ANTIMONOPOLY & UNILATERAL CONDUCT 2018 KNOW HOW

South Africa

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Overview

1 What is the legal framework governing unilateral conduct by companies with market power?

The Competition Act 89 of 1998 (the Act) addresses unilateral conduct by prohibiting a firm from abusing its dominant position in a relevant market. In terms of the Act, the following three issues need to be considered in determining whether a firm has abused its dominant position:

Jurisdiction

In order for the abuse of dominant provisions to be applicable, the Act must be of application in terms of section 3(1) of the Act: "The Competition Act applies to all economic activity within or having an effect within the Republic of South Africa."

In addition, section 6 of the Act provides that the abuse of dominance provisions do not apply to firms with a turnover or asset value below a particular threshold, which is currently 5 million rand. (See section 6 of the Act and GN 253 of 2001.)

Dominance

The abuse of dominance provisions contained in sections 8 and 9 of the Act will only apply if the firm is deemed to be "dominant" in terms of section 7 of the Act.

Prohibited conduct

In the event that the firm is found to be dominant in terms of section 7, the conduct in question must be assessed in light of sections 8 and 9 of the Act. Section 8 sets out conduct that constitutes an "abuse of dominance" and section 9 deals with "price discrimination" by a dominant firm.

Amendments to the Competition Act are expected – The Competition Amendment Bill, 2017 [B —2017] (the Amendment Bill) was published for comment on 1 December 2017. It is still in the comment stage. The Amendment Bill includes numerous proposed amendments in relation to the abuse of dominance provisions in the Competition Act.

2 What body or bodies have the power to investigate and sanction abuses of market power?

The institutions mandated to enforce the Act are the Competition Commission of South Africa (Commission), the Competition Tribunal (Tribunal) and the Competition Appeal Court.

The Commission is empowered to initiate complaints regarding abuses of dominance and to investigate such complaints lodged by itself or other complainants. Should the Commission, through its investigation, determine that any contravention has occurred, it will refer the complaint to the Tribunal for adjudication.

The Tribunal is an adjudicative body. The Tribunal also has inquisitorial powers in terms of the Act. It is empowered to decide on whether a contravention of the Act has occurred and impose a penalty or other appropriate remedy.

The Competition Appeal Court is a special division of the High Court, which has jurisdiction to hear appeals against the decisions of the Tribunal.

Monopoly power

3 What role does market definition play in market power assessment?

Market power is defined in terms of the Act as being "the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

To some extent one could assess market power with reference to the extent to which a firm can act unilaterally without having to conduct a complete market definition exercise, by reference to its price increases and profitability. In practice, however, to evaluate the reaction of competitors, it is necessary to define the market to identify competitors and market-wide pricing results.

4 What is the approach to market definition?

The competition authorities typically approach market definition by determining the degree of substitution between products and/or services, which indicates how closely they compete, and will analyse the following components of the "relevant" market:

Product market
The definition of a relevant product market involves an analysis of the products that are considered as substitutable, based on whether the products can serve the same purpose and for the same value for money.

Geographic market
The definition of a geographic market involves a consideration of the geographic area within which substitutable products compete. The Tribunal has in the past determined that it is posible that more than one geographic market can be identified as the relevant market/s – see Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd Case No. 68/LM/Aug06, para 35.

Functional market
The definition of a functional market involves analysing and identifying the level of the supply chain at which a company operates.

Methods to determine substitutability
The most commonly used method of determining substitutability is the SNIPP Test (Small but Significant Non-Transitory Increase in Price Test). The SNIPP Test is used to assess whether an increase in price of between 5 per cent and 10 per cent will cause a substantial number of consumers to shift their demand to an alternative product.

Other common methods of determining the scope of a market include analysing cross elasticities of demand, analysing price correlations and conducting critical loss analyses.

The Tribunal, in the large merger between Massmart Holding Limited and Moresport Limited Case No. 62/LM/Jul05 at paragraphs 49 and 51 stated that:

> *In this fluid and dynamic environment, traditional tests utilised by competition authorities such as the SSNIP test do not necessarily provide accurate tools with which to predict the impact of a merger on consumer behaviour. Neither are cross elasticities of demand easily calculated in such markets. In the absence of evidence on cross-elasticities of demand and in a consumer or demand driven market, reliance is placed on practical indicia to assist a competition authority in determining a relevant market… It is for this reason that competition authorities have regard to internal documents of each company, the pricing policies in relation to each other, the evidence of key executives or persons experienced in those businesses or in that industry, in order to define the relevant market.*

Therefore, the authorities often rely on the relevant firms' internal documentation, which would be indicative of what the firm considers its target market and competitors to be. The authorities will also obtain views from industry experts as well as customers and competitors. The significance of internal documentation is illustrated by the Tribunal's decision in Pioneer Foods/Future Life Health Products Case No. LM/017/May15.

5 How is market power or monopoly power defined?

Section 1 of the Act defines "market power" as "the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

In the case of Nationwide Poles/Sasol (Oil) Pty Ltd Case No. 72/CR/Dec03, the Tribunal found Sasol Oil exercised market power because it priced creosote at a liquid fuels equivalent price rather than with consideration of the wood preservative market for which creosote was used.

The Act does not speak of "monopoly power", but in section 7 of the Act defines "dominance".

6 What is the test for finding of monopoly power?

The Act does not speak of "monopoly power", but in section 7 of the Act defines "dominance". A firm with a market share of 45 per cent or more is presumptively dominant.

7 Is this test set out in statute or case law?

The test is statutory – it is contained in section 7 of the Act.

8 What role do market shares play in the assessment of monopoly power?

Market shares are central to the statutory test for dominance which is indicative of market power. In terms of section 7, where a firm has a market share of 45 per cent or more, there is an irrebuttable presumption that it is dominant and has market power. A firm with a market share of 35 per cent or more but lower than 45 per cent is deemed to be dominant unless it can prove that it does not have market power. A firm with a market share of less than 35 per cent is presumed not to be dominant unless the complainant can prove that the respondent actually has market power.

9 Are there defined market share thresholds for a presumption of monopoly power?

Yes - in terms of section 7 of the Act, a firm is dominant in the market if:

- it has at least 45 per cent of that market;
- it has at least 35 per cent, but less than 45 per cent, of that market, unless it can show that it does not have market power; or
- it has less than 35 per cent of that market, but has market power.

10 How easily are presumptions rebutted?

In the case of a firm with a market share of over 45 per cent of a relevant market, the firm is deemed to be dominant (and have market power) and there is no means of rebutting the presumption. There is, of course, a prospect of contesting the scope of the market and the market share in that market.

In the case of a firm with a market share of between 35 per cent and 45 per cent, the firm is presumed dominant but may rebut such presumption by proving that it does not have market power. In order to rebut such presumption, the respondent may raise factors such as the intensity of demand, the competitive constraint posed by rivals, barriers to entry by other firms and/or the degree of countervailing power of customers.

11 Are there cases where companies with high shares have been found not to exercise monopoly power?

Because there is an irrebuttable presumption that a firm with more than 45 per cent market share is dominant, there have been no instances in which a firm that exceeds that market share have been found not to exercise market power or not to be dominant.

12 What are the lowest shares with which companies have been found to exercise monopoly power?

There have been relatively few Tribunal decisions on abuses of dominance, and all have dealt with firms that have high market shares.

The lowest market share of a firm subject to an abuse of dominance referral that has been determined by the Tribunal has been Sasol Oil where the Tribunal found Sasol Oil to have approximately a 50 per cent share in the creosote market, in the matter of Nationwide Poles and Sasol (Oil) Pty Ltd Case No. 72/CR/Dec03.

13 How important are barriers to entry and expansion for the assessment of monopoly power?

This issue has not been considered by the Tribunal in abuse of dominance cases, because it has relied on the presumption of dominance where the respondent has held more than 45 per cent of the relevant market. However, an analysis of barriers to entry is often conducted in the context of mergers in determining if a transaction is likely to lead to the creation of market power. Therefore, the analysis of barriers to entry and expansion would be relevant in assessing whether market power is present in cases where a firm has a less than 45 per cent market share.

Notably, the South African competition authorities are placing increasing focus on the link between market structure, concentration and anticompetitive outcomes. Barriers to entry and expansion are a key consideration in this regard. Fewer barriers to entry imply that it is less likely that market power will be found to exist or be able to be exercised, while higher barriers to entry suggest the presence of market power.

14 Can the lack of entry barriers negate a finding of monopoly power?

This issue has not been considered by the Tribunal in abuse of dominance cases, because it has relied on the presumption of dominance where the respondent has held more than 45 per cent of the relevant market.

A lack of barriers to entry could only negate a finding of dominance or market power if the relevant firm's market share is less than 45 per cent. In that case, such lack of barriers to entry could be used to argue that new entrants would discipline any attempted exercise of market power, but it may not be determinative.

15 What kind of barriers to entry are typically considered in the analysis?

In the context of mergers, the Act explicitly lists barriers such as "tariff and regulatory barriers". However, in analysing the creation or presence of market power, all potential barriers are considered including natural or absolute barriers to entry, such as limited or constrained access to critical inputs, regulatory requirements, licensing, control of essential facilities and intellectual property rights, as well as strategic incumbent advantages, which an established firm in the industry would have as a result of being the first entrant into a market.

16 Can countervailing buyer power negate a finding of monopoly power?

This issue has not been considered by the Tribunal in abuse of dominance cases, because it has relied on the presumption of dominance where the respondent has held more than 45 per cent of the relevant market. However, an analysis of countervailing power is often conducted in the context of mergers in determining if a transaction is likely to lead to the creation of market power. Therefore, it would be relevant in assessing whether market power is present in cases where a firm has a less than 45 per cent market share.

The stronger the bargaining power that the customers of the firm have, the more likely it is that a firm will be found not to have market power, although the presence of countervailing power may not be determinative on its own.

Notably, however, proposed amendments to the Act, contained in the Amendment Bill (which is still in the public comment stage) envisages some instances of the use of buyer power as an abuse of dominance. For instance, the proposed amendments envisage an abuse when a dominant player requires a supplier to sell products at an excessively low price.

17 What if consumers can easily switch between suppliers?

This issue has not been considered by the Tribunal in abuse of dominance cases, because it has relied on the presumption of dominance where the respondent has held more than 45 per cent of the relevant market. However, an analysis of ease of switching is often conducted in the context of mergers in determining if a transaction is likely to lead to the creation of market power. Therefore, it would be relevant in assessing whether market power is present in cases where a firm has a less than 45 per cent market share.

High switching costs would be considered as barrier to entry which is likely to increase the likelihood of the presence of market power.

18 Are there any other factors that the regulator considers in its assessment of monopoly power?

The primary considerations in the determination of dominance is that of market shares and market power. Market power is analysed with reference to the firm's conduct such as its ability to charge above competitive prices or act independently of its customers, competitors or suppliers.

The South African authorities have also considered the firm's profitability in analysing the issues above, particularly in the context of excessive pricing cases. In the case of Sasol Chemical Industries /Competition Commission Case No. 48/CR/Aug10 and Mittal Steel / Harmony Gold / Durban Roodepoort Deep, Case No. 70/CAC/Apr07 the Tribunal also considered the extent of prior state ownership.

19 Are any entities or sectors exempt from the antimonopoly regime?

In terms of section 6 of the Act, and related regulation, firms with a turnover or asset value of less than 5 million rand are not subject to the abuse of dominance provisions of the Act.

No sectors are exempt from the abuse of dominance regime. In particular, section 81 states that "this Act binds the State" and the Tribunal has found that state-owned entity, South African Airways, contravened section 8 through their travel agent incentive schemes (Competition Commission v South African Airways (Pty) Ltd 18/CR/Mar01).

However, a firm can apply to the Competition Commission for an agreement or practice to be exempted from being considered a prohibited practice under the Act. In practice, these exemption applications primarily deal with horizontal agreements.

20 Can companies be deemed to hold collective monopoly power?

Sections 8 and 9 of the Competition Act make reference to a "firm" which is defined as a "person, partnership or trust" and presupposes single/individual monopoly power.

However, amendments to the Act signed in 2009, but which have not yet been brought into force, seek to address "complex monopoly conduct", which is strategic interdependence between major players in concentrated industries that results in coordinated outcomes, without any agreement between the competing firms.

The amendment provides for the prohibition of "conscious parallel" conduct by firms, which is coordinated conduct that occurs without communication or agreement but results in the prevention or substantial lessening of competition, which is not outweighed by technological, pro-competitive or efficiencies gains. The conduct of the firms must be found to have resulted in high entry to barriers in the market, exclusion of other firms from the market, excessive pricing in the market, refusal to supply other firms in the market or other market characteristics that indicate coordinated conduct.

It is not clear when, or if, this provision will be brought into force.

21 Can the exercise of joint monopoly power or tacit oligopolistic collusion be treated as an infringement?

Since the above-mentioned amendment introducing "complex monopoly conduct" has not yet been brought into force, joint monopoly power or tacit oligopolistic collusion is not an infringement in South Africa yet.

However, should the amendment be promulgated, conscious parallel conduct by firms, which is coordinated conduct that occurs without communication or agreement but results in the prevention or substantial lessening of competition, will be prohibited.

22 Has the competition authority published guidance on how it defines markets and assesses market power?

No – there are no guidelines on the definition of markets or the assessment of market power.

South Africa, like other jurisdictions, most often relies on the SNIPP test in order to define the market and then evaluate whether market power is present or exercised in the defined market. As noted above, they will also have reference to internal documents and the perspective of market players in defining markets.

Abuse of monopoly power

23 Is there a general definition for what constitutes abusive conduct? What does it entail?

The conduct which constitutes an abuse of dominance is set out in section 8 of the Act. This includes:

- section 8(a), which prohibits excessive pricing;
- section 8(b), which prohibits refusal of access to an essential facility;
- section 8(c), which deals with all exclusionary behaviour (conduct which impedes a firm from entering into or expanding within a market) that is not captured in section 8(d); and
- section 8(d), which prohibits certain enumerated exclusionary acts, set out in more detail below.

Section 9 of the Act also prohibits price discrimination by a dominant firm.

Proposed amendments to the Act, contained in the Amendment Bill envisage the removal of the general "catch-all" section 8(c) transgression. It also envisages adding additional offences as abuses of dominance.

24 What are the general conditions for finding an abuse?

The respondent must be dominant and its conduct must amount to an abuse of its dominant position by having an unjustified anticompetitive effect, or meeting the characteristics of excessive pricing or a refusal of access to an essential facility.

As to dominance, in principle, dominance need not arise in the market where the conduct occurs and it is possible to find a contravention where there is dominance in a related market that is being leveraged into a market where the firm is not dominant.

As to anticompetitive effects, in Nationwide Airlines (Pty) Ltd, Comair Ltd vs South African Airways (Pty) Ltd in relation to contraventions of section 8(d) of the Act, the Tribunal found that for an abuse to arise it does not require evidence of actual harm to consumers and that evidence of substantial or significant likely exclusion (foreclosure of the market to competition) is sufficient.

25 Is there a list of categories of abusive or anticompetitive conduct in the applicable legislation?

Section 8(d) of the Act details specific forms of conduct which are, subject to a rule of reason test, presumed to be abusive practices, including:

- Requiring or inducing a supplier or customer not to deal with a competitor;
- Refusing to supply scarce goods to a competitor when supplying goods is economically feasible;
- Selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
- Selling goods or services below their marginal or average variable cost; and
- Buying-up a scarce supply of intermediate goods or resources required by a competitor.

The Act also identifies specific conduct in the form of excessive pricing (section 8(a)) or refusal to give access to an essential facility (section 8(b)) as forms of abuse of dominance.

Proposed amendments to the Act, contained in the Amendment Bill envisage the removal of the general "catch-all" section 8(c) transgression. It also envisages adding additional offences as constituting exclusionary acts:

- Buying goods or services on condition that the seller accepts an unreasonable condition unrelated to the object of a contract;
- Engaging in margin squeeze; and
- Requiring a supplier to sell at an excessively low price.

26 Is this list open or closed?

Section 8(c) of the Act contains a catch-all provision for conduct not specifically circumscribed in the Act but that may nonetheless be exclusionary and would constitute an abuse of dominance if found to be anticompetitive.

Proposed amendments to the Act, contained in Amendment Bill, although removing the general "catch-all" section 8(c), still envisages the list exclusionary acts as an open list.

27 Has the competition authority published any guidance on what constitutes abusive conduct?

No. However, there have been decisions by the Tribunal and Competition Appeal Court which deal with abuse of dominance allegations and from which guidance can be taken.

28 Is certain conduct per se abusive (without the need to prove effects) and under what conditions?

Notionally section 8 (b) (refusing access to an essential facility) and, to some extent, section 8(a) (excessive pricing) of the Act contain what could arguably be considered closest to per se prohibitions by circumscribing conduct with particular characteristics without resorting to classic rule of reason economic analysis as to the effects of the conduct on competition.

29 To the extent that anticompetitive effects need to be shown, what is the standard to demonstrate these effects?

If the conduct in question falls within the categories of exclusionary conduct circumscribed by the Act, that conduct will have an anticompetitive effect 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.

Conduct with an anticompetitive effect can then be measured against any alleged pro-competitive or efficiency gains and if those gains do not outweigh the anticompetitive effect, a contravention will be found to have occurred.

30 Does the abusive conduct need to harm consumers?

In Nationwide Airlines (Pty) Ltd, Comair Ltd vs South African Airways (Pty) Ltd in relation to exclusionary act contraventions of section 8(d) of the Act, the Tribunal found that for an abuse to arise it does not require evidence of actual harm to consumers and that evidence of substantial or significant exclusion (foreclosure of the market to competition) is sufficient.

31 What defences are there to allegations of abuses of monopoly power?

The primary defences are that:
- there is no dominance on the part of the respondent firm in any relevant market;
- the conduct does not bear the characteristics of prohibited conduct (for instance, does not amount to excessive pricing; is not an essential facility; is not exclusionary;
- the effect of conduct is not anticompetitive measured against the test set out in question 29; and
- there are pro-competitive justifications for the conduct which outweigh any anticompetitive effect.

32 Can abusive conduct be objectively justified?

Yes. Conduct with an anticompetitive effect can then be measured against any alleged pro-competitive or efficiency gains and if those gains do not outweigh the anticompetitive effect, a contravention will be found to have occurred.

33 What objective justifications have been successful?

The Tribunal has treated efficiencies as a continuum with innovation on one end of the spectrum being viewed more favourably and pure economic benefit on the other end of the spectrum being viewed more sceptically. Efficiencies that benefit consumers or the public interest are likely to weigh more heavily against anticompetitive conduct whilst private efficiencies carry less weight. (see Competition Commission and Trident Steel (Pty) Ltd Case No. 114/CR/Dec12, in the context of assessing efficiencies in merger transactions).

34 How is the burden of proof distributed in an abuse analysis?

For liability to be established in an abusive dominance inquiry, it is necessary for the following to be established:
- the firm in question must be dominant;
- the conduct outlined in section 8 or 9 of the Act must be found to be present; and
- in most cases, the anticompetitive effect of such conduct must outweigh any technological, efficiency or pro-competitive gains.

In relation to the determination of dominance, dominance is presumed to be present if the complainant can show that the respondent holds a market share of 45 per cent or more. Between 35 per cent and 45 per cent market share, the onus is on the respondent to prove that it does not have market power. With a market share of less than 35 per cent, the onus is on the complainant to prove that the respondent does have market power.

The onus lies on the complainant to show that the respondent has engaged in the conduct outlined in sections 8 and 9 of the Act. For example, to show that a respondent has engaged in excessive pricing in contravention of section 8(a) of the Act, the onus lies on the complainant to prove that the price is "excessive" and that such price operates to the detriment of consumers. In practice, onus does not play a significant role at this stage of the analysis, since a respondent will not rely on the failure to make out a case on the face of it – it will also engage in an analysis to prove that the constituent elements of the offence are not present.

The onus in showing anticompetitive effects changes in cases of exclusionary conduct depending on whether the conduct falls within section 8(c) or 8(d) of the Act. In the case of section 8(c), the onus is on the complainant to show that there are no efficiency, pro-competitive or technological reasons which outweigh the anticompetitive effect of the conduct. In the case of conduct outlined in section 8(d), the respondent must show that there are efficiency, technological or pro-competitive benefits of the conduct that outweigh its anticompetitive effect and therefore the conduct does not constitute an abuse of dominance.

Proposed amendments to the Act contained in the Amendment Bill envisage shifting the onus where there is a prima facie case of a dominant firm charging an excessive price or requiring a supplier to sell at an excessively low price, such that the dominant firm should prove that such a price was reasonable.

35 What are the legal conditions to establish an abusive tie?

In order to establish a contravention of section 8(d)(iii) of the Act, which sets out the prohibition against tying:

- the respondent must be dominant (in the market of the tying product or service);
- the dominant firm must sell goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or force a buyer to accept a condition unrelated to the object of a contract;
- there must be anticompetitive effect in that there is evidence of actual harm to consumer welfare or it results in substantial foreclosure of the market to rivals (Competition Commission v South African Airways (Pty) Ltd 18/CR/Mar01); and
- The respondent must fail in showing that there are technological, efficiency or other pro-competitive gains which outweigh the anticompetitive effect of that conduct.

It seems likely that a hard tie would be required in order for an abusive tie to be established, although possibly an overwhelming incentive to purchase goods or services together may constitute a constructive tie. Where tying is used to maintain the quality of complementary inputs and to protect the goodwill of firms imposing the tie, it is possible that the conduct may be justified.

36 What are the legal conditions to establish a refusal to supply or refusal to license?

In order to establish a contravention of section 8(d)(ii) of the Act, which sets out the prohibition against refusals to supply:

- the respondent must be dominant (the Act does not specify in which market the respondent should be dominant);
- there should be a refusal to supply (which may include a constructive refusal to supply) by the dominant firm. Notably, the section does not refer to a refusal to supply "services", only "scarce goods" (Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers Case No. 15/CAC/Feb02);
- the refused customer must be a competitor of the respondent (the Act does not specify the market in which the parties must compete);
- the goods should be "scarce", therefore the complainant must show that it is not reasonably practicable or reasonably economical to obtain the good, or a substitute, from another source. The difference in cost, convenience or attractiveness should be such that the alternative good or source is not a viable substitute;
- the supply must be economically feasible in that the respondent should not be required to prejudice its ability to operate efficiently, to compete on the merits or to exercise normal, commercial caution;

- there must be anticompetitive effect in that there is evidence of actual harm to consumer welfare or it results in substantial foreclosure of the market to rivals (Competition Commission v South African Airways (Pty) Ltd 18/CR/Mar01); and
- the respondent must fail in showing that there are technological, efficiency or other pro-competitive gains which outweigh the anticompetitive effect of that conduct.

37 Do these abuses require an essential facility?

No, the prohibitions regarding a refusal or supply or a tying do not require the presence of an essential facility. In the case of a refusal to supply, the goods in question must be "scarce", in that the complainant must show that it is not reasonably practicable or reasonably economical to obtain the good, or a substitute, from another source.

The Act has a separate provision dealing with refusal of access to an essential facility.

38 What is the test for an essential facility?

Section 1 of the Act defines an "essential facility" as "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers".

The Competition Appeal Court has held that a "resource" does not include products, goods or services (National Association of Pharmaceutical Wholesales and Others / Glaxo Welcome (Pty) Ltd and Others, Case No. 45/CR/Jul01).

It is not necessary to demonstrate anticompetitive effects if a refusal of access to such facility is shown (The Competition Commission/Telkom SA Ltd Case No. 11.CR/Feb04). In this case, fixed line telecommunications infrastructure (Diginet access lines and copper links) was found to constitute an essential facility.

39 What is the test for exclusivity arrangements?

The Act does not prohibit exclusive arrangements. The test for whether an exclusive arrangement contravenes the legislation is if its anticompetitive effect is outweighed by technological, efficiency or pro-competitive gains.

Exclusivity arrangements could be assessed under the following provisions of the Act:

- Section 8(c), which prohibits general exclusionary practices if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. Exclusionary conduct is conduct, which "impedes or prevents a firm from entering into, or expanding within, a market".
- Section 8(d)(i), which prohibits a dominant firm from "requiring or inducing a supplier or customer to not deal with a competitor" unless the respondent can show that there are technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of that conduct.
- Section 5(1), which prohibits agreements between parties in a vertical relationship leads to a substantial lessening or prevention of competition, unless a party to the agreement can show that there are technological, efficiency or other pro-competitive gains which outweigh that effect. In these cases, neither party need be dominant, but the existence of an anticompetitive effect is unlikely to be present without dominance on the upstream or downstream levels of the market. The Competition Appeal Court in Competition Commission / South African Breweries Limited and 13 Other Respondents Case no 129/CAC/Apr14, provided that because "section 5(1) expressly refers to the effect of substantially preventing or lessening competition in a market, to trigger the application of section 5(1), it must follow that there is some likely effect upon price, output and/or quality of product which diminishes consumer welfare."

In terms of weighing the pro- and anticompetitive effects of exclusive dealing arrangements, the Tribunal in Competition Commission and Another /British American Tobacco South Africa (Pty) Limited Case No. 05/CR/Feb05 stated that: "From an anti-trust perspective, the sensitivity that attaches to these arrangements derives from the likelihood of foreclosure and the anti-competitive harm that may be generated by significant foreclosure. It is however, also widely accepted that exclusive arrangements may well generate pro-competitive outcomes."

This case also established that there must be a link between the anticompetitive effect and the inducement.

40 What is the test for predatory pricing?

In order to establish a contravention of section 8(d)(iv) of the Act, which sets out the prohibition against predatory pricing:

- the respondent must be dominant;
- the dominant firm must sell goods and services "below their marginal or average variable cost";
- there must be anticompetitive effect in that there is evidence of actual harm to consumer welfare or it results in substantial foreclosure of the market to rivals (Competition Commission v South African Airways (Pty) Ltd 18/CR/Mar01); and
- the respondent must fail in showing that there are technological, efficiency or other pro-competitive gains which outweigh the anticompetitive effect of that conduct.

In the Competition Appeal Court (CAC) case of Competition Commission / Media24 Limited Case 146/CAC/Sep16, the Appeal Court found, in order to contravene section 8(d)(iv) of the Act, the price must be below marginal or average variable costs. The CAC also held that in order for predatory conduct to fall within the section 8(c) "catch-all" provision such a pricing should be below Average Avoidable Cost.

Proposed amendments to the Act, contained in the Amendment Bill envisage amending the predatory pricing provision to be pricing below a "relevant cost benchmark", which may include average avoidable cost, average variable cost or long run incremental cost.

41 What is the test for a margin squeeze?

The Act does not contain an explicit provision prohibiting "margin squeeze". However, margin squeeze conduct has been assessed in terms of section 8(c) of the Act, which prohibits general exclusionary practices.

The Tribunal in Competition Commission v Senwes Limited Case No. 110/CR/Dec06 found that a margin squeeze amounts to an infringement of section 8(c) of the Act because it has the effect of impeding or preventing a rival from competing with the firm concerned. The Tribunal in determining this used the test suggested by Robert O'Donaghue and Jorge Padilla, which was adopted by the United Kingdom Competition Appeal Tribunal and provides the following four steps:

> *Firstly, the supplier of the input must be vertically integrated and dominant upstream; secondly, access to the input must be in some sense essential for downstream competition; thirdly, the prices charged by the dominant vertically integrated firm must render the activities of an efficient rival uneconomic; and lastly here is no objective justification for the prices charged.*

The final step relating to objective justification involves the efficiency defence where a firm is required to show that there is a technological, efficiency or other pro-competitive gain resulting from its conduct, that outweighs the anticompetitive effects.

The Tribunal also emphasised that although a firm should be dominant in the upstream market it need not be dominant as well in the downstream market for a margin squeeze to be effective.

Proposed amendments to the Act, contained in the Amendment Bill, envisage expressly including "margin squeeze" as an enumerated exclusionary act, constituting an abuse of dominance.

42 What is the test for exclusionary discounts?

The Act does not prohibit exclusionary discounts. The test for whether such discount contravenes the abuse provisions of the legislation is if its anticompetitive effect is outweighed by technological, efficiency or pro-competitive gains.

The granting of discounts could be assessed under the following provisions of the Act:

- section 8(c), which prohibits general exclusionary practices if the anticompetitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. Exclusionary conduct is conduct that "impedes or prevents a firm from entering into, or expanding within, a market;"
- section 8(d)(i), which prohibits a dominant firm from "requiring or inducing a supplier or customer to not deal with a competitor" unless the respondent can show that there are technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of that conduct;
- section 5(1), which prohibits agreements between parties in a vertical relationship leads to a substantial lessening or prevention of competition, unless a party to the agreement can show that there are

technological, efficiency or other pro-competitive gains which outweigh that effect. In these cases, neither party need be dominant, but the existence of an anticompetitive effect is unlikely to be present without dominance on the upstream or downstream levels of the market; and

- section 9(1)(c)(ii), which prohibits a dominant firm in its capacity as a seller of goods or services from discriminating between purchasers in respect of any discount, allowance, rebate or credit given in relation to those goods or services, provided that there is a likelihood that the price discrimination may lead to a substantial prevention or lessening of competition in that market. The test for determining price discrimination are set out below.

In the case of Nationwide Airlines/South African Airways (Pty) Limited Case No. 18/CR/Mar01, where South African Airways (SAA) had an incentive scheme with travel agents, the Tribunal found that SAA had contravened section 8(d)(i) and that the target rebates resulted in or had the potential of substantially foreclosing competitors from the segment of the scheduled domestic airline market and in that manner substantially lessened competition. The Tribunal took into account the fact that the financial incentives were significantly compelling and of the kind that rivals in that industry were unable to match.

43 Are exploitative abuses also considered and what is the test for these abuses?

Yes – the Act prohibits excessive pricing and price discrimination, both of which constitute exploitative abuses.

In order to establish a contravention of section 8(a) of the Act, which sets out the prohibition against excessive pricing:

- the respondent must be dominant;
- the dominant firm must charge an "excessive price", which is defined as a price that "bears no reasonable relation to the economic value of that good or service"; and
- the price must operate to the detriment of consumers. This requirement appears to undermine the status of the provision as notionally constituting a per se provision.

The competition authorities have found the process of determining whether a price is excessive involves both a factual determination and a value judgment. In the case of Mittal Steel / Harmony Gold / Durban Roodepoort Deep, Case No. 70/CAC/Apr07, the Competition Appeal Court found that the wording of section 8(a) requires four steps in order to determine whether an excessive price has been charged to the detriment of consumers – firstly, the determination of the actual price charged; secondly, the economic value of the good or service must be ascertained; thirdly, if the actual price exceeds the economic value, it must be determined whether the difference between them is unreasonable; and if so, lastly, it must be determined if the charging of the excessive price is to the detriment of consumers.

In the case of Sasol Chemical Industries Limited/Competition Commission Case No. 131/CAC/June14, the authorities used price-cost analysis to determine economic value. The Tribunal found Sasol had engaged in excessive pricing, partly because it had benefitted from state support and therefore had a cost advantage not brought about by innovation or risk taking. However, the finding was overturned by the Competition Appeal Court.

Price discrimination is prohibited in terms of section 9 of the Act, as discussed below in relation to "abusive discrimination".

Proposed amendments to the Act, contained in the Amendment Bill, envisage the removal of the requirement that an excessive price must operate to the detriment of consumers. This would bring the excessive pricing offence closer to being a per se prohibition, because the provision does not make provision for technological, efficiency or pro-competitive justifications.

44 Is there a concept of abusive discrimination and under what conditions does it raise concerns?

Yes – section 9 of the Act prohibits "price discrimination" by a dominant firm. It provides that an action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if:

- it is likely to have the effect of substantially preventing or lessening competition;
- it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
- it involves discriminating between those purchasers in terms of:
- the price charged for the goods or services;

- any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;
- the provision of services in respect of the goods or services; or
- payment for services provided in respect of the goods or services.

When determining the "equivalence" of transactions, the Competition Appeal Court has confirmed that it is sufficient that the transactions are "comparably sensible when regard is had to the essential economic features" (Competition Commission v South Africa Breweries Limited & Others, Cases 134/CR/Dec07 and 129/CAC/Apr14).

Differential treatment by a dominant firm can be justified if the dominant firm can show that the differential treatment:

- makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery;
- is aimed at meeting a price or benefit offered by a competitor; or
- is in response to changing conditions, such as the deterioration of perishable goods; the obsolescence of goods; a liquidation or sequestration procedure; or discontinuance of the relevant business.

In Sasol Oil (Pty) Limited / Nationwide Poles CC Case No. 49/CAC/April05 the Competition Appeal Court found that the Tribunal had erred in stating that section 9(1), which requires that the price discrimination be likely to have the effect of substantially preventing or lessening competition, amounted to a test of competitive relevance. The Competition Appeal Court held that "the question is whether there is a reasonable possibility that the price differential is likely to result in competitive harm." To answer this question, the following type of evidence could be presented –

- establishing the cost differentials between the least and most favoured customers;
- information on the manner in which small firms seek to adopt to the market in order to survive;
- statistics showing entry and exit patterns over time; and
- establishing a link between entry and exit patterns and the price or cost differentials.

Neuhoff et al, in A Practical Guide to the South African Competition Act, states that "if the alleged price discrimination did not occur between customers who compete, then there can be no contravention of the Competition Act."

Proposed amendments to the Act, contained in the Amendment Bill envisage shifting the onus in relation to price discrimination such that price discrimination need not involve a substantial prevention or lessening of competition to constitute price discrimination, but it is possible for a defendant to justify price discrimination by proving that the conduct will not substantially lessen or prevent competition.

The Amendment Bill also applies the discriminatory pricing provisions where the dominant firm is the purchaser of goods and services, not only the seller.

The proposed amendments also state that the effect on small business and firms owned or controlled by previously disadvantaged persons must be considered when evaluating this conduct.

45 Are only companies with monopoly power subject to special obligations under unilateral conduct rules?

Section 8 and 9 of the Act apply only to "dominant" firms.

46 Must the monopoly power exist in the same market where the effects of the anticompetitive conduct are felt?

No – the Act provides for abuses of dominance which involve the leveraging of market power with anticompetitive effects. In the case of Competition Commission / South African Airways (Pty) Ltd Case No. 18/CR/Mar01, the Tribunal confirmed that any "contrary interpretation [of the Act] would mean that a dominant firm could leverage its market power from one market to another, with impunity."

Provisions prohibiting anticompetitive tying and refusals to supply anticipate the leveraging of dominance to the detriment of competition. In the case of York Timbers Ltd / SA Forestry Company Ltd (SAFCOL) Case No. 15/CR/Feb01 the Tribunal noted that to prove a prohibited refusal to supply it must be shown that the respondent is:

> *either dominant in the market in which the alleged abuse is perpetrated or that the effect of the abuse is experienced in a related market, either upstream or downstream of the market in which the alleged perpetrator of the abuse is dominant.*

Sanctions and remedies

47 What sanctions can the competition authority impose or recommend?

In terms of section 58 of the Act, the Tribunal may make an "appropriate order" in relation to a prohibited practice, including:

- interdicting any prohibited practice;
- ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
- imposing an administrative penalty;
- declaring conduct of a firm to be a prohibited practice for the purposes of allowing for civil damages actions;
- declaring the whole or any part of an agreement to be void;
- ordering access to an essential facility on terms reasonably required; and
- ordering divestiture. In relation to divestiture, the Tribunal may order divestiture for an abuse of dominance if that prohibited practice cannot adequately be remedied in terms of another provision of the Act or the prohibited practice is a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice.

The Tribunal may also confirm a settlement agreement as an order of the Tribunal (a "consent order"). In addition, the Tribunal may adjourn a hearing if there is reason to believe that the hearing relates to a prohibited practice that might qualify for exemption in terms of the Act.

In relation to administrative penalties, the Tribunal may impose an administrative penalty of up to 10 per centof the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year. However, in the case of price discrimination (section 9) and general exclusionary conduct outlined in section 8(c), the Tribunal cannot impose a penalty for a first time offence, but it can impose a penalty if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice.

Proposed amendments to the Act, contained in the Amendment Bill, propose the removal of any "yellow card" (as is the case in a section 8(c) contravention), such that all abuses of dominance attract an administrative fine for a first time offence.

48 How are fines calculated for abuses of monopoly power?

Section 59 of the Act provides that when determining an appropriate penalty, the Tribunal must consider the following factors:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has cooperated with the competition authorities; and
- whether the respondent has previously been found in contravention of this Act.

The case of Competition Commission v Aveng Africa Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd, which was later confirmed by the Competition Appeal Court in Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) Ltd v Competition Commission, set out a methodology that are to be taken into account by the competition authorities in determining an administrative penalty. The Guidelines for the Determination of Administrative Penalties for Prohibited Practices (May 2015) sets out the six-stage test established in terms of the above case law. It involves the following steps:

- the determination of the affected turnover (the turnover in the line of business that was the subject of the prohibited conduct);
- the calculation of the base amount (with reference to the affected turnover in the relevant year);
- the duration of the contravention;
- comparison of the base amount against the statutory 10 per cent limit;

- consideration of aggravating and mitigating factors; and
- another comparison of the resultant amount against the statutory limit.

49 What is the highest fine imposed for an abuse of monopoly power?

The highest fine imposed to date is 449 million rand in the case of The Competition Commission/Telkom SA Ltd Case No. 11.CR/Feb04. The Tribunal found that Telkom had abused its dominance by refusing to grant rival value added network service providers with access to essential facilities in contravention of section 8(b) of the Act.

In the case of Sasol Chemical Industries/Competition Commission Case No. 48/CR/Aug10, the Tribunal imposed a total penalty of 534 million rand; however, that decision was overturned by the Competition Appeal Court.

50 What is the average fine imposed over the past five years?

Approximately 295.5 million rand.

51 Can the competition authority impose behavioural remedies?

Yes, the competition authority can impose behavioural remedies, including interdicting any prohibited practice; ordering a party to supply or distribute goods or services; and ordering access to an essential facility.

52 Can it impose both negative and positive behavioural obligations?

Yes, the competition authority can impose both positive and negative behavioural obligations on the dominant firm. For example, the competition authority can order a party to supply or distribute goods or services or order access to an essential facility. It can also interdict conduct that involves a prohibited practice.

53 Can the competition authority impose structural remedies?

Yes, the Tribunal is empowered to order divestiture for an abuse of dominance if that prohibited practice cannot adequately be remedied in terms of another provision of the Act or the prohibited practice is a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice.

In the case of Competition Commission South Africa / Sasol Chemical Industries Ltd (SCI), In re: Competition Commission South Africa / Sasol Chemical Industries Ltd and Others Case no. 45/CR/May06 and 31/CR/May05, the Tribunal confirmed a settlement agreement concluded between the Competition Commission and SCI, which included a combination of behavioural and structural remedies in relation to abuse of dominance in the fertiliser industry. Although SCI did not admit a contravention of section 8 and 9 of the Act, it did agree to divest of certain production facilities and business units.

54 Can companies offer commitments or informal undertakings to settle concerns?

At any stage of the complaint proceedings, but before the Tribunal has made a finding, the respondent can agree commitments with the Commission in the form of a consent agreement. The consent agreement will come into effect once it has been made an order by the Tribunal.

The Act does not make provision for informal undertakings.

55 What proportion of cases have been settled in the past five years?

In the past five years, two abuse of dominance cases have been settled.

In the case of Competition Commission / ArcelorMittal South Africa Limited (AMSA) Case no. CR092Jan07/SA090Aug16, numerous complaints, primarily involving collusive conduct were settled by AMSA. One of the complaints was an excessive pricing complaint. However, in the consent order, it states that “no findings were made by the Commission” in relation to this complaint. In addition, AMSA made no admission in relation to this complaint. Nevertheless, it was included and addressed as part of the consent agreement.

In the case of Competition Commission v Senwes Limited Case no. 110/CR/Dec06, the matter was prosecuted and appealed through every court including the Supreme Court of Appeal and the Constitutional

Court. Pursuant to the order by the Constitutional Court, the Commission and Senwes entered into a settlement agreement for purposes of setting out the remedies.

Since the inception of the Act, only four cases relating to abuse of dominance have been settled, excluding the Senwes settlement – this is out of 34 cases that have been either been referred to the Tribunal, or considered on an interim relief basis by the Tribunal, since 1999.

56 Have there been any successful actions by private claimants?

In terms of section 65(6)(b) of the Act, a party seeking to pursue an action for damages requires a certificate from the Tribunal or the Competition Appeal Court certifying that the conduct forming the basis of the damages claim has been found to be a prohibited practice. Such a certificate serves as confirmation of the contravention of the Act. The civil courts are tasked with assessing whether the elements necessary for a successful damages action are satisfied.

In a judgment handed down in August 2016, the High Court ordered SAA to pay 104.6 million rand (including interest) to Nationwide Airlines (Pty) Ltd (in Liquidation) for damages arising out of anticompetitive conduct. In February 2017, the High Court ordered SAA to pay 554 million rand (including interest) to Comair for damages arising out of anticompetitive conduct.

Appeals

57 Can a company appeal a finding of abuse?

Yes. After investigation of a complaint of abuse, either the Commission or the complainant (if the Commission is not the complainant) can refer the matter to the Tribunal for adjudication.

Either the applicant or respondent can appeal a decision of the Tribunal to the Competition Appeal Court. Such a decision can then be appealed to the Constitutional Court if the Constitutional Court grants leave, which it will do only if the matter is “in the interests of justice” to hear.

58 Which fora have jurisdiction to hear challenges?

In relation to findings of abuse of dominance by the Tribunal, the Competition Appeal Court has jurisdiction to hear appeals or reviews of those decisions.

In the past, the Supreme Court of Appeal had jurisdiction to hear appeals from the Competition Appeal Court, but such jurisdiction was removed through a constitutional amendment in the Constitution Seventeenth Amendment Act of 2012.

The Constitutional Court has jurisdiction to hear an appeal of a decision of the Competition Appeal Court, but it will only do so where it is in the interests of justice to consider such matter.

59 What are the grounds for challenge?

A party may appeal on the basis of an error on a point of law or a factual issue as well as issues of procedure or jurisdiction. To appeal a decision of the Tribunal, the decision must be final.

There can also be a review of the decision of the Commission by the Tribunal and a review of a decision of the Tribunal by the Competition Appeal Court. This involves scrutinising the decision-making process of the authority as a public administrative decision maker and whether the decision was lawful, rational and procedurally fair.

60 How likely are appeals to succeed?

Most appeals on abuse of dominance findings have been appealed successfully, including Mittal Steel South Africa Limited and Others / Harmony Gold Mining Company Limited and Another Case No. 70/CAC/Apr07; Sasol Chemical Industries Limited / Competition Commission Case No. 131/CAC/June14; and Sasol Oil (Pty) Limited / Nationwide Poles CC Case No. 49/CAC/Apr05 and Media 24 / Competition Commission Case No. 146/CAC/Sep16.

Topical issues

61 Summarise the main abuse cases of the past year in your jurisdiction.

In 2016, the Tribunal found Media24 engaged in an anticompetitive exclusionary act in the case of Competition Commission v Media24 Limited Case No. 013938/CR154Oct11. It was alleged that Media24, through its subsidiary Vista, engaged in predatory pricing by using its "fighting brand", Forum, which holds a position of dominance in the market for community newspapers, to force the exit of Gold Net News, the complainant and a competing community newspaper, from the market. It was alleged that Media24 cut Forum's advertising costs to the extent that Gold Bet News could not compete. Soon after, Forum closed down and that gave the opportunity to Vista to charge high tariffs and excessive costs. The Tribunal found that Media24's conduct negatively impacted consumer welfare and had the effect of dissuading competitors from entering the market. Media24 was not found to have contravened the predatory pricing provision of the Act in section 8(d)(iv) since it was not established that it charged below marginal or average variable costs. It was found by the Tribunal to have contravened section 8(c) (generally exclusionary conduct), which does not attract a fine for a first-time offence.

The following are complaints initiated or referred by the Commission since 2016:

Rooibos Limited

The Commission referred Rooibos Limited, a rooibos tea processor, to the Competition Tribunal. Rooibos Limited allegedly concluded two exclusionary contracts that had the effect of inducing rooibos tea farmers not to deal with rooibos tea processors that Rooibos Limited competes with, and in that way foreclosed the market.

HZPC Holland BV and Westgro Potatoes (Pty) Ltd

HZPC, a seed potato breeder based in the Netherlands, entered into an exclusive agreement with South African company Westgro for the sale of Mondial seed potato varietal to commercial farmers. The Commission alleges that this has resulted in significant barrier to entry in the market for Mondial seed potato varietal and as a result has had the effect of preventing or lessening competition in the market for the production and supply of Mondial seed potato varietal.

Uniplate Group (Pty) Limited

Two abuse of dominance complaints were referred by the Commission at the end of 2015 against Uniplate in relation to long term exclusive agreements requiring customers to purchase all of their requirements for number plate blanks from Uniplate and in doing so prevented its customers from sourcing from other suppliers in the market. Closing arguments have been completed and the Competition Tribunal will hand down judgment in due course.

Transnet SOC Limited

The Competition Commission is currently investigating Transnet, a state-owned entity, for allegations that the entity charges rates that are much higher than the global average and gives preferential treatment to certain customers to the exclusion of others.

Pharmaceuticals

The Commission recently initiated a complaint against three global pharmaceutical companies for alleged excessive pricing of cancer medicine.

Vodacom

The Competition Commission has initiated an investigation against Vodacom for allegedly abusing its dominance after it secured an exclusive contract with the National Treasury to be the sole provider of mobile telecommunication services to the government.

Afrimat Limited

Afrimat Limited, through its wholly owned subsidiary Clinker Supplies (Pty) Ltd has exclusive rights from Eskom to source waste ash from dumps at three disused coal-fired power stations in two provinces used to manufacture clinker bricks for low-cost housing. The Competition Commission has alleged that Afrimat abused its dominant position by charging clinker brick manufacturers excessive prices for its waste ash inputs.

SA Airlink

The Commission referred SA Airlink (Pty) Ltd, a privately controlled regional feeder airline, to the Competition Tribunal for prosecution on charges of excessive and predatory pricing. The complaints related to the Johannesburg-Mthatha route and allege that SA Airlink's prices were excessive before another airline, Fly Blue Crane entered the route. It was also alleged that SA Airlink then lowered its prices below its costs (predatory pricing) when Fly Blue Crane entered the route, and then reverted to charging excessing prices after Fly Blue Crane exited the route in January 2017.

62 What is the hot topic in unilateral conduct cases that antitrust lawyers are excited about in your jurisdiction?

The Commission's investigation of pharmaceutical companies for excessive pricing in cancer medication will constitute an important case for evaluating how to analyse costs of Research and Development in excessive pricing matters. This will build on the excessive pricing jurisprudence, which has previously dealt with intermediate industrial products without any need to consider the role of intellectual property in the economic value of a product.

South African lawyers will also be awaiting the Competition Tribunal's judgment on South Africa's first-ever tying case (the Uniplate decision).

63 Are there any sectors that the competition authority is keeping a close eye on?

The Commission prioritises investigations and referrals in industries that are likely to effect poor and disenfranchised customers and impact on the economy to the detriment of consumers. The prosecution of ArcelorMittal and Sasol related to intermediate industrial products that play a key role in manufacturing in the economy.

The Commission's investigation of pharmaceutical companies for excessive pricing is intended to address a concern regarding access of poor consumers to life-saving medication (and occurs at the same time that the Commission has been conducting an in-depth market inquiry into the private healthcare market).

The Commission's referral against Rooibos reiterates the Commission's ongoing focus on the agro-processing sector, which is a key industry for jobs and the economy.

The Commission has also launched market inquiries into the passenger transportation industry and the telecommunication industry. These are likely to look at issues of market structure rather than unilateral conduct.

64 What future developments can we expect?

The Commission has not yet successfully prosecuted an excessive pricing case, and has only successfully prosecuted and settled seven abuse of dominance referrals in its 20 years of existence. We can therefore expect that the Commission will be looking to find an appropriate abuse case to prosecute in order to clarify the scope of the abuse provisions in the Act and to deter unilateral conduct that acts to the detriment of competition.

We may see the Commission taking on more test cases to set a precedent and curb future abuses of dominance.

Antitrust lawyers, after submitting some 60 submissions commenting on the proposed amendments to the Act, can consider and comment a second iteration of the Amendment Bill, which was introduced in Parliament on 11 July 2018.

* With thanks to candidate attorney, Dudu Mogapi, for her assistance with this chapter.

Naasha Loopoo

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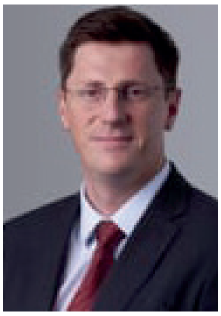
Naasha Loopoo is a senior associate in the Cliffe Dekker Hofmeyr competition law practice. She advises on all aspects of competition law, including prohibited practices (horizontal, vertical and abuse of dominance), multi-jurisdictional merger notifications and general competition advice. Naasha began her career as a Candidate Attorney at Glyn Marais in 2009 and later joined AECI Limited as a legal adviser in 2011. In the same year, she joined the Competition Commission of South Africa in the Enforcement and Exemptions Division of the Competition Commission of South Africa, where she gained experience in various industries such as telecommunications, petroleum products, healthcare, chemical and retail markets, among others. She was also a team member of the LPG market inquiry. In 2014, she joined Cliffe Dekker Hofmeyr's Competition team as an associate. Naasha was appointed as a senior associate in 2017.



Albert Aukema

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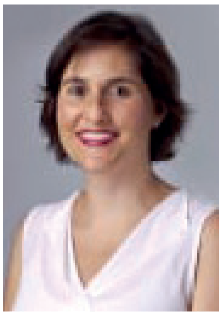
Albert obtained an LLB degree from the University of Pretoria and practises as a director in the Cliffe Dekker Hofmeyr competition law department. Albert specialises in all aspects of competition law. He has extensive experience in merger and prohibited practice proceedings before the competition authorities and appeal courts in South Africa. He also regularly advises on multi-jurisdictional mergers and has significant experience in obtaining merger approval across a wide range of jurisdictions and community bodies. His sector experience includes significant transactions and investigations for clients in the non-alcoholic beverages, security services, mining and telecommunications sectors. Albert also advises clients on consumer protection and consumer credit law and compliance.



Lara Granville
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Lara Granville is a director in the competition law practice of Cliffe Dekker Hofmeyr in Johannesburg. She has extensive experience in both the transactional and litigious aspects of competition law. She has advised on all aspects of competition law, including complex merger notifications; compliance training; negotiating consent orders; defending clients against prohibited practice allegations; and merger notifications to, and engagement with, various African competition law authorities. She has also advised clients in relation to other economic regulatory processes before the South African telecommunications and energy regulators. Her recent work includes representing a bank in relation to the South African Competition Commission's prosecution of alleged forex collusion; notification of a large merger in the non-alcoholic beverages industry to the South African, Kenyan, Tanzanian, Namibian and Comesa competition authorities, advising a client in the pharmaceutical industry in relation to an abuse of dominance investigation and advising a client in relation to one of the first enforcement actions taken by the Botswanan Competition Authority.

Prior to joining CDH, Lara was a director in the competition law team at Norton Rose Fulbright in Johannesburg. She spent a year on secondment at the London office of Norton Rose Fulbright working on the market inquiry into stator audit services.

Lara holds an LLB from the University of the Witwatersrand and an LLM from NYU, which she attended as a Global Hauser scholar. Lara is often called on by news publications to comment on competition law developments, and she is named as a "Future Leader" by Who's Who Legal.

Cliffe Dekker Hofmeyr (CDH) believes the right partnership can lead to great things. The partnerships it cherishes and values most are those it has forged through time and experience with its clients and, of course, its people. CDH is a full-service law firm – one of the largest business law firms in South Africa, with more than 350 lawyers and a track record spanning over 163 years.

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The firm's corporate and commercial offering covers the full spectrum of business legal services, which it delivers through core practice areas and sector teams. CDH has 12 core practice areas: corporate and commercial; competition; dispute resolution; employment; environmental; finance and banking; pro bono and human rights; projects and infrastructure; real estate; tax and exchange control; technology and outsourcing; and trusts and estates. The firm also has dedicated sector teams composed of lawyers from across practice areas, bringing a wealth of experience to key industries, such as aviation, black economic empowerment, construction and engineering, convergence and new media, employee benefits, energy, hospitality and leisure, insolvency and restructuring, insurance, M&A, mining and minerals, oil and gas, outsourcing, PPPs, private equity and more. The firm also has extensive public sector experience, acting for a large number of government departments and state-owned entities.

Whether needing seamless coordination across a number of jurisdictions or delivery in a single location, the firm's clients can rely on advice that is underpinned by a solid understanding of both local and international considerations.

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