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Abuse of dominance, standards and screens – a view from South Africa

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**Note: the views expressed here are those of the
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Abuse: view from the south?



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TOWARDS A FAIR AND EFFICIENT ECONOMY FOR ALL

- Vickers (2007) proposed a ‘mid-Atlantic consensus’ (EU and N America), especially amongst competition economists
- Good economics under-pinning rules
- *Convergence* on the framework is consistent with *diversity* in enforcement as, following Evans (2009), this depends on balancing likely harm from conduct and probability of detection with costs of over-enforcement
- Suggests greater concerns in countries such as South Africa and Chile about unilateral abuse – both likelihood and impact
- Standards and Screens – important for focusing on appropriate areas and as guide to businesses
- Note: institutional capabilities clearly matter; SA and Chile both with well-established institutions

Standards and screens?



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TOWARDS A FAIR AND EFFICIENT ECONOMY FOR ALL

- Scope for abuse of dominance now better understood ('post-Chicago') - where dominant firms have incentive and ability to exert market power
- Scale economies (on demand or supply side)
 - incumbent advantage, combined with sequential buyers (segmented customers/markets) over time and/or space
- Imperfect information
 - 'deep pockets'; reputation; signalling models
- Can be mutually reinforcing
- Consider super-dominant firms protecting their position, and ensuring can exert market power:
 - may be eroded by commitment problems, entry, inferior alternatives
 - sacrifice can be limited (eg loyalty rebates), while return (recoupment) stretches across related markets
 - in developing/smaller economies, monopoly position is often not based on innovation, but entrenched in mature markets

- South Africa
 - Similarities with Chile in economy, level of development (Chile much better performing)
 - Similar competition institutions, differences in laws
 - c48mn people, GDP per capita \$7200, resource-based, v high inequality
 - Pre-1994 five conglomerates controlled 86% of capitalisation of stock exchange; also former SOEs privatised as quasi-monopolies
 - Now very open economy
 - Democratic govt in 1994: competition law as key tool to address concentration & market power in context of liberalisation
- New Competition Act of 1998, effect in 1999,
 - Commission, Tribunal, Competition Appeal Court
 - Widely held up as a success (GCR, WEF etc)
 - Pre-merger notification – dominated first five years
 - Cartels and CLP – big success, especially from 2007
 - Challenges in abuse of dominance



- Separate discrete contraventions specified in law (opposite of Chile)
 - In response to business wanting ‘certainty’
 - Excessive pricing; essential facilities;
 - Named exclusionary abuses;
 - Catch-all exclusionary abuse (no penalty for first offence)
 - Market share threshold for presumption of dominance
- General move to ‘more economics’ based standards was anticipated by the South African Competition Act
 - Writes in tests to some sub-sections such as predation; explicit provision for pro-competitive defences
- Credibility depends on it working in practice (in Chile and South Africa in an adversarial regime)
- Experience of South Africa is a useful case study

- Excessive pricing
- Refusing access to essential facilities
- Gen exclusionary abuse prohibition where anti- outweighs pro-comp effects (no penalty for first offence)
- Specific exclusionary abuses prohibited (with pro-comp defences):
 - Requiring/inducing a supplier or customer to not deal with a competitor;
 - refusing to supply scarce goods to competitor when supplying those goods is economically feasible;
 - Tying, bundling
 - Predation, selling goods or services below their MC or AVC
 - buying-up a scarce supply of intermediate goods or resources required by a competitor.
- Price discrimination prohibited where anti-comp effect (subject to explicit justifications) (no penalty for first offence)

Overview of SA abuse enforcement

Sept99-Sept2012



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TOWARDS A FAIR AND EFFICIENT ECONOMY FOR ALL

- 18 cases referred to the Tribunal, plus 2 settled prior to referral = 20
- 9 cases ruled on by Tribunal (4 brought by private parties):
 - Tribunal found abuse in 6 (although 3 then over-turned on appeal)
- 5 settlements: 3 with substantive undertakings
- 6 awaiting Tribunal hearing
- Effects-based tests applied
- Often three to five years from referral to hearing; lengthy hearings with discovery, extensive factual and expert evidence cross-examined
- Former state-owned, regulated and/or supported in most cases:
 - SAA(2), Telkom (2), Sasol (3), Foskor, Mittal Steel (2), Safcol, Cigarettes & beer, agriculture, others (ticketing, newspapers, ARVs)
- Commission now bringing important cases to set precedents

Tests in practice?



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TOWARDS A FAIR AND EFFICIENT ECONOMY FOR ALL

- Exclusionary conduct - most substantive cases are of **inducement** s8(d)(i)
- Key case **South African Airways (SAA)** tests (loyalty rebates case):
 - Anti-competitive effect through either direct harm to consumer welfare or substantial foreclosure of (efficient) rivals
 - Evidence: mechanism (loyalty rebates); effect on buyers; effect on rivals
- Rebate schemes for travel agents and for travel agent employees
 - Retroactive, 'back to rand one'; individualised targets; 75% of ticket sales covered by travel agents
 - Travel agents described how it affected their behaviour (NB non-contestable or 'must have' base)
- Performance of rivals relative to dominant firm
- Consumer effect inferred
- Pro-competitive/efficiencies? Either must benefit consumers or expand output, and not be attainable through other means



Refusal to supply (8(d)(ii)) and margin squeeze

- ***Sasol Nitro*** (settled), related to favourable pricing to dominant firm's subsidiary and two firms with ability to by-pass and/or integrate upstream:
 - Other firms subject to margin squeeze, (constructive) refusal, discrimination
 - Settled with downstream divestitures, and pricing & supply commitments
- ***Senwes (under gen exclusion)***, relating to differential silo storage tariff:
 - Tribunal found 'margin squeeze' on independent traders relative to Senwes own trading arm (over-turned by SCA because of way it had been pleaded)

Other

- ***Predation (Pioneer, settled)***: Local exclusion to maintain national cartel
- ***Price discrimination (Nationwide Poles)***: overturned on appeal, effect on competition rather than a competitor (evidence and inference?)
- ***Patensie (agric co-ops)***: Refusing access to packing infrastructure
- ***Several still to be heard, and being investigated, including:***
 - Telkom (2) – various relating to broadband pricing; Computicket, exclusive contracts; Astral, exclusivity and inducement; newspapers and beer

A weighing up?



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TOWARDS A FAIR AND EFFICIENT ECONOMY FOR ALL

- Exclusionary abuse very important, must be pursued vigorously, based on sound economics, theories of harm and evidence (fair participation in terms of conduct)
- Similarities in types of conduct
 - entrenched super-dominant firms; former state ownership/support; protecting existing monopoly margins (and inefficiencies?) in mature industries
 - protecting over space as well as time
 - conduct evolves, not one-dimensional, requires flexibility in addressing it
- Application of key factors to identify exclusionary mechanism
 - Scale economies & incumbent advantage well reflected, together with segmentation of customers.
 - Imperfect information? Important, as uncertainty for entrants
- Ultimate qu: would firm with rationale (ability & incentive) to exclude be deterred? Would vigorous competition be deterred?
 - Low penalties, long cases and variable decisions? or
 - Evolution of sound rules, sanctions and remedies, and screens



“To say that the law on abuse of dominance should develop a stronger economic foundation is not to say that rules of law should be replaced by discretionary decision making based on whatever is thought to be desirable in economic terms case by case. There must be rules of law in this area of competition policy, not least for reasons of predictability and accountability. *So the issue is not rules versus discretion, but how well the rules are grounded in economics.*”

John Vickers, ‘Abuse of market power’, *Economic Journal*, 2005