off the ground because routes to market are tied up by incumbents through vertical agreements. Examples here could include supermarkets and banks, where the main participants have exclusive agreements but no single firm is necessarily dominant. The whole point of vertical restrictive practices provisions is to consider the prevalent arrangements and their impact on non-integrated rivals. The stance which has been taken is that as long as there are two or three large integrated firms then competition between them is all that matters.

Under the South African Act the provision on vertical restrictive practices has been interpreted such that it will only be relevant where there is unilateral dominance and, in effect, the cases have also been referred as abuse of dominance. This implies there is no benefit to increasing participation in itself by non-integrated businesses. In South Africa, there is an argument for positive discrimination in favour of non-integrated firms (as entrants and smaller businesses) even while this might narrowly constrain efficiency.

The decisions of the Tribunal and the CAC in *SAB* highlight the importance given to demonstrating consumer harm in showing a substantial lessening or prevention (CAC decision para 59 and 60). As the CAC indicated:

> 'However, s5(1) expressly refers to the effect of substantially preventing or lessening competition in a market. It must follow that some likely effect upon price, output and/or quality of the product which diminishes consumer welfare must be shown to exist in order to trigger the application of 5(1).' (para 60).[6]

This means that if the excluded rival is simply bringing different products to market, but not necessarily at a lower price or higher quality, then their possible participation is of no relevance. In this case it was common cause that there were scale economies in distribution of beer. It follows logically that by SAB withdrawing by far the largest volumes of beer (around 90% of the total) from the distribution of independent distributors their costs are higher and thus the distribution services to rivals of SAB would also be higher. In addition, an outlet could not receive a single mixed load but would have to receive non-SAB products separately from SAB products and hence increase the number of deliveries required. SAB argued that if they did not have exclusive appointed distributors these distributors would not have the same scale economies and SAB would have higher distribution costs.[7]

This contrasts sharply with the enforcement outcomes in other jurisdictions where, for example, cooler space was opened up to rivals, and the competitive process is valued over simple arguments about scale economies. In this regard, as long as there are fixed costs, then there are scale economies. It is also trite to observe that internalisation including through vertical integration saves transactions costs. It bears emphasising that competition is costly in the sense that it naturally means duplication of activities. Arrangements regarding coolers have instead been addressed in merger remedies where the ability of small firms to become competitive is one of the public interest criterion.

3.3 Abuse of dominance

There have been relatively few abuse of dominance cases over the 17 years in which the Act has been in force, with just 21 being referred to the Tribunal. This appears somewhat surprising given the concentration of the economy. The critical consideration of the record on exclusionary abuse of dominance is a major objective of this paper which is addressed in section 4 below.

A substantial proportion of the major abuse of dominance cases have also been to do with excessive pricing rather than exclusionary abuse. These have related to formerly state-owned industries (Sasol and Arcelor Mittal South Africa) and the industrial development implications

[6] Note that similarly under price discrimination the CAC indicated that the Commission had not met the onus of demonstrating that the conduct had the likely effect of substantially preventing or lessening competition (para 91).
[7] SAB also argued that they would bring the distribution arrangements all in-house.

of upstream market power for the buyers or consumers, where these are firms in relatively more labour-absorbing activities than the upstream businesses.[8] The cases involve the competition authorities effectively being the 'regulator of last resort' and the decisions of the Tribunal and the Competition Appeal Court (CAC) have reflected this in disagreements regarding the appropriate benchmarks for economic value against which the prices have to be measured as well as the appropriate basis on which the return on capital should be calculated. The CAC in *Mittal* found that the appropriate test was prices in a long-run competitive equilibrium where there is a free entry and exist and in *Sasol Chemical Industries* that the reward on capital should be calculated at the firm's own hurdle rate on assets at replacement cost in line with insurance values. If prices are being charged at these levels then it is difficult to understand why there would not already have been an entrant unless there are legal barriers to entry.

The Tribunal sought to include in the assessment the extent and durability of dominance of the firm in question, as well as to distinguish whether the position was due to state support or through ongoing innovation. The CAC in each of these cases rejected the Tribunal bringing in such factors. This means that the position regarding excessive pricing is confused and that it is unlikely to address entrenched dominance where the effect is to skew the structure of the economy. Other policy tools should instead be looked at to regulate such market power.

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

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

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

The different stances in the different sections of the Act, while appearing strange, is the result of the debate between the social partners and what is, in effect, the 'political settlement' reached in 1998/99. The business constituency (which was actually the organisation of the top 50

[8] There was also settlement of a matter involving anti-retroviral drugs.

companies, the then South Africa Foundation) adopted a stance which offered little resistance to the broadening of the merger review provisions[9] but argued for the need for circumscribed provisions in enforcement in order to protect 'certainty' for business. It was a deliberate negotiating strategy, as discussed at the time by the business team.[10] The appeal to business confidence drew its support from the timing of the negotiation of the legislation being shortly after the sharp depreciation of the currency in 1996 and the perceived need to placate international capital markets.

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

4.1 Abuse of dominance provisions

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

Under section 8(a) it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers, with such a price defined under the Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value (Section 1.(1) (ix) Definitions and interpretation). Economic value is not defined in the Act. As discussed above, there have been no findings upheld of excessive pricing, although there have been settlements.

Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying access to an essential facility.

Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms. However, there is no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological,

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

efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market.

Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, and for which a penalty may be imposed, as follows:

(i) requiring or inducing a supplier or customer to not deal with a competitor;
(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
(iv) selling goods or services below their marginal or average variable cost; or
(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

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

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

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

4.2 The record on enforcement of abuse of dominance

Twenty-one abuse cases in total have been referred to the Tribunal from October 1999 to September 2016, an average of 1.2 per year. The great majority were referred by the Commission. A further three cases that were not referred were subject to settlements, making 24 cases in total.

The Tribunal made a determination on twelve while nine cases were the subject of settlements with the Commission (six after referral), one of which the Tribunal did not confirm. Of the remaining three cases, one (*Omnia v Sasol*) was been withdrawn and the other two (*Computicket* and *Uniplate*) are still waiting to be heard by the Tribunal.

Of the twelve cases the Tribunal has decided, it has found that abuse occurred in nine (on the part of *Patensie*, *South African Airways* (twice), *Sasol*, *Mittal Steel SA*, *Senwes*, *Telkom*, *Sasol Chemical Industries* and *Media24*). However, in three of these the finding was overturned or set aside by higher courts (*Sasol*, *Mittal Steel SA* and *Sasol Chemical Industries*) while the appeal by *Media24* is still pending meaning five cases have conclusively found abuse of dominance. The Tribunal dismissed the cases in *Mandla-Matla*, *BATSA* and *SAB*. In addition, five of the settlements (*GlaxoSmithKline & Boehringer Ingelheim*, *Sasol Nitro*, *Foskor*, *Telkom*, and *ArcelorMittal SA*) involved substantive undertakings, even while not all having an admission. A further settlement in *Astral* included an admission under 8(c). On this basis, taking the findings and the substantive settlements, abuse of dominance has been proscribed in eleven cases (five findings and six settlements).

Table 1. Abuse of dominance cases, 1 September 1999 to 30 September 2016

Initiation	Referral	Case (Tribunal case no.)	Main alleged contravention	Status/finding
Dec 1999	Dec 2000	CC v SAFCOL, Yorkcor, CJ Rance (100/CR/Dec00)	Price discrimination in timber	26/6/02 Tribunal dismissed application to confirm consent agreement reached between CC and SAFCOL, as it went to contractual provisions, without consent of the other parties.
13/10/2000	March 2001	CC v SAA (18/CR/Mar01)	Inducing customer (travel agents) not to deal with competing airlines	28/7/05 Tribunal decision. Found incentive scheme with travel agents contravened 8(d)(i); R45mn penalty.
20/4/2000	June 2001	CC v Patensie Sitrus (37/CR/Jun01)	Exclusive supply arrangement with packing and distribution company, contravening 8(d)(i) and 5(1).	4/8/02 Tribunal decision, upheld by CAC. Found articles of association of packing and marketing former co-op contravened 5(1) and 8(d)(i) in requiring customers/members not to deal with competitors; no penalty.
Sept 2002	NA	CC/Hazel Tau and others v GlaxoSmithKline & Boehringer Ingelheim	Excessive pricing of ARVs	Case non-referred by the Commission following agreement in Dec 2003 to license generic manufacturers (in effective settlement).
30/4/2003 complaint lodged (CC non-ref 12/11/03)	Dec 2003	Nationwide Poles v Sasol Oil (72/CR/Dec03)	Price discrimination in creosote	31/3/05 Tribunal decision, found discount scheme was prohibited price discrimination 9(1). CAC decision - overturned.
May-August 2002 complaints filed by 21 companies	Feb 2004	CC v Telkom (11/CR/Feb04)	Exclusionary practices in pricing and access to fixed lines for value-added network service providers	Appeals of referral up to Supreme Court of Appeal. 7/8/2012 Tribunal decision found exclusionary abuse under 8(b) and 8(d)(i), penalty of R449mn.
19/9/02 (CC non-ref 6/1/04)	Feb 2004	Harmony Gold v Mittal Steel SA (13/CR/Feb04)	Excessive pricing of flat steel	27/3/07 Tribunal decision finding excessive pricing contravening 8(a) and penalty of R692mn 29/5/09 CAC overturned decision and remitted back to Tribunal to reconsider tests. Parties settled.

13/2/03 (CC non-ref 13/5/03) 24/7/03 (CC non-ref 25/5/04)	June 2004	Mandla-Matla v Independent Newspapers (48/CR/Jun04)	Exclusive arrangements with distributors contravening 8(d)(i) and 5(1); and refusal to supply distribution information contravening 8(c)	6/11/06 Tribunal decision, dismissed on all counts.
3/11/03 Nutriflo Aug04 Profert	May 2005 and May 2006	CC v Sasol Nitro (31/CR/May05 and 45/CR/May06)	Excessive pricing, refusal to supply and price discrimination in ammonia and related fertilizer products	20/07/10 Tribunal confirmed settlement, no admission, divestiture of downstream businesses and commitments.
1/10/2003	June 2005	CC, JTI v BATSA (55/CR/Jun05)	Arrangements with outlets for cigarette was exclusionary abuse under 8(d)(i) and/or 8(c), as well as under 5(1) referred by JTI.	25/06/09 Tribunal decision, dismissed on all counts Appeal to CAC lodged by JTI and then withdrawn.
Oct 2003	Sept 2006	Referred by CC in 2004. Nationwide Airlines, Comair v SAA (80/CR/Sep06)	SAA incentive schemes during the period 1 June 2001 - 31 March 2005 contravened 8(d)(i)	The Commission settled with SAA in 2006 without an admission and a penalty of R15mn. Comair and Nationwide Airlines objected and pursued a finding for the purposes of damages claims. 17 Feb 2010 Tribunal Decision, found contravened 8(d)(i), no penalty. Upheld on appeal.
Dec 2003 & Dec 2008	Jan 2007 and Nov 2012	CC v Mittal Steel SA and others (08/CR/Jan07)	Price discrimination in low carbon wire rod	Complaints of same conduct lodged by Barnes Fencing (as conduct had continued). Referred January 2007 and November 2012. Settled in August 2016 (without admission).
2/12/2004	Dec 2006	CC v Senwes (110/CR/Dec06)	Pricing for grain storage excluding rival traders	3/02/09 Tribunal decision found exclusion in form of margin squeeze, contravening 8(c), upheld by CAC. SCA overturned on 1 June 2011. Concourt upheld the Tribunal decision.
25/11/04	Dec 2007	CC v SAB (134/CR/Dec07)	Inducement not to deal with a competitor; price discrimination	Tribunal decision dismissed case 7/4/11, finding it did not have jurisdiction due to differences between complaint and Commission referral. Decision partly overturned by CAC on appeal. Tribunal dismissed remaining complaint, upheld by CAC on appeal.
20/2/07	June 2008	CC v Astral, Elite (74/CR/Jun08)	Exclusive arrangements regarding poultry breeding stock and feed	Settlement with admission of 8(c) contravention.
12/8/05	Dec 2008	CC v Rooibos (129/CR/Dec08)	Exclusive contracts with rooibos packers	November 2010 Tribunal confirmed settlement.
29/6/05 and four further complaints consolidated	Nov 2009	CC v Telkom	Excessive pricing and margin squeeze in pricing of broadband (leased lines)	Tribunal confirmed settlement, July 2013. Penalty of R200mn and price reductions amounting to R875mn as well as further commitments.
29/2/08 and four further complaints consolidated	April 2010	CC v Computicket	Exclusionary abuse, through exclusive contracts with inventory providers	Awaiting Tribunal hearing. Applications on various procedural grounds being heard.
2007	NA	CC v Foskor	Excessive pricing of phosphoric acid	Settled before referral, with admission, Tribunal confirmed settlement, 28/02/11.
12/11/07 (following request from DTI)	Aug 2010	CC v Sasol Chemical Industries	Excessive pricing of propylene and polypropylene	05/06/2014 Tribunal decision finding excessive pricing contravening 8(a) and penalty of R534mn. 17/06/2015 CAC overturned decision.
30/01/2009	Oct 2011	CC v Media24	Exclusionary abuse through below cost pricing under 8(c) and 8(d)(iv)	Hearing over 2013 and 2014. Tribunal decision pending. Under appeal to CAC.

		Omnia v Sasol	Excessive pricing	Referral withdrawn in 2013/14
July 2011	NA	CC v Arcelor Mittal SA	Excessive pricing	Settled August 2016 before referral and without admission with undertaking relating to prices to be charged for a five-year period.
30/06/2012	Nov 2015	CC v Uniplate	Exclusionary abuse through exclusive dealing under 8(d)(i), alternatively 8(d)(iii) or 8(c)	Awaiting Tribunal hearing

Source: Competition Tribunal decisions www.comptrib.co.za and Competition Commission press releases (www.compcom.co.za)

The cases have involved excessive pricing (eight cases, including the second Telkom case), price discrimination, and exclusionary conduct including vertical arrangements, loyalty rebates and predation. A majority of cases (13 in total) have involved former or current state owned companies (*Sasol* and related entities, *Mittal Steel* later *ArcelorMittal SA*, *Telkom*, *SAA*, *Safcol*, *Foskor*). In terms of sectors, heavy industries (steel and basic chemicals) have been most important, followed by four cases in agriculture and forestry, where there has historically been substantial state support (*Safcol*, *Patensie*, *Senwes* and *Rooibos*), and telecommunications and airlines (two each).

The various steps involved from referral to hearing and the scope for legal challenges have all meant that two to three years have typically elapsed from referral to Tribunal ruling in the major enforcement cases, with appeals following. It took more than eight years from referral for the Tribunal to make a decision in the first *Telkom* matter.

All-in-all, under the abuse of dominance provisions current state-owned companies (including Telkom in this category given its substantial state shareholding) have been fined five times (SAA twice, Telkom twice, and the IDC-owned Foskor). ArcelorMittal SA paid a penalty under the settlement although this included the admission of two cartels while there was no admission for the abuse of dominance charges and instead the company made commitments on pricing for the next five years. Sasol Nitro made divestitures and agreed to behavioural conditions regarding its conduct in fertilizer under a settlement reached with the Commission. Senwes also had remedies imposed on it.

How should this enforcement record be rated? If the likelihood of unilateral anti-competitive conduct was low then we would not be expecting much enforcement activity in this area. This could be the case if it was rare to find markets with a single dominant firm (which is presumed when market share of a single firm exceeds 45%). Notwithstanding the far-reaching collusive conduct that has been uncovered and addressed, the concentrated nature of the South African economy and the negative impact of anti-competitive conduct on its development is one of the few things all analysts and commentators agree on (see, for example, OECD, 2013; World Bank, 2016). The relatively small size of the South African economy and its distance from other industrial economies (compared to most in its peer group of other upper middle income countries), suggest that single firm dominance is a major issue. Moreover, the dominant firms generally developed under protection, regulation and support associated with the apartheid state's economic policies.

4.3 Exclusionary abuse of dominance

To assess the challenges of competition enforcement against exclusionary abuse of dominance further, I consider key cases to understand better the challenges faced by the competition authorities in their investigation and determination. The cases of exclusionary abuse of dominance where there has been a Tribunal finding are as follows:

- *Patensie* - Articles of association of packing and marketing former co-operative required farmers to deal only with the packing company, found that they constituted a vertical restrictive practice contravening 5(1) and required customers/members not to deal with competitors contravening 8(d)(i). No penalty even though one could have been imposed for 8(d)(i). Exclusive dealing arrangements by a dominant firm were found to be an inducement not to deal with competitors.
- *SAAI and II* – SAA's incentive schemes ('loyalty rebates') with travel agents were found to induce customers (travel agents) not to deal with competing airlines, contravening 8(d)(i); R45mn penalty in *SAAI* in *SAAII* there was a settlement with the Competition Commission for R15mn, and then a finding of a contravention by the Tribunal. *SAAI* was decided by Tribunal four years after referral and five years after complaint. It is also a very significant decision as the Tribunal set out the requirements for evaluating whether an exclusionary act (as specified in 8(c) or the subsections of 8(d)) had an anti-competitive effect. In this case, which it reinforced in subsequent decisions, the Tribunal held that an effect is established if there is '(i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.' While allowing for reasonable inferences to be drawn from proven facts, the Tribunal nonetheless indicated that the tests of effects would provide evidence of a quantitative nature which can be weighed against alleged efficiency or pro-competitive gains of the conduct. The onus under 8(c) is on the complainant, while under 8(d) it is on the respondent. The Tribunal found prices would have been lower if the rivals had not been undermined.
- *Senwes* - Exclusion by Senwes of independent grain traders and favouring its own trading operation through 'squeezing' the margins of the independent traders in charging them a higher storage price. The Tribunal found it to contravene 8(c) and therefore no penalty could be imposed. The case was appealed to the Constitutional Court on the grounds that the Commission's referral had focused on the effect of the Senwes storage pricing on the

farmers' decisions rather than the effect on the grain traders, however, the Constitutional Court upheld the Tribunal decision. Such conduct could be understood as a refusal to supply storage services although the refusal to supply provision (8(d)(ii)) refers only to goods, alternatively it could be understood as refusing to give a competitor access to an essential facility (under 8(b)) in which case a penalty could have been imposed. The ruling was confirmed six years after the referral and eight years after the complaint.

- *Telkom I* – Telkom refused access to its network to value-added network service providers (VANS) that competed with Telkom's own offerings in this area. The Tribunal found that the conduct constituted a prohibited practice in refusing access to an essential facility and inducing customers not to deal with a competitor (under section 8(b) and 8(d)(i)) and imposed penalty of R449mn.[11] This decision was more than eight years after the referral of the case and ten years after the complaints were made.
- *Telkom II* – Telkom engaging in exclusionary conduct with regard to downstream service providers principally through the pricing and terms of access of broadband. The settlement, involving a fine, price reductions and substantial commitments, was confirmed in July 2013 some eight years after the complaint and four years after referral.
- *Astral* – Astral admitted a contravention of 8(c) relating to an exclusive supply arrangement where members of the Elite joint venture which it unilaterally controlled were required to source 90% of their poultry breeding stock from it and could not choose competing breeds. The settlement in December 2012 was four years after referral and 5 and a half years after the complaint.
- *Media24* – The Tribunal found Media24 had committed an exclusionary act in operating the Forum title at below average total cost and with predatory intent. This does not fall within the definition of predatory pricing under 8(d)(iv) as selling goods below marginal or average variable, however, and was considered by the Tribunal under 8(c). The Tribunal further found the anti-competitive effect outweighed any pro-competitive gains as the impact on the rival Goldnet News had been demonstrated as well as of recoupment by Media24 in the form of higher prices after the conduct.

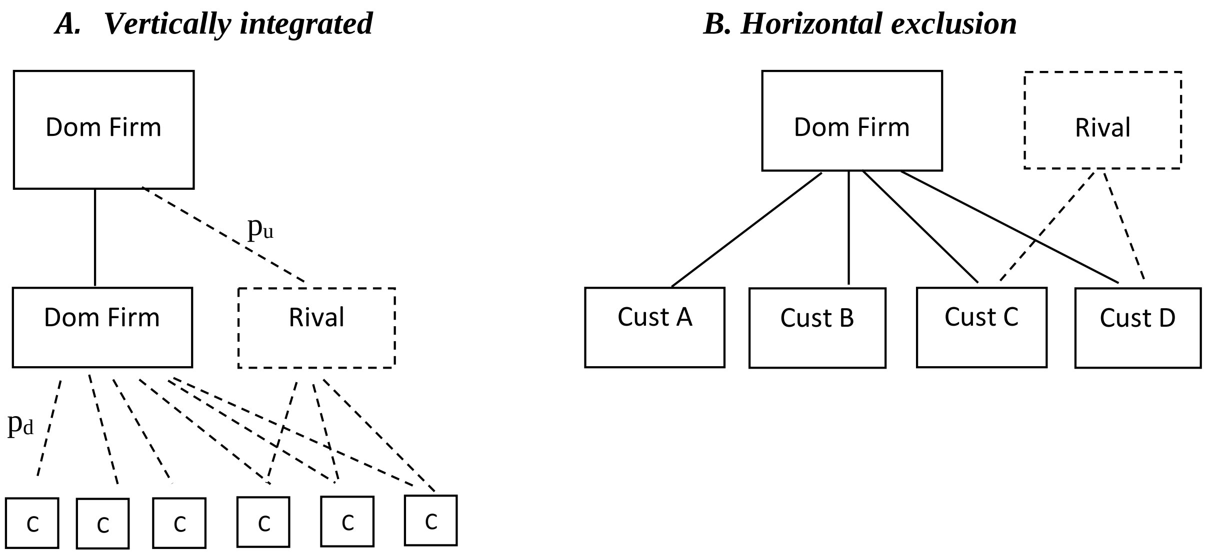
The Tribunal has found that an anti-competitive effect must be demonstrated and that a form-based approach cannot be adopted to 8(d) based on identifying the exclusionary acts and the fact of dominance. Moreover, the effect on competition has to be significant and capable of quantification, with the onus being on the respondent to demonstrate that efficiencies or pro-competitive effects outweigh the harm to competition under 8(d) while the Commission has the onus of proving the negative competition effects outweigh the benefits under 8(c). The Tribunal has applied a similar test of anti-competitive effect as substantial foreclosure and/or

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

evidence of consumer harm to a number of cases, as discussed in more detail in section 4.5 below. The decision to require effects to be quantified means economic analysis becomes central to the case.[12] This analysis is conducted in the context where the incumbent has the information and resources to martial its arguments for efficiencies, such as having achieved scale economies or internalised transactions costs, while smaller rivals who are potential competitors will struggle to quantify their effects on competition if they have been blocked from being effective rivals and so, in effect, have to speculate about the possible impact of their rivalry.

In understanding the mechanisms which can be used by dominant firms it is helpful to distinguish between conduct where the dominant firm operates in at least two market levels, and where there is just one market involved (Figure 1). In the first (schema A), the dominant firm is both a supplier to, and a competitor of, its rivals. Because the dominant firm can set prices and other supply conditions in both the upstream and downstream markets simultaneously it can undermine its rival in various ways. It can increase the input price (p_u), refuse to supply or degrade the quality of good or service supplied, and/or reduce the output price (p_d). In other words, the conduct could be refusing access to an essential facility (if the upstream level is about selling access to some critical infrastructure), refusal to supply and indispensable input, excessive pricing, or selling goods (downstream) below cost. In effect, the rival is undermined and cannot be competitive in terms of price, the range or scale of supply, and at the scale necessary to minimise production costs. There may in such cases be an overlap with an economic regulator such as in the cases of telecommunications.

Figure 1. Exclusionary schemas



[12] See also Bonakele (2016).

Where the dominant firm is not vertically integrated (schema B) it may exclude a smaller rival or entrant if it is able to tie-up the customers and so prevent the rival from being able to compete. If scale economies are large relative to the size of the market then the dominant firm need only tie-in enough customers to leave the rival unable to achieve minimum efficient scale. There are various different ways in which the dominant firm inhibits the rival from competing for customers. The firm could sign customers up under exclusive contracts. The firm could offer prices under loyalty inducing rebate arrangements which means that there is *de facto* quasi-exclusivity. If there are a few large key customers that can be targeted then prices below cost could be offered to them.

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

If there are different market segments and with lower barriers to entry for some (where, for example, customer switching costs or brand loyalty are lower) then the more contestable segment can be targeted by the incumbent, such a through a lower priced 'fighting brand', while higher prices and margins are maintained on the less contestable portion.[13] The ability to segment the market is important as it may then be the case that the potentially efficient rival can be blocked by conduct which is only targeted at a segment and, by undermining the rival where it is better able to compete, continues to protect profits in the other segments.

There could well be a combination of arrangements, which also change over time. Indeed, it would be surprising if a dominant firm with a lot to lose if smaller rivals get a foothold did not seek to tailor its strategies to the different market segments and key customers, and to evolve its strategy over time. The challenge in terms of evaluation is to distinguish what is vigorous 'competition on the merits' from conduct that makes no economic sense absent the anti-competitive rationale. The requirement to identify an anti-competitive effect (whether substantial foreclosure or consumer harm) of the specified conduct implies that the impact of each conduct can be separated, rather than conduct having a compound effect.

The South African Act is structured as if the conduct can be easily separated out into readily labelled 'text-book' arrangements. This has meant long legal wrangling in trying to place complex and evolving arrangements into one or other pigeon-hole. It has also led to confusion where the complainant has brought what it is able to perceive to the Commission, but the

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

investigation then reveals more detail and potentially a different understanding of its anti-competitive nature. More detail or a different understanding may also come to light in the hearing itself, as was the case in *Senwes*. The way the case is framed in terms of the economic analysis is also likely to evolve when economic experts are brought to testify, such as in Media24.

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

The *Media24* case highlighted that specifying particular economic tests in the Act can be problematic. With regard to below-cost pricing benchmarks, the Act provides (8(d)(iv)) that this is pricing below average variable cost or marginal cost, which was consistent with international precedent and economic textbooks at the time. However, as case law has evolved in response to the real world evaluation of conduct, the appropriate benchmark is now framed as 'average avoidable cost' reflecting decisions that firms make between alternative options and the costs that are incurred or avoided, rather than an idealised view of how firms vary output.[14]

4.4 Time for hearings, decisions and appeals

The nature of the South African Act with separate sub-sections for different 'pigeon-holes' of conduct is one reason why there has been such long time taken from complaint referral to Tribunal decision, as well as why there have been many further appeals. Referrals are challenged in terms of whether a case has been separately made out under each of the sub-sections identified as well as on what is required for a given sub-section.

There have also been challenges regarding whether the case referred reflects the complaint made. Several appeal court decisions have indicated that this is required. For example, in dismissing the referral against SAB Ltd the Competition Tribunal found itself bound by the decision of the Supreme Court of Appeal in *Woodlands*[15] where the court observed that *"The Act presupposes that the complaint (subject to possible amendment and fleshing out) as initiated will be referred to the tribunal."* However, the complainant may well not understand the conduct which is generating the outcomes which they observe and so the referral may be

[14] See European Commission guidance and discussion in *Media24*.
[15] Supreme Court of Appeal decision, Case No: 105/2010.

substantially different following the investigation where the Commission using its powers to obtain information can pull back the veil. This was illustrated in the fertilizer cases where the complaint was lodged against Sasol Nitro and led to a referral also against Omnia and Yara. A downstream firm had initiated a complaint alleging that Sasol, a dominant firm, had abused its dominant position. The Commission subsequently uncovered cartel conduct, which was one of the reasons that the downstream firm was only offered product by Sasol, and included this cartel conduct and the two other cartel members, Yara and Omnia, in the referral. The CAC subsequently overturned the Tribunal decision in *SAB*. There have been a succession of *Yara* decisions, with the CAC dismissing the referral against Omnia and Yara, and the SCA overturning the CAC decision in 2013, although the case has yet to be heard.

There have also been challenges to the Commission's decision to refer, which again relates to the evidence required and the characterisation of the conduct. The challenge to the Commission's referral of exclusive contracts on the part of Computicket, based on the respondents right to access internal documents regarding the rationality of the Commission's referral, has led to this not being heard despite being referred in 2010.

The other main reason why the hearings have taken so long in South Africa is that the Tribunal process has been an adversarial one where the Tribunal itself has stood back from identifying the necessary evidence required to make a determination. This contrasts with the approach of Chile's TDLC in which it sets out the so-called *auto de prueba* (the resolution of proof), which identifies what it believes is the scope of the case and the relevant facts. This also guides the hearing of factual witnesses and expert witnesses, normally local economic experts. While it may be (and has been) challenged on this resolution, it makes the hearing of the case proceed more quickly than in South Africa (see Box 1).

Box 1: South Africa – Chile comparison[16]

The competition law in Chile contains an over-arching prohibition on abuse of dominance, with examples of the types of conduct. In cases, the Chile Tribunal (the TDLC) identifies two categories: abuse of dominance cases and cases involving the 'imposition of artificial barriers to entry'. However, a great majority of the latter are, in effect, also about abuse of dominance, so they can be considered as single category for review purposes. During the period January 2004 – December 2012, the TDLC reviewed 59 cases regarding abuse of dominance. The investigating authority, the FNE, has referred 21 of these cases, compared with 32 cases between private parties with no direct intervention from the FNE.[17]

Of the 59 cases, the TDLC has sanctioned and fined in 19.[18] Nine of those regarded exploitation practices mostly towards consumers, but in some cases also towards suppliers. The other 10 sanctions regarded exclusionary practices: one for predation; two for exclusivity clauses (one of which includes sanction for rebates); one for tying; two for refusal to deal (in one of those cases, margin squeeze was also sanctioned); and four for conducts that raised artificial barriers to entry but do not fall under any 'clear-cut' category.

The uncertainty about the appropriate tests for the different types of conduct under the South African Act would make the direction of the scope of the case and the relevant facts which need to be heard quite difficult. However, it is the case that extensive evidence has been led in matters extending over weeks (including extensive and at times esoteric economic expert evidence and argument) when the case itself has turned on readily identifiable key pieces of evidence. Ultimately, the Chile legal framework has allowed the TDLC to apply a broad test of 'no economic sense' to much of the conduct, to assess whether the conduct is rational absent an exclusionary effect (see Roberts and Tapia, 2015; Roberts, Tapia, Ybar, 2013). This has been applied generally in the context of super dominance, and has effectively placed the onus on the respondent to justify why it has undertaken conduct which on the face of it obviously undermines a rival.

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

[16] This is drawn from Roberts et al. 2012.
[17] See FNE: http://www.fne.gob.cl/defensa-de-la-libre-competencia/actuaciones-ante-tribunales/. Note that there are cases initiated under the previous regime and ended in the TDLC. They were not 'referred' to the tribunal, so we have not considered them. This explains the difference in numbers.
[18] Note, the finding may only have been on one aspect of the case referred. It is also somewhat difficult to classify all of the cases given the nature of the Chilean legislation.

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

An interesting comparison can be made of how two relatively young regimes, South Africa and Singapore, have dealt with very similar exclusionary abuse of dominance cases relating to ticketing (Box 2). In Singapore, the Competition Commission decided three months after the Competition Commission South Africa, that there had indeed been an abuse of dominance. The decision in Singapore has been appealed and the authority's decision upheld in June 2012 by the Competition Appeal Board. In South Africa, the case is still to be heard by the Tribunal due to legal challenges to the Commission's referral.

Box 2: A tale of two cases – Computicket in South Africa and SISTIC.com in Singapore

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

In June 2010 the CCS found that ticketing company SISTIC.com had abused its dominant position by requiring venue operators and event promoters to use its services exclusively.[19] In addition to removing the exclusive dealing requirement a penalty was imposed. The decision was upheld by Singapore's Competition Appeal Tribunal and there are now more independent ticketing companies operating in Singapore.

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

[19] https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/abuse-of-dominant-position-by-sisticcom-pte-ltd

4.5 What explains the outcomes - harm to the competitive process or proof of substantial effects?

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

The other major emphasis in the Act is on (economic) effects-based tests. It is important to be clear that the debate is not about economics over law but whether the rules adopted are well-founded in economic principles. The principles of economics do not necessarily require complex modelling of possible effects on consumer welfare. However, if the approach adopted requires proving that prices would be lower and volumes higher, then it undoubtedly favours those parties that are able to hire specialist economic consultants.[20] It also implies a bias against smaller rivals with the potential to be efficient competitors but who cannot demonstrate in quantitative terms the effect they will have on market prices or quality.

The South African Act adopts 'substantial preventing or lessening competition' for vertical and horizontal (aside from 'hard core') restrictive practices, price discrimination, and for mergers.[21] In *Nationwide Poles* the CAC placed the emphasis on substantial lessening effects. However, as noted in Petersen's lectures on price discrimination, the *prevention* of competition could encompass exclusion of small rivals, even where they may not have a clear effect on overall outcomes, as there are still a number of larger rivals who can compete with each other (Petersen, 2006). But, the CAC's *SAB* decision, cited above, effectively ruled this out as it made clear that substantial lessening or prevention required demonstration that prices would be higher and quantity lower absent the conduct. There is no value placed on the ability of competitors to compete on equal footing if they cannot demonstrate they would be lowering prices or bringing improved quality. In effect, competition from such competitors is dismissed as trivial. It also begs the question as to what might be the impact of potentially effective competitors who have been undermined from the outset because of barriers erected by incumbents and cannot demonstrate in quantifiable terms what might be.

Under section 8, the Tribunal has emphasised (in the *SAA* and following decisions[22]) that effects need to be demonstrated in terms of evidence of actual harm to consumer welfare (that is, that lower prices or better quality would have resulted), or the exclusionary act is <u>substantial</u>

[20] As Wils (2014) has observed, the so-called 'more economic approach' can be seen as serving the self-interest of the economics profession as it creates a demand for services of economic consultants. This phenomenon has been evident in South Africa while the skills are in relatively scarce supply, but it is not necessarily the case. Rather, the way in which economics is taken into account needs to be considered so as not to unduly advantage parties with access to sophisticated economic analysis.

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

[22] See *SAA I* (para 132-136), quoted at para 143 of *SAA II*.

or significant in terms of its effect in foreclosing the market to rivals. While 8(d) appears to specify forms of conduct which are prohibited if undertaken by a dominant firm the issue is just one of onus in proving the effects. As set out in *SAA I* and reiterated in following decisions:

> *In terms of 8(c) we then consider whether the anti-competitive effect outweighs any efficiency justification for the conduct. If it does, we can find that there has been an abuse of dominance. Here again the onus is on the complainant.*
>
> *In terms of section 8(d) the burden of proof now shifts to the respondent who must prove that the efficiency justification outweighs the anticompetitive effect.*

Of course, the calculation of the effects and efficiencies made by the respondent and its typically large team of lawyers, economists and other experts, will have to be addressed by the complainant (normally the Commission) in either case. The bigger point is that the tests adopted under the legal provisions of the Act imply a choice not to value the competitive process in its own right, and the narrowing or widening of participation in markets by smaller firms. The effects are not understood in qualitative terms such as the range of choices on offer to consumers, and whether competition has been distorted in blocking rivals without due justification.

This differs from the stance in many if not most other countries where the dominant firm has a special responsibility not to allow its conduct to impair genuine undistorted competition (in the EU formulation). There is an implied test of materiality here, but not that the effect of the conduct must be demonstrated to be significant or substantial in quantifiable terms. As already noted, this is particularly important where we are concerned about the effect of conduct in erecting barriers to firms which are potentially efficient/effective competitors, rather than conduct which undermines a rival which was well-established to start with. In effect, the tests privileges, as complainants, large rivals (likely to be multinational firms) who are able to demonstrate a significant effect. Potentially efficient smaller firms have little, if any, chance of demonstrating a significant effect and the participation of this class of rivals has no merit in itself (due to, for example, bringing different choices to consumers). By their nature, these rivals will probably grow incrementally and are likely to enter through targeting a market or consumer segment and hence not be impacting across the market. They will also not achieve cost efficiencies until they reach minimum efficient scale. As *potentially efficient* competitors, the effects are therefore inherently speculative.

The implications of this choice is further brought into relief by decisions in mergers to impose remedies to ensure smaller firms are not harmed by the transaction. In cases such as Media24/NatalWitness and SABMiller merger first with Coca-Cola bottlers and then with ABInbev, a set of remedies were crafted to ensure effective competition on the part of smaller participants. However, while these were competition remedies they were imposed under the public interest criteria.

5. Concluding comments

Competition law and policy is about setting the rules for the market economy and the rules can be changed in order to shift the balance in favour of different outcomes, such as constructively opening up markets. It is not simply limited to enforcement against egregious offences such as hard core cartels that can be compared to racketeering or fraud. It also does not mean arbitrary actions against companies. The issue is whether the current rules mean the economy rewards effort, innovation and creativity. This is evident even in the priorities of Europe such as the inquiry into Google and in the USA with actions relating to pay-for-delay in pharmaceuticals. In a related example, the UK is working to support ‘challenger banks’ to bring greater rivalry to the big four established banks.[23]

Extensive firm and industry level analysis makes clear that productive capabilities are not simply about acquiring technology or skills but are to do with the internal ‘know-how’ of the firm including routines and working practices, and the linkages within clusters and supply chains (see, for example, Sutton, 2012). It is important to consider whether the nature of competition is performance based, where the investment in capabilities is incentivised as part of dynamic rivalry, rather than the ‘handicap’ competition (as Gerber, 2010, characterises it) where competitive positioning and returns depend more on inherited incumbency or disadvantage.

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

I have sought to highlight the diversity of approaches internationally and to raise the issue about the choices made in South Africa, particularly with regard to abuse of dominance.[24] South Africa made clear choices to combine a law with broad objectives and public interest provisions in mergers, with relatively narrow provisions on anti-competitive conduct in line with

[23] http://www.ft.com/intl/cms/s/0/d2520afa-8b78-11e4-ae73-00144feabdc0.html#axzz3bVko6jM8
[24] See also Budzinski (2008) for a review.

Anglophone countries, drawing heavily from jurisdictions such as Canada. As the cases have demonstrated, this meant that the choices made in the provisions relating to anti-competitive conduct did not reflect the objectives in the Act which emphasized the ability to participate in the economy, including by small and medium enterprises and by historically disadvantaged persons, and the need to address the legacy of apartheid in terms of concentrated ownership and control. The objectives have found expression in mergers conditions, however.

By comparison, European competition law (followed in most other countries) is expressed in broad provisions with particular arrangements and examples of conduct given in a non-exhaustive and non-exclusive list. This means the tests develop through case law and in guidelines.[25] Horizontal and vertical agreements under Art 101(1) are agreements and concerted practices that have as their <u>object or effect</u> the <u>prevention, restriction or distortion of competition</u>. This has been criticised by economists as not paying enough attention to the economic nature of vertical agreements and being too form rather than effects based.[26] The Guidelines on Vertical Restraints assist in specifying that Article 101(1) prohibits those agreements which appreciably restrict or distort competition. Arrangements such as price fixing and market division are indicated as particularly problematic and generally fall within horizontal practices. Article 101(3) provides that the prohibition does not apply to agreements which confer benefits for which the arrangements are indispensable, which are shared with consumers, and which do not eliminate competition in respect of a substantial part of the products in question, thus allowing for collaborations which build shared capabilities.[27]

Any abuse by one or more undertakings of a dominant position is prohibited under the EC's Article 102, in line with the special responsibility of dominant firms not to impair genuine undistorted competition competition. The dominant undertaking is entitled to compete 'on the merits'. Individual competitors are not protected but rather the competitive process. The different types of possible abuse indicated is not an exhaustive or exclusive list and nor are the tests specified in the law avoiding the problems encountered in *Senwes* about where a 'margin squeeze' falls and in *Media24* about the appropriate measure of costs.

Within Europe there are also notable differences in national competition regimes. For example, Germany has taken action against pricing practices of large supermarket chains and has stopped selective below cost pricing on certain product lines.[28] This 'loss-leading' impacts on smaller

[25] There are guidelines which have promoted a 'more economic approach', although they have not necessarily been followed (as in the recent Intel decision).
[26] See, for example, Bishop and Walker (2010)
[27] The Guidelines also recognise that there are generally less concerns about vertical arrangements, that market power is relevant at one or both levels and there is substantial scope for efficiencies.
[28] In the decision of 7 September 2000 the Bundeskartellamt prohibited the companies Wal-Mart, Aldi Nord and Lidl from selling certain basic foods such as milk, butter, sugar, flour, rice and vegetable fat below their respective cost prices. See

grocers and specialist retailers such as bakeries or butchers. However, in South Africa if there is vigorous competition between supermarkets who are selling a basket of products it is not clear that action against such practices would be taken for a number of reasons:

- there would likely not be unilateral dominance;
- the effect of small grocers and specialist stores may not be substantial as the supermarkets carry the products in any case (and are charging lower prices, and can likely show lower costs from scale economies in distribution);
- independents may well only be concentrated in a small geographic area; and,
- the pricing may not below average variable costs, as there are substantial overheads involved.

Regional guidelines produced by ASEAN on competition policy adopt a similar approach to the European Union in that they emphasise the competitive process, and the pursuit of fair or effective competition to contribute to improvements in economic efficiency, welfare, growth and development (ASEAN, 2010). With respect to horizontal and vertical agreements the guidelines recommend prohibiting those that appreciably prevent, distort or restrict competition. It is recommended that agreements are evaluated in terms of object or effect, and that hard core restrictions may be identified. The test in terms of appreciability allows for the setting of 'safe harbours'. Abuse of dominance is defined in terms of harm to the competition process. The two countries in ASEAN with well-established albeit young authorities, Singapore and Malaysia, follow this broad approach. An example of this in practice (in addition to the ticketing case) is the Competition Commission of Singapore settlement with Coca-Cola Singapore Beverages (CCSB) involving undertakings made by CCSB:

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

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http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2005.10.17-Resale_Below_Cost_Laws_Regulations.pdf?__blob=publicationFile&v=4

There are in line with the remedies agreed in South Africa with Coca-Cola, as part of the merger public interest test. However, it emphasises the quite different nature of the abuse of dominance tests.

It seems somewhat strange in retrospect that South Africa adopted narrower provisions for abuse of dominance and restrictive practices than the majority of jurisdictions around the world, given the country's economic challenges and history. The adoption of a list of discrete contraventions under 8(d) also can be seen, in hindsight, not to have recognised that firms are likely to pursue several different variations of conduct at once, and how to specify the conduct can be the subject of endless legal wrangling, even while the arrangement might be obvious. Conduct may also be interchangeable (as per margin squeeze and constructive refusal to supply), and the conduct will be ongoing and evolving over time.

The lessons of the assessment suggest we should consider changing the tests to adopt wording along the lines of restriction, prevention or distortion of competition for restrictive practices and of harm to competition for abuse of dominance. A non-exhaustive and non-exclusive list of particular types of conduct could be provided.

The key factors for assessment of abuse of dominance could be set out, as part of a structured rule of reason, as currently with mergers. It would ensure that the overall impact of multifaceted conduct can be taken into account. These factors could include:

- the extent and durability of dominance;
- how such a dominant position was acquired and maintained such as whether through innovation;
- the structural characteristics of the market including barriers to entry; and
- the impact on small and medium enterprises that are actually or potential effective competitors.

The powers to impose and monitor remedies, including divestiture, could be increased. Having completed a competition case the Tribunal is likely to have uncovered more information on a specific market, particularly given the discovery process and cross-examination under oath, than any other body (even industry specific regulators). The Tribunal will have been addressed at length by economists and industry experts called by the parties, and could ask to be addressed by further experts if necessary. It is thus well placed to enter into remedies where there are substantial and persistent competition problems with negative effects for the economy, including ordering divestiture. The authorities further need the ability to monitor such remedies.

Improved procedures could encompass the Tribunal playing a more proactive role in directing the presentation and hearing of evidence, as well as how complaint referrals are framed to place it in a strong position to fulfil its inquisitorial mandate and to make the correct decision.

There are also issues with ensuring an investigation is able to probe the different arrangements underlying apparent anti-competitive outcomes, rather than being limited to the specific conduct identified in the complaint. Generally the complainant perceives only the outcomes and surface-level conduct. They do not understand the mechanisms being used by the firm or firms in question – it is for the Commission to be able to investigate this. Similarly, a complainant often does not know of all the firms which may be involved.

More severe sanctions for providing false and misleading information are necessary. An important power in the Commission's investigations is being able to summons information and to conduct interviews under oath. This relies on the individuals being truthful rather than risking themselves being prosecuted for providing false and misleading information. The penalties are, however, not necessarily substantial enough to deter individuals from lying or misleading the Commission.

At the heart of the matter is whether the competition regime is viewed as part of economic policies which impact on how firms make decisions regarding investment, production, employment and sales, with appropriate penalties and remedies, or whether it is seen as part of a legal framework to punish transgressors. While hard core cartels may be separated out for the latter treatment, the competition regime is part of government's role in setting the 'rules of the game'. Government does this in many ways including setting tariff levels, taxation, investment incentives, funding for training and R&D, which all affect how firms operate and seek to make profits. In a mixed economy these need to ensure that the individual profit maximising decisions of firms are also in line with the long term interests of the country. As a result, in most countries, the competition authority has the powers to investigate, take decisions and impose remedies. The decisions must be properly founded and companies can appeal. But, the process of investigating and taking a decision, having reviewed all the evidence, is not subject to the same adversarial legal process as in South Africa.

Active competitive rivalry also requires positive policy steps. Intrinsic market failures in financial markets, education and skills, and product development all mean that potentially efficient competitors have higher hurdles to overcome than incumbents and that incumbents can entrench themselves. Economic policies are required to generate competitive outcomes and build dynamic productive capabilities, with constructive, performance-based, competition.

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The **Research Project on Employment, Income Distribution and Inclusive Growth (REDI3x3)** is a multi-year collaborative national research initiative. The project seeks to address South Africa's unemployment, inequality and poverty challenges.

It is aimed at deepening understanding of the dynamics of employment, incomes and economic growth trends, in particular by focusing on the interconnections between these three areas.

The project is designed to promote dialogue across disciplines and paradigms and to forge a stronger engagement between research and policy making. By generating an independent, rich and nuanced knowledge base and expert network, it intends to contribute to integrated and consistent policies and development strategies that will address these three critical problem areas effectively.

Collaboration with researchers at universities and research entities and fostering engagement between researchers and policymakers are key objectives of the initiative.

The project is based at SALDRU at the University of Cape Town and supported by the National Treasury.

Consult the website for information on research grants and scholarships.

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