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Dominance: the relevance of the Extraterritoriality Rule and Public Interest for  
Developing Countries

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I hereby declare that I have read and understood the regulations governing the submission of the LLM in Commercial Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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### **Abstract**

*Exclusionary acts are acts by a dominant firm that impede or prevent other firms from entering into, or expanding within a market. A key problem that South Africa and other competition authorities face is that all competition is exclusionary. Every low price or innovation impedes other firms from entering into or expanding within a market. The critical question is: how does one distinguish between well-functioning competition and a malfunctioning one? This issue has generated a lot of research to obtain a suitable test to answer this question. The tests adopted in both the USA and the EU jurisdictions are discussed in light of the test adopted in South Africa in the Competition Commission v South African Airways case. This thesis cautions against the wholesale adoption of USA and EU jurisprudence in South Africa considering the unique public interest objectives of the Competition Act of South Africa. This thesis acknowledges that competition law is still foreign to African economies and makes the argument for the adoption of competition law on a regional level to police the largely unregulated African market where cartels are free to engage in exclusionary practices at will and national governments lack the resources or will to adopt competition law on a national level. This thesis studies the extraterritorial application of competition law in the EU and USA to advance the argument that if competition laws are adopted as already done in COMESA on a regional level, such laws can function effectively using the extraterritoriality rule. This thesis goes further using the South African Competition Act to attempt to balance and justify the traditional efficiency goals of competition law with public interest goals which most developing countries will also attempt to incorporate into any competition law to be adopted.*

## **Chapter 1**

### **Introduction**

#### **1.1. Background**

Competition Law is governed by empowering legislation. Legislation in most developing and third world economies are mostly fashioned after the existing framework of legislation originating from the European Union (EU) or the United States of America (USA). While a lot of these pieces of legislation are often modified to suit the needs of these developing countries, it is usually not the case that a cautious approach is taken to ensure that imported legislation is designed to meet the specific national challenges of such a country. The Courts in most jurisdictions especially in the USA and the EU have attempted to deal with the lapse in competition legislations by giving landmark decisions on significant issues like dominant firms and their unilateral exclusionary behaviors. The big question to consider in this dissertation is how competition laws should apply to dominant firms. This question has raised much interest in recent years. Aside from establishing which firms have substantial market power that can harm competition, there have been difficulties in distinguishing competition on the merits from mere anticompetitive conduct. This is more obvious in the case of unilateral exclusionary behaviors and will be the central focus in this dissertation.

#### **1.2. Statement of Research Problem**

Unilateral behaviors adopted by dominant firms are called exclusionary because they aim at discouraging potential rivals' entry into the relevant market or, conversely, they intend to gradually drive existing competitors off the market.<sup>1</sup> In other words, exclusionary conduct is directly aimed at competitors, and only by damaging the latter does it cause a lessening of competition that ultimately damages consumers.

The fact that exclusionary conduct does not always lead to a straightforward lessening of consumer welfare makes the overall assessment of the anticompetitive

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<sup>1</sup> John Marshall 'Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared' (2007) 24 *J.Marshall J. Computer & Info.L.* 455 at 2.

character of the conduct more complex.<sup>2</sup> In particular, because the ultimate effects of the conduct on consumers is not always immediate, consumers may not immediately bear a higher price or will not face a sudden shortening of quantities. There is a sensible risk that the anticompetitive harm stemming from exclusionary conduct may be underestimated which raises the question of the effect of exclusionary conduct on public interest.<sup>3</sup> This is especially significant when consideration is given to the American approach which allows dominant firms to defend themselves by asserting that their conduct did not have the effect of harming consumers. The European Commission bodies on competition on the other hand regard consumer welfare as an important goal of competition policy and presume consumer damage where the distortion of competition is caused by the presence of a dominant firm on a market and is brought a step further by an abusive conduct but they insist that protecting competition as an institution should remain the main priority of competition law.<sup>4</sup>

Both the European Commission and the USA also have competition rules that have extraterritorial application and it will be interesting to evaluate their extraterritorial application in light of growing calls in developing countries that competition law should be governed by regional competition agreements as a more effective tool in policing multinational corporations.

The American and European Union approach to exclusionary conduct and their approach to the question of extraterritoriality and public interest are significant in discussing which approach will be best suited for developing economies. However, this analysis can only be successful if it is contextualized because contextualization is the basis of law. This dissertation will therefore aim to address the issue of exclusionary conduct in abuse of dominance using decided cases from the USA and the EU. How these foreign jurisdictions have addressed the issue of public interest will also be assessed when discussing the difficulty South Africa faces in considering public interest issues in competition cases and how they are important for enterprise development in developing countries and the balance of traditional efficiency goals.

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<sup>2</sup> Ibid.

<sup>3</sup> John Marshall (note 1) at 2.

<sup>4</sup> Ibid.

### **1.3. Scope and Objectives**

The objectives of this dissertation are as follows:

1. A brief look at the legislative background of the four key legislation relevant to these dissertation and introductory discussion of the relevance and advantages of competition law in promoting economic development and efficiency to serve as a foundation to the broader discussion of regulating exclusionary practices of dominant firms through competition law.
2. An analysis of s 8 of the South African Competition Act on the concept of exclusionary practices in abuse of dominant positions. The American Sherman Act and the European Commission Treaty Art. 82 will be first discussed to highlight the significant similarities and differences between the American and European approaches which are the most successful competition authorities in the world and how they may be useful in interpreting s 8 of the Competition Act of South Africa.
3. A discussion of the extraterritorial application of abuse of dominance rules in both the EU and the USA and the possibility of using this principle to advance the argument that regional competition agreements should govern competition law in Africa.
4. In a final analysis, I will consider how the public interest factor affects competition authorities in their decision making on exclusionary behaviours. I will again use South Africa as a case study where public interest is not only of vital importance to ensure economic growth but also a requirement in the Competition Act and how an equitable balance can be achieved between traditional competition goals of efficiency and public interest objectives.



## 1.4 Legislative Background

Four key pieces of legislation are crucial to the analysis in this dissertation. Below is a brief background of these pieces of legislation to ensure a holistic understanding of the discussion that takes place later on.

### 1.4.1 The United States (US) Sherman Act

The US pioneered competition law or antitrust law, as it is known in the US in the true sense. In the period after the American civil war productive capacity in America increased at a blistering pace but this also led to destructive boom and bust cycles and consequently a greater concentration of control of the economy into fewer hands.<sup>5</sup> Large American Corporations in the late 19<sup>th</sup> century used business trusts controlling interests in multiple corporations to conceal the true nature of their business arrangements. Big trusts came to be viewed as disguises for big monopolies. These perceived threats to democracy and free market values led to the enactment of the Sherman Act of 1890. The Sherman Act alongside other legislation became the most important tools in the US Competition law arsenal. The Sherman Act is widely formulated and it leaves much to the imagination of the courts.<sup>6</sup> The movement that agitated for regulation of these combinations was anti-trust and the body of law that developed in its wake in the United States is still known as antitrust law.<sup>7</sup>

The economists of the period believed that free competition that did not restrict the free exercise of trade but provided the fairest and the best economic system and this perception informed the politics of the time.<sup>8</sup> It was accepted that free competition in general would also promote efficiency.<sup>9</sup> In 1914 the law was further strengthened by the Clayton Act and the Federal Trade Commission Act.<sup>10</sup> These acts were intended to fill perceived gaps in the Sherman Act. These prohibitions were intended at ensuring access to markets, particularly for the small firms. The

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<sup>5</sup> William H Page 'Ideological conflict and the origins of antitrust policy' (1991) 1 *Tulane Law Review* at 31–33.

<sup>6</sup> Lawrence Reyburn & Philip Sutherland *Competition Act Commentary* Lexis Nexis Butterworths Chapter 2 para 2.4.

<sup>7</sup> *Ibid.*

<sup>8</sup> James May 'Antitrust in the formative era: political and economic theory in constitutional and antitrust analysis 1880–1918' 1989 *Ohio State Law Journal* 257 at 270.

<sup>9</sup> *Ibid.*

<sup>10</sup> Reyburn and Sutherland (note 6).

regulatory body in terms of the Act is the Federal Trade Commission and the Department of Justice is the enforcement body.

#### **1.4.2 European Commission (EC) Competition Law Treaty**

After the second world war several western European states which had been on different sides during the war decided to converge on an economic level in an attempt to create a peaceful Europe and to prevent the rising soviet communism of the time.<sup>11</sup> A relationship between anti competitive practices of firms was linked to the economic instability taking place in the region. The goal of establishing a single market emerged as a solution to these problems and unified competition rules was essential to achieving this. Three regulatory bodies are central to the implementation of the treaty. They are the National Competition Authorities of member states, the European Competition Commission, and the European Competition Network which facilitates decisions on allocation of cases to national or community authorities. Judicial review takes place with Court of First Instance of the European Communities and the European Court of Justice. European competition law shares many traits with antitrust law in the United States but it also differs in some respects.

In Europe there has been much less of an ideological debate about the nature and goals of competition law than in the US.<sup>12</sup> Initially huge emphasis was placed on the market integration goal of European competition law but competition law in Europe is moving towards an approach that focuses more on the protection of consumers and economic efficiency.<sup>13</sup> As in the United States, competition law in Europe operates on two levels. The member states have their own competition law systems to deal with more localised competition problems, however, the European Competition law system operates supra-nationally.<sup>14</sup> This allows the Commission to address anti-competitive practices of governments to a much greater extent than in the United States.

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<sup>11</sup> Ibid at para 2.5.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

### 1.4.3 South Africa's Competition Act 89 of 1998

The key economic objectives of the African National Congress (ANC) before the first democratic elections in South Africa were set out in its Reconstruction and Development Programme (RDP) in 1994.<sup>15</sup> It listed some of the economic and social ills that could be traced back to economic concentration and proposed strict antitrust legislation to create a more competitive economic environment.<sup>16</sup> It recommended legislation to address economic concentration, interlocking directorships, and anti-competitive practices such as market domination and abuse.<sup>17</sup> After the ANC came into power, the government published its proposed guidelines for competition policy to flesh out these broad policies. Anti-competitive conduct, abuses of dominances and mergers which do not serve the public interest, as well as ownership concentrations leading to excessive control over economic activity were to be addressed.<sup>18</sup>

In 1998 the Department of Trade followed up this document by publishing the Competition Bill. The explanatory memorandum to the Act confirmed that South African markets were concentrated which were the cause of many problems, and most importantly that it undermined the market system itself, but that previous legislation was inadequate in addressing these difficulties.<sup>19</sup> The overriding objective of the Act is the promotion of competition in order to underpin economic efficiency and adaptability, international competitiveness, the market access of small, medium and micro enterprises, diversification of ownership in favour of members of historically disadvantaged communities, and the creation of new employment opportunities.<sup>20</sup>

The legislation provides for a right of appeal from the decisions of the Competition Tribunal to a specially constituted judicial authority, the Competition Appeal Court. The Competition Tribunal and the Competition Appeal Court have sole jurisdiction over competition matters with some exceptions. One of the

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<sup>15</sup> Lawrence Reyburn & Philip Sutherland *Competition Act Commentary* Lexis Nexis Butterworths Chapter 3 para 3.2.3.

<sup>16</sup> *Supra*.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

exceptions relates to the civil courts' responsibility for calculating the quantum of damages.

#### **1.4.4 The Common Market for Eastern and Southern Africa (COMESA)**

##### **Competition Regulations**

Although intra COMESA trade had increased considerably as a result of the COMESA trading arrangement, it is common knowledge that developing countries have not achieved the expected results in terms of integration into the global market to compete with developed countries.<sup>21</sup> Through privatisation programmes launched with the World Bank Structural Adjustment Programmes, most African economies moved from economies led by state owned monopolies to private sector monopolies. With trading arrangements established through regional economic organisations such as COMESA, these private sector monopolies normally foreign owned, transcended national boundaries to become regional monopolies as trans-national corporations.<sup>22</sup>

As a result of a lack of competition policy and legislation at national and regional levels, the business environment in developing countries such as COMESA member states did not ensure equity and fairness through a predictable and level playing field.<sup>23</sup> The experience of developing countries showed that trade liberalisation and privatisation alone cannot be relied upon to bring about fair competition. The founding members of COMESA had foreseen the need for free and fair competition and to this effect made provision for free and fair competition in Article 55 of the COMESA Treaty. The provision prohibits anti-competitive practices and also makes provisions for regulations to be enacted to regulate competition within member States.

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<sup>21</sup>Brian Chigawa, Competition Policy Conference, Available at [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences\\_CompetitionPolicyTanz\\_Brian+Chigawa.prn.pdf/\\$FILE/Conferences\\_CompetitionPolicyTanz\\_Brian+Chigawa.prn.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Brian+Chigawa.prn.pdf/$FILE/Conferences_CompetitionPolicyTanz_Brian+Chigawa.prn.pdf) (accessed 18<sup>th</sup> June 2009) pg 2.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

### 1.5. Relevance of Competition Law in Promoting Economic Development

Much like the developed countries, developing countries are riddled with cartels and other restraints that obstruct the markets and hurt the people.<sup>24</sup> Globalization has lowered barriers to trade and paved the way to efficiency benefits from markets. It is argued that liberalization and competition law should work hand in hand to anchor these benefits.<sup>25</sup> A number of advocates of the developing world believe that globalization tends to increase the disparity of wealth and opportunity to the disadvantage of some of the poorest people.<sup>26</sup> In some developing countries, it made many producers worse off as their exported commodities faced competition in world markets and value-added tariffs for import and export became high.<sup>27</sup> If competition law in developing countries widens the inequality moat rather than build the mobility ladder, then the question whether free-market competition law should be advocated for the developing world requires serious re-consideration.<sup>28</sup> Further arguments have been expressed by a number of policy makers and economists about the relevance of competition policy for economic development or cautioned against the dangers of using tools adapted to the environment of developed countries in developing countries.

One of the arguments is that in developing countries, deregulation and open trade are sufficient to force competition on domestic markets.<sup>1</sup> This argument is premised on the belief that the absence of competition law does not necessarily lead to an anti-competitive trading environment. Frederic Jenny, a competition law expert counters this argument and states that in both developed and developing countries, competition law can be a useful complement to deregulation policies because these policies may in themselves be insufficient to bring about the expected benefits in terms of the promotion of efficiency.<sup>29</sup> He states that if the effects of international competition are not felt, privatization and deregulation may lead to undue

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<sup>24</sup> Eleanor Fox: 'Economic Development, Poverty and Anti-Trust: The Other Path' (2007) 13 *Sw. J.L. & Trade in Americas* pg 105.

<sup>25</sup> *Ibid.*

<sup>26</sup> Jeffrey D. Sachs, *Globalization and Patterns of Economic Growth*, in *Globalization: What's New?* (Michael W. Weinstein ed., 2005) 214.

<sup>27</sup> Ralph Kaplinsky 'Globalization, Poverty and Inequality: Between a Rock and a Hard Place' 2005 at 57.

<sup>28</sup> Marshall (note 1) at 110.

<sup>29</sup> Frederic Jenny 'Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation' Conference Paper sponsored by the University of Oklahoma College of Law and Center for Global Partnership. Pg 8.12.

concentration in the hands of a few wealthy individuals and the lack of competition thereby defeating market-opening measures associated with trade liberalization.<sup>30</sup>

A second argument is that the usefulness of domestic competition laws in developing countries may not outweigh the harm by multinational corporations who use such laws as a Trojan horse to destroy the national economies of developing countries.<sup>31</sup> This raises the issue of the limitations of domestic competition laws to solve problems raised by cross-border anti-competitive practices. Jenny argues that it is because some countries do not have domestic competition law that they become prime victims of transnational anticompetitive practices.<sup>32</sup> He argues that it is clear that international anti-competitive practices by multinationals can prevent economic development and failure by developing countries to have adequate means to fight such practices exposes them to significant setbacks on the road to economic development.<sup>33</sup>

Other arguments against the adoption of competition laws by developing countries are that the cost of adopting such laws may turn out to be larger than the expected benefits and competition laws in developing countries could be misused and lead to undue bureaucratic control over market mechanisms.<sup>34</sup> This may be so because most developing countries may not have the resources to enforce complicated competition policies or the policies do not address the specific problems of economic development but is rather focused on socio-political goals rather than purely economic goals.<sup>35</sup> This argument can however be easily countered by advocating for independent competition authorities to regulate the market and to engineer processes that would prevent undue interference with market mechanisms and as will be shown later in this paper, a country has a right to make a choice to balance both economic and socio-political goals in their competition rules.

Despite the scepticisms expressed above, there are various advantages of competition law for developing economies which are discussed next.

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<sup>30</sup> Ibid at 8.13.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid at 8.17.

<sup>33</sup> Ibid at 8.18.

<sup>34</sup> Ibid at 8.14-8.16.

<sup>35</sup> Ibid.

### 1.6. Advantages of Competition Law for Developing Countries

For any country to have an efficient competition law, the government, public and business sector must appreciate the benefits of competition. Although some economists are of the view that the advantages of competition are obvious, players in transitional economies are hesitant to the idea of competitive markets for many reasons including the fear of losing their dominance and monopolization in the market economy. Two major advantages of Competition law in a free market economy are identifiable and briefly discussed.

The first advantage concerns maintaining price competition and eliminating output or entry restrictions, in other words, ensuring lower prices and higher quality.<sup>36</sup> Maintaining competition is perhaps the most familiar role of competition law. Competition law prohibits anti-competitive behaviour such as price fixing and market divisions. By eliminating such behaviours, the effect of competition law will be to reduce consumer costs on the purchase of goods and services plus a much wider range of choices within a specific product.<sup>37</sup> It will also force producers to constantly improve their products and to make them cheaper. If they do not innovate and their rivals do, then they will cease to be in business.<sup>38</sup>

A second advantage is promoting social mobility and social cohesion.<sup>39</sup> This is one of the most important aspects of free market for developing economies. The concept of domestic competition has enormous social and legal implications and governments cannot expect to achieve the objectives of competition such as lower prices and higher quality without reducing domestic barriers to entry.<sup>40</sup> They must facilitate the formation of new firms to challenge the dominance of old ones.<sup>41</sup> This will result in the creation of new entrepreneurs and more jobs, which would allow more people to invest in the development of economic institutions and social stability.<sup>42</sup>

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<sup>36</sup> Kenneth Davidson 'Creating Effective Competition Institutions: Ideas for Transitional Economies' (2005) 6 *APLPJ* at 79

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid* pg 80.

<sup>39</sup> *Ibid* pg 83.

<sup>40</sup> *Ibid* pg 84.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* pg 85.

From the discussion above, it is quite obvious that Competition law in the 21<sup>st</sup> century is highly significant for developing countries and the discussion that follows below is important in shaping the future of Competition law specifically in the context of unilateral exclusionary practices in abuse of dominant positions in South Africa with lessons from the EU and USA.

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## Chapter 2

### Exclusionary Conduct in Abuse of Dominance under the EU and U.S

The aim of this chapter is to discuss different approaches to exclusionary conduct of dominant companies. It will be most appropriate to compare different approaches using the jurisprudence of American and European Competition law. The reason for this is because both systems have the most progressive competition laws. As stated earlier, unilateral behaviours adopted by dominant firms are called exclusionary because they aim at discouraging potential rivals' entry into the relevant market or conversely, they intend to gradually drive existing competitors off the market.<sup>43</sup> In other words, exclusionary conduct is directly aimed at competitors, and only by damaging the latter does it cause a lessening of competition that ultimately damages consumers. Under this chapter, the American Sherman Act and the European Commission Treaty Article 82 will be dealt with highlighting the significant similarities and differences.

Article 82 of the EC Treaty and Section 2 of the Sherman Act are often regarded as similar provisions because they both prohibit unilateral conduct which influences a certain market, and has the effect of impairing trade between member States.<sup>44</sup> In both cases the conduct becomes relevant when a certain degree of economic power is involved and in both cases the conduct, although generally adopted by a single undertaking, can also be pursued by more than one firm.<sup>45</sup> Nonetheless, despite these apparent similarities, several differences can also be traced between the two provisions. For instance, a major difference is that European competition laws do not punish conduct aimed at obtaining a dominant position. The mere attainment of a position of dominance in itself will not be punished under the European Union whereas the Sherman Act punishes both “monopolization” and “attempt to monopolize” cases.

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<sup>43</sup> John Marshall (note 1) at pg 2.

<sup>44</sup> *ibid* at page 4.

<sup>45</sup> *Ibid*.

## 2.1. Abuse of Dominant Position under U.S. Antitrust Law: Monopolization and Attempt to Monopolize

The meaning of the word "monopolize" has been the subject of much discussion since the enactment of the Sherman Act. Making profits is the ultimate goal of every firm so it is easy to understand the scepticism that has surrounded Section 2 of the Sherman Act whose strict interpretation could possibly punish companies that have acquired market power through legitimate means, usually referred to as competition on the merits.<sup>46</sup> This tension has been recognized since the very early days of American antitrust history when the Supreme Court clarified that "the law does not make mere size an offence or the existence of unexerted power an offence."<sup>47</sup> In a statement later confirmed in the famous *Alcoa* case, Judge Hand held that "the successful competitor, having been urged to compete, must not be turned upon when he wins."<sup>48</sup>

Section 2 of the Sherman Act punishes, with a fine or by imprisonment or both,

"every person who shall monopolize, or attempt to monopolize, or combine or conspire with another person or persons, to monopolize any part of the trade or commerce among the several States."

The most important thing to keep in mind about section 2 of the Sherman Act is that it is meant to punish two different types of behaviours which are monopolization and the attempt to monopolize.

As far as the mere monopolization claim is concerned, jurisprudence has recently clarified that "the offence of monopoly under S 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the wilful acquisition or maintenance of the power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident."<sup>49</sup> While mere possession of monopoly power is not sufficient to trigger section 2 monopolization claims, it is a necessary precondition because monopolization can be described as the conduct of a firm that already has a position of strength on the market and adopts anticompetitive exclusionary strategies to the

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<sup>46</sup> John Marshall (note 1) at pg 2.

<sup>47</sup> *U.S. v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920).

<sup>48</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir 1945).

<sup>49</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-597 (1985).

ultimate goal of preserving such position or further enlarging it.<sup>50</sup>

An attempt to monopolize differs from monopolization because it regards conduct of a company that aims to achieve monopoly power in a certain market.<sup>51</sup> Understandably, attempt to monopolization claims present an even harder case than mere monopolization because every firm tends to achieve a position of strength in the market. Therefore, in theory, each conduct could be characterized as an attempt to monopolize. This surely explains why American jurisprudence has crafted a somewhat more complex test for attempt cases, establishing that liability is found when there is proof of: 1) a predatory or anticompetitive conduct, 2) a specific intent to monopolize and 3) a dangerous probability of success.<sup>52</sup>

The first and the second elements are closely related because in attempt cases, a stronger proof of intent is often inferred by the type of conduct adopted by the firm as well as the strategies chosen to implement it.<sup>53</sup> The reason for this can be easily understood. Each competitor aims to win the game of competition, a mere intent to exclude competitors, usually present in most section 2 cases, is not deemed enough for attempt cases.<sup>54</sup> The range of conduct that might constitute attempts to monopolize is quite broad. In this regard it is interesting to note that the word anticompetitive in the test prescribed above in the case of attempt to monopolize has been broadly interpreted by the jurisprudence in such a way to include unfair practices.<sup>55</sup>

The third requirement of the test, the dangerous probability of success relies on structural factors namely, market shares, number of competitors, barriers to entry and all other elements determining the degree of market power already held by the firm attempting to obtain monopoly power.<sup>56</sup> Clearly, the stronger the power already detained by the firm, the bigger the chances that it will succeed in obtaining

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<sup>50</sup> Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* 2nd ed. (1999) pg 274

<sup>51</sup> John Marshall (note 1) at pg 2.

<sup>52</sup> Ibid pg 3. This test has been first inferred from the case *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905), and it has been reaffirmed by the Supreme Court in 1985 in *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 457 (1993).

<sup>53</sup> Ibid.

<sup>54</sup> Sullivan & Harrison, 'Understanding Antitrust and its Economic Implications', 2003 *Understanding Series, LexisNexis* at 204.

<sup>55</sup> John Marshall (note 1) at pg 3.

<sup>56</sup> Ibid.

monopoly power, hence the more dangerous the conduct.<sup>57</sup>

Several tests have been proposed to identify exclusionary conduct under Section 2 and will be discussed separately.

### 2.1.1. The No Economic Sense Test

This test was advocated by the Solicitor General of the USA and states that “conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition.”<sup>58</sup> In other words, that test asks whether challenged conduct would have been expected to be profitable apart from any gains that conduct may produce through eliminating competition.<sup>59</sup> Application of the no economic sense test is conceptually straightforward. If conduct allegedly threatens to create a monopoly because of a tendency to exclude existing competitors, the test is whether the conduct would likely have been profitable if the existing competitors were not excluded and monopoly was not created.<sup>60</sup>

Applying the no economic sense test requires consideration of both the gains from the challenged conduct which is separate from profits obtained from eliminating competition, and the costs of undertaking the conduct. The fact that a conduct produces some gross benefit for the defendant is not a sufficient basis for concluding that it makes economic sense.<sup>61</sup> According to Werden, conduct fails the no economic sense test if it is expected to yield a negative payoff, net of the costs of undertaking the conduct, and not including any payoff from eliminating competition.<sup>62</sup>

The no economic sense test looks at the reasonably anticipated impact of the challenged conduct when undertaken, and not into the actual impact of the conduct. Actual effects can provide powerful evidence of the reasonably anticipated effects, but actual effects also can be entirely irrelevant.<sup>63</sup> For instance, sound business decisions may prove unprofitable not because of the manner of implementing the

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<sup>57</sup> Ibid.

<sup>58</sup> Gregory J. Werden, ‘Identifying Exclusionary Conduct Under Section 2: The “No Economic Sense” Test’, (2006) 73 *Antitrust L.J.* 413 at 413.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid pg 2.

<sup>61</sup> Andrew I. Gavil, ‘Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance,’ (2005) 72 *Antitrust L.J.* 3 at 53.

<sup>62</sup> Werden (note 58) at pg 2.

<sup>63</sup> Ibid.

decision but because of misfortune or ineptitude, and competition law should not deem such conduct as exclusionary. Marketplace conduct may also prove profitable for reasons that could not have been anticipated when it was undertaken, and such unanticipated profits should not preclude a finding that conduct is exclusionary.

In applying the no economic sense test, what matters are the objective economic considerations for a reasonable person, and not the state of mind of any particular decision maker.<sup>64</sup> The no economic sense test is described as similar to the short-run profit sacrifice test which is discussed below.

### **2.1.2. The Profit Sacrifice Test**

The profit-sacrifice test examines the profitability of the defendant's conduct relative to a hypothetical market outcome that is used as the non-exclusionary benchmark.<sup>65</sup> The hypothetical “but-for” marketplace is one in which it is impossible to raise prices following the exclusionary conduct.<sup>66</sup> When exclusionary conduct potentially raises barriers to competition in some way, a defendant's exclusionary conduct can be said to sacrifice profits if the conduct would have been unprofitable in the absence of those enhanced barriers to competition.<sup>67</sup> The standard evaluates whether conduct “would make no economic sense for the defendant but for the tendency to eliminate or lessen competition.”<sup>68</sup> That is, the conduct would not be profit-maximizing absent its anticompetitive effect. This variation is primarily different from the conventional profit-sacrifice standard because it does not require a showing that there is a period of time in which the defendant's profits are lower than they were before the exclusionary conduct was undertaken.<sup>69</sup>

Although this standard shares many obvious similarities with the standard version of the no economic sense test, the no economic sense conceptualization resolves some of the implementation pitfalls of the standard profit-sacrifice formulation. While quite similar to the profit-sacrifice test, commentators have noted that a short-term profit sacrifice is neither necessary nor sufficient for conduct to be

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<sup>64</sup> Gavil (note 61).

<sup>65</sup> Steven C. Salop, ‘Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard’, (2006) 73 *Antitrust L.J.* 311 at 4

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Verizon Communications Inc v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682) pg 15.

<sup>69</sup> Salop (note 65).

deemed exclusionary by the no economic sense test.<sup>70</sup>

### 2.1.3. Consumer Welfare Test

The consumer welfare test which has also been proposed by academic scholars has also had its fair share of controversy trailing it for its inconsistency with the language of s 2 of the Sherman Act. Professor Salop advocates this test stating that any marketplace conduct harmful to consumers can and should be condemned under s 2.<sup>71</sup> Under this standard, it can be concluded that exclusionary conduct violates antitrust laws if it reduces competition without creating a sufficient improvement in performance to fully offset potential adverse effects on prices to prevent consumer harm.<sup>72</sup> Such conduct could be labeled “unreasonably exclusionary.”<sup>73</sup> Despite the use of the term “consumer welfare,” the evaluation is really about whether consumers are harmed from higher prices, reduced quality, or reduced innovation. Thus, a better term might well be a “consumer harm” standard rather than a “consumer welfare” standard.<sup>74</sup> What is important is that this test focuses on the effect of the conduct on the market, that is, consumers and the competitive process. In contrast, the other standards, the profit sacrifice and the no economic sense tests are focused instead on the impact of the conduct on the alleged offender. This is the key reason why the other standards are flawed according to Salop.<sup>75</sup>

A consumer welfare effect standard for evaluating the s 2 liability flows directly from the Court's observation that antitrust is a consumer welfare prescription. Such a standard was adopted explicitly by the D.C. Circuit in *United States v. Microsoft*<sup>76</sup>, in which the Court outlined a test requiring the plaintiff to prove that consumers would be harmed. If such proof is made, the monopolist may offer a pro-competitive justification for its conduct. This justification can be either invalidated by the plaintiff or the beneficial impact on consumers can be shown to outweigh evidence of anticompetitive consumer harm.<sup>77</sup> In this way, the likely effect on consumer welfare is predicted. According to Salop, antitrust law focuses on consumer

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<sup>70</sup> Ibid.

<sup>71</sup> Salop (note 65) at pg 8.

<sup>72</sup> Ibid.

<sup>73</sup> Herbert Hovenkamp, ‘Exclusion and the Sherman Act’, (2005) 72 *U. CHI. L. REV.* 147 at 154

<sup>74</sup> Salop (note 65) at pg 8.

<sup>75</sup> Ibid.

<sup>76</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

<sup>77</sup> Ibid at 58-59.

welfare, not the defendant's profits or the protection of competitors.<sup>78</sup> In most antitrust cases, the profit-sacrifice and consumer welfare effect standards will reach the same outcome which is a fact based analysis of the competitive effect of the alleged anticompetitive monopolizing conduct. However, there is no reason to think that the impact on the defendant's profits in the hypothetical world of the profit-sacrifice test would be a good proxy for the impact on consumers.<sup>79</sup>

The consumer welfare effect analysis generally would be an ex ante analysis, not an ex post facto analysis.<sup>80</sup> That is, the court would evaluate the likelihood and magnitude of expected consumer benefits or harms based on the information reasonably available at the time that the conduct was undertaken. It would not simply examine the ultimate ex post facto market effect. A key issue would be what consumer effect was reasonably foreseeable at the time of the investment. Also, the profit-sacrifice standard allows ex ante and ex post facto types of errors to be made. It permits conduct that causes ex post facto consumer harms. It also permits exclusionary conduct that causes ex ante consumer harms, for example, conduct that reduces expected consumer welfare, taking into account the probability of benefits and harms.<sup>81</sup>

Despite the strong advocacy for the Consumer welfare test by Salop, Werden argues that as interpreted by the Supreme Court, s 2 simply does not permit such an approach. As the Court noted in *Trinko*, s 2 “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”<sup>82</sup> Although the Court has described the Sherman Act as a “consumer welfare prescription,” the Court also has made clear that s 2 sweeps far less broadly than s 1.<sup>83</sup> While the s 1 test for legality is whether the conduct “imposes an unreasonable restraint on competition,” the Court in *Trinko* has held that harm “to the competitive process,” and not just to consumer welfare, is required to violate the Act.<sup>84</sup>

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<sup>78</sup> Salop (note 65) at pg 10.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid at pg 13.

<sup>81</sup> Ibid at pg 14.

<sup>82</sup> Werden (note 58) at pg 6.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

For half a century, the law's dominant paradigm for addressing single-firm exclusionary conduct under the US jurisdiction was the one articulated by the Supreme Court in *Aspen*.<sup>85</sup> By the rule in *Aspen*, a monopoly firm has a duty not to significantly exclude or handicap rivals by a refusal to deal unless there are “valid business reasons for the refusal.” In 2004 in *Verizon v. Trinko*<sup>86</sup>, the Supreme Court embraced a narrower perspective. It announced that Section 2 is an instrument to be applied reluctantly because it is difficult to separate anticompetitive exclusionary conduct from legitimate competition and courts are prone to make wrong decisions.

The Court held that even monopoly firms have the fundamental right to refuse to deal and that exceptions to this rule should be narrowly construed.<sup>87</sup> The Court reconceived *Aspen* as merely an exception to a strong freedom-not-to-deal rule, and it distinguished that case from *Trinko* on its facts. The *Aspen* exception, it is said, requires that defendant engage in a voluntary course of dealing and terminate that course of dealing, sacrificing profits in the short term to achieve higher supra-competitive profits in the long run.<sup>88</sup> Some scholars have concluded that the Supreme Court has now adopted a sacrifice-of-profits rule for a Section 2 violation. Eleanor Fox argues that to be sure, the Court's majority in *Trinko* favors a minimal interpretation of Section 2 and the profit sacrifice test if combined with availability of a good business justification is a minimal interpretation of Section 2.<sup>89</sup>

It therefore appears that of all the three tests discussed above, the profit sacrifice test seems to be the one favoured by the US Courts for dealing with exclusionary conduct.

## **2.2. Exclusionary Conduct in Abuse of dominant positions in EU Competition Law**

Article 82 of the European Commission (EC) Treaty expressly establishes that

‘Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as

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<sup>85</sup> Eleanor Fox ‘Is there life in *Aspen* after *Trinko*? The silent revolution of s 2 of the Sherman Act’ (2005) 73 Antitrust L.J. 153 at pg 2

<sup>86</sup> Note 68

<sup>87</sup> *ibid*

<sup>88</sup> Fox (note 85) at pg 8

<sup>89</sup> *Ibid* pg 9



incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- (b) limiting production, markets, or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts’.

The first paragraph of Art. 82 of the EC Treaty show that five elements must be present before it applies. These are:

- (a) one or more undertakings;
- (b) in a dominant position;
- (c) within the common market or a substantial part of it;
- (d) abusing the dominant position;
- (e) in such a way as to affect trade between Member States.

If any one of these elements is missing, Art. 82 does not apply. As seen above, the article provides a list of examples of abusive conduct, but EC founders purposefully left open both the concept of dominance and of abuse which have been elaborated upon by European Courts.<sup>90</sup> What is meant by a ‘dominant position’ is central to the operation of Art. 82. EU case law has adopted a rather comprehensive definition of dominance. A dominant position has been defined as

“A situation where a company detains such a position of strength on a certain market that it can make its own business strategy and decision without taking into consideration how competitors and customers will react and how consumers will be ultimately affected by it.”

The European Court of Justice (ECJ) has further described a dominant position as follows:

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<sup>90</sup> Art. 82 EC Treaty explains that an abuse may consist in: "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

‘... The dominant position thus referred to [in Article 82] relates to 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’.<sup>91</sup>

The practice of the ECJ and the Commission in determining whether an undertaking is in a dominant position involves a two-stage process. Firstly the relevant market is identified and secondly the power of the undertaking on that market is assessed.<sup>92</sup> The problem with this approach is that relevant markets are not easily defined and it is not possible to completely divide the definition of the market from the issue of the undertaking’s power on the market.<sup>93</sup> Nor can power on a market always be assessed by concentrating on that market alone, for factors outside it may affect competition within it.<sup>94</sup> These complications are well illustrated in the case law and decisions on Article 82, which also show that the definition of the market may be affected by the nature of the abuse in issue

According to some commentators, the ECJ has purposefully linked the power to prevent the maintenance of a competitive asset in the market to the power to behave independently, as if the former can only occur if the latter has been found.<sup>95</sup> This assumption seems reasonable because the concept of independence has often been referred to as the special feature of dominance.<sup>96</sup> Nonetheless, some other commentators prefer the part of the definition that describes dominance as the power to prevent effective competition being maintained, as this seems closely related to the economic concept of market power.<sup>97</sup>

Although it has become common, even in the language of the EC, to talk about undertakings’ market power as a synonym of a position of strength in a certain market, the concept of dominance is more comprehensive than market power as it

<sup>91</sup> Case 27/76 *United Brands v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429.

<sup>92</sup> Para 350, Chapter 2 EC Law: The Structure of Article 82.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Thomas Eilmansberger, ‘Dominance-The Lost Child? How Effects-Based Rules Could and Should Change Dominance Analysis’, (2006) 2 *European Competition Journal* pg 15.

<sup>96</sup> *Hoffmann-La Roche v. Commission*, [1979] ECR I-461, paras 42-48.

<sup>97</sup> Werden (note 58) at pg 3.

goes far beyond the power over prices.<sup>98</sup> Assessment of a position of dominance indeed takes into account a vast array of factors which is aimed at evaluating the overall commercial and economic position a certain undertaking has on a certain market vis-à-vis its competitors, but it does so without inquiring upon the conduct pursued by the firm.<sup>99</sup>

The EC case law has explained that the concept of abuse is an objective notion which is connected to dominance and it is distinct from it at the same time. It is linked to dominance in the sense that without dominance the behaviour would not be punished.<sup>100</sup> But it is distinct because the abuse amounts to a separate moment. The abuse takes place when competition on the market has already been distorted by the presence of the dominant position and it is punished expressly because it further disrupts this scenario by means different from competition on the merits.<sup>101</sup> According to the European Commission of Justice<sup>102</sup>,

“The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”

Two recent cases in the ECJ, *Michelin II* and *British Airways (BA)* both concern Commission decisions condemning price discount schemes by dominant firms. In both cases one of the central arguments of the applicant was that the Commission had not shown that the schemes had produced or would produce any harmful effects.<sup>103</sup> In both cases this argument was rejected, not on factual grounds, but on the ground that there was no legal requirement for the Commission to show the likelihood of actual anticompetitive effects.<sup>104</sup> In *British Airways* the Court of First

<sup>98</sup> ‘The Concept of Dominance in Article 82’, 2 *ECJ*, 31, special issue (2006).

<sup>99</sup> Werden (note 58) at pg 3.

<sup>100</sup> *Ibid* at pg 4.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Hoffmann-La Roche v. Commission*, [1979] ECR 461, P 91.

<sup>103</sup> John Kallagher, Brian Sher ‘Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82’ (2004) 5 *E.C.L.R.* at 2.

<sup>104</sup> *Ibid*.

Instance held that

"for the purposes of establishing an infringement of Art.82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct tends to restrict competition, or in other words, that the conduct is capable of having, or likely to have, such an effect".<sup>105</sup>

In the judgment, the Court of First Instance held that all that was needed for infringement of Art.82 to be established was for the system to "tend to prevent customers obtaining supplies from rival producers".<sup>106</sup> The Court of First Instance further held that BA's discount system did just that because the schemes were progressive, with increased commission rates "capable of rising exponentially from one reference period to another" and the Court of First Instance did not believe BA's five main competitors could be regarded as being in a position to grant similar advantages to travel agents, in view of the fact that BA sold a multiple of the tickets sold by all five of those competitors combined.<sup>107</sup>

In *Michelin II* the Court of First Instance specifically stated that under Art.82 there is no need to show anti-competitive effect. Instead the Court ruled that conduct can be abusive if it "tends to restrict competition or, in other words, that the conduct is capable of having that effect".<sup>108</sup> The *Michelin II* judgment justified this rule by reference to cases that establish that it is sufficient under Art.82 to show that conduct has the object of restricting competition. Since in *Michelin II* the object of Michelin was to make dealers more loyal, this practice must, according to the Court, have been susceptible of restricting competition.<sup>109</sup> *Michelin II* also addressed a second issue that is important for the assessment of exclusionary abuse; the extent to which a dominant firm can assert an efficiency justification for conduct that is otherwise abusive.<sup>110</sup> Thus the Court of First Instance set a threshold for exclusionary abuse that requires no actual harm, no likelihood of harm, but rather, the mere potential for harm.<sup>111</sup> This threshold focuses on the restriction on the customer, rather than the

<sup>105</sup> *British Airways v Commission* Case T-219/99 para 293.

<sup>106</sup> *Ibid* para 247.

<sup>107</sup> *Ibid.* paras [247], [272] and [276].

<sup>108</sup> *Michelin v Commission* Case T-203/01 para 239.

<sup>109</sup> *Ibid* paras 241 and 244.

<sup>110</sup> *Ibid* paras 98-110.

<sup>111</sup> Kallaugher (note 103) at pg 4.

effect on the competitor.<sup>112</sup>

The reasoning that underpins this position was discussed in a paper by Luc Gyselen, the Director of Competition in the European Commission in 2003, where he referred to the "structuralist" approach to exclusionary abuse under Art.82 and brings into the open the policy issues which underpin the rules set out in these Court judgments. Indeed, there are indications in the wording and analytical approach of the Court judgments that suggest that the Gyselen paper may have had a direct influence on the approach taken by the Court.<sup>113</sup> The test for abuse proposed by Gyselen, like that set out subsequently by the Court prohibits any conduct that has an appreciable potential for anticompetitive effect.

The conceptual framework of the Gyselen paper is based on the premise that Art.82 is meant to protect competition as "a structural process of rivalry."<sup>114</sup> Gyselen suggests that where pricing practices "artificially foreclose business opportunities" for the competitors of a dominant firm, those practices may "harm the competitive process."<sup>115</sup> He suggests further that intervention by an antitrust enforcer to protect this process is justified because of a faith that the process of rivalry will contribute "in the longer run" to customer and consumer welfare.<sup>116</sup> He cautions, however, that the relationship between the protection of rivalry and the eventual contribution to customer and consumer welfare "should have sound economic underpinnings" because otherwise the enforcer could end up protecting rivals, rather than protecting the process of rivalry.<sup>117</sup>

Gyselen identified a two step approach for assessing exclusionary abuse claims under Art.82. The Paper argues that the first step in an abuse case should be to identify whether there is "foreclosure".<sup>118</sup> Gyselen does not define what is meant by foreclosure but the introductory comments in the paper suggest that the question to be addressed is how dominant companies artificially raise the barriers to entry for the dominant company's competitors. Where the Commission can make the requisite

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Luc Gyselen, 'Rebates, Competition on the Merits or Exclusionary Practice?' European Competition Law Annual 2003: What is Abuse of a Dominant Position (Hart Publishing).

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

showing of foreclosure, the second step in the test would shift the burden to the dominant firm to show an efficiency justification for the conduct in question. This test would allow conduct that is justified on efficiency grounds, provided that the benefits were proportionate to the foreclosure effect.

A relevant question to consider is what level of foreclosure the Commission must demonstrate to justify its intervention under Art.82? Foreclosure is a tricky concept, but Prof. Kallaugher argues that Gyeselen is correct in suggesting that an abuse test requires some measure of actual or potential competitive harm that can loosely be described as a foreclosure effect in the context of exclusionary conduct.<sup>119</sup> He identifies this as the possible harm test and finds it consistent with the structuralist approach to Art.82 that focuses on changes in market structure rather than directly focussing on conduct in the market or the economic effects of such conduct.

When the ECJ articulated its test for exclusionary abuse in *Hoffman-La Roche* and *Michelin I*, it essentially adopted the approach that abuse consists of conduct:

- (1) that has the effect of reducing the competition in a market or preventing the emergence of new competition; and
- (2) where the effect is caused "by means other than normal competition on the basis of the performance of commercial operators".<sup>120</sup>

It is very tempting, particularly from a comparative law perspective, to link the Court's application of the performance based competition test to a "business justification" defence as found in US law under the Sherman Act. The Court of Appeals in *Microsoft* has suggested that where there is a showing of significant anti-competitive harm and a showing of business justification, there must be a balancing test; the consumer welfare benefit of the practice must be compared to the anticompetitive harm.<sup>121</sup> In effect, the *Microsoft* court would resolve monopolisation claims using an approach analogous to that applied in a rule of reason approach.<sup>122</sup>

Kallaugher argues that a better test would be to compare the harm resulting from the conduct with the commercial benefit of the conduct. He argues that where there are serious anti-competitive effects, it may be appropriate to require a showing

<sup>119</sup> Ibid at pg 12.

<sup>120</sup> Kallaugher (note 103) at pg 9.

<sup>121</sup> *United States v Microsoft Corp*, 253 F.3d 34, 56-57 (D.C. Cir. 2001).

<sup>122</sup> Op cit note 120.

of substantial benefits directly linked to the conduct that would exist irrespective of the exclusionary impact of the conduct, and even this showing may not be sufficient to justify some practices by real monopolists.<sup>123</sup> He argues further that this approach can only work if the foreclosure investigation focuses on identifying anti-competitive harm that can be compared to pro-competitive benefits.<sup>124</sup>

A structural analysis remains the point of departure for assessing dominance under Art.82 and this article is seen as protecting a process that has long run benefits, not on preventing losses to consumer welfare in the short or medium term.<sup>125</sup> Thus to protect the structural process of rivalry, the implication is that the Commission needs to protect the market structure that facilitates that rivalry.<sup>126</sup> Kallaugher argues against a pure structuralist approach because of its lack of sound economic underpinnings. According to him, a structuralist approach runs the risk of prohibiting conduct that can promote consumer welfare in the short or long term.<sup>127</sup> He argues further that a structuralist approach will inevitably result in protecting competitors rather than competition in many cases and for these reasons, the possible harm test cannot be reconciled with a competition policy based on economic effects.<sup>128</sup>

### **2.3. Comparing the EU and USA Exclusionary Provisions**

Art. 82 of the EC Treaty and s 2 of the Sherman Act are often regarded as similar provisions because both are meant to prohibit unilateral conduct which influences a particular market. In both cases the conduct becomes relevant when a certain degree of economic power is involved and in both cases the conduct, although generally adopted by a single undertaking, can also be pursued by more than one firm.<sup>129</sup> Nonetheless, despite these apparent commonalities, several differences can be traced in the two provisions.

The first relevant difference is that the European competition laws do not punish conduct aimed at obtaining a dominant position unlike attempt to monopolize cases

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<sup>123</sup> Kallaugher (note 103) at pg 23.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid at pg 15.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid at pg 16.

<sup>128</sup> Ibid.

<sup>129</sup> John Marshall (note 1) at pg 4.

in the US.<sup>130</sup> A finding of dominance is the fundamental point for assessing unilateral abuses; therefore, whatever the means and the strategies applied to achieve it, the mere attainment of a position of dominance in itself will not be punished.<sup>131</sup> Only the abuse of such position can trigger liability under Art. 82, therefore, no attempt claims can be pursued in Europe even where there is clear evidence that the company engaged in the practice with the specific intent to damage a competitor.

A second difference between the two doctrines is the fact that the European assessment of unilateral conduct does not take intent into account. The ECJ clarifies that the concept of abuse is an objective concept and, as a general rule, its assessment is not made dependent on an evaluation of the intent of a dominant undertaking.<sup>132</sup>

Another significant difference with regard to the assessment of abuse and monopolization or attempt to monopolize can be found in the defensive tools dominant firms have at their disposal once their conduct has been found abusive. Under Art. 82 of the EC Treaty, the firm can defend itself insofar as it can demonstrate that it has taken "reasonable steps as it deems appropriate to protect its interests, provided however that the purpose of such behaviour is not to strengthen this dominant position and abuse it".<sup>133</sup> Also, a firm might justify its conduct asserting that it has been forced to undertake such behaviour in order to minimize the losses it would suffer from the competition.<sup>134</sup> Under American antitrust law, dominant firms can defend themselves by simply asserting that their conduct is likely to pass efficiencies on consumers and that a balancing of the pro- and anti-competitive effects caused by the practice shows that the latter does not have the ultimate effect of harming consumers.<sup>135</sup>

The two approaches above are clearly different. The European concept of 'objective justification' appears as a limited defensive instrument whereby the undertaking claims that the conduct was not abusive because it only engaged in the

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> *Hoffmann-La Roche v. Commission* [1979] ECR 461, P 91.

<sup>133</sup> *Atlantic Container Line AB and Others v. Commission*, Joined cases T-191/98, T-212/98 to T-214/98, [2003] ECR II-3275, P 1113.

<sup>134</sup> European Commission Discussion Paper, *supra* at PP 81-83.

<sup>135</sup> John Marshall (note 1) at pg 4.



conduct to defend its own business.<sup>136</sup> On the contrary, the American approach seems more like an affirmative instrument aimed at showing the overall pro-competitive character of the behaviour.<sup>137</sup> This difference is clearly stated by the wording of the Court of First Instance explaining that companies cannot justify their conduct on the basis that they bring about certain advantages for themselves or for consumers.<sup>138</sup>

The European Commission seems to have endorsed a different approach towards the efficiency defence by stating that exclusionary conduct may fall outside the ambit of the prohibition of Art. 82 if the dominant undertaking can prove that its conduct produces efficiencies that outweigh the negative impact on competition.<sup>139</sup> However, while the position of the Commission is not yet firmly grounded, it should be pointed out that the European defence based on efficiency seems reasonably narrower in scope than its American counterpart. The European Commission in its Discussion Paper presents a four-prong test which is not easy to comply with. Accordingly, the dominant company has to prove that: a) the allegedly abusive conduct has realized or is likely to realize efficiencies; b) the conduct is indispensable to produce such efficiencies; c) the efficiencies benefit consumers; d) competition in a substantial part of the products concerned is not eliminated.<sup>140</sup>

American antitrust law has evolved more and more towards the idea of antitrust as a "consumer welfare prescription". This view has led courts to specifically concentrate on conduct whose effect directly restrains output or increases price, to the immediate detriment of consumers, and to disregard practices that do not directly cause such an effect not distorting of competitive equilibria.<sup>141</sup> Although actual proof of harm to consumer welfare is not expressly required by the Sherman Act, an exclusionary conduct will not be punished lacking clear evidence of consumer

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<sup>136</sup> The ECJ has often explained that undertakings do not have an unconstrained right to protect their commercial interests; rather, their defensive actions must be proportionate to the desired goal and not result in conduct that strengthens or abuses of a dominant position. *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, case 27/76, [1978] ECR 207, PP 189-190.

<sup>137</sup> Op cit note 135.

<sup>138</sup> *Atlantic Container Line AB and Others v. Commission*, Joined cases T-191/98, T-212/98 to T-214/98, [2003] ECR II-3275, P 1114.

<sup>139</sup> Ibid.

<sup>140</sup> European Commission Discussion Paper, pg 84-92.

<sup>141</sup> Eleanor M. Fox, 'What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect', (2002) 70 *Antitrust L.J.* 371.

harm.<sup>142</sup> As a result, the concept of anticompetitive conduct entirely reverts to whether the conduct harms consumers, in the sense that it actually diminishes consumer welfare.<sup>143</sup>

On the contrary, European competition bodies have always regarded consumer welfare as one important goal of competition policy; however, they have shown equal concerns towards the protection and safeguard of competitive structures of markets and openness.<sup>144</sup> More specifically, while the Commission explains that the protection of competition on the market is ultimately intended at enhancing consumer welfare, it has been clearly stated that competition as an institution must be considered the main priority of competition rules.<sup>145</sup> This substantial difference regarding the policy goals of antitrust law bears a significant impact on the practical assessment of anticompetitive conduct in general and exclusionary conduct in particular. In fact, European antitrust law does not require evidence of consumer welfare as further element to prove the abuse.<sup>146</sup> Rather, consumer damage is presumed whenever the distortion of competition, already caused by the same presence of the dominant firm on the market, is brought one step further by the abusive conduct.<sup>147</sup>

The way American and European bodies frame anticompetitive conduct is probably one of the most sensible differences in comparative antitrust law. As anticipated, the European abuse of dominant provision in Art. 82 codifies a list of anticompetitive conduct that falls under the category of abuse. Although the list is not exhaustive, when evaluating an alleged anticompetitive practice, European competition agencies would be expected to see whether it falls under one of the specified categories of abuses. On the contrary, this attitude does not seem to permeate American antitrust law, where both s 1 and s 2 of the Sherman Act do not provide any list of anticompetitive practices and merely set two big frameworks under which anticompetitive conduct might fall.

As a general tendency, modern American antitrust law does not seem concerned

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<sup>142</sup> John Marshall (note 1) at pg 5.

<sup>143</sup> *supra*.

<sup>144</sup> *Ibid*

<sup>145</sup> *Ibid*.

<sup>146</sup> *Ibid*.

<sup>147</sup> *Ibid*.

about framing conduct in order to fit within specific categories of anticompetitive behaviours, rather, it seems more interested in finding when the conduct brings about an anticompetitive effect on the market.<sup>148</sup> Under American antitrust law, certain specific types of conduct have been codified by statutory provisions and have been specifically developed through the case law.

#### **2.4. Using Refusals to Deal cases as a practical differentiation between American and European Exclusionary Practices**

Broadly speaking, refusals to deal involve the conduct of a company that has exclusive control over a scarce resource, no matter whether tangible or intangible, or an infrastructure whose access is indispensable to compete in a certain market or in a separate but closely related market.<sup>149</sup> The undertaking takes advantage of such strategic position and employs it in order to preserve or strengthen its dominant position in that market or to acquire it in the closely related market.

American and European approaches towards refusals to deal differ with regard to both the normative framework and the practical assessment of the cases. American antitrust assessment of refusals to deal comes under s 2 of the Sherman Act as either monopolization or attempt to monopolize. It is widely acknowledged that a dominant firm's unilateral refusal to deal with a competitor may constitute prima facie evidence of exclusionary conduct when the refusal harms the competitive process.<sup>150</sup> Generally, harm to competition is presumed when the behaviour causes a reduction in output and an increase in price in the relevant market, or by a decrease in overall efficiency level in the market that impacts negatively on consumers.<sup>151</sup> Where proof of harm to the competitive process is established, the dominant firm may rebut the presumption by establishing valid business justification for its conduct.

American antitrust treatment of monopolization cases in general and refusal to deal cases in particular tends to focus its attention exclusively on the market where the conduct under analysis displays its effects.<sup>152</sup> This means that the monopolization claim under s 2 will be framed as monopolization or attempt to monopolize

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid at pg 6.

<sup>150</sup> John Marshall (note 1) at pg 6.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

depending on the degree of market power held by the company in the market that will be ultimately affected by the anticompetitive conduct.<sup>153</sup>

If an undertaking has exclusive control on a certain infrastructure which is necessary to provide a certain service and such undertaking denies access to the infrastructure to its competitors, the conduct will be framed as a monopolization case or as an attempt to monopolize depending on the level of market power held by the undertaking on the service market.<sup>154</sup> However, it often happens, in refusal to deal cases, that the undertaking involved is active in two market segments and that the alleged exclusionary behaviour is aimed at monopolizing a distinct market where the undertaking does not have a position of dominance. In any case, whether the refusal is framed as monopolization or attempt to monopolize, the focus of antitrust authorities is always towards the market where the anticompetitive conduct is going to display its effects.

European antitrust law proceeds in a different way. As explained earlier, because refusals to deal cases are assessed as abuse of dominant position under Art 82, the conduct can only be punished if the undertaking is found to be dominant in the first place. In this sense, preliminary finding of dominance represents a guarantee that such a duty can only be imposed on firms whose position of strength might allow them to unduly distort competition through the refusal.<sup>155</sup>

It is possible however that the competition authorities are quite often confronted with market scenarios where a company is dominant in a certain market but the effects of its exclusionary conduct are going to be asserted on a second-related market where the company has no corresponding position of economic strength. Since European antitrust law does not punish "attempt" of abuses of dominant position, it could seem that such refusal to deal would risk going unpunished. This is not the case because European antitrust law regarding abuses of dominant position acknowledges the possibility that the anticompetitive conduct will produce its effects in a distinct market from the one where the undertaking is found to be dominant.

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

In the case of *British Airways v Commission of the European Communities*<sup>156</sup>, the case concerned an allegation of abuse of dominance by Virgin Airways that British Airways (BA) was using marketing and incentive agreements with travel agents to distort competition. The Commission for European Communities agreed that BA abused its dominant position in the United Kingdom market for air travel agency services which had an effect of distorting competition between BA and other airlines on the United Kingdom markets for air transport services.<sup>157</sup> The Court of the European Communities held on appeal that BA could not accuse the commission of failing to demonstrate that its practices produced an exclusionary effect. According to the Court, for the purposes of establishing an infringement under Art 82 of the European Community Treaty prohibiting abuse of dominance, it is not necessary to demonstrate the abuse in question had a concrete effect on the markets concerned.<sup>158</sup> It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or in other words, that the conduct is capable of having or likely to have such an effect.<sup>159</sup>

Specifically, the jurisprudence regarding refusals to deal has developed around the principle that undertakings dominant in one market should not try to extend such dominance to ancillary markets. Therefore, the European Commission will first focus on the market where the company detains its competitive advantage and inquire whether it holds a dominant position in that market and only then will it analyze the second-related market whose competition the dominant undertaking aims at distorting.<sup>160</sup> This is why European antitrust bodies often try to distinguish two distinct markets which are a primary market where the undertaking controls the strategic input and a secondary market where such input is necessary to compete.<sup>161</sup>

The difference between the two approaches has some relevance, especially with regard to cases where there is an attempt to monopolize. The possibility under American antitrust statutory provisions to raise a s 2 claim with no need to prove that the company already holds a substantive degree of monopoly power but rather a

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<sup>156</sup> First Chamber Case T-219/99.

<sup>157</sup> Ibid para 24 & 26.

<sup>158</sup> Ibid para 293.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

probability that market power will be achieved as a result of the conduct, seems to increase the chances that such a s 2 action will be filed.<sup>162</sup> Nonetheless, because American assessment of refusal to deal does not take into account the strategic power that an undertaking might hold in an upstream market where it is dominant, demonstrating that market power will be actually achieved in the relevant market might not be easy in practice.<sup>163</sup>

South African law takes a slightly different approach to the American and European approaches and the next chapter will discuss this variation before I make a case for the more suitable approach.

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<sup>162</sup> Ibid.

<sup>163</sup> For example, in the Microsoft case the Court divided Microsoft's conduct into three sets of anticompetitive behaviors: violation of section 1 of the Sherman Act (tying practices); violation of [section 2](#) of the Sherman Act (monopolization of the operating system market); and violation of [section 2](#) of the Sherman Act (attempt to monopolize the browser market). Not surprisingly, only the monopolization claim was affirmed while the attempted monopolization of the browser market (where Microsoft was not dominant) was dismissed. U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

### Chapter 3

#### Exclusionary Practices in Abuse of Dominance in the South African Competition Act

The South African definition of “dominance” is somewhat unusual when compared with the definitions in other jurisdictions. The peculiarity is that the South African legislation defines dominance by reference to specific market share thresholds and lays down an irrebutable presumption of dominance above a certain market share.<sup>164</sup> In other jurisdictions, the legislation tends not to define dominance. Instead the courts have developed definitions of dominance based on actual market power, and these definitions do not generally include irrebutable presumptions based on market share.<sup>165</sup> Where the case law does mention particular market shares as a guide to the enquiry, the presumptions of dominance tend to be at higher market shares than those laid down in the South African legislation.<sup>166</sup> The South African legislature appears to have opted for a more rigid and explicit approach to the definition of dominance in the interest of greater certainty and simplicity.

When approaching any potential instance of abuse of dominance, it is necessary to answer the following three questions:<sup>167</sup> Do the abuse provisions apply to the situation in question? Is the firm in question dominant? If so, has the firm engaged in any conduct prohibited by the abuse provisions? Unless the answer to all three questions is in the affirmative, there is no liability under the abuse provisions. For a prohibition of exclusionary conduct to take effect, the first two questions must have been answered in the affirmative. The focus of this section is to answer the third question. To do so, the provision of s 8 must be considered.

Section 8(c) and (d) of South Africa’s Competition Act of 1998 prohibits exclusionary practices:

“It is prohibited for a dominant *firm* to -

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<sup>164</sup> Phillip Sutherland & Katharine Kemp *Competition law of South Africa*, LexisNexis Butterworths Durban 2000 chapter 7 pg 7-32.

<sup>165</sup> Ibid.

<sup>166</sup> S 7 of the Competition Act of 1998 provides a threshold of 45%, 35%, but less than 45%, of that market, unless it can show that it does not have *market power*; or it has less than 35% of that market but has market power.

<sup>167</sup> Sutherland (note 164) at pg 7-34.

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

engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

- (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 a contract, or forcing a buyer to accept a condition unrelated to the object of a 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.”

Section 8(d) lists five specific types of exclusionary acts that are prohibited so long as the complainant proves that the act in question had an anti-competitive effect and the respondent does not prove that the action resulted in certain pro-competitive gains that outweighed that effect. Each type of act is a recognised means by which a dominant firm can exclude other firms from a market with potentially anti-competitive effects. Section 8(c) prohibits all those exclusionary acts not specifically listed in s 8(d), but only if the complainant proves that the act in question had an anti-competitive effect that outweighs any pro-competitive gain proved by the respondent.

It is important to note that intention is not a prerequisite for abuse of dominance



under South African law.<sup>168</sup> The complainant need not prove that the dominant firm aimed to misuse its market power or to create an anti-competitive effect.<sup>169</sup> In some circumstances, proof of the respondent's aim may strengthen objective evidence of likely anti-competitive effect.<sup>170</sup> Also, it does not matter that third parties agreed to, or even requested the conduct engaged in by the dominant firm.<sup>171</sup> A customer or supplier who willingly entered into a prohibited agreement with the dominant firm cannot absolve the dominant firm by their waiver or consent.<sup>172</sup> Abuse of dominance does not require another party as victim.<sup>173</sup>

Exclusionary acts are acts that impede or prevent a firm from entering into, or expanding within, a market.<sup>174</sup> Under s 8(c) and (d), the element of the two provisions essentially defines the nature of the acts targeted: the acts in question must be exclusionary, as opposed to acts that directly exploit consumers such as excessive pricing.<sup>175</sup> A key problem that South Africa and other competition authorities face is that all competition is exclusionary.<sup>176</sup> Every low price or innovation impedes other firms from entering into or expanding within a market. The critical question is: how does one distinguish between well-functioning competition and a malfunctioning one?<sup>177</sup> This issue has generated a lot of research to obtain a suitable test to answer this question.

As stated earlier, under s8(c), the complainant must prove that the anti-competitive effect of the act out-weighs its technological, efficiency or other pro-competitive gains. Under s 8(d), the complainant must show that the act had an anti-competitive effect and if it does so, it will succeed in its claim unless the respondent shows technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect. It is important to not only distinguish between s 8(c) and (d) but also to explore the meaning of words in these sections.

The crucial difference between the two provisions is the probative deadlock on

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<sup>168</sup> Sutherland (note 164) at pg 7-35.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> *Patensie Sitrus Beherend Beperk v Competition Commission* CAC 16/CAC/Apr02 30.

<sup>172</sup> Sutherland (note 164) at pg 7-35.

<sup>173</sup> *Patensie Sitrus Beherend Beperk v Competition Commission* CAC 16/CAC/Apr02 24.

<sup>174</sup> Section 1 of the 1998 Competition Act.

<sup>175</sup> Sutherland (note 164) at pg 7-46.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

the question of whether the act has a net positive or net negative effect where the respondent must be found innocent under s 8(c) and guilty under s 8(d).<sup>178</sup> Since a number of factors affect the state of a market, it is impossible to say precisely to what extent an exclusionary act caused the harm that succeeded it. It is therefore likely to be a relatively common situation for the court to find that the net effect of the act is neither anti-competitive nor pro-competitive.<sup>179</sup> In both circumstances, the onus applicable under the particular subsection will determine the fate of the dominant firm.<sup>180</sup>

The respondent under s 8(d) may be punished with a large fine for a first-time contravention while a respondent under s 8(c) may only receive such a fine if its conduct is a substantial repeat of a contravention that was the subject of a previous ruling.<sup>181</sup> This difference in treatment is explained as the fact that, by listing specific types of exclusionary conduct, s 8(d) warns dominant firms of certain behavioural “danger zones” whereas no specific warning is made under s 8(c).<sup>182</sup>

It is now necessary to explore the concepts in s 8.

### 3.1. Anti-Competitive Effect

The term anti-competitive effect is not defined in the Act and the term cannot be said to have any absolute meaning. In reality, what is labelled anti-competitive is merely that which a particular community regards as undesirable conduct in the context of commercial competition and that which is undesirable varies from community to community depending on the aspirations held for commercial competition.<sup>183</sup> It depends on a community to determine what it will consider as fair or foul competition. Most emerging competition authorities draw a line where there is harm to consumer welfare.<sup>184</sup> Most competition authorities consider that actual or threatened harm to consumer welfare does require intervention.<sup>185</sup> Harm to consumer welfare may occur when a dominant firm’s exclusionary conduct leads or threatens

<sup>178</sup> Sutherland (note 164) at pg 7-47.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Section 58(1)(a)(iii) of the Competition Act.

<sup>182</sup> *Competition Commission v South African Airways (Pty) Ltd* 18/CR/MAR01 at para 102.

<sup>183</sup> Sutherland (note 164) at pg 7-48.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid at 7-49.

to lead to lower market output, higher prices, reduced quality or innovation.<sup>186</sup>

It can be very difficult to prove that a dominant firm's conduct actually causes harm to consumers, and so it is widely recognised that such harm to consumer welfare can be inferred from the impact of the dominant firm's conduct on its rivals in the market in certain circumstances. In the USA, harm to consumer welfare may be inferred from conduct that significantly impairs the opportunities of rivals and that either does not further competition on the merits or does so in an unnecessarily restrictive way.<sup>187</sup> Essentially, the adverse impact of the conduct is weighed against its efficiency gains. In the EC, the inference of consumer harm tends to be drawn from evidence of distortion or hindrance of the competitive process.<sup>188</sup>

The ECJ has explained that the very presence of a dominant firm weakens competition in the relevant market and that the firm trespasses when it engages in competition other than on the merits such that the already weakened competition on the market is hindered.<sup>189</sup> This further distortion of competition is considered to be inherently harmful to consumers. While the concepts behind the US and EC tests in this respect may be similar, in practice they are applied differently. The US court are more concerned with the quantifiable effects of the conduct on competition while EC courts have tended to find the relevant harm on the basis of some impairing or undermining of competition without attempting to explain the extent of the effect.<sup>190</sup>

The Competition Tribunal has shown a tendency to adopt tests applied by foreign courts without explanation as to why such tests are appropriate in the context of South African law. It is important to note that injury to, or unfair treatment of a dominant firm's rival per se is not sufficient to demonstrate anti-competitive effect.<sup>191</sup> Second, proof of harm to consumer welfare is sufficient to establish anti-competitive effect.<sup>192</sup> However, proof of harm to consumer welfare is not necessarily essential: the significant or substantial foreclosure of a market to the dominant firm's rivals will give rise to an inference of anti-competitive effect.<sup>193</sup> Three areas continue

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<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> *Hoffman-La Roche & Co AG v Commission* supra.

<sup>190</sup> *British Airways plc v Commission* supra paras 271, 286, 288.

<sup>191</sup> *Msoni v British American Tobacco South Africa (Pty) Ltd* CT 49/IR/Jul02 par 59.

<sup>192</sup> *Competition Commission v South Africa Airways (Pty) Ltd* supra para 132.

<sup>193</sup> Ibid.

to lack clarity, namely, whether it is also necessary to show that the conduct creates, extends or maintains market power; what is necessary to demonstrate significant or substantial foreclosure; and what is necessary to establish anti-competitive effect based on consequences in a second, non-dominated market.<sup>194</sup> The answers to these questions can be traced through South African law.

The judicial pronouncements on the meaning of anti-competitive effect in South Africa have lacked direction. In the case of *York Timbers Ltd v South African Forestry Company Ltd*<sup>195</sup>, the Competition Tribunal applied the tests propounded for the US offence of monopolisation. Accordingly, the Tribunal held that the element of anti-competitive effect required the complainant to demonstrate that the respondent's "market power has been created or extended in consequence of the alleged act".<sup>196</sup> No explanation was proffered as to why such a test should be adopted in South Africa. On appeal, the Competition Appeal Court (CAC) reinforced the Tribunal's approach to anti-competitive effect, holding that the appellant had failed to show the necessary anti-competitive consequences.

In *Msomi v British American Tobacco South Africa*, the Tribunal noted that the effect of the respondent's conduct may be that certain firms will no longer be viable in the "market" but that this alone could not constitute an exclusionary act.<sup>197</sup> In *Competition Commission v Patensie Citrus Beherend Beperk*, the Tribunal seemed to follow its now overruled approach of not requiring any demonstration of anti-competitive effect under s 8(d).<sup>198</sup> On appeal, the CAC did not comment on this, but in considering whether an abuse has been perpetrated, it cited the decision of the ECJ in *Hoffman-La Roche & Co AG v Commission* which is quoted as follows:

"the concept of abuse is an objective concept relating to behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of

<sup>194</sup> Sutherland (note 164) at pg 7-50.

<sup>195</sup> No 15/IR/Feb01.

<sup>196</sup> Paras 93-100.

<sup>197</sup> CT 49/IR/Jul02 para59.

<sup>198</sup> No 37/CR/Jun01 para 9.5.

competition still existing in the market or the growth of that competition”<sup>199</sup>

In the most recent case of abuse of dominance, *Competition Commission v South Africa Airways (Pty) Ltd*<sup>200</sup>, the Tribunal engaged in a lengthy discussion of foreign case law on the meaning of anti-competitive effect. The Tribunal arrived at the conclusion that anti-competitive effect is present 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”<sup>201</sup>

The Tribunal noted that direct evidence of harm to consumer welfare was not a necessity but that harm to structure suffices to show an infringement of the Act.<sup>202</sup> It is argued that where there is no evidence of consumer harm, a demonstration of substantial foreclosure would be required.<sup>203</sup>

No reason has been advanced by the South African courts to limit the effect of the words “anti-competitive” to the concept of creating, enhancing, or preserving the market power of the dominant firm.<sup>204</sup> Nothing in the language of s 8 confines the meaning of the phrase. Section 8(c) and (d) require the complainant to demonstrate the anti-competitive effect flowing from the exclusionary act in question. The language adopted by the Tribunal in the *Competition Commission* case by contrast comes directly from US commentary.<sup>205</sup> This is problematic because s 2 of the Sherman Act which the Tribunal has borrowed its language from deals with monopolization while there is no reference to such concept under the South African Act. It is argued that this is not to say that South African Courts may not ultimately determine that US anti-competitive effect in the South African context requires a demonstration of US style “monopolization”.<sup>206</sup> It is argued that such a principle should only be adopted on the basis of sound and thorough reasoning within the context of the South African Act, having particular regard to the purposes of the Act

<sup>199</sup> Sutherland (note 164) at pg 7-51.

<sup>200</sup> 18/CR/Mar01.

<sup>201</sup> Ibid para 132.

<sup>202</sup> Ibid para 131.

<sup>203</sup> Ibid para 136.

<sup>204</sup> Sutherland (note 164) at para 7-52.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid at para 7-53.

and their application in this country's economic and legal context, which differs markedly to those of both of the EC and the US.<sup>207</sup>

### 3.2. Technological, Efficiency or other Pro-Competitive Gains

According to s 8, even if the conduct of the dominant firm creates an anti-competitive effect, that conduct might still be justified if it was necessary to create some technological, efficiency or other pro-competitive gains that outweigh its anti-competitive effect. It is the proof of pro-competitive gains that may show the respondent's conduct to be vigorous competition rather than an abuse of dominance. Any pro-competitive gain pleaded by the respondent must be directly related to, and dependent upon, the conduct under investigation such that the gains could not otherwise be achieved –it is the *sine qua non*.<sup>208</sup> If there are non-infringing alternatives that can achieve the effect, the gain will be rejected.<sup>209</sup>

The pro-competitive gains must be weighed against the anti-competitive effect of the act. These gains and effects will most often be conceptual rather than directly quantifiable: it is always difficult to establish just how much of a financial effect is attributable to a certain act.<sup>210</sup> While the CAC has held that it is competition and not customers that must benefit from the conduct, it is argued that the better view is probably that the extent of benefit to the relevant customers should be weighed against harm to other participants in the market.<sup>211</sup> It is also argued that the courts should take into account a dynamic view of the market.<sup>212</sup> While it may seem fitting to force a dominant firm to make certain supplies or concessions to its rival on a static view of the market, the court should consider whether such an order would ultimately harm the market by removing the incentive for dominant firms to make beneficial investments.<sup>213</sup>

It will be appropriate to place my discussion on exclusionary conduct as done earlier with the US and EU approaches into context by assessing how the general clause in s 8 has been applied in practical terms by the Court in terms of refusals to

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<sup>207</sup> *Ibid.*

<sup>208</sup> *Patensie Citrus* (note 171) at para 30.

<sup>209</sup> *Ibid* at para 32.

<sup>210</sup> Sutherland (note 164) at pg 7-58.

<sup>211</sup> *Patensie* (note 171) at 32.

<sup>212</sup> *Op cit* note Sutherland at 210.

<sup>213</sup> *Ibid.*

deal in s 8(d)(i).

### 3.3. Refusals to Deal under the South African Competition Act

To succeed in a claim of refusal to deal under the South African provision, the complainant must prove that the respondent is a dominant firm, the respondent required or induced a supplier or customer not to deal with a competitor and the act had an anti-competitive effect.<sup>214</sup> The respondent in defence can show that the pro-competitive gains outweigh the anti-competitive effect.

The Competition Tribunal's most detailed analysis of the abuse provisions to date concerned a case of inducement not to deal in *Competition Commission v South African Airways (SAA) (Pty) Ltd.*<sup>215</sup> The case concerned the legality of two incentive schemes which the respondent, SAA, South Africa's largest domestic airline had with two travel agents. The commission alleged that the incentives constituted an abuse of dominance designed to exclude or impede SAA's rivals in the domestic airline market.<sup>216</sup> The first consideration for the Tribunal was to identify the relevant market. In this case, there were two possible relevant markets which were interdependent, the travel agency sales domestic travel market and the market for domestic airline travel.<sup>217</sup> The Tribunal found that both markets existed and after having considered whether SAA met the dominance percentage as prescribed by the Act, it found that the SAA was dominant in both markets.<sup>218</sup> The Tribunal found that there is nothing in the Act that suggests that an abuse of dominance cannot be perpetrated in one market and the effect experienced in another related market.<sup>219</sup>

To determine abuse as stated earlier, there must be a violation of Section 8 and in this case, the commission alleged a violation of s 8(c) and (d) (i). The court found that the onus of proof of the s 8(d) was on the respondent while the complainant bore the onus to negate in s 8(c).<sup>220</sup>

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<sup>214</sup> Ibid at pg 7-59.

<sup>215</sup> 18/CR/Mar01.

<sup>216</sup> Ibid para 1.

<sup>217</sup> Ibid para 33.

<sup>218</sup> Ibid para 94.

<sup>219</sup> Ibid para 36.

<sup>220</sup> Ibid para 99.

The next question that the Tribunal had to consider was whether an exclusionary act could be presumed to have an anti-competitive effect. This question was quite an important one since both the USA and the EU had different approaches to this question. It is useful to consider the approach of these two competition giants while evaluating the South African approach. To answer this question, the Tribunal considered the purpose of abuse of dominance prohibition under the Act. It identified two species of abuse of dominance. The one kind termed exploitative abuse focuses on the effect of the abuse on the consumer who in consequence of the output decisions of the dominant firm may be facing output constraining behaviour which leads to higher prices.<sup>221</sup> The other kind is an abuse that has an exclusionary effect which is conduct that excludes growth of rivals in the market.<sup>222</sup>

Two positions have emerged in the USA on the first kind of abuse of dominance. The first approach is said to be favoured by the proponents of the Chicago school which requires that there must be a showing of harm to consumer welfare in order to make a conduct unlawful.<sup>223</sup> Absent such a showing, these proponents contend that there is a danger that the courts will mistake protecting competitor benefits for consumer welfare.<sup>224</sup> The US Court of Appeals in the *Virgin Atlantic v British Airways*<sup>225</sup> case supported this approach. This case is similar to the *South African Competition Commission v SAA* case as it also dealt with an alleged abuse of dominance by an airline, British Airways, engaging in predatory business practice through the use of incentive agreements with travel agencies to stifle competition. Virgin Airways alleged that the incentive agreements by British Airways offered below cost pricing and thus attracted passengers to British Airways' transatlantic flights and losses from these low cost pricing were recouped from flights where British Airways exercised monopoly power and could charge higher fares.<sup>226</sup> The net effect according to Virgin Airways was to impede Virgin Airways' efforts to expand its service. The court in this case held that for Virgin Airways to show that British

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<sup>221</sup> Ibid para 114.

<sup>222</sup> Ibid para 115.

<sup>223</sup> Ibid para 118.

<sup>224</sup> Chang, Evans and Shumalensee, 'Has the Consumer harm standard lost its teeth? High Stakes AntiTrust The last Hurrah?' Brookings Joint Centre for Regulatory Studies USA.

<sup>225</sup> U.S. 2<sup>nd</sup> Circuit Court of Appeals 99-9402.

<sup>226</sup> Ibid pg 3.



Airways engaged in an unreasonable restraint of trade, it had to ultimately show that British Airways' actions had a competition-reducing effect harming consumers.<sup>227</sup>

The second approach is to find liability if there is evidence that the exclusionary behaviour will lead to substantial market foreclosure.<sup>228</sup> Writers who support this approach are concerned that if harm to consumer welfare were the standard, competition law would be under-deterrent because evidence of harm to consumer welfare is difficult to prove.<sup>229</sup> This approach finds favour from *Fishman v Wertz*<sup>230</sup> where the court held that competition law protects competition and the competition process, not results.

This second approach is consistent with the position of the EU. According to Soames, the European Commission is more willing to assume harm based on potential adverse effects on a competitive process that is perceived to have long run benefits.<sup>231</sup> In other words, there is a tendency to protect the structure of competition in the market rather than protect against losses to consumer welfare in the short term.<sup>232</sup> This is based on the belief that harm to the competitive process will indirectly cause anticompetitive harm.<sup>233</sup> This was the position of the European Court of Justice in the case of *British Airways v Commission of the European Communities*.<sup>234</sup> This case is also similar to the South African and America Airline cases as it concerned an allegation of abuse of dominance by Virgin Airways that British Airways was using marketing and incentive agreements with travel agents to distort competition. The Commission for European Communities agreed that British Airways abused its dominant position in the United Kingdom market for air travel agency services which had an effect of distorting competition between British Airways and other airlines on the United Kingdom markets for air transport services.<sup>235</sup>

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<sup>227</sup> Ibid pg 8.

<sup>228</sup> Op cit note 215 at para 121

<sup>229</sup> Ibid.

<sup>230</sup> Ibid para 123.

<sup>231</sup> Trevor Soames 'Towards a "smart" Article 82' Fordham 32<sup>nd</sup> Conf. on International Antitrust Law and Policy, para 4.23 pg 20.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> First Chamber Case T-219/99.

<sup>235</sup> Ibid para 24 & 26.

The Court of the European Communities held on appeal that the BA could not accuse the commission of failing to demonstrate that its practices produced an exclusionary effect. According to the Court, for the purposes of establishing an infringement under Art 82 of the European Community Treaty prohibiting abuse of dominance, it is not necessary to demonstrate the abuse in question had a concrete effect on the markets concerned.<sup>236</sup> It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or in other words, that the conduct is capable of having or likely to have such an effect.<sup>237</sup>

According to Eleanor Fox, what the Courts are doing when they find behaviour to be anti-competitive in the absence of harm to the consumer is essentially consciously or sometimes unconsciously making inferences of fact and law and sometimes, mixed fact and law to arrive at findings of competitive harm by way of proxy.<sup>238</sup> She goes on further to state that Courts may find as a matter of fact that a business practice is exclusionary and the practice has the potential to foreclose the market for competitors of the dominant firm.<sup>239</sup> As a matter of inference according to her, Courts may find that there is a likelihood of competition being foreclosed and such foreclosure will have an adverse impact on competition.<sup>240</sup> Such inference according to Fox is legal.

In light of the consideration from the American and European jurisdiction, the Tribunal in South Africa adopted the following approach; it concluded that an anti-competitive effect is different from an exclusionary act.<sup>241</sup> To determine whether an exclusionary act has an anti-competitive effect, the question will be answered in the affirmative if there is (1) evidence of actual harm to consumer welfare or (2) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.<sup>242</sup> According to the Tribunal, the latter conclusion is factual and

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<sup>236</sup> Ibid para 293.

<sup>237</sup> Ibid.

<sup>238</sup> Fox 'What is harm to Competition? Exclusionary Practices and Anti-Competitive Effect' 70 *Anti-Trust L.J.* 371.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> *Competition Commission* case para 136.

<sup>242</sup> Ibid para 132.

partly based on reasonable inferences drawn from proven facts.<sup>243</sup> If the answer to the question is affirmative, according to the Tribunal, it can conclude that the conduct will have an anti-competitive effect and whether the anti-competitive effect is based on actual harm or likely foreclosure, there is evidence of a quantitative nature that can allow a measurement against the efficiency justification clause in s 8(d).<sup>244</sup>

It is argued that the South African Courts should avoid taking a mechanistic view of foreclosure based on percentages of the market foreclosed, and instead focus on the likely effect of the exclusion of the dominant firm's rivals and, in particular, whether there is any genuine pro-competitive explanation for the exclusion.<sup>245</sup>

From the discussion in this paper so far, it can be established that the South African approach to exclusionary conduct has been a hybrid approach combining both the American and the European approaches to exclusionary conduct in abuse of dominance. Proponents of the European approach rejected the American approach of proof of adverse effect to the consumer as too strict and difficult to prove. South Africa's hybrid approach of proof of adverse effect or likelihood of foreclosing competition is an attempt at playing safe the game of regulation by pleasing both the big firms who advocate the American approach and those who argue that the Courts should develop the law in line with the conservative objectives of the Competition Act of 1998. Such an approach is simply not favourable for developing economies as it allows the possibility of dominant firms to get away with exclusionary practices should they successfully convince a Court that the facts of a particular case warrant adopting the approach of proof of adverse effect to the consumer.

Having discussed the tests for exclusionary practices in detail, it is appropriate to discuss the practical application. This thesis acknowledges that competition law is still foreign to African economies and makes the argument for the adoption of competition law on a regional level to police the largely unregulated African market where cartels are free to engage in exclusionary practices at will and national governments lack the resources or will to adopt competition law on a national level. This thesis studies the extraterritorial application of competition law in the EU and

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<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Sutherland (note 164) at pg 7-63

USA to advance the argument that if competition laws are adopted as already done in COMESA on a regional level, such laws can function effectively using the extraterritoriality rule. The applicability of this rule is discussed in the next chapter.

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## Chapter 4

### The Extraterritoriality Rule

#### 4.1. International Public Law on Extraterritoriality

The limits upon a State's jurisdictional competence and therefore upon its ability to apply its competition laws to overseas undertakings are matters of public international law. There are two elements to a State's jurisdictional competence. First, a State has jurisdiction to make laws through its arms of government and this is known as a State's subject-matter jurisdiction.<sup>246</sup> Secondly, a State has jurisdiction to enforce its laws and this is referred to as enforcement jurisdiction.<sup>247</sup> Based on the principles of nationality and territoriality, the extraterritorial application of competition rules is ensured through the use of three legal constructs, namely the economic entity doctrine, the implementation doctrine and the effects doctrine.<sup>248</sup> The former two doctrines are established under the EC law and in the absence of formal recognition by the ECJ, the status of the effects doctrine remains unresolved.

The nationality principle enables national legislatures and courts to have jurisdiction over their citizens whether juristic or natural persons concerning illegal acts abroad.<sup>249</sup> The territoriality principle provides that national legislatures and courts have jurisdiction to regulate acts which originated and/or was completed within their own territory whether committed by citizens or foreigners.<sup>250</sup> The rationale for this is that a country where the illegal act is committed has the strongest interest in prosecuting or obtaining recompense from those responsible. The territoriality principle has been extended to acts which originate within its territory, that is subjective territoriality and acts which originated abroad but completed within its territory, which is objective territoriality.<sup>251</sup>

The principles of nationality and territoriality have implications for the applicability of competition law in the US and the doctrines of economic entity,

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<sup>246</sup> Richard Whish, *The international dimension of competition law*, Competition Law (6<sup>th</sup> Ed), (2008) Oxford University Press chapter 12 at pg 472.

<sup>247</sup> Ibid.

<sup>248</sup> Geradin, Reysen and Henry, 'Extraterritoriality, Comity and Cooperation in EC Competition Law' pg 1.

<sup>249</sup> Op cit note Whish at 246.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

implementation and effects are also relevant. For instance, the idea of objective territoriality can be applied to the effects of an agreement entered into or an anti-competitive act committed in another State.<sup>252</sup> The effects doctrine has been embraced in the USA in the case of *United States v Aluminium Co of America* where the Court held that it is settled law that any State may impose liabilities even upon persons not within its allegiance for conduct outside its borders which has consequences within its borders which the State reprehends.<sup>253</sup> Some US Courts drawing on the principle of judicial comity have attempted to apply the effects doctrine in a relatively restrictive way, requiring not only that there should be a direct and substantial effect within the US, but also that the respective interests of the United States in asserting jurisdiction of other States which might be offended by such assertion would be weighed against one another.<sup>254</sup> Various factors relevant to comity analysis include<sup>255</sup>

- the relative significance of the alleged violation of the conduct within the US as compared to conduct abroad
- the nationality of the persons involved or affected by the conduct
- the presence or absence of an intention to affect US consumers, markets or exporters
- the relative significance and foreseeability of the effects on the US compared to the effects abroad
- the existence of reasonable expectations that would be furthered or defeated by the action
- the degree of conflict with foreign law or articulated by foreign economic policies
- the extent to which the enforcement activities of another country may be affected and the effectiveness of foreign as opposed to US enforcement.

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<sup>252</sup> Ibid.

<sup>253</sup> 148 F.2d 416 (2<sup>nd</sup> Circuit 1945), pg 444.

<sup>254</sup> Fox 'Reasonableness and Extraterritoriality' (1986) *Fordham Corporate Law Institute Journal*, pg 49.

<sup>255</sup> The DoJ/FTC International Guidelines, para 3.2.

The principle of comity has also been recognised by the European Court of First Instance in *Gencor v Commission case*.<sup>256</sup> I will first discuss the extraterritorial application in the US and EU jurisdictions for referral purposes before discussing the Common Market for Eastern and Southern Africa (COMESA) Competition Regulation which is the relevant legislation for the analysis in this section.

#### **4.2. Extraterritorial Application of US Competition Law**

In the *American Banana v United Fruit Company*<sup>257</sup> case, the defendant, a US corporation engaged in all sorts of anti-competitive acts in Latin America for several years which essentially gave it monopoly over the US banana market. The plaintiff who was also a US corporation then entered into the banana market but the defendant tried to force it into complying with its monopoly practices which was essentially cartel behaviour but the plaintiff refused. The defendant then conspired to drive plaintiff out of business by persuading the government of Costa Rica to take over the plaintiff's land and the plaintiff reacted by bringing a Sherman Act claim to a US Court. The court held that there is a presumption that all legislation is prima facie territorial and the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.<sup>258</sup> The court further said, "for another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other State concerned justly might resent".<sup>259</sup>

In the *Alcoa* case, the issue was whether US antitrust laws could impose liability upon foreign companies who concluded agreements outside US that violated US antitrust laws. The court held that the US has jurisdiction where there's both intent to affect US commerce and actual effect.<sup>260</sup> It appears that the requirement of intent to affect and actual effect must both be present for jurisdiction to exist. The decision of the court in *Alcoa* which extended the jurisdiction of the court for conduct outside its

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<sup>256</sup> [1999] ECR II-753 (CFI).

<sup>257</sup> 213 U.S. 347 (1909).

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Note 256.

borders which has consequences within its borders was a significant departure from the *American Banana* case.

In the *Hartford Fire Insurance Co v California*<sup>261</sup> case, there was a group of foreign and domestic companies engaged in various conspiracies to affect the American Insurance market. The question before the court was whether the principle of international comity requires US courts to refrain from exercising jurisdiction over certain claims against foreign companies under the Sherman Act. The court reaffirmed the decision of *Alcoa* and stated also that no comity conflict exists “where a person subject to regulation by two states can comply with the laws of both States even if one law is more onerous than the other and the State with the less restrictive law objects.”<sup>262</sup> In a dissenting opinion, Judge Scalia stated that comity is a presumptive interpretive rule to be applied by courts when considering the legislative intent behind an Act with regard to extra territorial application.<sup>263</sup> It is not an invitation for the courts to practice “adjudicative comity”.<sup>264</sup>

In the case of *Hoffman-La Roche v Empagran*<sup>265</sup>, a claim was brought under the Sherman Act by a mix of US and foreign parties alleging harm suffered in US and abroad from a price fixing scheme of a vitamins cartel. The court had to consider an application of the Foreign Trade Amendment Act 1982. The question before the court was whether foreigners who suffer harm in foreign countries as a result of violations of US antitrust laws can sue for damages in US courts? The court concluded that as plaintiffs had suffered harm not in the US but in Ukraine, Panama, Australia and Ecuador, they could not sue in the US.<sup>266</sup> The court however left open the question of whether the foreign plaintiffs could sue in the US if the foreign injury that they had suffered was inseparable from the domestic harm caused by the cartel to customers in the US.<sup>267</sup> The court further held that the Sherman Act and the Foreign Trade Amendment Act cannot apply because Courts should ordinarily

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<sup>261</sup> 509 US 764 (1993).

<sup>262</sup> Ibid.

<sup>263</sup> ibid pg 800.

<sup>264</sup> Ibid.

<sup>265</sup> 542 US 155, (2004) .

<sup>266</sup> Ibid.

<sup>267</sup> Ibid pg 7.



construe statutes to avoid unreasonable interference with sovereign authority of other nations.<sup>268</sup>

#### **4.3. The Extraterritorial Application of European Community(EC) Competition Law**

Many non-EC undertakings have been held to have infringed competition rules. The court of justice has not yet ruled specifically whether there is an effects doctrine under EC law since it has always been possible in cases under Art 81 and 82 to base jurisdiction on other grounds such as the economic entity doctrine.<sup>269</sup> In the *Dyestuffs* and *Wood Pulp* cases, the question of whether EC law should recognise the effects doctrine was argued at length but the ECJ was able to avoid pronouncement on the issue.

The *Dyestuffs*<sup>270</sup> case represents the decisive EC case as far as the economic entity doctrine is concerned. On the basis of the nationality principle, jurisdiction was asserted over non-EC parent undertakings by attributing liability to them for the illegal price fixing of dyestuffs by their subsidiaries located in the EC over which the non-EC parent undertaking exercised control.<sup>271</sup> Objection was raised to the commission's jurisdiction on the basis that a parent company with offices outside the community should not be liable for fines solely by reason of effects produced within the community by actions taken outside the community. It was argued that conduct should be attributed to a subsidiary company within the community and not the parent company outside the community. The court came to the conclusion that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.<sup>272</sup> Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit.<sup>273</sup> According to the *Dyestuffs* line of case law, the crux of the issue is to check the extent to which a non-

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<sup>268</sup> Ibid pg 6.

<sup>269</sup> Whish (note 246) at pg 478.

<sup>270</sup> 1972 (ECR) 619 .

<sup>271</sup> Geradin (note 243) at pg 4.

<sup>272</sup> Note 270 at para 132.

<sup>273</sup> Ibid para 134.

EC parent undertaking controls its subsidiaries located in the EC in order to establish a single economic entity.<sup>274</sup>

The implementation doctrine represents an alternative legal construct as far as the extraterritorial application of EC competition law is concerned, its advent reflecting the inherent limitations of the economic entity doctrine because it could not be stretched to catch purely non-European players.<sup>275</sup> This doctrine is based on the territoriality principle and practices fall within Article 81 and 82 irrespective of the geographic origin provided they are implemented within the European Community.<sup>276</sup>

In the *Wood Pulp* case, the jurisdiction of the commission was again objected to on the basis that no price-fixing agreement was concluded within the EC and companies alleged to have engaged in price fixing were all located outside the EC.<sup>277</sup> The commission in finding that there was a concerted practice between undertakings in several non-EC countries held that jurisdiction could be based on the effects of the concerted practice in the EC.<sup>278</sup> The court however also held that on the facts of the case, the agreement had been implemented within the EC and it was unnecessary to have recourse to the effects doctrine.<sup>279</sup> The court held that object and effect of agreement was to restrict competition within the EC because where non-EC producers sell to EC buyers at pre-fixed prices, agreement is implemented within the EC.<sup>280</sup> The court stated that the exercise of the commission's jurisdiction was consistent with the territoriality principle as it was triggered by the implementation of the agreement within the EC.<sup>281</sup>

The court further held that

“It should be observed that an infringement of Article [81], such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the *formation* of the agreement, decision or concerted practice and the *implementation* thereof. If the applicability of

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<sup>274</sup> Geradin (note 248) at pg 5.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

<sup>277</sup> (1988) 4 CMLR 901.

<sup>278</sup> Ibid paras 11-23.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Ibid.

prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented. The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community. Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law".<sup>282</sup>

The adoption of the effects doctrine was however supported in the *Wood Pulp* case in the opinion of Advocate Darmon who stated that

"a State has jurisdiction to prescribe rules of law governing conduct that takes place outside its territory and causes an effect within its territory provided that three conditions are satisfied: (a) the conduct and its effect are constituent elements of a restrictive practice, (b) the effect within the territory is substantial, and (c) it occurs as a direct and primarily intended result of the conduct outside the territory."<sup>283</sup>

According to *Wood Pulp*, therefore, the criterion as to the implementation of an agreement is satisfied by mere sale within the community and the jurisdiction of the community will be triggered.

Though the effects doctrine has been recognised and accepted by the commission, there has been no explicit judgment affirming the doctrine. In the *Gencor v Commission* case, the territorial scope of the European Community Merger Regulation (ECMR) vis-à-vis a proposed concentration notified by undertakings whose registered offices and mining operations were outside the community was at issue.<sup>284</sup> Gencor had objected that the Commission did not have jurisdiction under the ECMR to prohibit activities in South Africa especially where those activities were approved by the government of South Africa. The commission had prohibited the merger on the basis that it would have created a dominant duopoly as result of which effective competition would be significantly impeded in the common

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<sup>282</sup> Ibid paras 16-18.

<sup>283</sup> Ibid para 57.

<sup>284</sup> (1999) ECR II-753, para 90.

market.<sup>285</sup> The Court held that on the territorial scope of the ECMR, the *Wood Pulp* judgment requiring implementation within the community did not contradict the commission's assertion of jurisdiction in this case.<sup>286</sup> The court also held that the application of the ECMR was justified where the proposed merger will have an immediate and substantial effect within the community.<sup>287</sup> This judgment is of immense significance because the court also did not adopt the effects doctrine since it determined the subject-matter jurisdiction on the basis of turnover thresholds in the ECMR and equated them to the implementation doctrine in the *Wood Pulp* case.

There has been significant resistance to extraterritoriality by a number of jurisdictions. The US *Alcoa* case set off a number of governmental reactions which objected to the extraterritorial application of US antitrust laws.<sup>288</sup> Several countries have passed blocking statutes whereby they attempt to thwart excessive assumptions of jurisdiction. It must be remembered though that States have no power to block subject matter jurisdiction of other countries. There are no provisions in EC law which have this effect.<sup>289</sup> The commission considers that this is essentially a matter for the governments of the individual member states.<sup>290</sup> The United Kingdom (UK) has been the most vocal objector to extraterritorial jurisdiction. The UK Protection of Trading Interests Act<sup>291</sup> is a blocking statute that applies in any case in which foreign law is being applied in a way that could harm UK's commercial interests.

There have been a considerable number of internationalization efforts largely through the Organization for Economic Cooperation and Developments (OECD) and United Nations Conference on Trade and Development (UNCTAD). There have also been some bilateral and regional international cooperation agreements mostly among developed countries. I believe that the internationalization efforts in competition law should also be extended to Africa in an age where there are increasing numbers of multinational institutions operating across the continent with most African countries ill-equipped to regulate the activities of these companies. It is suggested that as long as competition laws cannot be implemented successfully at the national levels due to

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<sup>285</sup> Ibid para 96.

<sup>286</sup> Ibid paras 78-82.

<sup>287</sup> Ibid.

<sup>288</sup> Whish (note 246) at pg 487.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

<sup>291</sup> 1980.

lack of resources, and in order to ensure stability on the continent where companies are becoming more dominant and foreign investment keeps flowing in, competition law should be regulated on a regional level. Such a law if adopted on a regional level can only apply and be effective if it has extraterritorial application. These raises questions such as how enforcement efforts of various jurisdictions will be coordinated and how jurisdictional and policy conflicts between countries will be addressed. The rest of this section will be devoted to exploring the solutions to these questions. I will use COMESA's attempts at regulating competition law on a regional level as a case study in making my recommendations.

#### **4.4. Competition Cooperation in the COMESA Regional Trade Agreement**

Of all the regional trade groupings of developing countries, COMESA is probably the most advanced in the provision of a framework for cross-border and international cooperation in competition matters through its formulation and adoption of a regional competition policy and law, even though the competition authority to implement that policy and law is still to be established.<sup>292</sup> The regional competition law was formulated and adopted in accordance with the provisions of Article 55 of the COMESA Treaty, which prohibits any practice which negates the objective of free and liberalised trade, including “any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market”. It also provides for the adoption of regulations aimed at regulating competition within the member States. Competition rules were adopted by the Council of Ministers in 2004. Current members of the bloc include Burundi, Comoros, Democratic Republic of Congo (DR Congo), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.<sup>293</sup>

The preamble to the COMESA Competition Regulations clearly spells out the broad objectives and aims of the regional competition law in addressing competition

<sup>292</sup> UNCTAD 2006 ‘Analysis of cooperation and dispute settlement mechanisms relating to competition policy in regional free trade agreements, taking into account issues of particular concern to small and developing countries.’ Available at [http://www.unctad.org/sections/wcmu/docs/c2clp\\_ige7p1\\_en.pdf](http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p1_en.pdf) (accessed on 15th June 2009) pg 4.

<sup>293</sup> Briefing paper ‘Taking the Right Steps Competition Administration in Eastern & Southern Africa.’ Available at <http://www.cuts-ccier.org/7up3/pdf/BriefingPaper01-2008.pdf> [accessed on 15th June].

concerns of a cross-border nature. The preamble also recognizes the need for Member States to give effect to the principles of regional competition regulations and rules and to use moderation and self-discipline for co-operation in the field of anti-competitive business practices.<sup>294</sup> It also indicates various forms of cooperation in areas such as: (i) elimination of restrictive business practices that affect trade between the member States; (ii) consultations and conciliation on matters related to anti-competitive practices affecting regional and international trade; (iii) notification, exchange of information, co-ordination of actions and consultation among member States in the enforcement of competition law; and (iv) relationship between national competition authorities and the regional authority.<sup>295</sup> The Regulations goes on further to state the purpose of the regulations “to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors”.<sup>296</sup>

Interestingly, the COMESA competition regulations are based on the EC competition law regime but also on the domestic competition rules that already exist in some Member Countries, such as, Zimbabwe, Kenya, Zambia and Malawi.<sup>297</sup> The COMESA Regional Competition Policy is intended to harmonize existing national competition policies to avoid contradictions and provide a consistent regional economic environment. These Regulations apply to all economic activity conducted by both private and public entities within or having an effect within the common market except for those activities provided under Article 4.<sup>298</sup> The Regulations cover all possible anti-competitive practices (inclusive of anti-competitive agreements, abuse of dominance, and anti-competitive mergers and acquisitions). Horizontal

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<sup>294</sup> Preamble ‘COMESA Competition Regulations 2003.’ Available at [https://www.givengain.com/unique/tralac/pdf/Comesa\\_competition\\_regulations\\_feb2003.pdf](https://www.givengain.com/unique/tralac/pdf/Comesa_competition_regulations_feb2003.pdf) [accessed on 15th June 2009].

<sup>295</sup> UNCTAD 2006, (note 292).

<sup>296</sup> Article 2 of the COMESA Competition Regulations Treaty.

<sup>297</sup> Damien Geradin *Competition Law and Regional Economic Integration: An analysis of the Southern Mediterranean Countries* 2004 at 17.

<sup>298</sup> Art 4 lists the following exclusions: (a) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment; (b) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members; (c) activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public interest.

agreements between direct competitors are outrightly, or *per se*, prohibited under the Regulations.<sup>299</sup>

Abuse of a dominant position is also prohibited under the Regulations as incompatible with the Common Market in so far as it may affect trade between Member States, if it: (i) restricts, or is likely to restrict, the entry of any undertaking into a market; (ii) prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market; (iii) eliminates or removes, or is likely to eliminate or remove, any undertaking from a market; (iv) directly or indirectly imposes unfair purchase or selling prices or other restrictive practices; (v) limits the production of goods or services for a market to the prejudice of consumers; (vi) as a party to an agreement makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement; or (vii) engages in any business activity that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market.<sup>300</sup>

The COMESA Competition Regulations therefore have adequate provisions to deal with exclusionary conduct and any anti-competitive practices that distort competition in the Common Market. In particular, the Regulations are geared to effectively deal with anti-competitive practices of multinational companies based in foreign countries but with subsidiaries operating in the Common Market.<sup>301</sup> They are also geared to deal with global mergers, and even international cartels.

While efforts are currently being made at cooperation at bilateral level in the handling of competition cases with cross-border effects, these have been found not to be enough. For example, the global *Coca-Cola/ Cadbury-Schweppes merger* was examined by two countries in the region, Zambia and Zimbabwe. Even though the competition authorities of the two countries examined the merger separately in so far as it affected their respective markets, there was constant exchange of information on the common features of the transaction, such as the intentions of the merging parties and the possible effects on the relevant beverages markets, between the two

<sup>299</sup> UNCTAD 2006, (note 292) at pg 5.

<sup>300</sup> Art 18(1) of the COMESA Competition Regulations Treaty.

<sup>301</sup> Op cit note 299.

authorities in order to ensure that the outcomes of their respective examinations did not adversely affect each other's markets.<sup>302</sup> The cooperation between the two competition authorities ensured that adequate conditions were placed on the approval of the merger in both countries. In the case of Zimbabwe, the merger was approved on condition that the local Cadbury-Schweppes bottling plant be modernised and used for empowerment purposes, and also that the local beverage brands, the Mazoe and Calypso brands owned by Cadbury-Schweppes, be developed into regional and international brands.<sup>303</sup>

It is however known that the global merger not only affected Zambia and Zimbabwe in the COMESA region but also a number of other countries, who unfortunately were unable to examine the transaction because of a lack of national competition law and authority and thus did not have the opportunity of imposing developmental conditions on its approval.<sup>304</sup> A regional approach to the global merger could therefore have ensured maximum benefits to the whole region. It is also noted that with the progressive reduction and eventual elimination of tariffs in trade between COMESA member States, most trade disputes between member States will be related to non-tariff barriers to trade.<sup>305</sup> Since most, if not all, non-tariff barriers to trade are exclusionary in nature, it is submitted that such practices could effectively be dealt with under the abuse of dominance provisions of the COMESA Competition Regulations.

#### **4.4. Proposed Recommendations**

COMESA's efforts at regulating competition on a regional level must be applauded. It is no secret that virtually all member countries of COMESA are at a developmental state so far behind when comparing them to members of the EU. This poses different forms of challenges in regulating competition significantly different from the experiences in the EU. A challenge that will face COMESA unlike the EU is the current non existence of national competition legislation in some of the member countries. This gives rise to problems of implementation and enforcement which will severely handicap the effectiveness of the COMESA Competition

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<sup>302</sup> Ibid at pg 6.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid pg 7.



Regulations. It is recommended that while the adoption of the Regulation is a positive step in the right direction, it is very crucial that all member countries should ratify and adopt the treaty in order for it to be expressly binding and applicable in their respective national jurisdictions. Furthermore, a regional Competition Commission with supra national powers similar to institutions established by the African Union should be established to carry out enforcement measures based on the regulations. Such a commission will be able to overcome institutional difficulties in enforcing competition laws such as excessive bureaucracy, corruption and lack of transparency, lack of resources and professional expertise within the competition authority.

I recognise the fact that there may be a potential problem whereby a conflict arises between economic policies of different countries and the commission has to make a decision on a conduct that affects multiple countries which is acceptable in one country and not the other. Such a situation will have to be dealt with on a case by case basis with the need for member countries to be proactive in their cooperation on competition related matters. It will also be helpful if the commission can be endowed with conciliatory powers to sanction supervised talks in cases such as this between member countries to resolve such conflicts. It is only when conciliatory efforts fail should the commission make decisions that are tailor made in such a way that the policies of the countries involved are respected based on the principles of comity earlier discussed in this chapter.

Also, taking into consideration my earlier discussion on extraterritoriality in the USA and EC in this section, significant hurdles that a competition law with a regional scope can overcome will involve the adoption of the implementation and the effects doctrine as suggested by Advocate Darmon in the *Wood Pulp* case. It is only then that the true efficiency benefits of the competition regulations can be fully maximised.

A vital question to consider next is how public interest should play a role in developing a suitable approach to exclusionary practices in abuse of dominance. South Africa will be used as case study again. This is necessary considering the fact that efficiency justifications serve as a defence for exclusionary practices and there

are conflicting interests between the objectives of efficiency and the objectives of public interest in South Africa's Competition Act.

University of Cape Town

## Chapter 5

### The Role of Public Interest

The preamble of the Competition Act recognises that South Africa's discriminatory past resulted in a skewed distribution of ownership and control, inadequate restraint on anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.<sup>306</sup> It acknowledges that the economy should be open to greater ownership by a greater number of South Africans and that a credible competition law and effective structures to administer that law are necessary for an efficient functioning economy.<sup>307</sup> It stresses that "an efficient, competitive economic environment, balancing the interest of workers, owners and consumers and focused on development" will benefit all South Africans.<sup>308</sup>

The preamble of the Competition Act states that the Act is enacted to:

1. provide all South Africans equal opportunity to participate fairly in the national economy;
2. achieve a more effective and efficient economy in South Africa;
3. provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
4. create greater capability and an environment for South Africans to compete effectively in international markets;
5. restrain particular trade practices which undermine a competitive economy;
6. regulate the transfer of economic ownership in keeping the public interest;
7. establish independent institutions to monitor economic competition;

The overall purpose of the Competition Act is to promote and maintain competition, in order

- ‘(a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;

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<sup>306</sup> Preamble to the Competition Act of 1998.

<sup>307</sup> Sutherland (note 164) at pg 4-3.

<sup>308</sup> Ibid.

- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.<sup>309</sup>

Academic scholars argue that it will be difficult to balance the equitable goals of the Competition Act (the Act) with the objectives of efficiency also listed in the purpose of the Act. Many competition lawyers have been critical of the notion that competition law should protect small undertakings and promote the spread of ownership as this may undermine efficiency.<sup>310</sup> They claim that increases or decreases in competition depend on the efficiency of firms in a particular market and not on the size or large number of these firms.<sup>311</sup> The notion that competition law should assist in redressing the injustices of South Africa's past is unique to South Africa, yet it may be equally difficult to achieve this without any cost to efficiency, especially in the short term.<sup>312</sup> Nevertheless, the Act does not give South African competition lawyers a choice but to grapple with a multitude of goals.

According to Eleanor Fox, if expectations are high that South Africa's new competition law will visibly change the terms of economic participation in favour of the historically repressed black majority in South Africa, they are likely to be unfulfilled.<sup>313</sup> The statutory endorsement of both efficiency and equitable goals means that South Africa has to be cautious of foreign and especially American authorities that regard efficiency as the only goal of competition law.<sup>314</sup>

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<sup>309</sup> Section 2 of the Competition Act.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Eleanor Fox 'Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia' 2000 *Harvard Intl Law Journal* at pg 1

<sup>314</sup> *Mondi Ltd/Kohler Cores and Tubes* 20/CAC/Jun02 par 48.

The focus on small and medium-sized enterprises (SMEs) is important against the background of the structure of the South African economy.<sup>315</sup> High levels of concentration, and the conglomerate structure of business in many sectors from mining, to manufacturing and services, are important challenges for small business development in South Africa, besides the common challenges that SMEs face more generally.<sup>316</sup> According to Hartzenberg, the conglomerate structure of business in South Africa and the strong vertical linkages that exist in many industries can prove to be effective barriers to entry for smaller enterprises.<sup>317</sup> The goal of promotion of a greater spread of ownership, especially regarding historically disadvantaged persons, reflects the concerns about the unequal distribution of income and wealth in South Africa. South Africa for many decades was one of the most unequal distributions of income in the world, with strong racial lines affecting the distribution of income within the economy. Greater spread of ownership among the populace and the relevance of SMEs promoting equal distribution are deemed to be important to ensure longer-term balanced and sustainable development.<sup>318</sup>

The Act's preamble reverts to the political motivations behind the rationale for the policy reform process of the post apartheid government. The particular problems facing competition law and its effective enforcement, including practices, some of which were promoted and supported by apartheid policies and laws, led to high levels of concentration of ownership and control, inequitable constraints on economic participation by the majority of South Africans, and ineffective restraints on anti-competitive trade practices.<sup>319</sup> The Act articulates four pillars of public interest. These are small and medium enterprise development and black economic empowerment, employment, impact on a particular industry or region, and the ability of national industries to compete in international markets.<sup>320</sup> Perhaps the most distinctive pillar of the public interest in the South African competition legislation is empowering historically disadvantaged persons. The Competition Act, in this respect, echoes the focus in South Africa's Constitution on full and equal enjoyment

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<sup>315</sup> Trudi Hartzenberg 'Competition Policy and Enterprise Development: The Role of Public Interest objectives in South Africa's Competition Policy' pg 12.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid at pg 13.

<sup>319</sup> Ibid.

<sup>320</sup> Ibid at pg 31.

of all rights and freedoms, and enshrines the economic empowerment of black persons in South Africa in the Act.<sup>321</sup>

Although the inclusion of public interest issues in the Competition Act has been criticised, their inclusion has to be read in context. Some of the major challenges to sustainable development in South Africa are job creation and black economic empowerment. Explicit reference to these factors is thus to be expected in a significant area of policy and law such as competition and in some sense, it provides a balance of considerations in the challenge to develop a set of complementary policies and laws to facilitate enterprise development and the achievement of broader socio-economic objectives.<sup>322</sup> Competition law is very instrumental for effective market governance. The rules of the market game that include competition rules can enhance market outcomes by promoting not only the achievement of efficiencies, but also greater equity.<sup>323</sup> To this extent South Africa's competition law is progressive in its explicit incorporation of public interest considerations; whereas even mature jurisdictions shy away from such potentially contentious territory.

With South Africa's history, the inclusion of public interest concerns is justifiable. The nature of the South African economy, gross unequal distribution of income which ultimately results in the inequality of economic opportunity have to be addressed by a coherent set of policy initiatives.<sup>324</sup> A challenging question is to what extent different policies can impact on the promotion of small and medium sized enterprises and in particular what specifically can be the contribution of competition law in this regard.

The contribution of competition policy while in some cases being more indirect, can play an extremely important role in ensuring that SMEs, not only get access to specific market opportunities, but also do not fail because of anti-competitive practices.<sup>325</sup> Competition policy and the law which gives effect to this policy provide indispensable checks and balances to ensure that the market process works without being rigged by larger firms or firms that may have market power, which can be used

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<sup>321</sup> Hartzenberg (note 315) at pg 13.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid at pg 20.

<sup>325</sup> Ibid.

to the disadvantage of other market participants.<sup>326</sup> This does not mean that there should be no casualties of the market and the process of competition, but competition should be fair and without prejudice.

While it may be desirable to include public interest considerations explicitly to limit the scope of interpretation, care has to be taken both in the drafting of the law and in the implementation of that law. Efficiency and consistency in the implementation of competition law are very important advocacy tools in a developing country. There may be occasions where the promotion of public interest objectives will be better served by other policy interventions other than competition policy, and the competition authorities should be bold enough to hold back on interfering when such circumstances arise.

As stated earlier, the public interest objectives in South Africa are largely based on achieving equality and lessening of discrimination. It is therefore a valid exercise to ask if competition law can work as a means of advancing equality without substantially undermining market goals and without capture by private interests.<sup>327</sup>

In spite of the multiple public interest aspirations of the Act, majority of the body of the statute reflects relatively well-tested principles of competition law as discussed in chapter 3. For example, anti-competitive agreements are forbidden unless their pro-competitive and efficiency gains outweigh the anti-competitive concerns.<sup>328</sup> While the section concerning the abuse of dominance contains low market power thresholds, a firm can rebut the presumption by showing that it lacks market power.<sup>329</sup> Furthermore, a dominant firm must not engage in specified exclusionary acts such as using leverage to sell products and refusing to supply scarce goods to a competitor. The respondent however, can defend its conduct by showing that the pro-competitive and efficiency gains of its conduct outweigh the losses.<sup>330</sup> Dominant firms are prohibited also from engaging in price discrimination that is likely to substantially lessen competition. They can, however, use the usual defences of cost justification, meeting competition, and responding to changed market conditions

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<sup>326</sup> Ibid.

<sup>327</sup> Eleanor Fox (note 313).

<sup>328</sup> Chapter 2 of the Competition Act.

<sup>329</sup> S 7.

<sup>330</sup> S 8.

such as deteriorating perishable goods.<sup>331</sup>

A clause that is significantly different from standard competition law is the clause stating that Competition Tribunal may exempt for up to five years agreements otherwise prohibited if they contribute to "promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive."<sup>332</sup> The provisions allowing exemption for agreements that promote the competitiveness of firms owned or controlled by historically disadvantaged individuals reflect a bold approach. The concept is different in kind from mere prohibition of price discrimination and uses of leverage that block economic opportunity on the merits and even these prohibitions have fallen into disfavour under "efficiency antitrust."<sup>333</sup>

According to Fox, the availability of exemption for certain agreements and mergers could imply that South Africans are sometimes willing to pay a supra-competitive cartel price for goods and services as a cost of advancing the critical effort to bring more of the historically excluded population into the economic mainstream.<sup>334</sup> The Competition Tribunal is however not authorized to exempt an agreement unless the exemption is likely to help the recipients become more competitive for example, more efficient and effective in the marketplace.<sup>335</sup> The small margins for the grant of exemptions are perhaps reserved for the gray area within which the competitive effects of an agreement are ambiguous. According to Fox, the South African legislators may have succeeded in doing what Waelbroeck recommends: allowing discrimination based on economic considerations where it helps, not hurts, the market.<sup>336</sup> This result is made possible by the availability in the statute itself of pro-competitive justifications for anti competitive conducts.

The goals of equality and opportunity in the marketplace are often said to be inimical to competition and therefore not appropriate goals for a competition law.<sup>337</sup> Moreover, efficiency advocates assert that competition law is not a good tool to

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<sup>331</sup> S 9.

<sup>332</sup> Competition Act of 1998.

<sup>333</sup> Eleanor Fox (note 313) at pg 4.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Eleanor Fox (note 313) at pg 7.



obtain economic equality.<sup>338</sup> They claim that efficiency is seldom the objective of the legislators who enact competition laws; rather they focus on private power and how to contain its use and abuse.<sup>339</sup> Proponents of competition law are usually entrepreneurs who want a fairer shot in the marketplace.<sup>340</sup> Fox is of the opinion that the question of a competition law that favours the oppressed is not a question of why but why not.<sup>341</sup>

As the South African background statements imply, an economy that has been run by an elite that has suppressed the majority, may be unable to meet its efficiency potential until a substantial level of equality in fact has been achieved. Until the previously disadvantaged participate fully in the economy and enjoy the benefits, the efficiency potential of the nation will remain a tall order. Also, for the competition law of a developing country, goals are more important than efficiency. Achieving a more equitable distribution of opportunity may be one of such goals and a nation should have the right to make this choice.

Also, the use of public interest considerations to allow SMEs greater access to specific markets is significant in showing that developing countries can use equitable distribution goals to combat exclusionary practices by dominant firms and promote fairer competition.

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<sup>338</sup> *supra*

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*

## 6. Conclusion

This paper started off by reviewing the relevance and advantages of competition law for developing economies. I was able to establish that despite the challenges that developing countries might encounter in implementing and giving effect to competition laws, the advantages of having such laws to combat anti-competitive practices outweigh the scepticisms against the effectiveness of the law.

I considered in detail exclusionary conduct in abuse of dominant positions by first discussing US competition law, in particular section 2 of the Sherman Act with regard to monopolization and attempt to monopolize cases. I discussed the three dominant tests that have been propounded in evaluating this area of law in the USA, which are the profit sacrifice, no economic sense and consumer welfare tests. I went on to discuss Art 82 of the European Commission Treaty with regard to abuse of dominant positions taking into consideration important case law that has emerged in the community and the structural analysis approach that was propounded in the Gyeselen paper.

I proceeded to discuss the similarities and differences between the US and EU approaches highlighting the significant differences that the EC does not punish attempts to attain a dominant position neither does it take intent into account unlike the US approach. In a final analysis on this section, I used refusal to deal cases especially the *British Airways* cases decided in both jurisdictions to make comparisons.

The Competition Act of South Africa was the next section that I dealt with taking a critical look at Section 8. I went into detailed discussions about the specific meanings of phrases used in the section and undertook a careful analysis of the *Competition Commission v South African Airways* case by placing into context my analysis under refusal to deal cases as well.

I came to the conclusion that given the proposed tests under the American approach and the position adopted under the EC, it appears that South Africa has opted for a hybrid approach to dealing with exclusionary conduct under abuse of dominance without taking an exclusive position on proof of adverse effect or likelihood of foreclosing competition. I submitted that such an approach is simply

not favourable for developing economies as it allows the possibility of dominant firms getting away with exclusionary practices in cases where a Court is successfully convinced that the facts of a particular case warrant adopting the approach of proof of adverse effect to the consumer to the detriment of the objectives of the Competition Act which favours consumer welfare and protection.

The next section in this paper took a look at the extraterritorial application of competition law. I did so in order to evaluate the practical application of the competition rules earlier discussed in developing countries that have not enacted competition legislation. I evaluated both the US and EC approaches to extraterritoriality using case law to decipher the various approaches. The objective of this analysis was to lay a foundation to make a case for the regulation of competition law on a regional level which will have the effect of such law being implemented and applicable extraterritorially. I used the COMESA Competition Regulation as a case study to make recommendations that where competition law is adopted on a regional level, the implementation of the laws should be overseen by a commission with supra national authority and should also engage in a process of mandatory conciliation before arbitration in cases where State policies differ to enhance better cooperation among States on competition matters. I also suggested that the effects doctrine which has not been expressly adopted under the EC regime will be instrumental in successfully pursuing competition regulation on a regional level in Africa.

Finally, I placed my overall discussion into perspective by looking at the effect of public interest in combating exclusionary practices in developing economies. I used South Africa as a case study to determine whether it is indeed possible to balance typical competition law objectives of efficiency and equitable goals that a developing economy is most likely inclined to pursue when enacting competition laws. I came to the conclusion that while balancing these two objectives may be difficult in practice, pursuing equitable goals rather than efficiency through competition law does not undermine the effectiveness of the law to police anti-competitive practices.

I hope that this dissertation will be a useful contribution to the various campaigns and advocacy across Africa for the regulation of cartels and dominant firms through competition law.

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