



**UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA**

UNIVERSITY OF PRETORIA

FACULTY OF LAW

**AN ANALYSIS OF THE APPROACHES USED FOR ESTABLISHING DOMINANCE IN THE
UNITED STATES, EUROPEAN UNION AND SOUTH AFRICA**

by

PHILIP BOUWER

(Student number: 282 58101)

To be submitted in part fulfilment of the requirements for the degree of Master of Laws in
Mercantile Law, University of Pretoria, South Africa

Prepared under supervision of Professor Corlia Van Heerden of the University of Pretoria

UNIVERSITY OF PRETORIA

October 2015

PLAGIARISM DECLARATION

I, **PHILIP BOUWER**, declare that this dissertation is my original work. It has not been submitted before to any other university or institution. Where works of other people are used, references have been provided. I hereby present this work in partial fulfillment for the award of the LLM degree in Mercantile Law.

Signed

.....

Philip Boucher

30 October 2015

Pretoria,

South Africa

SUMMARY

When an allegation is made against a firm that it has engaged in conduct that is detrimental to consumers and competition as a whole within the particular market, it will first need to be established whether or not that firm can be said to be dominant in the market. Only a firm that is dominant within the market can act to an appreciable extent independently of its competitors and consumers. However, how is dominance established, especially within the American, European and South African markets?

In order to answer this question, this dissertation will first seek to define the terms of “dominance” and “market power” in the context of the above markets. This enquiry will also focus on how the concepts of dominance and market power are related to each other. After these concepts have been defined and expanded, the process of establishing dominance in the United States, European Union and South Africa will be explored. The means of establishing market laid down in each market will then be critically compared with one another and the specific advantages and disadvantages of each will be expanded upon.

South Africa is unique due to the fact that the establishment of dominance has been codified in the Competition Act and is dependent on the possession of certain prescribed market shares. The aim of this paper will be to determine whether the establishment of dominance can simply be linked to the possession and maintenance of large market shares or, does an accurate inquiry into dominance require taking into account a variety of factors, such as the barriers to entry or expansion the countervailing power of consumers.

Once the deficiencies of the approach laid down by the Act have been established, and the specific goals which the Act seeks to achieve have been highlighted, a new alternative approach for the establishment of dominance will be proposed. This will be a less structured approach taking into account a variety of factors relevant to the case at hand. In this way the process of establishing dominance will be done on a case by case basis which will hopefully lead to more accurate determinations of dominance.

Table of Contents

PLAGIARISM DECLARATION	2
SUMMARY	3
CHAPTER 1 - INTRODUCTION	6
1. 1. Scope and Nature of Dissertation	7
CHAPTER 2 – DEFINING DOMINANCE AND MARKET POWER	9
1. Introduction.....	9
2. What is Market Power?.....	9
3. Defining Market Power and Dominance in the United States	10
4. Defining Market Power and Dominance in the European Union	11
5. Defining Market Power and Dominance in South Africa.....	13
6. The Relationship between Market Power and Dominance	14
CHAPTER 3 – ESTABLISHING DOMINANCE IN THE UNITED STATES, EUROPEAN UNION AND SOUTH AFRICA	15
1. Introduction.....	15
2. Does Competition Policy apply to the Entity in question.....	15
2.1. United States	15
2.2. European Union.....	16
2.3. South Africa	16
2.4. Joint Dominance	17
3. Identifying and Defining the Relevant Market.....	18
3.1. United States	18
3.2. European Union.....	20
3.3. South Africa	21
3.4. Market Shares.....	21
4. Does the Entity in question possess Market Power.....	22
4.1. Establishing Market Power in the US	22
4.2. Establishing Market Power in the EU	23
a. Market Share	24
b. Barriers to Entry or Expansion	25
c. Countervailing Buyer Power	27
4.3. Establishing Market Power in South Africa	27

CHAPTER 4 – THE ADVANTAGES AND DISADVANTAGES OF THE VARIOUS APPROACHES FOR ESTABLISHING DOMINANCE	29
1. Historical Approaches underlying the Competition Policy of the United States, European Union and South Africa	29
1.1. The Harvard Theory of Competition Law	29
1.2. The Chicago and Post Chicago Theories of Competition Law	30
1.3. The Goals of Competition Law in South Africa	32
2. Analysis of the methods for Establishing Dominance	34
2.1. Establishing Dominance in the United States	34
a. Advantages of the Unites States’ Approach	34
b. Disadvantages of the Unites States’ Approach	35
2.2. Establishing Dominance in the European Union.....	35
a. Advantages of the European Union’s Approach	35
b. Disadvantages of the European Union’s Approach	36
2.3. Establishing Dominance in South Africa	37
c. Advantages of the South African Approach	37
d. Disadvantages of the South African Approach	38
CHAPTER 5 - CONCLUSION	42
1. Deficiencies of the South African Approach For Establishing Dominance	42
2. Possible Alternatives for the Establishment of Dominance in South Africa.....	44
1.1. An Economic Approach	44
1.2. Proposal for a New South African Approach	45
BIBLIOGRAPHY	47

CHAPTER 1 - INTRODUCTION

Competition plays an important role in the market place given the fact that its primary goals should be the achievement of allocative efficiency and the protection of consumer welfare.¹ Consumers are often more likely than not to choose a product that is either cheaper or offers them a better value for their money than competing products. As a direct consequence of competition in the market place, profit driven firms are ultimately forced to become more efficient which results in prices being driven downwards and consumers being given more value for their money. The goal of such a competitive market is the benefit of the consumers of that market and the protection of which is dependent on the implementation of sound policy with such aim in mind.²

The profit driven nature of such competitive markets however leads some firms to on occasion engage in conduct of an anti-competitive nature in an attempt to gain an advantage over their competitors in their particular market. Ideally, if a firm was to engage in such conduct which would result in consumers being charged more or provided with an inferior product, the ordinary market forces present in a perfectly competitive market would lead to a situation where that firm would no longer be able to compete in the relevant market which would ultimately lead to that firm eventually failing.³ However, if a firm was dominant in such market to the extent that it would allow that firm to act in a manner independent of its competitors and in manner that would have the effect of substantially lessening competition within the particular market, then those market forces would not be able to maintain the *status quo* in the market which would then allow the firm in question free reign to impose its will on consumers. In such a situation, the firm in question may be deemed to be dominant within its particular market. This Dominance may be a result of various factors such as the firm in question providing an essential resource, supplying a scarce resource or operating within a market that is very difficult for new participants to enter.⁴ Whatever the reason for the dominance in question, the prevention of such dominance may not always be possible nor should it be the aim of the authorities tasked with the protection of competition within the market.⁵ The aim of such authorities is instead the protection of

¹ See Bork *The Antitrust Paradox* (1978), pg. 91 and Crane "Antitrust Modesty" (2006-2007) *Michigan Law Review*, 1193, pg. 1198.

² For example the American anti-trust laws, European Union Conventions on competition law and the South African Competition Act.

³ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-6

⁴ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-28 – 7-31.

⁵ Neuhoff, Govender, Versfeld, Dingley *A Practical Guide to the South African Competition Act* (2006), pg. 11, Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-64 – 1-69.

competition within the market they have been tasked to protect by ensuring that firms that have dominance in the market do not engage in conduct which has the effect of preventing or lessening competition within that market. Accordingly, it becomes essential that an effective regulatory framework is established through the enactment of sound policy which seeks to protect competition in the market through the achievement of the goals of efficiency and consumer welfare.

1. Scope and Nature of Dissertation

The question we now must ask is; how is this dominance within the market established is established? In the South African market competition is regulated in accordance with the framework laid down by the Competition Act⁶ (hereinafter referred to as “the Act”) which lays down the test for the establishment of dominance in the South African Market space. However, the question must be asked whether the concept of dominance is narrow enough in its scope for it to be established within the confines of prescribed legislative parameters which seek to make the establishment of dominance largely dependent on a firm’s market share⁷ or, is dominance a much broader concept dependent on the presence of a variety of other factors in addition to market share for its establishment?

In order to answer this question, this dissertation will seek to define the concept of dominance as it pertains to the South African market as well as how dominance is defined in markets such as the United States and the European Union. This enquiry will require going further than mere legislative definitions of dominance and accordingly the approaches followed by the various judicial authorities in the defining and establishment of dominance will also need to be examined. The definition of dominance however cannot be viewed in isolation which will require an enquiry into the concept of market power. This enquiry will also take into account the principles laid down by the various judicial authorities as well as the factors taken into account in determining whether a firm can be said to have market power. Since market power under certain circumstances is an essential element for the establishment of dominance in South Africa⁸, the concepts of dominance and market power must be reconciled with each other. This will require understanding how the two concepts are interrelated as well as their similarities to each other and how they fundamentally differ from each other.

⁶ No. 89 of 1998.

⁷ As more fully described in Section 7 of the Competition Act and discussed more fully in Chapter 2 *infra*.

⁸ Section 7(b) and (c) of the Competition Act.

With the understanding of the concepts of dominance and market power and how the concepts are interrelated with each other, the enquiry then turns to how dominance is established. Although the establishment of dominance is legislated in Section 7 of the Act, it is necessary to evaluate the how the Competition Commission (hereinafter referred to as “the Commission”), the Competition Tribunal (hereinafter referred to as “the Tribunal”) and the various other Courts have interpreted and applied these provisions. Once the practical method for establishing dominance in the South African market has been discussed, the methods used for the establishment of dominance in foreign markets, particularly in the American and European market spaces, will also be established. These methods will then be critically compared to the South African method for the establishment of dominance with the ultimate aim of determining whether or not the South African method is sufficiently broad enough to adequately determine dominance and in the event that this approach is wanting, to determine whether the establishment of dominance should be a more fact based enquiry taking into account a variety of factors present in the relevant market going beyond mere market share.

Once the various approaches used in the establishment dominance have been discussed and the shortcomings of the various approaches, particularly the one used in South Africa, are evident, the specific goals which the relevant competition policy aims to achieve will need to be examined to best understand each markets approach to defining and establishment of dominance. It will be important to establish whether or not these goals seek to adequately protect competition within the particular markets and to establish whether or not such goals should be changed with the aim of creating an environment which would best protect and promote competition in that market.

CHAPTER 2 – DEFINING DOMINANCE AND MARKET POWER

1. Introduction

In order to establish whether a firm has breached the abuse of dominance provisions of a particular jurisdiction, it must be established whether that firm is fact dominant in its market. To be able to establish dominance, one must first be able to define and understand the concept itself. The concept of dominance does not however exist in isolation and appears to co-exist together with the concept of market power. As will become apparent from this chapter, the concepts of dominance and market power do not exist independently of each other when establishing whether or not a firm has abused its dominant position within the market in question.

2. What is Market Power?

The way market power is defined will largely depend on the manner in which competition policy is regulated in the particular market. In this regard, market power can be defined in four different ways.⁹ The first draws on economic principles related to firms ability to raise prices. When looking at market power from this perspective¹⁰, a firm will possess market power when it has the ability to raise prices above those of its competitors and will still be able to make a profit.¹¹ In terms of the second method of defining market power, a firm will be said to have market power if it can be shown that the firm possesses commercial power.¹² Commercial power is simply the power of one firm to act in a manner that may harm the interests of other all other market participants and not just those of its competitors.¹³ The third means of defining market power is to define it as the power of a firm to exclude its competitors and gain a competitive advantage.¹⁴ The fourth way of defining market power suggests market power as a jurisdictional issue which

⁹ G Monti *EC Competition Law* 2008 pg 125.

¹⁰ G. Monti, *EC Competition Law* (2008) pg. 125.

¹¹ See *United States v Oracle Corporation* 331 F Supp 2d 1098 (2004), pg. 1114, where the court held it is the: reduction in output and the elevation of price that has been the historic concern of antitrust.”

¹² G. Monti, *EC Competition Law* (2008) pg. 125 - 126.

¹³ G Monti “The Concept of Dominance” (2006) *European Competition Journal* 31, pg. 8, also see G. Monti, *EC Competition Law* (2008) at pg. 125 – 126 where commercial power is equated with contractual concepts such as economic duress.

¹⁴ See G. Monti, *EC Competition Law* (2008) pg. 126. Here the purpose of competition policy is to penalize the conduct of firms which harm their competitors.

simply implies that the abuse of dominance provisions of a particular jurisdiction will not apply below a threshold determined by that market's policy makers.¹⁵

The simplest and most widely accepted definition for market power is the power to profitably raise prices above the competitive level for a sustained period of time.¹⁶ Simply put, this means a firm would have the power to raise the price of its product above the price determined by the ordinary market forces of supply and demand and still be able to make a profit due to the fact that loss of consumers will not represent a significant loss in demand. From an economic point of view, market power has been defined as the ability to set price above marginal cost.¹⁷ Marginal cost is the change in the total cost that arises when the quantity is incremented by one unit. In general terms, marginal cost can be said to be the cost of producing one more unit of a particular product.¹⁸ The economic definition of market power is important to bear in mind in establishing dominance given the significant intersection that exists between law and economics in dealing with competition.

3. Defining Market Power and Dominance in the United States

In order to fully understand market power from an American perspective, it is important to bear in mind that economic analysis has played a significant role in the application of anti-trust laws in US markets. The anti-competitive effects of a firm abusing its dominant position or market power was initially governed by the Sherman Antitrust Act¹⁹ (hereinafter referred to as "the Sherman Act") which was enacted in 1890 and the later Clayton Act²⁰ enacted in 1914. Section 2 of the Sherman Act creates an offence against monopolization²¹ and accordingly states:

"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 felon."

¹⁵ G Monti "The Concept of Dominance" (2006) *European Competition Journal*, pg. 31.

¹⁶ See E Gellhorn & W E Kovacic *Antitrust Law and Economics in a Nutshell* (4th Ed) 1994, Pg.94.

¹⁷ R A Posner & WM Landes "Market Power in Antitrust Cases" (1994) *The Harvard Law Review* 937, 939.

¹⁸ Under normal market conditions, an increase in price will lead to a reduction in the quantity demanded. However, where the reduction in the quantity sold does not outweigh the increase in a firm's profits that firm will be deemed to have market power.

¹⁹ 26 Stat. 209 U.S.C. 1-7.

²⁰ 15 U.S.C. 12-27.

²¹ The terms monopoly and market power will be treated as synonymous unless otherwise stated.

It is evident from the Section 2 that US competition law equates a dominant firm with a firm that can be said to hold a monopoly. But the possession of dominance and/or a monopoly is not in itself an offence and as such, given the age of the Acts in question, the task of developing the monopoly offence has largely fallen to the Courts.²² The US Supreme Court accordingly laid down the principles for the monopoly offence in the matter of *United States v Grinnell Corp*²³ where the court held that the monopoly offence contained in Section 2 of the Sherman Act consisted of two elements namely; the possession of market power in the relevant market and the willful acquisition and maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.²⁴ From the above principles, and as stated earlier, the possession of market power and/or dominance is not what competition policy seeks to avoid but rather the abuse of such power by a dominant firm.

In dealing with matters of monopolizing and abuse dominance by a firm, US courts have defined market power as “the power to control prices or exclude competition”.²⁵ It becomes clear that the definition of market power from a US perspective draws heavily on the underlying economic principles of a firm’s ability to raise prices. It becomes clear that where a firm possesses the power to raise prices that firm will have market power. Therefore, in terms of US anti-trust law, a firm with market power can be said to be dominant within the particular market.

4. Defining Market Power and Dominance in the European Union

Abuse of dominance in the European market space has been codified in Article 82 (previously Article 86) of the Treaty on European Union (Maastricht Treaty)²⁶. Article 82 provides that:

“An undertaking, or group of undertakings, is prohibited from abusing a position of dominance within the common market or substantial part thereof”.

The Treaty however fails to define the concept of a “dominant position” which has left the task of interpreting Article 82 to the relevant Courts. In the matter of *United Brands v The*

²² B A Facey & D H Assaf “Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey” (2012) *Antitrust Law Vol. 70*, 524.

²³ 384 U.S. 563 (1966), pg. 570 – 571

²⁴ Also see *United States v Microsoft Corporation* (D.C Cir. 2001) 253 F.3d, 34, where the court held that “a firm is a monopolist if it can profitably raise prices substantially above the competitive level.”

²⁵ *United States v El du Pont de Nemours Co* 351 U.S.0 (1956), pg. 391.

²⁶ *Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

*Commission*²⁷, the European Court of Justice interpreted a dominant position, within the ambit of Article 82, to mean:

“a position of economic strength enjoyed by an undertaking which enables it hinder the maintenance of effective competition on the relevant market by allowing it to behave in an appreciable extent independently of its competitors and customers and ultimately of consumers” and which definition has since become the *locus classicus* for dominance and has found application in various other cases.²⁸

There however seems to be an ideological shift in how European authorities are currently defining the term dominance.²⁹ This new approach to defining the term dominance entails that a firm will be dominant when it has the power to assert “substantial market power” within a market.³⁰ This ideological shift can be seen in the guidelines which have been published by the different European authorities for dealing with matters of abuse of dominance. For example, the Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses states:

“For dominance to exist the undertaking in concerned must not be subject to effective competition constraints. In other words, it must have substantial market power.”³¹

This new definition of dominance has further been endorsed by the office of the UK Office of Fair Trading (OFT) which states that a firm will not be dominant if lacks substantial market power.³² Both the Commission and the OFT have accepted that market power is the ability to sustain prices above the competition level or restrict output or quality below competition levels.³³ But the possession of market power in itself does necessarily mean that a firm is dominant. Naturally most market participants will have some degree of market power, however only a firm that can be shown to possess substantially more market power than other market participants

²⁷ (1978) ECR 207 par. 65.

²⁸ See *Hoffman La Roche v Commission* (1979) ECR 461 par. 38, and *Nederlandsche Bandem-Industrie Michelin NV v Commission* (1983) ECR 3461 par. 30

²⁹ See DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) and UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415.

³⁰ Geradin, Hofer, Louis, Petit & Walker *The Concept of Dominance in EC Competition Law Research Paper on the Modernization of Article 82 EC* Global Competition Law Centre (July 2005), See DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) and UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415.

³¹ Pg. 10, par. 23.

³² UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415 par. 2.9.

³³ UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415 par. 1.4.

will be deemed dominant. The dominant firm can then use this power to harm the economic freedom of other market participants. These principles will be discussed in more detail in later chapters.

5. Defining Market Power and Dominance in South Africa

South African authorities have deviated substantially from their American and European authorities in their approach to defining the concept of dominance. Instead of seeking to define the term dominance, the Act is more concerned with providing a framework within which dominance can be established. As will be discussed in later chapters, the issue of whether or not a particular firm has dominance is largely dependent on that firm's market share and whether it possesses market power. Therefore rather than attempting to define dominance, the Act instead provides a definition for market power.

The definition of market power as contained in Section 1 has been directly imported and adapted from the principles of dominance developed and laid down by previous decisions of the American and European Courts.³⁴ The Act defines market power as the power of a firm to control prices, to exclude competitors or to behave in appreciable extent independently of its competitors, customers or suppliers.³⁵ Three distinct elements can be extracted from the above definition.³⁶ The first is the ability to control prices which, as stated above, entails the ability of firm to raise prices above the competition level and still maintain a level of profitability. The second element is ability to exclude competition. This refers to the power of a firm to raise the costs of competitors to the extent where it reduces the ability of competitor's to compete in the relevant market or exclude them from the market altogether.³⁷ The final element of the Act's definition of market power is the power to act independently of competitors. This element of market power has been directly imported from the definition of dominance as laid done by the European courts.³⁸ Although the power to act in an appreciable extent independently of competitors is a very vague and far reaching concept, it would seem to lend itself to the power

³⁴ See *United Brands v The Commission*(1978) ECR 207 and *United States v Microsoft Corporation* (D.C Cir. 2001) 253 F.3d.

³⁵ Section 1 of the Act.

³⁶ Sutherland and Kemp *Competition Law of South Africa* 2013 Issue 16 Pg. 7-28.

³⁷ ³⁷ Sutherland and Kemp *Competition Law of South Africa* 2013 Issue 16 Pg. 7-31.

³⁸ *United Brands Co v Commission* (1978) ECR 207 par. 65 and *Hoffman La Roche v Commission* (1979) ECR 461 par. 38.

of a firm to influence prices, output, quality or the variety of a product or even limit innovation in a market for a substantial period of time.³⁹

6. The Relationship between Dominance and Market Power

In determining whether a firm has abused its dominance position, it becomes clear that dominance is largely dependent on that firm possessing market power. However, the manner in which the various jurisdictions define these terms has differed substantially. US legislation equates the term dominance with the offence of monopolization which, through the application of case law has been extended to the acquisition and maintenance of market power. Dominance from an American perspective has been heavily influenced by economic theory such as the Chicago School approach.⁴⁰ As such American anti-trust authorities have been more concerned with the establishment of market power, as the power to raise prices above the competition level, in determining whether anti-trust laws have been breached.

European policy, which seeks to prohibit a firm from abusing a dominant position, has dealt with concept of dominance by defining the term “dominant position”.⁴² This position has however changed with European authorities starting to adopt a more economic orientated approach that equates dominance with substantial market power. The South African policy makers, for the most part have used the developments in both American and Europe as the template for the Act. As such the Act, which depends largely on the possession of market power for the establishment of dominance, has endeavored to define the term market power⁴³. Regardless of the various approaches adopted by the different jurisdictions for the establishment, the one common feature in the establishment of dominance is the possession of market power. All market participants will possess some degree of market power, but only those firms which possess significantly more market power can truly be considered dominant.

³⁹ DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) par. 24.

⁴⁰ G Sandicchi *American and European Perspectives on Monopolization and Abuse of a Dominant Position: A Comparative Law and Economic Analysis of Single Firm Conduct*, pg. 20.

⁴¹ The Chicago School theory advocates that small competitors should not be protected at the expense of competition. In this regard single firm should be viewed through the lense of price theory and that certain practices may lead to proficiency gains which are thus procompetition and that certain firms which hold a dominance position would in certain circumstances lack the necessary incentives to engage in conduct which be seen to lessen competition.

⁴² See *United Brands v The Commission*(1978) ECR 207, *Hoffman La Roche v Commission* (1979) ECR 461 and *Nederlandsche Banden Industrie Michelin v Commission* fn.430, OJ 2002 L143/1.

⁴³ Section 1.

CHAPTER 3 – ESTABLISHING DOMINANCE IN THE UNITED STATES, EUROPEAN UNION AND SOUTH AFRICA

1. Introduction

Now that it has been established that the concept of dominance can be understood to mean the possession of market power by a firm, the manner in which dominance is established in the US, EU and South African markets needs to be analysed. In order to establish whether or not a particular entity can be deemed dominant for purposes of competition law, the following three questions will need to be answered:

- Firstly, will the competition policies of the relevant jurisdiction apply to the entity in question?
- Secondly, what is the relevant market, how can it be defined and what is the entity in question's market share.
- Lastly, does this entity possess market power?⁴⁴

As will be discussed further in this chapter, the question of the relevant market and its definition has followed a fairly uniform approach in all of the above jurisdictions. Whether or not the applicable competition policy applies to the entity in question will depend on the provisions of the policy of the relevant jurisdiction. The process of establishing dominance will also need to be answered in accordance with the methods laid down and practiced in each market.

2. Does Competition Policy apply to the Entity in question?

2.1 United States

The monopoly offence contained in Section 2 of the Sherman Act makes specific reference to the term "person". Although no formal definition is given for the term "person", and given the lack of evidence to the contrary, it would seem that the offence of monopolisation would apply to any and all persons and entities engaged in commerce within the US market, regardless of the nature of such person or entity. Therefore, the abuse provisions of the US will apply to natural persons, juristic persons, partnerships, associations and any other entity engaged in commerce within the US market.⁴⁵

⁴⁴ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-11 – 7-12.

⁴⁵ US Code, Title 15, Chapter 34, § 1311, (f).

2.2 European Union

The competition policy of the European Union applicable to the abuse of dominance applies to all conduct of an “undertaking or association of undertakings”.⁴⁶ An “undertaking” has however remained undefined which has left the task of defining the term of an “undertaking” to the courts. In the matter of *Klaus Höfner and Frits Elser v Macrotron GmbH*⁴⁷ the Court adopted a functional approach to defining the term “undertaking” and accordingly held that an undertaking can be defined as every entity engaged in economic activity, regardless of its legal personality or status or the way in which it is financed.

This definition has further been extended in the matter of *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas*⁴⁸ to denote

“an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal.”

From these definitions it becomes clear that the term “undertaking” is a very broad concept which seems to encompass natural persons, partnerships, juristic entities, both state and public entities as well parties engaged in contractual relationships. When taking into account how broad the definition of undertaking is, the undertaking in question may not always be easy to identify.⁴⁹ Therefore and until a more uniform definition is provided, determining whether the entity in question is indeed an undertaking for purposes of competition law, will require an examination of the facts in question.⁵⁰

2.3 South Africa

The abuse provisions of the Act only applies to dominant firms with an annual turnover in, into or from South Africa at or above R5 million or that has assets in South Africa valued at or above R5 million.⁵¹ In a departure from the competition policy of the US and the EU, the Act defines a firm to include a person, partnership or a trust.⁵² Given the limited scope of the above definition,

⁴⁶ Article 82 of EC Treaty and Article 101 of Treaty on the Functioning of the European Union (TFEU).

⁴⁷ (1991) ECR I – 1979. Par. 21.

⁴⁸ Case 170/82 (1984) ECR 2999. Par. 11.

⁴⁹ A Jones, “The Boundaries of an Undertaking in EU Competition Law” (2012) 8(2) *European Competition Journal* (301-331).

⁵⁰ A Jones, “The Boundaries of an Undertaking in EU Competition Law” (2012) 8(2) *European Competition Journal* (301-331), also see O Odudu, “The Meaning of Undertaking within 81” *EC Kings College London*.

⁵¹ Section 6 of the Act.

⁵² Section 1 of the Act.

the question has since arisen whether or not the concept of a “single economic entity” falls within the definition of a firm as envisaged by the Act.⁵³ This question was first raised in the matter of the *Competition Commission v Patensie Citrus Beherend Beperk*⁵⁴ where the Competition Tribunal (hereinafter referred to as “the Tribunal”) first used the concept of a single economic entity. On appeal, the Competition Appeal Court (hereinafter referred to as “the CAC”) held that it was unnecessary to decide whether this concept should apply to the abuse of dominance provisions of the Act.⁵⁵ Despite the Tribunal making reference to a single economic entity in subsequent matters⁵⁶, no basis has to date been put forward for the definition of a firm to be extended to include a single economic entity for purposes of abuses in terms of Section 7.

2.4 Joint Dominance

A further issue to consider is the concept of “joint dominance”. This concept has been rejected by the South African competition authorities as well as the US authorities, which rejects the notion of a shared monopoly due to the fact that the monopoly offence is an enquiry into single firm conduct and therefore requires a single firm to possess a monopoly.⁵⁷ The EU has however differed in its approach to the theory of joint dominance in that the mere fact that a dominant position is held by more than one firm acting collectively, will not necessary insulate a single firm from claims of abuse of dominance.⁵⁸ This was the position in the matter of *Italian Flat Glass v Commission*⁵⁹ where the court held:

“There 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 the fact, together they hold a dominant position *vis-à-vis* the operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licenses, a technological lead affording them power to behave in an appreciable extent independent of their competitors, their customers and ultimately of their consumers.”

⁵³ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, Pg. 7-12.

⁵⁴ 37/CR/June01, par. 95.

⁵⁵ *Patensie Citrus Beherend Beperk v Competition Commission* 16/CAC/Apr02 22-25.

⁵⁶ *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd* 80/CR/Sep06 and *Bulner SA (Pty) Ltd v Distillers Corporation SA Ltd* 94/FN/Nov00.

⁵⁷ D.H. Assaf & B.A. Facey, “Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey”, (2002-2003) *Antitrust Law Journal*, 513-591, Pg.541, also see *Sun Dun Incorporated v Coca-Cola Corporation* 704, F. Supp, 381 (D. Md. 1990), pg. 390.

⁵⁸ D.H. Assaf & B.A. Facey, “Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey”, (2002-2003) *Antitrust Law Journal*, 513-591, Pg.542.

⁵⁹ (1992) 5 C.M.L.R. 302, pg. 358.

Therefore, the concept of joint dominance may not find application in South African competition law and US antitrust law, but will be a consideration to keep in mind when establishing the whether or not EU competition law applies, in respect of abuse of dominance, to the entity in question. What is interesting to note about the concept of joint dominance, is that it represents a departure from the traditional idea that the abuse of dominance is generally concerned with single party conduct.

3. Identifying the Defining the Relevant Market

Identifying and defining the relevant market plays an important role in defining the boundaries of the analysis of the effect of a firm's conduct on competition. Once the relevant market has been established, it is possible to establish who the firm in question's competitors are as well as the factors which constrain that firm's ability to act independently of its competitors.⁶⁰ A further important purpose for establishing the market in question will be for the establishment of the firm in question's market share, the purpose for which will be discussed later in this chapter. To best understand the process of identifying and defining the relevant market of the firm in question in the US, EU and South Africa, focus will now be placed on the process developed by the US authorities and which process has found application in both the EU and South Africa.

3.1 United States

The general test used for defining the relevant market is the "hypothetical monopolist test" which was first introduced in the US Merger Guidelines.⁶¹ The hypothetical monopolist test defines the market as a group of suppliers of substitute goods that could control prices if they worked together as a single supplier.⁶² Where it is shown that the hypothetical monopolist would not be able to control the price of the relevant product and remain profitable within the relevant geographic region or focal market, the test will then be repeated including the next best substitute until the hypothetical monopolist will be able to control the price and remain profitable.⁶³ Accordingly the aim of the test is to determine whether or not the market is one worth monopolizing.⁶⁴

⁶⁰ Van Bael & Bellis, *Competition Law of the European Community* 2010, and pg.116.

⁶¹ S Bishop & M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2002) pg. 132.

⁶² Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-19.

⁶³ Sutherland and Kemp *Competition Law of South Africa* (2013) 7-20.

⁶⁴ S Bishop & M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2002) pg. 132.

Criticism has however been levied against the hypothetical monopolist theory test for situations where inferior substitute goods or services have already failed to curtail the prices of the product complained about. This will usually exist in a situation where the product subject to the complaint is already being sold well above the competition level.⁶⁵ This has become known as the “cellophane fallacy” which takes its name from the matter of *United States v E.I. du Pont De Nemours & Co.* (the cellophane case).⁶⁶

In this matter the US government alleged that du Pont had monopolized the cellophane market as the cellophane market was distinct from the market for other wrapping materials and these products afforded strong competition to prevent from du Pont from exercising monopoly power. Du Pont produced about 75% of the cellophane sold in the United States but cellophane only constituted about 20% of total flexible material package sales.⁶⁷ The court *a quo* held that the market in question included all flexible material packaging and as such du Pont could not be regarded as a monopolist.⁶⁸ However, the US Supreme court held that the assessment of market power in a market with differentiated products required evidence on cross-elasticity of demand.⁶⁹ The reason for this was that each producer of a different product had a monopoly in the market of its own product and it would not make sense to equate the power to control the price of one’s own product with monopoly power. The majority held that since cellophane met competition from many end uses, those producers who needed or wanted only cellophane would not be entitled to the benefits of competition.⁷⁰

This approach has however been heavily criticised by many economists due to the fact that the Court carried out its analysis without taking into account that du Pont was already charging a monopolist price for cellophane and as a consequence, any further price increases would no longer be profitable.⁷¹ In order to avoid this problem, the analysis should have been carried out at a time when du Pont was pricing at a more competitive level to accurately assess how consumers would react to any change in price.⁷² Given the problems that have arisen from the cellophane fallacy and in an attempt to avoid same, the US Merger Guidelines have stated that

⁶⁵ G. Monti, *EC Competition Law* (2008) pg. 151.

⁶⁶ 351 U.S. 377 (1956).

⁶⁷ K.N. Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003), pg. 236.

⁶⁸ K.N. Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003), pg. 236.

⁶⁹ See G. Monti, *EC Competition Law* (2008) pg. 134, where Cross-elasticity of demand is defined as the percentage change in the quantity demanded of a product that results from one percentage change in the price of another product.⁶⁹

⁷⁰ See Elhauge & Geradin *Global Antitrust Law and Economics* (2007), pg. 282.

⁷¹ G. Monti, *EC Competition Law* (2008) pg. 134.

⁷² G. Monti, *EC Competition Law* (2008) pg. 134.

a competitive price should be used in circumstances where suspicion exists that present prices have been overinflated.⁷³

3.2 European Union

Previous decisions of the European courts have largely defined the relevant market in accordance with the hypothetical monopolist test as laid by the US authorities⁷⁴, however for the sake of greater certainty, the European Commission has issued “The Notice on Market Definition” (hereinafter referred to as “the Notice”).⁷⁵ The Notice is based on a classical constraints approach that recognises market power can be constrained by demand-side substitutability⁷⁶, supply-side substitutability⁷⁷ and by competition.⁷⁸ The Notice therefore calls for a two stage enquiry in defining the relevant market which requires first establishing the relevant product market, which can be defined as all those products and services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, price and intended use⁷⁹, and secondly to determine the relevant geographic market, which comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because of the conditions of competition are appreciably different in those areas.⁸⁰ The Notice therefore provides a definition that broad and leaves much room for discretion. Although this may create some uncertainty for the firms in question, it will allow the Commission to take various factors into account when defining the relevant market as the relevant product market⁸¹ and the geographical boundaries of the market.

⁷³ Par. 1:11.

⁷⁴ See *Hoffman La Roche v Commission* (1979) ECR 461, para.28: where the court stated “the concept of the relevant market implies that there can be effective competition between the products which form part of it presupposes that there is a sufficient degree of inter-changeability between all the products forming part of the same market in so far as a specific use of such product is concerned”.

⁷⁵ European Commission, Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, 1997 O.J. (C372) 5.

⁷⁶ The degree of substitutability between products from a customer’s perspective.

⁷⁷ The ability of suppliers to switch production sufficiently quickly and at low cost.

⁷⁸ Van Bael & Bellis, *Competition Law of the European Community* 2010, and pg. 119.

⁷⁹ The Notice, point 7.

⁸⁰ The Notice, point 8.

⁸¹ The Notice defines the relevant product market as the market comprising all those products and services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.

3.3 South Africa

The hypothetical monopolist test has been recognised in South African Law⁸² for purposes of identifying and defining the relevant market. There are however five factors which will generally be taken into account when determining the effect of price increases as warranted by the test.⁸³ These factors will include:

- The historical data of pricing relationships and trade patterns;
- The extra costs that will be incurred by the consumers in switching to a substitute and by suppliers in entering the market or increasing output;
- any absolute barriers to substitution;
- information on consumer convenience; and
- Preference and survey responses of consumers and suppliers as to their probable responses to price increases.⁸⁴

What is also important to note is that the South African competition authorities have been cognisant of the problems associated with tests such as the cellophane fallacy.⁸⁵

3.4 Market Shares

Once the relevant market has been identified and defined, the market share of the firm in question needs to be established. There is no single test for calculating a firm's market share but rather, market share will always be a question of fact taking the relevant circumstances of the case into account.⁸⁶ Some of the factors that may be taken into account will include a firm's direct sales values to consumers, a firm's production capacity within the relevant market, a firm's capacity of supply within the relevant market, the effect of imports on the market in question and a vertical integrated firm's internal production capacity.⁸⁷ In addition to these various others factors which may be relevant to the defined market may be taken into account.

4. Does the Entity in question possess Market Power

4.1 Establishing Market Power in the United States

⁸² *South African Raisins (Pty) Ltd v SAD Holdings Ltd 04/IR/Oct/1995, Patensie Sitrus Beherend Beperk v Competition Commission 16/CAC/Apr02 16-17.*

⁸³ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-20(1).

⁸⁴ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-20(1) – 7-21.

⁸⁵ *Patensie Sitrus Beherend Beperk v Competition Commission 16/CAC/Apr02 15-17.*

⁸⁶ Sutherland and Kemp *Competition Law of South Africa* (2013) 7-24.

⁸⁷ UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415 par. 4.8.

No defined method exists for determining whether the firm in question does in fact possess market power in the US with the Courts differing in their approaches. Despite this, market share has been used as a method of providing an indication as to whether or not the firm in question possesses market power. This approach was highlighted in the *Alcoa*⁸⁸ case where the court held that where a firm held 90% of supply it “is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three is not”.⁸⁹ Although these statements have been used as a guideline for establishing market power, it has generally been accepted that market shares in excess of 70% will usually create a presumption of dominance⁹⁰ and market shares in excess of 50% may, under certain circumstances, be sufficient for the establishment of dominance.⁹¹ The process of focusing solely on market shares as a means of establishing dominance has however come under severe criticism from various commentators.⁹² Instead of relying solely on market share as a determinant of market power, an enquiry which evaluates market share together the ease of access to the market, the availability of substitute goods and any other factor which may be relevant to the matter at hand should be accepted.⁹³

An alternative method that has been used in the US for establishing market power has been to evaluate whether or not the firm in question has enjoyed large profit margins. This approach has however also been criticised as it becomes difficult to differentiate between profits that are the result of a firm’s dominant position or profits that are solely economic in nature.⁹⁴ The method of accounting used may also be a factor for a firm evidencing excess profit margins.⁹⁵ A firm may also be inclined to enjoy higher profits where that firm has taken a great deal of risk in its market and has benefited from such risks. What becomes clear is that profit margins, except for maybe in a few exceptional cases, cannot be an accurate measure of firm’s market power.

Given the disappointments of the above methods, this has lead economists to propose a further method for the establishment of dominance. The new method focuses on a firm’s ability to raise

⁸⁸ *United States v Aluminum Co. of America* 148 F.2d 214 (1945).

⁸⁹ *United States v Aluminum Co. of America* 148 F.2d 214 (1945), at 424.

⁹⁰ *United States v United Shoe Machinery Corp* 110 F.Supp 295 (D.Mass 1953).

⁹¹ D.H. Assaf & B.A. Facey, “*Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey*”, (2002-2003) *Antitrust Law Journal*, 513-591, Pg. 536.

⁹² B A Facey & D H Assaf “*Monopolization and Abuse of Dominance in Canada, the United Sates, and the European Union: A Survey*”, (2002-2003) *Antitrust Law Journal* 524, pg. 536.

⁹³ E Gellhorn & W Kovacic, *Antitrust Law and Economics in a Nutshell* (4th ed.) 1994, pg. 97.

⁹⁴ KN Hylton, *Antitrust Law Economic Theory and Common Law Evolution* (2003), pg. 231.

⁹⁵ KN Hylton, *Antitrust Law Economic Theory and Common Law Evolution* (2003), pg. 232.

prices without being constrained by competitors.⁹⁶ This new test has further been embodied in the 1992 Merger Guideline⁹⁷. In terms of the guidelines, once the relevant market has been defined, it will need to be determined whether a small nontransitory price increase (usually around five Percent) will cause a substantial shift of buyers to substitute goods.⁹⁸ In order to evaluate to potential response of buyers, the following factors will be taken into account:

- Evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
- Evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
- The influence of downstream competition faced by buyers in their output markets; and
- The timing and costs of switching products.⁹⁹

This approach however, has failed to find wide spread acceptance by the Courts.¹⁰⁰

4.2 Establishing Market Power in the EU

As discussed in chapter 2, in the EU a firm will be dominant where it possesses substantial market power. But how is substantial market identified and measured? There are two generally accepted methods for measuring market power.¹⁰¹ The first method is the direct method based on whether or not a firm's prices are above marginal cost.¹⁰² The second is an indirect method which takes into account various factors such as the market shares of the firm in question, the market shares of competitors, and the barriers to entry to the market and the powers of consumers or buyers.¹⁰³ This indirect method of establishing market power has found wide acceptance by both the European Commission and by the Courts.¹⁰⁴

⁹⁶ K.N. Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003), pg. 232.

⁹⁷ Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission (Issued 1992, revised 1997).

⁹⁸ E Gellhorn & W Kovacic, *Antitrust Law and Economics in a Nutshell* (4th ed.) 1994, pg. 110.

⁹⁹ Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission (Issued 1992, revised 1997), Section 1.11.

¹⁰⁰ E Gellhorn & W Kovacic, *Antitrust Law and Economics in a Nutshell* (4th ed.) 1994, pg. 113.

¹⁰¹ G Monti "The Concept of Dominance" (2006) *European Competition Journal* 31, pg. 3.

¹⁰² A firm will be considered dominant where it can set its prices above the competitive level but still remain profitable. See the discussion on the Lerner Index in chapter 5 *infra*.

¹⁰³ G Monti "The Concept of Dominance" (2006) *European Competition Journal* 31, pg. 3.

¹⁰⁴ F. Dethmers & N. Doodoo, *The Abuse of Hoffman-La Roche: "the Meaning of Dominance under EC Competition Law"*, (2006) *European Law Review* 10, 537 – 549, pg. 541, *Hoffman La Roche v Commission* (1979) ECR 461.

a) Market Share

The first step in this indirect enquiry will be to establish the market share of the firm in question. Both this indirect method and the initial enquiry into market share have been confirmed in the matter of *Hoffman La Roche v Commission* where the Court held that:

“The existence of a dominant position may derive from several factors which, taken separately, are not determinative but among these factors a highly important one is the existence of very large market shares.”¹⁰⁵

Although the Court recognises that a large market share in itself may not be evidence of a dominant position, it does however stress the importance of a large market share in establishing dominance. But what measure of market share will be indicative of dominance? In the matter of *Hilti AG v Commission*¹⁰⁶ the European Court of Justice held that a market share between 70% and 80% was in itself clear indication of the existence of a dominant position. However, in the matter of *Akzo v Commission*¹⁰⁷ the court held that a rebuttable presumption of dominance exists where market shares exceed 50%. This approach however has come under criticism because the general onus rests on the Commission to prove dominance, but in terms of this approach, the onus shifts to the firm in question to prove it is in fact not dominant. In matters where market share is between 40% and 50%, The ECJ held that market share may indicate a dominant position but further economic factors would need to be taken into account in order to make a finding of dominance.¹⁰⁸ In matters where market share is less than 40%, it has generally been accepted that market power cannot be assumed unless exceptional circumstances exist.¹⁰⁹

What becomes clear is that the establishment of dominance should not solely rest on a firm's market share. Instead the weight placed on firm's market share should rather be done on a case to case basis taking into account the market shares of competitors and other relevant economic factors which may be present in the relevant market. This approach has been endorsed by the ECJ in *Hoffman La Roche* where the court stated:

¹⁰⁵ *Hoffman La Roche v Commission* (1979) ECR 461, par. 39-40.

¹⁰⁶ (1991) ECR II – 1439, par. 92.

¹⁰⁷ (1991) ECR I – 3359, par. 60.

¹⁰⁸ *United Brands v Commission* (1978) ECR 207, par. 108-110.

¹⁰⁹ *British Airways v The Commission* (2003) ECR II – 5917; Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ No. C 165 Of 11 July 2002, pg.6, par. 75.

“A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, as far as production, supply and demand concerned.”¹¹⁰

b) Barriers to Entry or Expansion

One of the additional economic considerations that should be taken into consideration together with market power, are the barriers to entry and expansion within the particular market. Barriers to entry can be defined in two ways. The first defines barriers to entry as the factors which make entry very costly¹¹¹ while the second defines entry barriers as the costs which must be borne by a firm which seeks to enter the industry but not borne by firms already in the industry.¹¹² Both these definitions should find application in trying to establish whether barriers to entry and expansion exist. The simplest way for competitors to meet an increase in price by a firm would be to increase their output in that particular market. However, where, due to the existence of certain barriers, competitors and smaller firms are unable to increase their output to meet price increases, a presumption of dominance may be created against the firm in question. This principle again met with approval by the ECJ in the *Hoffman La Roche where the court held*:

“an undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of supply which it stands for, without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share is by virtue of that share in a position of strength.”¹¹³

In an attempt to create certainty and simplify the process of establishing whether or not barriers to entry or expansion exist, the European Commission’s Discussion Paper¹¹⁴ has listed the following factors that should be taken into account when determining whether or not barriers to entry or expansion exist:

¹¹⁰ *Hoffman La Roche v Commission* (1979) ECR 461, par. 40.

¹¹¹ G Monti “The Concept of Dominance” (2006) *European Competition Journal* 31, pg. 5.

¹¹² Stigler, “The Organization of Industry” (1968) *University of Chicago Press*, pg. 67.

¹¹³ *Hoffman La Roche v Commission* (1979) ECR 461, par. 41.

¹¹⁴ DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) par. 4.2.2.

i. Legal Barriers

These may include government concessions, licenses, legislated monopolies, patents and other intellectual property rights. The fact a firm may benefit from such rights may be an indication of dominance.¹¹⁵

ii. Capacity Constraints

These will include large capital investments that will need to be made in order to enter or expand within the market and that cannot be recovered by exiting the market.

iii. Economies of Scale and Scope

The capacity for large scale production and distribution may give an alleged dominant firm a position of dominance over smaller producers given the fact that such a firm could spread its fixed costs over larger output or greater range of products with the ultimate effect of reducing its average unit costs. This creates a situation where smaller producers may not be able to enter or expand in a market due to higher average unit costs, as it would be inefficient to do so.

iv. Absolute Cost Advantages

Where a firm has preferential access to essential facilities, natural resources, research and development advantages or capital advantages, this may be indication of dominance as other firms would not be able to compete effectively in the market.

v. Privileged Access to Supply

A firm may be either vertically integrated or have sufficient control over the supply of inputs making it difficult or costly for competitors to compete.

vi. Highly Developed Distribution and Sales Networks

These confer significant commercial advantages to a firm over its competitors.

vii. The Established Position of the Incumbent Firms on the Market

Attributes such as customer loyalty and long standing relationships with suppliers and customers may create a situation which hinders a competitor's ability to compete.

viii. Other Strategic Barriers to Entry

These may include barriers that make it difficult or expensive for consumers to switch suppliers.

There is however a further factor that should be considered in addition to the above factors. This deals with the product offered by competitors to the firm in question as well as the ability of consumers to switch to these products. If a situation exists where the product offered by

¹¹⁵ *Decca Navigator Systems v Commission*, OJ No. L 43 of 15 February 1989, pg.27.

competitors is inferior to that of the product of the firm in question, this may be the cause of the firm in question not being able to compete in the relevant market.¹¹⁶ It would also be important to establish whether or not consumers view the products of competitors as suitable substitutes of the product of the firm in question.

c) Countervailing Buyer Power

As discussed in Chapter 2, one of the requirements for dominance is the ability of the firm in question to act independently of its consumers.¹¹⁷ However, a situation might arise where the consumers of the firm in question possess the power to influence the terms and conditions on which they purchase the products from the firm in question. In circumstances where the consumers can be shown to possess this power, it may be difficult to prove that the firm in question does not possess market power. In order to establish the extent of consumers countervailing power, the economic power that consumers possess will need to be measured against the economic power of the firm in question.¹¹⁸

4.3 Establishing Market Power in South Africa

The means of establishing dominance in South Africa differs substantially from the approaches followed in the US and EU due to the fact that the Act codifies the specific process to be followed in establishing whether or not the firm in question is in fact dominant. Accordingly Section 7 of the Act provides as follows:

“A firm will be dominant in a market 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.”

From the above provisions it becomes clear that where a firm possess more than 45% market share in the relevant market, an irrebuttable presumption of dominance, and by implication market power, is created. Thus, per se dominance is enshrined within the Act. This view has

¹¹⁶ F. Dethmers & N. Dodoo, “The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law”, (2006) *European Law Review* 10, 537 – 549, pg. 543.

¹¹⁷ *Hoffman La Roche v Commission* (1979) ECR 461, para.38.

¹¹⁸ See *SIV and Others v Commission* (1991) ECR II – 1403.

further been confirmed by the Competition Tribunal and the Competition Appeal Court.¹¹⁹ Where the market share of the firm in question exceeds but 35% but is less than 45% a rebuttable presumption of dominance is created.¹²⁰ The onus then shifts on to the firm in question to prove that it does not possess market power within the relevant market to avoid a finding of dominance being made against it.¹²¹ Finally, where the market share of the firm in question does not 35%, that firm will be presumed to not be dominant within the relevant market.¹²² The onus will then rest on the Competition Commission to prove that the firm in question does in fact possess market power in the relevant market for that firm to be regarded as dominant for purposes of the Act.¹²³

¹¹⁹ *Patensie Sitrus Beherend Beperk v Competition Commission* 16/CAC/Apr02 15-17, pg.26: where the court held that into S7, a market share of 70% created a irrebutable presumption of dominance; *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01, para.48: where it was held that because SAA's market share exceeded 45% it was presumed to have market power in terms of S7(a).

¹²⁰ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-11.

¹²¹ Neuhoff, Govender, Versfeld & Dingley *A Practical Guide to the South African Competition Act* (2006), pg. 108.

¹²² Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-11.

¹²³ Neuhoff, Govender, Versfeld & Dingley *A Practical Guide to the South African Competition Act* (2006), pg. 108.

CHAPTER 4 – THE ADVANTAGES AND DISADVANTAGES OF THE VARIOUS APPROACHES FOR ESTABLISHING DOMINANCE.

1. Historical Approaches underlying the Competition Policy of the United States, European Union and South Africa

To best analyse the approaches adopted by the various jurisdictions for establishing dominance, the historical approach informing each jurisdiction's competition policy and the goals it seeks to achieve will first need to be understood. Historically, competition policy was largely influenced by the Harvard School theory which later gave way to the Chicago and Post-Chicago theories. These approaches are discussed below.

1.1 The Harvard theory of Competition Law

The Harvard School of thought, which dominated antitrust thinking in the United States during the 1960s and 1970¹²⁴, is not so much a theory on the nature of competition itself but rather a theory on the regulation of competition.¹²⁵ This approach is rooted in the belief that competition law does not possess the inherent power to correct economic imbalances or constrain a particular firm from exercising power within a market.¹²⁶ The Harvard theory therefore necessitates the regulation of competition law through the enactment of sound competition policy.¹²⁷ The Harvard theory was also the first theory to accept the role that economics played within competition law¹²⁸ as well as accepting the limits of economics as it pertains to competition regulation.¹²⁹ The Harvard School therefore uses economic evidence to justify the regulation of the competition landscape and accepts that regulation rests on the pillars of equality and the prevention of unchecked power.¹³⁰

¹²⁴ Van den Bergh & Camesasca *European Competition Law and Economics* (2001) 29.

¹²⁵ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-25.

¹²⁶ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-25.

¹²⁷ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-25, also see Kaysen & Turner *Antitrust Policy* (1959) 4 – 5.

¹²⁸ Van den Bergh & Camesasca *European Competition Law and Economics* (2001) 13-16.

¹²⁹ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, 1-26. Also see Sullivan *The Law of Antitrust* (1977) 1, where states that; “Today one interested in antitrust cannot ignore economics. The topic is addressed at the outset not only to address its current importance, but also to put economics in perspective and mark out both its utility and the severe limitations upon what it offers to law, limitations which are often ignored.”

¹³⁰ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-31, also see Sullivan *The Law of Antitrust* (1977) 2-6.

The Harvard theory also accepts the idea that competition policy seeks to not only promote economic goals but political goals too.¹³¹ The goal of competition policy then becomes the achievement of “workable competition”.¹³² Workable competition can then be achieved by competition policy which; firstly, should seek to promote economic welfare of firms and the economy as a whole.¹³³ This entails ensuring both productive and allocative efficiency within the market.¹³⁴ Secondly, competition policy should seek to constrain the power of firms in the market and prevent them from abusing that power to the detriment of other market participants.¹³⁵ Thirdly, competition policy seeks to determine a single framework for fair business conduct.¹³⁶ Lastly competition policy should strive to restrict social and political power.¹³⁷ By restricting social and political power, the achievement of the political goals such as the redistribution of power from larger more powerful firms to smaller firms can be achieved.¹³⁸ Therefore, firms that may be regarded as dominant are simply those that have “won the race” in respect of product offerings and efficiency.¹³⁹

1.2 The Chicago and Post Chicago Theories of Competition Law

During the early 1970's the Harvard theory began to fall out of favour in the United States antitrust arena. As a consequence the Harvard theory began to give way to Chicago Theory of competition law which went on to dominate antitrust law in the United States up to the late 1980s.¹⁴⁰ The Chicago approach to competition accepts that the sole purpose of competition

¹³¹ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-31, also see Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 7-11 – 7-12. Van den Bergh & Camesasca *European Competition Law and Economics* (2001) pg. 31-32.

¹³² This concept was first developed by Clark “Towards a Concept of Workable Competition” (1940) *American Economic Review*, 827, and entails that the most desirable form of competition that is practically attainable has to be found and this cannot be done by approximating a market as closed to possible as a perfect market.

¹³³ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-31.

¹³⁴ See Kaysen & Turner *Antitrust Policy* (1959) 11, where they state the goals of competition policy are to ensure “the largest number of outputs from the available bundle of resources”.

¹³⁵ Sutherland and Kemp *Competition Law of South Africa* (2013) 1-32, also see Sullivan *The Law of Antitrust* (1977) 11, 21 where reference is made to the “decentralisation of economic power”.

¹³⁶ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-31.

¹³⁷ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-31.

¹³⁸ When taking the goals of competition law according to the Harvard School into account, it becomes evident the purposes of competition law in South Africa are deeply rooted in the Harvard approach as will be discussed in more detail in this chapter.

¹³⁹ Roberts *Effects-based tests for abuse of dominance in practice: the case of South Africa* working paper 4/2012, pg. 2.

¹⁴⁰ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-42.

policy is the promotion of both productive and allocative efficiency.¹⁴¹ The Chicago theory therefore accepts that firms are profit maximisers¹⁴² and that where a firm could show that it possessed high profit margins, this was mostly an indicator of high efficiency rather than an abuse of a dominant position.¹⁴³

Unlike the Harvard approach, which places the emphasis on the manner in which the market structure impacts on the conduct of firms and accordingly determines performance, the Chicago approach is concerned with the conduct of firms, most notably collusion between firms.¹⁴⁴ The Chicago approach has accordingly leveled several criticisms against the Harvard Theory which include that it consists of a range of incompatible goals, its ideas lack economic theory, it leads to over regulation and that the concept of workable competition has become unfashionable.¹⁴⁵

The Chicago Theory however began to fall out of favour with most competition authorities towards the end of the 1980s for various reasons including; that efficiency cannot be seen as the only goal of competition¹⁴⁶, the protection of consumers does not seem to be at the heart of the theory¹⁴⁷, and that the theory places too much emphasis on economics¹⁴⁸.

The above criticisms lead to the development of the “Post-Chicago” or “New Economic” theory. The effects of the Chicago theory as they pertain to efficiency and consumer welfare can still be seen as major goals of competition law under this new theory.¹⁴⁹ This approach has also begun to take hold in Europe where the European Commission have begun a move towards a more economic approach focusing on consumers and efficiency as the core aims of its competition policy.¹⁵⁰ Although this new Post-Chicago/New Economic approach still borrows largely from

¹⁴¹ See Bork *The Antitrust Paradox* (1978), pg. 91, where he states the that “*the whole task of antitrust can be summed up as the effort to improve allocative efficiently without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.*”

¹⁴² Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-45.

¹⁴³ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-43-1-45, also see Demsetz “Industry Structure, Market Rivalry and Public Policy” (1973), *Journal of Law and Economics*, 1.

¹⁴⁴ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-45.

¹⁴⁵ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-32 – 1-34.

¹⁴⁶ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-47.

¹⁴⁷ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-47.

¹⁴⁸ See Fox & Sullivan “Antitrust – Retrospective and Prospective: where are we coming from? Where are we Going” (1987), *New York University Law Review*, 936, pg. 957.

¹⁴⁹ Sutherland and Kemp *Competition Law of South Africa* (2013) 1-48, also see Crane “Antitrust Modesty” (2006-2007) *Michigan Law Review*, 1193, pg. 1198.

¹⁵⁰ Sutherland and Kemp *Competition Law of South Africa* (2013) 1-48, also see G Monti “The Concept of Dominance” (2006) *European Competition Journal* 31, pg.13 and G Sandicchi *American and European Perspectives on Monopolization and Abuse of a Dominant Position: A Comparative Law and Economic Analysis of Single Firm Conduct*, pg. 5.

the Chicago theory, the theory itself has been refined to place larger emphasis on newer economic theories which address some of the weaknesses highlighted above. It furthermore places less emphasis on theoretical assumptions and more emphasis on the actual conduct of a firm and the context under which the conduct occurred.¹⁵¹

1.3 The Goals of Competition Law in South Africa

As is common with competition policy in South Africa, the objectives of competition law have been laid down in the Act. In the preamble of the Act, the Act states that the previous political dispensation created a situation where ownership of the economy was concentrated in a small group of the population and certain groups of people had been restricted from free and fair participation in the economy. Furthermore the Act recognises that the ownership of the economy must be open to all South Africans and that in order to achieve this, an efficient, competitive and balanced economy with effective competition policy and enforcement authorities are necessary.¹⁵²

The preamble of the Act further states that the Act has been enacted to:

- a) Provide all South Africans equal opportunity to participate fairly in the national economy;
- b) Achieve a more effective and efficient economy in South Africa;
- c) Provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
- d) Create greater capability and an environment for South Africans to compete effectively in international markets;
- e) Restrain particular trade practices which undermine a competitive economy;
- f) Regulate the transfer of ownership in keeping with the public interest; and

¹⁵¹ G Sandicchi *American and European Perspectives on Monopolization and Abuse of a Dominant Position: A Comparative Law and Economic Analysis of Single Firm Conduct*, pg. 22.

¹⁵² Preamble to the Act.

- g) Establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.

In addition, Section 3 of the Act provides that the purpose of the Act is to promote and maintain competition in the Republic in order to:

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

What is important to note from the above provisions is that the objectives of the Act extend far beyond the achievement of consumer welfare and efficiency. Instead, and in line with the Harvard approach, the Act provides for the achievement of certain political goals particularly for purposes of redressing the injustices of the past. This more classical approach to competition regulation, as discussed above, has however largely fallen out of favour in markets with a more developed economy and approach to competition regulation.¹⁵³

The issue that also arises is what value the Commission, Tribunal and Courts will award these objectives over the objectives of consumer welfare and efficiency. In the matter of the *Minister of Economic Development v Competition Tribunal*¹⁵⁴ the Tribunal held that when viewed historically, the Act allows for an economic perspective that extends beyond consumer welfare because of the wording of Section 2. The court however preferred the submission that

¹⁵³ *Supra*, also see Fox “Discrimination and Competition Law: Lessons from and for South Africa and Indonesia” (2000) *Harvard Comparative Law Review*, 583.

¹⁵⁴ 110/CAC/Jun11, par. 98 - 99

competition is about the promotion of consumer welfare and that any other approach would significantly complicate the implementation of the Act because of the complexity of the economic calculations involved.¹⁵⁵

The objectives of the Act are obviously a consideration that will need to be taken into account when assessing the conduct of firms. However it seems that the ultimate consideration that will need to be taken into account will always be the welfare of consumers. This should be a significant consideration that the Commission should bear in mind when seeking to establish dominance.

2. Analysis of the methods used for the Establishment of Dominance

2.1 Establishing dominance in the United States

a) Advantages of the United States' Approach

As discussed in chapter 3, there is no uniform approach for the establishment of dominance in the United States. This presents a unique advantage that will enable the relevant authorities and the Courts to evaluate each matter on a case by case basis taking into account the factors relevant to the particular case.¹⁵⁶ This allows the authorities the flexibility to adopt an approach which will hopefully provide an accurate determination of dominance. Although large market shares may be an indication of dominance, in a situation where a firm's market share is not conclusive proof of dominance, the profit margins of that firm can be evaluated.¹⁵⁷ If both these approaches fail to provide a definitive answer, the ability of a firm to constrain prices can be evaluated.¹⁵⁸ In this way, the establishment of dominance will not be constrained by a closed list of factors which, if applied correctly, could lead to accurate determinations for the existence of dominance.

¹⁵⁵ Also see the decisions of *Anglo American Ltd/Kumba Resources Ltd* 46/LM/Jun02 04/09/2003, par. 155 and *Nationwide Poles (Pty) Ltd v Sasol (Oil) (Pty) Ltd* 72/CR/Dec03, par. 83.

¹⁵⁶ K.N. Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003), pg. 230-234.

¹⁵⁷ See chapter 4, par. 4.1.

¹⁵⁸ See chapter 4, par 4.1.

b) Disadvantages of the United States' Approach

An enquiry focusing solely on a firm's market share as a determinant for dominance has come under severe criticism for its unreliability.¹⁵⁹ This is further complicated by the lack of uniformity in the extent of market share required by the Courts for a determination of dominance in the United States.¹⁶⁰ The lack of settled guidelines for the exact extent of market share required for a finding of dominance has the potential to lead to disputes being unnecessarily drawn out and requiring a variety of other factors to be evaluated to establish dominance.¹⁶¹

Evaluating a firm's profit margins is also not without its faults. A firm may enjoy high profit margins for a variety of factors which have nothing to do with dominance or market power.¹⁶² Profit margins would only serve as an accurate determinant of dominance where the firm's large profit margins can be directly attributed to the possession of dominance within the relevant market. The power to constrain prices is also problematic in that it fails to take into account situations where the particular market has already been monopolized. Price increases in a monopolized market may result in a loss of revenue making the price increase unprofitable for the firm in question.¹⁶³ This approach also fails to take into account the fact that consumers may change products where a firm increases its prices. This may also create a situation which would enable new participants to enter the market in competition with the firm in question.¹⁶⁴ In such an instance, it may not be possible to establish dominance.

2.2 Establishing dominance in the European Union

a) Advantages of the European Union's Approach

The European approach offers the certainty of a legislative approach together with the flexibility of the United States' approach. Both the European Courts and Commission have agreed that although a high market share may be indicative of dominance or market power, it cannot always be a determinant of dominance in each and every case.¹⁶⁵ This allows for the existence of

¹⁵⁹ B A Facey & D H Assaf "Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey" (2012) *Antitrust Law Journal* Vol. 70 524, pg. 536 and K.N. Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003), pg. 230- 231.

¹⁶⁰ See Chapter 3 *supra* at 4.1.

¹⁶¹ E Gellhorn & W Kovacic, *Antitrust Law and Economics in a Nutshell* (4th ed.) 1994, pg. 97.

¹⁶² Take for example a firm that functions in a variety of markets with a variety of products or a firm that enjoys strong exports in an economy with a weak currency.

¹⁶³ K.N. Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003), pg. 231.

¹⁶⁴ K.N. Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003), pg. 232.

¹⁶⁵ *Hoffman La Roche v Commission* (1979) ECR 461, par. 39-40.

dominance to be evaluated on a case by case basis.¹⁶⁶ The Commission is therefore not obliged to make a finding of dominance based on high market shares¹⁶⁷ and can examine a variety of other factors, such as the absence of entry or expansion constraints, the existence of intense competition and the countervailing power of consumers.¹⁶⁸ An approach such as this, which takes into an account a variety of factors, can lead to a more accurate determination of dominance or market power on a case by case basis.

b) Disadvantages of the European Union's Approach

The European Commission typically evaluates market shares together with competitive advantage.¹⁶⁹ In this regard, the European Commission will usually regard a high market share as an indication of competitive advantage.¹⁷⁰ It is submitted that this approach however defeats the purpose of competition regulation for two reasons.¹⁷¹ The first is that the mere fact that a firm possesses a competitive advantage may not be an indication of dominance. Competitive advantage may be a result of a variety of factors such as different business strategies or efficiencies which would have no bearing on a firm's dominance. Secondly, by seeking to equate competitive advantage with dominance or market power, the possibility presents itself that consumer may be undermined where competition seeks to protect inefficient producers.¹⁷² Allocative efficiency requires that scarce resources be awarded to the most efficient producer.¹⁷³ By seeking to protect inefficient producers at the expense of efficient producers would undermine to achievement of efficiency. What becomes apparent is that this approach is in clear contradiction with the core principles of European competition policy of allocative efficiency and

¹⁶⁶ *Hoffman La Roche v Commission* (1979) ECR 461, par. 40.

¹⁶⁷ F. Dethmers & N. Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law", *European Law Review* (2006), 10, 537 – 549, pg. 544.

¹⁶⁸ As laid down in the DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) and UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415.

¹⁶⁹ F. Dethmers & N. Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law", *European Law Review* (2006), 10, 537 – 549, pg. 546.

¹⁷⁰ F. Dethmers & N. Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law", *European Law Review* (2006), 10, 537 – 549, pg. 546.

¹⁷¹ F. Dethmers & N. Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law", *European Law Review* (2006), 10, 537 – 549, pg. 546 - 548.

¹⁷² F. Dethmers & N. Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law", *European Law Review* (2006), 10, 537 – 549, pg. 547.

¹⁷³ Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 17, pg. 1-42 – 1-43.

consumer welfare.¹⁷⁴ Furthermore several of the Commission's findings of dominance which equated high market share with competitive advantage have come under intense criticism.¹⁷⁵

It also unclear what weight is afforded to each of the factors listed in the Discussion Paper. From the previous decisions of the Courts, it seems clear that the most weight is still afforded to a firm's market share.¹⁷⁶

2.3 Establishing dominance in South Africa

a) Advantages of the South African approach

The unique feature of the Act of defining dominance by reference to specific market share thresholds is also the Act's best strength when establishing dominance. This is due to the simple fact that the Act creates a level of certainty to the existence of dominance when certain market thresholds are met.¹⁷⁷ Although market shares are an important consideration in the establishment of dominance in both the United States and the European Union, these are not the only considerations which are taken into account such as barriers to entry and the countervailing power of consumers. There is also a large degree of uncertainty that exists as to the value each factor should be awarded when establishing whether or not the firm in question is in fact dominant.¹⁷⁸

In terms of the Act, a firm with a market share in excess of 45% is automatically deemed to be dominant. From a regulatory and enforcement perspective, this lowers the onus on the Commission when attempting to establish dominance to simply an inquiry into that firm's market share. The Commission can therefore limit the scope of its enquiry first to the extent of firm's

¹⁷⁴ DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005), par. 4.

¹⁷⁵ In case IV/M.877, *Boeing/McDonald Douglas*, July 30, 1997, par. 37, it was held that Boeing was dominant despite being in an ever changing market defined by constant innovation, case IV/34.780, *Virgin/British Airways*, July 14, 1994, par. Where British Airways was held to be dominant despite a variety of new competitors entering the market and consumer prices subsequently being driven lower, and in case COMP/M.2220, *General Electric/Honeywell*, July 3, 2001, where general electric was held to be dominant despite competitors such Rolls-Royce being able to effectively compete and constrain its ability to raise prices.

¹⁷⁶ See Geradin, Hofer, Louis, Petit & Walker "The Concept of Dominance in EC Competition Law Research Paper on the Modernization of Article 82 EC" (July 2005) *Global Competition Law Centre*, pg. 10

¹⁷⁷ See *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01, para.48: where it was held that because SAA's market share exceeded 45% it was presumed to have market power in terms of S7(a).

¹⁷⁸ See Geradin, Hofer, Louis, Petit & Walker "The Concept of Dominance in EC Competition Law Research Paper on the Modernization of Article 82 EC" (July 2005) *Global Competition Law Centre*, pg. 10, where it was submitted that "There is, however, much uncertainty as to the value of market shares as an indicator of dominance, as well as to the relationship between market shares and the "other" factors".

market share without having to examine a variety of other factors in order to make a finding of dominance. This differs from the approach followed in the United States and European Union, where the onus will rest on the relevant regulatory authorities to establish whether or not the firm possesses monopoly power or substantial market power by examining a variety of other factors *in addition to* market share.¹⁷⁹

In a continuance from the advantage discussed above, the onus on the Commission is further reduced where a firm possesses a market share less than 45%. So long as the market share of the firm in question is above 35%, the onus will then be on the firm in question to in fact prove that it does not possess market power in order for it not to be considered dominance. This approach again differs from the approach followed in other jurisdictions where the onus will generally rest on the relevant authorities to establish dominance.¹⁸⁰

The Act clearly seeks to create certainty and simplify the procedure the Commission would need to follow when attempting to establishing dominance. The Commission would only need to establish the firm's market share in order to establish dominance. In certain situations the firm in question would be able to rebut the presumption of dominance its market share has created, but where that market share exceeds 45%, that presumption of dominance will be irrebuttable. Only in circumstances where a firm's market share does not exceed 35% will it be incumbent on the Commission to establish that the firm in question does in fact possess market power in order to make a finding of dominance. However, it has generally been accepted that dominance can only exist in exceptional circumstances with such a low market share.¹⁸¹

b) Disadvantages of the South African Approach

The South African approach's biggest strength is also its biggest weakness. The approach laid down in the Act lacks any flexibility regarding the establishment of dominance. As previously stated, where a firm's market share exceeds 45%, that firm will always be regarded as

¹⁷⁹ D.H. Assaf & B.A. Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", (2002-2003) *Antitrust Law Journal*, 513-591, Pg.536

¹⁸⁰ F. Dethmers & N. Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law", (2006) *European Law Review*, 10, 537 – 549, pg. 541

¹⁸¹ See Elhauge & Geradin *Global Antitrust Law and Economics* (2007), pg.268 where it was submitted it was highly unlikely that market power would exist with market shares less than 25%, also see D.H. Assaf & B.A. Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", (2002-2003) *Antitrust Law Journal*, 513-591, Pg.536, where it was submitted that market power will only be present in exceptional circumstances with market shares under 50%.

dominant. The question that remains is whether or not dominance can be inferred solely from a firm's market share, especially a market share as small as 45%?

In both the United States and the European Union, market shares are the starting point in the establishment of dominance.¹⁸² However, both of these jurisdictions have accepted that a high market share is usually indicative of dominance, but in certain circumstances, a firm with a high market share can be shown to lack market power.¹⁸³ Take the following two scenarios as an example. Imagine a situation where a firm possesses a large percentage share of a market, say in the region of about 80% to 90%. The market in question is one that has no or very limited barriers to entry or expansion. Now imagine that firm has been accused of abusing its "dominant position" by charging consumers an excessive price.¹⁸⁴ When examining this conduct in the context of Section 7, the firm would automatically be viewed as being dominant given its market share. What the Act fails to take into account is the low barriers to entry and expansion of the market in question. Consumers generally will not be willing to pay this excessive price which will present competitors with an opportunity to increase their production levels or enter the market. This now places the Competitors of this firm in a position where they can charge a lower price than the firm in question and consequently erode that firm's market share. Given the fact that this firm will lack the power to control prices, exclude competition or act independently of its competitors,¹⁸⁵ this firm cannot be regarded as being dominant.

The second scenario to take into account is where consumers may be unwilling to pay excessive prices for the product of the firm in question, or where suitable substitutes exist for these products. Now the firm will again be considered dominant given its large market share, however what the act fails to take into account is the way consumers may react to the firm attempting to exploit its "dominant" position. If this firm were to raise prices above the level which consumers were willing to pay or endeavored to restrict supply in an attempt to raise prices, consumers would simply stop purchasing the product of this firm and purchase the substitute products of the firm's competitors which would result in a loss of revenue for the firm in question. In a situation where consumers possess such countervailing power, the firm will be

¹⁸² See Elhauge & Geradin *Global Antitrust Law and Economics* (2007), pg.270.

¹⁸³ See G. Monti, *EC Competition Law* (2008) pg. 144, See Elhauge & Geradin *Global Antitrust Law and Economics* (2007), pg.270, Lorenz *An Introduction to EU Competition Law* (2013) pg. 197 -199, Bishop and Walker *The Economics of EC Competition Law: Concepts, Applications and Measurement* (2000), pg 2.39 – 2.60 and UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415., par.4.4.

¹⁸⁴ Section 8 (a).

¹⁸⁵ Definition of "Market Power" as contained in Section 1.

unable to impose its will on markets and accordingly will lack the necessary market power to be regarded as dominant.¹⁸⁶

A further scenario that could possibly arise is one in which another firm that is also dominant, makes an allegation that its competitor has abused its dominant position. This situation could arise where both the complainant firm and the firm complained of both possess market shares in excess of the 45% threshold, or where both firms can be shown to possess market power. This can lead to a situation where one competitor may attempt to use the provisions of the Act as a means to gain an advantage over its competitors or frustrate its competitors with malicious complaints to the Commission. Such a situation could place an enormous administrative and investigative strain on the Commission that would now be forced to investigate these complaints. Furthermore, the complainant firm itself may be guilty of conduct that could be regarded as an abuse of its dominant position within the same market and which conduct may not form part of the Commission's investigation. The risk may then exist that the Commission could make a finding of dominance against the firm complained of while the complainant firm can continue to abuse its dominance unabated, or even have its degree of market power increased. It is important to note that this is a hypothetical scenario which is highly unlikely to ever exist. However the possibility for such a situation to come into existence may one day present itself and the appropriate measures will need to be put into place to prevent such a situation arising.

The Act also fails to take into account positions of market power that may arise due to exceptional economic circumstances.¹⁸⁷ One such an example would be during the oil crisis of the 1970's where many oil firms, due to the shortage of oil globally, many firms, regardless of their market shares, found themselves in a position of dominance given their customers dependence on them for the supply of a scarce product.¹⁸⁸ In such situations of customer dependence, a finding of market power can be made even in situations where a firm does not possess a substantial market share.¹⁸⁹

¹⁸⁶ See the matter of *Hutchinson 3G (UK) Ltd v Office of Communications* (2005) CAT 39, where the UK Competition Appeal Tribunal overturned a finding of dominance despite the firm in question holding 100% of the market for the provision of call termination given the fact there had been an inadequate assessment of British Telecom's countervailing buyer power.

¹⁸⁷ Van Bael & Bellis *Competition Law of the European Community* 2010, pg. 112.

¹⁸⁸ Van Bael & Bellis *Competition Law of the European Community* 2010, pg. 112 - 113.

¹⁸⁹ Also see *Nederlandsche Banden Industrie Michelin v Commission* fn.430, OJ 2002 L143/1, par. 56, where the European Court of Justice made a finding of dominance against Michelin given the fact that dealers found themselves in a position of dependence to Michelin given the heavy demand for Michelin from the public.

The aim of the Act is not only to protect competition within the South African market space, but also the achievement of certain political goals.¹⁹⁰ This structural approach to competition regulation, which focuses predominantly on market shares, has been criticised by the Chicago approach for under appreciation of the other factors which may influence a finding of dominance.¹⁹¹ It is also important to bear in mind that competition regulation itself cannot be viewed as a mechanism for the achievement of economic stability and for a redistribution of wealth because the achievement of such goals should fall to the enactment of sound fiscal policy.¹⁹²

¹⁹⁰ Especially the goals of redressing the economic situation currently present in South Africa as result of the previous political dispensation as discussed in the Preamble and Section 2 of the Act.

¹⁹¹ Sutherland and Kemp *Competition Law of South Africa* (2013) 1-34.

¹⁹² Sutherland and Kemp *Competition Law of South Africa* (2013) 1-31 – 1-32.

CHAPTER 5 – CONCLUSION

1. Deficiencies of the South African Approach for establishing dominance

When taking into account all the deficiencies of the various approaches discussed in Chapter 4, it is clear that there is no single uniform approach for the establishment of dominance globally. Despite each approaches disadvantages, the process for establishing dominance laid down by the Act is the most flawed of all the potential approaches. This can be broken down into a variety of reasons. Firstly, when looking at the objectives of the Act¹⁹³, the Act's foundation is rooted in the outdated Harvard Approach. The adoption of this approach is a clear attempt by the South African government to use the Act as a mechanism for the achievement of its own political goals.¹⁹⁴ What the South African government failed to take into account were the many criticisms leveled against the Harvard approach, particularly the incompatibility of antitrust and political goals.¹⁹⁵ The Courts have further expressed a view that the political goals of the Act are irreconcilable with fundamental goal of consumer welfare.¹⁹⁶ This view has also been shared by various commentators that have expressed the view that the government cannot expect to use the Act as a mechanism for the achievement of its goals of a distribution of wealth and Black Economic Empowerment.¹⁹⁷ Although the promotion and protection of small and medium business will always remain a goal of competition policy within the South African context, it should not be its overriding goal. It is also important to bear in mind that in many cases where protecting smaller firms at the expense of larger firms is the priority, it may lead to a situation of higher prices and decreased output which, will ultimately be to the detriment of consumers.¹⁹⁸

¹⁹³ As contained in the Preamble and Section 2 of the Act.

¹⁹⁴ See the Department of Trade and Industries *A Guide to the Microeconomic Reform Strategy* May 2002.

¹⁹⁵ See chapter 4, par. 4.1.

¹⁹⁶ See *Minister of Economic Development v Competition Tribunal* 110/CAC/Jun11, par. 98 – 99, *Anglo American Ltd/Kumba Resources Ltd* 46/LM/Jun02 04/09/2003, par. 155 and *Nationwide Poles (Pty) Ltd v Sasol (Oil) (Pty) Ltd* 72/CR/Dec03, par. 83.

¹⁹⁷ See Fox “Equality, discrimination and competition law: lessons from and for South Africa and Indonesia” (2000) *Harvard Comparative Law Journal* 579, pg 588 where states “If expectations are high that the new competition law visibly change the terms of economic participation in favour of the historically repressed black majority in South Africa, they are likely to be unfulfilled; the stated purposes of the competition law could give false hope. In view of the clarity and limits of the law, however, it is doubtful that expectations will be high for benefits other than the right to compete on the merits, which itself is empowering.”

¹⁹⁸ See *Brown Shoe Co v United States* 370 US 294 (1962), 344, where the US Supreme Court that “It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralization.”

Secondly, the establishment of dominance cannot solely hinge on the existence of large market shares. The argument could be made that in South Africa, when compared to the United States and European Union, represents a very small market, with, most markets being dominated by one or a few major players. In this regard high market shares may well be an indication of dominance. However, as the South African market continues to grow and become more inclusive, new participants could enter the market and firms which previously dominated certain markets could see their market power eroded due to factors such as a lack of innovation. Both the Commission and the Tribunal should be cognisant of the evolving South African Market. In this regard, competition policy should take into account the dynamic nature of markets and understand that a process of establishing dominance which relies solely on market share will find no place in future South African markets.

Thirdly, what an approach that focuses solely on market share does not take into account, is the problems sometimes associated with trying to define the relevant market. The European Union acknowledged this problem in its Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses¹⁹⁹ which is what has led the Commission to consider a variety of other factors in its assessments of dominance. The limitations of the hypothetical monopolist test have also come to light and this test has received much criticism.²⁰⁰ Furthermore the European Union has since attempted to lay down a more structured approach to defining the relevant market with its Notice on Market Definition²⁰¹, but this approach remains largely broad and subject to a variety of factors relevant to each independent case. When taking the difficulties of establishing the relevant market into account, the difficulties that will exist in establishing market share become obvious. The method used for the determination of market share may also cause inaccuracies in the assessment of dominance. As discussed previously²⁰², market share will always be determined on the facts relevant to the case at hand. However, where these factors are considered incorrectly, the possibility may arise that market shares could be overstated and incorrect determinations of dominance made.

Lastly, the Act's definition of market power²⁰³ is taken directly from the definitions of dominance laid down in outdated case law of the United States and the European Union. In Europe the definition of dominance has evolved to the possession of substantial market power by a firm.

¹⁹⁹ Paragraph 32.

²⁰⁰ See Chapter 3 *supra*, specifically the "cellophane fallacy".

²⁰¹ See Chapter 3 *supra*.

²⁰² See Chapter 3 *supra*.

²⁰³ Section 1.

This definition takes into account that most market participants will have some degree of market power but, only those firms who possess substantially more market power than the other market participants will be considered dominant. The Act also fails to provide a framework for establishing market power and determining the extent of a firm's market power. The difficulty associated with market power creates a further issue which the Act fails to take into account.

The South African authorities would do well to take the above considerations in account when determining dominance. Competition policy should be evolved in way that moves away from political objectives and rather to the achievement of economic goals.²⁰⁴

2. Possible alternatives for the establishment of dominance in South Africa

2.1 An Economic Approach

Economists have adopted their own approach for establishing dominance through a numerical method for measuring a firm's ability to set prices above the competitive level known as the Lerner Index.²⁰⁵ Economists define market power as the ability of a firm to raise prices, through the reduction of output, above the level that would prevail under competitive conditions and as a result enjoy increased profits.²⁰⁶ The Lerner Index therefore measures the mark-up over marginal price of a firm's prices²⁰⁷ and is represented in terms of the following equation:²⁰⁸

$$L = (p - mc) / p$$

where p represents the price charged by the firm in question and mc represents marginal cost. The higher the value of L , the greater the possibility that firm in question possesses market power.

The advantage of using such an economic method to establish dominance is that unlike national laws, economic theory is not bound by national borders and enforceability.²⁰⁹ This approach also recognises the contribution economic theory has made in the development of competition

²⁰⁴ See *United States v El du Pont de Nemours Co* 351 U.S.0 (1956), pg. 391 and *Hoffman La Roche v Commission* (1979) ECR 461 par. 38.

²⁰⁵ See Hylton *Economic Theory and Common Law Evolution* (2003), pg. 235 – 237, D.H. Assaf & B.A. Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", (2002-2003) *Antitrust Law Journal*, 513-591, Pg. 515 – 519 and Bishop & Walker *Economics of E.C. Competition Law: Concepts, Application and Measurement*, Pg. 2.27 – 2.39.

²⁰⁶ Bishop & Walker *Economics of E.C. Competition Law: Concepts, Application and Measurement*, Pg. 2.27.

²⁰⁷ Hylton *Economic Theory and Common Law Evolution* (2003), pg. 235, see footnote 9.

²⁰⁸ Hylton *Economic Theory and Common Law Evolution* (2003), pg. 235.

²⁰⁹ D.H. Assaf & B.A. Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", (2002-2003) *Antitrust Law Journal*, 513-591, Pg. 514.

policy worldwide. However, this approach is too not without its faults. The first problem is that it is very difficult to determine marginal cost.²¹⁰ If marginal cost cannot be accurately determined, then it would call into doubt any determinations of market power made based on such a calculation. Secondly, the index overstates the extent which the firm's price exceeds the competitive level.²¹¹ This is due to the fact that marginal cost is usually measured at a monopoly output level rather than at the actual competitive level.²¹²

2.2 Proposal for a New South African Approach

Economics itself does not offer a real solution to the problem of the establishment of dominance. Although economics has played a significant role in the development of global competition policy, it is important to maintain the distinction between law and economics.²¹³ In this regard, the South African legislature should accept that competition policy should not be used as a means of achieving its goals of a redistribution of wealth and Black Economic Empowerment. This realisation should then lead to the development of a process for the establishment of dominance which frees itself from its present political burden and is rather guided by the goals of consumer welfare and efficiency.²¹⁴

Ultimately, the legislature should accept the deficiencies of the approach which focusses solely on market share as laid in Section 7 of the Act and abandon this approach altogether. Instead, an approach which focusses solely on the establishment of substantial market power should be adopted. Such an approach will ensure that the Commission and Tribunal are always aware of the fact that all market participants hold some degree of market power, but only those market participants who possess substantially more market power than the rest and use that power to the detriment of its competitors can be considered dominant.²¹⁵ The legislature should then

²¹⁰ Hylton *Economic Theory and Common Law Evolution* (2003), pg. 235.

²¹¹ Hylton *Economic Theory and Common Law Evolution* (2003), pg. 235.

²¹² Hylton *Economic Theory and Common Law Evolution* (2003), pg. 235.

²¹³ See Sutherland and Kemp *Competition Law of South Africa* (2013) , D.H. Assaf & B.A. Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", (2002-2003) *Antitrust Law Journal*, 513-591 and See G. Monti, *EC Competition Law* (2008).

²¹⁴ The goals set forth by the Post-Chicago approach and that have been adopted by both European and American authorities in their anti-trust policy and as discussed in Chapter 4, par. 1.2.

²¹⁵ See G. Monti, *EC Competition Law* (2008), pg. 127.

adopt a method for establishing dominance similar to the process that has been developed by the European Commission and Courts.²¹⁶

This new approach for establishing dominance should then follow the following methodology; first, the relevant market and the market share of the firm in question need to be established. The enquiry should also seek to establish how long that firm has held its market share and the history of the composition of the market in question. Regardless of the extent of the firm in questions market share, the enquiry should then seek to establish the market shares of that firm's competitors and the level of competition present in the relevant market. The barriers of entry and expansion to the relevant market must then be established. It subsequently must also be established whether or not consumers possess the necessary power to resist and negate the effects of price increases by the firm in question. And finally, any other factors which may be relevant to the market in question must be taken into account. These enquiries will ensure that a firm cannot be held dominant where it lacks the necessary market power and will further ensure that determinations of dominance will be accurate.

Although the above approach cannot guarantee an accurate determination of dominance in each and every case and can be somewhat cumbersome, it will serve the South African market space better in the long run. This approach will also help in creating uniformity and certainty in the ever growing global market space in which many foreign and South African multi-national corporations engage in their respective business activities.

²¹⁶ DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) par. 4 and UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* 2004 OFT 415 pg. 11 -34.

BIBLIOGRAPHY

Primary Sources

Legislation

1. Clayton Act 1914 15 USC 12-27 (United States).
2. Competition Act No.98 of 1998.
3. Competition Act (R.S.C., 1985, c. C-34) (Canada).
4. Sherman Antitrust Act 26 Stat. 209 15 USC 1-7 (United States).

Treaties

1. European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at: http://europa.eu/eu-law/decision/making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf, accessed on 26th of June 2015.
2. European Union, *Consolidated version of the Treaty on the Functioning of the European Union, Treaty of Lisbon*, 13 December 2007, 2008/C 115/01, available at: http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendly_latest%20version.pdf, accessed on 26th of June 2015.

Case Law

1. *Akzo v Commission* (1991) ECR I – 359.
2. *Anglo American Ltd/Kumba Resources Ltd* 46/LM/Jun02.
3. *Boeing/McDonald Douglas*, case IV/M.877, s, July 30, 1997.
4. *British Airways v The Commission* (2003) ECR II – 5917.
5. *Brown Shoe Co v United States* 370 US 294 (1962).
6. *Bulner SA (Pty) Ltd v Distillers Corporation SA Ltd* 94/FN/Nov00.
7. *Competition Commission v Patensie Sitrus Beherend Beperk* 37/CR/June01.
8. *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01.
9. *Decca Navigator Systems v Commission*, OJ No. L 43 of 15 February 1989.
10. *General Electric/Honeywell*, COMP/M.2220, July 3, 2001.
11. *Hilti AG v Commission* (1991) ECR II – 1439.
12. *Hoffman La Roche v Commission* (1979) ECR 461.
13. *Hutchinson 3G (UK) Ltd v Office of Communications* (2005) CAT 39.

14. *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* Case 170/82 (1984) ECR 2999.
15. *Klaus Höfner and Frits Elser v Macrotron GmbH* (1991) ECR I – 1979.
16. *Minister of Economic Development v Competition Tribunal* 110/CAC/Jun11.
17. *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd* 80/CR/Sep06.
18. *Nationwide Poles (Pty) Ltd v Sasol (Oil) (Pty) Ltd* 72/CR/Dec03.
19. *Nederlandsche Banden Industrie Michelin v Commission* fn.430, OJ 2002 L143/1.
20. *Patensie Sitrus Beherend Beperk v Competition Commission* 16/CAC/Apr02 22-25.
21. *SIV and Others v Commission* (1991) ECR II – 1403.
22. *South African Raisins (Pty) Ltd v SAD Holdings Ltd* 04/IR/Oct/1995.
23. *Sun Dun Incorporated v Coca-Cola Corporation* 704, F. Supp, 381 (D. Md. 1990).
24. *United Brands v The Commission*(1978) ECR 207.
25. *United States v Aluminum Co. of America* 148 F.2d 214 (1945).
26. *United States v El du Pont de Nemours Co* 351 U.S.0 (1956).
27. *United States v Grinell Corp* 384 U.S. 563 (1966).
28. *United States v Microsoft Corporation* (D.C Cir. 2001) 253 F.3d.
29. *United States v Oracle Corporation* 331 F Supp 2d 1098 (2004).
30. *United States v United Shoe Machinery Corp* 110 F.Supp 295 (D.Mass 1953).
31. *Virgin/British Airways*, case IV/34.780, July 14, 1994.

Secondary Sources

Textbooks

1. Van Bael & Bellis(2010), *Competition Law of the European Community*, Kluwer Law International.
2. Van den Bergh & Camesasca (2001), *European Competition Law and Economics*, Intersentia – Hart.
3. Bishop & Walker (2002), *Economics of E.C. Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell limited.
4. Bork (1978), *The Antitrust Paradox*, Simon & Schuster.
5. Elhauge & Geradin (2007), *Global Antitrust Law and Economics*, Foundation Press.
6. A Ezrachi (2012), *EU Competition Law. An Analytical Guide to Learning Cases*, Hart Publishing.
7. E Gellhorn & W E Kovacic (1994), *Antitrust Law and Economics in a Nutshell* (3rd Ed), West Group.

8. D J Gifford & L J Rasind (1983), *Federal Antitrust Law – Cases and Materials*.
9. R Greaves (2012), *Dominance & Monopolization Volume II*, Ashgate Publishing Limited.
10. K N Hylton (2003), *Economic Theory and Common Law Evolution*, Cambridge University Press.
11. C Jones & M van der Woude (2009), *EC Competition Law Handbook 2008/2009 Edition*, Sweet & Maxwell Limited.
12. Kaysen & Turner (1959), *Antitrust Policy*, Oxford University Press.
13. M Lorenz (2013), *An Introduction to EU Competition Law*, Cambridge University Press.
14. P Marsden (2006), *Handbook of Research in Trans-Atlantic Antitrust*, Edward Elgar Publishing Limited.
15. P A McNutt (2005), *Law, Economics & Antitrust. Towards a New Perspective*, Edward Elgar Publishing Limited.
16. G. Monti (2008), *EC Competition Law*, Cambridge University Press.
17. J Neethling (2008), *Unlawful Competition (2nd Ed)*, Lexis Nexis Butterworths.
18. Neuhoff, Govender, Versfeld & Dingley, *A Practical Guide to the South African Competition Act*, Lexis Nexis Butterworths
19. Sullivan (1977), *The Law of Antitrust*, West Publishing.
20. Sutherland and Kemp (2013), *Competition Law of South Africa Service Issue 18*, Lexis Nexis Butterworths.

Journals

1. D.H. Assaf & B.A. Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", (2002-2003) *Antitrust Law Journal*, 513-591.
2. Clark, "Towards a Concept of Workable Competition" (1940) *American Economic Review*, 827.
3. Crane, "Antitrust Modesty" (2006-2007) *Michigan Law Review*, 1193.
4. Demsetz, "Industry Structure, Market Rivalry and Public Policy" (1973), *Journal of Law and Economics*, 1.
5. F. Dethmers & N. Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law" (2006) *European Law Review* 10, 537 – 549.
6. Fox, "Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" (2000) *Harvard Comparative Law Review*, 583.
7. Fox & Sullivan, "Antitrust – Retrospective and Prospective: where are we Coming From? Where are we Going" (1987) *New York University Law Review*, 936, pg. 957.
8. A Jones, "The Boundaries of an Undertaking in EU Competition Law" (2012) 8(2) *European Competition Journal* (301-331).

9. W M Landes & R A Posner, "Market Power in Antitrust Cases" (1994) *The Harvard Law Review* 937, 939.
10. G Monti, "The Concept of Dominance" (2006) *European Competition Journal* 31.
11. Stigler, "The Organization of Industry" (1968) University of Chicago Press, pg.67.

Online Sources

1. Department of Trade and Industry, W Dobson, *A Guide to the Microeconomic Reform Strategy* May 2002, available at http://www.gov.za/sites/www.gov.za/files/mic_econ_ref_0.pdf, accessed on 14th of October 2015.
2. Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ No. C 165 of 11 July 2002, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>, accessed on 30th of September 2015.
3. Competition Commission, *Ten years of enforcement by the South African competition authorities, Unleashing Rivalry 2009*, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf>, accessed on 15th of October 2015.
4. Competition Commission, *15 years of enforcement: Peoples Account*, available at <http://compcom.co.za.www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf>, accessed on 15th of October 2015.
5. DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>, accessed on 26th of June 2015.
6. European Commission, *Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law*, 1997 O.J. (C372) 5, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209(01)), accessed on 7th of August 2015.
7. Geradin, Hofer, Louis, Petit & Walker, *The Concept of Dominance in EC Competition Law Research Paper on the Modernization of Article 82 EC*, Global Competition Law Centre July 2005, available at <http://orbi.ulg.ac.be/bitstream/2268/21597/1/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf>, accessed on 26th of June 2015.
8. Roberts, *Effects-based tests for abuse of dominance in practice: the case of South Africa* working paper 4/2012, available at <http://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/52d8eec7e4b0de281e23a8e4/1389948615191/EFFECTS-BASED+TESTS+FOR+ABUSE+OF+DOMINANCE+IN+PRACTICE+THE+CASE+OF+SOUTH+AFRICA.pdf>, accessed on 15th of October 2015.
9. G Sandicchi *American and European Perspectives on Monopolization and Abuse of a Dominant Position: A Comparative Law and Economic Analysis of Single Firm Conduct 2005*, available at <http://people.stern.nyu.edu/lwhite/al&e.spring2005/TermPapers/sandicchi.pdf>, accessed on 26th of June 2015.

10. UK Office of Fair Trading, *Competition Law Guideline: Assessment of Market Power 2004* OFT 415, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284400/oft415.pdf , accessed on 26th of June 2015.