# PREDATORY PRICING: SINGLE-FIRM DOMINANCE, EXCLUSIONARY ABUSE AND PREDATORY PRICES (PART 1)

Jan Louis Van Tonder
*LLB LLM LLM*
*Postgraduate Certificate, Competition Law*
*Postgraduate Diploma, EU Competition Law*
*Postgraduate Diploma, Economics for Competition Law*
*Research Associate, Faculty of Law, Mercantile Law Department, Nelson Mandela University*
*Attorney and Conveyancer of the High Court of South Africa*
*Solicitor of the Senior Courts of England and Wales*

**SUMMARY**

Important pronouncements of legal principle were recently made by the Competition Appeal Court and Constitutional Court on the determination of predatory pricing under section 8 of the Competition Act 89 of 1998. These pronouncements must now be seen in the context of the subsequent commencement of certain provisions of the Competition Amendment Act 18 of 2018, which affect predatory pricing cases under section 8 of the Act. In light of these developments, the main aim of this series of three articles is to evaluate the law relating to the economic concept of predatory pricing under the Competition Act. In this context, the main constituent elements of a predatory pricing case – namely, dominance, identifying an exclusionary abuse and predatory prices – are discussed in three parts. Part One critically evaluates the law on the determination of single-firm dominance under section 7 of the Competition Act. Part Two starts to focus on abuse analysis and discusses the basic forms of abuse, the meaning of abuse, tests that have been developed to identify exclusionary abuse, criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Part Three then specifically deals with the law of predatory prices under section 8(*c*) and 8(*d*)(iv) of the Competition Act. Pursuant to section 1(3) of the Competition Act, appropriate foreign and international law may be considered when interpreting or applying the Competition Act. This is complementary to section 1(2)(*a*), which directs that the Competition Act must be interpreted in a manner that is consistent with the Constitution and that gives effect to the purposes set out in section 2. In light hereof,

where appropriate, the South African position is compared, mainly with the position in the European Union and the United States.

## 1 INTRODUCTION

Competition law aims to promote low prices and prevent high ones. Yet, a predatory pricing case is exactly based on a firm charging a price that is too low. This has been referred to as the paradox of predatory pricing.[1] Society considers predation socially harmful because short-term aggressive price-cutting drives out competitors and results in long-term higher prices. Against this background, important pronouncements of legal principle were recently made by the Competition Appeal Court[2] and the Constitutional Court[3] in the lengthy *Media24* case[4] on the determination of predatory pricing under section 8 of the Competition Act 89 of 1998 (the Act). These decisions must now be seen in the context of the subsequent commencement of certain provisions of the Competition Amendment Act 18 of 2018, which affect predatory pricing cases under section 8 of the Act.

In light of these developments, the main aim of this series of three articles is to evaluate the law relating to the economic concept of predatory pricing under the Act. While competition law is not concerned with low pricing by non-dominant firms, section 8 of the Act prohibits dominant firms from engaging in the exclusionary act of predatory pricing. In this context, the main elements of predatory pricing – namely, dominance, identifying an exclusionary abuse and predatory prices – are discussed in three parts. This first article critically evaluates the law on the determination of single-firm dominance under section 7 of the Act. Part Two starts to focus on the abuse analysis and discusses the basic forms of abuse under section 8, the meaning of abuse, tests that have been developed to identify exclusionary conduct, criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Part Three then specifically deals with the law of predatory prices under section 8(*c*) and 8(*d*)(iv) of the Act. The competition law systems of the European Union (EU) and the United States (US) are unquestionably the most developed and advanced systems of all competition-law jurisdictions. This means that the South African courts frequently look to their experience for guidance on how to fill the complexities of modern competition law in a unique South African context. Accordingly, throughout these articles and where appropriate, the South African position will be compared (mainly) with the position in these jurisdictions.

If a firm is not found to be dominant, the abuse-of-dominance provisions will not apply. The dominance analysis therefore plays a crucial role in any abuse-of-dominance case. However, while the abuse analysis leans towards economic effects, the dominance analysis adopts a formalistic approach. The main aim of this article is to evaluate critically the law on the

1 Crane "The Paradox of Predatory Pricing" 2005 91 *Cornell Law Review* 1 2–3.
2 *Media 24 Proprietary Limited v Competition Commission of South Africa* 146/CAC/Sep16.
3 *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26.
4 See also *Competition Commission v Media 24 (Pty) Ltd* [2016] ZACT 86.

determination of single-firm dominance under section 7 of the Act. Under heading 2, this article starts with a short discussion on the differences in approach to dominance under article 102 of the Treaty on the Functioning of the European Union (TFEU)[5] and section 2 of the United States Sherman Act 1890 (Sherman Act). This background context remains relevant for both Parts Two and Three of this series of articles. As the articles develop, further differences relevant to the elements being discussed in Parts Two and Three will be emphasised where appropriate. Under heading 3, this article then critically evaluates the South African approach to a dominance analysis under section 7 of the Act, and heading 4 provides a conclusion.

## 2 DIFFERENCES IN APPROACH IN THE US AND EU

### 2 1 General differences

At its core, section 2 of the Sherman Act was enacted in 1890 as part of criminal law, with monopolisation being classified as a felony. During the late nineteenth century, the economic environment of the US was characterised by a number of dominant cartels and conglomerates, or "trusts" as they were known, that had adverse effects for consumers. The main motivation behind US antitrust law was therefore the desire to undo these cartels and conglomerates. As Frank Easterbrook wrote:

> "Back in 1890 Senator Sherman and colleagues protested the Sugar Trust and other malefactors and told the judiciary to do something about it. They weren't sure just what. Their statute does not contain a program; it is instead a blank check."[6]

Article 102 TFEU, on the other hand, was inserted in the Treaty of Rome in 1957 (or the EC Treaty) not only to create legal rights and obligations, but also to create a "new legal order of international law".[7] The origins of European competition law were very different and reflected a desire to break down trade barriers and promote economic integration with the hope that this would lead to a period of stability and peace in the post-war European environment.[8] In the pursuit of establishing an internal market as set out by article 3(3) of the Treaty on European Union (TEU), article 102 TFEU is a legal instrument used by the EU specifically to address conduct by dominant undertakings in the market that impedes this goal; this also includes a system ensuring that competition law is not distorted.[9] As the European

---

5 Consolidated version of the Treaty on the Functioning of the European Union [2012] *OJ* C326/01 (TFEU).

6 Easterbrook "Workable Antitrust Policy" 1986 84 *Mich L Rev* 1696 1702; see also Stigler "The Origin of the Sherman Act" 1985 14 *The Journal of Legal Studies* 1–12.

7 Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 95; see further O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 2ed (2013) 55, where the authors write about the various influences on Article 102 TFEU.

8 O'Donoghue *et al Law and Economics of Article 102 TFEU* 62.

9 Case C-52/09 P *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527 par 20–21.

Court of Justice in *Konkurrensverket v TeliaSonera Sverige AB* stated, "Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market".[10]

As time passed, the development of case law strengthened Senator Sherman and his colleagues' interpretation of section 2 of the Sherman Act. Likewise, the practice of the European Commission and the case law of the European courts developed and strengthened the purpose and meaning of article 102 TFEU.[11]

Against this background, the US has adopted a less interventionist approach to enforcement under section 2 of the Sherman Act than has the EU under article 102 TFEU. The EU institutions appear to have greater confidence in their predictive assessments of the markets.[12] By contrast, the US institutions and courts appear to have less confidence in their predictive abilities, and believe that market forces are better overall at correcting inefficiencies than are government agencies or court interventions.[13] The quintessence of the US's circumspect approach against excessive intervention is motivated by a judicious assessment of what conduct is truly anti-competitive, with the aim of not chilling competition through mistaken condemnation of ambiguous conduct – that is, preventing false positives.[14] As US judge Learned Hand famously stated, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[15]

---

10 *Ibid*.

11 See Mestmäcker "The development of German and European competition law with special reference to the EU Commission's Article 82 Guidance of 2008" in Pace *European Competition Law: The Impact of the Commission's Guidance on Article 102* (2011) 35.

12 O'Donoghue *et al Law and Economics of Article 102 TFEU* 62.

13 *Ibid*.

14 See, for example, in *Brooke Group Ltd v Brown & Williamson Tobacco Corp* (1993) 509 US 209, the US Supreme Court's reluctance to treat price cuts as predatory was based, among other factors, on the concern that the strict rule could chill legitimate price competition. The court stated that, as a general rule, "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable "risks of chilling legitimate price cutting"; see also *Verizon Communications Inc v Law Offices of Curtis V Trinko,* LLP (2004) 540 US 398 414, where it was held that "[u]nder the best of circumstances, applying the requirements of §2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.' […] Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"; *Concord Boat Corp v Brunswick Corp* (8th Cir 2000) 207 F 3d 1061, which noted that "[b]ecause cutting prices in order to increase business often is the very essence of competition, which antitrust laws were designed to encourage, it 'is beyond the practical ability of a judicial tribunal to control [above cost discounting] without courting intolerable risks of chilling legitimate price cutting.'"; and *United States v AMR Corp* (10th Cir 2003) 335 F 3d 1114, which stated that "caution in predatory pricing cases is the watchword 'as the costs of an erroneous finding are high'".

15 *United States v Aluminum Co of America* (2d Cir 1945) 148 F 2d 416.

## 2 2 Substantive differences

Certain substantive differences relating to the conditions and circumstances under which liability can be found for predatory pricing under section 2 of the Sherman Act and article 102 TFEU are also apparent. Although the reasons and effect of the finer differences will be unpacked as the articles develop, it is important to bear in mind at the outset that US antitrust law follows different cost benchmarks and also requires proof of the dominant firm's ability to recoup losses.

According to established case law, article 102 TFEU does not prohibit the mere existence of a dominant position, only its abuse.[16] Moreover, when an undertaking holds a dominant position, its behaviour in the market may be scrutinised for compatibility with article 102 TFEU. EU competition law therefore aims to prevent powerful firms from using their power abusively. On the other hand, section 2 of the Sherman Act does not require a prior formal finding of a dominant position, but seeks to identify anti-competitive conduct that creates or threatens to create a monopoly.[17]

The emphasis of the European Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings that hold a dominant position do not exclude their competitors by means other than competing on the merits.[18] Article 102 TFEU is, therefore, not only concerned with practices that may cause damage to consumers directly[19] but, as the European Court of Justice has explained, this provision also includes practices that are detrimental to consumers through their impact on

---

16 Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461 ("*Michelin*") par 57 and Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports* v *Commission of the European Communities* [2000] ECR I-1365 par 37.

17 See *US v Grinnell Corp* (1966) 384 US 563 570–571, where it can be seen that from the earliest cases construing the provision, the US courts have recognised that section 2 does not attempt to make the size of a firm, however large, or the existence of unexerted power on its part an offence when unaccompanied by unlawful conduct in the exercise of its power.

18 Guidance Communication on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] *OJ* C45/02 ("the Guidance Paper") par 6; see also Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 par 38, noting that the Treaty's competition rules are designed to protect not only the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus competition as such. Dominant firms are therefore entitled to compete "on the merits" in relation to pricing, contractual conditions, output, quality, innovation, cost reduction and efficiency. See Bellamy and Child *European Union Law of Competition* 8ed (2018) 860. For a US perspective, see Hovenkamp "Exclusion and the Sherman Act" 2005 72 *U Chi L Rev* 149–150, which refers to the "Areeda-Turner laundry list" of competition on the merits, including "'non-exploitative pricing, higher output, improved quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like'" but stating that such a standard "may do an adequate job of characterizing past decisions. But it is not always very helpful in evaluating novel practices".

19 Case C-6/72 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* [1973] ECR 215 par 26.

competition.[20] However, the Grand Chamber of the Court of Justice has held that competition on the merits may lead to competitors exiting the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other aspects, price, choice, quality or innovation.[21] Under article 102 TFEU, predatory pricing is a good example of this.[22] Below-cost pricing benefits consumers, at least in the short-term, unless and until the low prices are recouped in the following stage through higher prices. However, predatory pricing may be condemned under article 102 TFEU without proof of recoupment, because it can cause a competitor either to exit the market or be marginalised, which alters the structure of competition in a way that may harm consumers.[23]

Other distinctive features of article 102 TFEU include: the imposition of a special responsibility on the dominant firm not to allow their conduct to impair genuine undistorted competition on the internal market;[24] *per se* impermissible conduct; and, although not important for purposes of these articles, the possibility of bringing proceedings against dominant undertakings for exploitative abuses.

## 3 SINGLE-FIRM DOMINANCE

### 3 1 Constituent elements of section 8

Following the wording of Chapter 2 Part B of the Act, and assuming that the provisions relating to the territorial application of the Act are met,[25] four constituent elements must be satisfied for the abuse of dominance provisions to apply:

(i) a "firm";[26]

(ii) meeting the financial threshold provisions;[27] and

---

[20] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I-09555 par 176; see also *TeliaSonera Sverige AB supra* par 21–22, which notes that the function of the competition rules of the Treaty, including article 102 TFEU, is to "prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union"; and see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] ECR I-09291 par 63, where it was stated that "the Court has held that […] like other competition rules laid down in the Treaty […] [it] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such".

[21] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172 par 22 ("*Post Danmark I*"); Case C-413/14 P *Intel Corp. v European Commission* EU:C:2017:632 par 134.

[22] O'Donoghue *et al Law and Economics of Article 102 TFEU* 6.

[23] Case COMP/38.233 *Wanadoo Interactive*, European Commission Decision of 16 July 2003; Case T-340/03 *France Télécom SA v Commission of the European Communities* [2007] ECR II-00107; Case C-202/07 *France Télécom SA v Commission of the European Communities* [2009] ECR I-02369.

[24] *Michelin supra* par 57. It is often the case that, owing to historical advantages benefitting network incumbents, a tougher standard of abuse is applied to dominant (incumbent) network operators in regulated network industries through an expansive view of the doctrine of "special responsibility". See *Post Danmark I supra* par 23.

[25] S 3 of 89 of 1998.

[26] S 1 of 89 of 1998.

(iii) holding a dominant position;

(iv) must engage in an exclusionary act prohibited by section 8.

The first and second elements focus on the jurisdictional application of the Act and are not the focus of these articles. The existence of a dominant position is considered before the question of any abuse. This requires defining the relevant market. Apart from market definition, these two elements are usually the main issues under section 8.

## 3 2 Importance of dominance under section 8

Establishing dominance is an essential prerequisite for section 8 to apply. Dominance is the core market power threshold under the Act. However, the Act does not direct that dominance itself is contrary to section 8. If dominance is not proven, the abuse provisions will not apply, regardless of the anti-competitive effects of the conduct in question.

This important point is shared with article 102 TFEU,[28] but not with the legal regime under the Sherman Act. In the latter case, a firm that is not yet dominant may commit a violation if its conduct would lead to monopolisation or, in the case of attempted monopolisation, if there were a dangerous probability that it would succeed in doing so. This means, at least in theory, that a firm with a small market share could violate section 2 of the Sherman Act if there were a dangerous probability that its attempt to monopolise would eventually succeed. In contrast, before conduct can fall into a prohibited category under section 8 of the Act (as under article 102 TFEU), it is essential to establish dominance at the time of the alleged abuse.

## 3 3 Definition of dominance

Section 7 defines the circumstances in which a firm may be found dominant as follows:

(a) a firm with a market share of at least 45 per cent in the relevant market is dominant (this is an irrebuttable presumption);[29]

(b) a firm with a market share of at least 35 per cent, but less than 45 per cent of the relevant market is presumed to be dominant unless the firm can prove that it does not have market power (this is a rebuttable presumption);[30] or

(c) if the firm's market share of the relevant market is below 35 per cent, the complainant has the burden of proving that it has market power.[31]

---

27 S 6 of 89 of 1998.

28 See *Michelin supra* par 47 "[a] finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".

29 S 7(*a*) of 89 of 1998. *See Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 par 87.

30 S 7(*b*) of 89 of 1998.

31 S 7(*c*) of 89 of 1998.

This codification of dominance means that the dominance analysis entails an assessment of whether a firm falls under one of these three structurally defined circumstances. This codification also does little to provide any comfort to firms in terms of a "safe harbour" – that is, where a firm is so small in a correctly defined market that it is highly unlikely to have market power.

## 3 4 Analytical framework for assessing dominance

Based on the above definition, and taking the practice of the US and the EU into account,[32] a considered determination of whether a firm holds a dominant position should involve the following two steps:

1. Market definition: the relevant (product and geographic) market provides a frame of reference for analysing whether the firm concerned holds a dominant position and, therefore, whether its conduct may be abusive within the meaning of section 8. The main purpose of market definition is to identify in a systematic way the immediate competitive constraints faced by a firm. This step also involves the identification of the competitors in the market, which may include supply-side substitutes.
2. Market power analysis: assessing the degree of market power enjoyed by the firm on the relevant market. In relation to section 7(*a*), this step involves a consideration of the market share of the firm concerned. As regards section 7(*b*) and (*c*), the analysis relates to market share and market power. An analysis of market power may further involve some or all of the following considerations: the nature of the market and the competitive process, barriers to entry, exit and expansion and competitive constraints.

The use of market share as an indicator of dominance is common to all three circumstances of the dominance analysis under section 7, but the Act does not indicate how a firm's market share is to be calculated. This is with good reason,[33] especially in relation to section 7(*a*). If the assessment of market share is the sole or main basis for the finding of a dominant position, there can be no clearly correct, or even best, basis on which to assign[34] market share in all cases.[35] This requires that considerable care should be taken in such assignment.[36] Although market share is reflected in descriptive

---

[32] See *Continental Can supra;* Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461 par 38–41 and 48; *US v Microsoft Corp* (DC Cir 2001) 253 F 3d 34; see also *United States v Grinnell Corp* (1966) 384 US 563.

[33] Werden "Assigning Market Shares" 2002 70 *Antitrust Law Journal* 67–104.

[34] Werden 2002 70 *Antitrust Law Journal* fn. 2 where the author explains that the use of term "assignment" reflects "the wide range of conscious choices to be made" and that "[t]his task goes well beyond 'calculation' and 'measurement' – two terms conventionally used to describe it".

[35] For a discussion and analysis on the calculation, measurement and assignment of market shares see Werden 2002 70 *Antitrust Law Journal* 67–104; O'Donoghue *et al Law and Economics of Article 102 TFEU* 144–145; Bellamy *et al European Union Law of Competition* 871–878; Bishop and Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* 3ed (2010) 65; Niels, Jenkins & Kavanagh *Economics for Competition Lawyers* 2ed (2016) 100–103.

[36] Werden 2002 70 *Antitrust Law Journal* 104.

statistics for an industry, they are intended for the useful description of the comparative sizes of competitors in the relevant market. Therefore, market share should be the share of some real and measurable industry quantity that reasonably serves as a common denominator for the collection of products in the relevant market.

In difficult cases, the actual computations may be extremely complex, which in turn may limit their robustness in terms of the implications for a dominance analysis.[37] Under these circumstances, this will arguably put more pressure on an accurate market definition exercise, especially in relation to section 7(*a*), to safeguard the robustness of the dominance assessment.

## 3 5 Section 7(*a*)

### *3 5 1 Market share as the sole indicator of dominance*

In *Competition Commission v South African Airways (Pty) Ltd*,[38] SAA was held to be presumptively dominant. As a result, the Competition Tribunal did not find it necessary to consider in great detail the evidence presented by SAA's expert witnesses to the effect that it does not, in fact, have market power. The Competition Tribunal regarded this evidence as irrelevant, because, on a simple reading of section 7(*a*), once a firm's market share exceeds the 45 per cent threshold, it is presumed to be dominant; the section states categorically that a firm is presumed dominant if it has 45 per cent of the market. This is to be contrasted with section 7(*b*) where the presumption of market power is rebuttable.

Market share plays an important role in the market power analysis and is traditionally used as a first indicator of market power.[39] However, assessing market share in isolation cannot be used as a guide to conclude effectively that a firm has market power.[40] The existence of a dominant position may derive from several additional factors which, taken separately, are not necessarily determinative.[41] However, in order to avoid a simplistic checklist approach, the determination of dominance requires a careful assessment of market conditions, in what must necessarily be a case-by-case analysis.[42]

---

37 See Evans and Schmalensee "The Antitrust Analysis of Multi-Sided Platform Businesses" 2012 *Coase-Sandor Institute for Law & Economics Working Paper No. 623*; O'Donoghue *et al Law and Economics of Article 102 TFEU* 146.

38 18/CR/Mar01 par 87.

39 See for eg., Dansby and Willig "Industry Performance Gradient Indexes" 1979 64 *The American Economic Review* 249–260; Motta *Competition Policy: Theory and Practice* (2004) ch 3; United States Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines* (2010) ch 5; Rey "Towards a Theory of Competition Policy" (2014) IDEI University of Toulouse 32–34.

40 Bellamy *et al European Union Law of Competition* 871–872.

41 *Hoffmann-La Roche supra* par 39.

42 Geradin, Hofer, Louis, Petit and Walker "The Concept of Dominance in EC Competition Law" *Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* (2005) College of Europe 10.

While market share remains a useful first indicator in this analysis, market share cannot by itself be decisive.[43]

Depending on the type of market and players in question, assessing market share alone may fail properly to address one or more of the following issues, which in turn can have consequences for the abuse analysis:[44]

- whether market power was attained as a result of superior skill, foresight, and industry;
- conditions of competition in innovative markets;
- accurately capturing market power in markets where products are differentiated from the viewpoint of consumers in terms of time, switching costs, consumer information, branding, product features, product quality, level of service or the location of the seller;
- the firm's profitability;
- the position of the firm's rivals;
- whether the market is growing or declining;
- properly considering that some bidding markets may be characterised by intense competition despite the presence of large market shares;
- whether the firm in question is in fact an unavoidable trading partner;
- taking account of potential competition and buyer power;
- capacity utilisation;
- recognising different levels of vertical integration;
- taking account of multi-sided platforms and network effects;
- the technical or financial resources of a firm;
- cost asymmetries;
- first-mover or incumbency advantages;
- the importance of economies of scale and scope; and
- whether market share ultimately shows a position of strength over a relatively long period of time (for instance, a period between three and five years, depending on the market in question) – that is, lasting market power, which involves a proper assessment of barriers to entry, exit and expansion.

Therefore, observing a firm's high market share on its own can be highly misleading and a poor indicator of market power if the relevant market conditions, market characteristics and competitive constraints faced by the firm are not also assessed in conjunction with the market share of the firm in question.[45] By only assessing market share, no emphasis is placed on the price-setting power of the firm, or its ability to exclude competition or to behave independently, but makes the finding of dominance a purely

---

43 *Ibid*.

44 Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 10–15; O'Donoghue *et al Law and Economics of Article 102 TFEU* ch 4; Bishop *et al The Economics of EC Competition Law* ch 3.

45 Posner and Landes "Market Power in Antitrust Cases" 1980 94 *Harvard Law Review* 937–996; Bishop *et al The Economics of EC Competition Law* ch 3; Motta *Competition Policy* ch 3.

mechanical analysis based on market share.[46] For all these reasons, while section 7(*a*) creates an irrebuttable presumption for the benefit of the competition authority, this approach to dominance is not consistent with an economic approach.

### *3 5 2 Threshold level for intervention*

It is arguable that the threshold level for intervention set by the legislature is in fact too low. In this regard, the decisional practice and case law of article 102 TFEU differs materially from the treatment of monopolisation conduct under US antitrust law. Under article 102 TFEU, meeting a 50 per cent market share threshold, without more, immediately suggests dominance.[47] An analysis of cases in the US tends to show that monopolisation concerns arise in cases where the firm's market share exceeds 70 per cent.[48] Even under these circumstances, an analysis of other market conditions in conjunction with market share (the most important of which is the presence or lack of barriers to entry) is required.[49] In light hereof, US courts have held that a market share of 100 per cent does not necessarily establish monopoly power in the absence of a showing that the respective market is protected by entry barriers.[50] US antitrust law under section 2 of the Sherman Act therefore appears to be less restrictive than the standards to determine dominance under article 102 TFEU.[51] Accordingly, it has been argued that a significant problem with article 102 TFEU is that the threshold for intervention is too low.[52]

Bloch argues that this approach has significant ramifications from a policy standpoint in terms of discouraging efficiency-enhancing conduct that is not unlawful.[53] This means firms that are found to be "dominant" are prohibited from engaging in business conduct that non-dominant firms are permitted and encouraged to pursue. Thus, article 102 TFEU, when compared to section 2 of the Sherman Act, may impede firms with large market shares in

---

46 Harbord and Hoehn "Barriers to Entry and Exit in European Competition Policy" 1994 14 *International Review of Law and Economics* 411–435; Kaplow and Shapiro "Antitrust" 2007 2 *Handbook of Law and Economics* ch 15.

47 For instance, under art 102 TFEU, the European Court of Justice held in *Hoffmann-La Roche supra* that generally a very large share, in the absence of exceptional circumstances, is sufficient evidence of the existence of a dominant position. On that basis, the European Court of Justice held, in Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359 par 59–60, that 50% is a large market share, and when accompanied by the fact that AKZO's market share remained stable over a period of three years, this was sufficient proof of a dominant position. A market share in excess of 50% therefore, in the absence of countervailing indications, creates a rebuttable presumption of dominance in the EU.

48 Bloch, Kamann, Brown and Schmidt "A Comparative Analysis of Article 82 and Section 2 of the Sherman Act" 2006 7 *Business Law International* 151.

49 *Ibid*.

50 Bloch *et al* 2006 *Business Law International* 152.

51 *Ibid*.

52 See Bellamy *et al European Union Law of Competition* 873–877 and O'Donoghue *et al Law and Economics of Article 102 TFEU* 147–150 for a full discussion of the general indicators relating to the level of market shares in the EU.

53 Bloch *et al* 2006 *Business Law International* 152.

an otherwise competitive market from engaging in pro-competitive conduct, which the law seeks to promote.[54] Although policy reasons probably justify the mechanical nature of a section 7(*a*) dominance analysis,[55] nevertheless, from an economic perspective, it is suggested that the same critique applies to section 7(*a*).

## 3 6 Section 7(*b*) and (*c*)

Both paragraphs (*b*) and (*c*) of section 7 refer to the term "market power", while section 7(*a*) does not, only referring to the firm in question as dominant once the 45 per cent threshold is crossed. Under section 7(*b*), the presumption of market power is rebuttable by the firm in question,[56] and under section 7(*c*), the complainant is required to prove that the respondent possesses market power.[57] For purposes of section 7(*b*) and (*c*), "market power" means that the firm has the power to control price, to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers.[58]

Although market share still plays a key role in each of these circumstances in dominance analysis, the definition attempts to capture the main concepts of market power found in the US, EU and, to a certain extent, the United Kingdom (UK). In principle, the term "dominance" is a legal concept, but the assessment of dominance is ultimately influenced by economic considerations. As such, the definition of "market power" requires the identification of corresponding legal and economic concepts.

### *3 6 1 Basic legal concept of dominance*

The latter part of the definition, "behave to an appreciable extent independently of its competitors, customers or suppliers", corresponds with the terminology used in the working definition of dominance established in EU case law under article 102 TFEU. The European Court of Justice in *United Brands* and *Hoffman-La Roche* captured this notion by referring to the ability to behave independently and to hinder or exclude competition:

> "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[59]

---

54 *Ibid*.

55 As regards the possible policy reasons behind this approach, see Sutherland and Kemp *Competition Law of South Africa* (2017) Issue 21 Lexis Library s 7.7.6.5 and Mackenzie "Are South Africa's Predatory Pricing Rules Suitable?" (September 2014) available at http://www.compcom.co.za/wp-content/uploads/2014/09/Neil-Mackenzie-Predatory-Pricing-in-SA.pdf (accessed 2015-03-22) section 2.

56 *Competition Commission v South African Airways (Pty) Ltd supra* par 87.

57 Sutherland *et al* Competition Law of South Africa 7–26.

58 S 1 of 89 of 1998.

59 See Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* [1978] ECR 207 par 65; *Hoffmann-La Roche supra* par 38.

In the European Commission's discussion paper on the application of article 102 TFEU to exclusionary abuses, the European Commission treats this definition as consisting of three elements as follows: (a) there must be a position of economic strength in a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained in that market by (c) affording it the power to behave independently to an appreciable extent.[60] The European Commission considers the latter two elements to be closely linked. However, Geradin, Hofer, Petit and Walker,[61] as well as Neven, Nutall and Seabright,[62] maintain that these elements are one and the same. This is to an extent confirmed by the EU courts, which have never drawn any distinction between these elements, and also appears to be the approach taken by the European Commission in its subsequent guidance paper relevant to its article 102 TFEU enforcement priorities.[63]

Although the first element does not appear in the South African definition of market power, the latter two elements concern the link between the position of economic strength held by the firm in question and the competitive process. Dominance is the ability to prevent effective competition being maintained in the market and to act to an appreciable extent independently of other competitors. The notion of independence, which is the special feature of dominance, is related to the level of competitive constraints faced by the firm in question. For dominance to exist, the firm concerned must, for a sustained period, not be subject to effective competitive constraints. This means that the firm must have substantial market power.

From an economic perspective, since every firm (even a monopolist) will be constrained by its respective demand curve, no firm can really behave – at least not on a sustainable basis – independently of its competitors, consumers or customers. First, the presence of competitors limits to some extent the commercial behaviour of all firms, since the presence of these competitors affects the firm's demand curve. This applies to firms in a competitive market as well as to a dominant firm. All firms will increase prices to the point at which further price increases would not be profitable. In this sense, competitors do constrain the behaviour of firms so that even a dominant firm does not act independently of its competitors. Secondly, an individual firm's demand curve is also affected by the behaviour and preferences of its customers. Firms invariably face downward-sloping demand curves, indicating that a higher price means that it will have fewer sales. It is not generally open to a firm to raise prices and sell the same quantity as before. Again, this applies to all firms, whether dominant or not.[64]

---

60 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) par 21.

61 Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 3.

62 Neven, Nutall and Seabright "Merger in Daylight: The Economics and Politics of European Merger Control" 1993 *Center for Economic Policy Research* 18.

63 The Guidance Paper par 10.

64 For example, in wholesale markets when a firm's customers are not the end consumers, the firm will still not be able to behave independently of consumers. This is because demand for intermediate goods is a "derived" demand – that is, it is ultimately determined by end

Strictly speaking, only a true monopolist would be able to behave independently of its competitors, customers and consumers.

This means that the notion of independence, as a useful indicator of dominance, does not provide an adequate basis for differentiating between all firms in a market, whether dominant or not. However, reference to "an appreciable extent" perhaps recognises that most firms have market power and suggests that independence is not absolute, but a matter of degree. This latter part of the definition also recognises that both suppliers and buyers can have market power. Usually, for purposes of clarity, market power refers to a supplier's market power; and where a buyer's market power is at issue, the term "buyer power" is used.[65] Equally, and depending on the circumstances, when a firm's customers are not the end consumers (for example, in wholesale markets), the term "customers" is likely to refer to those customers.

### *3 6 2 Basic economic concept of dominance*

Although the wording "exclude competition" is common to the US, UK and the EU, the wording "power to control prices" appears to resemble, at least, the first part of the US definition of monopoly power. The US Supreme Court has defined monopoly power specifically as the "power to control prices or exclude competition".[66] However, the US Supreme Court and lower courts have refined this definition further by incorporating more economic principles associated with the definition of market power, holding that market power is "the ability to raise prices above those that would be charged in a competitive market".[67]

In real-world industries, few firms are pure price takers facing perfectly elastic demand. For example, the unique location of a shop selling widgets may confer the shop with slight market power, because some customers are willing to pay a little more rather than walk an extra block or incur further search costs for the next-closest widgets shop. In economic terms, the widgets shop has some market power, even if only an insignificant degree. In nearly all industries, fixed costs exist and products are differentiated from one another, whether in terms of time, switching costs, consumer information, branding, product features, product quality, level of service or the geographical location of the seller. This means that most firms possess some degree of market power.[68] One firm may be able to increase price well above competitive levels on a sustainable basis while another may only be able to increase price slightly above the competitive norm for a short time.

consumers. See Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* fn. 5.

65 See s 8(4) of 89 of 1998.

66 *United States v. E. I. du Pont de Nemours & Co*. (1956) 351 U.S. 391.

67 *NCAA v. Board of Regents of the University of Oklahoma*. (1984) 468 U.S. 85, 109 n.38; see also, for instance, *United States v Microsoft Corp* (DC Cir 2001) 253 F 3d 51; *Eastman Kodak Co. v. Image Technical Servs. Inc*. (1992) 504 U.S. 451, 464; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (1984) 466 U.S. 2, 27 n.46; and Carlton and Perloff *Modern Industrial Organization* 4ed (2005) 642; Posner and Landes 1980 94 *Harvard Law Review* 939.

68 Posner *Antitrust Law* 2ed (2001) 265; Motta *Competition Policy* 115–116.

But the type of power described is qualitatively identical in both cases. Motta acknowledges that firms would only have no market power in the theoretical models of perfect competition or in the Bertrand model with homogeneous goods and perfectly symmetric firms.[69] Thus, most firms with downward-sloping demand curves possess a small degree of market power, but this does not warrant intervention by the competition authorities.[70]

Under the Sherman Act, market power and monopoly power are related but not the same. Monopoly power under section 2 requires something greater than market power under section 1,[71] but Krattenmaker, Lande and Salop have argued that they believe market power and monopoly power to be qualitatively identical concepts since both terms refer to anti-competitive economic power that can ultimately compromise consumer welfare.[72] Their view is that courts should be less concerned with labelling the type of anti-competitive economic power exerted by a firm. Instead, they should focus on the methods by which this power is achieved. Precisely at what point market power becomes so great that the law deems it to be monopoly power is largely a matter of degree rather than one of kind. Clearly, however, monopoly power requires, at a minimum, a substantial degree of market power.[73]

In Europe, a firm enjoys a dominant position if it has substantial (or significant) market power, which means that it has the ability to raise prices profitably above competitive levels or restrict output significantly below competitive levels for a sustained period. This standard definition of market power is also used by a number of competition authorities in Europe. For instance, the European Commission considers that "[a]n undertaking that is capable of substantially increasing prices above the competitive level for a significant period of time holds substantial market power".[74] The UK Competition and Markets Authority refer to market power as "the ability to raise prices consistently and profitably above competitive levels".[75]

---

69 Motta *Competition Policy* 115.

70 Carlton "Market Definition: Use and Abuse" Spring 2007 *Competition Policy International* 7.

71 *Eastman Kodak Co. supra* 481.

72 Krattenmaker, Lande and Salop "Monopoly Power and Market Power in Antitrust Law" 1987 76 *Georgetown Law Journal* 246–247.

73 See, for eg., *Bacchus Indus., Inc. v. Arvin Indus., Inc*. (10th Cir. 1991) 939 F.2d 887, 894, which defines monopoly power as "substantial" market power; *Deauville Corp. v. Federated Dep't Stores, Inc*. (5th Cir. 1985) 756 F.2d 1183, 1192 n.6, which defines monopoly power as an "extreme degree of market power"; Areeda and Hovenkamp *Fundamentals of Antitrust Law* 2ed (2002) 318, which states that "the Sherman Act § 2 notion of monopoly power is conventionally understood to mean 'substantial' market power"; Posner and Landes 1980 94 *Harvard Law Review* 937, which defines monopoly power as "a high degree of market power".

74 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) par 24; see also The Guidance Paper par 11; Commission Working Document on the Proposed New Regulatory Framework for Electronic Communications Networks and Services: Draft Guidelines on market analysis and the calculation of significant market power COM (2001) 175 final par 65; Commission Notice Guidelines on Vertical Restraints (2000) *OJ* C291/01 par 119.

75 UK Office of Fair Trading Competition Law Guideline: Assessment of Market Power 2004 OFT 415 par 1.2 and 1.4.

Dominance should therefore only apply to those firms that possess substantial market power or a very high degree of market power.[76] But does the reference to the ability of a firm to behave to an "appreciable extent" already equate dominance with substantial (or significant) market power? In recent times, within the EU, the legal notion of independence described earlier has been tied to the economic notion of substantial market power. This reference to an "appreciable extent" suggests that the South African market power definition is not concerned with the trivial amount of market power that most firms enjoy. For example, in *Nationwide Poles v Sasol Oil (Pty) Ltd*,[77] although the Competition Tribunal concluded that by "dint" of a market share in excess of 45 per cent Sasol had market power, the Competition Tribunal went further and showed that Sasol evidenced its dominance by its exercise of market power, because it priced creosote at a liquid fuels equivalent price rather than with consideration of the wood preservative market for which creosote was used.[78] The Competition Tribunal held that this bolstered its finding of dominance.[79]

### *3 6 3 What counts as substantial market power?*

Considering that the core (economic) concept underlying the notion of market power is a firm's ability to increase profits and to harm consumers by charging prices above competitive levels, the question then turns on what counts as substantial market power, as opposed to insubstantial or insignificant market power. A firm that is not constrained by competition from a sufficient number of equally efficient existing and potential competitors can profitably raise price or prevent price from falling in two ways.

First, the firm may raise or maintain price above the competitive level directly by restraining its own output.[80] The first part of the market power definition thus focuses on the power to control price profitably, directly by restraining one's own output. However, in terms of implementation, it is not clear by how much price must exceed the competitive level before there is (substantial) market power. According to Geradin *et al*, a one-way test can be inferred from the market definition SSNIP methodology.[81] At the same time, market power is also not simply a matter of higher prices. Market power may be exercised by increasing price, reducing quality, range, service and/or by slowing innovation. Thus, the definition should also include, for example, the ability to reduce quality or slow the pace of innovation. It is also well known that determining the competitive price level is a difficult, if not impossible, task. The same unsatisfactory result applies when the competitive level is taken to mean marginal cost. Therefore, while the exercise of substantial market power can be proved by way of direct

---

76 The Guidance Paper par 10; Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 4; Motta *Competition Policy* 35.

77 72/CR/Dec03.

78 *Nationwide Poles v Sasol Oil supra* par 70–71.

79 *Nationwide Poles v Sasol Oil supra* par 71.

80 See Stigler *The Organization of Industry* (1968) for an analysis of this type of market power.

81 Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 5.

evidence[82] of actual exercise of control over prices, it is difficult to find such direct evidence. This means that market power is most likely to be inferred by way of indirect and or circumstantial evidence of the firm's ability to control prices, which can be gauged from an assessment of existing competition,[83] potential competition[84] and buyer power.[85]

A second form of market power is the "power to exclude". According to Krattenmaker, Lande and Salop, this form of market power can be found where:

> "[a] firm or group of firms may rise price above the competitive level or prevent it from falling to a lower competitive level by raising its rivals' costs and thereby causing them to restrict output […] Such allegations are at the bottom of most antitrust cases in which one firm or group of firms is claimed to have harmed competition by foreclosing or excluding its competitors. We denote this power as "exclusionary" [...] market power".[86]

Here the focus is on the dominant firm using its market power to create, maintain or strengthen its position further by engaging in anti-competitive conduct in order to foreclose, exclude or deter competitors from the market. This form of market power is already explicitly taken into account in the US, EU, UK and South Africa (as well as other jurisdictions). Examples of such exclusionary behaviour include predatory pricing, certain forms of price discrimination, refusal to supply and margin squeeze, which invariably leads to foreclosure of competitors or because it raises competitors' costs, limits their capacity to compete effectively or limits the ability of competitors to introduce new, innovative products. Again, the exercise of substantial market power can be proved by way of direct evidence of actual exclusion of competition from the relevant market, but it will also be difficult to find such direct evidence. Hence, substantial market power is usually inferred by way of an indirect assessment of the firm's ability to exclude competition, including existing competition, potential competition and countervailing buyer power. However, care should be taken by the competition authorities to ensure that the aim of the investigation is to protect competition and consumers, not competitors.

## 4 CONCLUSION

It can be seen that exclusionary conduct by a single firm is outside the scope of section 8 unless the firm is found to be a dominant firm within the meaning

---

82 For instance, high profits, price-cost margins, demand elasticity and evidence of anti-competitive effects.

83 This means firms already in the market. The effectiveness of existing competition is gauged, among others, by market share over time and ease of expansion. The focus is thus on the competitive constraints imposed by the existing sellers and the position of actual competitors on the market, which looks at the market position of the dominant firm and its competitors.

84 This means future expansion by actual competitors and firms that may enter the market and prevent exercise of market power in the long run. The effectiveness of potential competition is gauged by barriers to entry (and expansion).

85 This means credible threats to switch to new suppliers or sponsor new entry and growth.

86 Krattenmaker *et al* 1987 *Georgetown Law Journal* 249.

of section 7. However, when the abuse analysis is leaning towards economic effects, as section 8 suggests, a prior dominance assessment is essential. While the abuse analysis is notoriously difficult and prone to error on any approach, the dominance assessment provides the advantage of efficiently screening out cases where it need not be undertaken.

As to the standard of proof of dominance, section 7 defines dominance mainly in a formalistic manner. In particular, section 7(*a*) relies only on market share while section 7(*b*) and (*c*) rely on market share and market power. In theory, the formalistic and strict nature of section 7(*a*) should mean that there is more efficient scope for enforcement and perhaps greater scope for private actions. While section 7(*b*) and (*c*) are less clear on when a firm is dominant, and probably apply to firms with a mild degree of market power, such firms will in any event be less likely to distort competition than the same conduct by a firm with great market power under section 7(*a*). So, on balance, the competition authorities can direct their resources better by examining the latter than the former. While the market-share level as indicator for section 7(*a*) dominance is arguably set quite low, the conditions provided under section 7(*b*) and (*c*) also hardly give any comfort.

It is widely understood that the market share of correctly defined markets should at most be used as a way to screen or filter out cases that deserve no further consideration. In the US, and to a certain extent the EU, high market share alone never implies dominance. Unless the market definition exercise has been incorrectly carried out, there can be no significant prospect of single-firm dominance without at least substantial market power. In the context of predatory pricing, consumers suffer only when prices go up relative to where they otherwise would have been – that is, once market power has been enhanced. This does not necessarily mean that demonstrating dominance means prices will inevitably rise if a competitor exits. This may be so if there is a near monopolist in the market and predation also occurs in that same market. But firms only marginally dominant may still face a similar amount of competition after marginalising a small competitor.

The wording of the South African "market power" definition appears to borrow primarily from the experiences in the US and EU and, to date, has not been given much consideration in the case law. The first element of the notion of dominance under the South African definition incorporates an economic concept, which is broadly associated with the concept of market power as understood in the economic literature and found in US antitrust case law. The latter two elements of the definition are broadly consistent with the legal concept of dominance in the US and EU. However, the incorporation of all three elements means that the South African concept of market power is *sui generis* to South African competition law. It does not correspond with the legal definition of dominance under section 7(*a*), and also does not fully correspond with the legal or economic concept of dominance under EU competition law. Likewise, the legal definition of dominance under EU competition law corresponds fully with neither the economic concept of dominance nor the US concept of dominance.

In cases that proceed to abuse analysis, the dominance assessment should ideally be integral to – not separate from – the analysis of harm to competition and consumers. Crucially, in this regard, dominance (a legal concept) should be seen as the possession of substantial market power (an economic concept). As a matter of policy, the competition authorities should be encouraged to clarify explicitly that dominance amounts to substantial market power, whether or not this applies to borderline cases.