

**AN AMENDMENT OF SECTION 8(d)(iv) OF THE SOUTH AFRICAN  
COMPETITION ACT AS A KEY TOOL TO ADJUDICATE EXCLUSIONARY  
ABUSE**

**BY**

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## **PLAGIARISM DECLARATION**

I, **JOWIDENE IMELIA VAN SCHALKWYK**, declare that this mini-dissertation is my own work. It has not been submitted before to any other university or institution. Where work of other people is used, references have been provided. I hereby present this work in fulfilment for the award of the LLM degree in Mercantile Law.

Signed

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8 December 2018

Mokopane

South Africa

## List of abbreviations

CFI	Court of First Instance
EC	European Communities
ECJ	European Court of Justice ECJ
<i>ECLR</i>	<i>European Competition Law Review</i>
EU	European Union
<i>NWJILB</i>	<i>Northwestern Journal of International Law &amp; Business</i>
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Communities
TFEU	Functioning of the European Union
UK	United Kingdom
US	United States
RSA	Republic of South Africa

## **Abstract**

Competition law primarily seek to make markets more competitive: it ultimately aims for low consumer prices or for high consumer welfare. However, this can only be achieved if resources are efficiently allocated. Due to abuse of dominance practices and concentrated markets, allocative efficiency does not always materialise, and government intervention is required to improve market outcomes for consumers. The Competition Act 89 of 1998 prohibits exclusionary acts namely, where a dominant firm prevents another firm from entering into or expanding within a market. Under the caveat of exclusionary abuse falls predatory pricing. The notion of predatory pricing is conceptually quite straightforward. It occurs when a dominant firm sets its prices so low for a sufficient period that its competitors are forced to leave the market and others are deterred from entering. Once the targeted competitor has been eliminated, the period thereafter is one of sharp price increases, enabling the predator to recoup the losses sustained in the period of predation because of its increased market power.

A firm's conduct will also be exclusionary if it sells its goods or services below their "average avoidable cost" or the "long run average incremental cost (LRAIC)". South Africa is currently experimenting with a Competition Amendment Bill, 2017 wherein it seeks to implement a relevant cost benchmark into section 8(1)(d)(iv). Due to the novelty of predatory pricing in the South African jurisdiction, it is necessary to have regard to the evolution of predatory pricing in more developed competition jurisdictions. In light of this, this dissertation undertakes a critical and comparative study on the regulation of predatory pricing in South Africa, the European Union and the United States of America pre-empting that this study can draw from their experience and provide key lessons for South African authorities tasked with implementing and possibly refining the relevant legal regime.

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## Chapter 1: Introduction

### 1.1 Context

“The proscription of predatory pricing creates a policy paradox for competition authorities, as numerous writers have noted. It seems to prohibit the very outcome the process of competition seeks to promote – low prices to consumers. Why then should the desired outcome become undesirable?”<sup>1</sup>

An act by a dominant firm which prevents another firm from entering into, or expanding within, a market constitutes exclusionary abuse.<sup>2</sup> Under the very big umbrella of exclusionary abuse falls the practice of predatory pricing. The notion of predatory pricing is conceptually quite straightforward. It generally occurs where a dominant firm sets its prices so low for a sufficient period of time that its competitors are forced to leave the market and others are deterred from entering.<sup>3</sup> The answer by competition regulators is that predatory pricing is only a transient pleasure to consumers; and that in the longer term it poses an existential threat to competition in that particular market, because once the targeted competitor has been eliminated, the low price honeymoon is over and the period thereafter is one of sharp price increases, enabling the predator to recoup the losses sustained in the period of predation because of its increased market power.<sup>4</sup>

As mentioned, competition law seeks to make markets more competitive: it ultimately aims for low consumer prices or, more generally, for high consumer welfare.<sup>5</sup> This can however, only be achieved if resources are efficiently allocated.<sup>6</sup> Due to abuse of dominance practices<sup>7</sup> and concentrated markets<sup>8</sup> it does not always materialise and government intervention is required in an attempt to improve market outcomes for

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1 *The Competition Commission v Media 24 Limited* CR154Oct11.

2 Section 1(x) of the Competition Act 89 of 1998. (Hereinafter the Act).

3 <http://www.oecd.org/competition/abuse/2375661.pdf>. Accessed on 19 February 2018 at 7.

4 *The Competition Commission v Media 24 Limited* [par 74].

5 Elhauge *et al* Research Handbook on the Economics of Antitrust Law, [hereinafter Elhauge]; Neuhoff *et al* A practical guide to the South African Competition Act (2017), [hereinafter Neuhoff]; Sharky The theory of natural monopoly.

6 Elhauge *et al* Research Handbook on the Economics of Antitrust Law, (2012), [hereinafter Elhauge].

7 Listed in Section 8 and 9 of the Competition Act 89 of 1998 [hereinafter The Act].

8 The Competition Amendment Bill, 2017



consumers.<sup>9</sup> Notably the statutory test for dominance requires an assessment of market share and market power.<sup>10</sup> A firm's dominance cannot be determined in isolation but is always determined in relation to a relevant market. In terms of the South African Competition Act 89 of 1998 a firm is regarded as dominant if it has at least 45% of the relevant market or if it has 35% of the market but less than 45% of that market, unless it can show that it does not have market power or if it has less than 35% of that market, but has market power.<sup>11</sup> "Market power" is defined in the Act as "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers."<sup>12</sup> Section 8(b) to (d) of the Act gives an outline of what is deemed to be exclusionary abuse. Of more importance and the actual focus of this dissertation, is section 8(d)(iv) of the Act – the predatory pricing clause.

Section 8(d)(iv) the Act regulates predatory pricing and reads as follows:

Section 8 - it is prohibited for a dominant firm to -  
(d) 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 (by) –

....

(iv) selling goods or services below their marginal or average variable cost".

In order to appropriately interpret this provision, it is therefore necessary to determine what the cost benchmark described as "below their marginal or average variable cost" means. Simply put, marginal cost is cost incurred by a firm when producing an additional unit or output.<sup>13</sup> Although marginal costs is a theoretical measure of cost, it is not often used in practice. Authors have recognised that marginal costs are difficult to ascertain from a firm's books of account as firms typically do not account for costs in this manner. Rather, they suggest a substitute for marginal costs being "average avoidable costs".<sup>14</sup> Whish and Bailey deem variable- and avoidable costs more useful concepts to consider in the context of predatory pricing, defining variable costs as "costs that vary with the amount of products that a firm produces" and avoidable costs

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9 Neuhoff 6.

10 Neuhoff 140.

11 Section 7 of the Act.

12 Section 1 (xiv).

13 R Whish & D Bailey "Competition Law" 2012, footnote 8 at 5 [hereinafter Whish & Bailey].

14 P Areeda & D Turner "Predatory Pricing and related practices under section 2 of the Sherman Act" *Harvard Law Review* 697-733 716.

as “those costs which a firm would avoid incurring (or to put the matter another way, the savings it would make) by ceasing a particular activity over a specified period of time”. For example where a firm is accused of predatory pricing over an 18-month period, it may be relevant to ask what costs it would have avoided if it had not produced the units that were the subject of the predation.<sup>15</sup> Notably, as will be discussed later, there is no indication of a substitute cost benchmark other than using a firm’s average variable cost (AVC) or marginal cost.

The Competition Tribunal<sup>16</sup> has to date only heard two cases of an alleged contravention of section 8(d)(iv) of the Act. In October 2000, an interim relief application which sought an order in terms of section 59 of the Act<sup>17</sup> was brought by Nationwide Airlines (the Applicant) against South African Airways (SAA – the respondent).<sup>18</sup> By way of background, South Africa’s airline industry experienced a sharp escalation in operating costs at the time. Between August and November 2000, its jetline fuel prices increased by 56% from its July level. At the same time the rand/dollar exchange rate changed unfavourably. The Applicant alleged that these escalations in their costs forced them to upwardly adjust their prices over this period, but their competitors, inter alia the respondent, did not. The applicants claimed, that based on the respondents’ own figures, their costs ought to have increased by at least 20% over this period.<sup>19</sup> The applicants therefore contended that the respondents’ passivity in the face of rising costs was tantamount to pricing below their marginal or average variable cost. Consequently, the applicants requested the Competition Tribunal to order the respondents to increase the prices of certain classes of their tickets by 20%. Mackenzie<sup>20</sup> argues that this raised the presumption of anti-competitive effects (rather than the complainant or the Commission having to prove such effects). This was changed in *Competition Commission v South African Airways*<sup>21</sup>, where the Tribunal held that the complainant or the Commission bears the onus to prove the conduct’s anti-competitive effect.<sup>22</sup> Since Nationwide failed to

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15 R Whish & D Bailey “Competition Law” 2012 717.

16 The Competition Tribunal of South Africa.

17 Section 59 sets out grounds for imposing an Administrative Penalty on a firm found guilty of contravening the Act.

18 *Nationwide Airlines v South African Airways* 92/IR/Oct00.

19 *Ibid* at 1.

20 N Mackenzie “Are South Africa’s Predatory Pricing Rules Suitable?” (2012) at 12.

21 *The Competition Commission v South African Airways* 18/CR/Mar01.

22 *Ibid* at par 132 to 135.

establish that SAA was pricing below its marginal or average variable cost and the predatory pricing charge was dismissed under section 8(d)(iv) of the Act.<sup>23</sup>

The second predation case which sheds more light on the matter is the *Media 24* - case.<sup>24</sup> In a nutshell, Media 24 owned two weekly newspapers, namely Vista and Forum. Forum “conveniently” exited the market soon after another newspaper, namely, Gold Net News (GNN), had exited the market. The Commission had originally alleged that Media24 had priced Forum below its AVC, using it as a fighting brand – this at least was the case made out in the complaint referral, a case that Media 24 denied.<sup>25</sup> Media 24 countered the allegation by indicating that GNN’s demise was a result of other external factors such as the 2008 economic recession, and that Forum had always generated revenue at prices which “exceeded any legally acceptable measure of cost”.<sup>26</sup> The Commission relied on section 8(d)(iv) and, in the alternative, section 8(c) of the Act to show that Media 24 had engaged in predatory pricing.<sup>27</sup> Prevailingly, the Commission alleged that Forum had priced below their AVC, alternatively, below its average total cost (ATC).<sup>28</sup> On this subject, the Commission contended that on the facts, Media 24’s average avoidable costs (AAC) amounted to their AVC and therefore produced evidence before the Tribunal in order to establish Forum’s AAC only.<sup>29</sup>

This case is now regarded as the leading jurisprudence on predatory pricing, and specifically, how section 8(d)(iv) would be interpreted and applied by the Tribunal. It is, however, imperative to note that the finding by the Tribunal was based on section 8(c) of the Act which is commonly referred to as the “catch-all” provision. The Tribunal did not respond to questions relating to the interpretation of section 8(d)(iv). Most notably, it did not indicate whether or not section 8(d)(iv) permits complainants to utilise cost measurement standards other than the AVC or marginal cost to prove that a dominant firm has engaged in predatory pricing in contravention of the provision.

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23 Ibid 18 at 16.

24 *The Competition Commission v Media 24 Limited* at 2 [para 2].

25 *The Competition Commission v Media 24 Limited* at 31 [para 132].

26 *The Competition Commission v Media 24 Limited* at 2 [para 5].

27 *The Competition Commission v Media 24 Limited* at 3 [para 7].

28 Ibid 24 at par 533.

29 Ibid at 24 par 134.

An important “take-home message” from the *Media 24*-case relates to the relationship between section 8(d)(iv) and 8(c) of the Act. While section 8(d) sets out specific types of conduct which are generally considered as anti-competitive, if engaged in by a dominant firm, section 8(c) of the Act is a more general provision that reads as follows:

*Section 8 – It is prohibited for a dominant firm to -*

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

The most important distinction between section 8(d)(iv) and 8(c) of the Act is that a first-time contravention of section 8(c) does not lead to the imposition of an administrative penalty.<sup>30</sup> So, from a strategic point of view, the Competition Commission<sup>31</sup> would ideally want to get cases brought under section 8(d)(iv) as opposed to section 8(c). Another distinction between these two sections relates to the onus of proving that the predation was exclusionary and anti-competitive. In terms of section 8(c), the Commission or complainant bears the onus to show that the anti-competitive effect outweighs any efficiency justification for the conduct or pro-competitive gains raised by the respondent.<sup>32</sup> In terms of section 8(d) the burden of proof now shifts to the respondent who must prove that the efficiency justification outweighs the anticompetitive effect. If the respondent does not, then the conduct will be found to be an abuse.<sup>33</sup>

## 1.2 Problem statement

In South Africa the primary rules prohibiting predatory pricing is entrenched in legislation. The AVC or marginal cost used to be the only test that was applied to ascertain if a firm was involved in predatory pricing or if it used a predatory pricing strategy. On 1 December 2017 however, the Competition Amendment Bill<sup>34</sup> was

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30 A first-time contravention of Section 8(d)(iv) of the Competition Act may lead to an administrative penalty of up to 10% of a firm's annual turnover.

31 The Competition Commission of South Africa. (Hereinafter the Commission).

32 *The Competition Commission v South African Airways* 18/CR/Mar01 at par 134.

33 *Ibid* at 135.

34 Government Gazette No. 41294.

released for public comment. This is an indication that South Africa has been contemplating how to make competition legislation more “enforceable”. A key amendment to the Competition Act is the introduction of a standard which benchmarks against the respondents own “cost benchmarking” as opposed to the utilisation of more objective standards tests. The benchmarking, contained in clause (1)(i) of the Amendment Bill, now includes reference to “average avoidable costs” or “LRAIC”.

It appears that a suitable rule has been tailor-made for the South African economic environment and it seems to reflect local enforcement priorities but whether this is indeed the correct approach to take merits further investigation. It should further be noted that predatory pricing has recently received significant attention from competition authorities across various jurisdictions.<sup>35</sup> In light of this it is submitted that a more substantive consideration of predatory pricing in South Africa is required – one of the aims of this dissertation. Accordingly, this dissertation undertakes a critical and comparative study on the regulation of predatory pricing in South Africa, the United States (US) and the European Union and seeks to draw on their experience with the view to extract key lessons for South African authorities tasked with applying and possibly refining the relevant legislation. The ultimate objective of this dissertation is to determine whether the proposed amendment to the predatory pricing clause of the Act, compared to how other jurisdictions deal with predatory pricing, provide a logical and unprejudiced legal response to the adjudication of predatory pricing in South Africa.

### 1.3 Methodology and Structure

This study consists of a literature review which will scrutinize all relevant legislation, textbooks, policies, journal articles, cases and appropriate electronic resources of the relevant jurisdictions. The remainder of the dissertation is divided into four chapters. For the purposes of comparison, this dissertation will in Chapter 2 and 3 conduct an in-depth analysis reflecting on the legal frameworks of the United States (“US”) and the European Union. These two jurisdictions are undoubtedly the most influential

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<sup>35</sup> The European Commission has launched investigations into predatory pricing in the potato-chips industry; Also see Indian Competition Commission has also launched an investigation into alleged predatory pricing in the taxi industry and the Paris Court of Appeals’ dismissal of the predatory pricing and exclusionary conduct allegations made against Google by an online maps rival.

authorities on predatory pricing, and indeed competition law in general. This can be ascribed as a natural consequence of their position as two of the most significant commercial hubs in the world. The two jurisdictions however follow completely different approaches: where the US approach generally involves less interference in competition, the European approach can be argued to be quite hands-on with substantial interference.<sup>36</sup> Chapter 4 will review South Africa's legal framework for predatory pricing and evaluate it against the comparative frameworks as set out in Chapter 2 and 3. Chapter 5 comprises of the conclusion of the dissertation, which seeks to bring the primary cords of the comparative analysis together, providing insights as to the effectiveness of South Africa's approach to adjudicating predatory pricing, and possible lessons which can be drawn from the experience of the US and Europe with a view of providing clarity for the local authorities.

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36 See elaboration in Chapter 2 and 3 of this dissertation.

## 2 Chapter 2: Predatory Pricing in the US

### 2.1 Introduction

“A firm may reduce its prices in an attempt to destroy its rivals or to deter new entry. Although the Sherman Act has long been construed to prohibit this practice, the case law on predatory pricing has been characterized by vagueness and a paucity of economic analysis”<sup>37</sup>

When a firm is accused of predatory pricing, its charge sheet consists of claims that it is pricing at levels that are unreasonably low.<sup>38</sup>

The legal background for predatory pricing in the US is founded under the auspices of the Sherman Act<sup>39</sup>, the Federal Trade Act<sup>40</sup> and the Clayton Act as amended by the Robinson Patman Act.<sup>41</sup> Section 2 of the Sherman Act is the most commonly used in matters on predatory pricing and it will therefore be the focus of this dissertation. An outlay of section 2 is of particular importance for the demarcation of the law on predatory pricing in the US. Section 2 provides as follows:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 100,000,000 if a corporation, or, if any other person, \$ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court’.”<sup>42</sup>

The US Supreme Court has on occasion held that this statute represents “the Magna Carta of free enterprise”<sup>43</sup> and at its core section 2 makes it illegal to acquire or to

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37 P Areeda & DF Turner “Predatory pricing and related practices under Section 2 of the Sherman Act” 697-733 697.

38 DJ Gifford “Predatory pricing analysis in the Supreme Court” (1994) *The Antitrust Bulletin* 431-483 435.

39 The *Sherman Act* of 1890 15 U.S.C. Section 2.

40 Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive trade practices

41 The *Robinson Patman Act* 15 USC ss 13(a) section 3.

42 Section 2 of the Sherman Act of 1890.

43 As described by the US Supreme Court in *United States v. Topco Associates Incorporated* 405 U.S. 596, 610 (1972).

maintain a monopoly power through improper means.<sup>44</sup> However a closer analysis of section 2 makes it clear that it prohibits three offences namely: (a) monopolization, (b) attempts to monopolize and (c) conspiracy to monopolize. For purposes of this discussion the focus will be on “monopolisation” and “attempt to monopolise”. In the U.S, the long-standing test used to determine monopolization is firstly, the establishment of monopoly power of the alleged predator in the relevant market, and secondly, the wilful acquisition of that power as distinguished from growth because of a superior product, business acumen or historic accident.<sup>45</sup>

As for the first element of the test, the Act does not define what it means for a firm to have monopoly power. However, in *AD/SAT v. Associates Press*<sup>46</sup> the Second Circuit defined “monopoly power” as: the ability to price substantially above the competition level and to persist in doing so for a significantly long period without erosion by new entry to the market or expansion. “Market power” being the ability to raise prices profitability above those that would be charged in a competitive market.<sup>47</sup> Regarding the second element, a firm will not be found to have monopoly power unless it is accompanied by an element of anti-competitive conduct.<sup>48</sup> Such conduct is often described as “exclusionary” or “predatory” conduct and may include conduct to obtain a monopoly unlawfully, and to maintain it unlawfully.<sup>49</sup> Otherwise said, section 2 makes it illegal to obtain or maintain monopoly power through improper means. Achieving monopoly power through predatory pricing could therefore be deemed as “improper means”. It is accordingly important to distinguish between “natural monopolisation” e.g. where firms obtain a monopoly because their product is superior and “unlawful monopolization” where firms obtained their monopoly by improper means such as predatory pricing.

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44 U.S. Department of Justice “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” (2008).

45 *United States v Grinnell Corporation* 384 U.S. 563 (1966) [par 571].

46 181 F.3d 216, 277 (2d Circuit. 1999); See also *United States v. E.I. du Pont de Numours & Co. (Cellophane)*, 351 U.S 377,391 (1956). Raybould DM & Firth A “” Law of Monopolies: Competition law and practice in the USA, EEC, Germany and the UK; also see *US v Grinnell Corp* 84 US 563 (1966).

47 U.S. Department of Justice “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” (2008) – chapter 2.

48 *Verizon Communications, Incorporated v Law Offices of Curtis v Trinko LLP* 540 U.S. 398 (2004) at 407.

49 U.S. Department of Justice “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” (2008) – chapter 1.



Secondly section 2<sup>50</sup> also proscribes attempts to monopolize which will include a prohibition against attempts of predatory pricing. It is therefore important to determine what the requirements for attempted monopolization is. In terms of *Spectrum Sports, Inc. v McQuillan*<sup>51</sup> establishing “attempted monopolization” requires proof that:

- (a) that the defendant has engaged in predatory or anti-competitive conduct with
  - i. a specific intent to monopolize; and
  - ii. a dangerous probability of achieving monopoly power.

As for the anti-competitive conduct requirement, it is very vague and the Act does not provide any explanation of what behaviour qualifies as “anti-competitive”. The second element is “specific intent to monopolize”. According to Areeda and Hovenkamp this entails a specific intent to destroy competition or to build a monopoly. From this element it can be inferred that the anti-competitive conduct undertaken by the firm must be carried out solely to drive out competitors and to establish a monopoly in a specific relevant market. Anti-competitive behaviour will therefore not be deemed illegal if a firm’s goal is to compete vigorously without an intent to monopolize.<sup>52</sup>

The “dangerous probability”<sup>53</sup> element requires consideration of the “relevant market and the defendant’s ability to lessen or destroy competition in the market”.<sup>54</sup> In other words, the likelihood must exist that a firm attempting to gain a monopoly by eliminating its competitors actually has the ability to do so. The US department of Justice held that the reason behind this approach is to prevent any constraint of the ‘vigorous and creative unilateral-business strategies’ of smaller companies, which may arise out of fear of section 2-liability.<sup>55</sup>

## 2.2 US case law

### 2.2.1 *Utah Pie Co. v. Continental Banking Co.*

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50 of the Sherman Act of 1890.

51 506 U.S. 447, 456 (1993).

52 H Hovenkamp Antitrust Policy after Chicago Law (1985) 2 *Michigan Law Review* 84; See also *United States v Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Circuit. 2005).

53 The anticompetitive behaviour with intent to monopolize is only unlawful if there is a ‘dangerous probability’ of actually achieving monopoly power.

54 *Spectrum Sports*, 506 U.S. at 456.

55 U.S. Department of Justice “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” (2008) – Chapter 1.

In its first decision on predatory pricing, the US Supreme Court condemned the pricing strategy of three baking firms which had allegedly injured the Plaintiffs competitive position by selling frozen pies at discriminatory prices in the Salt Lake City market.<sup>56</sup> Utah Pie is a small, family run business located in Salt Lake City that produced fresh pies locally for many years. In 1957, Utah Pie Company entered the frozen pie market. It competed with Continental Baking Company, Pet Milk Company, and Carnation Milk Company.<sup>57</sup> Utah Pie was able to undercut its national competitors' prices due to having their manufacturing plant locally. In response to Utah Pie's lower prices, the competitors also lowered their prices. One competitor, Continental Baking Company, started selling its frozen pies in the Salt Lake City market for \$2.85, which was below-cost price, while charging higher prices for the same pies in other locations. In turn, Utah Pie reduced its price for frozen apple pies to \$2.75, a price Continental Baking Company refused to match. In 1961, Utah Pie filed a suit for price discrimination.<sup>58</sup>

The court *a quo* ruled in favour of the Utah Pie Company but its decision was reversed by the Court of Appeal. The Supreme Court ruled, however, in favour of Utah Pie, finding that:

"Continental Baking Company had engaged in predatory pricing due to the fact that a jury may have 'reasonably concluded that a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force."<sup>59</sup>

Notwithstanding the above Utah Pie still held a market share of over 45% at the end of the price competition. Moreover, during 1958 to 1961 Utah Pie still managed to generate significant profits.<sup>60</sup>

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56 *Utah Pie v Continental Baking Company* 386 U.S. 685 (1967). It should be noted that this case was decided in the context of the Robinson Patman Act of 1936 and not the Sherman Act. It is nevertheless considered representative of how predatory pricing in general was approached by the courts at the time, see U.S. Department of Justice, 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act', Chapter 4 Price Predation. (Hereinafter referred to as Utah Pie)

57 These 3 large firms are nationwide distributors of produce, including frozen pies, to American grocers and is deemed to be Utah Pies Co national competitors.

58 *Ibid* at 690-697.

59 *Utah Pie vs Continental Baking Company* 386 U.S. at 699.

60 *Ibid*.

This ruling was criticised across the board as an example where the courts protected competitors rather than competition.<sup>61</sup> According to Bowman<sup>62</sup> this was the most anti-competitive decision of the decade, and in the words of the Bork:<sup>63</sup>

“... Defendants were convicted not of injuring competition but, quite simply, of competing...”

In other words, the declining price structure in the *Utah Pie* scenario had lessened competition because of discriminatory pricing by the national companies. In addition to lessening competition, the three defendants also stripped the plaintiff of its monopoly position preventing it from engaging in predatory conduct. Significantly there was no finding on the possibility of recoupment in the ruling and despite the aforementioned criticism this ruling paved the way as the Supreme Court handed down another significant decision in respect of predatory pricing when it decided the *Matsushita*-case, discussed below.<sup>64</sup>

#### 2.2.2. *Matsushita Electric Industrial Company v. Zenith Radio Corporation*

In this matter Zenith claimed that Matsushita and twenty other Japanese-owned or -controlled manufacturers of electrical appliances conspired and sold their products below costs in the US while selling similar products in Japan at higher than costs levels in order to cross-subsidise the loss sales in the US.<sup>65</sup> This was supposedly done by charging very high prices in Japan as well as using the monopoly profits from the Japanese market to financially support the predatory prices on export sales to the US market to eliminate its American competitors in order to ultimately establish a monopoly. In addition, Zenith alleged that the lifespan of predation was already two decades old, and while producers suffered economic losses in the short run, once the low pricing honeymoon was over and Japanese competitors established a monopoly, American consumers would suffer in the long run.<sup>66</sup>

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61 U.S. Department of Justice, ‘Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act’, Chapter 4 Price Predation.

62 W S Bowman ‘Restraint of Trade by the Supreme Court: The *Utah Pie* Case,’ (1967) 77 *Yale LJ* 70 at 84.

63 RH Bork *The Antitrust Paradox: A Policy at war with itself* 1978 New York

64 *Matsushita Electric Industrial Company v Zenith Radio Corporation* 475 US 574 (1986). (Hereinafter “the *Matsushita case*”).

65 *Matsushita Electric Industrial Company v Zenith Radio Corporation* 475 US 574 (1986).

66 *Ibid* at 582-593.

The Supreme Court found that for a predatory pricing strategy to be successful, the following three conditions must be met:

- a) there must be a likelihood that the predator will acquire a monopoly position;
- b) it must cause entry barriers for potential new competitors; and
- c) the predator must be able to uphold its monopoly position long enough to recoup its losses and ultimately make profits because of the predatory pricing.<sup>67</sup>

Since the alleged predatory pricing had not caused any entry barriers for new competitors, the Supreme Court however found that the conditions for predatory pricing were not fulfilled.

### 2.2.3 *Cargill Incorporated v Monfort of Colorado Incorporated*

In the *Cargill* decision<sup>68</sup>, the Supreme Court reconsidered its view held in *Matsushita* earlier the same year. The plaintiffs in *Cargill* sought to enjoin the impending acquisition of the second and third largest beef packer companies in the US, contending that it would alter the market structure in a way that would subject them to elevated costs, lower prices and reduced profits by the means of injury from below-cost pricing.<sup>69</sup>

Similar to the *Matsushita*-case, *Cargill* contains an extensive discussion of why predatory pricing rarely succeeds.<sup>70</sup> In particular, the Court highlighted two significant obstacles to a successful predation strategy that are not often overcome, being firstly:

“...a predator must be able to absorb the market shares of its rivals once prices have been cut.”<sup>71</sup>

And secondly:

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67 Ibid 589.

68 *Cargill Incorporated v Monfort of Colorado Incorporated* 479 U.S. 104 (1986). (Hereinafter referred to as “the *Cargill* case”).

69 Ibid 106-110.

70 *Cargill Incorporated v Monfort of Colorado Incorporated* 479 U.S. at 11921 note 15; at 121 and 122 note 17.

71 *Cargill Incorporated v Monfort of Colorado Incorporated* 479 U.S. at 119 note 15.

“It is also important to examine the barriers to entry into the market, because 'without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.’<sup>72</sup>

In other words, the Court’s *ratio* stems from the fact that the Plaintiff’s losses were a result of fierce competition rather than constituting an antitrust injury and that the merged company would not have been capable of successfully pursuing a predatory scheme due to the lack of entry barriers and a low market share. Its definition of predatory pricing now allows for the possibility that some below cost pricing may be well intended and lawful. What is more, the Court recognises that the practise of predatory pricing does in fact occur.<sup>73</sup> Both Matsushita and Cargill emphasise the relationship between price and cost and the central role that recoupment plays in a successful predation strategy.<sup>74</sup> These judgments laid the foundation for the Supreme Court’s landmark case that followed suit seven years later.

#### 2.2.4 *Brooke Group Ltd v Brown & Williamson Tobacco Corporation*

In this 1993 the Supreme Court provided a detailed analysis of the standard that ought to be applied to predation claims. By way of background, this case involved the cigarette market where Liggett<sup>75</sup> holding 2% of the market share, introduced generic cigarettes and began taking sales away from major companies, charging a price 30 percent lower than its competitors’ branded cigarettes. Within the next four years, Liggett managed to gain 4 per cent of the overall cigarette market at the expense of the well-established companies selling branded cigarettes. The respondent, Brown & Williamson Tobacco Corp<sup>76</sup> applied a counterstrategy by introducing their own generic brand.<sup>77</sup> However, Liggett responded as this gave way to a price war.<sup>78</sup> Liggett alleged

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72 *Cargill Incorporated v Monfort of Colorado Incorporated* 479 U.S. at 120 note15; See also *Matsushita Electric Industrial Company v. Zenith Radio Corporation* 475 US 574 (1986) at 591.

73 *Cargill Inc. v. Monfort, Inc.*, 479 U.S. 104 at 121; *Matsushita*, 475 U.S. at 589; P Areeda & D. Turner, supra note 14 717; RH Bork supra note 53 149; SR Beck “Intent as an element of predatory pricing under Section 2 of the Sherman Act” (1991) *Cornell Law Review* 1242-1284 1249.

74 CR Leslie “Predatory pricing and recoupment” (2013) *Columbia Law Review* 1695-1771 1726.

75 The Brooke Group had been renamed during litigation.

76 At the time Brown & Williamson Tobacco Corp held 12% of the market share.

77 The basis of their counterstrategy was to sell their own generic brand to wholesalers at lower prices than Liggett along with discounts and rebates.

78 *Brooke Group Ltd v Brown & Williamson Tobacco Corporation* 509 U.S 209 (1993) at 209; KE May “Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.: A victory for consumer welfare under the Robinson-Patman Act” (1994) *University of Richmond Law Review* 507-529 517.

that Brown & Williamson Tobacco Corp was attempting to force them to raise the prices to slow the growth of the generic market, which would enable the latter to earn *supra*-competitive profits from its branded lines for a longer period of time.<sup>79</sup>

The Court considered the standards of the Sherman Act, and held that the plaintiff must firstly prove that the prices complained of are below an appropriate measure of costs.<sup>80</sup> Secondly, it stated that it had to be proved that the alleged predator had reasonable prospect or that there is the dangerous probability of recouping its investment in below-cost prices, thus hurting competition.<sup>81</sup> The Court viewed market place recoupment as highly unlikely and held that Liggett failed to prove the possibility of recoupment by Brown & Williamson.<sup>82</sup> However, the Court declined, as it did before, to solve the issue of what measures of costs was most appropriate to analyse the pricing conduct, since the parties in this case agreed that the relevant measure of costs is Average Variable Cost (AVC).<sup>83</sup>

The Court held that recoupment is a key feature of predatory pricing, and that it is up to the plaintiff to prove the likely occurrence of such recoupment. Importantly, the court also explains that evidence of below-cost prices is not sufficient to serve as proof of probable recoupment:<sup>84</sup> one has to estimate the cost of the alleged predation and do a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.<sup>85</sup> In the matter at hand, Liggett did not provide enough evidence to convince the court that a realistic possibility of recoupment existed resulting in a rejection of the claim.

One can infer from the *Brooke*-case that success in a predatory pricing claim requires the plaintiff to prove that the prices charged by the defendant were below an appropriate measure of the defendant's costs in the short term and that the defendant had a dangerous probability of recoupment in the long run.<sup>86</sup> Since the *Brooke*-

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79 Ibid 68 at 212.

80 Ibid 68 at 222.

81 Ibid 68 at 224.

82 Liggett Group, Inc.v. Brown & Williamson Tobacco Corp., 964 F.2d 335, 342 (4th Cir. 1992) 113 S. Ct. at 2589.

83 *Brooke Group Ltd v Brown & Williamson Tobacco Corporation* 509 U.S 209 (1993) at 217.

84 Ibid 68 at par 225.

85 Ibid 68 at 226.

86 U.S. Department of Justice, 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act', Chapter 4 Price Predation.

judgment there has however been further developments in respect of how the US assess predatory pricing claims. The following is a short overview of the latest position.

## 2.5 Department of Transportation guidelines

The most remarkable development in the US since the *Brooke* case has been the Department of Transportation (DOT) guidelines.<sup>87</sup> This policy recognises predatory pricing as a strategic problem and allows for proof of recoupment based on “reputation effects”. The purpose of the Guidelines is to focus on the ability of an air carrier, which dominates a geographical area, to exclude competition and possible new entrants.<sup>88</sup> In terms of the Guidelines a dominant airline would be conducting predatory strategies if it excluded or prevented new entrants from entering the market by charging low fares, only to charge high fares thereafter.<sup>89</sup> In addition, the Guideline relies on a gross revenue measure of the dominant airline to identify predation.<sup>90</sup> Bolton *et al* indicate that this substitution of the traditional cost test<sup>91</sup> may be justified since the distinct features of the airline industry markets makes the focus on output expansion a particularly effective predation strategy.<sup>92</sup> The purpose of the Guidelines is therefore to identify the predatory strategy involved in local airline markets and not to define predatory pricing in the US under a single legal formulation.

## 2.6 Conclusion

Hemphill states that in the US, the competition law doctrine is extremely sceptical about predatory pricing.<sup>93</sup> The two tick-box requirements namely, (a) sales at a below-cost benchmark and (b) the possibility of recoupment, makes it exceedingly difficult for a plaintiff to succeed in a predatory pricing claim. It is clear from the discussed US case law regarding predatory pricing that recoupment or the possibility thereof is pivotal if a plaintiff intends to successfully prove a predation claim. In fact, recoupment

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87 63 FR 28021 - Enforcement policy regarding unfair exclusionary conduct in the air transportation industry 7 TRR (CCH) para 49,227 et seq.

88 Bolton P & Brodley JF& Riordan, MH. Predatory Pricing: Strategic Theory and Legal Policy Center for Economic Research No. 9982, 1999 2261-2330 2261.

89 *Ibid* 76 at 17921.

90 *Ibid* 76 at 17922.

91 *Ibid* 15 at 717.

92 Bolton P & Brodley JF& Riordan, MH. Predatory Pricing: Strategic Theory and Legal Policy Center for Economic Research No. 9982, 1999 2261-2330 2261.

93 CS Hemphill “The role of recoupment in predatory pricing analysis” (2001) 53 *Stanford Law Review* 1581-1612 1581.

seems to be the very essence of a predatory pricing strategy and without it competition will not suffer. The next chapter will showcase the regulation and practice of predatory pricing in the EU.



### 3 Predatory Pricing in the European Union (EU)

#### 3.1 Article 102 Treaty on the Functioning of the European Union (TFEU)

Predatory Pricing in the EU is regulated by Article 102 (previously Article 82) of the TFEU<sup>94</sup>. In terms of this article predatory pricing refers to:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal 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 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.”

Most striking about this Article are the three crucial elements required for its smooth functioning: a firm must have a dominant position in the relevant market, it must be abusing that position and that abuse must affect the trade between the Member States.<sup>95</sup> Since these conditions are essential requirements to raise a predatory pricing challenge they warrant a microscopic analysis.

##### 3.1.1 *The concept of dominant position and market definitions*

It is common cause that a firm must occupy a dominant position to be cloaked under Article 102 TFEU. However, in *Hoffmann La-Roche*<sup>96</sup> the court held that abuse does not imply that the dominance is the means by which the abuse is brought about, *viz* there need not be a parallel between dominance and abuse. Accordingly, in European

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94 Article 102 TFEU is formerly known as Article 82 of the EC-Treaty (and before that, Article 86). On account on of consistency, this mini-dissertation will refer to article 102 TFEU regardless of the time frame and thus Article under which the respective caselaw was reviewed.

95 M Cuthbert, *EU Law in a Nutshell*, (5 ed 2006) 78.

96 In Case 85/76 *Hoffman/LaRoche & Company AG v Commission of the European Communities* 1979.

competition law a firm's ability to occupy a dominant position is not unlawful and although dominance is a pivotal requirement under Article 102 TFEU, the proviso does not offer guidance as to what qualifies as dominance. A diagnosis of this concept has however been made by the European Court of Justice ("The ECJ") in one of its pioneer cases, *United Brands*.<sup>97</sup> The court held [that] the ban is only enforced against "companies enjoying a position of economic strength enabling them to prevent effective competition being maintained on the relevant market by giving them power to behave to an appreciable extent independently of their competitors, customers and consumers".<sup>98</sup> Thus, the court affixes the concept of dominance to a firm's economic power and importantly on its ability to operate independently in a market.

It is trite that a dominant firm is not exposed to efficient competitive constraints, such a firm should therefore be "...subject to a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."<sup>99</sup> Taking this "special responsibility" into account, a dominant firm cannot be deprived of its inherent privilege to protect its own commercial interests when it is under attack and while such a firm ought to be allowed the right to take reasonable measures, such behaviour will not be permitted if its intent is to strengthen its dominant position and consequently abuse it.<sup>100</sup> Concomitantly, the process to determine the existence of a dominant position is both site specific and twofold: it requires the definition of a relevant market<sup>101</sup> and an evaluation of firm's market share.<sup>102</sup>

The existence of a dominant position for purposes of EU competition law is a question of fact determined by relevant market factors.<sup>103</sup> The aim of determining a relevant market and a firm's dominance within it, is to establish the extent to which a firm is subject to competitive pressure and restraint. Safe to say that the narrower the definition of the relevant market is, the greater the market share of the firm and the easier it is to conclude that the firm is dominant under Article 102.<sup>104</sup> The ECJ has

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97 Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* 1978.

98 *Ibid* at 65.

99 Case 322/81 *Michelin I v Commission of the European Communities* 1983 par 57.

100 A Arnall & A Dashwood & M Dougan & M Ross & E Spaventa & D Wyatt *Wyatt & Dashwood's European Union Law* 1036.

101 With reference to product-, geographical and temporal market.

102 *Ibid*.

103 M Cuthbert *EU Law in a Nutshell*, (5 ed 2006) 79.

104 M Furse *Competition Law of the UK and EC*, (5 ed 2006) 191.

described the relevant market in numerous cases wherein which firms argued that the Commission's definition of the relevant market is too narrow.<sup>105</sup> In *United Brands*, the court took a general approach defining the relevant market by focusing on "interchangeability" which refers to the degree to which the goods or services are substitutable<sup>106</sup> with other products.<sup>107</sup> *United Brands* produced and supplied bananas to Member States and was accused of an assortment of abusive practices.<sup>108</sup> A contentious issue was the definition of the relevant market. *United Brands* submitted that the bananas were part of a larger market of fresh fruit and provided evidence to show that the cross-elasticity between bananas and other fruit was high.<sup>109</sup>

The ECJ considered several factors in its *ratio*, amongst others the seasonal substitutability in general between banana and all seasonal fruit: bananas ripen the whole year round without any season having to be taken into account; and the question whether it can be replaced by other fruits must be determined over the span of an entire year for the purpose of ascertaining the degree of competition between it and other fresh fruit; for the banana to be viewed as creating a market, it must be possible for it to be singled out by its special features distinguishing it from other fruits that is only to a limited extent substitutable with bananas and is only exposed to their competition in a way that is barely noticeable.<sup>110</sup> The court concluded that the cross-elasticity was low and bananas were a specific market because they embodied an important part of the diet of certain consumers, and because they had clear-cut attributes which made other fruit incompatible as substitutes.<sup>111</sup>

Akin to this ruling is that of *Michelin*.<sup>112</sup> In summary, in the *Michelin*-case the Commission instituted an action against Michelin based on its habit of awarding discounts on tyre sales, alleging that the discounts were granted to tie purchasers to

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105 See Case 85/76 *Hoffman/LaRoche & Co. AG v Commission of the European Communities* 1979; Case T—83/91 *Tetra Pak International SA v Commission of the European Communities* 1994; Case 6/72 *Europemballage Corporation and Continental Can Co Incorporated v Commission of the European Communities* 1973.

106 Referred to as the Substitutability Test.

107 Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* 1978.

108 MH FritzPatrick "United Brands Company v. Commission of the European Communities: window to price discrimination law in the European Economic Community" (1979) 1 *NWJILB* 338-348 340.

109 *Ibid* 95 at 224.

110 Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* 1978 [par 22, 23, 27, 28 and 29].

111 *Ibid* at 272.

112 Case 322/81 *Michelin I v Commission of the European Communities* 1983.

them. It was common cause that Michelin held a dominant position in the market for new replacement tyres for lorries, buses, and similar vehicles. Michelin argued that the definition for the relevant market on which the Commission founded its decision was arbitrary and artificial, *viz*, too wide. The court vehemently denied these arguments and held that *vis-à-vis* replacement tyres at the user level there is no substitutability between car- and van tyres on the one hand. and heavy-vehicle tyres on the other.<sup>113</sup> In other words, car-and van tyres have no influence whatsoever on competition on the market in heavy-vehicle tyres.<sup>114</sup>

Contrary to the aforementioned judgments the court has also on occasion disagreed with the Commission on its determination of the relevant market. One such case was *Continental Can*<sup>115</sup> where the court stated that:

“In order to be regarded as constituting a distinct market, the products in question must be individualized not only by the mere fact that they are used for packing certain products, but by particular characteristics of production which make them specifically suitable for this purpose. A dominant position on the market for light metal containers for meat and fish cannot be decisive as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market by a simple adaptation...”

From this it appears that the Commission in the *Continental Can*-matter had not been persuasive in showing why e.g. manufacturers of tins for vegetables, condensed milk, olive oil or fruit juice, could not by making some adaptation to their product, enter the field as serious competitors to the market leader if the latter raised its prices disproportionately.<sup>116</sup>

As for the relevant geographic market, in the *Tetra Pak*-case<sup>117</sup> Tetra Pak defined it as the territory in which all firms “operate in the same or sufficiently homogenous condition of competition in relation to the relevant product or services” and further “where it is not necessary for those conditions to be homogenous”. In *Hilti*<sup>118</sup> the court

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113 Case 322/81 *Michelin I v Commission of the European Communities* 1983 [par 39].

114 *Ibid* at par 39.

115 Case 6/72 *Europemballage Corporation and Continental Can Co Inc v Commission of the European Communities* 1973 [par 14].

116 *Ibid* at 33.

117 Case T- 83/91 *Tetra Pak International SA v Commission of the European Communities* 1994 [par 91], definition confirmed on appeal in Case C-333-94 *Tetra Pak* [note 3]; Case T- 219/99 *British Airways plc v Commission of the European Communities* 2003 [par 108].

118 Case C – 53/92 *P Hilti AG v Commission of the European Communities* 1994.

found that in the absence of special factors, the relevant geographic market was the entire EU.

Once the court has established the relevant market, it then must decide if a firm is dominant within that market.<sup>119</sup> A measurement of a firm's market power is therefore required. The main indicator of a firm's dominance is its market share, since only a company who possesses a large part of one market can be deemed to be in a dominant position.<sup>120</sup> According to the court, exceedingly large market shares are in itself proof of the existence of a dominant position.<sup>121</sup> Hardly any firms, other than monopolies, will be able to attain 100% of the market and it should not be perceived that a market share of this size is necessary for Article 102 to "stick", but a *de facto* monopoly will lead to a finding of dominance.<sup>122</sup> Although the court found that *United Brands*<sup>123</sup> market share of 40 to 45 percent provided evidence of preponderant strength since its market share was several times greater than that of its nearest competitor<sup>124</sup>, it overturned a Commission finding that other factors were present indicating that Hoffman-La Roche was dominant in the market for B3 vitamins with an estimated market share of forty three percent.<sup>125</sup> Contrary to this, the court has however found that firms with a market share below forty per cent can be viewed to be dominant, depending on the strength and numbers of competitors.<sup>126</sup> In its 2005 *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*<sup>127</sup> the Commission emphasizes that market shares may be qualified by an

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119 P Craig & G De Burca *EU Law text, cases and materials* (6 ed 2015) 1061.

120 Case C-52/07 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenka Tonsättares Internationella Musikbyra* (STIM) upa 2008 [21-22].

121 See Case 298/83 *C.I.C.C.E v Commission of the European Communities* 1985; Case T-219/99 *British Airways plc v Commission of the European Communities* 2003 [par 99-100].

122 Case C-52/07 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenka Tonsättares Internationella Musikbyra* (STIM) upa 2008 [21-22].

123 Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* 1978 [note 4]; In Case C-62/86 *Akzo Chemie BV v Commission of the European Communities* 1991 the ECJ held that a market share of fifty percent was very large and it is indicative of a dominant position [par 60]; Case T-228/97 *Irish Sugar plc v Commission of the European Communities* 1999 [par 70].

124 16 percent.

125 Case 85/76 *Hoffman/LaRoche & Co. AG v Commission of the European Communities* 1979 [note 3;16].

126 In T-219/99 *British Airways v Commission* the relevant market share was 39.7 per cent with this firm having more than seven times the share of its closest competitor, Virgin Atlantic [note 38]; In C-250/92 *Gottrup-Klim v Dansk Landsberg* 1994 the court found that a market share of 36 per cent and 32 per cent was respectively insufficient without other factors present to constitute irrefutable evidence of dominance.

127 *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (2005) 1-72.

analysis of the degree of product differentiation in the market. The Commission uses an analogy to suggest that there may be instances where a rival with ten per cent market share poses greater competition constraints on a firm with fifty per cent market share than another rival firm supplying twenty per cent of the market. This may well be the case where the firm with the lower market share and the allegedly dominant firm both sell premium branded products whereas the rival with the larger market share sells a bargain brand.<sup>128</sup> In relation to this, the court has regarded a firm as “super dominant” where it refers to the fact that there was dominance amounting to ninety per cent with only one competitor in that specific relevant market.<sup>129</sup>

In the first paragraph of Article 102 TFEU “any abuse” [by a dominant firm] is prohibited. The *caveat* then refers to four categories in subsections (a) to (d) in which a dominant position can be abused, amongst others: discriminatory pricing, excessive pricing, refusal to deal, and predatory pricing. The following paragraphs will illustrate how the law on predation has developed in the EU.

## 3.2 EU predatory pricing case law

### 3.2.1 *AKZO Chemie BV v Commission of the European Communities*

*AKZO*<sup>130</sup> is the leading case law in the application of Article 102 to predatory pricing. *AKZO* was based in the Netherlands, it manufactured organic peroxides and its market share was more than sixty per cent. *AKZO* was a major supplier of a chemical substance, benzoyl peroxide to the EC which is used in the manufacturing of plastics and the bleaching of flour. Engineering and Chemical Suppliers Ltd (ECS), a small competitor in the UK, was initially engaged in the flour market but also manufactured organic peroxides. In order to deter ECS from expanding its business into the market in organic peroxides for plastic, *AKZO* had a meeting with ECS’s manager at which it threatened that it would use “aggressive measures” to target ECS’s important customers and offer them prices which were below previous rates and below average

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<sup>128</sup> DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, open for public consultation, (2005) [par 33].

<sup>129</sup> See Joint cases C-395/96P and C-396/96P *Compagnie Maritime Belge Transports, Compagnie Maritime Belge Transports SA and Dafra Lines A/S v Commission of the European Communities* 2000 [par 34;119;137]

<sup>130</sup> Case C-62/86.

total cost to drive ECS out of the flour market, unless ECS withdrew from the plastic market. ECS disregarded the threats and AKZO followed through with its threats over a period of four years. AKZO simultaneously charged their own customers sixty per cent more than the customers targeted by ECS.<sup>131</sup> As a result, ECS's business plummeted and their turnover decreased by seventy per cent. ECS filed a complaint at the Commission alleging that AKZO engaged in predatory pricing. The Commission found AKZO guilty and imposed an initial fine of ECU ten million on AKZO together with certain obligations with regard to its future business conduct.<sup>132</sup>

In applying Article 102 TFEU, the court firstly determined whether AKZO held a dominant position in the relevant market.<sup>133</sup> The court found that AKZO's dominance was incontestable and dismissed AKZO's arguments stating the contrary. Next, the court considered whether AKZO abused its dominant position. The court found that prices below average total costs, that is to say, costs which differ based on the quantities produced, used by a dominant firm to eliminate a competitor, must be regarded as abusive.<sup>134</sup> In addition, the court found that there is no lucid explanation in the present matter for a dominant firm to reduce prices in the manner AKZO did other than to force competitors out of the market.<sup>135</sup> Moreover, the court held that prices below average total costs, but above average variable costs, must be viewed as a predatory tool used to force a competitor out of the market. The court's *ratio* is that firms in the market which may be as efficient as the dominant firm, but which are incapable of withstanding the competition waged against them due to their smaller financial resources, are not capable of withstanding competition waged against them.<sup>136</sup> Furthermore, the court held that the deliberate infringement by AKZO was

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131 Ibid 118 at par 9(iii).

132 Ibid 118 at par 2-10.

133 The Commission first considered its market share, which according to AKZO's own assessment was 50%. The Commission then considered the following factors: AKZO's share is equal to the combined shares of all the other producers put together; apart from two competitors, AKZO offers a far broader range of products than any of its rivals and has the most highly developed marketing organization and the leading knowledge in matters of safety and toxicology; AKZO's market share, like that of its two main competitors, remained stable during the period in question; AKZO was able even during periods of economic downturn to maintain its overall profit margin by regular price increases and/or increases in sales volume; AKZO had admitted that it had the capacity to eliminate troublesome competitors from the market and, after doing so, it was able to raise its prices. The Commission also considered the fact that various smaller producers had endeavoured to increase their market share or to penetrate the market and had always been prevented from doing so by AKZO's reactions.

134 Ibid 118 at par 71.

135 Ibid 118 at par 102.

136 Ibid 118 at par 72.

intended to prevent a competitor from extending its activity into a market in which AKZO held a dominant position.<sup>137</sup> A key factor in determining the outcome of the case was AKZO's eliminatory intent.<sup>138</sup> AKZO had dishonourable objectives and it primarily wanted to cause harm to its competitors which the court confirmed, stating that AKZO did not to pursue a general policy of favourable prices.<sup>139</sup> The court further held that the selective nature of prices below average total costs but above average variable costs proved that AKZO intentionally targeted a specific competitor, namely ECS. This predatory conduct by AKZO formed a golden thread in ECS's predation claim and as indicated above, AKZO was found guilty of predatory pricing under Article 102 TFEU.<sup>140</sup>

For these reasons, the *AKZO*-case established the following principles to determine predatory pricing:

- a) prices lower than average variable cost is a strong indication of predatory pricing and further investigation is deemed unnecessary;
- b) prices higher than the average variable costs but lower than the average total costs require proof that the dominant firm's intent behind the pricing tool is to force the competitor out of the market;
- c) prices above average total costs will normally not fall within the ambit of predation.

These principles provide a seemingly easy way to ascertain if a firm has abused its dominant position by way of predatory pricing. However, Lowe<sup>141</sup> argues that the simple application of the *AKZO* test would not reflect economic reality in some industries and that the requirement to prove intent seems difficult to fulfil and hardly compatible with judicial precedents, stating that the "abuse" is an objective concept.

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137 C- 62/86 *AKZO Chemie BV v Commission of the European Communities* 1991 [par 162].

138 During the first meeting AKZO made known its intention to make a general price reduction in the flour additives sector if ECS continued to sell benzoyl peroxide in the plastics sector, and its determination to sell at prices below its production cost, if necessary, even if this entailed incurring a loss estimated at UKL 250 000.

139 C- 62/86 *AKZO Chemie BV v Commission of the European Communities* 1991 [par 115].

140 C- 62/86 *AKZO Chemie BV v Commission of the European Communities* 1991 [par 146].

141 P Lowe "EU Competition Practice on Predatory Pricing" (5 December 2003) *Introductory address to the Seminar "Pros and Cons of Low Prices"* at 4 available at [http://ec.europa.eu/competition/speeches/text/sp2003\\_066\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2003_066_en.pdf).



The *AKZO* test, despite its critique, has however been affirmed in other predation cases, such as the *Tetra Pak*-case.<sup>142</sup>

### 3.2.2 *Tetra Pak International SA v Commission of the European Communities*

In the aseptic sector, Tetra Pak is based in Switzerland and manufactures the so-called 'Tetra Brik' system, designed for packaging of liquids such as milk. The company held a dominant position in the packaging market, with an estimated 78% market share in both aseptic and non-aseptic cartons. This portion was seven times bigger than its closest competitor, and Tetra Pak “would unquestionably still hold a dominant position”, even on that wider market.<sup>143</sup> The company was accused of tying<sup>144</sup> and predatory pricing in the Italian market. For purposes of this dissertation only the latter will be discussed.

The Commission contended that Tetra Pak set the prices of Tetra Rex cartons in Italy at a level designed to oust its competitors. It based its argument on the *ratio* in *AKZO*, that the existence of extremely negative gross margins<sup>145</sup> from 1976 to 1982 gives rise at least to a presumption of eliminatory intent.<sup>146</sup> Tetra Pak however maintained that the prices it charged from 1976 to 1982 in Italy for non-aseptic Tetra Rex cartons were not predatory with regards to competitors, but that it was a *de facto* result of vigorous competition between Tetra Pak and Elopak.<sup>147</sup> Furthermore, Tetra Pak argued that they had no predatory intent when they set their prices below average variable costs. Thus, the judgment in *AKZO v Commission* would not be applicable to this case.<sup>148</sup> Moreover, Tetra Pak argued that it had no reasonable prospect of recouping<sup>149</sup> in the

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142 C-333/94 *Tetra Pak International SA v Commission of the European Communities* 1994.

143 *Ibid* 132 at par 118.

144 A Arnulf & A Dashwood & M Dougan & M Ross & E Spaventa & D Wyatt *Wyatt & Dashwood's European Union Law* 1068. An arrangement where a person is required to accept, as a condition of entering into a contract, “supplementary obligations which, by their nature or commercial usage, have no connection with the subject of such contracts.”

145 A negative gross profit margin can occur when the costs exceed the revenue generated from the sale of the product.

146 *Ibid* 132 at par 146.

147 *Ibid* 132 at par 142.

148 *Ibid* 132 at par 143 referring to C- 62/86 *AKZO Chemie BV v Commission of the European Communities* 1991 [par 71].

149 Recoupment occurs when a dominant firm charges monopoly prices in an effort to regain the losses it sustained in the predation stage and to earn a steady stream of profits.

long-term the losses incurred on sales of Tetra Rex cartons.<sup>150</sup> Ultimately, the Commission had to prove eliminatory intent and whether Tetra Pak could recoup its losses.<sup>151</sup>

In the opening statements of the ECJ's judgement it repeated the stance taken in *United Brands*, namely that a firm in a dominant position may take reasonable steps to protect its position, but that this right does not include a right to strengthen and abuse its dominant position.<sup>152</sup> The court furthermore adopted the stance in *AKZO* that:

an undertaking in a dominant position has no interest in applying prices below average variable costs (that is to say, those which vary depending on the quantities produced) except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss equal to the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and at least part of the variable costs relating to the unit produced.<sup>153</sup>

Since Tetra Pak reduced its prices below the average variable costs in the relevant market between 1976 to 1982 the court reasoned that there was no other rational explanation for selling products at prices this low unless it was to eliminate a competitor out of the market.<sup>154</sup>

As for the possible recoupment, the Commission found that it is not necessary to demonstrate specifically that the firm had a reasonable prospect of recouping incurred losses.<sup>155</sup> Instead, the Commission submitted that Tetra Pak's admission that its policy, resulting from intensive pricing competition, was deliberate, and the eliminatory effect of that policy, constituted irrefutable evidence of a systematic practice of predatory pricing.<sup>156</sup> This judgement was reiterated in the verdict of *France Telecom*<sup>157</sup> where the ECJ held that proof of recoupment was not required to find predation under Article 102 TFEU, although the possibility of such recoupment could be relevant in

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150 Ibid 132 at par 144.

151 Based on *Brooke Group v Brown and Williamson Tobacco* 1993 where it was held that sales at a loss can only be considered eliminatory where the company in question has a reasonable prospect of eventually recouping its incurred losses.

152 Ibid 132 at par 147.

153 Ibid 132 at par 148.

154 Ibid 132 at par 148-150.

155 Ibid 132 at par 150.

156 Ibid 132 at par 184.

157 Case C-202/07 *P France Telecom SA v Commission of the European Communities* 2009 [109-113].

deciding whether the behaviour was abusive.<sup>158</sup> Moreover in *Deutsche Telekom*<sup>159</sup> the ECJ held that a dominant firm could not drive firms from the market that were as efficient as the dominant firm, but which because of their small financial resources, were incapable of withstanding the competition waged against them. However, the verdict in *Post-Denmark*<sup>160</sup> was more nuanced and the ECJ concluded that low prices would not be an exclusionary abuse merely because the price was lower than the average total costs ascribed to the activity concerned, but higher than the average incremental costs pertaining to that activity. Furthermore, it was necessary to consider if the predation policy, without objective justification, produced a likely exclusionary effect ultimately detrimental to competition and for consumers' interests.<sup>161</sup>

The *Tetra Pak*-case strengthens the stance taken by the court in the *AKZO*-case, namely, that prices below average variable costs will always be considered predatory and prices below average total costs are predatory if there is proof of eliminatory intent. This concomitantly stalwarts the precedent that the AKZO-test must be applied in matters when one assesses predatory pricing in the EU. In addition, the court stated explicitly that it was unnecessary to demonstrate the possibility of recoupment.<sup>162</sup>

This verdict is in strong contrast to the judgement handed down in the 1993 US-case *Brooke Group*, where the likelihood of recoupment had to be proven to be found guilty of predatory pricing.<sup>163</sup> In handing down this judgement, the court took a firm stand dissociating itself from the way predatory pricing is practised in the US.

### 3.3 Recent developments in the EU

#### 3.3.1 *Deutsche Post AG v European Commission*<sup>164</sup>

This was the first formal decision taken by the EC under Article 82 (now Article 102) of the EC Treaty, wherein which predatory pricing conduct is prohibited as an abuse

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158 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige* [par 40-45].

159 Case C-280/08 P *Deutsche Telekom AG v Commission of the European Communities* 2010.

160 Case C-209/10 *Post Danmark A/S v Konkurrenceradet* 2012.

161 *Ibid* at par 44.

162 *Ibid* 98 at 1072.

163 See paragraph 2.2.4 of this dissertation.

164 *Deutsche Post AG* (Case Comp/35, 141) *Official Journal of the European Communities* (O.J.)2001 L125/27.

of dominance. Here, the EC found that DP used a predatory pricing scheme in the postal service and international courier service market. DP's competitor alleged that DP was selling parcel-delivery services below costs.<sup>165</sup> The EC found that DP had provided discounts to its large mail-order customers and DP was subsequently fined 24 million Euros.<sup>166</sup>

DP was however not convicted of any predatory conduct since, the relevant measure of cost that a multi-service postal operator has to engage in entails participation in certain competitive activities and these activities had not been clarified previously. In its decision, the EC added that economic concepts which are used to identify predation was not sufficiently developed at the time of the abuse.<sup>167</sup> As it currently stands, a monopolist activity in a competitive market is considered predatory if a firm does not cover its incremental costs.<sup>168</sup>

### 3.3.2 Notice on the application of the Competition Rules to Access Agreements in the telecommunications sector framework, Relevant Market and Principles

In this notice<sup>169</sup> the EC emphasized the importance of incremental costs on the application of competition rules to access agreements in the telecommunications sector.<sup>170</sup> The EC indicated that it will use incremental costs as the lower threshold for predatory pricing in this sector. This approach echoes that of Areeda and Turner which advocates for a short-run marginal cost test.<sup>171</sup> Grout<sup>172</sup> argues that if AVC is regarded as a good proxy for short-run marginal costs absent common costs then short-run incremental costs should be considered a good proxy where common cost is present.

### 3.3.3 Draft notice on the application of the competition rule to anti-competitive practices in air transport

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165 This was only based on DP's revenues from the monopoly it acquired in the letter-mail market.

166 Ibid 150 at par 45.

167 The abuse took place from 1974.

168 The costs which occur only when a certain takes place and which would be avoided if the activity ceased.

169 Notice on the application of the Competition Rules to Access Agreements in the telecommunications sector framework, Relevant Market and Principles OJ 98/C 265/02.

170 Ibid at 115.

171 See paragraph 1.1 of this dissertation.

172 PA Grout "Recent Developments in the Definition of Abusive Pricing in European Competition Policy" Centre for Market and Public Organisation Working Paper Series No. 00/23.

In addition, the EC issued a draft notice<sup>173</sup> pertaining to the rules on anti-competitive practices in aviation transport. Here, the Commission recognised the difficulty in applying the *AKZO* test to this specific market since the calculation of the measure of output in this industry proves difficult. In addition, the EC adopted the approach that the entire fare mix has to be considered as it would be impractical to consider whether any individual fare is predatory.<sup>174</sup> The draft notice suggests that the classification of cost as fixed or variable is more difficult in the aviation transport sector than in manufacturing industries since a lot of costs which would be considered fixed, such as the depreciation of an aircraft which varies in relation to its age and the frequency that it is used as regards to the number of departures and landings.<sup>175</sup>

Finally, the complexity of pricing in the aviation sector is that seats are sold over a considerable period. The result thereof is that a proper application of the *AKZO* test would require an evaluation of fares against those costs which were available at the time of sale. This would be a complicated and time-consuming process.<sup>176</sup> For this reason as well as the specific circumstances of the aviation sector, it seems that a test for predatory pricing in this sector must be developed and that merely adopting the *AKZO* test may lead to unsatisfactory results.

### 3.3 Conclusion

The onus of proof when determining predatory pricing varies depending on the market-structure and power of a firm. Reasons can be attributed to the fact that it may be immensely challenging to create a test that can consider all the relevant economic and structural factors necessary to ascertain whether predatory pricing has occurred. This is beneficial to courts granting them flexibility to determine predation, if any. On the other hand, it forces firms into a thought-provoking phase i.e. determining which competitive behaviour will be regarded as abusive. The discussed EU case law does however, provide guidelines to determine predation. A firm will be guilty of predatory pricing in the EU if it holds a dominant position in the relevant market and abuses that

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173 Draft notice on the application of the competition rule to anticompetitive practices in air transport, September 1992.

174 T Soames & R Adams, "Predatory Pricing in Air Transport" 3 *ECLR* 159 (1994).

175 *Ibid* at 159.

176 *Ibid* at 160.

position by either pricing below average variable costs, or below average total costs if eliminatory intent is evident.

In Chapter 4 the focus will be on the regulation and practice of predation by firms within South African markets. This chapter will form a foundation to relay the relevance of using the South African market in this comparative study. In addition, concepts, definitions, legislation and accepted case law will be discussed to illustrate predatory behaviours and the repercussions of these practices.

## Chapter 4: Predatory Pricing in South Africa

“Price competition is the essence of free and open competition. It favours more efficient firms and it is for the benefit of consumers both in the short and the long run. Dominant firms not only have the right but should be encouraged to compete on price.”<sup>177</sup>

South Africa’s competition law was previously regulated by the Promotion of Competition Act.<sup>178</sup> A few critics<sup>179</sup> are of the view that the Act has had little impact on making the South African market more competitive since it was influenced by Apartheid-policies. The Competition Act<sup>180</sup>, as amended, was one of the policy instruments identified by the democratic government that came into power in 1994 as a mechanism to strengthen the South African competition law regime so as to transform the economy. However, given the inadequacies of the old competition policy, the first task under the new dispensation was to redesign the policy with new objectives.<sup>181</sup>

Section 8 distinguishes between abuse of dominance as either exploitative or exclusionary. The Act defines exclusionary abuse as an act that impedes or prevents a firm entering into or expanding within, a market.<sup>182</sup>

The applicable parts of section 8 read:

‘It is prohibited for a dominant firm to –

...

(c) 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

(d) 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:

...

(iv) selling goods or services below their marginal or average variable cost;’

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177 Joined cases C-395/96 P and C-396/96 P *Compagnie Belge Transports and others v Commission*, Opinion of Mr Fennelly ECR. 2000 I-1411.

178 96 of 1979.

179 I Lesofe N Nontombana A review of abuse of dominance provisions of the Competition Act – is it necessary? 1-17 2; N Mackenzie Are South Africa’s Predatory Pricing Rules Suitable? (2012) at 10.

180 89 of 1998, (herein after referred to as “The Act”).

181 OECD Peer Review: Competition Law and Policy in South Africa, 2003 13.

182 Section 1(x) of the Competition Act 89 of 1998.

#### 4.1 Section 8(d)(iv)

Section 8(d)(iv) is known as the predation clause. It requires that prices must be below a firm's marginal cost<sup>183</sup> or average variable costs<sup>184</sup> ("AVC") to qualify for an effects analysis and a potential administrative penalty. Areeda and Turner<sup>185</sup> argues that AVC is the most accurate benchmark, but it is extremely difficult to compute: comparing a product's price with the true marginal cost of producing the product only indicates whether the dominant firm is losing money on the last unit as opposed to the sales at the potentially predatory price. Mackenzie<sup>186</sup>, on the other hand, argues that the AVC standard is unnecessarily under-inclusive since international "best practice" regards average avoidable costs ("AAC") to be a more accurate benchmark to use when assessing possible predation claims. In addition, he argues that AAC is a more inclusive standard, making it desirable for South Africa.<sup>187</sup> This cost benchmark is merely an indication of which types of pricing necessitates a closer analysis and a potential penalty.<sup>188</sup>

It should be noted that the explicit reference in section 8(d)(iv) to the cost benchmark contrasts with both Article 102 TFEU in the EU and Section 2 of the Sherman Act. It can be inferred from the wording in section 8(d)(iv) that it supports an effects-based approach. This implies that any firm selling at below average variable costs automatically undergoes scrutiny, without any question of intent.<sup>189</sup> As in EU competition law, if prices are below average variable cost there is a presumption of predatory intent.<sup>190</sup> Section 8(d)(iv) makes no mention of the possibilities of recoupment. However, in *Nationwide Airlines v South African Airlines*<sup>191</sup> the Competition Tribunal held that:

"We would prefer not to insist on recoupment as a requirement as do the U.S.

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183 Cost of producing the last unit. See Areeda & Turner "Predatory Pricing and Practice under Section 2 of the Sherman Act" *Harvard Law Review* 697-733 712 (1975).

184 The sum of all variable cost divided by the output. See Areeda & Turner "Predatory Pricing and Practice under Section 2 of the Sherman Act" *Harvard Law Review* 697-733 700 (1975).

185 Areeda And Turner "Predatory Pricing and Practice under Section 2 of the Sherman Act" *Harvard Law Review* 697-733 716 (1975).

186 N Mackenzie Are South Africa's Predatory Pricing Rules Suitable?" (2012) at 1.

187 Ibid at 1.

188 Ibid at 12.

189 Ibid at 12.

190 See Chapter 3.2.2 of this dissertation.

191 Case 92/IR/Oct00.



courts. For instance a firm operating in multimarkets may use predation as a form of investment in a reputation for being a tough competitor. Thus a predation strategy in market A would send a message to its competitors not only in market A, but also in markets C, D and E. Predation here has a broader strategic value beyond any recoupment it may attain in market A.”

In other words, proof of recoupment is not a requirement to find a claim of predation in South African competition law. Consequently, the practices listed under section 8(d)(iv) is anti-competitive implying that prices at this level are subject to closer scrutiny and if a firm is found guilty for participating in predatory pricing, they may be liable to pay a penalty.<sup>192</sup>

#### 4.2 Section 8(c)

Section 8(c) generally referred to as the “catch-all” clause which prohibits exclusionary acts, other than those acts listed under section 8(d). In terms of Act an exclusionary act refers to an act that impedes or prevents a firm from entering into or expanding within, a market.<sup>193</sup> In *Commission v South African Airways*<sup>194</sup> the Commission held that within its ambit the definition of exclusionary abuse underpins both pro-competitive and anti-competitive conduct. In the case of section 8(c) a complainant firm must establish that the anti-competitive conduct outweighs the technological, efficiency or other pro-competitive gain.<sup>195</sup> For this reason, the burden of proof for the application of section 8(c) is higher than under section 8(d)(iv). The inverse of this is that the complaining firm is not bound by the prescribed cost benchmark under section 8(d)(iv), subject to additional evidence of predatory pricing beyond cost is required.<sup>196</sup> The Act is unclear of what type of evidence this might be, but the Competition Tribunal has on occasion held in *Nationwide Airlines v South African Airlines*<sup>197</sup> that recoupment could be an example of such evidence.

#### 4.3 Case law regarding predatory pricing in SA

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192 Section 59(1)(a) of the Competition Act 89 of 1998; See also N Mackenzie “Are South Africa’s Predatory Pricing Rules Suitable?” (2012) at 12.

193 Section 1(x) of the Competition Act 89 of 1998.

194 *Commission v South African Airways* 18/CR/Mar01, paragraph 108.

195 *Commission v South African Airways* 18/CR/Mar01, paragraph 112.

196 *Nationwide Airlines v South African Airlines* 92/IR/Oct00 at 11.

197 Case 92/IR/Oct00.

Similarly, to the US and EU abuse of dominance inter alia by means of predatory pricing is prohibited. Although the South African Competition Act has “come of age”, it has only tested two predatory pricing cases to date. The one being the *Media-24* case and the other very recent case namely, the *SA Airlink*-case.

South African competition law has therefore not had much opportunity to engage with predatory pricing. It is uncertain whether this is because such cases are rare or because the burden of proof in these matters is considered too great.<sup>198</sup> In fact, the *Media24*-case is the first opportunity that the Competition Tribunal<sup>199</sup> has had to consider a predation case on its merits after a full-blown trial.

#### 4.3.1 *Nationwide Airlines v South African Airlines (SAA) “Nationwide case”*

In an earlier decision in the *Nationwide*-case, the Tribunal was called upon to consider the interpretative issues in an interim relief application. This case, by its nature, did not go to trial and had to be decided on the papers.<sup>200</sup> In this matter, Nationwide brought an urgent interdict against SAA alleging that SAA was involved in predatory pricing.<sup>201</sup> The Tribunal set out its interpretation of the Act’s application to predatory cases. The first point made was that section 8(d)(iv) was not exhaustive of the provisions of the Act that may apply to predatory pricing.<sup>202</sup> The Tribunal held that even if pricing conduct could not be found to have fallen below the marginal cost or AVC thresholds that are set out in section 8(d)(iv), it may still be found predatory, but in such instance the applicable provision would be section 8(c) and not section 8(d)(iv).<sup>203</sup> The Tribunal held that this conclusion would have several implications<sup>204</sup>:

“Unless the record shows unequivocally that a respondent is pricing below the prescribed cost levels the Tribunal should not make a finding under section 8(d)(iv) but consider the complaint in terms of section 8(c).”<sup>205</sup>

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198 *Media 24 Proprietary Limited v Competition Commission* (146/CAC/Sep16).

199 Hereinafter referred to as the Tribunal.

200 *Nationwide Airline (Pty) Ltd v SAA (Pty) Ltd* [1999-2000] CPLR 230 (CT).

201 *The Competition Commission v South African Airways* 18/CR/Mar01.

202 *Nationwide Airline (Pty) Ltd v SAA (Pty) Ltd* [1999-2000] CPLR 230 (CT).

203 *Nationwide Airline (Pty) Ltd v SAA (Pty) Ltd* [1999-2000] CPLR 230 (CT) page 10.

204 The tribunal would argue that something in addition to evidence of below cost pricing must be shown before a finding of predation can be sustained. Their approach however approach is to limit the scope of this subsection by critically construing any evidence when considering a complaint of predation under this section.

205 *Nationwide Airline (Pty) Ltd v SAA (Pty) Ltd* [1999-2000] CPLR 230 (CT) page 10.

This shows that the Tribunal interpreted section 8(d)(iv) restrictively. It is not clear and it does not seem sensible to bring a predatory pricing case under an urgent interdict since an interdict is essentially decided on paper.

#### 4.3.2 *Competition Commission v SA Airlink (“SA Airlink”)*

The Commission has referred SA Airlink (Pty) Ltd (“SA Airlink”), a privately controlled regional feeder airline with 55 000 annual flights to 37 destinations to the Tribunal.<sup>206</sup> The referral is based on a complaint lodged by Fly Blue Crane (Pty) Ltd and the OR Tambo District Chamber of Business between 2015 and 2017 that SA Airlink’s prices were excessive before Fly Blue Crane entered the route. In addition, it was alleged that SA Airlink then lowered its prices below its costs (predatory pricing) when Fly Blue Crane entered the route and that it furthermore went back to their exorbitant prices (excessive pricing) after Fly Blue Crane exited the route in January 2017.<sup>207</sup> The Tribunal investigated the complaint and found that:

- (a) SA Airlink contravened the Competition Act by abusing its dominance from September 2012 to August 2016 by charging excessive prices on the route to the detriment of consumers;
- (b) Consumers would have saved between R89 million and R108 million had SA Airlink not priced excessively on this route;
- (c) Lower prices would also have resulted in more passengers travelling by air on the route, possibly contributing to the local economy of Mthatha;
- (d) The airline engaged in predatory pricing in that it priced below its average variable costs and average avoidable costs for some of its flights’
- (e) The predatory pricing conduct of SA Airlink contributed to the exit of Fly Blue Crane, their only competitor at the time on the Johannesburg-Mthatha route; and
- (f) The effect of the predation is also likely to deter future competition on this route from other airlines.<sup>208</sup>

Based on these findings, the Commission has recommended a harsh penalty (to the Tribunal) of up to 10% of SA Airlink’s annual turnover for both the conduct of excessive

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206 The Daily Maverick Newspaper available at <https://www.dailymaverick.co.za/article/2018-02-20-competition-commission-black-entrepreneur-dared-to-challenge-airlinks-monopoly-to-mthatha-then-she-was-booted-out/> .

207 Competition Commission Media Release, 14 February 2018, “SA Airlink to be prosecuted for abuse of dominance”. The case has not been decided at the time this dissertation is written.

208 Ibid.

pricing and predatory pricing. The Commission has also requested the Tribunal to determine other appropriate remedies to correct the conduct.<sup>209</sup>

#### 4.3.3. *Competition Commission v Media24 Ltd (“Media24”)*

In this case, a predatory pricing charge was levied against Media24 for using one of its publications, Forum, as a fighting brand upon the entry of Gold Net News (GNN), for alleged predatory pricing related to the advertising rates that were below Average Variable Cost and Average Total Cost charged by Media24 in two newspapers in the Goldfield region of the Free State, in the period from 2005 until 2009. GNN exited the market in April 2009 and Media24 closed Forum in January 2010 so that Vista became the only community newspaper in circulation in Welkom. The Commission held that the conduct by Media24 was exclusionary and anti-competitive, with no pro-competitive gain.<sup>210</sup>

The matter was referred to the Tribunal, who considered various cost measures that does not appear in the Act, amongst others; Average Avoidable Cost (AAC)<sup>211</sup> and that pricing below the high benchmark of Average Total Costs (ATC)<sup>212</sup> was predatory due to an intention to predate by Media24. Naturally ATC includes more costs than other cost benchmarks such as AVC and ACC and for this reason the standard has its critics<sup>213</sup> amongst those who fear that it will lead too easily to a false positive.<sup>214</sup> But intent in this context is a slippery concept and the Tribunal has on occasion held that competing firms by reason of the very fact that they are competitors intend to take business from one another – it is therefore not clear when that intent becomes anti-competitive.<sup>215</sup>

The Tribunal’s approach was unanimously rejected by the Competition Appeal Court<sup>216</sup>. Absent proof of intention, the CAC confirmed that section 8(c) of the Competition Act sets a test which requires objective proof of exclusion and anti-

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209 Ibid.

210 Ibid 187 at par 621.

211 AAC refer to cost that a firm could have avoided by not engaging in the predatory pricing strategy.

212 the ATC candidate includes fixed-, variable- and sunk costs.

213 Richard Whish, *Competition Law*, Seventh Edition page 93.

214 A false positive signifies assuming conduct to be harmful when it is in fact not.

215 Ibid 187 at par 77.

216 Hereinafter referred to as “The CAC”.

competitive effects respectively.<sup>217</sup> In addition, the CAC rejected the requirement that firms set prices above ATC when applying section 8(c) of the Act.<sup>218</sup> The writer welcomes this approach as firms can often not provide legitimate commercial reasons for not covering all allocated overheads, a component of ATC. The ATC standard imposed by the Tribunal would have prevented dominant firms from introducing new products that would add incrementally to overall profits. Such an approach would also have prevented firms from utilising economies of scope.<sup>219</sup> This means that firms would have been prohibited from passing on these savings to consumers through lower prices. Furthermore, the CAC made it clear to dominant firms: if they price in a manner that does not increase incremental profits, they are at risk of being found to be predating. For this reason, dominant firms are required to price above the AAC.<sup>220</sup> It is a standard, which enjoys wide support in international case law.<sup>221</sup> Of further importance is the CAC's rejection of Commission's inclusion of the calculations of costs not only directly incurred in producing the product, but also those hypothetical profits foregone by not pursuing a different business strategy. The CAC held that:

“such opportunity costs by way of foregone profits are not relevant for predation analysis.”<sup>222</sup>

From this analysis it can be inferred that the CAC's intention is to aid effective compliance by firms. The CAC provided clarity as to how predation should be tested for under section 8(d)(iv). This entails that predation cases should apply the more forgiving cost standards of marginal or AVC. In the short run, marginal cost or AVC will be materially lower than AAC, which makes compliance with section 8(d)(iv) easier.<sup>223</sup>

Considering all relevant factors, it should however be asked whether the proposed amendment to the predatory pricing clause alluded to in Chapter One<sup>224</sup> and compared to how other jurisdictions deal with predation, provide a logical and unprejudiced legal

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217 *Media 24 Proprietary Limited v Competition Commission* (146/CAC/Sep16) para 55.

218 *Media 24 Proprietary Limited v Competition Commission* (146/CAC/Sep16) para 57.

219 Economies of scope refers to savings derived from having shared infrastructure servicing a portfolio of products.

220 This means that prices must cover all costs truly incremental to the production of that product, whether labelled variable, fixed or overhead.

221 See Chapter 2 and 3 of this mini-dissertation.

222 *Media 24 Proprietary Limited v Competition Commission* (146/CAC/Sep16) at para 105.

223 *Media 24 Proprietary Limited v Competition Commission* (146/CAC/Sep16) at para 110.

224 See Chapter 1.2 of this dissertation.

response to adjudicate predatory pricing in South Africa? A discussion on these recent developments in the South African Competition Law regime will shed more light on this question.

#### 4.2.3 *Recent developments*

Despite the promulgation of the Competition Act on 1 September 1999, the South African economy remained captive by high levels of concentration and a skewed ownership profile. This, in turn, led to the recent Competition Amendment Bill<sup>225</sup> which seeks to further advance the objectives of the Act<sup>226</sup> in two pivotal ways namely: limiting concentration in South African markets and the racially-skewed spread of ownership of firms in the economy and enhancing the policy and institutional framework, and procedural mechanisms for the administration of the Act.<sup>227</sup> These measures are designed to improve policy coherence, as well as to promote institutional and procedural efficiency.<sup>228</sup>

Under the Amendment Bill section (8)(d)(iv) is amended by omitting in its entirety the cost benchmark “below their marginal or average variable cost” and substituting it with the concept “predatory prices”.<sup>229</sup> In terms of the Amendment Bill<sup>230</sup> predatory prices refers to prices for goods or services below the firm’s AAC<sup>231</sup> or AVC.<sup>232</sup> These definitions imply that in most cases the firm’s AAC and AVC will be the same. In fact, Mackenzie argues that it would only make a difference in a few cases if AAC were adopted as the appropriate standard, and when this occurs the difference between the two measures may not be significant. A dominant firm which charges predatory prices below AAC but above AVC will now face prosecution under the amended section

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225 *Government Gazette* No. 41294; B23A-2018. (hereinafter referred to as “The Amendment Bill”).

226 Section 2 of the Act stipulates the purpose of the Act is to (i) promote the efficiency, adaptability and development of the economy; (ii) provide consumers with competitive prices and product choices; (iii) promote employment and advance the social and economic welfare of South Africans; (iv) expand opportunities for South African participation in world markets; (v) ensure that small and medium sized enterprises have an equitable opportunity to participate in the economy; and (vi) promote a greater spread of ownership by increasing the ownership stakes of historically disadvantaged persons.

227 *Government Gazette* No. 41294.

228 *Ibid.*

229 Clause 1(i) of the *Competition Amendment Bill* B23B-2018 1-36 3.

230 Clause 1(i) of the *Competition Amendment Bill* B23B-2018 1-36 3.

231 Clause 1(a) defines average avoidable costs as the sum of all costs, including variable costs and product specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output.

232 Section 1(a) defines average variable costs as the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product.

8(d)(iv) and not only under section 8(c) which was the case previously. In this regard Mackenzie points out that it is important to note that the amended section 8(d)(iv) does not raise a conclusive assumption. The effect of the predatory pricing strategy will therefore still have to be analysed before an adverse finding can be made.<sup>233</sup> Any reference to marginal cost has been omitted in the Amendment Bill. According to Mackenzie<sup>234</sup>, the excuse that it is difficult to compute marginal cost therefore no longer holds.

#### 4.4 Conclusion and Recommendations

The proposed amendment seeks to replace the use of marginal cost with average avoidable cost (“AAC”) as one of the tests for predation.<sup>235</sup> This amendment is welcomed since the use of average avoidable costs is in line with both economic thinking and practice in other jurisdictions such as the EU.<sup>236</sup> In fact, it also provides more protection for smaller firms as it requires prices to reflect product-specific fixed costs, which average variable costs does not reflect.<sup>237</sup> However in its *Submission on the Competition Amendment Bill*, Genesis Analytics<sup>238</sup> indicated that the definition of AAC contained in the Amendment Bill does not align with the definition which is commonly applied by the economics literature in the context of predation assessment, and in fact aligns more with a LRAIC standard<sup>239</sup> which is an appropriate measure. Genesis Analytics made a recommendation which the author is amenable to namely that the definition of AAC should be revised to read as follows:

“Average avoidable cost” means the sum of all costs, including variable costs and product specific fixed costs, that could have been saved if the firm ceased producing the identified amount of output.<sup>240</sup>

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233 N Mackenzie “Are South Africa’s Predatory Pricing Rules Suitable?” (2012) at 18.

234 N Mackenzie “Are South Africa’s Predatory Pricing Rules Suitable?” (2012) at 18.

235 Ibid 221 at 15.

236 See Chapter 3 of this dissertation.

237 Genesis Analytics “Submissions on the Competition Amendment Bill, 2018” 6 August 2018 at 106.

238 Genesis Analytics is a specialist microeconomics consultancy in South Africa. Microeconomics being the study of product, labour and capital markets.

239 LRAIC refers to the average changes to incremental costs that firms are able to predict and account for. Examples of long run incremental costs are energy, maintenance, growth and rent.

240 Ibid 108.3.

According to Genesis Analytics this definition would provide the correct approach to determine if the dominant firm has engaged in a profit sacrifice that is predatory is to start from a position where production is already occurring and to assume that output moves from the current identified level to zero. The difference between this approach and what is suggested by the Amendment Bill is that this measure correctly excludes the unrecoverable sunk costs in producing the output which would not factor into a profit sacrifice.<sup>241</sup>

Mackenzie remarks that the Amendment Bill shows strong signs of a move to an open-textured statutory provision, which will enable the Competition Authorities to vigorously adjudicate cases for profit sacrifice.<sup>242</sup> International “best practice” considers that AAC is usually a more accurate benchmark to assess potential predatory pricing. It is also a more inclusive standard which makes it desirable for South Africa.<sup>243</sup> Under the Amendment Bill the standard of AAC and long average incremental cost have been included which creates scope to develop South Africa’s competition law in the direction of this preferable alternative.

The next chapter contains the conclusions on the key difference between the predatory pricing approach in the US, the EU and the RSA together with some criticism on the prohibition on predatory pricing.

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241 Ibid at 108.3.

242 N Mackenzie “Are South Africa’s Predatory Pricing Rules Suitable?” (2012) at 18.

243 N Mackenzie “Are South Africa’s Predatory Pricing Rules Suitable?” (2012) at 1.



## Chapter 5: Conclusions and recommendations

### 5.1 Key Differences

Predatory pricing has been viewed with considerable suspicion by the courts and authorities in the US, the EC and South Africa. Notably the approaches of the US and the EU towards predatory pricing differ in several aspects.

In the US, Section 2 of the Sherman Act does not explicitly state that a firm must hold a dominant position in the relevant market to be found guilty of a predation strategy. A predatory pricing claim in terms of Section 2 of the Sherman Act requires “a dangerous probability of achieving monopoly power”.<sup>244</sup> However, in the EU, the prohibition against predatory pricing underpinned in Article 102 (previously Article 82) TFEU requires that a firm must have a dominant position in the market as a requirement to be found guilty of predatory pricing.<sup>245</sup> This implies that a firm with a low market share is allowed to adopt competitive measures, or compete more aggressively, than its dominant counterparts. A firm that does not hold a dominant position in the relevant market will at no time be likely of achieving a monopoly and will accordingly not be found guilty of predatory pricing. It has been said that behaviour which is normally compliant with competition law may be considered exclusionary when exercised by a monopolist.<sup>246</sup> Thus, although not explicitly stated in section 2 of the Sherman Act, in the US dominance is de facto also a requirement for predatory pricing.

The prohibition on predatory pricing in South Africa has quite a few links to EU competition law and Article 102 TFEU. Firstly, AVC is used as benchmark for illegal pricing. This correlates with the findings in the *AKZO* case.<sup>247</sup> Secondly, in contrast to US- and in accordance with EU competition law, proof of recoupment does not seem to be a prerequisite. Predatory intent is not necessary under section 8(d)(iv), but proof<sup>248</sup> thereof is a requirement in cases under section 8(c). Nonetheless, this is yet

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244 Section 3.1 of this mini-dissertation.

245 Section 2.2.1 of this mini-dissertation.

246 Areeda & Hovenkamp Antitrust Law 2ed (2002) at 272.

247 See Section 3.2.2.2 XXX of this dissertation.

248 The nature of this proof is not yet defined, but as previously noted the probability of such recoupment is likely to serve as such proof.

another contrast to US competition law which requires that specific intent to monopolize must be proven under Section 2 of the Sherman Act.<sup>249</sup>

## 5.2. Criticism on the prohibition of predatory pricing

This paragraph seeks to show the most common criticism of the prohibition on predatory pricing. Is it an irrational pricing strategy due to the unlikelihood of the predator to recoup its losses after selling under cost price?

The prohibition on predatory pricing has not been uncontested and some economists<sup>250</sup> consider it highly controversial. In an analysis of the *Standard Oil* -case, McGee<sup>251</sup> considered the logical application of predatory pricing.<sup>252</sup> According to McGee, Standard Oil did not make it itself a party to predatory pricing and it would be irrational for a firm to attempt to monopolise a market by way of predatory pricing. In the acclaimed article, *The Myth of Predatory Pricing*<sup>253</sup>, DiLorenzo echoes McGee's view and substantiates it with the following reasons:

Firstly, the loss of dollar on each one thousand items sold is greater than the loss of a dollar on each one hundred items sold.<sup>254</sup> In essence this means that a predatory pricing scheme is very costly for firms attempting to undertake it since the biggest firm will suffer the biggest losses as it holds the biggest volume of sales. Secondly, it is difficult to determine the period of a price war, all the expenses that will be incurred as a result thereof and proving recoupment under such circumstances will be virtually impossible.<sup>255</sup> Thirdly, the predator might be left with losses if its competitors decide to momentarily close their firms to allow the market to reset, giving them more profitable prices. In the alternate, DiLorenzo argues that other firms may increase competition against the predator firm when buying the facilities of a firm that has gone

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249 See Chapter 4X of this dissertation.

250 J McGee 'Predatory Price Cutting: The Standard Oil (N.J.) Case'(1958) *Journal of Law and Economics* 137-169; H Demsetz 'Barriers to Entry' (1982) *American Economic Review* 72, F Easterbrook 'Predatory Strategies and Counterstrategies'(1981) *University of Chicago Law Review* 48; T J DiLorenzo, 'The Myth of Predatory Pricing' (1992) *Cato Policy Analysis* No. 169.

251 J McGee 'Predatory Price Cutting: The Standard Oil (N.J.) Case'(1958) *Journal of Law and Economics* 169.

252 J McGee "Predatory Price Cutting: The Standard Oil (N.J.) Case" (1958) *Journal of Law and Economics* 169.

253 TJ DiLorenzo "The Myth of Predatory Pricing" (1992) *Cato Policy Analysis* 169 2.

254 TJ DiLorenzo "The Myth of Predatory Pricing" (1992) *Cato Policy Analysis* 169 2.

255 TJ DiLorenzo "The Myth of Predatory Pricing" (1992) *Cato Policy Analysis* 169 2.

bankrupt due to the dominant firms predation strategy.<sup>256</sup> In addition, predatory pricing bears the risk of spreading to adjacent markets causing the predators loss to extend to markets that was not originally part of the predatory pricing strategy.<sup>257</sup> The firm that would suffer the most loss is the predator and for this reason it does not make sense to prohibit this behaviour.

However, Easterbrook<sup>258</sup> argues that a predatory pricing strategy is futile since there are numerous counterstrategies available to the firm who is subject to it. Koller<sup>259</sup> supports this view and means that legal academics and economists have yet to prove that a predatory pricing strategy will create of a monopoly. In *Matsushita*<sup>260</sup>, the US Supreme Court held that:

“The success of a predatory pricing scheme is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralising the competition.”

The Supreme Court admitted further that:

“There is a consensus among commentators that predatory pricing strategies are rarely tried, and even more rarely successful”<sup>261</sup>

Finally, DiLorenzo argues that the prohibition on predatory pricing is illogical as there is no proof of monopolies being created through predatory pricing strategies. A prohibition of predatory pricing can therefore only eliminate competitive pricing.<sup>262</sup>

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256 TJ DiLorenzo “The Myth of Predatory Pricing” (1992) *Cato Policy Analysis* 169 2.

257 TJ DiLorenzo “The Myth of Predatory Pricing” (1992) *Cato Policy Analysis* 169 3.

258 F Easterbrook *Predatory Strategies and Counterstrategies* (1981) *University of Chicago Law Review* 48 334. These strategies will not be discussed in detail as it falls outside the objectives of this paper.

259 RH Koller “Myth of Predatory Pricing: An empirical Study” (1971) *Antitrust Law and Economics Review* 4. Koller analysed the period between 1890 and 1970 and found no evidence of the establishment of any monopoly in the USA because of predatory pricing.

260 *Matsushita Electric Industrial Company v Zenith Radio Corporation* 475 U.S. 590 at 589.

261 *Matsushita Electric Industrial Company v Zenith Radio Corporation* 475 U.S. 590 at 589.

262 TJ DiLorenzo “The Myth of Predatory Pricing” (1992) *Cato Policy Analysis* 169 11; See also H Demsetz *Barriers to Entry* (1982) *Economic Review* 72; RM Isaac “In Serch of Predatory Pricing” (1985) *Journal of Political Economy*.

### 5.3 Conclusion

Predatory pricing has been introduced to South African via enactment of the Competition Act and the more recent Amendment Bill. Practical efforts to conceptualise and enforce the prohibition on predatory pricing have, however, proven to be a cumbersome enterprise. To identify elements that hinder the enforcement of the prohibition on predatory pricing this dissertation compared the legal frameworks of both the US, the EU and South Africa against elements which underlies the conviction of a firm guilty of predation. From this comparison a number of key lessons could be drawn.

In the US, competition law has no fixed guidelines in respect of which cost benchmark should be applied to determine predatory pricing.<sup>263</sup> In fact, the US courts has held that below-cost pricing in itself is not sufficient to constitute predatory pricing as it requires proof that a realistic possibility of recoupment exists.<sup>264</sup> The EU competition law, on the other hand, has set guidelines indicating that it is sufficient that the prices applied are below average variable cost.<sup>265</sup> This has been explicitly stated in cases like *AKZO* and *Tetra Pak* where the court held that it makes no sense for a dominant firm to sell its goods or services for prices this low if not in an attempt to eliminate its rivals.

In the US, “specific intent to monopolize” always seems to be a requirement. According to the U.S Department of Justice this requirement means that a firm must have “a specific intent to destroy competition or to form a monopoly”.<sup>266</sup> For this reason it is therefore not sufficient for a firm to merely compete vigorously to beat competitor’s prices in order to prove such intent. In the EU, on the other hand, prices below AVC are presumed to be because of predatory intent, and no further proof is necessary. In the EU, proof of intent becomes a requirement once the prices are higher than AVC

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263 These guidelines have been suggested with the most prominent one being the Areeda-Turner test, which promotes a presumption of illegality if a cost-based test is met. For additional information, see Areeda and Turner ‘Predatory Pricing and Practices under Section 2 of the Sherman Act’ (1975) *Harvard Law Review* at 697. The Areeda-Turner test, although it received ample theoretical attention, has not taken hold in US courts.

264 See section 2.2.3

265 See Chapter 3.1 of this mini-dissertation.

266 U.S. Department of Justice “Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act” Chapter 1 Introduction.

but lower than the ATC.<sup>267</sup> As previously discussed, dominant firms have however been found guilty of abusive conduct in accordance with Article 102 TFEU in cases where no such intent was found, based on the rationale that dominant firms have a special responsibility not to distort competition.<sup>268</sup> In the US, proof of intent is always a pre-requisite. In the EU, however this burden of proof is stricter the bigger the market share is and in some cases the burden of proof does not seem to be a requirement at all. It is argued that proof of intent is, by far, a stricter condition<sup>269</sup>, and because of this predatory pricing is more difficult to prove in the US.

Perhaps the most noteworthy difference between predatory pricing in the US and EU is proof of possible recoupment. The EU does not have “possibility of recoupment” as a requirement for a successful claim of predatory pricing. In *Tetra-Pak* the court held that proof of recoupment is not necessary.<sup>270</sup> In the EU the probability of recoupment is almost impossible to prove, and for this reason it can be argued that it is more difficult to establish predatory pricing in the EU than in the US. A consequence of the *Brooke* judgment is that the possibility of recoupment is a condition for finding guilt based on intent in respect of a predation claim in the US. In fact in the US, the probability of recoupment is the very essence upon which a predatory pricing scheme is based. Absent it, a predatory pricing claim would be fruitless. In respect of this, the US Department of Justice<sup>271</sup> is of the notion that if dangerous probability of recoupment cannot be proven, an unlawful monopoly will not occur, and competition will not be compromised.

The dissertation demonstrates, all too well, that competition law continues to demand a careful and most likely fairly complicated economic analysis of the challenged conduct. The question to be solved is to what extent the competition authorities can use their experiences in order to effectively solve upcoming predatory pricing cases. There are substantial differences between the prohibition of predatory pricing in the EU and the US and RSA predatory pricing laws echoes that of the EU.

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267 See Chapter 2.2.2XXXX of this dissertation.

268 See Chapter 3.2.125 XX of this dissertation.

269 See Chapter 2.1 and 3.2.1 of this dissertation.

270 See section 3.2.2 with referral to C-333/94 *Tetra Pak International SA v Commission* section 150.

271 U.S. Department of Justice, “Competition and Monopoly: Single-Firm Conduct under section 2 of the Sherman Act” Chapter 4 Price Predation.

The author is of the view that in order to completely prohibit predation, section 8(c) of the Act should also be amended so that it can no longer be regarded as an alternative to section 8(d). In other words, for the imposition of an administrative penalty under section 8(c) a firm would no longer be required to repeat the abuse of dominance conduct instead it would be possible to immediately impose an administrative penalty for a first time contravention of section 8(c). An amendment of section 8(c) in this regard would however, also require the amendment of section 59(1)(b) which must allow for the imposition of an administrative penalty for first time offenders of section 8(c).

## 6 Conclusion

South Africa is an exceptional example of a developing economy with a new statutory competition law regime inspired to a considerable extent by the EU competition law model on predatory pricing.

It is clear from the US case law regarding predatory pricing that recoupment or the possibility thereof is pivotal to successfully prove a predation claim. Recoupment is the very essence of a predatory pricing strategy and without it competition will not suffer.

In the EU, the onus of proof when determining predatory pricing varies depending on the market- structure and power of a firm. Reasons can be attributed to the fact that it may be immensely challenging to create a test that can consider all the relevant economic and structural factors necessary to ascertain whether predatory pricing has occurred. This is beneficial to courts granting them flexibility to determine predation, if any. On the other hand, it forces firms into a thought-provoking phase i.e. which competitive behaviour will be regarded as abusive. Caselaw does however, provide guidelines to determine predation. A firm will be guilty of predatory pricing in the EU if it holds a dominant position in the relevant market and abuses that position by either pricing below average variable costs, or below average total costs if eliminatory intent is evident.

Predatory Pricing have been introduced to the South African Competition Authorities via the promulgation of Competition Act. Practical efforts to adjudicate and impose penalties for predatory conduct have in the past, however, proven to be cumbersome. The question must then be asked whether South Africa's predatory pricing rules have been suitable and if they are why they are so ineffective despite the existence of a statutory framework with a comprehensive Competition Authority regime. The answer to this is the Competition Amendment Bill which amends section 8(d)(iv) providing a more distinct cost benchmark to determine predatory pricing strategies. To identify the frailties that hinder the adjudication of predatory pricing, this mini-dissertation sought to compare the legal regime of both the EU and the US and South Africa against a set of elements which would appear to underlie an effective prosecution of predatory pricing. Such comparison meant that various key lessons for the improvement of the South African competition law framework could be distilled.

Lastly, as demonstrated by this dissertation, the prohibition on predatory pricing in the relatively new South African Competition Act serves as an example of a jurisdiction influenced by, in this case, the EU approach. This is likely to be the case in most developing countries, because of the particularly detrimental effects abuse of dominance and monopolies can have on such countries.



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