REGULATION OF PREDATORY PRICING IN THE REPUBLIC OF SOUTH AFRICA

BY

MUHLURI ALANSTRAIR MALULEKE, 13220056

Submitted in partial fulfilment of the requirements for the degree of

MASTERS OF LAWS

In the

FACULTY OF LAW

At the

UNIVERSITY OF PRETORIA

SUPERVISOR: PROF CM VAN HEERDEN

PLAGIARISM DECLARATION

I, **MUHLURI ALANSTRAIR MALULEKE**, understand what plagiarism is and am aware of the University's policy in this regard.

I declare that this mini dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

I have not used work previously produced by another student or any other person to hand in as my own.

I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

SIGNATURE

M.A MALULEKE

January 2020

Malamulele

South Africa

Abstract

The purposes of competition law, amongst others, are to promote competition in the markets and to prohibit any conduct which is inconsistent with these and other purposes of the competition law.

In this dissertation, I discuss section 8(c) and 8(d)(iv) of the Competition Act 89 of 1998 (the Act) which regulate predatory pricing in South Africa (RSA). Dominant firms are prohibited from engaging in exclusionary acts. An exclusionary act is an act that impedes or prevents a firm from entering into, participating in or expanding within a market. The Act lists 'predatory pricing' as one of the exclusionary acts.

According to section 1 of the Act, 'predatory pricing' means prices for goods or services below the firm's average avoidable cost (AAC) or average variable cost (AVC). AAC is 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. On the other hand, AVC means 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.

I will also discuss recent predatory pricing case laws and recent amendments to the Act. Furthermore, I will critically analyse the regulation of predatory pricing in United States of America (USA), Canada and European Community (EU) and then highlight key differences between the regulation of predatory pricing in RSA and in the aforementioned three jurisdictions.

Table of Contents

CHAPTER 1 BACKGROUND TO THE STUDY

1.1. Introduction

Competition Law in South Africa is regulated in accordance with the Competition Act 89 of 1998 (hereafter the Act). Section 2 of the Act provides that the purpose of the Act is to promote and maintain competition in the Republic in order:

a. to promote the efficiency, adaptability and development of the economy;
b. to provide consumers with competitive prices and product choices;
c. to promote employment and advance the social and economic welfare of South Africans;
d. to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
e. to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
f. to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The Act applies to all economic activities within or having an effect within the Republic but it, however, does not apply to collective bargaining agreements as well as certain conduct with no commercial purpose.[1] Chapter 2 of the Act lists, amongst others, "predatory pricing" as a prohibited practice.

Predatory pricing occurs when a dominant firm reduces its prices in the short run so as to drive competing firms out of the market or discourage entry of new firms in an effort to gain larger profits via higher prices in the long run than would have been earned if the reduction had not occurred.[2] The court in *Media24 Proprietary Limited v Competition Commission of*

[1] Section 3 of the Competition Act 89 of 1998.

[2] Joskow PL & Klevorick AK 'A Framework for Analyzing Predatory Pricing Policy' 89 *Yale L.J.* 1979 p 220 (hereafter Joskow and Klevorick).

South Africa[3] (*Media-24 case*) described predatory pricing as an abuse of dominance that occurs when a dominant firm deliberately reduces prices to a loss-making level when faced with competition from an existing competitor or a new entrant to the relevant market and that the existing competitor, having been disciplined or having exited the market or a new entrant having been foreclosed, the dominant firm then raises its prices, thereby causing consumer harm. What drives a firm to engage in predatory pricing, as it appears from the above definitions, appears to be the expectation that long-run profits will actually be more than enough to compensate for what has been sacrificed in the short run.

In South Africa, predatory pricing is prohibited by section 8(d)(iv) of the Competition Act 89 of 1998 which reads as follows:

> "It is prohibited for a firm to sell goods or services below their marginal or average variable cost."

The Competition Amendment Bill[4] published on 5 July 2018 (Amendment Bill), amongst others, seeks to introduce provisions that clarify and improve the determination of prohibited practices relating to restrictive horizontal and vertical practices, abuse of dominance and price discrimination and to strengthen the penalty regime. The amendment Bill also proposed amendments relating to predatory pricing. These proposed amendments have now been enacted in the Competition Amendment Act 18 of 2018 that was signed into law in February 2019. These amendments are an important part of this research which will be discussed in detail in subsequent chapters of this dissertation.

Unlike the Act, the Amendment Act contains a definition for predatory pricing, namely that it means prices for goods or services below the firm's average avoidable cost or average variable cost[5]. The Amendment Act also contains definitions of "average avoidable cost" and "average variable cost". Average avoidable costs, as defined in the Amendment Act, means the sum of

[3] *Media 24 Proprietary Limited v Competition Commission of South Africa* (146/CAC/Sep16) [2018] ZACAC 1; 2018 (4) SA 278 (CAC) (19 March 2018) para 26.

[4] The Competition Amendment Act 18 of 2018.

[5] Section 1(i) of the Competition Amendment Act 18 of 2018.

all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm had not produced as identified amount of additional output. Average variable cost means the sum of all the costs that vary with an identified quantity of a particular product, divided by the produced quantity of that product.[6]

Another significant aspect of this research is the analysis of the *Media24*-case. In this case, the Competition Commission failed to meet the criteria for a complaint against Media 24 as required by section 8(d)(iv)[7] thereby demonstrating how difficult it is to prove predatory pricing. The Commission, in the alternative, pleaded a case under section 8(c) of the Act[8] based upon a different cost standard below which Media24 was allegedly pricing. The Competition Tribunal in 2016 found that Media 24 committed exclusionary act, thereby contravening section 8(c) of the Act, by engaging in a predatory pricing strategy to get rid of its competitors. The Competition Appeal Court noted that there is a fine line between effective competition on pricing and predation. It dismissed the predatory pricing case against Media 24 after carefully considering expert economists' evidence and submissions on the appropriate tests to be adopted in predatory pricing cases.

1.2. Research aim

The primary aim of this research is to evaluate the current regulation of predatory pricing in South Africa under the Competition Act as well as the changes introduced by the Amendment Act. The tests applied by the Competition Appeal Court and the effects of the *Media-24* judgment in general will also be evaluated. The research further aims to expose any loopholes in the Act regarding the regulation of predatory pricing that are not addressed in the Amendment Act. Tests and mechanisms employed in Canada and United States of America to

---

[6] Section 1(a) of the Competition Amendment Act 18 of 2018.

[7] Section 8(d)(iv) as amended by the Competition Amendment Act 18 of 2018 states that it is prohibited for a firm to sell goods or services below their marginal or average variable cost unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act.

[8] Section 8(c) of the Competition Act 89 of 1998 states that it is prohibited for a firm to 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.

determine and regulate predatory pricing will also be evaluated. Lastly, the study aims to make recommendations on how loopholes in the Act and the Amendment Act may be addressed.

1.3. Methodology

In this research, I will use legislation, books, journal articles and positive law. Local and foreign literature which deal with predatory pricing in United States of America (USA), Canada and European Union will also be used.

1.4. Chapter layout

Chapter One of the research is the roadmap to the study and gives an overview of the nature and scope of this research as well as research methods to be employed and the chapter lay-out. In Chapter Two, I will look at how predatory pricing is regulated in the United States of America (USA), Canada and the European Union (EU). Chapter Three will address regulation of predatory pricing in South Africa. The changes proposed in the Amendment Act and the *Media-24* case will also be discussed in detail. Chapter Four will contain the conclusions and recommendations of the study.

2. CHAPTER 2

2.1. REGULATING PREDATORY PRICING IN UNITED STATES OF AMERICA (US)

There are three pieces of legislation in the US regulating predatory pricing, namely the Sherman Antitrust Act of 1890 (hereafter the Sherman Act), the Federal Trade Commission Act of 1914 (hereafter the FTC Act) and the Clayton Antitrust Act of 1914 (hereafter the Clayton Act) as amended by the Robinson–Patman Act of 1936. Hereunder, I will discuss their purpose, application, relevance and penalties for engaging in predatory pricing.

2.1.1. The Sherman Antitrust Act of 1890

The Sherman Act was introduced in the US in 1890 and has been described as a 'Magna Carta of free enterprise' by the US Supreme Court.[9] The Sherman Act aims to prevent conduct which unfairly limits competition, not competition itself.[10] The Sherman Act's purpose, as explained by the US Supreme Court, is:

> "to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."[11]

Predatory pricing in the US is regulated and prohibited by section 2 of the Sherman Act. Section 2 of the Sherman Act reads 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,

[9] *United States v. Topco Associates Incorporated* 405 U.S. 596, 610 (1972).

[10] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

[11] *N. Pac Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

> shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."[12]

According to the US Department of Justice, section 2 of the Sherman Act "thus aims neither to eradicate monopoly itself, nor to prevent firms from exercising the monopoly power their legitimate success has generated, but rather to protect the process of competition that spurs firms to succeed."[13]

In a nutshell, section 2 of the Sherman Act proscribes not only monopolisation of trade or commerce but also the attempt to and/or conspiracy to monopolise any part of trade or commerce. As a result, section 2 of the Sherman Act criminalises three types of conduct, namely: actual monopolisation, attempted monopolisation and conspiracy to monopolise.[14] These three types of conduct proscribed by the section 2 of the Sherman Act will be discussed in detail below.

(a) Actual monopolisation of any part of the trade or commerce

The court has, in the past, held that actual monopolisation, for it to be in conflict with the section 2 of the Sherman Act, need to contain two elements, namely monopoly power and conduct which indicate the "wilful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[15]

Monopoly power, for purposes of the Sherman Act, means "substantial market power that is durable rather than fleeting market power being the ability to raise prices profitability above

---

[12] Section 2 of the Sherman Antitrust Act of 1890.

[13] U.S. Department of Justice "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act" (2008) chapter 2.

[14] *Ibid.*

[15] *United States v. Grinnell Corporation* 384 U.S. 563 (1966) [pp. 570-571].

those that would be charged in a competitive market."[16] It, however, needs to be emphasised that monopoly power alone is not unlawful unless it is accompanied by anti-competitive conduct.[17] Monopolisation, for purposes of the Sherman Act, comprises of "both conduct used to acquire a monopoly unlawfully and conduct used to maintain a monopoly unlawfully."[18] Notably the US Supreme Court has previously ruled that illegal monopoly does not occur where buyers have alternative markets which they may readily use for their purposes.[19] For a defendant to be guilty of this offence, the defendant must possess a significant share of the business conducted in the relevant market.[20]

(b) Attempt to monopolise any part of the trade or commerce

The second offence under section 2 of the Sherman Act is an 'attempt to monopolise.' Attempt to monopolise consists of three elements namely: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[21] All these three elements have to be proven for an 'attempt offence.'

---

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

[17] *Ibid.*

[18] U.S. Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008) chapter 2.

[19] *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 394 (1956).

[20] The percentage of market control which will be considered equivalent to monopoly power differs with the type of market involved. The cases, however, suggest that control of 80% or more of the relevant market will in itself suffice to prove that a firm possesses monopoly power. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (80% market share constitutes monopoly power); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957) (95*%); United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (90%). On the other hand, control of less than 50% is often considered conclusive evidence of the absence of monopoly power. See, e.g., *United States v. United Shoe Machinery Corp*., 110 F. Supp. 295, 346 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954) (50% or smaller share insufficient*); Kershaw v. Kershaw Mfg. Co*., 209 F. Supp. 447, 454 (M.D. Ala. 1962), aff'd per curiam, 327 F.2d 1002 (5th Cir. 1964) (7.2% insufficient).

[21] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

With regard to the first element, namely 'anti-competitive conduct', it must be noted that none of the abovementioned pieces of legislation, including the Sherman Act, regulating predatory pricing in US contain a definition of the concept 'anti-competitive conduct.' Van Schalkwyk[22] argues, and I agree with her, that the 'anti-competitive conduct' element is vague and it is recommended that to avoid confusion, legislation or any positive law implement and adopt one uniform definition of the phrase 'anti-competitive conduct.'

The second element of the 'attempt to monopolise' offence is 'specific intent to monopolise.' The court has held in the past that: "it is not necessary to show that success rewarded [the] attempt to monopolize; rather, when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the completed result."[23]

While the conduct that is legal for a monopolist is also legal for an aspiring monopolist,[24] the conduct that may be "illegal for a monopolist may be legal for a firm that lacks monopoly power because certain conduct may not have anticompetitive effects unless undertaken by a firm already possessing monopoly power."[25] The court, with regard to the intent to monopolise, has held that an attempt to monopolise does not necessarily mean an "intent to compete vigorously"[26] but entails "a specific intent to destroy competition or build

---

[22] Van Wyk J.I (2018) *An amendment of section 8(d)(iv) of the South African competition act as a key tool to adjudicate exclusionary abuse,* unpublished LLM thesis, University of Pretoria at page 10 .

[23] *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951). Spectrum Sports, 506 U.S. at 455 (quoting Swift & Co. v. United States, 196 U.S. 375, 396 (1905). U.S. Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008) chapter 1.

[24] *Olympia Equip. Leasing Co. v. W. Union Tel*. Co., 797 F.2d 370, 373 (7th Cir. 1986) (Posner, J.) (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 828a (1978)).

[25] *United States v. Dentsply Int'l, Inc*., 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist."); 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 806e (2d ed. 2002).

[26] *Spectrum Sports*, 506 U.S. at 459; *see also* 3B AREEDA & HOVENKAMP. 805b, at 407–08 ("[T]here is at least one kind of intent that the proscribed 'specific intent' clearly cannot include: the mere intention to prevail over

monopoly."[27] It is clear from the case law that section 2 of the Sherman Act's purpose, amongst others, is to encourage competition in the market by prohibiting and criminalising conduct which destroys competition or builds monopoly. According to the US Department of Justice:

> "some courts have criticized the intent element as nebulous and a distraction from proper analysis of the potential competitive effects of the challenged conduct. One treatise concludes that "'objective intent' manifested by the use of prohibited means should be sufficient to satisfy the intent component of attempt to monopolize" and that "consciousness of wrong-doing is not itself important, except insofar as it (1) bears on the appraisal of ambiguous conduct or (2) limits the reach of the offense by those courts that improperly undervalue the power component of the attempt offense."[28]

The third element of 'attempt to monopolise' under section 2 of the Sherman Act is a 'dangerous probability of success.' The 'dangerous probability of success' enquiry requires consideration of "the relevant market and the defendant's ability to lessen or destroy competition in that market."[29] The same factors that are used to ascertain whether a

---

one's rivals. To declare that intention unlawful would defeat the antitrust goal of encouraging competition on the merits, which is heavily motivated by such an intent.")

[27] *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953). One leading treatise concludes that "'objective intent' manifested by the use of prohibited means should be sufficient to satisfy the intent component of attempt to monopolize." 3B AREEDA & HOVENKAMP, 805b2, at 410.

[28] U.S. Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008) chapter 2. A.A. *Poultry Farms, Inc. v. Rose Acre Farms, Inc*., 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.) ("Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. . . . Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation.")

[29] *Spectrum Sports*, 506 U.S. at 456.

defendant charged with monopolisation has monopoly power, are the factors used by the lower courts to make the assessments stated above.[30]

Lower courts have in the past ruled that, in certain instances, it may be unnecessary to prove the 'dangerous probability of success' element for an attempt to monopolise action.[31] It should be noted however that the 'dangerous probability of success' element is not completely done away with as the court in *Cornwell Quality Tools Co. v. C.T.S. Co*[32] considered it a requirement for an attempt to monopolise offence. Bjorkman is of the view that "the courts should take the final step towards clearing up this confused area of the law and provide a uniform interpretation of 'attempt to monopolise' by eliminating 'dangerous probability of success' as an element of the offense."[33] He observes that the 'dangerous probability of success' element adds nothing but confusion to the 'attempt to monopolize' analysis and it is his opinion that it should therefore be eliminated.[34]

---

[30] U.S. Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008) chapter 2.

[31] *See, e.g., A.H. Cox & Co. v. Star Mach. Co*., 653 F.2d 1302 (9th Cir. 1981); *California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981); *Pierce Packing Co. v. John Morrell & Co*., 633 F.2d 1362 (9th Cir. 1980); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc*., 627 F.2d 919 (9th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981); *Carpet Seaming Tape Licensing Corp. v. Best Seam, Inc.,* 616 F.2d 1133 (9th Cir. 1980*); Ernest W. Hahn, Inc. v. Codding,* 615 F.2d 830 (9th Cir. 1980).

[32] The law in the Ninth Circuit is somewhat confused. Some panels have required a "dangerous probability of success." See *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir.), *cert. denied,* 404 U.S. 1049 (1971), where the court stated that C.T.S. had to prove "specific intent to monopolize *and* . . . sufficient market power to come dangerously close to success." 446 F.2d at 832 (emphasis added). Generally, however, the Ninth Circuit has not required independent proof of "dangerous probability of success." Recently, in *West v. Whitney-Fidalgo Seafoods, Inc*., 628 P.2d 10 (Alaska, 1981), the Alaska Supreme Court adopted the Ninth Circuit position in interpreting Alaska's attempt to monopolize statute, ALASKA STAT. § 45.50.564 (1980), which is identical to the federal statute. The court stated that "proof of relevant market and dangerous probability that such market will be monopolized are not indispensable elements of the attempt offense." 628 P.2d at 15.

[33] John C. Bjorkman, *Attempt to Monopolize: Dangerous Probability of Success as an Obstacle to Enforcing Section 2 of the Sherman Act*, 5 SEATTLE U. L. REV. 289 (1982) at 291.

[34] *Ibid*.

(c) Conspiracy to monopolise any part of trade or commerce

Finally, the third conduct proscribed by section 2 of the Sherman Act is the conspiracy to monopolise any part of trade or commerce. Holmes draws a distinction between conspiracy to monopolise by conspirators who jointly have monopoly power and conspiracy to monopolise by conspirators with no joint monopoly power.[35] Holmes uses two cases, namely *American Tobacco Co. v. United States*[36] and *United States v. Griffith,*[37] to elaborate on the elements of the offence of conspiracy to monopolise any part of trade or commerce by conspirators with joint monopoly power. The elements of this offence, as outlined by Holmes, are:

1. proof of the conspiracy itself;
2. monopoly power;[38]
3. the "intent and purpose" to exercise monopoly power. [39]

[35] William C. Holmes, Conspiracies to Monopolize: A Decisional Model, 42 Ohio St. L. J. 733, (1981) at 740–741.

[36] 328 U.S. 781 (1946).

[37] 334 U.S. 100 (1948).

[38] The market shares or other indicators of market power of the individual conspirators can be aggregated and viewed as a whole for purposes of determining whether the conspirators have actual monopoly power.

[39] William C. Holmes, Conspiracies to Monopolize: A Decisional Model, 42 Ohio St. L. J. 733 (1981) 740–741. Proof of a conspiracy can be found not only in an exchange of words but in a course of dealing between the conspirators or other circumstantial evidence. In American Tobacco, for example, the conspiracy was proven by parallel behavior and by dealings between the conspirators. See also United States v. United States Gypsum Co., 333 U.S. 364 (1948) ("prima facie" conspiracy established by industry-wide licensing agreements entered into with knowledge of the adherence of others in a common illegal scheme); United States v. Singer Mfg. Co., 374 U.S. 174 (1963) (conspiracy established by course of dealing and by statements of co-conspirators). See generally L. SULLIVAN, ANTITRUST 311-29 (1977); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 9.02[2] (1979). Aggregation of the conspirators' market shares can convincingly establish the existence of joint monopoly power. See, e.g., American Tobacco Co. v. United States, 328 U.S. 781 (1946) (a combined market share of over 80%); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) (a combined market share of over 94%).

These three elements were elaborated by the Supreme Court in American *Tobacco Co. v. United States* as follows:

> "A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under s 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a *power* that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the *intent and purpose* to exercise that power."[40]

Holmes correctly argues that defendants, despite the fact that they possess joint monopoly power, should be allowed to prove the competitive reasonableness of their intended action if their intended joint action is not conclusively unreasonable. [41]

The second offence is the conspiracy to monopolise any part of the trade or commerce by conspirators with no joint monopoly power. There is no consensus, amongst the US courts with regard to the elements constituting the offence of conspiracy to monopolise any part of the trade or commerce by conspirators who do not possess monopoly power jointly. On the one hand, courts have ruled that this offence has three elements, namely: proof of conspiracy, specific intent to seize control of an appreciable amount of interstate commerce and overt acts in furtherance of conspiracy.[42] On the other hand, the courts have ruled that this offence has four elements, namely: existence of the conspiracy, the relevant market, specific intent to acquire monopoly power within the relevant market and overt acts in furtherance of the

---

[40] 328 U.S. 781 (1946).

[41] William C. Holmes, Conspiracies to Monopolize: A Decisional Model, 42 Ohio St. L. J. 733, 740–41 (1981).

[42] Salco *Corp. v. General Motors Corp*., 517 F.2d 567, 576 (10th Cir. 1975); *United States v. Consolidated Laundries Corp*., 219 F.2d 563, 572-73 (2d Cir. 1961); *United States v. National City Lines*, 186 F.2d 562, 567-68 (7th Cir. 1951); *Giant Paper & Film Corp. v. Albemarle Paper Co*., 430 F. Supp. 981 (S.D.N.Y. 1977); *Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n of South Carolina*, 436 F. Supp. 418 (D.S.C. 1976), affd, 569 F.2d (4th Cir.), cert. denied, 439 U.S. 910 (1978); Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1231-32 (N.D. Ill. 1976).

conspiracy.[43] Although there is no agreement as to the elements constituting the offence of conspiracy to monopolise any part of the trade or commerce by conspirators with no joint monopoly power, there is, however, agreement that this offence does not require actual possession of monopoly power or dangerous probability of success of achieving monopoly power.[44]

It appears, from the article by Holmes, that 'the relevant market' as an element of this offence is the reason there is disagreement as to the elements of this offence. Holmes argues that, in instances where the conspirators lack monopoly power, after establishing the conspiracy and existence of the relevant market it has to be proven that the conspirators had specific intention to gain monopoly power in a relevant market by engaging in predatory acts or acts that competitively unreasonable.[45]Holmes further argues that, except in cases where the conspirators' intended act is clearly predatory or exclusionary, the competitive unreasonableness of any intended conduct must always be proven taking in account factors such as industry structure, conspirators' relative position within the market, purported purpose of the conduct and its impact upon competition as well as the availability of less restrictive alternatives.[46]

Above, I have discussed all the types of conduct that are proscribed by section 2 of the Sherman Act. I also discussed the elements of each offence as well as penalties for all proscribed offences. What should be noted from the above discussion is that section 2 of the Sherman Act is worded broadly in that it proscribes not only the actual predatory conduct but

---

[43] Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 991 (9th Cir. 1980); *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co*., 510 F.2d 1140, 1144 (2d Cir.), cert. denied, 421 U.S. 1011 (1975); *Sulmeyer v. Coca Cola Co*., 515 F.2d 835 (5th Cir. 1975), cert. denied, 424 U.S. 934 (1976); *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418,420 (D.C. Cir. 1957*); Joe Westbrook, Inc. v. Chrysler Corp*., 419 F. Supp. 824 (N.D. Ga. 1976).

[44] Hunt-*Wesson Foods, Inc. v. Ragu Foods, Inc*., 627 F.2d 919 (9th Cir. 1980); *Giant Paper& Film Corp. v. Albemarle Paper Co*., 430 F. Supp. 981 (S.D.N.Y. 1977); and *Joe Westbrook, Inc. v. Chrysler Corp*., 419 F. Supp. 824 (N.D. Ga. 1976).

[45] William C. Holmes, Conspiracies to Monopolize: A Decisional Model, 42 Ohio St. L. J. 733 (1981) at 740–41.

[46] *Ibid.*

proscribes also the attempt and conspiracy to engage in predatory pricing. Below, I will discuss other legislation, namely: the FTC Act and the Clayton Act, proscribing predatory pricing in USA. The Clayton Act, for purpose of this research, will not be discussed in detail as it does not contain a provision that directly proscribes predatory pricing behaviour.

2.1.2. The Federal Trade Commission Act of 1914 (the FTC Act)

Predatory pricing in US is further declared unlawful by section 5(a) of the FTC Act. Section 5(1) and (2) of the FTC Act read as follows:

> "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[47]

Section 5(b) of the FTC Act vests the Federal Trade Commission (hereafter the Commission) with powers to investigate companies suspected of practicing unfair and/or deceptive

[47] The Federal Trade Commission Act of 1914. The Use of Section 5 of the Federal Trade Commission Act in Robinson-Patman Enforcement: A Desirable End Through Questionable Means, 1963 *Duke Law Journal* (1963) at 145-153.

activities.[48] It should be noted that section 5 of the FTC Act is broader than both the section 2 of the Sherman Act and Section 2 of the Clayton Act, and that the courts have used section

[48] Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph [FN1] (2) not later than 120 days after the date of the filing of such request.

5 of the FTC Act to challenge unfair methods of competition that are covered, as well as those not covered, by the section 2 of the Sherman Act and the section 2 of the Clayton Act.[49] In short, conduct that violates either section 2 of the Sherman Act or section 2(a) of the Clayton Act also violates section 5 of the FTC Act. The courts have also successfully used section 5 of the FTC Act to proscribe, amongst others, the refusal to trade,[50] exclusive dealing agreements[51] and price fixing activities.[52]

2.1.3. The Clayton Act

As already stated above, section 2(a) of the Clayton Act[53] does not directly address predatory pricing behaviour. Section 2(a) of the Clayton Act is a provision proscribing price discrimination but it is, however, worded in a way that may allow the courts to use it to proscribe predatory pricing behaviour as well. Section 2 of the Sherman Act, as discussed above, proscribes actual monopolisation, attempt to monopolise and conspiracy to monopolise any part of trade or commerce. On the other hand, section 2(a) of the Clayton Act makes it unlawful to engage in price discrimination if such price discrimination will result in, amongst others, creation of monopoly in any line of commerce. Consequently, a person must first be guilty of price discrimination for him/her to be guilty of predatory pricing conduct in terms of section 2(a) of the Clayton Act. Accordingly, a person can be guilty of price discrimination without being guilty of predatory pricing behaviour *but* a person cannot be guilty of predatory pricing behaviour without being guilty of price discrimination in terms of section 2(a) of the Clayton Act. Furthermore, a person who is found guilty of engaging in price discrimination which resulted in monopolisation of trade or commerce in terms of section 2(a) of the Clayton Act will also be guilty for violating section 2 of the Sherman Act which

[49] OECD (Organisation for economic Cooperation and Development) Predatory pricing OECD Publications, Paris 1989.

[50] *FTC v. Beech-Nut Packing Co.* 257 U.S. 441 (1922).

[51] *FTC v. Eastman Kodak Co.* 274 U.S. 619 (1927).

[52] *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927).

[53] As amended by the Robinson-Patman Act.

proscribes monopolisation of trade or commerce. It is for this reason that section 2(a) of the Clayton Act may be used to proscribe predatory behaviour.

2.1.4. US case law

(a) *Utah Pie v Continental Baking Company* (Utah Pie case)

In 1967, the Supreme Court was presented with an opportunity to condemn predatory pricing conduct.[54] Utah Pie was a small family business within Salt Lake City producing fresh pies. Utah Pie Company expanded its business in 1957 when it entered the frozen pie market wherein its competitors became Continental Banking Company, Pet Milk Company and Carnation Milk Company. At the time, these firms were the large distributors of produce as well as frozen pies to American grocers. As a result of the fact that Utah Pie at the time had its own manufacturing plant locally, Utah Pie managed to undercut its national competitors' prices. This triggered Utah Pie's competitors mentioned above to lower their prices immediately.[55]

Continental Baking Company priced its frozen pies, which were of same grade and quality in Salt Lake City and elsewhere, below cost prices in the Salt Lake market where it competed with Utah Pie and charged higher price in other markets where Utah Pie was not doing business. Continental Baking Company priced its frozen pies on the Salt Lake market at $2.85 and $2.75 elsewhere. Consequently Continental Baking Company's sales of frozen pies in 1960 increased from 3350 dozen to 18000 dozen while its market share grew from 1.8% in

[54] *Utah Pie v Continental Baking Company* 386 U.S. 685 (1967) at para 685. It is important to note that the Robinson Patman Act of 1936, not section 2 of the Sherman Act or section 5 of the FTC Act, was used to decide this case.

[55] *Ibid*.

1960 to 8.35 in 1961.[56] This prompted the Utah Pie Company to file a suit on 8 September, 1961.[57]

The Court initially ruled in favour of Utah Pie. The Court of Appeal, however, overturned the initial judgment which was in favour of Utah Pie.[58] The Supreme Court later ruled in favour of Utah Pie again and held as follows:

> "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."[59]

The Supreme Court of Appeal was criticised sharply by various authors for this decision on the basis that the decision chooses competitors over competition. Bowman, who sharply criticises the judgment, c argues that this judgment "must rank as the most anti-competitive antitrust decision of the decade"[60] because the "antitrust law has been turned into a law against price

[56] *Ibid* at para 690-697. It should be noted that, although Utah Pie Company share of the Salt Lake City market may have slightly declined because of its competitors, it managed to build a new plant in Salt Lake City in 1958 and both its sales volume and financial position substantially increased and improved.

[57] *Ibid.* It should be noted that a period of lawsuit covers 1958-1960.

.[58] The Court of Appeals concluded that Continental's conduct had only minimal effect, that it had not injured or weakened Utah Pie as a competitor, that it had not substantially lessened competition and that there was no reasonable possibility that it would do so in the future.

[59] *Ibid*. the SC argued that the CoA's decision rested on the fact that Utah's sales volume continued to climb in 1961 and on the court's own factual conclusion that Utah was not deprived of any pie business which it might have otherwise might have had.

[60] W S Bowman 'Restraint of Trade by the Supreme Court: The *Utah Pie* Case,' (1967) 77 *Yale LJ* 70 at 84.

competition."[61] This judgment is also criticised by Van Schalkwyk[62] who correctly argues that it does not address the possibility of recoupment as element of predatory pricing.

(b) *Matsushita Electric Industrial Co. v. Zenith Radio Corp*

In this case, Japanese corporations manufacturing and selling consumer electronic products (CEP) including television sets were the petitioners while the respondents were American corporations also manufacturing and selling television sets.[63] The respondents claimed that "the Japanese manufacturers had conspired to charge supra-competitive prices in Japan in order to subsidise predatory pricing and other exclusionary activities in the United States."[64] The respondent further 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."[65] The respondents alleged that the petitioners' conduct violated various anti-trust laws proscribing price fixing discussed above. The district court granted a summary judgment in favour of the Japanese corporations on the basis that American corporations' inadmissible evidence did not raise a genuine issue of material fact.[66]

The Supreme Court held that the following three conditions should be met for predatory pricing to be successful:

---

[61] Ibid.

[62] Van Schalkwyk (2018) *An amendment of section 8(d)(iv) of the South African competition act as a key tool to adjudicate exclusionary abuse,* unpublished LLM thesis, University of Pretoria at page 12.

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

[64] OECD (Organisation for economic Cooperation and Development) Predatory pricing OECD Publications, Paris 1989.

[65] Van Schalkwyk (2018) *An amendment of section 8(d)(iv) of the South African competition act as a key tool to adjudicate exclusionary abuse,* unpublished LLM thesis, University of Pretoria at page 12. *Matsushita Electric Industrial Company v Zenith Radio Corporation* 475 US 574 (1986) at 582-593.

[66]Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation." *Oyez,* www.oyez.org/cases/1985/83-2004. Accessed 6 Oct. 2019.

1. "there must be a likelihood that the predator will acquire a monopoly position;
2. it must cause entry barriers for potential new competitors; and
3. 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."[67]

The court in this case emphasised the role recoupment plays in determining whether or not specific conduct constitutes predatory pricing. The court concluded that the above stated conditions were not satisfied.

(c) *Cargill Incorporated v Monfort of Colorado Incorporated*

This case, just like the *Matsushita* case, demonstrates how difficult it is to successfully prove predatory pricing. The facts were that Monfort, which at the time was the fifth largest beef packer in the United States, sought to enjoin an impending acquisition by Excel, the second largest beef packer, of Spencer Beef, the third largest beef packer. Excel would have remained the second largest firm in the market even after the acquisition but would have rivalled the largest.[68] Monfort's contention was that such "acquisition 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."[69] The Supreme Court, in this case, laid down the following two factors as obstacles that make predatory pricing difficult to prove:

1. "a predator must be able to absorb the market shares of its rivals once prices have been cut; and

[67] *Matsushita Electric Industrial Company v Zenith Radio Corporation* 475 US 574 (1986) at para 589. J.I Van Wyk "An amendment of section 8(d)(iv) of the South African competition act as a key tool to adjudicate exclusionary abuse" (2019) at 12.

[68] *Cargill Incorporated v Monfort of Colorado Incorporated* 479 U.S. 104 (1986).

[69] *Ibid.*

2. 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."[70]

The court concluded by stating 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."[71] Furthermore, the definition of predatory pricing according to Cargill, namely pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run, creates an impression that in certain instances pricing below the cost may be well-intended and lawful.[72] It is important to note that the Supreme Court recognised that "[w]hile firms may engage in the practice only infrequently, there is ample evidence suggesting that the practice does occur."[73]

(d) *Brooke Group Ltd. v Brown & Williamson Tobacco Corp*

According to May,[74] the court in this case, unlike in the *Utah Pie case*, prioritised competition over competitors. In 1980, Liggett Group Inc[75] attempting to regain market share, introduced a line of 'black and white' generic cigarettes that sold for substantially less than branded cigarettes.[76] Liggett Group Inc initially had 2% of the cigarette market share but, within four

[70] *Ibid* at 119 note 15.

[71] *Ibid.*

[72] *Ibid.*

[73] *Cargill Inc. v. Monfort, Inc.,* 479 U.S. 104 at 121; Matsushita, 475 U.S. at para 589.

[74] Keith A. May, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.: A Victory for Consumer Welfare Under the Robinson-Patman Act, 28 U. Rich. L. Rev. (1994) at 508.

[75] The Brooke Group had changed its name at the time of litigation.

[76] Keith A. May, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.: A Victory for Consumer Welfare Under the Robinson-Patman Act, 28 U. Rich. L. Rev. (1994) at 508 . Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2582 (1993). "Black and whites" are generic cigarettes packaged in plain white packages with simple black lettering describing their contents.

year after it started charging 30% lower than its competitors, its market share grew from 2% to 4% of the overall cigarette market. The respondents responded by coming with their own generic brand which they planned to sell to wholesalers at prices lower than Liggett Group Inc's. Liggett then filed a suit alleging that the respondents' conduct constituted a price discrimination that was possibly in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[77]

The court concluded that, for respondents' conduct to have violated section 2(a) of the Clayton Act as alleged by Liggett Group Inc, Liggett Group Inc first had to prove that "the prices complained of are below an appropriate measure of costs and, secondly prove that the alleged predator had reasonable prospect or that there is the dangerous probability or recouping its investment in below-cost prices, thus hurting competition."[78] The court emphasised the importance of the 'recoupment' element for predatory pricing analysis and rejected the plaintiff's claim on the basis that the plaintiff failed to prove the possibility of recoupment by the respondent. Most importantly, the court held that:

> "evidence of below-cost prices is not sufficient to serve as proof of probable recoupment: 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."[79]

As pointed out by Denger et al, the court, however, did not 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).[80]

2.1.5. Conclusion

[77] *Ibid*.

[78] *Cargill Incorporated v Monfort of Colorado Incorporated* 479 U.S. 104 (1986) at 222-224.

[79] *Ibid.*

[80] Ibid. Denger, Michael L. Herfort, John A. Predatory pricing claims after Brooke Group In: 62 Antitrust L.J., 541 (1994) at 557.

As it can be seen from the cases discussed above, proving predatory pricing in the US is a mammoth task. The above case discussion makes it clear that, for one to successfully prove predation, there must be evidence of pricing below the cost and the possibility of recoupment. Possibility of recoupment, according to the cases discussed above, appears to be an essential element of predatory pricing in the US. According to Bolton and others,[81] the US has not adopted any cost benchmark as a standard test for determining predatory pricing because, in the *Brooke* Case, the court did not rule that "average total cost" was an appropriate cost test for predation but that prices below average total cost, cost of marginal standard or average variable cost may indicate predation. However, the fact that there are three pieces of legislation**,** namely; the Sherman Act, the FTC Act and the Clayton Act, regulating predatory pricing behaviour makes it little better for the courts. If, for example, it cannot be proven that a person is guilty for violating section 2 of the Sherman Act, a person can be charged for violating section 5(a) of the FTC Act which is broader than section 2 of the Sherman Act.

2.2. REGULATING PREDATORY PRICING IN CANADA

2.2.1. The Combines Investigation Act

Previously, predatory pricing in Canada was proscribed by section 34(1)(b) and (c) of the Combines Investigation Act.[82] According to Barry, section 34(1)(b) and (c) was basically concerned with "large national corporations which might use its deep pockets to destroy smaller competitors in particular geographic locations and with policies of selling products at unreasonably low prices which have the effect of eliminating competition."[83] Under this section, the conduct of lowering pricing to meet spot competition alone appears to have been lawful while, on the other hand, the conduct of lowering of pricing with the effect or tendency

[81] Bolton, Brodley and Riordan "Predatory Pricing: Strategic Theory and Legal Policy" (2000) 88 Geo Law Journal 2239 at 2244.

[82] R.S.C. 1970, c. C-23.

[83] Barry R. Campbell, Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law, 5 N.C. J. Int'l L. & Com. Reg. 57 (2016) page 81.

of substantially lessening competition or eliminating competition which was proscribed.[84] The Combines Investigation Act was repealed by and replaced with the Competition Act R.S.C.1985, c.C-34 in 1986.

2.2.2. The Competition Act, RSC 1985 (the Competition Act)

Predatory pricing in Canada is now regulated and proscribed by the Competition Act.[85] Section 1.1 of the Competition Act provides for the purpose of the Competition Act and it reads as follows:

> "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."[86]

This purpose may be interpreted to mean that any conduct, including predatory pricing, which hinders competition or that is inconsistent with this purpose, is unlawful.

Under the Competition Act, predatory pricing was initially regulated in terms of the section 50(1) and section 79 but section 50(1) was later repealed in 2009 by the Budget Implementation Act, 2009.[87]. Predatory pricing is now regulated only in terms of section 79 of the Competition Act. Notably the repealed section 50 of the Competition Act was a criminal provision while section 79, on the other hand, is a civil provision. Before section 50(1) was repealed, the Commissioner of Competition (hereafter "Commissioner") as enforcer of the

[84] Ibid.

[85] The Competition Act, RSC 1985.

[86] Section 1.1 of the Competition Act.

[87] Budget Implementation Act, 2009, SC 2009, c 2.

Canadian Competition Act had a choice to decide predatory pricing conduct in accordance with section 50 or section 79 of the Competition Act. The Commissioner's choice, however, had to be influenced by the circumstances and merits of each case.[88] For example, the Commissioner would generally use section 79, rather than section 50 of the Competition Act, in instances where predatory pricing behaviour was done concurrently with other types of anti-competitive acts.

(a) Section 50 of the Competition Act

The now repealed section 50(1)(a)-(c) of the Competition Act provided that everyone engaged in a business who:

> (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,
>
> (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

[88] Kara Beitel, "Predatory Pricing in the Canadian Context" (2003) 12 Dal J Leg Stud 203 at 221.

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."[89]

Section 50(1)(c), as alluded to above, makes it a criminal offence to engage in predatory pricing. Under section 50(1)(c) of the Competition Act, predatory pricing had three elements, namely (a) a policy of selling, (b) at reasonably low pricing and effect, and (c) tendency or intent to substantially lessen competition or eliminate competitor. The court held in the past that the policy of selling does not have to be in writing.[90] The court, with regard to the second element, has "acknowledged that there may be circumstances in which pricing below some measure of cost would be justified and the question to be asked in each case was whether there were any external or [anticipated] long term economic benefits [which] would accrue to the seller by reducing its prices below cost."[91] The penalty for engaging in predatory pricing was an imprisonment period not exceeding 2 years.

All three elements had to be satisfied and a predatory pricing case would not proceed unless all these elements were met. The predatory pricing threshold was, however, whether or not the predatory pricing policy of the alleged predator was likely to have anti-competitive effect or tendency or is designed to have that effect. Van Duzer [92] correctly argues that section 50(1)(c) of the Competition Act protected competitors regardless of the overall effect of the conduct on competition and efficiency. As a result, he recommended that section 79 of the Competition Act should, instead of section 50, be used to avoid such problems.[93] Skeoch et

[89] The Competition Act, RSC 1985.

[90] *R.* v. *Perreault,* [1996] R.J.Q. 2565, [1996] A.Q. No. 2660 (C.S.)

[91] *R.* v. *Hoffmann-La Roche Ltd.* (1980),28 O.R (2d) 164 at 194,109 D.L.R (3d) 5 at 35 (H.C.)

[92] VanDuzer, J. Anthony, Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance. Ottawa Law Review, Vol. 32, No. 2, 2001. Available at SSRN: https://ssrn.com/abstract=2724776

[93] *Ibid.*

al[94] also recommended that section 79, instead of section 50(1)(c), be used. Their reason was that:

> "One of the central difficulties with using the criminal law in this field is that the function of criminal law and the purpose and capacity of the criminal sanction depend upon a substantive prohibition that is defined sufficiently precisely in advance that a person has fair notice, before engaging in the conduct, that it is against the law and the public interest for him to do so. Ideally a widely accepted moral disapproval of the conduct exists in addition to the specific prohibition. Competition law, however, cannot realistically define many undesirable events except in terms of their economic effect or likely economic effect. Mergers, uses of market power, and price differentials, for example, are desirable, inconsequential, or harmful only according to the market context in which they occur.[95]

In 1992 Predatory Pricing Enforcement Guidelines [96] (PPEG) were released by the Canadian Competition Bureau (Bureau). The purpose of PPEG was, amongst others, to interpret the predatory pricing provision contained in section 50(1) of the competition Act. The PPEG introduced a two part test of determining whether or not alleged predator's prices were "unreasonably" low.[97] The elements of this test were market power criteria and cost based criteria.

The first stage of this test entailed a determination of whether or not the alleged predator had market power. Only after it was established that the alleged predator had market power the Bureau would proceed to the second stage. It must be noted that the Competition Act

---

[94] L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Information Canada, 1976) at 218-222, 260-276.

[95] *Ibid* at 239-240.

[96] http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01139e.html.

[97] Competition Bureau, *Predatory Pricing Enforcement Guidelines* at Part 3.

does not define what market power is.[98] As a result market power is usually determined by looking at the market share of the alleged predator, for example an alleged predator with less than 35% of the market share unlikely has the ability to unilaterally affect industry pricing.[99] According to the PPEG, relevant geographic and product market are normally used to define the market share.[100]

The second stage of the test is to determine whether or not the alleged predator's pricing was unreasonable taking into account the extent to which such prices were below the cost of supplying products.[101] According to the courts, prices above average total cost will not be considered to be "unreasonably low".[102] The PPEG provide that "prices less than average variable cost will be considered to be unreasonably low in the absence of some legitimate commercial objective, such as the need to sell off perishable inventory."[103] According to the PPEG, prices between average total cost and average variable cost may, depending on all the circumstances of each case, either amount to predatory behaviour or not.[104]

(b) Section 78 and 79 of the Competition Act

As already stated above, since the repeal of section 50, predatory is now regulated in terms of section 79 of the Competition Act. Section 78 of the Competition Act defines different kinds of anti-competitive acts. Section 78(i) of the Competition Act reads as follows:

> "For the purposes of section 79, anti-competitive act, without restricting the generality of the term, includes selling articles at a price lower than

---

[98] VanDuzer, J. Anthony, Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance. Ottawa Law Review, Vol. 32, No. 2, 2001.

[99] Organisation for Economic Co-operation and Development 15-Mar-2005.http://www.oecd.org/competition/

[100] Competition Bureau, *Predatory Pricing Enforcement Guidelines* at Part 3.2

[101] *Ibid*.

[102] *R.* v. *Consumers Glass Company Ltd. and Portion Packaging* (1981),33 O.R (2d) 228 at 246-47, 124 D.L.R. (3d) 274 at 292-293 (H.C.). *R.* v. *Hoffmann-La Roche Ltd.* (1980),28 O.R (2d) 164 at 194,109 D.L.R (3d) 5 at 35 (H.C.).

[103] https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home

[104] Ibid.

> the acquisition cost for the purpose of disciplining or eliminating a competitor."[105]

The main difference between section 50 and section 79 of the Competition Act is that the latter requires the alleged predator to be a dominant firm while the former did not require the alleged predator to be a dominant firm. As indicated, in Canada a firm is considered dominant if its market share is greater than 35% of the market.[106] Section 79(1) of the Competition Act reads as follows:

"Where, on application by the Commissioner, the Tribunal finds that:

> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice."

In addition to the prohibitory order stated above, section 79(2) and 79(3.1) of the Competition Act provides for alternative orders and administrative monetary penalties for violation of 79(1) of the Competition Act. Section 79(2) of the Competition Act reads as follows:

> "Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order

[105] Section 78(i) of the Competition Act.

[106] Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (Ottawa: Competition Bureau, 2001) at 6 [Competition Bureau, Enforcement Guidelines].

> under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market."[107]

In addition, section 79(3.1) of the Competition Act reads as follows:

> "If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000."

The aggravating and mitigating factors to be considered by the Tribunal when imposing the administrative monetary penalty, in terms of section 79(3.1) of the Competition Act, are:

> "(a) the effect on competition in the relevant market;
> (b) the gross revenue from sales affected by the practice;
> (c) any actual or anticipated profits affected by the practice;
> (d) the financial position of the person against whom the order is made;
> (e) the history of compliance with this Act by the person against whom the order is made; and
> (f) any other relevant factor."[108]

Notably, any anti-competitive act in violation of section 79 of the Competition Act will not be regarded as unlawful if it is done as a result of a right or enjoyment of any Act of Parliament pertaining to intellectual or industry property.[109]

2.2.3. Canadian case law

[107] Section 79(2) of the Competition Act.

[108] Section 79(3.2) of the Competition Act.

[109] Section 79(5) of the Competition Act.

Most predatory pricing cases in Canada were decided in terms of the now repealed section 50 of the Competition Act. Hereunder I will discuss three predatory pricing cases, two which were decided in terms of section 34(1)(c) of the Combines Investigation Act and one that was decided in terms of section 79 of the Competition Act. Cases decided in terms of 34(1)(c) of the Combines Investigation Act are *R v Producer's Dairy*[110] and *R v Hoffman-la Roche.* [111]

(a) *Producer's Dairy*

Producer's Dairy case[112] was the first predatory pricing case in Canada. In this case, the Restrictive Trade Practices Commission (RTPC) had the opportunity to interpret the term 'policy' for purposes of section 34(1)(c) of the Combines Investigation Act. As already stated above, section 34(1)(c) of the Combines Investigation Act required a party accused of engaging in predatory pricing behaviour to have a 'policy' of selling products at prices which are unreasonable low. In this case, a major dairy factory in the milk market substantially reduced its selling prices with the intention of expanding within the market. This caused its competitor, Producer Dairy Ltd, to respond by also reducing its selling prices to retailers and wholesalers. It should be noted, however, that unions affected fought against low prices and, as a result, Producer's Dairy Ltd withdrew its low prices just after 2 days. The RTPC held that Producer's Dairy Ltd low prices were in response to its competitor's substantial reduction of prices and, as result, Producer's Dairy Ltd did not have intention to lessen the competition in the market. The RTPC further held that a 'policy' "required something more than the adoption of a temporary expedient to meet an aggressive, competitive move aimed directly at an important customer."[113] RTPC, however, did not address other elements of predatory pricing conduct discussed above.

(b) *Hoffmann* case

[110] (1966), 50 C.P.R. (2d) 265 (Ont. C.A.).

[111] (1980), 109 D.L.R. (3d) 5 (Ont. H.C.J.) (Hoffmann).

[112] (1966), 50 C.P.R. (2d) 265 (Ont. C.A.) at 271.

[113] (1966), 50 C.P.R. (2d) 265 (Ont. C.A.) at 271.

The *Hoffmann* case was the first predatory pricing that ended with a conviction of the alleged predator. In this case, a company called Hoffman-La Roche Ltd was the only producer of Librium and Valium in Canada. When a competitor called Frank Horner Ltd entered the market in 1961, Hoffman-La Roche Ltd decided to give hospitals and governments Valium for free for a period of over six months. This case[114] is of significant importance as the court interpreted all the elements of the predatory pricing behaviour offence.

The court held that a 'policy', for purposes of predatory pricing analysis, "involved conscious conduct by the responsible employees of the accused of a continuing and repetitive nature."[115] The court also held that the purpose behind the price cut is irrelevant as to whether or not the behaviour constituted a policy of pricing and that only intent would be relevant for determining the issue of whether a price is 'unreasonably low.'[116]

The court, with regard to appropriate test for 'reasonably low', held that prices above "short-run historical (book) production costs" are never unreasonable, but that prices below that level may be unreasonable, depending on the circumstances. The court laid down the following three factors to determine if prices are 'unreasonably low':

1. the duration of the prices;
2. the competitive circumstances (including whether the pricing was proactive or reactive); and
3. the expectation of legitimate long-term benefits for the seller.[117]

The court concluded by stating that distributing Valium to the hospitals and governments free of charge constituted 'unreasonably low' prices in the circumstances, given the financial loss

---

[114] (1980), 28 O.R. (2d) 164, 109 D.L.R. (3d) 5, 48 C.P.R. (2d) 145 (H.C.J.)

[115] (1980), 109 D.L.R. (3d) 5 (Ont. H.C.J.) Lawson A.W. Hunter, **Q.C."** and Susan M. Hutton*"Is the Price Right?: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy. (1993) 38 McGill L.J. 830.

[116] *Ibid.*

[117] *Ibid.*

of millions of dollars Hoffman- La Roche suffered as a result of such distribution, the duration of the program and its proactive nature.[118]

With regard to the last element of the predatory pricing behaviour offence, namely tendency or intention to substantially lessen competition or eliminate a competitor, the court "inferred predatory intent from comments in internal company documents, from the magnitude of the price cuts, and from the fact that losses of $2.6 million were incurred in order to prevent a forecasted $0.6 million encroachment by Frank Homer."[119] The court applied the three factors it used to determine if prices are "unreasonably low" to conclude that Hoffmann's intent was to eliminate Frank Horner as a competitor.[120] Hunter et al[121] correctly argue that, from this judgment, it can be concluded that sales above total cost can never be unreasonable.

(c) The *NutraSweet* case

The *NutraSweet* case[122] is the first case to be decided in terms of section 79 of the Canadian Competition Act. There was no precedent on this matter as this was the first case and the Tribunal, as a result, relied on American and European monopolisation cases to interpret section 79 of the Competition Act. NutraSweet Company (NSC) was a company producing and selling aspartame worldwide to companies that needed aspartame to manufacture foods and beverages.[123] NSC sold ninety five percent of its aspartames in Canada while it sold the other five percent worldwide. It was alleged, amongst others, that NSC was selling its products below the acquisition cost for purposes of disciplining or eliminating competitors. The Tribunal found that it was difficult to apply the term 'acquisition cost' to manufacturing situations. The Tribunal further stated that the 'acquisition cost' test was intended to be

[118] *Ibid.*

[119] *Ibid*.

[120] *Ibid.*

[121] *Ibid.*

[122] *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) **1** (Comp. Trib.).

[123] *NutraSweet,* No. CT-89/2 at **5.**

applied to distribution situation.[124] The Tribunal concluded by endorsing pricing below average variable cost as an appropriate test for determining predation. [125]

2.2.4. Conclusion

Unlike regulation of predatory pricing in USA, in Canada there is a standard cost benchmark for determining predatory pricing. Because of this standard cost benchmark, it is easier to prove predatory pricing conduct that may be in violation of section 79 of the Competition Act. Section 79 of the Competition Act is clearly worded and prohibits selling of prices below acquisition costs. Cases discussed above made it clear that pricing below the average variable cost was the appropriate test for determining predation.

As already stated above, section 79 of the Competition Act requires a firm accused of engaging in predatory pricing behaviour to be dominant within the relevant market. Factors determining dominance within the market have been discussed above. Most importantly, the Competition Act gives the Tribunal various ways of dealing with predatory pricing behaviour that actually lessens or has the effect of lessening the competition. Furthermore, the Competition Act provides hefty fines for firms that engage in predatory pricing behaviour.

---

[124] *NutraSweet,* No. CT-89/2 at 74. "i.e., to situations where articles are purchased for resale. Since NSC buys product from Ajinomoto, there is a purchase and resale by NSC. [Under section 78(i)] acquisition cost is restricted to the cost of the articles and not to the cost of distributing them ... ; that is, only the price paid to Ajinomoto, and not the marketing and distribution costs of the Canadian operations, conforms to acquisition cost."

[125] *Ibid.*

2.3. REGULATING PREDATORY PRICING IN THE EUROPEAN UNION (EU)

2.3.1. The Treaty on The Functioning of The European Union (TFEU)

Predatory pricing in the EU is controlled by article 102 of the Treaty on the Functioning of the European Union (TFEU). Section 102 of the TFEU provides as follows:

> "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."[126]

Predatory pricing behaviour, according to article 102 of the TFEU, has three main elements, namely that it entails "one or more undertakings," "abuse of dominant position" and "effects on trade between member states." It should be noted that the TFEU does however not define any of these elements. As a result, I will use some of the European Court of Justice's judgments to explain these elements in detail.

[126] Article 102 of TFEU.

a. Undertaking

The first element mentioned in article 102 is "undertaking." The European Court of Justice ("ECJ") held, with regard to the term "undertaking" in the context of article 102 of the TFEU, that:

> "for the purpose of EU antitrust law, any entity engaged in an economic activity, that is an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded."[127]

The phrase "any entity' as it appears from the above definition of "undertaking" includes, amongst others, companies, self-employed individuals, trade associations and so forth.[128] The ECJ with regard to the phrase "economic activity" held that:

> "an organisation which purchases goods - even in great quantity - not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market."[129]

It is clear from the above that the purpose of purchasing goods or services must be to offer such goods or services for economic activity not for any other activity irrespective of quantity of goods purchased.

b. Abuse of dominance

The second element of article 102 of the TFEU is "abuse of dominance." It is clear from the content of article 102 of the TFEU that, for a firm to be guilty of predatory pricing behaviour,

---

[127] http://ec.europa.eu/comm/competition/general_info/u_en.html#t62. Case 41/90, *Höfner and Elsner v Macrotron GmbH* 1991.

[128] *Ibid.*

[129] Case T-319/99, *Fenin v Commission 2003* at para 37.

the firm needs to be dominant in the relevant market. Such dominant firm also has to abuse its position and such abuse must have a negative impact on trade between member states. This necessitates an explanation of what constitutes "dominant position" in the context of article 102 of the TFEU. In the *United Brands v Commission case*[130], the term "dominance" was defined as:

> "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[131]

It should be noted that "dominance", in the context of article 102 of TFEU, does not necessarily mean that only one firm must be dominant. More than one firm may, for example through actual or economic links, be collectively dominant for purposes of article 102 of the TFEU.[132] With regard to joined dominance, the ECJ has held that:

> "[t]here is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead

---

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

[131] *Ibid.*

[132] Case C-395/96 *Compagnie maritime belge transports and Others v Commission* 2000 [para 45]. In this case, the Commission held that "[t]he existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. – Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question"

> affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers."[133]

In the *Hoffman-LaRoche v Commission* case, it was stated that "the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very high market shares."[134] The ECJ in this case[135] acknowledged that market share may be evidence of existence of a dominant position. A market share which is below 40% is regarded as an indication of lack of dominance while a market share of between 40% and 50% requires thorough economic analysis to decide if a firm is dominant.[136] According to the ECJ, there is a presumption of dominance if a firm's market share is above 50%.[137] On the other hand, a market share of between 70% and 80% clearly indicates a firm's dominance.[138] A market share, however, is of course only determined after the "relevant market" has been established, as discussed below.

According to the ECJ, the main purpose of defining "relevant market" is that "relevant market" is a "necessary precondition for any judgment concerning allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such

---

[133] Case T-68/89 *Societa Italiano Vetro SPA v Commission* 1992 [para 358]. CaseC-393/92 *Municipality of Almelo and Others v Energiebedrijf IJsselmij* 1994, where the ECJ that ""in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market."

[134] Case 85/76 *Hoffman/LaRoche & Company AG v Commission of the European Communities* 1979 [para 39].

[135] *Ibid* at para 41.

[136] Department of Private Law, University of Oslo, EU Competition Law – Abuse of Dominance (Article 102 TFEU) Eirik Østerud eirik.osterud@jus.uio.no.

[137] Case C-62/86 ***AKZO Chemie BV v Commission of the European Communities*** **1991** at para 60.

[138] Case T-30/89 *Hilti v Commission*1991 at para 92.

a market has already been defined."[139] According to the European Commission's *Notice on the Definition of the Relevant Market* (hereafter "Commission's Notice"),[140] definition of the "relevant market" is important because it:

1. "is a tool to identify and define the boundaries of competition between firms;
2. serves to establish the framework within which competition policy is applied by the Commission;
3. is to identify in a systematic way the competitive constraints that the undertakings involved face; and
4. to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance."[141]

It should however be noted that the "relevant market", for purposes of article 102 of the TFEU, is different from other definitions of market used in other contexts.[142]

According to the Commission's Notice, "relevant market" is defined by combining the relevant product market and relevant geographic market.[143] The relevant product market "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use".[144] On the other hand, the relevant geographic market "comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be

[139] Case T-61/99 Adriatica di Navigazione SpA v Commission 2003 at para 27.

[140] European Commission's Notice on the Definition of the Relevant Market (97/C 372 /03).

[141] *Ibid* at para 2.

[142] *Ibid* at para 3. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

[143] *Ibid* at para 4.

[144] *Ibid* at para 7.

distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."[145]

c. Effect of trade between member states

The last element of article 102 of the TFEU is the "effect on trade between member states." Article 102 of the TFEU, as stated above, only applies if the alleged conduct affects trade between member states. Member states are obliged to apply article 101 or 102 of the TFEU whenever applying national competition laws to the agreement or abusive practice that affect trade between member states. However, member states are not obliged to also apply national competition laws whenever applying article 101 or 102 of the TFEU to agreements or abusive practices that affect trade between member states. Member states, in that situations, may use its own national competition laws to deal with such agreements or abusive practices.[146]

The phrase "may affect" as it appears from article 102 of the TFEU according to the ECJ entails that "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States."[147] According to the ECJ, the word "trade" does not necessarily mean only exchanges of goods and services across the board. It is a broad word encompassing all cross-border economic activities.[148] It should be

---

[145] *ibid*.

[146] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07) para 9. Article 3 of Regulation 1/2003. OJ L 1, 4.1.2003, p. 1.

[147] Supra 131 at para 23. Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* 1996.

[148] Supra 131 at para 19. See also Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* 1981 ECR p. 2021, at para 18. See also Case C-309/99 J.C.J. *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* 2002 [para 95] and Case C-41/90 *Höfner and Elser* 1991 at para 33.

noted, for purposes of article 102 of the TFEU, that an agreement or abusive practice may affect either several member states or single or part of member state.[149]

2.3.2. EU PREDATORY PRICING CASE LAW

(a) *AKZO Chemie BV v Commission of the European Communities* (Akzo)[150]

In this case, it was alleged that Akzo was abusing its dominant position within the organic peroxides market.[151] Akzo was accused of abusing its dominant position by engaging in predatory pricing and price discrimination thereby violating article 102 of the TFEU. Akzo's competitor namely:, Engineering and Chemical Supplies Ltd ("ECS"), main concern was that "Akzo implemented its pricing policy in response to ECS' expansion into the plastics sector of the organic peroxides market in the United kingdom and Germany."[152] ECS further argued that Akzo's intention, when it lowered its prices, was to get ECS out of the organic peroxide market in Europe. The ECJ in July 1993 released its interim decision wherein it ordered Akzo "to raise its profits to the levels realised before it began the alleged predatory and discriminatory pricing."[153]

The ECJ handed down its final decision on December 14 of 1985. The ECJ held that Akzo indeed abused its dominant position within the organic peroxide market. The ECJ further held that Akzo's intention was meant to drive ECS out of the lucrative plastics sector and as result it violated Article 86 of the Treaty of Rome.[154] Akzo was then fined ECU 10 million and the ECJ described Akzo's conduct as "one of the worst infringements under article 86."[155] The

---

[149] Supra 131 at para 23.

[150] Case C-62/86 ***AKZO Chemie BV v Commission of the European Communities*** **1991.**

[151] *Ibid.* Organic peroxides are specialty chemicals used mainly in the polymer industry. Benzoyl peroxide, the major organic peroxide in terms of production and variety of uses, is widely utilized in the polymer sector.

[152] *Ibid*. Thomas G. Ehr "*The European Commission's ECS/AKZO Standard for Predatory Pricing in the E.E.C.: Deterrence or Disorder?"* 17 GA. J. INT'L & COMP. L. 271 (1987) at page 273.

[153] *Ibid* at page 274.

[154] Please note that article 86 of the Treaty of Rome is now article 102 of the TFEU.

[155] COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT ON COMPETITION POLICY 85 (1986).

importance of the *Akzo* case is that the ECJ outlined all elements of predatory pricing conduct as prohibited by article 102 of the TFEU.

The ECJ in the *Akzo* case established the following three principles to determine predatory pricing:

1. "prices lower than average variable cost is a strong indication of predatory pricing and further investigation is deemed unnecessary;
2. 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;
3. prices above average total costs will normally not fall within the ambit of predation."[156]

In this case, the ECJ's focus was on the elimination of competitors as a necessary element of predatory pricing behaviour and there was no emphasis on recoupment as necessary element of predatory pricing behaviour.

(b) *Tetra Pak II* 1997 4 CMLR 662

In this case[157], the European Court of Justice (ECJ) held that the possibility of recouping losses suffered as a result predatory pricing behaviour is not a requirement for establishing predatory pricing. The Court held as follows:

[156] *Ibid* at page 25. "Price below average variable cost … by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs… and, at least part of the variable costs relating to the unit produced. Moreover prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan of eliminating a competitor…"

[157] Tetra Pak II 1997 4 CMLR 662.

> "furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated. The Court of First Instance found, at paragraph 151 and 191 of its judgement, that there was such a risk in this case. The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy lead to the actual elimination of competitors."[158]

The ECJ in this case emphasised elimination of competitors as an important requirement for establishing predatory pricing behaviour. It is clear, from the above quoted paragraph, that predatory pricing behaviour does not necessarily have to result in actual elimination of competitors from the relevant market. It can be successfully proven even if there is a mere "risk" that competitors will be eliminated from the relevant market.

(c) *QualComm*

The most recent case dealing with predatory pricing is the *QualComm* case.[159] Qualcomm is a larges supplier of baseband chipsets worldwide. The purpose of baseband chipsets is to process the communication function in mobile devices like smartphones, tablets etc. They can be used for both voice and data transmission.[160] It was alleged that Qualcomm between 2009 and 2011 abused its dominant position, in violation of article 102 of the TFEU, by selling compliant baseband chipsets, Universal Mobile Telecommunications System (UMTS), below cost to some of its customers with the intent of driving its competitor, namely Icera Inc, out of the market.[161] Qualcomm sold certain quantities of three of its UMTS chipsets below cost

---

[158] *Ibid.*

[159] Case T-371/17 *Qualcomm, Inc. and Qualcomm Europe, Inc. v European Commission*.

[160] https://eu-competitionlaw.com/eu-commission-hits-qualcomm-with-fine-of-eur-242-million-for-predatory-pricing/ .

[161] https://eu-competitionlaw.com/eu-commission-hits-qualcomm-with-fine-of-eur-242-million-for-predatory-pricing/ . It must however be noted that Qualcomm was alleged to have abused its dominant position not only

to Huawei and ZTE, two strategically important customers, with intention of eliminating Icera, its main rival at the time in the market segment offering advanced data rate performance.[162]

The European Commission (EC) found that Qualcomm was in a dominant position between 2009 and 2011. Between 2009 and 2011, Qualcomm's market share was almost 60% which was three times more than its competitor's market share. The EC held further that Qualcomm, by engaging in predatory pricing, abused its dominant position.[163] The EC took the following two factors into account, in deciding whether or not Qualcomm engaged in predatory pricing:

1. "A price-cost test for the three Qualcomm chipsets concerned; and
2. A broad range of qualitative evidence demonstrating the anti-competitive rationale behind Qualcomm's conduct, intended to prevent Icera from expanding and building market presence."[164]

In conclusion, Commissioner Margrethe Vestager stated that:

> "Baseband chipsets are key components so mobile devices can connect to the Internet. Qualcomm sold these products at a price below cost to key customers with the intention of eliminating a competitor. Qualcomm's strategic behaviour prevented competition and innovation in this market, and limited the choice available to consumers in a sector with a huge demand and potential for innovative technologies. Since this is illegal under EU antitrust rules, we have today fined Qualcomm EUR 242 million."[165]

---

by engaging in predatory behaviour but by also engaging in exclusive dealings with its customers. For purpose of this research, I will address only allegation of predatory pricing behaviour.

[162] *Ibid*.

[163] *Ibid.*

[164] *Ibid.*

[165] *Ibid.*

As a result, Qualcomm was thus fined EUR242 million for violating article 102 of the TFEU by abusing its position by engaging in predatory pricing. These three case are important as they demonstrate the steps the ECJ and the EC take when determining whether or not an undertaking in a dominant position abused such position by engaging in predatory pricing.

2.3.3. Conclusion

In the EU, there is a presumption that pricing below the average total cost is lawful but additional evidence may be used to prove the violation of article 102 of the TFEU. A firm may only be guilty of predatory pricing in terms of article 102 of the TFEU if it holds a dominant position in a relevant market and, with eliminatory intent, prices its products either below average variable costs or below average total costs. Cases discussed above provide a clear indication of how to prove predatory pricing behaviour. Furthermore, they demonstrate all the elements of the predatory pricing behaviour under article 102 of the TFEU.

2.3.4. The Competition Act

As indicated, predatory pricing in the Republic of South Africa (RSA) is regulated by the Competition Act ("Act").[166] The purpose of the Act and its scope of application have already been discussed.[167]

Predatory pricing in the RSA is prohibited by section 8(d)(iv) and section 8(c) of the Act. The Competition Commission ("the Commission") has over the years preferred using section 8(d)(iv) of over section 8(c) of the Act because an infringement of section 8(c) of the Act does not result in administrative penalty unless such violation is not a first violation.[168] According to section 7 of the Act, only a dominant firm may be guilty of predatory pricing in terms of either section 8(c) or section 8(d)(iv) of the Act. A firm is dominant if:

a) "it has at least 45% of that market;
b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power: or
c) it has less than 35% of that market, but has market power."[169]

The Act also contains a definition of "market power." According to the Act, "market power" means the "power of firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers."[170] Below I will discuss both section 8(d)(iv) and section 8(c) of the Act in detail. Thereafter I will compare regulation of predatory pricing in the RSA and USA, Canada and EU and point out significant differences.

---

[166] 89 of 1998.

[167] See chapter 1.1 of this dissertation.

[168] Section 59 of the Competition Act allows the Commission to impose an administrative penalty for violation of section 8(d)(iv) of the Act even if such violation is a first time violation.

[169] Section 7 of the Competition Act 89 of 1998.

[170] Section 1 of the Competition Act 89 of 1998.

(c) Section 8(d)(iv) of the Act

Before its amendment on 12 July 2019 by section 5 of the Competition Amendment Act[171], section 8(d)(iv) of the Act provided that it was prohibited for a dominant firm to sell goods or services below their marginal or average variable cost unless the firm concerned can show that technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act.[172] The Act however did not contain definitions of "marginal variable cost"(MCV)[173] and "average variable cost"(ACV). Mackenzie[174] sharply criticises the AVC criterion as being unnecessarily under-inclusive and argues further that the Average Avoidable Cost criterion is a more inclusive standard which is preferred internationally as a more accurate benchmark against which to assess potential predatory pricing.

According to the Act after its amendments on 12 July 2019, it is prohibited for a dominant firm to abuse its dominance by selling goods or services at predatory pricing unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act.[175] According to the Act, predatory pricing is an exclusionary act which means prices for goods or services are charged below the firm's Average Avoidable Cost (AAC) or Average Variable Cost (AVC).[176] AAC means 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.[177] AVC, on the other hand, means the sum of all costs that

---

[171] 18 of 2018

[172] Section 8(d)(Iv) of the Competition Act 89 of 1998 before amendment.

[173] 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).

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

[175] Section 8(d)(iv) of the Competition Act 98 of 1998 after amendments.

[176] Section 1 of the Competition Act 98 of 1998 after amendments. Exclusionary act means an act that impedes or prevents a firm from entering into, participating in or expanding within a market.

[177] *Ibid.*

vary with an identified quantity of a particular product, divided by the total produced quantity of that product.[178]

Contrary to legislation prohibiting predatory pricing in the USA and EU, section 8(d)(iv) of the Act pre- and post its amendment does not talk about the possibility of recouping losses suffered by the alleged predator when engaging in predatory pricing behaviour as a requirement. This was affirmed by the Competition Tribunal in the *Nationwide Airlines v South African Airlines*[179] where the Competition Tribunal held that:

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

Thus, the elements of predatory pricing according to the section 8(4)(iv) of the Act are: a dominant position, and pricing of goods or services below AAC and AVC. It can be argued that section 8(d)(iv) of the Act post its amendment in July 2019 is clearer than section 79 of the Competition Act of Canada and article 102 of the TFEU in that the Act contains definitions of every element of the predatory pricing contravention. As a result, it is not necessary to consult cases for determination of whether or not a dominant firm abused its dominant position by selling its goods or services at predatory pricing.

(d) Section8(c) of the Act

Section 8(c) of the Act provides that it is prohibited for a dominant firm to "engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of

[178] *Ibid.*

[179] Case 92/IR/Oct00.

that act outweighs its technological, efficiency or other pro-competitive gain."[180] An exclusionary act has been described above as an act that impedes or prevents a firm from entering into, participating in or expanding within a market.[181] Section 8(c) of the Act is generally referred to as a "catch all" clause because it prohibits all exclusionary acts not specifically those listed under section 8(d) of the Act. Van Schalkwyk argues that the "burden of proof for the application of section 8(c) is higher than under section 8(d)(iv) of the Act, because 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."[182]

2.4. Case law on predatory pricing in the RSA

As stated above, predatory pricing case laws are no longer that important as the Act post its amendment contains all definitions of all the elements of the predatory pricing contravention. Before amendment of section 8(d)(iv) of the Act, cases were important to determine whether predatory pricing occurred as the wording of section 8(4)(iv) of the Act was vague and did not define the critical terms of the predatory pricing behaviour.

(a) *Nationwide Airlines v South African Airlines* (hereafter "Nationwide")

In this case,[183] Nationwide Airlines alleged that SAA engaged in various anti-competitive acts which violated the Act. For purpose of this research, I will only discuss the allegation of predatory pricing. Nationwide Airlines accused SAA of engaging in predatory pricing, by pricing their airfares below marginal or average variable cost, because SAA did not increase their air fares after fuel prices increased and that they did not adjust their air fares despite the fact that value of the rand depreciated against USA dollar.[184] As a result, Nationwide

---

[180] The Competition Act 98 of 1998.

[181] *Ibid* section 1.

[182] Van Wyk J.I (2018) *An amendment of section 8(d)(iv) of the South African competition act as a key tool to adjudicate exclusionary abuse,* unpublished LLM thesis, University of Pretoria at page 34. *Commission v South African Airways* 18/CR/Mar01, paragraph 112.

[183] COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA Case no. 92/IR/Oct00.

[184] *Ibid* page 3 para iii (a).

Airways sought interim relief against SAA in terms of section 59(1) of the Act.[185] For section 59(1) relief to succeed, SAA had to be dominant in the relevant market, there had to be evidence of abuse and SAA's air fares had to be below the marginal or average variable cost.

The Competition Tribunal in its decision did not put emphasis on 'recoupment' as requirement for predatory pricing behaviour. The Competition Tribunal dismissed the predatory pricing charge against SAA on the basis that Nationwide failed to produce sufficient evidence to establish that SAA's airfares were below marginal or average variable cost as required by section 8(d)(iv) of the Act. The Competition Tribunal held that Nationwide Airways did not succeed in proving occurrence of predatory pricing under section 8(d)(iv) of the Act or anti exclusionary act under section 8(c) of the Act.[186] This ruling creates an impression that recoupment is a requirement for predatory pricing contravention in terms of section 8(d)(iv) of the Act.

(b) *Competition Commission v SA Airlink (Pty) Ltd ("SA Airlink")*

Between 2015 and 2017, Mr Khwezi Tiya, Fly Blue Crane (Pty) Ltd and the OR Tambo District Chamber of Business lodged a complaint with the Competition Commission against SA Airlink

[185]Section 59(1) of the Act reads as follows:

> At any time, whether or not a hearing has commenced into an alleged prohibited practice, a person referred to in section 44 may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if:
>
> a) there is evidence that a prohibited practice has occurred ;
>
> b) an interim order is reasonably necessary to:
>
> I. prevent serious, irreparable damage to that person; or
>
> II. to prevent the purpose of this Act being frustrated;
>
> c) the respondent has been given a reasonable opportunity to be heard. Having regard to the urgency of the proceedings; and
>
> d) the balance of convenience favour the granting of the order.

[186] COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA Case no. 92/IR/Oct00.

for engaging in excessive and predatory pricing.[187] The allegation against SA Airlink was that it lowered its prices below AVC and AVV when one of its competitors, namely Fly Blue Crane, entered the market and that it later raised its prices after Fly Blue Crane was no longer its competitor in the market.[188] The Commission investigated the allegation and found the following:

1. "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;
2. Consumers would have saved between R89 million and R108 million had SA Airlink not priced excessively on this route;
3. Lower prices would also have resulted in more passengers travelling by air on the route, possibly contributing to the local economy of Mthatha;
4. The airline engaged in predatory pricing in that it priced below its average variable costs and average avoidable costs for some of its flights. (Variable costs are those costs which vary with the output. Avoidable costs are those costs that can be avoided if a decision is made to alter the course of a business/project);
5. 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
6. The effect of the predation is also likely to deter future competition on this route from other airlines."[189]

As a result, The Commission referred SA Airlink to the Competition Tribunal proposing a harsh administrative penalty of 10% of SA Air link's annual turnover as well as other remedies

[187] Competition Commission Media Release, 14 February 2018, "SA Airlink to be prosecuted for abuse of dominance". http://www.compcom.co.za/wp-content/uploads/2018/01/Airlink-Final.pdf

[188] *Ibid.*

[189] *Ibid.*

against SA Airlink for engaging in both excessive and predatory pricing. The Deputy Commissioner concluded by stating that:

> "[SA Airlink's] conduct has had a negative effect on the route, even contributing to the exit of a new competitor that had entered the market in late 2016. Our estimates further show that air travellers in that area overpaid more than R100 million for the 5 years over which the conduct took place. The Commission is concerned about SA Airlink's conduct and will seek the maximum administrative penalty before the Tribunal."[190]

The Commission, however, later decided not to prosecute SA Airlink on the basis that the alleged conduct did not contravene the Act.[191]

(e) *Competition Commission v Media24 Ltd ("Media24")*

This is probably the most important predatory pricing case to date in the RSA. In this case,[192] Gold Net News lodged a complaint with the Competition Commission against Media24. Gold Net News alleged that Media24 engaged in predatory pricing. Gold Net News and two newspapers, namely Vista and Forum, owned by the Media24, were competitors in Welkom between 1999 and 2009. Within this period, Media24 was in a dominant positon within the newspaper market while Gold Net news, on the other hand, owned only a quarter of the market share.

Gold News Net and its competitors named above made money through selling adverts as they distributed newspapers for free. Forum drastically reduced its advertisements' prices between 2004 and 2009. Gold Net news saw this as contravention of the Act and argued that Forum's reduced prices were below the production and normal overhead costs. After nine months, both Gold Net News and Forum exited the newspaper market which left Vista as the

---

[190] *Ibid.*

[191] http://www.compcom.co.za/wp-content/uploads/2019/01/Weekly-Media-Statement-23-May-2019-Final.pdf

[192] *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26.

only newspaper in the market. It should be borne in mind that both Forum and Vista were owned by Media24. The Commission after its investigation referred the allegation against Media24 to the Competition Tribunal. [193]

The Tribunal found Media24 guilty of contravening section 8(c) of the Act rather than section 8(d)(iv) of the Act. Section 8(d)(iv) of the Act requires the alleged predator's prices to be below AVC and AVV while section 8(c) on the other hand prohibits all exclusionary acts. The Tribunal, however, acknowledged that the AVC of producing products was the appropriate standard for determining predatory pricing. As a result, the Tribunal found Media24 guilty of predatory pricing because Media24 had the intent to perform predatory pricing and that Media24's prices were below average total costs.[194] The Tribunal held that "Media24's actions had an anti-competitive effect and that there was no evidence of procompetitive gain which outweighed this effect."[195] The Tribunal further held that, due to the fact that Vista increased its prices by 17% after Gold Net Newspaper's exited the market and that no competitor entered the market after Forum and Gold Net News exited the market, the recoupment requirement for predatory pricing was met.[196] This creates an impression that recoupment is a requirement for predatory pricing and as result contradicts the Nationwide Airline Case discussed above.

Media24 appealed the Tribunal's decision to the Competition Appeal Court (CAC). The Tribunal's decision was overturned by the CAC for the following two reasons:

1. "predatory pricing can only be proven through evidence of specific exclusionary conduct, and not evidence of the intention with which that conduct was committed; and

[193] *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26.

[194] *Competition Commission v Media 24 (Pty) Ltd [2016] ZACT 86* (Tribunal decision).

[195] *Ibid* at para 621.

[196] *Ibid.*

2. the average total cost threshold advanced by the Tribunal was inappropriate."[197]

The CAC concluded that the average total cost was an inappropriate cost standard to determine predation and that the test in 8(c) of the Act is an objective one concerned with the consequences of the conduct and not with the intention of the alleged predator.[198]

The Commission then approached the Constitutional Court for leave to appeal against the CAC's judgment on the basis that it is inconsistent with the purpose and objectives of the Act and also for clarity on the appropriate test for determining predatory pricing. The Constitutional Court gave minority and majority judgments. The majority of judges held that "this application raises an arguable point of law of general public importance within this Court's jurisdiction, that leave to appeal should be granted and that the appeal must be dismissed with costs, including the costs of two counsel."[199]

When determining whether or not pricing below AVC resulted in exclusionary effects, the length of the period of predatory pricing must be taken into account.[200] The Constitutional Court further held that the average total cost (hereafter 'ATC') may in certain instances be an appropriate cost standard.[201]

2.5. Conclusions

In the RSA, determining predatory pricing in terms of section 8(d)(iv) is no longer difficult as there is a standard cost benchmark, namely pricing below AVC or AAC. The problem only arises if section 8(c) of the Act is used as it does not contain a standard cost benchmark. In

[197] *Media 24 (Pty) Ltd v Competition Commission* 2018 (4) SA 278 (Competition Appeal Court judgment).

[198] *Ibid* at para 111.

[199] *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26 at para 4.

[200] Ibid para 85. The constitutional Court held further that "Alleged predatory prices that last only one month may not cause an equally efficient rival to lose any money by not exiting the market unless those prices are lower than the short-run costs incurred by operating on a month-to month basis.

[201] *Ibid* at para 102.

the *Media24* case, the Tribunal endorsed AVC as an appropriate cost test to determine predatory pricing. The CAC, however, rejected AVC as appropriate test for determining predatory pricing without giving reason. At the time of writing of this dissertation, there is no standard cost benchmark for determining predatory pricing in terms of section 8(c) of the Act.

3. CHAPTER 4

Conclusions and Recommendations

Predatory pricing in the US is proscribed by three pieces of legislation as discussed in Chapter Two. In the US it is proscribed for any person to monopolise, attempt and conspire to monopolise any part of the commerce or trade. It is also illegal to engage in unfair methods of competition and deceptive acts that affect commerce. Unlike in the EU, 'recoupment' is an essential element of predatory pricing behaviour. Furthermore, the US is yet to adopt any cost benchmark to determine a predatory pricing behaviour. It is recommended that a standard cost benchmark cost to prove predatory pricing behaviour be adopted because it is difficult to prove predatory pricing.

Canada has only one section in its Competition Act which makes it unlawful for a dominant firms to sell articles at prices below the acquisition costs if the purpose is to eliminate competitors from the relevant market. Only firms that are dominant within a relevant market may contravene the Competition Act by selling articles at prices lower than the acquisition costs. Canada's Competition Act further provides mitigating and aggravating factors for contravening the section 79 of the Competition Act. Canada and the EU both have a cost benchmark to determine predatory pricing behaviour. The difference, however, is that in Canada a cost benchmark is provided for in the Competition Act whereas in the EU a cost benchmark was developed and adopted by the courts.

In the EU, pricing any product or service lower than the average variable costs by a dominant firm constitutes an abuse of a dominant position and contravenes article 102 of the TFEU. According to the case law discussed above, the only objective of pricing products or services below the average variable costs is to eliminate competitors from the relevant market. Most importantly, a competitor does not have to be actually eliminated. A dominant firm will still contravene article 102 of the TFEU even if there is a mere probability that a competitor may

be eliminated from the relevant market. Lastly, it should be noted that the European Commission and the EU courts have rejected 'recoupment' as an essential element of contravening article 102 of the TFEU.

South Africa, as compared to the three jurisdictions discussed above, is the only jurisdiction with two provisions in one piece of legislation prohibiting predatory pricing behaviour. Both provisions prohibiting predatory pricing behaviour requires a firm accused of engaging in predatory pricing behaviour to be dominant in a relevant market. South Africa's Competition Act is also the only legislation with a specific definition of what predatory pricing is. Like Canada's Competition Act and the EU's jurisprudence, South Africa's Competition Act provides for a cost benchmark to determine predatory pricing behaviour. The other provisions prohibiting predatory pricing behaviour is widely worded in that it prohibits all exclusionary acts including those not specifically stated by the Competition Act. As a result, South Africa's competition Act is more like Canada's section 79 of the Canadian Competition Act and article 102 of the TFEU than the US laws prohibiting predatory pricing behaviour.

The purpose of the RSA's Competition Act, as stated above, is to promote and maintain competition in the Republic. The Act further states that consumers should be provided with competitive prices and product choices to ensure that competition is promoted and maintained. It is clear from the purpose of the Act that the Act is concerned about competition rather than consumers who play a significant role in promoting and maintaining the competition. It should however be noted that promoting, let alone maintaining, competition would be a futile exercise without the involvement of consumers. As a result, it is recommended that the Act, when prohibiting predatory pricing behaviour, should take into account the interests of consumers. This is because it does not necessarily follow that if prices are below or above certain benchmark consumers incur any losses. Consumers' interests, as significant role players in competition, should take priority over anyone else's interests.

Furthermore, only dominant firms may, in contravention of the Act, engage in predatory pricing behaviour. The Act contains a test to determine if a firm is dominant in a market. Despite the Act containing a test to determine if a firm is dominant, it is not always easy to determine dominance in certain markets. Consequently, firms in markets where dominance cannot be proven, or easily proven, may engage in predatory pricing behaviour and get away

with it on the basis that they are not dominant. Therefore, it is recommended that the Act be amended to contain a provision which will prohibit firms from engaging in predatory pricing that may not dominant in terms of the Act but whose conduct of engaging in predatory pricing behaviour harms competition and are not in the best interests' of consumers.

4. BIBLIOGRAPHY

4.1. List of Statutes

1. Treaty on the Functioning of the European Union 2009
2. Competition Act 89 of 1998
3. Competition Amendment Bill 18 of 2018
4. The Sherman Anti-Trust Act of 1890
5. The Federal Trade Commission Act of 1914
6. The Clayton Antitrust Act of 1914
7. The Robinson–Patman Act of 1936
8. The Budget Implementation Act, 2009, SC 2009, c 2
9. The Combines Investigation Act R.S.C. 1970, c C-23
10. The Competition Act, RSC 1985, c C-34

4.2. US Cases

1. aff'd per curiam, 327 F.2d 1002 (5th Cir. 1964)
2. aff'd per curiam, 347 U.S. 521 (1954)
3. affd, 569 F.2d (4th Cir.), cert. denied, 439 U.S. 910 (1978)
4. *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)
5. *A.H. Cox & Co. v. Star Mach. Co*., 653 F.2d 1302 (9th Cir. 1981)
6. *California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981)
7. *Cargill Incorporated v Monfort of Colorado Incorporated* 479 U.S. 104 (1986)
8. *Carpet Seaming Tape Licensing Corp. v. Best Seam, Inc.,* 616 F.2d 1133 (9th Cir. 1980*)*
9. *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir.), *cert. denied,* 404 U.S. 1049 (1971)
10. *Corp. v. General Motors Corp*., 517 F.2d 567, 576 (10th Cir. 1975)
11. *Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n of South Carolina*, 436 F. Supp. 418 (D.S.C. 1976)
12. *Ernest W. Hahn, Inc. v. Codding,* 615 F.2d 830 (9th Cir. 1980)
13. *FTC v. Beech-Nut Packing Co.* 257 U.S. 441 (1922)
14. *FTC v. Eastman Kodak Co.* 274 U.S. 619 (1927)

15. *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927)
16. *Giant Paper & Film Corp. v. Albemarle Paper Co*., 430 F. Supp. 981 (S.D.N.Y. 1977)
17. Hartford-Empire Co. v. United States, 323 U.S. 386 (1945)
18. *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co*., 510 F.2d 1140, 1144 (2d Cir.), cert. denied, 421 U.S. 1011 (1975)
19. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc*., 627 F.2d 919 (9th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981)
20. *Joe Westbrook, Inc. v. Chrysler Corp*., 419 F. Supp. 824 (N.D. Ga. 1976)
21. Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957)
22. *Kershaw v. Kershaw Mfg. Co*., 209 F. Supp. 447, 454 (M.D. Ala. 1962)
23. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951)
24. *Matsushita Electric Industrial Company v Zenith Radio Corporation* 475 US 574 (1986)
25. *N. Pac Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)
26. *Olympia Equip. Leasing Co. v. W. Union Tel*. Co., 797 F.2d 370, 373 (7th Cir. 1986)
27. *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418,420 (D.C. Cir. 1957*)*
28. *Pierce Packing Co. v. John Morrell & Co*., 633 F.2d 1362 (9th Cir. 1980)
29. *Poultry Farms, Inc. v. Rose Acre Farms, Inc*., 881 F.2d 1396, 1402 (7th Cir. 1989)
30. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)
31. *Sulmeyer v. Coca Cola Co*., 515 F.2d 835 (5th Cir. 1975), cert. denied, 424 U.S. 934 (1976)
32. Swift & Co. v. United States, 196 U.S. 375, 396 (1905)
33. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953)
34. Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1231-32 (N.D. Ill. 1976)
35. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)
36. *United States v. Consolidated Laundries Corp*., 219 F.2d 563, 572-73 (2d Cir. 1961)
37. *United States v. Dentsply Int'l, Inc*., 399 F.3d 181, 187 (3d Cir. 2005)
38. *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 394 (1956)
39. *United States v. Grinnell Corporation,* 384 U.S. 563 (1966)
40. *United States v. National City Lines*, 186 F.2d 562, 567-68 (7th Cir. 1951)
41. *United States v. Singer Mfg. Co., 374 U.S. 174 (1963)*
42. *United States v. Topco Assocs., Inc.* 405 U.S. 596, 610 (1972)
43. United States v. United States Gypsum Co., 333 U.S. 364 (1948)
44. *United States v. United Shoe Machinery Corp*., 110 F. Supp. 295, 346 (D. Mass. 1953)

45. *Utah Pie v Continental Baking Company* 386 U.S. 685 (1967)
46. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).
47. *West v. Whitney-Fidalgo Seafoods, Inc.*, 628 P.2d 10 (Alaska, 1981)
48. 328 U.S. 781 (1946)
49. 334 U.S. 100 (1948)

4.3. Canada Cases

1. *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d)
2. *R.* v. *Consumers Glass Company Ltd. and Portion Packaging* (1981),33 O.R (2d)
3. *R.* v. *Hoffmann-La Roche Ltd.* (1980),28 O.R (2d)
4. R. v. Producer's Dairy Ltd (1966), 50 C.P.R. (2d) 265 (Ont. C.A.)
5. *R.* v. *Perreault,* [1996] R.J.Q. 2565, [1996] A.Q. No. 2660 (C.S.)

4.4. EU Cases

1. Case C-41/90 *Höfner and Elser* 1991
2. Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* 199
3. Case C-309/99 J.C.J. *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* 2002
4. Case C-393/92 *Municipality of Almelo and Others v Energiebedrijf IJsselmij* 1994
5. Case C-395/96 *Compagnie maritime belge transports and Others v Commission* 2000
6. Case T-30/89 *Hilti v Commission* 1991
7. Case T-61/99 Adriatica di Navigazione SpA v Commission 2003
8. Case T-68/89 *Societa Italiano Vetro SPA v Commission* 1992
9. Case T-83/91 *Tetra Pak V Commission of the European Communities* 1994 ECR II-75
10. Case T-319/99, *Fenin v Commission 2003*
11. Case T-371/17 *Qualcomm, Inc. and Qualcomm Europe, Inc. v European Commission*
12. Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* 1978
13. Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* 1996
14. Case 85/76 *Hoffman-La Roche v Commission of the European Communities* 1979
15. Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* 1981

4.5. RSA Cases

1. *Competition Commission v Media 24 (Pty) Ltd [2016] ZACT 86*
2. *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26
3. *Media 24 Proprietary Limited v Competition Commission of South Africa* 146/CAC/Sep16
4. *Nationwide Airlines v South African Airways* 92/IR/Oct00
5. *The Competition Commission /Media 24 Limited Case* CR154Oct11

4.6. US Sources

1. Areeda & Turner "Predatory Pricing and Practice under Section 2 of the Sherman Act" *Harvard Law Review* 697-733 712 (1975)
2. Denger, Michael L. Herfort, John A. Predatory pricing claims after Brooke Group In: 62 Antitrust L.J., 541 (1994) at 557
3. Keith A. May, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.: A Victory for Consumer Welfare Under the Robinson-Patman Act, 28 U. Rich. L. Rev. 507 (1994)
4. John C. Bjorkman, *Attempt to Monopolize: Dangerous Probability of Success as an Obstacle to Enfor* William C. Holmes, Conspiracies to Monopolize: A Decisional Model, 42 Ohio St. L. J. 733, 740–41 (1981).*cing Section 2 of the Sherman Act*, 5 SEATTLE U. L. REV. 289 (1982)
5. SR Beck "Intent as an element of predatory pricing under Section 2 of the Sherman Act" (1991) *Cornell Law Review* 1242-1284 1249
6. The Use of Section 5 of the Federal Trade Commission Act in Robinson-Patman Enforcement: A Desirable End Through Questionable Means, 1963 *Duke Law Journal* 145-153 (1963)
7. W S Bowman 'Restraint of Trade by the Supreme Court: The *Utah Pie* Case,' (1967) 77 *Yale LJ* 70 at 84
8. OECD (Organisation for economic Cooperation and Development) Predatory pricing OECD Publications, Paris 1989
9. U.S. Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008)
10. J.I Van Schalkwyk "An amendment of section 8(d)(iv) of the South African competition act as a key tool to adjudicate exclusionary abuse" (2018)

4.7. Canada Sources

1. Barry R. Campbell, Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law, 5 N.C. J. Int'l L. & Com. Reg. 57 (2016)
2. Bolton, Brodley and Riordan "Predatory Pricing: Strategic Theory and Legal Policy" (2000) 88 Geo Law Journal 2239
3. Kara Beitel, "Predatory Pricing in the Canadian Context" (2003) 12 Dal J Leg Stud 203
4. Lawson A.W. Hunter, **Q.C."** and Susan M. Hutton*"Is the Price Right?: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy. (1993) 38 McGill L.J. 830
5. L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Information Canada, 1976)
6. VanDuzer, J. Anthony, Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance. Ottawa Law Review, Vol. 32, No. 2, 2001
7. DOT proposal – unfair exclusionary conduct in airline transportation industry policy, 7 TRR (CCH)
8. http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01139e.html.
9. Competition Bureau, *Predatory Pricing Enforcement Guidelines*
10. Organisation for Economic Co-operation and Development 15-Mar-2005
11. http://www.oecd.org/competition/
12. https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home
13. Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (Ottawa: Competition Bureau, 2001) at 6 [Competition Bureau, Enforcement Guidelines]

4.8. EU Sources

1. Thomas G. Ehr "The European Commission's ECS/AKZO Standard for Predatory Pricing in the E.E.C.: Deterrence or Disorder?" 17 GA. J. INT'L & COMP. L. 271 (1987)
2. http://ec.europa.eu/comm/competition/general_info/u_en.html#t62.
3. Department of Private Law, University of Oslo, EU Competition Law – Abuse of Dominance (Article 102 TFEU) Eirik Østerud eirik.osterud@jus.uio.no.
4. European Commission's Notice on the Definition of the Relevant Market (97/C 372 /03)

5. Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07) para 9. Article 3 of Regulation 1/2003. OJ L 1, 4.1.2003, p. 1.
6. COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT ON COMPETITION POLICY 85 (1986)
7. https://eu-competitionlaw.com/eu-commission-hits-qualcomm-with-fine-of-eur-242-million-for-predatory-pricing/

4.9. RSA sources

1. Mackenzie N “Are South Africa’s Predatory Pricing Rules Suitable?” 2012
2. J.I Van Schalkwykyk “An amendment of section 8(d)(iv) of the South African competition act as a key tool to adjudicate exclusionary abuse” (2019)
3. http://www.compcom.co.za/wp-content/uploads/2018/01/Airlink-Final.pdf
4. Competition Commission Media Release, 14 February 2018, “SA Airlink to be prosecuted for abuse of dominance”