UNIVERSITY OF
Southampton
School of Law

Mauritian Competition Law
Optimising the 'Object or Effect' test of the Unilateral Conduct Rules under the Competition Act 2007

By Siven Pillay Rungien

Supervisor – Dr Hedvig Schmidt

Thesis for the Degree of Doctor of Philosophy – August 2017

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF BUSINESS AND LAW

LAW

DOCTOR OF PHILOSOPHY

MAURITIAN COMPETITION LAW: OPTIMISING THE 'OBJECT OR EFFECT' TEST OF THE UNILATERAL CONDUCT RULES UNDER THE COMPETITION ACT 2007

by Siven Pillay Rungien

This Thesis concerns the unilateral conduct rules of the Competition Act 2007 of Mauritius. The Thesis compares the 2007 Act against two other models of competition – South Africa and the European Union. The analysis demonstrates that the Mauritian unilateral conduct rules represent a sophisticated qualified-effects-based approach to assessing abuse of dominance, however there are a number of issues regarding its implementation. In assessing these issues, this Thesis contributes to knowledge in this area in the following ways. First, it identifies the key role of competition culture in achieving long-term social welfare and the concomitant goals of the Mauritian unilateral conduct rules. Second, it demonstrates how a flexible approach to those rules, taking into account both 'object' and 'effect', will not only improve the legitimacy and transparency of legislation but also ensure that the Competition Act 2007 contributes to both the ongoing economic development of Mauritius and positive social change.

Contents

Table of Contents

ABSTRACT i

Contents iii

Table of Cases vii

Table of Legislation xxi

Declaration of Authorship xxv

Acknowledgements xxvii

1. Introduction 1
1.1. Introduction 1
1.2. The Problem 10
1.3. Research Questions 12
1.4. Research Method, Approach and Thesis Structure 13
1.5. Limitations 14
1.6. Conclusion 14

2. The Purpose of Mauritian Competition Law 17
2.1. Introduction 17
2.2. Theoretical Underpinnings of Competition Law 18
2.2.1. Perfect Competition and Absolute Monopoly 19
2.2.2. Allocative, Product and Dynamic Efficiency 20
2.3. CAM's Welfare Objective 24
2.3.1. Social Welfare 24
2.3.2. Consumer Welfare 25
2.4. Non-Welfare Goals 28
2.4.1. Protecting the Competitive Process 28
2.4.2. Protecting Competitors 30
2.4.3. Economic Freedom 32
2.4.4. Fairness 40
2.4.5. Market Liberalisation 43
2.5. Conclusion 44

3. Testing for Abuse under section 46 CAM 47
3.1. Introduction 47
3.2. Some General Thoughts Regarding Tests for Abuse 47
3.3. Rejecting a Single Approach to Exclusionary Abuse under CAM 52
3.3.1. *Per se* rules for Section 46 53
3.3.1.1. Essential Facilities as a possible *Per se Rule* under section 46 CAM 56
3.3.2. The Test of Intent/Object 58
3.3.2.1. Object (or intent?) under section 46 CAM 66
3.3.2.2. Development of an object/intent approach under SACA unilateral conduct rules 75
3.3.3. The Test of Effect 77
3.3.4. The Case for a Combined Test for Exclusionary Abuse under section 46 CAM – *Intent* or Effect 79

3.3.4.1. The Case for A Disjunctive Tiered Approach under Section 46 CAM...80
3.4. The Proposed Two-Tier Approach for Exclusionary Abuse under CAM....84
3.4.1. Intent: the First-Tier for Abuse....87
3.4.1.1. The Naked Intent/Exclusion Test....88
3.4.1.1.1. Article 102 TFEU examples of Naked Restrictions – *Intel* and *AstraZeneca*....89
3.4.1.2. No Economic Sense Test....91
3.4.2. Effect as the Second-Tier for Abuse....92
3.4.2.1. Consumer Harm – the Consumer Choice Standard....93
3.4.2.1.1. Defining the Consumer Choice Standard....94
3.4.2.2. Implementing the Consumer Choice Standard under CAM....97
3.4.2.2.1. Confirming CAM's Consumer Choice Standard....101
3.4.2.3. Consumer Choice under Article 102 TFEU....103
3.4.2.4. Consumer Choice under SACA....106
3.4.2.5. An Alternative Effect Test - As Efficient Competitor Test....107
3.4.2.6. Scoping the reach of section 46 CAM....109
3.4.2.6.1. The nature and scope of effect under section 46(3)(d)....110
3.5. Conclusion....113

4. Dominance under Section 46 CAM....115
4.1. Introduction....115
4.2. Dominance and the Monopoly Situation - Dominance is the 'real' first test under CAM....116
4.2.1. The Starting Point: Section 46(3) CAM....118
4.2.2. Adopting Consistent Dominance 'Terminology'....119
4.2.3. Dominance is required for Abuse....121
4.3. Indicators of Dominance under CAM....124
4.3.1. Market Shares and Barriers to Entry....125
4.3.2. Constraints offered by Competitors....128
4.3.3. Consumer Power, Inertia and Information Asymmetry....130
4.3.4. Limited Demand and Geographical Location....134
4.4. CAM, Special Responsibility & Competition on the Merits....135
4.4.1. Special Responsibility & Competition on the Merits under Article 102 TFEU and SACA....139
4.5. Conclusion....146

5. The Public-Interest Test under CAM....149
5.1. Introduction....149
5.2. The Rationale for Public-Interest Tests....149
5.3. The Public-Interest Test under CAM....153
5.3.1. The CCM's approach to Public-Interest....156
5.3.2. Burden of Proof....157
5.3.3. Pass-on requirement....159
5.3.4. CAM Examples of Public-Interest Considerations....160
5.4. Public-Interest considerations under Article 101(3) TFEU....165
5.5. Public-Interest considerations under Article 102 TFEU....167
5.6. Public-Interest considerations under SACA....170
5.7. Conclusion....176

6. CAM's Institutional Structure, Enforcement and Remedies....179
6.1. Introduction....179
6.2. Competition Institutions....182
6.3. The Institutional Structure under CAM....184
6.4. Constitutional Issues in the CAM Procedure....187
6.5. The SACA Institutional Structure....189

6.6. Remedies for breaches of Section 46 CAM 194
6.6.1. Structural Remedies under CAM 197
6.6.2. Conduct and Behavioural Remedies under CAM 198
6.6.3. Examples of CCM Remedies 200
6.7. Financial penalties 202
6.7.1. Fines under Article 102 TFEU and SACA 206
6.8. Commitments and self-regulation 208
6.9. Conclusion 213

7. Conclusion: Reforming the Mauritian Unilateral Conduct Rules 215
7.1. Introduction 215
7.2. Confirming the Objectives and Goals of CAM 215
7.3. A Tiered-Approach to 'Object or Effect' 216
7.4. Dominance as the 'Monopoly Situation' under CAM 217
7.5. Redrafting section 50 and its Public-Interest Factors 218
7.6. Two Key Institutional Reforms 218
7.7. Future research areas 219
7.8. Conclusion 220

Appendix A: Competition Act 2007 223

Appendix B: Competition Act 2003 235

Appendix C: South African Competition Act No. 89 1999 245

Appendix D: Articles 101 and 102 Treaty on the Functioning of the European Union 253

List of Abbreviations 255

Bibliography 257

Table of Cases

<u>Australia</u>

High Court

Boral Besser Masonry Ltd v ACCC [2003] 215 CLR 374

<u>European Union</u>

Court of Justice

AKZO v Commission, C-62/86, ECLI:EU:C:1991:286

Asnef-Equifax v Asociaciónade Usuarios de Servicios Bancarios (Ausbanc) C-238/05, ECLI:EU:C:2006:734

AstraZeneca v Commission, C-457/10 P, ECLI:EU:C:2012:770

Beef Industry Development and Barry Brothers, C-209/07, ECLI:EU:C:2008:643

British Airways v Commission, C-95/04 P, ECLI:EU:C:2007:166

Cartes Bancaires v Commission, C-67/13 P, ECLI:EU:C:2014:2204

CRAM v Commission, Joined Cases 29/83 and 30/83; ECLI:EU:C:1984:130

Deutsche Telekom v Commission, C-280/08 P, ECLI:EU:C:2010:603

Dole Food and Dole Fresh Fruit Europe v Commission, C-286/13 P, ECLI:EU:C:2015:184

Expedia, C-226/11, ECLI:EU:C:2012:795

France Télécom v Commission, C-202/07 P, ECLI:EU:C:2009:214

General Motors, C-551/03 P, ECLI:EU:C:2006:229

GlaxoSmithKline, C-501/06 P, ECLI:EU:C:2009:610

Hilti v Commission, C-53/92 P, ECLI:EU:C:1994:77

Hoffmann-La Roche v Commission, Case 85/76, ECLI:EU:C:1979:36

Irish Sugar v Commission, C-497/99 P, ECLI:EU:C:2001:393

Maxima Latvija, C-345/14, ECLI:EU:C:2015:784

Metro v Commission (No.2), Case 75/84, [1986] ECR 3021

Michelin v Commission, C-322/81, ECLI:EU:C:1983:313

Oscar Bronner, C-7/97, ECLI:EU:1998:569

Post Danmark, C-209/10, ECLI:EU:C:2012:172

Post Danmark, C-23/14, ECLI:EU:2015:651

Société Technique Minière (L.T.M) v Maschinenbau Ulm GmbH (M.B.U), Case 56/65, ECLI:EU:C:1966:38

Syfait and Others, C-53/03, ECLI:EU:C:2005:333

TeliaSonera Sverige, C-52/09, ECLI:EU:C:2011:83

Tetra Pak v Commission, C-333/94 P, ECLI:EU:C:1996:436

Tomra and Others v Commission, C-549/10 P, ECLI:EU:C:2012:221

United Brands v Commission, Case 27/76, ECLI:EU:C:1978:22

General Court

AstraZeneca v Commission, T-321/05, ECLI:EU:T:2010:266

British Airways v Commission, T-219/99, ECLI:EU:T:2003:343

Cartes Bancaires v Commission, T-491/07 RENV, ECLI:EU:T:2016:379

Deutsche Telekom v Commission, T-271/03, ECLI:EU:T:2008:101

Dole Food and Dole Germany v Commission, T-588/08, ECLI:EU:T:2013:130

France Télécom v Commission, T-340/03, ECLI:EU:T:2007:22

General Motors Nederland and Opel Nederland v Commission, T-368/00, ECLI:EU:T:2003:275

Hilti v Commission, Case T-30/89, ECLI:EU:T:1991:70

Intel v Commission, Case T-286/09, ECLI:EU:T:2014:547

Irish Sugar v Commission, T-228/97, ECLI:EU:T:1999:246

ITT Promedia v Commission, T-111/96, ECLI:EU:T:1998:183

Michelin v Commission, T-203/01, ECLI:EU:T:2003:250

Microsoft v Commission, T-201/04, ECLI:EU:T:2007:289

Tetra Pak v Commission, T-51/89, ECLI:EU:T:1990:41

Tetra Pak v Commission, T-83/91, ECLI:EU:T:1994:246

Tomra Systems and Others v Commission, T-155/06, ECLI:EU:T:2010:370

European Commission – Decisions

AstraZeneca (Decision COMP/AA.37.507/F3)

Beecham/Parke, Davis [1979] OJ L70/11

Cartes Bancaires (Decision COMP/D1/38606)

Chiquita (Decision IV/26699) [1977] OJ L 95

Coca-Cola (Decision COMP/A.39.116/B2)

De Laval-Stork [1977] OJ L 215/11

Intel (Decision COMP/37.990)

Kabel und Metallwerke Neumeyer AG and Establissments Luchaire SA Agreement [1975] OJ L222/34

Microsoft (COMP/C-3/37.792)

P & O Stena Line [1999] OJ L163/61

Prokent-Tomra (Decision COMP/E-1/38.113)

Wanadoo Interactive (Decision COMP/38.233)

Wanadoo Espana vs Telefonica (Decision COMP/38.784)

Virgin/British Airways (Decision IV/D-2/34.780) [2000] OJ L 30/1

Opinions

AstraZeneca C-457/10 P ECLI:EU:C:2012:293

Cartes Bancaires C-67/13 P ECLI:EU:C:2014:1958

Coty, C-230/16, ECLI:EU:C:2017:603

GlaxoSmithKline C-468/06 ECLI:EU:C:2008:180

Intel C-413/14/ P ECLI:EU:C:2016:788

Post Danmark, C-23/14, ECLI:EU:C:2015:343

Mauritius

Competition Commission of Mauritius - Decisions

Decision of the Commissioners of the Competition Commission of Mauritius *Alleged Monopoly Abuse in the Supply of Secondary School Books in Mauritius* CCM/DS/0011 (17 April 2014)

Decision of the Commissioners of the Competition Commission of Mauritius *IBL Consumer Goods' Sales Contract with Retail Stores* CCM/HG/INV 001 (9 September 2010)

Decision of the Commissioners of the Competition Commission of Mauritius *Image-based clearing solutions* CCM/DS/0015 (7 January 2015)

Decision of the Commissioners of the Competition Commission of Mauritius *Importation of Slaughter Cattle in Mauritius* Commission/HG/003(21 December 2011)

Decision of the Commissioners of the Competition Commission of Mauritius *Investigation into the tying of broadband Internet Access and Pay-TV* Commission/DS/0007 (26 October 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *Investigation on the proposed merger of the insurance businesses of Swan and Rogers Group* Commission/DS/013 (23 February 2013)

Decision of the Commissioners of the Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* Commission/DS/0012 (26 October 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *Merchant Discount Rate of Cim Finance Ltd* CCMDS/0021 (20 April 2017)

Decision of the Commissioners of the Competition Commission of Mauritius *Merger Between Event Strategy Ltd and LC Events Ltd* CCM/DS/002 (4 July 2011)

Decision of the Commissioners of the Competition Commission of Mauritius *Possible Collusion in the Market for Secondary School Books* CCM/DS/002 (9 May 2011)

Decision of the Commissioners of the Competition Commission of Mauritius *Potential Collusive Arrangement in the Beer Market* CCM/DS/0014 (22 August 2014)

Decision of the Commissioners of the Competition Commission of Mauritius *Proposed Merger between Holcim Ltd and Lafarge S.A.* CCM/DS/0016

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to ABC Banking Corporation* Commission/HG/004/01 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to AfrAsia Bank Ltd* Commission/HG/004/02 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Barclays Bank Plc* Commission/HG/004/05 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Bank of Baroda* Commission/HG/004/06 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Banques des Mascareignes Ltee* Commission/HG/004/04 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Habib Bank* Commission/HG/004/08 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to HSBC* Commission/HG/004/09 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Mauritius Commercial Bank* Commission/HG/004/10 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Mauritius Post and Cooperative Bank* Commission/HG/004/11 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to State Bank of Mauritius Ltd* Commission/HG/004/13 (5 November 2012)

Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Automatic Electronic Ignition Keys and related synchronizing services* CCM/DS/0010 (3 January 2014)

Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Phoenix Beverages* CCM/DS/0008 (30 April 2013)

Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Quality Beverages* CCM/DS/0012 (23 April 2014)

Decision of the Commissioners of the Competition Commission of Mauritius *Travel Agents' Service Fee* CCM/DS/001 (13 October 2010)

Competition Commission of Mauritius – Investigations

Competition Commission of Mauritius *Alleged Monopoly Abuse in the Supply of Secondary School Books in Mauritius* INV016 (20 January 2014)

Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010)

Competition Commission of Mauritius *Importation of secondary school textbooks in Mauritius* CCM/INV/006 (21 March 2011)

Competition Commission of Mauritius *Importation of slaughter cattle in Mauritius* INV003 (14 September 2011)

Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013)

Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014)

Competition Commission of Mauritius *Investigation on the proposed merger of the insurance business of Swan Group and Rogers Group* (13 February 2012)

Competition Commission of Mauritius *Proposed Merger between Holcim Ltd and Lafarge S.A.* INV028 (13 May 2015)

Competition Commission of Mauritius *Review of completed merger of Event Strategy Ltd and LC Events Co. Ltd* (25 February 2011)

Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012)

Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010)

Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012)

Competition Commission of Mauritius – Undertakings

Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014)

Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Phoenix Beverages* CCM/INV/019 (19 March 2013)

Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* INV012 (11 September 2012)

Competition Commission of Mauritius *Merchant Discount by Cim Finance Ltd* INV035 (13 April 2017)

Market Studies

Competition Commission of Mauritius 'Addendum to Executive's Director's Report of the study of the market for cement in Mauritius' (April 2011)

Competition Commission of Mauritius 'Advice of the Commission to the Minister of Business, Enterprise, Commerce and Consumer Protection: Study of the cement market' CCM/AS/001/MS001 (2011)

Competition Commission of Mauritius 'Cement Market Study – Preliminary Report' MS 002 (4 September 2012)

Competition Commission of Mauritius 'Evaluation of CCM case: IBL Consumer Goods Sales Contracts with Retail Stores' (18 November 2011)

Competition Commission of Mauritius 'New Cement Market Study' CCM/MS/002 (15 October 2012)

Competition Commission of Mauritius 'Study of the Market for Cement in Mauritius – Preliminary Report' CCM/MS/001 (22 October 2010)

Competition Commission of Mauritius 'Study of the Market for Cement in Mauritius' CCM/MS/001 (7 April 2011)

Competition Commission of Mauritius, 'The Competition Commission Launches a Market Study into the Pharmaceutical Sector in Mauritius' CCM/MS/004 (12 November 2013)

South Africa

Constitutional Court

Competition Commission of South Africa v Senwes Ltd (CCT 61/11) [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (12 April 2012)

Supreme Court of Appeal

American Natural Soda Ash Corporation and Another v Competition Commission of South Africa (554/2003) [2005] ZASCA 42 (13 May 2005)

Competition Appeal Court

American Natural Soda Ash Corp and Another v Botswana Ash (Pty) Ltd and Others (64CAC/AUG/06) [2007] ZACAC 1 (5 January 2007)

Clover Industries Limited and Another v Competition Commission and Others; Ladismith Cheese (Pty) Ltd v Competition Commission of South Africa and Others (81/CAC/Jul08) [2008] ZACAC 3 (12 November 2008)

Competition Commission v Yara South Africa (Pty) Ltd and Others (93/CAC/Mar10, 94/CAC/Mar10) [2012] ZACAC 5 (13 September 2012)

Competition Commission of South Africa v Computicket (Pty) Ltd (118/CAC/APR12) [2013] ZACAC 2 (20 September 2013)

Competition Commission of South Africa v South African Breweries Ltd and Others (114/CAC/Nov11) [2012] ZACAC 8 (14 November 2012)

Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission (33/CAC/Sep03) [2003] ZACAC 9; [2004] 1 CPLR 25 (CAC) (3 December 2003)

GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. and Others (62/CAC/APR06) [2006] ZACAC 6 (6 December 2006)

Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002)

National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Pty) Ltd and Others (29/CAC/Jul03) [2005] ZACAC 2; [2005] 1 CPLR 102 (CAC) (18 February 2005)

Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

Omnia Fertilizer Ltd v The Competition Commission in re: The Copetition Commisson of Soouth Africa v Sasol Chemical Industries (Pty) Ltd and Others (77/CAC/Jul08, 31/CR/MAY05, 45/CR/MAY06) [2009] ZACAC 5 (16 October 2009)

Patensie Sitrus Beherend v Competition Commission and Others (16/CAC/Apr02) [2003] ZACAC 4; [2003] 2 CPLR 247 (CAC) (7 July 2003)

Phutuma Networks (Pty) Ltd v Telkom SA (Pty) Ltd (108/CAC/MAR11) [2012] ZACAC 9 (20 November 2012)

SAPPI Fine Paper (Pty) Ltd v Competition Commission and Another (23/CAC/Sep02) [2003] ZACAC 5; [2003] 2 CPLR 272 (CAC) (25 September 2003)

Sasol Chemical Industries Limited v Competition Commission (131/CAC/Jun14) [2015] ZACAC 4; 2015 (5) SA 471 (CAC) (17 June 2015)

Sasol Oil (Pty) Ltd v Nationwide Poles CC (49/CAC/Apr05) [2005] ZACAC 5 (13 December 2005)

Schering (Pty) Ltd and Others v New United Pharmaceutical Distributors (Pty) Ltd. [formerly Mainstreet 2 (Pty) Ltd] and Others [2001] ZACAC 5; [2001] ZACAC 5 (30 November 2001)

Senwes Ltd v Competition Commission of South Africa (87/CAC/FEB09) [2009] ZACAC 4 (13 November 2009)

Senwes Ltd v Competition Commission of South Africa (87/CAC/FEB/09) [2010] ZACAC 3 (3 February 2010)

South African Airways (Pty) Ltd v Comair Ltd and Another (92/CAC/MAR10) [2011] ZACAC 3; 2012 (1) SA 20 (CAC) (11 April 2011)

Trudon (Pty) Ltd v Directory Solutions CC and Another (96/CAC/Apr10) [2010] ZACAC 1 (1 September 2010)

Yara South Africa (Pty) Ltd v Competition Commission and Others in re: Competition Commission v Sasol Chemical Industries Ltd and Others; Omnia Fertilizers v Competition Commission [2011] ZACAC 9; [2011] ZACAC 2 (14 March 2011)

York Timbers Ltd v SA Forestry Ltd (09/CAC/May01) [2001] ZACAC 3; [2001-2002] CPLR 94 (CAC) (18 September 2001)

Woodlands Dairy (Pty) Ltd and Another v Competition Commission (88/CAC/Mar09) [2009] ZACAC 3 (26 September 2009)

Competition Tribunal

AEC Electronics (Pty) Ltd v Department of Minerals and Energy (48/CR/Jun09) [2010] ZACT 12 (8 February 2010)

Astral Operations Ltd and Others v Competition Commission, In re: Competition Commission v Astral Operations Ltd and Others (74/CR/Jun08) [2011] ZACT 83 (20 October 2011)

Autobi (Pty) Ltd v Transunion Auto Information Solutions (Pty) Ltd (59/CR/May12) [2013] ZACT 7 (11 February 2013)

BMW South Africa (Pty) Ltd t/a BMW Motorrad v Fourier Holdings (Pty) Ltd t/a Bryanston Motocycles (97/CR/Sep08) [2011] ZACT 3 (1 February 2011)

Competition Commission v BMW South Africa (Pty) Ltd t/a BMW Motorrad (97/CR/Sep08) [2010] ZACT 21 (17 March 2010)

Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others [2001] ZACT 15 (23 April 2001)

Competition Commission v Media 24 (pty) Ltd (92/CR/Oct11) [2013] ZACT 19 (28 March 2013)

Competition Commission v Senwes Ltd (110/CR/Dec06) [2013] ZACT 34 (15 May 2013)

Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd (05/CR/Feb05) [2009] ZACT 46 (25 June 2009)

Competition Commission and Another v South African Breweries and Others (134/CR/DEC07) [2010] ZACT 45 (9 July 2010)

Competition Commission South Africa v Foskor (Pty) Ltd (43/CR/Aug10) [2011] ZACT 10 (28 February 2011)

Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd and Others (45/CR/May06,31/CR/May05) [2009] ZACT 25 (17 April 2009)

Competition Commission South Africa v Sasol Chemical Industries Ltd; Competition Commission South Africa v Sasol Chemical Industries Ltd and Others (31/CR/May05) [2009] ZACT 33 (20 May 2009)

Competition Commission South Africa v Sasol Chemical Industries Ltd, In re: Competition Commission South Africa v Sasol Chemical Industries Ltd and Others (45/CR/May06, 31/CR/May05) [2010] ZACT 48 (20 July 2010)

Competition Commission v Telkom SA Ltd (11/CR/Feb04) [2012] (7 August 2012)

Competition Commission v Telkom SA Ltd (11/CR/Febr04) [2011] ZACT 2 (17 January 2011)

Competition Commission v Telkom SA Ltd (11/CR/Febr04) [2011] ZACT 39 (23 June 2011)

Directory Solutions CC v Trudon (Pty) Ltd and Another (77/IR/Nov09) [2010] ZACT 27 (8 April 2010)

Competition Commission v Yara South Africa (Pty) Ltd and Another, In re Competition Commission v Sasol Chemical Industries and Others (31/CR/May05) [2010] ZACT 15 (24 February 2010)

Computicket (Pty) Ltd v Competition Commission (20/CR/Apr10) [2012] ZACT 20 (22 March 2012)

Gogga Tracking Solutions (Pty) Ltd v Vodacom Service Provider (Pty) Ltd (09/IR/Mar10) [2010] ZACT 38 (7 June 2010)

*Harmony Gold Mining Company Ltd & Another and Mittal Steel South Africa Ltd and Another (*13/CR/FEB04) [2007] ZACT 21 (27 March 2007)

Independent Newspapers Pty Ltd and Others v El page; In Re: El Page v East Cape Property Guide and Another (017913) [2014] ZACT 40 (31 March 2014)

Invensys PLC and Others v Protea Automaton Solutions (Pty) Limited, In Re: Protea Automaton Solutions (Pty) Limited v Invensys PLC and Others (019315) [2015] ZACT 19 (12 March 2015)

Linpac Plastics (SA) Pty Ltd and Another v Du Plessis and Another, In Re: Linpac Plastics Ltd and Others v Du Plessis and Others (019513) [2014] ZACT 64 (6 November 2014)

Media24 Ltd and Another v Competition Commission of South Africa and Others (18/X/APR10) [2010] ZACT 44 (8 July 2010)

Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd (80/CR/Sept06) [2010] ZACT 13 (17 February 2010)

New Reclamation Group (Pty) Ltd v Jacobs (21/CR/Mar11) [2011] ZACT 66 (5 September 2011)

Normandien Farms (Pty) Ltd v Komatiland Forests (Pty) Ltd (018507) [2014] ZACT 31 (4 June 2014)

Sasol Chemical Industries Ltd v Omnia (Pty) Ltd; In Re: Omnia (Pty) Ltd v Sasol Chemical Industries Ltd (38/CR/Apr2 (016907), 016907) [2013] ZACT 115 (18 December 2013)

South African Breweries and Others v Competition Commission (134/CR/DEC07) [2011] ZACT 73 (16 September 2011)

Telkom SA Ltd v Competition Commission South Africa (55/CR/Jul09, 73/CR/Oct09, 78/CR/Nov09) [2011] ZACT 4 (4 February 2011)

Woodlands Dairy (Pty) Ltd and Another v Competition Commission; Competition Commission v Clover Industries Limited and Others (103/CR/Dec06) [2009] ZACT 18 (17 March 2009)

Notices

Notice 710/2011, 3 October 2011

Notice 843/2012, 19 October 2012

Notice 243/2016, 11 March 2016

United Kingdom

Competition Tribunal

NAPP Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading, 10001/1/1/01

United States

Supreme Court

Northern Pacific Railway Co. v United States 316 U.S. 346 (1942)

United Nations

Permanent Court of Arbitration

Republic of Mauritius v United Kingdom of Great Britain and Northern Ireland (In the Matter of the Chagos Marine Protected Area Arbitration) (18 March 2015)

Table of Legislation

European Union

Treaty on the Functioning of the European Union

European Parliament, *Selection of Texts concerning Industrial Matters of the Community for 1950 – 1982* (Luxembourg, Office for Official Publications of the European Communities, 1982)

Guidelines, Notices and Recommendations

Commission, 'Completing the Internal Market' COM(85)310' (1985)

Commission 'DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses' (D2005)

Commission 'European Competition Policy - Delivering Better Markets and Better Choices' (2005)

Commission 'Notice on the definition of the relevant market for the purposes of Community Competition Law '[1997] OJ C372/5 (Commission Notice on Market Definition')

Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97 ('Guidelines on Article 101(3)')

Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7 ('Guidance on Article 102')

Commission 'What is an SME?' (2012)

Commission, 'White Paper: Impact and effectiveness of the Single Market' COM(96)520 (1996)

Economic Advisory Group on Competition Policy 'An economic approach to Article 82' (July 2005)

Mauritius

Constitution of the Republic of Mauritius

Competition Act 2007, as amended 2013

Competition Act 2003

Competition Commission of Mauritius Rules of Procedure 2009

Competition Commission (Amendment) Rules of Procedure 2011

The Competition Bill (No VI of 2003) Debate No. 3 of 01.04.2003

The Competition Bill (No. XXV of 2007) Debate No. 33 of 20.11.2007

Guidelines, Notices and Recommendations

Competition Commission of Mauritius 'Guidelines: Collusive Agreements CCM 3' (November 2009)

Competition Commission of Mauritius 'Guidelines: General provisions CCM 7' (November 2009)

Competition Commission of Mauritius 'Guidelines: Market definition and the calculation of market shares CCM 2' (November 2009)

Competition Commission of Mauritius 'Guidelines: Mergers CCM 5' (November 2009)

Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009)

Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009)

Competition Commission of Mauritius 'Memorandum of Understanding between the Competition Commission of Mauritius and Ministry of Renewable Energies and Utilities' (2010)

Competition Commission of Mauritius 'Rules of Procedure CCM 1' (2009)

Competition Commission of Mauritius 'Prioritisation principles' (2010)

South Africa

Competition Act No. 89 1999

United Nations

UNCTAD Model Law on Competition

United Nations Conference on Trade and Development 'Capacity building on competition law and policy for development' (2008)

United Nations Conference on Trade and Development, 'Draft report of the intergovernmental group of experts on competition law and policy on its third session' (July 2001) TD/B/COM.2/CLP/L.6

United Nations Conference on Trade and Development 'The United Nations Set of principles and rules on competition TD/RBP/CONF/10/Rev.2' (2000)

United Nations Conference on Trade and Development 'Report of the Forth United Nations Conference to review all aspects of the Set of multilaterally agreed equitable principles and rules for the control of restrictive business practices TD/RBP/CONF.5/16 including Corr.1' (2000)

United Nations Conference on Trade and Development, 'UNCTAD Handbook of Statistics 2010' (2010)

United Nations Conference on Trade and Development, 'UNCTAD Model Law on Competition TD/RBP/CONF.7/8' (2010)

United Nations Conference on Trade and Development 'Model Law on Competition (2010) –Chapter I' (2010)

United Nations Conference on Trade and Development 'UNCTAD Model Law on Competition: Revised Chapter II TD/RBP/CONF7/L.2' (2011)

United Nations Conference on Trade and Development 'UNCTAD Model Law on Competition: Revised Chapter IX TD/B/C.I/CLP/L.2' (2011)

United Nations Conference on Trade and Development 'UNCTAD Model Law on Competition: Revised Chapter X TD/B/C.I/CLP/L.3' (2011)

United Nations Conference on Trade and Development, 'UNCTAD Model Law on Competition: Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation' (2010)

Declaration of Authorship

I, Siven Pillay Rungien,

declare that the thesis and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research.

'Mauritian Competition Law: Optimising the 'Object or Effect' test of the Unilateral Conduct Rules under the Competition Act 2007'

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. None of this work has been published before submission

Signed: S P Rungien

Date: 31 July 2017

Acknowledgements

First I would like to thank the University of Southampton. The University and the School of Law has been my place of legal academic study from undergraduate to doctoral candidate. It also kindly funded the scholarship which enabled this research to be undertaken.

The greatest of thanks goes to my supervisor, Dr Hedvig Schmidt. She saw the potential in me to be successful in my doctoral studies and has shown patience, kindness, support, encouragement and even more patience as I sought to commit my thinking to paper. It has been an incredible pleasure to work with her.

I would like to extend my thanks to other members and colleagues at the School of Law. I would like to thank Professor Renato Nazzini and Dr. Andrea Lista who provided further supervision and advisory support during parts of this Thesis. Thanks should also be given to Professor Hilton Staniland for his advice following the upgrade process. I would also like to thank Dr Emma Laurie, Dr John Coggan, and Dr Oren Ben-Dor for their continuous words of encouragement. This can also be extended to my fellow PhD colleagues at the University of Southampton, in particular Dr. Valerio Torti and Dr. Harry East, during our time together.

In October 2014, the School of Law funded a trip to the first conference on Competition Law in Developing Countries, organized by Concurrences and hosted at New York University. There I was lucky enough to meet (and catch up with for the third time) Ms. Kiran Meetarbhan, Deputy Executive Director and Chief Legal Advisor to the Competition Commission of Mauritius. I was also lucky enough to meet Professor Eleanor M. Fox and Professor Bill Kovacic. All were kind enough to take an interest in my work, were happy to field questions, and offer words of advice and encouragement. The Conference was also a particular turning point for me: it demonstrated the practical relevance of my Thesis and gave it a tangible quality and sense of impact.

Lastly but by no means least, I would like to thank my family and friends especially my mother Jambal, my father Vijay, my sister Melissa, Nerissa, and the 'Fruit and Nut'. They have been a constant source of love and support, and have seen the best and worst of me during the ebbs and flows of this Thesis. I owe them much and am looking forward to paying back.

1. Introduction

1.1. Introduction

This Thesis is concerned with the unilateral conduct rules of Mauritius.[1] By adopting a predominantly effects-based approach the Mauritian provisions take a relatively modern approach to assessing unilateral conduct. The Mauritian unilateral conduct rules consist of two provisions. Section 46 of the Competition Act 2007 Mauritius ("CAM") provides for the assessment of abuse; section 50 CAM the assessment of certain public interests and efficiencies. Mauritius identifies a critical element which sets its unilateral conduct rules apart the from European Union and other leading competition jurisdictions: abuse of dominance cases under CAM are not subject to financial penalties: abusive monopolies are a problem to be remedied, not an offence to be penalised.[2]

However, the application of these rules over the last eight years has revealed a number of gaps and inconsistencies. With a new competition jurisdiction such issues are not to be unexpected. Nevertheless, the specific nature of these issues might be considered somewhat surprising given a) the international wealth of unilateral conduct experience and guidance available and b) the development of the Mauritian unilateral conduct rules over time. CAM had a 2003 predecessor (the Competition Act 2003 Mauritius) that was subsequently repealed. Simply put, the 2003 Act had a number of strengths not adopted under CAM. These included *inter alia* dominance as a condition precedent for the unilateral conduct rules, a linear test of abuse, and a specialist institutional structure. Furthermore, the majority of investigations conducted by the Competition Commission of Mauritius (the "CCM") hitherto have been unilateral conduct cases: as will be discussed, there have been particular cases where fines might have been reasonably considered and/or imposed.

---

[1] Competition Act 2007, sections 46 and 50

[2] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009)
para 1.4

Nevertheless, the coming into force of CAM in November 2009 represents a key stage in the liberalisation of the Mauritian economy. Over the last fifty years, Mauritius has moved from output focused on certain commodities protected by international tariff and non-tariff concessions like textiles and sugar to a service and knowledge economy with greater competition domestically and internationally. Whilst market liberalisation has been necessary to produce the free markets and concomitant economic forces necessary to improve the Mauritian economy, the introduction of competition law and policy is nevertheless required in order to deliver the benefits that trade liberalisation may bring.[3]

This Thesis also takes a broader perspective on CAM and its position in the global collection of unilateral conduct provisions. Notwithstanding the line of demarcation between CAM and the European Union, and South Africa regarding sanctions that may be imposed for abusive unilateral conduct[4] there is much linking the three together. The linkage takes two forms. The first relates to the specific application of the Mauritian unilateral conduct rules. Despite their form, the application of the Mauritian unilateral conduct rules is based on abuse of dominance. The second point relates to the policy choices underlying CAM. CAM seeks to adopt a modern set of unilateral conduct rules.[5] The provisions indicate that Mauritius aspires to implement an effects-based, economically grounded set of rules. However, there is a lack of clarity regarding how the provision hangs together. Is dominance a prerequisite for finding an abuse of dominance? Section 46 provides that the extent of the dominant position shall be taken 'into account'. How might one discern normal competitive conduct from anticompetitive conduct? Section 46 provides a test of harm to the Mauritian economy or consumer. Is the finding of harm to the Mauritian economy or

---

[3] RJ Langhammer, 'Changing Competition Policies in Developing Countries: From Policies Protecting Companies against Competition to Policies Protecting Competition' (2000) < http://siteresources.worldbank.org/INTWDRS/Resources/477365-1257315064764/3199_langhammer.pdf> accessed 27 March 2013

[4] Article 102 Treaty on the Function of the European Union

[5] In this context, modernisation follows the debate taken in the European Union with increased focus on effects-based rules and consumer welfare.

consumer a required element for an abuse under section 46? Again, section 46 provides that such harm shall be taken 'into account.' Whilst the approach under CAM might be considered modern, its structure needs to be revised and its content more transparent.

If modernisation of unilateral conduct rules means adopting a more economic, effects driven approach, the debate regarding Article 102 TFEU and its modernisation is illustrative of the different contours this may take. However, the critical difference here is that the European debate has taken place after many years of rule and principle development. As will be discussed later, the historical underpinnings of Article 102 TFEU, specifically its management of competing and complementary goals, are considered to be a 'good' model for developing countries. The Mauritian rules should also be allowed time to evolve into a provision which best meets its economic needs.[6] Mauritius has undergone almost fifty years of focused market liberalisation before its competition law came into force. The 1960's were a period of industrialization, the 1970's a period of extensive insulation from competition in certain markets on one hand and the first steps towards market liberalisation on the other. The 1980's and 1990's have seen preferential trade agreements come to an end, with Mauritius deploying a strategy for growth and economic diversification in the early 2000's. It is only at the end of this period of significant economic upheaval (2009 onwards) that competition regulation has finally made it onto the Mauritian roster of reform. Neither the purpose of CAM, nor the goals it seeks to achieve are clearly stated. An effects-based approach is adopted, but does the competition culture and the values that underpin an effects-based, economics driven approach exist in Mauritius? As noted above, the development of Mauritian competition rules may reach a point where efficiency and effects can be the primary concerns, but first the foundation has to be laid. Mauritian economic liberalisation continues to proceed but the translation of this into political, social, and economic freedom at the highest levels appears to be slow. Whilst Mauritius is a stable democracy, a perception remains that entrenched

[6] On the importance of time and competition law development see e.g. WE Kovacic,'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) 23 Brooklyn Journal of International Law 403, 408

political and business powers are not yet wholly amenable to competitive or democratic forces.[7] Over recent time, Mauritius has shown a downward (negative) trend in international corruption perception rankings.[8]

Over the last 20 years, the number of countries with a competition law has significantly increased. Over 100 countries now have competition laws in force. 75% have 'developing' status.[9] One of the main reasons for the expansion in competition jurisdictions is increased market liberalisation and privitisation.[10] The increase in competition laws raises questions about globalisation, convergence, harmonization and whether such convergence is desirable.[11] Calls for harmonisation of competition laws and the establishment of a global competition law have been heard at the international level, but those calls are not universally supported. Opposition has come from developing and least developed countries[12] on the following grounds: first, the primary motivation for developing a global competition law is to facilitate liberalisation, foreign direct investment and market access to the benefit of established nations; second, a certain level of 'hypocrisy' exists where developed countries recommend the

---

[7] See e.g. J Reed 'Politics: Democracy thrives amid the intrigues' Financial Times, 7 September 2012

[8] see e.g. M Jenkins, 'Overview of Corruption in Mauritius' (Transparency International, 20 October 2014); Corruption Perceptions Index 2015, Transparency International. The Independent Commission against Corruption (Mauritius) was established in 2002 under the Prevention of Corruption Act 2002.

[9] K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>, page 2; EM Fox, 'Economic Development, Poverty and Antitrust: the Other Path' (2007) 13 Southwestern Journal of Law and Trade in the Americas 211; T Stewart, J Clarke and S Joekes *Competition Law in Action: Experiences from Developing Countries* (Ottawa International Development Research Centre, 2007); DS Evans and F Jenny (eds) *Trustbusters: Competition Authorities Speak Out* (Competition Policy International, 2009)

[10] OECD *Regulatory Reform, Privatisation and Competition Policy* (OECD, 1992) A second reason is that developing countries are responding to the neo-liberal international development policies under the 'Washington Consensus' see e.g. K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>

[11] See e.g. DS Evans, 'Why Different Jurisdictions Do Not and Should Not) Adopt the Same Antitrust Rules' (2009) 10(1) Chicago Journal of International Law 161; EM Fox, 'The Central European Nations and the EU Waiting Room - Why Must the Central European Nations Adopt the Competition Law of the European Union? (1998) 23 Brooklyn Journal of International Law 351; SE Foster, 'While America Slept: the Harmonization of Competition Laws Based on the European Union model' (2001) 15 Emory International Law Review 467

[12] K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143> page 3

development of global rules facilitating market access whilst retaining their own subsidies; third, such rules would be duplicitous in nature given that certain developed countries continue to exempt particular commercial conduct from the ambit of their domestic competition law:[13] whilst the market power of such cartels might be insignificant on their own domestic developed market, the concern for developing countries is the potential of those cartels to engage in anticompetitive conduct on the host markets; fourth; the promised benefits of market liberalisation and pro-market reform have not materialized. Rather than improving competitive conditions and leading to long-term social welfare, such reforms have tended to entrench wealth inequalities and further diminish consumer power.[14]

> [o]ur understanding of competition policy from the development perspective is that there is a need for government to assist and promote local firms so that they can survive, be viable and develop despite their relative present weakness, so that they can successfully compete with foreign firms and their products…there could be a competition agreement…that would oblige our governments to give almost total freedom and market access rights for foreign firms and their products and services, whilst local firms would not be able to receive assistance or subsidies and many of them may not survive.[15]

Thus there is an inherent tension underneath the competition rules of developing countries such as Mauritius. This tension is comprised of i) such

---

[13] such as the establishment of export cartels.

[14] K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>, page 5-6; On the last point see also T Stewart, J Clarke and S Joekes *Competition Law in Action: Experiences from Developing Countries* (Ottawa International Development Research Centre, 2007); DS Evans and F Jenny (eds) *Trustbusters: Competition Authorities Speak Out* (Competition Policy International, 2009), and EM Fox, 'Economic Development, Poverty and Antitrust: the Other Path' (2007) 13 Southwestern Journal of Law and Trade in the Americas 211

[15] Statement from Angola, Kenya, Lesotho, Malawi, Mozambique, Tanzania, Uganda, Zambia, Zimbabwe: Southern and Eastern African Trade Information and Negotiations Institute (2003) Recommendation from the Sixth SEATINI Workshop for Trade Official of Southern and Eastern Africa, Impala Hotel, Arusha, Tanzania, 2- 5 April 2003 SEATINI Bulletin 6(6) <www.seatini.org/bulletins/6.06.php> accessed 11 March 2011

rules forming part of the overall economic development strategy, particularly where that strategy has focused on attracting external investment, ii) the subsequent entrance of relatively financially and commercially astute foreign entrants to the market; iii) the need to allow domestic firms the economic space to grow and compete and iv) the need to ensure that all players on the market benefit from fair competition. In this context, the argument that competition rules of developing economies should place primacy on economies of scale, allocative and productive efficiency gains traction.[16] However, the economic rationale for this argument has been questioned: (state) monopolies may not have been subject to market discipline; regulatory capture or rent seeking may be pervasive; market-by-market assessment will be required to determine what constitutes the minimum efficient scale for a given product or service; and research suggests it is intensive *domestic* rivalry that improves the economic performance of developing economies.[17] Furthermore, it is the key argument of this Thesis that the economic, social and legal context of Mauritius and other developing countries require the development of a competition culture which focuses on generating competition, fair competition and equity. This resonates with Fox's conclusions that i) developing economies require competition law which accounts for 'the opacity, blockage and political capture of…[their] markets, and includes some measure of helping to empower people economically to help themselves' and;[18] ii) '[a] model consistent with development economics is not one where the role of the state is very much a residual one confined to regulating instances of market failure.'[19]

---

[16] MS Gal, *Competition Policy for Small Market Economies* (Harvard University Press, 2003); K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>,, page 8

[17] K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>,, page 9; M Porter, *Competitive Advantage of Nations* (The Free Press, New York, 1990); SJ Evenett 'Five Hypotheses concerning the Fate of the Singapore Issues in the Doha Round' (2003) 23 Oxford Review of Economic Policy 392

[18] EM Fox, 'Economic Development, Poverty and Antitrust: the Other Path' (2007) 13 Southwestern Journal of Law and Trade in the Americas 211, 213

[19] EM Fox, 'Economic Development, Poverty and Antitrust: the Other Path' (2007) 13 Southwestern Journal of Law and Trade in the Americas 211, 211

Research also suggests the competition laws being adopted internationally are similar and represent 'good' policy choice.[20] Standard setting comes from a number of sources. As well as cross-fertilisation between jurisdictions, international organizations such as the OCED[21], the ICN[22] and UNCTAD[23] also influence the development of competition law. Contributions by these organisations include: 'the promotion of consumer welfare; preventing excessive concentration levels; addressing anticompetitive practices of undertakings (including multi-national enterprises) that can negatively effect the trade performance and competitiveness of developing countries; reinforcing the benefits of regulatory reform; promoting the advocacy of pro-competitive policy reforms and a culture of competition; and increasing an economy's ability to attract and maximise the benefits of investment.'[24] 'Good' is defined as i) commonality and ii) avoiding reactionary protection measures taken by other States due to perceived unfair trade.[25] Nevertheless, commonality should, if appropriate, be developed over time. Mauritius is a small developing island state ("SDIS") and has the characteristics of a number of economic labels – it may also be described as a developing economy, an island economy, and a small market

[20]E Alemani and others 'New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries' (No. 1104, ECO/WKP(2013)96, OECD Economics Department Working Papers, 2013). It should be noted that Alemani et al. issue the caveat on their Report that what constitutes good competition policy is an approximation based on common features of competition rules.

[21] The Organisation for Economic Co-operation and Development (OECD) is an international organisation which provides a forum for its members to discuss and develop economic and social policy. Competition law and policy forms a key area of its work. For example, it hosts 'Global Forums', one of which is competition, which covers areas of policy of global interest in which the OECD has particular expertise. The Global Forums provide an opportunity for sharing experiences and practice, creating networks, and promoting dialogue. For non-OECD members, the OCED offers a 'Centre for Co-operation with Non-Members' (CCNM). The CCNM co-ordinates various programmes for providing assistance and expertise on competition law development to Non-Members.

[22] The International Competition Network provides for an informal venue for competition authorities to work together and explore procedural and substantive standards.

[23] The United Nations Convention on Trade and Development ("UNCTAD") supports developing countries with addressing their development issues and economic growth by *inter alia* holding forums on development matters, offering technical assistance to its members and organizing the World Investment Forum.

[24] M Gestrin, 'A Policy Framework for Investment: Competition Policy' (Rio De Janeiro, Brazil, 2005) < http://www.oecd.org/investment/investmentfordevelopment/35488898.pdf> accessed 15 November 2012

[25] RJ Langhammer, 'Changing Competition Policies in Developing Countries: From Policies Protecting Companies against Competition to Policies Protecting Competition' (2000) < http://siteresources.worldbank.org/INTWDRS/Resources/477365-1257315064764/3199_langhammer.pdf> accessed 27th March 2013

economy. Common amongst these labels is the view that competition law is a driver of growth through maintaining competitive markets, promoting competition as a value in itself, and achieving efficient markets. Competition between firms is considered the most appropriate means for achieving efficient allocation of resources, maintaining pressure on costs and prices and for stimulating innovation and consumer satisfaction.[26] Therefore having effective competition law and policy is conducive for 'achieving greater levels of economic efficiency, growth, employment and living standards. Pro-competitive reform and sound competition law enforcement have delivered dramatic price reductions, a proliferation of new products, superior quality and service and enhanced innovation…more importantly, they have strong links with key pillars of economic growth and development such as investment, governance, the cultivation of an entrepreneurial class, privatization and trade.'[27]

In general, the position of jurisdictions which describe themselves as developing economies and have competition rules is as follows: whilst the competition frameworks and rules need not differ between jurisdictions of different sizes, their economic circumstances 'may materially influence the outcome of the competition law assessment.'[28] However, whilst it may be accepted that the basic analytical framework may be the same between jurisdictions, not only may the economic environment affect the outcome of small market economy competition investigations, it may also affect the underlying philosophy and emphasis applied. For example, one of the key arguments of this Thesis is that the competition laws for small jurisdictions should have a specific focus on the creation and maintenance of competition culture particularly where close

---

[26] D Geradin, 'Competition law and Regional Economic Integration: an Analysis of the Southern Mediterranean Countries' (No.35, World Bank Working Paper, 2004) <www.stopnwo.com/docs/Competition_Law_and_Regional_Economic_Integration.pdf> accessed 6 April 2011; E Gellhorn; WE Kovacic; S Calkins; *Antitrust Law and Economics* (5th Edn, Thomson and West 2004)

[27] OECD 'Global Forum on Competition: Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity' (2004)

[28] see e.g. New Zealand response, Swiss Competition Authority and Israel Antitrust Authority 'Competition Law in Small Economies' ICN 8th Annual Conference 6

political and business elites remain, the economy has recently faced removal of international trade protection,[29] and weak market forces pervade

As noted, a concern is that economic growth does not always cascade through society.[30] Thus a question to be considered is where competition law sits within the greater set of policies designed to promote economic and social growth and how it complements these other measures. These concerns are central to a legitimate application of competition law. If traditional factors such as investment and education have not been sufficient to deliver growth,[31] intangible factors such as culture (economic, legal, business) must also have contributed to this deficiency. In this regard, this Thesis advocates that a consideration of competition law must include an understanding of the prevailing competition culture that exists in a jurisdiction. To restrict competition law to a tool for economic growth without further consideration of how it links with other development tools is counter towards the general trend which sees growth more holistically.[32]

It is recognised that small market economies stand to gain more from international trade and finance due to their financial and market-size constraints.[33] Such trade may take place through foreign direct investment, bank loans and official development flows.[34] As will be discussed in the next section, foreign direct investment (particularly for Mauritius) has been a key tool for its economic growth and current prosperity. The introduction of a more liberal regime for transnational companies ("TNCs")[35] carries a degree of uncertainty for the application of the Mauritian competition law. On the one hand, the uncertainty revolves around the potential for anticompetitive conduct and the

[29] for example through Export Processing Zones and preferential trade agreements
[30] see e.g. World Bank 'World Development Report 1999/2000: Entering the 21st Century' (1999)
[31] World Bank 'World Development Report 1999/2000: Entering the 21st Century' (1999), 2
[32] see e.g. World Bank 'World Development Report 1999/2000: Entering the 21st Century' (1999), page 2
[33] World Bank 'World Development Report 1999/2000: Entering the 21st Century' (1999), 5
[34] World Bank 'World Development Report 1999/2000: Entering the 21st Century' (1999), Foreign direct investments is investment made by TNCs to purchase a stake in the management of a company or factory; Foreign portfolio investment is the purchase of 'paper' assets such as equities and bonds;
[35] Also referred to as Multinational Enterprises (MNEs) in the literature.

possibility that TNCs might be able to wield dominant power. On the other hand, positive spillovers may result from the activities of TNCs if they bring their own higher standards of compliance, and more sophisticated management capabilities.[36] Nevertheless, whilst small countries benefit in a greater proportion from international trade and globalization, it is also true that they may be affected to a greater extent by anticompetitive conduct and other negative events. An outstanding issue is to apply competition rules in a manner which supports the positive outcomes of competition without deterring undertakings from participating in the Mauritian market.

As a concluding remark of the Introduction, this Thesis argues that the optimal approach for Mauritius and other developing competition jurisdictions is to focus on promoting and maintaining competition and to establish a pro-competition competition culture: such jurisdictions ought to adopt a competition law agenda that errs on the side of intervention – even if the investigations amount to a decision not to intervene, the learning obtained can be used to strengthen competition and growth in those jurisdictions.

1.2. The Problem

The problem is as follows. Since their coming into force in 2009, the Mauritian unilateral conduct rules have been applied in a number of cases. A general pattern with regards their execution has appeared, based around what one might consider to be a traditional approach of i) assessing whether the undertaking has dominant position and ii) whether this position has been abused. Eight years on, however, a number of problems have arisen. First, the ultimate purpose of the Mauritian unilateral conduct rules, and the Mauritian competition law in general, remains uncertain. As will be argued, the discrete objectives which can be identified within CAM suggest that long-term social welfare, in order for these objectives to be achieved, must be the ultimate objective of CAM. Second, the Mauritian unilateral conduct rules present a sophisticated approach to assessing abuse of dominance. That a small economy

[36] World Bank 'World Development Report 1999/2000: Entering the 21st Century' (1999), 81

seeks to implement such a mature approach in what effectively constitutes its first set of 'real' competition rules should be appreciated. However, the rules have been inconsistently applied. In particular, the lines of demarcation for when a case may be treated as 'object' case or an 'effect' case remain to be set. Furthermore, the standard(s) by which abuse of a dominant position may be assessed have not been clarified. Thus CAM remains opaque to dominant undertakings, competitors and consumers as to when or whether the object of conduct is sufficient to trigger the Mauritian unilateral conduct rules and, when such conduct is caught by the rules, by what standard the conduct will be assessed. Finally, in this regard, this Thesis argues that such rules requires the development of a competition culture which values efficiency, social welfare and performance-based competition. Such a competition culture will take time to develop: only the enforcement of these rules with these themes in mind will support the development of such a culture capable of supporting the rules as they stand. The final core problem addressed by this Thesis relates to the administration and enforcement of CAM. The flat structure of CAM's institutions do provide an expeditious means of enforcing the law. This Thesis argues that, with long-term social welfare in mind, the flat structure of CAM potentially inhibits the development of the law through reduced opportunities for judicial consideration dialogue.

Taking the identified problems in account, there are a number of motivations for this question. First, there are the Mauritian rules themselves. Mauritius is a young competition jurisdiction, a small economy, and has adopted sophisticated, mature, unilateral conduct rules. The Mauritian unilateral conduct rules are sophisticated and complex in relation to how abuse of dominance is assessed, and how public-interests are taken into account. The rules reflect a degree of maturity in that they reflect an overall effects-based approach, assessing the trade-off between the anticompetitive effects of the conduct in question. This notion of maturity stems from the proposition that other countries and regions with much longer histories of competition law have moved to an effects-based approach over time and experience. The adoption of an effects-based approach has formed a significant part of the modernisation debate of European unilateral

conduct rules under Article 102 TFEU. An effects-based approach is enshrined in the competition law of South Africa. Second, there is the question of framing models of competition law which are appropriate for developing countries and small economies, and the question of framing such rules which meet the needs of Mauritius. Third, research on competition laws for developing countries follows three main lines of enquiry– the purpose of the rules; the form or substantive nature of those rules; and the institutional structure required to implement those rules. The application of the Mauritian unilateral conduct rules hitherto cuts across each of these areas.

1.3. Research Questions

The primary research question focuses on the test of abuse under the Mauritian unilateral conduct rules, and whether those rules have been coherently drafted and applied to i) achieve the Mauritian competition objective of long-term social welfare and ii) provide a workable, transparent set of rules. The answers to these questions have implications for the manner in which the Mauritian unilateral conduct rules are currently implemented, their legitimacy and also their role in Mauritius' economic growth and development.

The main research question is approached by these secondary questions:

- What theoretical support is there for the normative supremacy of long-term social welfare; how is this reconciled with the provisions of the Competition Act 2007; and what benefits would derive from pursuing long-term social welfare over consumer welfare?
- How will a properly framed test of 'object or effect' support the long-term social welfare objective; what elements are currently missing; what changes are required going forward; and what benefits to Mauritius does the pursuit of long-term social welfare through 'object or effect' offer?

- How does the assessment of dominance and its formal inclusion as a condition precedent in the test for abuse support the ultimate objective of CAM and improve the effectiveness of the unilateral conduct rules?
- How is the public-interest test currently applied and what are the implications; what changes are required to bring the public-interest test in line with the ultimate objective of CAM and ensure that 'object or effect' can be effectively applied?
- What institutional issues remain regarding the enforcement of the Competition Act 2007 and how does these affect the application of the Mauritian unilateral conduct rules?

1.4. Research Method, Approach and Thesis Structure

The test of abuse under the Mauritian unilateral conduct rules can be understood only by defining its normative aspects, analysing its substantive rules, and assessing its means of implementation. The literature on competition law for developing countries considers that the European Union and South African models of competition law are pertinent for evaluating those of developing countries: these are used to dialectically assess the Mauritian unilateral conduct rules. This ensures that the Mauritian rules are not assessed in vacuum but are placed in a global context.

As a conceptual study, this Thesis analyses judicial decisions and case law to the extent that they are relevant to understanding the Mauritian unilateral conduct rules and how they are applied.

The structure of the Thesis is as follows. Chapter 2 is concerned with the ultimate objective of CAM and argues that ultimate objective of CAM is long-term social welfare. Chapter 3 argues that the inclusion of an 'object or effect' test for abuse is appropriate for Mauritius. Consideration needs to be given to the structure of the test and the economic assessments which would support it. Chapter 4 looks at the factors of dominance that have been relevant to CCM decisional practice thus far: the argument of this Chapter is that a reform of

section 46 is required to bring dominance more centrally into the section 46 assessment. Chapter 5 is concerned with the second part of the Mauritian unilateral conduct rules – the public-interest test under section 50. The inclusion of a public- interest test is to be welcomed. However, the drafting of the provision undermines the application of section 46. Chapter 6 focuses on the institutional framework under CAM. Two main lines of enquiry relate to the judicial/decision making structure, and the enforcement remedies available , in particular the lack of financial penalties for anticompetitive unilateral conduct. Chapter 7 collates the recommendations of this Thesis and presents the necessary changes required to repackage the Mauritian unilateral conduct rules. The reforms proposed support Mauritius in maintaining competition, promoting a competition culture and continuing its further economic development.

1.5. Limitations

There are two specific limitations of this Thesis on CAM and the Mauritian competition rules:

First, this Thesis focuses specifically on the Mauritian unilateral conduct rules and what their current application may reveal regarding CAM. It does not therefore consider in detail the other provisions under CAM namely those assessing collusive behaviour.

Second, an aspect of research on competition law for developing countries looks at the transformational or developmental purpose of competition law. In particular, for the Mauritian competition/economic context this may include looking at the competitive opportunities of marginalized groups in society. A detailed discussion sits outside the scope of this Thesis, but it is an area for future research on Mauritian competition law and the competition law of developing countries in general.

1.6. Conclusion

Mauritius has demonstrated significant economic growth over the last fifty years.

As a small developing island state, it is prone to concentrations of market power, and abuses of unilateral conduct. This Chapter has set out the context and background for Mauritius developing and applying a set of unilateral conduct rules focused on long-term social welfare, developing a Mauritian competition culture and safeguarding economic opportunities. This relates not only to the application of CAM itself, but also CAM's wider context and its place in contributing to Mauritius' continuing economic growth. It is for these development aspects that the Mauritian unilateral conduct rules are considered through the lens of the European and South African competition rules. These two model competition frameworks both have links to the competition mandates of developing countries. The ordoliberal foundations of the European Union competition law are apt for guiding the competition rules of developing countries; South Africa, as a developing country itself, offers further guidance, particularly around incorporating multiples objectives into competition law.

2. The Purpose of Mauritian Competition Law

2.1. Introduction

This Chapter argues that the ultimate objective of CAM is long-term social welfare. It is the only objective capable of consolidating the application of the Mauritian unilateral conduct rules and ensuring that its relevant parts operate together. Long-term social welfare gives formal equality to all participants in the market, and attributes equal value to their welfare and promotes the overall welfare of society.[1] It looks at whether any increases in social welfare are sustainable in the long-term.[2] Thus the objective of long-term social welfare promotes the dynamic aspects of the market, accommodates the political, economic and social aims of CAM and supports its legitimacy.

Evidence of the long-term social welfare objective of CAM can be found in the structure of the unilateral conduct rules and the prescribed remit of the CCM under section 50. The rules apply only to conduct by dominant undertakings that harm consumers or adversely affect the economy. If those thresholds are met and section 46 applies, the dominant undertaking may plead public-interests considerations to mitigate the imposed remedy. When considering remedies, the CCM is specifically tasked with applying the rules in such a manner so as to safeguard the competitive process. The interaction between these provisions serves to promote different stakeholder interests such as producers, consumers, and future consumers.

On the basis that there are multiple goals to be achieved with the application of CAM, this Chapter further argues that these can be accommodated through the ultimate objective of long-term social welfare. The first part of this Chapter

[1] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 40
[2] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 40

looks at economic theory behind welfare conceptions of competition and establishes the normative superiority of long-term social welfare. The second part of this Chapter then considers the non-welfare goals which form part of CAM's application and contribute to a thick application of the long-term social welfare objective but are in themselves insufficient to be CAM's ultimate objective.

2.2. Theoretical Underpinnings of Competition Law

The ultimate objective of Mauritian competition law has to be long-term social welfare. By definition, it is the only objective that looks at the sum societal effects of the competitive process. Economically, this means the sum surplus gained by producers and consumers in a competitive market. In order to understand why long-term social welfare is the superior objective for competition law more needs to said about industrial organization theory, and the theoretical insights between structure, conduct and performance.[3]

What we are considering is the relationship between market conditions and structure that give both the best market performance and prevent abuse of market power in the long-term. Under competition law, market structure is a distinct concept focusing on market concentration, product differentiation and barriers to entry.[4] Market concentration refers to the number of competitors in the market; product differentiation refers to the extent to which products offered are seen as not being identical by buyers; barriers to entry relates to the ease or difficulty for new entrants to gain access to the market. The market structure will both inform and result from the conduct of the undertakings on the market. Their patterns of behaviour will relate to prices and output, product decisions and their engagement with competitors.[5] In turn, the performance of the market will be affected, amongst other things, by the conduct of the undertakings. A

---

[3] See e.g. the works by J Bain, *Industrial Organization* (2nd Edition, John Wiley, 1968) and by the same author, *Barriers to New Competition* (Harvard University Press, 1956)

[4] J Fejø, *Monopoly Law and Market* (Kluwer, 1990), 38

[5] J Bain, *Industrial Organization* (2nd Edition, John Wiley, 1968), 9; J Fejø, *Monopoly Law and Market* (Kluwer, 1990), 42

number of factors including prices, supply, costs and the adaptation of undertakings to market conditions also determine market performance.[6]

2.2.1. Perfect Competition and Absolute Monopoly

The two polar models of market structure from economic theory are perfect competition and absolute monopoly. They seek to explain, assuming rational participants and all things being equal, the quality of market performance and outcomes that one might expect.

The conditions of perfect competition are as follows. First, there many sellers are on the market. Second, those sellers act as price takers, pricing directly from market feedback. Third, perfect information is available to consumers. Fourth, products are homogenous. Price is set at marginal cost, that is the cost of producing one additional unit. The undertakings therefore make a normal profit when this price is applied to all the units they sell up to this additional unit. As price is determined by the market in the perfect competition model, undertakings do not make decisions on price *per se*, but make decisions on output. If entry increases, supply also increases and prices will fall. This state of affairs will continue until the market enters 'zero-profit' state, and there is no more profit to be made.

Absolute monopoly refers to the conditions where a single undertaking which constitutes the entire market. This allows the undertaking to act as the price maker. However, it will have to take into account the levels of demand at different prices. The absolute monopolist will seek to maximise profit by looking to equate marginal costs with marginal revenue.

This level of abstraction might suggest that perfect competition leads to better market performance than absolute monopoly. This is not correct. Static models do not explicitly account for dynamic aspects of the market and what factors prompt undertakings to innovate and therefore compete. Schumpeter posits

[6] J Bain, *Industrial Organization* (2nd Edition, John Wiley, 1968), 10

that the potential for profit and market power spurs innovation.[7] This market power is temporary as new rivals and goods are brought to the market, and thus it is monopolistic power (or its potential) which drives competition. However, sheltered from competition, the monopolist has little external incentive from rivals to price competitively, reduce its costs and innovate.[8] But, due to other factors involved, this does not automatically mean therefore that more competition, in the sense of competitor numbers, automatically means more innovative competition.[9] Because of this, Motta identifies a… "middle ground" environment, where there exists some competition, but also high enough market power coming from…innovative activities…" which perhaps provides the best circumstances for dynamic output.[10] The most robust conclusion is that monopoly, given the lack of external disincentives on the monopolist to innovate and become more efficient, is worse than competitive structures in terms of dynamic efficiency.[11] This can be seen in the relationship between social welfare and different types of economic efficiency.[12]

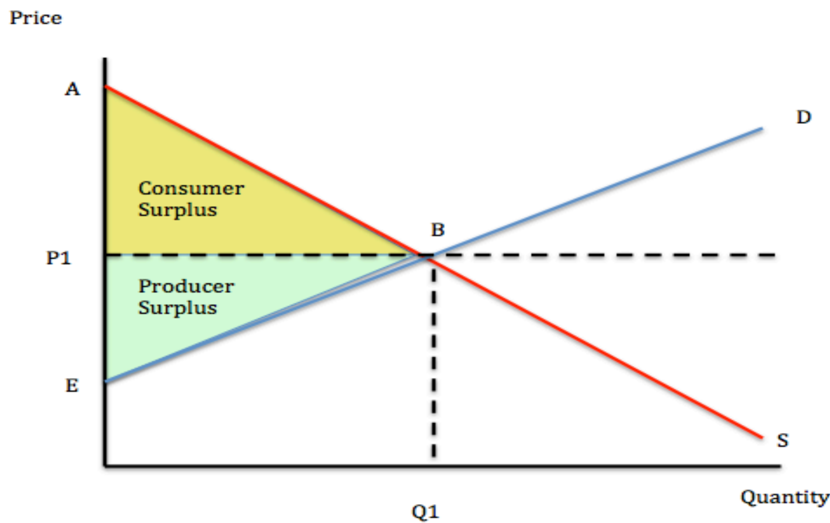
2.2.2. Allocative, Product and Dynamic Efficiency

Allocative efficiency occurs when i) factors of production are allocated in a market to ii) where they can best be used for tasks that consumers value the most.[13] Expressed another way, allocative *in*efficiency occurs when an undertaking prices its products too high.[14] Under static models of competition, allocative efficiency is maximized when price equals marginal cost.[15] Social welfare is maximised where resources are used to produce the goods most

[7] J Schumpeter *'Capitalism, Socialism and Democracy* (Harper Brothers, 1942)
[8] M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), page 56
[9] M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), page 57
[10] M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), page 57
[11] M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), page 57
[12] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 33-38
[13] RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted by The Free Press, 1993), 91
[14] M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), 40
[15] LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 23

desired by society and production cannot be increased without a trade-off of a more a valued product.

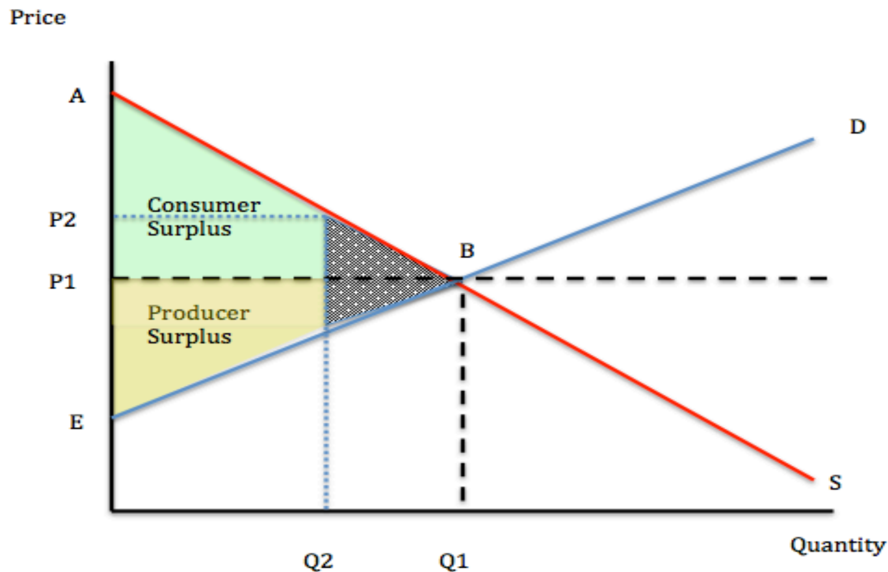
Figure 2.1: Total Welfare under Perfect Competition



Thus the price of the product will be at the competitive market price (P1), where supply and demand intersect (B). Pricing at this point means that price will be equivalent to marginal cost and total welfare will be maximised – the total area indicated by triangle (ABE).

By contrast, the monopolist will produce where marginal cost equals marginal revenue and charge an increased price to maximise his profits. This results in both producer and consumer surplus loss (deadweight) loss to the economy: consumers who would buy the product at the competitive price are priced out of the market; producers forgo the profit to be gained from selling additional goods.

Figure 2.2 : Deadweight loss under Monopoly Pricing



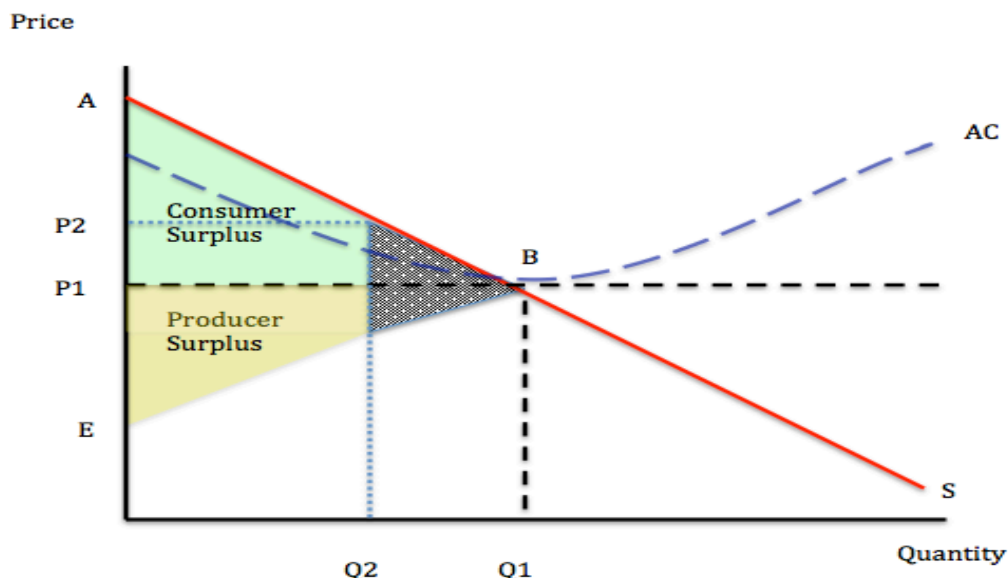
Here the monopolist has priced in relation to marginal revenue and cost, resulting in a decrease in output and an increase in price. The shaded triangle shows the ensuing deadweight loss in consumer and producer surplus.

Product efficiency occurs when producers participate in activities which generate wealth, in other words offering anything for which customers are willing to pay.[16] Its optimal expression is when products are produced at the lowest possible cost given the current technology available; [17] product inefficiency occurs when the costs of the undertaking are too high.[18] There are two main reasons why the monopolist might use inefficient technology.[19] The first is managerial slack, also described as 'X-inefficiency' where the monopolist faces less pressure to refine its processes.[20] Leibenstein posits that the losses resulting from product (X) inefficiency might outweigh the losses from allocative efficiency. The second is that competition itself selects efficient firms; therefore to remain in a competitive market, a firm will have to seek efficient technologies to survive. Without competition, a key incentive to be efficient is removed.

---

[16] RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted by The Free Press, 1993), 104
[17] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 35
[18] M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), 45
[19] M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), 47 - 51
[20] H Leibenstein, 'Allocative Efficiency vs. "X-Efficiency"' (1966) 56(3) The American Economic Review 392

Figure 2.3: Productive Inefficiency under Monopoly Pricing



Here we can see that the monopolist's practice is productively inefficient: the point at which it has chosen to price and produce is not at the lowest point of the average cost curve (AC). Product efficiency increases social welfare: whether it increases consumer surplus or producer surplus specifically is dependent on whether benefits from product to efficiency are passed to consumers or not.[21]

The above discussion sets out the normative supremacy of the long-term social welfare and why, as a matter of principle, competitive market structures are to be preferred over monopolistic structures. It is in this regard, that Mauritius faces the following dilemma as its economic characteristics of Mauritius skew towards concentrated oligopolistic and monopolistic markets with reduced incentives to compete.[22] Therefore, high barriers to entry such as geographic location, the limited domestic demand of a small population, economic and political concentrations of power, and consumer inertia effects such as

---

[21] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 35

[22] The Competition Bill (No VI of 2003) Debate No. 3 of 01.04.2003; The Competition Bill (No. XXV of 2007) Debate No. 33 of 20.11.2007;
Competition Commission of Mauritius 'Study of the Market for Cement in Mauritius' CCM/MS/001 (7 April 2011); Competition Commission of Mauritius 'New Cement Market Study' CCM/MS/002 (15 October 2012)

significant brand loyalty all combine to create economic conditions where external pressures are reduced and, concomitantly, the opportunities to abuse market power are relatively high. As the Mauritian unilateral conduct decisional practice has since demonstrated, cases coming to the CCM demonstrate entrenched and strong monopolistic situations, high degrees of dominance, and conduct which abuses the dominant position. Thus whilst, long-term social welfare should be the ultimate objective of CAM, the manner in which it is attained may be predicated on goals such as protecting economic opportunity and/or protecting the consumer.

2.3. CAM's Welfare Objective

2.3.1. Social Welfare

One may look at social welfare in the short-term or long-term. It is long-term social welfare which should form the normative basis for Mauritian competition law. First, short-term social welfare cannot be the ultimate objective of competition law as, by focussing on the immediate market circumstances, it disregards future market opportunities for prospective undertakings, customers and consumers. Second, as explained by Nazzini, long-term social welfare accounts for value-based choice.[23] Consumers will pay for the products they value; and the prices they pay will reflect the level of value attached to those products. Therefore, the products available in the market and the price they command represents that which market participants most desire. Looked at in this way, long-term social welfare provides a theoretical framework to capture non-welfare goals such as fairness and economic freedom which are essential to the application and legitimacy of competition law.

That long-term social welfare is the ultimate objective of CAM is identified in the opening speech of CAM's second reading.[24] The content of CAM's long-term social welfare objective is identified as i) correcting long outstanding distortions

[23] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 33
[24] The Competition Bill (No. XXV of 2007) Debate No. 33 of 20.11.2007

in the Mauritian economy; ii) providing fairer treatment to *all* (my emphasis) present and future parties involved in the production and consumption of Mauritian goods; iii) efficient allocation of resources; iv) ensuring consumers have the best possible choice in terms price, quality and supply; and v) for producers, encouraging competition, research and development, innovation, dynamic efficiencies, better corporate governance and improved overall competitiveness. Thus long-term social welfare objective is the only objective which is capable of accommodating the structure and content of CAM. First, the effects-based rules under the Mauritian unilateral conduct rules strikes a balance between the perspectives of the consumer and the producer. Section 46 determines whether an abuse of dominance has occurred with reference to its effect on the consumer and the economy. Section 50(4) provides that the listed public interest factors may be taken into consideration if they have been or are likely to be shared with consumers or businesses. Second, consumers is broadly defined under CAM – as well as final consumers, consumers under CAM is defined as any direct or indirect user of a good, and includes all operators at different levels of the supply chain. Third, is the reference to adverse effects on the economy which may result from an abuse of dominance. How this might be applied as a test of harm is yet to be determined. Nevertheless, its inclusion informs the application of CAM; the consideration of the extent to which the efficiency, adaptability and competitiveness of the economy is harmed invites both a current assessment and that of the future market development – these all fit within the objective of long-term social welfare.

2.3.2. Consumer Welfare

The importance of maintaining long-term social welfare as the ultimate objective of CAM is demonstrated when one looks at the content of CAM. At critical junctures of its unilateral conduct rules, CAM already contains an emphasis on protecting the consumer. The first is section 46(3)(d) which requires the CCM to take into account adverse effects on the consumer when assessing whether or section 46 has been breached. The second is in the public-interest test section 50 CAM, where the dominant undertaking must show that any benefits have or are likely to be passed on to the consumer. The section 46 decisional practice

has adopted a wide test of consumer harm. As applied under CAM, this has looked at harm caused to consumers not only through abuse of market power traditionally understood (i.e. the raising of price or reduction of output *per se,* but also harm caused to the consumer through reduction of choice. For the purposes of this Thesis, consumer welfare refers specifically to the welfare gains accruing to consumers.[25]

As outlined by Nazzini, consumer welfare is a goal of competition law.[26] In the pursuit of long-term social welfare, consumer welfare may form a proxy-standard as a means to achieve this objective. However, in itself, consumer welfare cannot be the ultimate objective of Mauritian competition law.

From a static perspective, the pursuit of consumer welfare certainly has normative advantages. The first argument for a consumer welfare objective is that it correlates with the economic concept of market power. Consumers are harmed if the acquisition of market power leads to higher prices and lower output.[27] Allocative inefficiency is caused if the loss of consumer surplus is greater than the increased profits to producers. Thus pursuing a consumer welfare objective addresses distribution of wealth issues from producer to consumer.[28] However, the difficulty lies in whether competition law has the appropriate tools to address such distribution concerns properly. An assessment would be required of the levels of income between consumers and undertaking owners, and a judgment made on the effects of the wealth distribution. The purpose of this would be to assess whether the transfer is neutral or has an adverse effect on the consumer.[29] In addition, like the CCM's

---

[25] Thus it may be distinguished from other, more ambiguous uses of the consumer welfare term. See RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted by The Free Press, 1993; R Nazzini, *The Foundations of European Union Competition Law*: *The Objective and Principles of Article 102* (Oxford University Press, 2011)

[26] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011)

[27] See e.g. S Bishop and M Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd Edition, Sweet and Maxwell, 2010) 27

[28] RH Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings Law Journal 65; R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 41

[29] R Pittman 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) Competition Policy International 205

position regarding fairness,[30] the issue of wealth distribution cannot in itself be pursued without an underlying competition concern. It is the anticompetitive issue, such as abuse of dominance, that triggers the application of competition law rather than wealth mis-distribution *per se.* Thus, redistribution of wealth is only relevant to competition law where it arises from anticompetitive conduct.

A second argument for pursuing a consumer welfare objective relates to internal efficiency issues related to poor governance[31] and inefficient use of assets (X-inefficiency).[32] However, this would require a case-by-case analysis of managerial decisions and assessment of internal aspects of an organisation – this is required so that firms with efficient structures are not penalized:[33] at the same time this is a task outside the scope of competition rules and for which national competition authorities are ill-suited. The final main argument for pursuing a consumer welfare objective is its enforceability.[34] However, just because a standard is easier to enforce does not mean that is should be elevated to objective status.[35] Furthermore, in terms of long-term performance of the market, a focus on consumer welfare has significant shortcomings. First, it does not take into account dynamic aspects of the market such as innovation, quality improvement and the fact that changes in consumer preference occur over time.[36] Thus it fails to take into account aspects of the market required critical for continuing economic development. Second, while there may be appropriate reasons for protecting consumer welfare in a given case it is not evident as a matter of principle why the welfare of consumers should be preferred over producers as the ultimate objective of Mauritian competition law.

---

[30] Competition Commission of Mauritius 'Guidelines: General provisions CCM 7' (November 2009), para 2.13

[31] J Farrell and ML Katz, 'The Economics of Welfare Standards in Antitrust' (Competition Policy Centre, Institute of Business and Economic Research' UC Berkeley, 2006), 12

[32] H Leibenstein, 'Allocative Efficiency vs. "X-Efficiency"' (1966) 56(3) The American Economic Review 392

[33] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 43

[34] RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted by The Free Press, 1993)

[35] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 45

[36] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 40; KT Do, 'On the Normative Foundations of the Global Competition Governance' < http://ssrn.com/abstract=2563685> accessed 4 October 2015, 35

2.4. Non-Welfare Goals

The content of CAM's unilateral conduct rules and the decisional practice of CCM indicate that CAM encapsulates several non-welfare goals. These non-welfare goals inform the concept of competition under CAM and how it is applied. However, because of their level of abstraction, these goals are not capable of being the ultimate objective of CAM, nor are they capable of forming the legal test(s) for CAM's application.

2.4.1. Protecting the Competitive Process

Protecting the competitive process is a non-welfare goal under CAM. Three aspects of CAM demonstrate this. First, section 46(2) treats separately the abuses of exclusion and exploitation. Exclusionary abuses focusing on how dominant undertakings have excluded their rivals from the market have at their centre a focus on the competitive process. Second, this objective may be read into section 46(3) which requires the CCM to take into account whether the consumer or economy has been harmed by the conduct under review. This provision runs parallel to the position of the South African unilateral conduct rules for example, where the judiciary have been explicit that those rules prohibit anticompetitive harm to the consumer or the competitive process.[37] Third, the CCM has specific mandate under section 50 CAM to promote competition and the benefits to be gained from a competitive process regarding price, output, choice and quality. Protecting the competitive process raises certain questions for Mauritius. As discussed in relation to absolute monopoly, the benefits from competition arise from the incentives, internal and external, upon the undertaking. In the main, the incentives come from the process of rivalry, as other competitors compete in the market. This also has to include consideration of the economic characteristics of Mauritius which tends towards concentrated market structures and concentrated market power. But what protecting the competitive process means for a Mauritian unilateral conduct case

[37] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010), para 182

would require a case-by-case assessment. It does not assume, or it would not be sensible to assume that, in spite of Mauritius' economic characteristics, that one market structure is more competitive, efficient or effective in delivering welfare than another. As pointed out by Gal and demonstrated in *Slaughter Cattle*, small market characteristics may sometimes mean that economic concentrations are more efficient and may be benefit the market e.g. by maintaining sustainable supply. The question, and this is where protecting the competitive process is relevant, is how that sustainable supply has been achieved – the incremental focus therefore includes the competitive structure in the market at that given time, the nature of the rivalry, the conduct of the dominant undertaking and its current and future effects (thinking of the long-term social welfare objective of CAM). Therefore, whilst protecting the competitive process is a goal of CAM, its framing and content lies in the existence of a higher objective, namely long-term social welfare.

Image-based Clearing Solutions[38] provides a good example of protecting the competitive process and structure under CAM. Blanche Birger was the dominant undertaking in two markets for bank cheque clearing systems: the software market and the hardware market. Notwithstanding Blanche Birger's dominance in the hardware market, the market retained a significant degree of competitiveness but for Blanche Birger's conduct: by limiting the operability of its software to its hardware, Blanche Birger was tying both markets and thus reducing competition in the hardware market. Two key factors drove the concerns of this investigation: first, a contributory factor to Blanche Birger's dominance position across the two markets was its first-mover advantage.[39] This in itself is insufficient to conclude that market structure should be protected: one cannot intervene in current market structures simply because of historical advantages obtained. The second aspect however is the enduring competitiveness of the hardware market. Instead of competing on the merits of

[38] Decision of the Commissioners of the Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014); Decision of the Commissioners of the Competition Commission of Mauritius *Image-based clearing solutions* CCM/DS/0015 (7 January 2015)
[39] This occurred through Blanche Birger's participation in the programme to automate the cheque clearing process.

its scanners, Blanche Birger's conduct reduced competition in the hardware market by tying hardware to its dominant software: most banks were using its software and so were compelled to use its hardware irrespective of the quality of its scanners. Thus, as the market could maintain and increase its competitiveness but for the Blanche Birger's conduct, the CCM found there were appropriate reasons to protect the competitive structure of the hardware market. This reasoning can be explained in terms of the long-term social welfare objective of CAM. The reason for protecting the competitive structure of the scanner hardware market satisfies the perspectives of the consumer, competing rivals, and the dominant undertaking. Consumers benefit from a competitive market which can accommodate other goods, rivals are able to compete for custom, and Blanche Birger retained a degree of control over the interoperability of its goods. This allows the market process to determine which goods should be available.

2.4.2. Protecting Competitors

The CCM is clear that it strives to protect the competitive process, rather than competitors.[40] However, this absolute position is inimical to the purpose of CAM: the protection of competitors, where it respects the competitive process thus far and promotes long-term social welfare, should not be overlooked. This does not require the protection of competitors or a single competitor *per se*. However, the Thesis argues there may be circumstances where the protection of a specific competitor may be reasonable in light of a) the economic circumstances of the case, b) the dominant undertaking's anticompetitive behaviour, and c) the adverse effect upon the consumer or economy. This is particularly so where Mauritian markets are prone to having a single dominant competitor and few marginal competitors. In these cases, where the markets could be competitive, or the evolution of the market has allowed those marginal undertakings to continue to operate, those competitors should be protected from anticompetitive behaviour and their place in the market explicitly recognized.

[40] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 2.27

However, rather than protecting a competitor *per se*, this collapses into either protecting the competitive competition, or protecting economic freedom. This relates to how the long-term social welfare objective informs the application of CAM, rather than forming the specific legal test. If part of the market remains contestable under conditions of dominance, then under the long-term social welfare standard the market should determine to what extent that portion remains contestable, rather than allowing the dominant undertaking to anticompetitively foreclose that portion of the market.

The importance for the legitimacy of unilateral conduct rules under section 46 CAM is demonstrated in *IBL.*[41] The case concerned IBL Consumer Goods' (hereafter "IBL") import of Kraft-brand food products and the sales contract it sought to implement with various retailers. Under the agreements, IBL offered volume-related discounts ranging from between 2% - 4% on Kraft-processed cheese (the dominant product) in return i) meeting sales targets and ii) providing shelf space for other (non-dominant) Kraft products.

The TSP had two characteristics: i) volume-related discounts for Kraft Cheese with higher end-of-year rebates given for meeting certain sales targets; ii) shelf space and promotional requirements for certain Kraft chocolates and biscuits; requiring that promotional requirements and shelf-space requirements in the confectionary market were equivalent to that of the market leader.

At the time of *IBL*, a long-term duopoly existed in the relevant market between IBL with a market share of 90% and Chesdale at 10%. Of Chesdale's market position and importance to the market, the investigation stated:

> Given this very high market share, the effect on the existing competitor (Chesdale) is not the primary focus of concern (there is relatively little competition to be lost). However, retailers' incentives to promote or even

[41] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010); Decision of the Commissioners of the Competition Commission of Mauritius *IBL Consumer Goods' Sales Contract with Retail Stores* CCM/HG/INV 001 (9 September 2010).

> allow new competitors into this market would seem to be significantly reduced or even eliminated by the volume-related discount, if those competitor's would reduce Kraft's sales. Consequently, the volume-related discount scheme seems likely to have the effect of preserving and protecting Kraft's very high market share for processed cheese.[42]

It is necessary to consider the long-term effects on the market: whilst the 10% market share held by Chesdale might have presented little competition to Kraft, it nevertheless represented a clear consumer choice in the face of a very dominant product: thus IBL ought to have competed on the merits of its products in order to increase its already significant market share in the market.

2.4.3. Economic Freedom

Closely related to protecting competition and protecting competitors is the protection of economic freedom. Economic freedom however, is more than protecting the opportunities of competitors; also includes the economic freedom of consumers. As noted above, the consumer perspective is specifically accounted for in CAM. Furthermore, the protection of economic freedom of competitors is seen as a pertinent competition objective for developing competition jurisdictions as they establish their competition principles and competition culture.[43] Thus economic freedom is concerned with ensuring that consumers and competitors are able to act and participate within the market free from anticompetitive constraint. This can be seen by the fact that unilateral conduct rules are concerned with the actions only of dominant undertakings – where the ability of that undertaking to act to a sufficient degree free from competitive constraint leads to anticompetitive outcomes. This way of thinking about economic freedom focuses on its negative aspect, namely freedom from constraint. However, particularly for developing countries, the goal of economic

---

[42] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010) , para 5.7.6.
[43] This is one of the reasons why European Union competition law is seen as a good model for developing countries.

freedom has a positive, more transformative aspect: a theory of agency.[44] This has been defined in two ways 'inclusive economic growth' and 'freedom to compete.'

Gal and Fox argue that a goal of the competition laws of developing countries should be inclusive economic growth. They argue that the goal of inclusivity legitimises competition law in the following ways.[45] First, it preserves both economic opportunity and freedom from coercion. Second, inclusivity seeks to preserve opportunity for *all* market participants, both actual and potential, rather than just those who already exercise economic power. Thus inclusiveness is not only 'efficiency defined as increase aggregate wealth, but efficiency defined also in terms of enabling the masses of people to participate on their merits in the economic enterprise.'[46] Thus inclusive economic growth can be seen as a thicker version of economic freedom. Sen's 'freedom to compete'[47] extends participation beyond efficient markets and meritocracy to include human rights and flourishing. This promotes people (and thus market participants) as agents of change and moves away from seeing competition solely through the lens of welfare and income generation.[48] Thus economic freedom as the freedom to compete seeks to capture the dual aspects of the market, namely as an instrument for material advancement and also a vehicle for individual liberty.[49] One issue with this thick conception of freedom to compete is identifying its

[44] A Sen, *Development as Freedom* (OUP, 1999); H Schweitze 'The Role of Consumer Welfare in EU Competition Law in J Drexl, RM Hilty, L Boy, C Godt, B Remiche (eds) *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Larcier, 2009); AA Frediani, 'The World Bank, Turner and Sen – Freedom in the Urban Arena' (UCL, DPU Working Paper No.136, 2009)

[45] MS Gal and EM Fox 'Drafting Competition Law for Developing Jurisdictions' in MS Gal, M Bakhoum, J Drexl, EM Fox and DJ Gerber (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015), 324

[46] MS Gal and EM Fox 'Drafting Competition Law for Developing Jurisdictions' in MS Gal, M Bakhoum, J Drexl, EM Fox and DJ Gerber (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015), 326

[47] see e.g. A Sen, *Development as Freedom* (OUP, 1999); D Kennedy, 'The "Rule of Law", Political Choices, and Development Common Sense' in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), 95; H Schweitze 'The Role of Consumer Welfare in EU Competition Law in J Drexl, RM Hilty, L Boy, C Godt, B Remiche (eds) *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Larcier, 2009), 552

[48] AA Frediani, 'The World Bank, Turner and Sen – Freedom in the Urban Arena' (UCL, DPU Working Paper No.136, 2009), 2

[49] KT Do, 'On the Normative Foundations of the Global Competition Governance' < http://ssrn.com/abstract=2563685> accessed 4 October 2015 , 10

outer limits of application. For example, Akman asks how does one manage the dynamic aspect of the market given a) its unpredictable nature and b) difficulties in measurement? In relation to uncertainties of the market, it is argued that this 'is not an obstacle to be overcome, but are rather the systemic results of individual freedom and central to the value of competition for society.'[50] The limits of freedom to compete are defined by the limits on the rules of competition law – inefficient firms have to leave the market.[51] But what does this really mean? If a dominant firm acts inefficiently through its anticompetitive conduct e.g. the anticompetitive effects of its conduct outweigh the benefits, or its conduct is anticompetitive by its very nature, does that mean it should leave the market? Or do we mean inefficient in terms of economies of scale (particularly when we talk of developing or small economies)? What if a firm is inefficient when measured by economies of scale, but there is demand nevertheless for its product? If the competitive process allows the entity to remain viable and thus demonstrates it meets a specific demand, then its opportunity to participate in the market ought to be protected. Sen argues that this extends the goals of competition law beyond strict welfare concerns and requires the protection of both opportunity and process.[52]

IBL, *Image-based Clearing Solutions* and *Manhole Covers* can also be considered cases of promoting economic freedom of competitors and protecting their right to participate in the market free of anticompetitive unilateral conduct, and perhaps confirms that protecting economic freedom/the freedom to compete is a holistic way of looking at protecting the competitive process and the competitive opportunities of market participants. *Manhole Covers* provides the clearest example of a dominant undertaking's conduct constraining the economic freedom of participants in the market, particularly with its requirement of non-existent quality assurance and its ability to influence third-party customers as a

---

[50] H Schweitze 'The Role of Consumer Welfare in EU Competition Law in J Drexl, RM Hilty, L Boy, C Godt, B Remiche (eds) *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Larcier, 2009), 522

[51] H Schweitze 'The Role of Consumer Welfare in EU Competition Law in J Drexl, RM Hilty, L Boy, C Godt, B Remiche (eds) *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Larcier, 2009), 522

[52] A Sen, 'Markets and Freedoms: Acheivements and Limitations of the Market Mechanism in Promoting Individual Freedom' (1993) 45 Oxford Economic Papers, 519, 522-525

dominant infrastructure provider. Its conduct was without economic merit and prevented undertakings with legitimate products from participating in the market. The competitiveness of the relevant market and the opportunities available for competition was also confirmed in *Image-based Clearing Solutions.* The nature of the hardware market continued to present significant competitive opportunities and demand for the products of the incumbent's rivals.

IBL, described above is a more interesting example because it is a case of preserving economic freedom in way that promotes long-term social welfare and Mauritian competition culture: the outcome of that case promoted the economic freedoms of i) an existing marginal competitor, ii) the existing consumers and demand of that marginal competitor, and iii) competitive opportunities for new competition. The last point is crucial: the CCM's intervention promoted economic freedom for future competition. As subsequently occurred, new undertakings were able to penetrate the market: this new entry may not have been able to take place, if IBL had been able to lock-up the promotional channels of the market by linking shelf-space of its products to its market share. Of further note is whether the conduct is 'particularly distortionary' for a market which has yet to experience such conduct, which will cause rivals to either i) also pay for shelf space themselves or ii) face their products having reduced placement on market shelves. The main concern was that IBL's conduct would lead to 'only large suppliers and big international brands' being displayed prominently in Mauritian supermarkets.'[53]

If the economic freedom of market rivals is to be protected, the corollary must be that undertakings exercise that right or make practicable steps to do before they can rely on competition law for assistance. In *Slaughter Cattle* for example, the issue turned on whether the Murray Express cattle carrier in question constituted an 'essential facility' controlled by the dominant undertaking

[53] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), paras 5.7.8 – 5.7.9. The Executive Director gives the example of IBL negotiating with one particular store to provide volume-related discounts on its dominant product in return for that store ceasing to sell a juice product which competed with one of Kraft's weaker products.

(Socovia), without which Socovia's rivals could not operate in the market. During a period when vessel was unavailable, Socovia was able to hire two other vessels. This fact cast doubt on the degree to which the Murray Express could constitute an essential facility. In its decision dismissing the CCM's findings, the Commissioners found that Socovia's rivals had not either sought to make arrangements to source other vessels or had been unwilling to take the risks of doing so.[54] This follows the same line of reasoning, adopted by the Commissioners, in *Oscar Bronner*, where the European Court of Justice held that, in relation to newspaper delivery scheme held by the dominant undertaking, there were no:[55]

> technical, legal or even economic obstacles, capable of making it impossible, or even unreasonably difficult, for any publisher of daily newspapers to establish, alone or in co-operation with other publishers, its own nationwide home delivery scheme.

Due to its historical context and institutional development, the European competition model is seen as being 'instructive' for developing countries in terms of shaping their competition law.[56] The historical context is the development of European competition law to address issues of small, fragmented economies, high levels of government intervention and high barriers to entry. The institutional context focuses on the fact that European competition law enforcement is mainly administrative. It takes place predominantly through the activities of the European Commission. This is also the case with Mauritius at present with decisions mainly taking place through the CCM and little judicial involvement at this stage.

---

[54] Decision of the Commissioners of the Competition Commission of Mauritius *Importation of Slaughter Cattle in Mauritius* Commission/HG/003(21 December 2011), para 3.3.24

[55] *Oscar Bronner*, C-7/97, ECLI:EU:1998:569

[56] DJ Gerber 'Adapting the Role of Economics in Competition Law: a Developing Country Dilemma' in MS Gal, M Bakhoum, J Drexl, EM Fox and DJ Gerber (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015), 262-263

The proposed link between European competition law and developing countries is its Ordoliberal foundations. Ordoliberalism focuses on the economic order to control the harmful effect of concentrations of economic and political power.[57] Thus Ordoliberal-based competition rules seek to create a market where individuals are able to undertake economic activities in the market free from government coercion and restrictive conduct from private undertakings.[58] The four elements of Ordoliberalism are: i) promoting individual economic freedom; ii) that the State has a roles in protecting the basic conditions of competition, iii) maintaining the rule of law and iv) that economic order stems from the economic activity of a free and open society,[59] where market participants are viewed as legal equals.[60] Thus Ordoliberalism provides for a more active role for the State in implementing and enforcing competition law, focusing on maintaining individual economic freedom against the exercise of private power. Maintaining competition and maintaining the competitive process are valued in themselves. In adopting a humanist approach to competition and protecting the economic freedom of individuals, ordoliberalism views competitive benefits such economic growth and efficiencies as derived goals resulting from the competitive process.[61] For this reason it is suggested that the ordoliberal philosophy is important for Mauritius in terms of its development and competition goals, and protecting economic opportunities for the Mauritian people.

Prior to the modernisation of Articles 101 and 102 TFEU, one could argue that the primary EU focus was ordoliberal, thus focussing on preserving rivalry, preventing foreclosure and promoting competition on the merits of products and services. In particular, this can be seen in the operation of Article 102 TFEU where its operation is underpinned by the concepts that dominant undertakings

---

[57] LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 42; P Marsden and LL Gormsen, 'Guidance on abuse in Europe: The continued concern for rivalry and competitive structure' (2010) 55(4) The Antitrust Bulletin 875, 881

[58] LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 45; DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998), 240

[59] LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 43

[60] E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, 2010), 27

[61] see e.g. DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998), 239 and 241.

have a special responsibility to the market in which in which they operate and ought to compete on the merits of their goods. Nevertheless, it should be noted that the source of Ordoliberalism in EU competition law is a matter of dispute: it has been argued that *travaux preparatoires* of the Treaties make no reference to the Ordoliberal thinking.[62] Whilst interpretations of ordoliberalism are not necessarily agreed,[63] core tenets can be thought of as 'fairness', that small to medium enterprises are conducive to consumer welfare and that dominant firms either ought to behave as if constrained by competitive forces or should not engage in conduct which unfairly restricts rivals' access to the market. The first of the latter two points is problematic: on the one hand, it provides a first principle clear line with regards certain conduct. When acting as if the market is competitive, for example, the dominant undertaking should price its products competitively in relation to the market. However, if the undertaking ought to behave as if the market is competitive, then without further clarification, this also suggests it should compete as aggressively as it can against the remaining competition, as it ordinarily would in order to be profitable in a competitive market. Furthermore, in the absence of actual constraint and competitive feedback, how does an undertaking know what the competitive outputs are – ultimately, it can act only within its own assumptions. The second point – that a dominant undertaking should not engage in conduct which unfairly restricts market access, whilst sounding promising suffers from the limitation of how one distinguishes fair from unfair competitive conduct. With 'fairness' not being axiomatic, further normative content is required. In this regard, two particular concepts have developed under Article 102 TFEU – the concepts of 'competition on the merits' and 'special responsibility'. One way of articulating Ordoliberal thinking on competition might be to think about it as 'performance-based

[62] see e.g. P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart, 2012); R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011)

[63] cf DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998), 241; DJ Gerber *Global Competition Law: Law, Markets, and Globalisation* (Oxford University Press, 2010), 167-168; EJ Mestmacker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' in LF Pace (ed) *European Competition Law: The Impact of the Commission's Guidance on Article 102*' (Edward Elgar Publishing, 2011), 25 – 63.

competition': this includes pricing, better quality products and better service,[64] with dominant undertakings acting *as if* faced by competition.[65] As will be discussed, elements of Ordoliberal thinking appear in the CCM's analysis of unilateral conduct under section 46 CAM.

At various points, both Mauritius and South Africa have stated that their competition laws pursue the objective of social (total) welfare.[66] The question most relevant here is the degree of institutional intervention. McMahon argues that an overall ordoliberal approach would be appropriate for such economies as they unpick the complexities of competition matters, markets tending towards economic concentration, and socially embedded inequalities. In recently liberalised economies, the aim is to impose market discipline and increase incentives for competition.[67] McMahon argues that the pursuit of a social welfare objective is inappropriate for developing economies.[68] This is on the basis that a utilitarian objective concerned with sum welfare, coupled with a belief in self-correcting markets, is insufficient to meet the specific needs of developing countries. By contrast, McMahon argues that Ordoliberalism is the more appropriate approach with its focus on economic freedom, preservation of rivalry and competition on the merits. The two can be reconciled. First, social welfare, in its long-term form, increasing the aggregate wealth of society, is appropriate as the ultimate objective of the competition law. As pointed out, its aggregate aspect is how social welfare is measured, but it represents the value

---

[64] R O' Donoghue, and J Padilla, *The Law and Economics of Article 102 TFEU'* (2nd Ed, Hart Publishing, 2013), 57; DJ Gerber, 253

[65] DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998), 252

[66] International Competition Network 'Competition Enforcement and Consumer Welfare: Setting the Agenda (10th Annual Conference, The Hague, 2011)
; G Monti, 'Unilateral Conduct: the Search for Global Standards' in A Ezrachi, (ed) *Research Handbook on International Competition Law* (Edward Elgar, 2012)

[67] K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>, 15

[68] K McMahon, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>, 15

that individuals place on goods in society.[69] However, the optimal means to achieving that objective will be determined by the economic context of the competition law. Where Mauritius has economic characteristics that lends itself to both economic concentrations of power and markets that may not necessarily self-correct, an approach that focuses on rivalry and economic freedom as a means of achieving social welfare is appropriate

2.4.4. Fairness

Section 46 CAM does not refer to 'fairness' as part of its provision. By contrast, the unilateral conduct rules under the 2003 Act listed the imposition of unfair prices or trading conditions as an example of conduct which would be reviewed. The legitimacy of competition as a co-ordination mechanism of economic activity and the legitimacy of CAM is predicated on both being seen as fair. For societies with weak competition culture, competition must be seen as making positive contributions to livelihoods and welfare overall. Fairness and efficiency are seen as being contradictory aims, for example when we have cases of large incumbents, smaller marginal competitors and are looking at marginal efficiencies. But less is said about when efficiency and fairness are congruent. In this regard, developing economies which need to generate competition should be focused on the larger efficiencies that can be gained from preserving competitive opportunity: as their competition law and competition culture develop, it is possible that their approaches can shift towards a more incremental, economic approach over time.

Nevertheless the question remains as to whether a broader concept of fairness exists under CAM. If it does, this raises question of to whom does the obligation of fairness apply, to whom is the obligation owed, and what is meant by the term.

Two sources suggest that fairness is implicit in CAM. The first source is the pass-on requirement in section 50, assuming that dominant undertakings carry some

---

[69] R Nazzini *The Foundations of European Competition Law*: *The Objective and Principles of Article 102* (Oxford University Press, 2011), 33

of form detrimental advantage over their customers: one of the criteria when considering remedies for anticompetitive conduct, and whether to what extent any public- interests effects may be taken into account, is that the benefits have been shared or are likely to be shared with consumers or business in general.[70] The second is the CCM. As well as its decisional practice (discussed below), its guidance on the 'General Provisions' of CAM states:

> The CCM can intervene only when there is a competition problem, and only to promote the interests of affected consumers and users. The CCM does not have the power to intervene solely on the grounds of 'fairness' between different consumers, or between consumers and suppliers. There is no provision in the Act for the CCM to favour some groups of consumers or some sections of society over others.[71]

To promote long-term social welfare, the CCM is correct to state that its remit does not include favouring any particular sections of society. However, the CCM omits to mention the interests of producers: nor it does have the power to intervene solely on grounds of fairness between producers and consumers. Promoting long-term social welfare values the participation of all market players. Thus the answer to the question of 'fairness to whom?' comes in two parts. First, the obligation of fairness is upon the producer. Second, if there is an obligation of fairness upon producers, the nature of it would depend on the conduct and economic circumstances in question, the extent of the dominant position held by the undertaking and the nature of the abuse in question.

Nevertheless, defining fairness as a workable standard for competition law is a difficult task.[72] The obstacle is identifying an objective standard by which fairness can be measured.[73] This is based on the proposition that fairness is not

---

[70] CAM, section 50(4)
[71] Competition Commission of Mauritius 'Guidelines: General provisions CCM 7' (November 2009), para 2.13
[72] See e.g. P Akman, *The Concept of Abuse in EU Competition Law* (Hart Publishing 2012); R Nazzini *The Foundations of European Competition Law*: *The Objective and Principles of Article 102* (Oxford University Press, 2011)
[73] P Akman, *The Concept of Abuse in EU Competition Law* (Hart Publishing 2012);

capable of being defined in itself but requires further clarification. A good example is pricing and what constitutes a fair price. The AEIK investigation illustrated the different ways that the fairness of a price might be calculated.[74] Nevertheless, there are probably cases where intuitively one can see that conduct is unfair without further reference to an external standard required. Thus what is required is a balanced approach between semantic and intuitive notions of competition on the one hand and the technocratic understandings of competition on the other. In a definition of anticompetitive behaviour, the OECD states that 'competition laws prohibit…conduct that is "anticompetitive" – that is conduct that does or is likely to restrict output and increase price, impede market expansion or new entry, reduce product or service quality, or stifle innovation. *They also prohibit firms from obtaining market power by…means other than skill, foresight and industry*.'[75] This suggests that the balance of fairness is between economic efficiency (generally low prices and high output) and competition on the merits (competition by skill).

The object-based element of section 46 may be the method which fairness elements may be incorporated into the Mauritian unilateral conduct rules. One reason that it is appropriate for CAM to have an object-test for unilateral conduct is that there may be instances of unilateral conduct which by their nature are predominantly anticompetitive and thus may be censured without further enquiry into effect. Particularly for Mauritius and other countries facing similar matters, object rules may help to improve the legitimacy of competition law, support the accommodation of multiple objectives and promote the overall long-term social welfare objective. *Manhole Covers* and *Insurance and Credit Products* suggest a possible link between fairness, aspects of conduct which are clearly not competition on the merits and assessment by object. The Chapter on Abuse proposes that tests based around naked restrictions of competition and no-economic sense are appropriate tests for object. These discussions suggest that fairness may be considered a guiding principle, but what constitutes 'fair' will a)

---

[74] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013)
[75] Emphasis added. OECD' Economic Efficiency, Growth and Opportunity' (2004), 42

turn on a case-by-case basis and b) have to be read in conjunction with other standards.

2.4.5. Market Liberalisation

Competition law is seen as a necessary and complementary requirement to ensure the success of efforts to liberalise market and ensure that political concentrations of economic power are not replaced by concentrations of private concentrations of economic power. If market liberalization has eliminated public barriers to trade and economic transactions, competition law is required to ensure that private barriers are not erected in turn. From a development perspective, priority may initially be placed on market liberalisation before competition measures.[76] However, the South African *Telkom* of demonstrates that liberalisation in itself does not equal competition. The monopolist incumbent which owned the privatised telecoms network used its position to harm downstream competitors by a) restricting access to its infrastructure on the basis of spurious claims regarding use of licences and b) contacting directly consumers of those competitors to encourage them not to deal with those downstream rivals.[77] Mauritius has experienced significant economic growth and change in light of its liberalisation programme moving from a sugar and textile economy to one focusing on new areas of growth, including information and communications technology, financial services and specialty tourism, and increased foreign direct investment.

A good example of the difficulties of reconciling the aims market liberalisation and competition has been the developments of the Mauritian cement market. Following CAM coming into force in November 2009, the Mauritian cement market has been liberalised in three phases: the initial CCM market study (MS001) and the cement market's subsequent liberalisation; the second CCM

[76] This is suggested to be the position of the IMF (Stiglitz, 2002)
[77] *Competition Commission v Telkom SA Ltd* (11/CR/Febb04) [2012] 7 August 2012; S Roberts and J Tapia, 'Abuses of Dominance in Developing Countries: A View from the South with an Eye on Telecoms' (UCL Centre for Law and Economics Society Working Paper 1/2013, 2013), 13

market study (MS002); third, the international merger of the Holcim S.A. and Lafarge S.A. Effectively, liberalisation of the cement market has taken the market out of government control for supply and stability. It was hoped that liberalisation, together with the availability of the Mauritian unilateral conduct rules would lead to both more competitive prices and increased choice. However, at the time of the studies, neither of those outcomes had occurred, the overall price of cement had increased, and the market remained as concentrated as before.

2.5. Conclusion

The aim of this Chapter was to confirm long-term social welfare objective as he ultimate goal of CAM. Sections 2.2. – 2.2.2 set out the economic theory illustrating why monopoly as whole risks anticompetitive outcomes. This explains why, on the basis that Mauritian economic characteristics already skew towards market concentrations of economic power, the Mauritian unilateral conduct rules should not hesitate to adopt an approach which generally favours intervention in order to establish competition as the process for driving efficiencies. This led to conclusions of 2.3.1 and 2.3.2 which confirmed the superiority of long term social welfare over the consumer welfare standard. Competitive protection of the consumer is already twice accounted for in CAM. But, as stated in 2.3.1 above, the wide application of CAM seeks to pursue a number of goals geared towards improving societal wealth overall. Thus allowing for an undertaking's dominant position in the market, and protection of the consumer already inherent in CAM's unilateral conduct rules, the pursuit of long-term social welfare maintains a balance between those two short-term perspectives with view to the overall functioning of the market in the long-run.

The next part of this Chapter (sections 2.4 – 2.4.5) looked at possible non-welfare goals that are part of CAM. Whilst CAM incorporates other non-welfare goals as part of its purpose, none of these goals, such as protecting competition and fairness, are capable of constituting CAM's ultimate objective as their aims: they have to be read and applied in the light of a normatively superior objective.

Amongst other things, these concepts support a holistic application of CAM, supporting its legitimacy and ensure a sophisticated application of its rules.

3. Testing for Abuse under section 46 CAM

3.1. Introduction

This Chapter calls for the exclusionary test of abuse under section 46 CAM to be revised. An intent or effects-based provision, with a transparent and structured framework, would support CAM's long-term social welfare objective. Inherently anticompetitive conduct would come within the scope of ''intent.' Conduct with both anticompetitive and pro-competitive elements would be assessed under effect. Pro-competitive effects insufficient to prevent a finding of abuse of dominance might be used as evidence for the public-interest test under section 50 CAM. More broadly, the object and effects provision, appropriately applied, is capable of supporting the legitimacy of the legislation and contributes to the Mauritian competition culture. In their current form however, the drafting of the rules prevent this test from being workable. The structure of section 46 blurs the difference between the current test of object and effect. Furthermore, the decisional practice of the CCM suggests a lack of transparency with regards the application of section 46 and how abuse is assessed.

The Chapter is structured as follows. The first part of the Chapter looks at the separate approaches of *per se* rules, intent, object and effect to confirm that these alone are insufficient to constitute the test of exclusionary abuse under CAM. This sets the foundation for the argument that a tiered, dual approach consisting of 'intent or effect' is the test for exclusionary abuse under CAM which meets its long-term social welfare aspirations. The last part of this Chapter looks at the sub-tests that constiteus

3.2. Some General Thoughts Regarding Tests for Abuse

‘After all, abuses are forms of conduct that are otherwise lawful; they become susceptible to legal attack because they are performed by a dominant firm.’[1] In assessing tests of abuse, the basic proposition is that ‘unnecessary restrictions on firms’ incentive or ability discover and respond to consumer demand in an efficient manner imposes substantial costs on economies at all levels of development…’[2] The decision of whether conduct constitutes an abuse requires an assessment of the conduct in its context. For example, a particular form of conduct may be anticompetitive in a developing economy due to scarcities of capital, land, and lack of available competition.[3] Therefore, the tradeoffs for assessing abuse of dominance may differ.[4] From the OECD’s perspective, an effective competition policy focuses on the efficiency losses caused by an undertaking’s conduct i.e. conduct that results in welfare and productivity losses.[5] It is suggested that this entails an effects-based approach to enforcement, analysing the economic effects of the conduct in question and taking efficiencies into account.[6] However, it could be argued that this represents the stage where a competition jurisdiction has reached a degree of maturity in terms of its competition experience. This maturity will be reflected in the development of the competition culture, the promotion of long-term social welfare and the enforcement of competition law. A competition jurisdiction needs time to reach the stage where it can prioritise (if and when appropriate) efficiency-based goals above others. In order to reach that stage, a competition culture promoting meritocracy, fair competition, democratic participation and efficiency – values that underpin efficient competition – needs to be cultivated; this turn will promote long-term social welfare as the efforts of producers and choices of consumers are valued. The application and development of the respective unilateral conduct rules will be critical to this process. The

---

[1] *Competition Commission v Media 24 (Pty) Ltd* (92/CR/Oct11) [2013] ZACT 19 (28 March 2013), para 28; see also *AKZO v* Commission, C-62/86, ECLI:EU:C:1991:286, para 270; *France Télécom v Commission,* C-202-07 P, ECLI:EU:C:2009:214, para 106; *Deutsche Telekom v Commission,* C-280/08 P, ECLI:EU:C:2010:603, para 177; *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, para 25

[2] OECD ‘Economic Efficiency, Growth and Opportunity’ (2004), 44

[3] OECD ‘Economic Efficiency, Growth and Opportunity’ (2004), 44

[4] OECD’ Economic Efficiency, Growth and Opportunity’ (2004), 44

[5] E Alemani, and others ‘New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries’ (No. 1104, OECD Economics Department Working Papers, 2013), 9

[6] E Alemani, and others ‘New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries’ (No. 1104, OECD Economics Department Working Papers, 2013), 9

competition jurisdiction will have to develop its understanding and interpretation of its rules not only in general, but also in its own social, political and economic context. At this stage of Mauritian competition law development, the unilateral conduct rules need to focus on being workable and transparent,[7] generating competition and establishing a Mauritian pro-competition culture.

As a matter of overall approach, the assessment of abusive unilateral conduct under CAM is effects-based. It involves the balancing of anticompetitive and pro-competitive effect. Section 46 is concerned with the effects of restricting competition, exploitation of the monopoly situation, and harm to the Mauritian economy or consumer. The assessment of remedies under section 50 requires the following public interests to be taken into consideration: the safety of goods and services; if the allocative or productive efficiency with which goods or services is improved; if new goods or services are developed and improved; if technological and economic progress is improved.[8] In empowering the CCM to take into consideration immediate harm to competition, but also to look at protecting competition and future developments of the market, the effects-based approach under CAM is geared towards promoting long-term social welfare.

CAM's effects-based approach is notable for the following reasons: First, it applies to both exclusionary and exploitative conduct, thus unifying the assessment of the prohibitions under section 46. Second, the assessment of effect takes place in two discrete stages: the assessment of anticompetitive effect is done at the investigation/prosecution stage; the assessment of public-interest or pro-competitive effect at the remedies stage under section 50. Thus the 'balancing' exercise, which is a particular hallmark of the effects-based approach, takes place during the assessment under section 50. Third, in order for a public-interest factor to be considered, section 50 explicitly requires that its effect outweighs the anticompetitive effect of the conduct. This means as a matter of logic that efficiencies are not part of the definition or test for abuse under section

[7] See e.g. JE Stiglitz and A Charlton, *Fair Trade for All* (Oxford University Press, 2005), 272 – Per se rules are easier and less costly to apply.
[8] CAM sections 50, 60, 61. The next chapter considers the specific requirements for assessing the prescribed public benefits listed in CAM.

46 CAM. If that were the case, then a finding that the pro-competitive effects of the conduct outweigh its restriction of the market would mean such conduct falling outside the scope of section 46 CAM. The nature of the effects-based approach under CAM creates two specific problems. First, the structure of the effects-based approach (section 46 and section 50 CAM) prevents a holistic assessment of conduct under section 46 CAM. Second, that same structure prevents 'object' from being an operational test. As will be argued below, the test of object is predicated on conduct being inherently anticompetitive – no plausible pro-competitive explanation is available. The placement of section 50 prevents this proper assessment of object from being available. The unilateral conduct rules pursue a number of goals - section 46 is the appropriate place for these different interests to weighed and allow for a practicable scoping of the object or effect provision under section 46. If any pro-competitive benefits are insufficient to defend an undertaking from an adverse finding under section 46, either to rebut a finding of object or overcome a finding of anticompetitive effect, then any established pro-competitive effects should still be available as a source of mitigation under section 50. Thus by separating the assessment of abuse from the potential pro-competitive justifications, the current structure of the CAM rules undermine the pursuit of long-term social welfare. This is because findings of abuse become potentially predicated on the market context (dominance and barriers to entry) without consideration as to whether those same conditions give rise to pro-competitive benefit. This could make findings of dominant positions and abuse of those positions relatively easy to find, and given the overall structure of CAM unilateral conduct rules capture conduct which actually has a net benefit on welfare.

An alternative proposal would be to do away with the object element of section 46 CAM. Four arguments for adopting a pure effects-based approach are as follows. First, markets are complex and the effects of conduct may be ambiguous. Second, in this context, the balancing nature of an effects-based approach is suited to supporting the social welfare objective. Third, it has been argued that the effects-based approach leads to more consistency, ensuring that practices which have the same effect are treated the same under law. Fourth, shifting the

focus on to effect of conduct minimizes any advantages undertakings gain by arbitraging between different practices.[9] This leads to a case-by-case assessment. Consistency is achieved by determining whether an economically plausible narrative supports the alleged harm with the standard focusing on consumer welfare and efficiencies.[10] A workable effects-based approach requires that undertakings i) conduct themselves in a pro-competitive manner, ii) are generally compliant with competition standards and iii) have sufficient expertise and knowledge to apply the competition rules.[11]

Nevertheless, the approach under CAM does present a number of issues. First, whilst it may be the general approach to assessing unilateral conduct, a pure effects-based approach is not compliant with the structure of section 46. The rules are based on *object* or *effect*, not just effect alone. Second, CAM is not predicated solely on efficiency considerations or harm to the consumer. As will be discussed later in this Chapter, consumer harm has been broadly defined by the CCM's decisional practice so far. Furthermore, the CCM is empowered under section 50 CAM to have regard to promoting competition in the first instance as the primary mechanism for pursuing optimal market outcomes. Section 46 CAM has been adopted to protect the competitive process as a means of supporting markets to deliver efficiencies, high quality products and services, and fair outcomes for market participants. Third, an effects-based approach presents practical matters that require careful consideration. Competition law involves the interaction between economic and legal principles. Regardless of the approach adopted, be it object or effects-based, economics provides the framework for the interpretation of legal rules, and for determining when conduct is anti or pro-competitive.[12] An effects-based approach that requires that public-benefit outweighs the anticompetitive effect further promotes this

---

[9] Economic Advisory Group on Competition Policy 'An economic approach to Article 82' (July 2005), 6
[10] Economic Advisory Group on Competition Policy 'An economic approach to Article 82' (July 2005), 8-9, 13
[11] O Budzinski and MHA. Beigi 'Generating instead of protecting competition' in MS Gal, M Bakhoum, J Drexl, EM Fox and DJ Gerber (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015), 236
[12] A Pera, 'Changing Views of Competition, Economic Analysis and EC Antitrust Law' (2008) 4(1) European Competition Journal 127, 131

integration. However, the informational requirements and concomitant costs make a pure effects-based approach difficult to implement.[13] This is particularly an issue for the NCAs of smaller jurisdictions whose resources and capacity will be less compared to larger jurisdictions. Furthermore, if an effects-based approach is practised at enforcement level, then the judicial level must be capable of understanding arguments submitted before it. Indeed, this in turn creates space for the involvement of experts, who will assist the courts in understanding the market dynamics at hand. In an adversarial process, this will lead to presentations of conflicting economic analysis. Such analysis may also generate further complexities e.g. consensus regarding the assumptions on which they are grounded and ambiguous findings.[14] Finally, there is a concern that an effects-based approach may be perceived as favouring 'big business.'[15] For example, big business may be better able to afford the necessary economic expertise required to build cases under the effects-based approach. A further matter is whether, from a welfare perspective, the application of CAM's unilateral conduct is based upon dynamic or static efficiencies. It could be argued that if CAM's application is predicated on the latter, larger businesses may be better able to satisfy this standard be demonstrating economies of scale for example in economic conditions with limited demand and high barriers to entry.

3.3. Rejecting a Single Approach to Exclusionary Abuse under CAM

This section discusses the possible overall approaches to exclusionary approaches to CAM – *per se*, effect, object, intent. It confirms that each of these

---

[13] P Lowe, 'Consumer Welfare and Efficiency: New Guiding Principles of Competition Policy?' (2007) <http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf> accessed 30 March 2012, 8; I Lianos, 'Categorical Thinking in Competition Law and the "Effects-Based" Approach in Article 82 EC in A Ezrachi (ed), *Article 82 EC: Reflections on its Recent Evolution* (Hart Publishing, 2009), 21

[14] I Lianos, '"Judging " Economists: Economic Expertise in Competition Law Litigation: A European View' in I Lianos and I Kokkoris (eds) *The Reform of EC Competition Law* (Kluwer Law International, 2010) 190, 235, 244, 245

[15] ILO Schmidt, 'The Suitability of the More Economic Approach for Competition Policy: Dynamic vs Static Efficiency' (2007) 28(7) European Competition Law Review 408, 411

approaches, taken individually, are unsuitable for regulating unilateral conduct under CAM.

3.3.1. *Per se* rules for Section 46

It has been suggested that a strict policy should be adopted toward exclusionary practices with no offsetting benefits of dominant firms.'[16] Thus, a number of advocates support the adoption of some degree of *per* se framework for developing countries and young competition jurisdictions.[17] The *per se* approach determines conduct as abusive if it corresponds to the legal examples or formal categories of abusive behaviour without requiring further economic assessment.[18] *Per se* legality rules have the benefit of being straightforward to apply and are cheap to implement from a legal costs point of view. It has been argued by certain commentators that *per se* rules are appropriate only where i) experience or logic demonstrates that the benefit or harm is clear and ii) the risk of false positives or negatives is small.[19] In the European Union case of *GlaxoSmithKline*,[20] the Advocate General cautioned against the development of *per se* rules for Article 102 TFEU even when intent and anticompetitive effects may be evident. This is on the basis that such conduct may have pro-competitive benefits and undertakings should therefore have the opportunity to submit their justifications.[21]

A rationale for *per se* rules was given by the US Federal Supreme Court in *Northern Pacific Railway Co. v United States* 316 U.S. 346 (1942)

---

[16] MS Gal, 'Size does matter: The Effects of Market Size on Optimal Competition Policy' (2001) 74 Southern California Law Review 1437, 1471

[17] See O Budzinski and MHA Beigi 'Generating instead of protecting competition' in MS Gal, M Bakhoum, J Drexl, EM Fox and DJ Gerber (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015), 242

[18] UNCTAD 'Model Law on Competition (2015) Revised Chapter IV' Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, 6-10 July 2015), para 13. See also O Black 'Per se rules and the rule of reason: what are they? (1997) 18 European Competition Law Review 145.

[19] see e.g. R O' Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU'* (2nd Ed, Hart Publishing, 2013), 225

[20] *GlaxoSmithKline*, C-501/06 P, ECLI:EU:C:2009:610

[21] *GlaxoSmithKline* C-468/06 ECLI:EU:C:2008:180; para 76

> '…there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use. The principle of *per se* unreasonableness not only makes the type of restraints which are prescribed…more certain to the benefit of everyone, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable…

In principle, *per se* rules for unilateral conduct would not be inconsistent with CAM. Section 42 CAM automatically prohibits certain types of bid rigging. Having *per se* rules would present advantages under CAM. Their main advantage is administrative efficiency. Once it is determined that the conduct is falls within the designated category, no further evidential enquiry is required. The conduct is deemed anticompetitive. *Per se* rules are not concerned with dominant positions. It is the specific act itself which is prohibited. This is on the basis that conduct itself is so anticompetitive that it is socially unacceptable and so should be prohibited – because the conduct is revealed to be '…almost always results in anticompetitive consequences, and is almost never justified for business reasons.[22] *Per* se rules also offer a degree of deterrence - the specific conduct is identified and a *per* se rules leaves no doubt regarding the legality of those rules under the law. Because of their administrative efficacy, high thresholds for the *per se* tests are required. This would be required if *per se* rules are to meet the long-term social welfare objective of CAM to minimise the risk that pro-competitive conduct is not prohibited under the Act. A particular difficulty with this is the requirement that unilateral conduct is predicated on the undertaking holding a dominant position. As is discussed in the next Chapter, dominance is a

[22] R. Pitofsky, 'Commentary: In Defense of Encounters: The No Frills of a *Per* Se Rule Against Vertical Price Fixing' (1983) 71 Georgetown Law Journal 1487, 1489

question of degree, looking for example at the market shares of the undertaking, its rivls and barriers to entry. Thus, for the purposes of the CAM unilateral conduct rules, it could be argued *per se* rules are in principle, incompatible with long-term social welfare objective. This is because, based on the elements that constitute a dominant position, it is not possible to determine which forms of conduct are automatically *per se* unlawful from anticompetitive effects point of view, simply because on a case-by-case basis, an assessment of the conduct is required. In addition forms of conduct not *per se* prohibited would escape the jurisdiction of section 46, notwithstanding their anticompetitive effect.

In this regards, the South African unilateral conduct rules offer an example.

Under sections 8(a) and (b) SACA, excessive pricing and refusing access to an essential facility are *per se* prohibited. Unlike the other SACA unilateral conduct sections, there is no requirement to take consider the pro-competitive effects of such conduct. The application of these rules is strictly regulated by the South African competition institutions. For example, the ZACAC overturned a Tribunal finding that a refusal to deal constituted a refusal to provide access to an essential facility.[23] The Tribunal's argument was that the two forms of conduct were the same from an economic point of view; the Appeal Court's ruling was that incorrect interpretation of conduct would lead to wrong assessments of the practice under SACA. What this case demonstrates is the legal complexity in properly characterising these forms of conduct. This was also a matter relevant in the *ANSAC* case.[24] The South African Competition, Commission, ZACT and ZACAC agreed that (regarding section 4(1)(b)(i) and (ii) of SACA, no more evidence is required to assess the conduct once sufficient evidence has been adduced to establish that the practice falls within that provision. This was overturned on appeal to Supreme Court, which held that the Tribunal had failed to submit sufficient evidence to characterise the conduct as coming within the

---

[23] *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002)

[24] *American Natural Soda Ash Corp and Another v Botswana Ash (Pty) Ltd and Others* (64CAC/AUG/06) [2007] ZACAC 1 (5 January 2007)

relevant *per se* provisions. This required an assessment of the 'nature, purpose and effect' of the agreement.[25]

Thus the main argument for rejecting *per se* rules as the only set of rules under section 46 is that, from an assessment of dominance perspective, it is very difficult to draft a precise set of rules that sufficiently capture a form of conduct which is deemed to so anticompetitive to warrant *per se* prohibition.

3.3.1.1. Essential Facilities as a possible *Per se Rule* under section 46 CAM

This suggestion is based on the economic characteristics of Mauritius, the findings of the cement market studies, and the facts of *Slaughter Cattle*. Due to the lack of resources and infrastructure in Mauritius, it may be relatively easy for an undertaking to find itself in possession of an essential facility. This alone should not warrant an investigation under section 46, let alone a *per se* provision. However, *Slaughter Cattle* and the cement market studies highlight the importance of access to essential facilities in order to facilitate competition in a downstream market and the importance of this to the Mauritian economy. In *Slaughter Cattle* for example, the essential facility was the cattle carrier: the capacity of which met the entire monthly demand for cattle. Likewise in the cement market studies, the importance of the cement sector for the Mauritian economy, the limited port-infrastructure available for cement processing, and the potential for a competitive downstream cement product market could be used as examples where a *per se* approach might be useful.

The Essential Facilities doctrine is a refusal to supply abuse. The extent to which it is a sub-set of refusal to supply as opposed to being a refusal to supply generally and therefore should be treated differently is a difficult assessment to make – this was the issue in *GlaxoWellcome.*

---

[25] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* (554/2003) [2005] ZASCA 42 (13 May 2005)
paras 40, 43, 47, 65, 69)

The basic proposition is that dominant undertaking controls or owns something – to which rivals in a downstream market need access in order to compete. In *Slaughter Cattle,* the CCM confirmed its four criteria:[26]

i) the monopolist has effective control of the facility;
ii) competitors or potential competitors do not have the ability to duplicate the facility;
iii) there was a refusal to supply on reasonable terms;
iv) it is feasible for the monopolist to provide its competitors with access to the facility.

The criteria for an 'essential facilities' case are therefore quite broad and could cover a broad range of refusal to supply cases. Thus identification of what constitutes essential facilities case starts with the main problem of *per se* rules – the ability to precisely identify the nature of the conduct that should be rendered *per se* unlawful. The second issue with a essential facilities doctrine as *per se* rule is that its means that a dominant undertaking would be forced to share it property or assests with its competitors. This constitutes a severe interference with the property rights of the dominant undertaking and, if is to be applied, should occur only under the strictest of circumstances. The *per se* assessment does not admit pro-competitive justifications to be submitted: the severe nature of the application of the essential facilities doctrine in combination with a *per se* rule would suggest that is unsuitable for the long-term social welfare objective of CAM as it fails to value specific rights of the dominant undertaking. Finally, the what constitutes an essential facility case is a complex assessment of what constitutes control, the ability to duplicate and reasonable terms. The fact that these are complex legal determinations subject to case-by-case analysis further supports the argument that essential facilities is not an appropriate subject matter for *per se* rules under Mauritian competition law.

[26] Decision of the Commissioners of the Competition Commission of Mauritius *Importation of Slaughter Cattle in Mauritius* Commission/HG/003(21 December 2011) , para 5.45

3.3.2. The Test of Intent/Object

As will be demonstrated below, tests of 'object' have resulted in much debates as to i) the meaning of object; ii) the thresholds that apply; iii) and the evidence required; iv) and whether evidence of intent is circumstantial evidence regarding possible effect, or whether evidence of context and possible effect is circumstantial evidence to demonstrate intent.

Whilst there is no specific definition of intent for the purposes of competition law, subjective intent may be defined as the defendant's state of mind and the knowledge that he had at the time of act.[27] Object may be defined as practices that lack economic justification and necessarily serve an exclusionary purpose.[28] For the purposes of this Thesis, the assumption will be made that there are both conceptual and practical differences between the two. However, as pointed out Akman, analysis of European case law suggests the terms are used interchangeably when assessing restrictions of competition by object.[29]

Assuming the difference between intent and object, both subjective intent and object involve primarily an assessment of the defendant's aims, the nature of the conduct and the economic and legal context involved. Thus the assessment of intent includes internal and external circumstances.[30] Internal evidence of intent can comprise documents, e-mails and other statements of intent from the undertaking. External evidence can include 'market factors' and therefore constitutes the economic and legal context of the case. Under Article 101 TFEU for example, object is a two-part test. First, is the conduct capable of causing harm? Second, does it reveal a sufficient degree of harm?[31] Like subjective

---

[27] R Nazzini *The Foundations of European Competition Law*: *The Objective and Principles of Article 102* (Oxford University Press, 2011), 57; P Akman, 'The Role of Intent in the EU Case Law on Abuse of Dominance' (2014) 39(3) European Law Review 316, 317

[28] See Opinion of Advocate General Kokott, *Post Danmark,* C-23/14, ECLI:EU:C:2015:343, paras 28-29

[29] P Akman, 'The Role of Intent in the EU Case Law on Abuse of Dominance' (2014) 39(3) European Law Review 316

[30] P Akman, 'The Role of Intent in the EU Case Law on Abuse of Dominance' (2014) 39(3) European Law Review 316, 318

[31] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, paras 49 and 58; *Société Technique Minière (L.T.M) v Maschinenbau Ulm GmbH (M.B.U),* Case 56/65, ECLI:EU:C:1966:38,

intent, this also requires an analysis of the content, objectives of the conduct and the economic and legal context. According to the Court in *Cartes Bancaires*, the legal context includes the nature of the goods affected and the conditions, functioning and structure of the market.[32]

Looking at the European case law, object as necessary effect is the predominant non-actual effect test. Under Article 101 TFEU, the European Court of Justice has rejected a test of subjective intent.[33] According to the Court's jurisprudence assessing for object, subjective intent is a relevant factor to be taken into account to establish other assessments of abuse e.g. object or effect. This interpretation was confirmed by the European Court of Justice on appeal in *Cartes Bancaires*. First, it confirmed that practices are caught by the object provision under Article 101 TFEU because the very nature of those practices may be regarded 'as being harmful to the proper functioning of normal competition.'[34] Second, it defined the "very nature" and thus object to mean that the conduct is 'so likely to have negative effects' that recourse to assessment of actual effect is not required:[35] in order to be deemed anticompetitive by object, the conduct must be demonstrated to have caused a sufficient degree of harm to competition.[36] The consideration of subjective intent was part of the first line of appeal against the General Court's decision in *Cartes Bancaires*. In relying on the statements of certain members of the Cartes Bancaires group, and focusing on the actual formulas used, the appellants argued that the General Court erred in relying on subjective intent to establish object.[37] On appeal, the European Court of Justice accepted that direct evidence, and the evidence considered by the General Court may be taken into consideration.[38] However, where the General Court erred is

---

paras 359 -360; *Beef Industry Development and Barry Brothers*, C-209/07, ECLI:EU:C:2008:643, para 15; *Coty,* C-230/16, ECLI:EU:C:2017:603 para *117*

[32] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, 53

[33] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, para 54; *Allianz Hungária Biztositó and Others* EU:C:2013;160; para 37; *GlaxoSmithKline Services Unlimited v Commission*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, para 58

[34] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, para 50

[35] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, para 51

[36] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, paras 52 and 53

[37] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, para 20

[38] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, para 54. See also *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paras 31, 39 and 43; *GlaxoSmithKline Services v Commission*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, para 58

that it failed to establish that the conduct revealed sufficient degree of harm to be characterised as anticompetitive by object.[39] This was on the basis that i) the General Court found that the conduct pursued a legitimate objective (to prevent free riding) and ii) it established the finding of object on the direct evidence of the undertakings in question.[40] This last point suggests that in the light of a stated legitimate objective, and other evidence being inconclusive, direct evidence is insufficient.

Like Article 101 TFEU, subjective intent is not a necessary requirement under Article 102 TFEU for a finding of object nor sufficient in itself to exculpate or incriminate a defendant undertaking:[41] '…mere will to do so does not translate into capability to restrict competition.'[42] Direct evidence without further analysis (such as analysis of all the circumstances) is inconclusive. An example of the assessment is *AstraZeneca* and the specific matter regarding misleading of patent offices.[43] The European Court of Justice begins with the first part of an object assessment – analysis of the all the relevant circumstances. Regarding the misrepresentations, the Court took into consideration the '…consistent and linear conduct…characterised by…misleading representations and by a manifest lack of transparency.'[44]

The argument for object as the preferred alternative over intent is that it focuses on the correct concern for competition law the effect of the conduct. Presumptions of actual effect are made from an assessment of the facts of the case. However, there is not a fixed definition of what constitutes an object assessment and how it differs from an effect assessment. One distinction offered is that object is a 'detailed examination' of the conduct itself and effect is a 'thorough examination' of the consequence of the conduct.[45] Without this, the

---

[39] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, para 69
[40] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, paras 62 and 64
[41] *Post Danmark,* C-23/14, ECLI:EU:C:2015:343, para 39;
[42] *Intel* C-413/14/ P ECLI:EU:C:2016:788, para 128
[43] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770
[44] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, para 93
[45] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 60

procedural economy offered by object would be reduced.[46] Therefore the assessment of object against its content, form and context must differ from the demonstration of anticompetitive effect.[47] AG Wahl suggests that this works in the following way: the assessment of the content and form of the practice may be used to determine whether or not the conduct has anticompetitive object. The assessment of context may be used *only* to either to i) supplement a finding of anticompetitive of object or ii) offer counter evidence. If assessment of the content and form of the practice does not reveal anticompetitive object, this cannot be rectified by assessment of its context.[48] Thus conduct caught by object can be described as conduct which: i) entails an inherent risk of particularly serious harmful effect;[49] ii) its anticompetitive effects outweigh its pro-competitive effects; iii) experience demonstrates that this is conduct which is constantly prohibited;[50] iv) the effects are not ambivalent or ancillary in relation to pro-competitive effect.[51]

In *Intel*,[52] Advocate General Wahl offers a further alternative, distinguishing between the analysis required under object, and the 'fully fledged' analysis required under effect. In the first instance, cases which have deemed certain forms of conduct to be inherently harmful – those conclusions have been reached with assessment of the context of the case. The finding that these forms of conduct has are anticompetitive by object has not been axiomatic, but as a process of inductive reasoning. In *Hoffmann-La Roche*, for example, the European Court of Justice held that, save in exceptional circumstances, exclusive rebates are presumptively unlawful.[53] This presumption has been extended to loyalty rebates.[54] However, it was only following an analysis of the relevant circumstances that the Court in *Hoffmann-La Roche* found the exclusive rebates

[46] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 60
[47] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 44
[48] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, paras 44 and 45
[49] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 55;
[50] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 55
[51] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 56
[52] *Intel v Commission*, Case T-286/09, ECLI:EU:T:2014:547
[53] *Hoffmann-La Roche v Commission,* Case 85/76, ECLI:EU:C:1979:36*,* paras 90
[54] *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paras 66 – 71; *British Airways v Commission*, C-95/04 P, EU:C:2007:166, para 52; *Tomra Systems and Others v Commission,* C-549/10 P, EU:C:2012:221, para 75

to be presumptively unlawful (and therefore capable being restrictive by object).[55] The relevant circumstances in *Hoffmann-La Roche* included assessment of the conditions of the regarding the grant of the rebates, the market coverage of the agreement, the conditions of the pharmaceutical market, and the terms and conditions of agreement between the dominant undertaking and its customers. In *Michelin I*, the circumstances included whether the conduct

> '…*tends* to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market…or to strengthen the dominant position by distorting competition.'[56]

In *Intel*, the General Court considered the market coverage of the rebates, the duration of the conduct, the market performance of the competitor and the 'as-efficient competitor' test carried out by the European Commission. In the circumstances of that case, Advocate General Wahl considers that the market coverage, duration and the application of the as-efficient competitor test were the relevant conditions to be considered for object: competitor performance is relevant only where an effects-based assessment is required.[57] Finally, in *Post Danmark II*, the relevant circumstances included not only whether the rebates enhanced loyalty, but also whether the conduct had the potential to create market foreclosure in light of the market conditions and coverage of the conduct.[58]

As noted above, a distinction has been drawn between assessment by object and a fully-fledged effects analysis. The above cases show the types of considerations that may constitute the context analysis required for an assessment of object under Article 102 TFEU. It may be asked that if these are accepted e.g. such as the as-efficient competitor test, what role remains for a 'fully-fledged' effects analysis? As advocated in this Thesis, effects-based tests such as the as-efficient competitor test should be applied only when the 'fully-fledged' effects

[55] *Hoffmann-La Roche v Commission,* Case 85/76, ECLI:EU:C:1979:36*,* para 87 onwards
[56] *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, para 72 (my emphasis)
[57] *Intel* C-413/14/ P ECLI:EU:C:2016:788, paras 137 - 173
[58] *Post Danmark,* C-23/14, ECLI:EU:2015:651, paras 29-30 and 39 - 46

assessment is required – in other words, when the conduct cannot be determined to be anticompetitive by object. This would occur if the assessment of the circumstances showed, for example, that the object of the conduct appears ambivalent or is ancillary to a pro-competitive object or legitimate objective.[59] This would accord with the Court's determination in *Hoffmann-La Roche* that there may be exceptional circumstances that prevent a finding of anticompetitive object. In *Post Danmark II*, the Court found that objective justifications must be available to the defendant when object analysis is undertaken[60] – the defendant must be permitted to offer a counter argument. On the basis that this proposition is accepted – that object-findings need to be capable of rebuttal, the argument that section 50 CAM and the public-interests test needs to be incorporated into the assessment of unilateral conduct is reinforced.

One specific matter to be considered is the threshold for harm. This reflects a very precise normative difference suggested by Odudu based on choice and chance as to why a test of intent should be preferred over object.[61] Such conduct should be caught by competition rules because the defendant undertaking *chose* to act in an anticompetitive manner and it is by *chance* that its conduct did not have anticompetitive effect. Thus it would prevent dominant undertakings from speculatively acting in anticompetitive manner in the knowledge that the unilateral conduct rules would be inapplicable in the absence of effect, and supplement the deterrent effect of competition law.[62] Furthermore, as will be seen in the European case law, the thresholds of the object test appear to change depending on the nature of the intent involved.

The argument is that for conduct to be deemed as anticompetitive by object, the possibility of effect must be more than hypothetical.[63] Therefore, in the first instance, the conduct must be capable of harm. In *Post Danmark II*, the European Court of Justice confirmed that this requires an assessment of all the relevant

---

[59] *Intel* C-413/14/ P ECLI:EU:C:2016:788, para 120

[60] *Post Danmark,* C-23/14, ECLI:EU:2015:651, paras 48-49

[61] Odudu O, ''Interpreting Article 81(1): The Object Requirement Revisited' (2001) European Law Review 379

[62] see e.g. the Australian case of *Boral Besser Masonry Ltd v ACCC* [2003] 215 CLR 374

[63] *Post Danmark,* C-23/14, ECLI:EU:C:2015:343, para 80

circumstances.[64] But object is not an assessment of actual effect, so what probability of harm is required? In *Post Danmark II*, Advocate General Kokott deemed that appropriate threshold is 'more likely than not.'[65] This is on the basis, for example, of the strength of the dominant position, the position of rivals, the source of the dominant position.[66] By contrast, Advocate General Wahl strongly rejects the 'more likely than not' test and posits that the correct threshold is the test of 'all likelihood'.[67] He makes this argument on the basis of the purpose of European Union competition law – to capture form would hamper the objectives of European Union competition law, by 'capturing…a non-negligible number of practices that…may be pro-competitive.'[68] Consequently, the European Commission has to prove conclusively that the conduct leads to an abuse of a dominant position whether by i) restricting the customer's freedom to choose; ii) barring competitors' access to the market or iii) strengthening the dominant position.[69]

The European Court of Justice has adopted a lower threshold, however. In *Post Danmark II*, With regard to all the circumstances, the Court held the effect must be probable[70] given a) the dominant position of the undertaking indicates a weakened market in the first instance and b) the special responsibility of the dominant undertaking not impair the market further.[71] In *AstraZeneca* the Court held the relevant threshold to be that of 'potential' effect. In that case, i) AstraZeneca was not dominant at the time the rights it had misleadingly procured were to take effect; ii) the misleading statements was corrected by some patent offices; and iii) the rights obtained were not always used to prevent entry of rival products. Thus in these circumstances, where no effect from the conduct occurred, the Court held that analysis of the circumstances, plus

[64] *Post Danmark,* C-23/14, ECLI:EU:2015:651, para 68
[65] *Post Danmark,* C-23/14, ECLI:EU:C:2015:343, para 82. See *British Airways v Commission*, C-95/04 P, EU:C:2007:166, para 68; *Michelin v Commission*, T-203/01, EU:T:2003:250, para 239; *Post Danmark*, C-209/10. EU:C:2012:172, paras 42 and 44
[66] *Post Danmark,* C-23/14, ECLI:EU:C:2015:343, para 42
[67] *Intel* C-413/14/ P ECLI:EU:C:2016:788, para 117
[68] *Intel* C-413/14/ P ECLI:EU:C:2016:788, para 119
[69] *Intel* C-413/14/ P ECLI:EU:C:2016:788, para 121
[70] *Post Danmark,* C-23/14, ECLI:EU:2015:651, para 74
[71] *Post Danmark,* C-23/14, ECLI:EU:2015:651, paras 70 - 72

potential effect were sufficient for the conduct to fall under Article 102 TFEU.[72] This suggests that where there is evidence of eliminatory intent, conduct which has the potential to eliminate competition, and there is no legitimate explanation, the object-form of assessment under Article 102 TFEU may be satisfied.[73]

Regarding the *AstraZeneca* outcome, where an undertaking's conduct was found to be abusive by object even though it did not have anticompetitive effect, it could be argued that the ruling is specific to the facts of that case. On the other hand, it could be argued more generally that evidence of object plus potential effect may be sufficient to trigger Article 102 TFEU where there is evidence where legal procedures are being used to anticompetitively gain an advantage, or where conduct involves some kind of deceit. One of AstraZeneca's arguments on appeal was that it was acting within the lawful bounds of the patent system, and therefore its acts were not anticompetitive.[74] The Court rejected this on the grounds that, at the very least, AstraZeneca was aware of the errors it had made in the patent process and it had been advised to intervene and correct those errors.[75] Furthermore, having become aware of these errors, AstraZeneca continued to make misrepresentations in the patent process, notwithstanding that it had opportunities to give the correct information.[76] Finally, notwithstanding AstraZeneca's belief in its interpretation of the rules of the patent system, it had an obligation to disclose all relevant information relating to its patent submission.[77] Thus the assessment of the evidence pointed AstraZeneca to have been misleading the patent offices, concealing relevant information and leading the patent offices to believe the veracity of the information provided by AstraZeneca which it knew to be incorrect and would have led to the granting of legal rights to which it was not entitled.[78] This

[72] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, para 149
[73] P Akman, 'The Role of Intent in the EU Case Law on Abuse of Dominance' (2014) 39(3) European Law Review 316, 329
[74] see e.g. *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, paras 69-73
[75] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, para 88
[76] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, para 91
[77] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, para 95
[78] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, para 96

analysis of Astrazeneca's knowledge strongly suggests a subjective intent test is being applied.

3.3.2.1. Object (or intent?) under section 46 CAM

In *IBL*[79] and *Coolers*,[80] the CCM's focus has been primarily on the direct proof from the defendant.

The starting point in *IBL* is whether the object or effect of the undertaking's agreement is to i) protect the market power of its dominant product and ii) leverage the market power of its dominant product into other markets through volume related discounts and shelf space requirements (either for example that shelf space for the dominant product is linked to its market share, or that volume related discounts for the dominant product will be offered for in return for increased shelf space for products with lower market share.[81] The CCM then sets out the general economic rationale of such conduct and then considers the anticompetitive effects of such conduct when implemented by a dominant undertaking. This leads to the CCM to set out its assessment of the facts and what it calls 'The Stated Object of the TSP'.[82] IBL submitted that the TSP had four specific objectives: i) to replace existing volume-related discounts which were unsatisfactory for IBL as they permitted customers to order infrequently; ii) to improve the sales of the dominant product which had been 'stagnant' for a number of years; iii) improve the low brand awareness of its weaker products - the agreement was a means to promote them and increase sales in a less risky manner; iv) to meet the competition of the competitor who was engaging in an aggressive campaign against IBL's dominant product. In addition, the object of the agreement was to increase sales, not to restrict competition; and the shelf-space requirements did not exceed the market share of the dominant product. In conducting a factual analysis, the CCM concludes that the IBL was successful in

---

[79] *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010)

[80] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014)

[81] *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), para 2.1.2

[82] *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), para 5.5

its objective – sales of its dominant product had grown: therefore, because the stated objective of IBL had been achieved, '[t]he question is whether this strategy also has the effect of restricting…competition.'[83]

In this regard, the CCM takes an object as subjective intent approach. But it undertakes only one part of the analysis – that of direct evidence from the undertaking. It fails to set IBL's direct evidence against the economic and legal context of the case. Instead the CCM asks the following two questions. First, what is IBL's stated objective? – to achieve increased sales. Second, did IBL achieve that outcome (irrespective of any other outcome)? – it did. On that basis, the CCM moves to an effects-analysis. The problem with this approach is that it is overly permissive. An object-test is permissive in itself;[84] only conduct which has no plausible economic justification will be caught by a properly-framed object assessment. That assessment requires a consideration of both the direct evidence and circumstantial evidence, and the whether the intent has been implemented.

The *Coolers* investigation also pursues a subjective intent-based line of enquiry.[85] In this case, in seeking to identify i) the rationale of the conduct and ii) the likely effects, the CCM shows that it recognises that object and effect are discrete tests.[86] However, like *IBL*, the CCM's assessment of rationale focuses mainly on the direct evidence of the defendant. In the section entitled 'The object of the exclusionary clause', the evidence and assessment rests solely on rationale and object presented by Quality Beverages. The clause of the agreement exists to allow Quality Beverages a degree of control and to ensure that the retailer understands that the coolers provided are the property of Quality Beverages; though the clause is exclusionary, no exclusion of competition or competitors has

---

[83] *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), para 5.6.7

[84] R Nazzini *The Foundations of European Competition Law*: *The Objective and Principles of Article 102* (Oxford University Press, 2011), 50

[85] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014), paras 5.34-5.36.

[86] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014), para 2.2

occurred on the part of the defendant. As Quality Beverages eschews the production and sale of alcohol, the clause ensures a) that the alcoholic beverages are not stocked in Quality Beverages' coolers and b) that the products of Quality Beverages remains competitive against the sale of alcoholic beverages – products with higher consumption rates and better margins. Again the CCM seems focused on the direct evidence of the defendant undertaking: the question is whether the object of the clause, taking into account the economic context, is to restrict competition, not what is the direct evidence of intent submitted by Quality Beverages.

AEIK[87] and *Broadband and Pay-TV*[88] show when the CCM has interpreted object as necessary effect.

In *AEIK,* the CCM investigation held that the pricing practices adopted by the undertakings did not have object or effect of restricting competition. The facts concerned the aftermarket supply of electronic car keys. The concern was that brand-franchised car retailers were abusing their dominant position in the aftermarket by i) excluding independent competitors from the market by withholding the manufacturing codes required to make the keys, and ii) exploiting consumers with anticompetitive pricing. In this instance, the *AEIK* investigation highlighted factors which were relevant to both types of assessment. These factors include the position of the dominant undertaking; the extent of the conduct; the position of customers; possible evidence of actual foreclosure; evidence of any exclusionary strategy; the position of competitors.[89] The descriptions of these factors indicate that either the CCM treats (in this case) object as synonymous with effect or assumes it to be so. In relation to dominance for example, the CCM states for both object *and* effect that:[90]

---

[87] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013)
[88] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012)
[89] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 3.41
[90] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 3.41

> '[i]n general, the stronger the dominance, the higher the likelihood that conduct protecting that position leads to anticompetitive foreclosure.'

In relation to the extent of the allegedly abusive conduct, the CCM states:[91]

> '[i]n general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect.'

Both of these factors are identified as being relevant to object and effect in this case – the implication of this is that object collapses into an effects-based assessment. This implication is raised later in the CCM's theory of harm. It outlines its theory of harm as an abuse of "the monopoly situation by way of market foreclosure via its conduct of withholding from the owners of cars the AEIK passwords for the cars so that the availability of substitute products and substitute synchronising services are restricted on the market."[92] Again, the CCM sets out its position in terms of effect and does not explain the specific relevance of object. In *AEIK,* object is relevant because of the source of the restriction – the withholding of codes does not stem from the undertakings themselves, but from the car manufacturers themselves.[93] Thus the analysis of this case turns on two questions: First, is the object of withholding the codes so as to restrict competition or does it plausibly serve a pro-competitive purposes? Second, if it does plausibly serve pro-competitive purpose, does the conduct have the effect of restricting competition? In *AEIK*, plausible reasons were given for the conduct namely – protecting the integrity of car security systems; and that monitoring any interventions regarding the security is undertaken within defined parameters to, again, maintain the integrity of the system and safeguard the interests of consumers.

---

[91] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 3.41
[92] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 6.1
[93] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 6.12

A similar issue occurred in *Broadband Internet and Pay-TV*, where the conduct of the defendant undertaking was found in the investigation to have both object *and* effect of restricting competition.[94] Various references are made to the reasons behind Mauritius Telecom's conduct, and the overarching rationale is identified.[95]

Mauritius Telecom engaged in two forms of conduct: predatory pricing (pricing certain of its broadband products at below cost, and tying (tying certain broadband and premium television package content together). Both of these were separately held to have the object and effect of restricting competition in the relevant market.[96] In relation to the tying behaviour, Mauritius Telecom's business strategy was found to have the objectives of i) creating 'artificial hurdles', discontinuing one product (for which there was demand) to shift prospective from one product to another; ii) where the standalone broadband product was retained, deliberately keeping the price high to induce consumers to take the lower priced combined product; iii) imposing disincentives for certain consumers on a specific product by not improving their customer service, even though improvements were being rolled out across other products.[97]

Notwithstanding these findings on Mauritius Telecom's strategy, which demonstrates the object of restricting competition, the CCM's concluding statements combine object and effect together.[98] For example in relation to tying, the CCM investigation states by tying internet and television content together, Mauritius Telecom was leveraging its market power from the internet market into the premium television content market.[99] Concluding that this has the object and effect of restricting competition, the CCM continues to explain the

[94] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), paras 1.6 and 8.4;
[95] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.43(c).
[96] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), paras 8.4 and 9.7
[97] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.43
[98] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 8.4
[99] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 9.7

effect of the conduct,[100] but explains no further how the conduct has the object of restricting competition. Furthermore, the CCM has conducted a greater number of cases where effect has been assessed and not drawn the same conclusion that the object is also present or even considered it. Before object can be considered the same as effect in a given case, object needs to be clearly defined. For example, if one accepts that object is 'conduct without pro-competitive rationale' it is possible to argue that Mauritius' Telecom's conduct in this case also had a distinct object of restricting competition. Once Mauritius Telecom's position in the competitive pay-TV market is understood, the primary economic rationale behind its conduct becomes clear. Mauritius Telecom sought to implement the conduct not for the benefit of its consumers but to make financially viable its commercial decisions in the pay-TV market. First, in order to be able to offer pay-TV and be competitive in that market, MT had to be able to offer 'TV-channel rights holders' an adequate customer base.[101] Second, MT required this customer base in order to recoup its costs for securing pay-TV rights.[102]

Section 46 is not the only provision under CAM to contain an 'object or effect test.[103] The case of *Travel Agents' Service Fees*[104] concerned whether Air Mauritius (the national airline) and the Mauritius Association of IATA Travel Agents (MAITA) had entered into a collusive horizontal agreement to fix service fees charged for flight ticket purchases. The investigation found that, prior to CAM, Air Mauritius and MAITA had entered into an actual collusive agreement to fix the level of service fees. Evidence of explicit negotiation between the two parties was characterised as having the object to distort the market.[105] Following CAM coming into force, however, the CCM noted that there were no

---

[100] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 9.8

[101] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.69

[102] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.69. The CCM investigation noted this is example of exploitative conduct, but did not pursue this line of enquiry.

[103] Section 41 CAM covers collusive horizontal agreements which have the object or effect of fixing prices, sharing markets, or restricting the supply of goods or services; section 44 CAM captures non-collusive horizontal agreements which have the object or effect of restricting competition.

[104] Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010)

[105] Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010), paras 4.1-4.2

further subsequent explicit communications between the parties, yet there was continued clustering around certain high level price points.[106] The CCM found that the parties remained in a collusive arrangement, with the effect of the arrangement to restrict competition.[107] In this case, the CCM interpreted the object function narrowly. It found that the explicit pre-CAM agreement had the object of fixing prices.[108] Since CAM, the investigation found that were no explicit communications between the organisations fixing prices; nor however, were there any communications bringing the agreement to an end.[109] Thus the investigation opted to focus on the effect of the arrangements in place, noting that if an explicit agreement had remained in force, it would have been subject to the strongest measures available under CAM.[110] The issue here is the CCM's willingness to quickly discount an assessment of object in the face of an agreement to fix prices, and no subsequent attempts to formally bring that agreement to an end. With the prices of both parties remaining at the higher end of the price range, this would suggest Air Mauritius and MAITA were prepared to quietly continue with their pricing arrangements.

Ultimately, whether the test is subjective intent or object, the evidence to be taken into account is the same. The question turns on what assessment is to applied, given all the evidence taken into account. With the orthodox interpretation of object as necessary effect there is a risk that the assessments leave little room for an actual effects-assessment. This has been a criticism of certain aspects of the Article 102 TFEU case law.

Both intent and object are capable of providing procedural economy in unilateral conduct rules. They attempt to identify factors which mean a full effects analysis

---

[106] Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010), paras 3.15-3.37

[107] Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010), paras 4.2 – 4.3

[108] Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010), para 4.1. As CAM does not have retroactive application, the arrangements in place prior its coming to force did not come within its scope.

[109] Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010), paras 4.2 – 4.3

[110] Competition Commission of Mauritius *Travel Agents' service fees* INV 004 (30 July 2010), paras 5.9 – 5.10.

is not required. For example because object establishes the anticompetitive impact of agreement and thus there is no need to conduct an effects-based assessment;[111] '…it makes it easier to determine the restrictive impact of certain practices…'[112] At the same this is the main reason why a test of intent or object cannot in themselves constitute a single test for abuse. Conduct which is ambiguous in terms of intent or object requires an effects-based analysis. This could be demonstrated by either evidence of a plausible pro-competitive explanation or plausible suggestion of pro-competitive effect.

One of the key arguments for object as necessary effect instead of subjective intent is that it would extend the scope of the unilateral conduct rules to far – conduct which has potential pro-competitive effects would be caught too. However, the basic structure of an object (intent)-assessment is the object (intent); the act; and lack of plausible legitimate justification.[113] The requirement that object as subjective intent cannot be established if the conduct has a plausible legitimate justification reduces the risk that an object as subjective intent test would be too broad. One of the principle concerns is to ensure that the scope of the relevant unilateral conduct rules does not become too broad and its enforcement undermines principles relating to evidence and the burden of proof.[114] However, one concern is the potential risks of an under-inclusive approach. In this regard, it has been argued that the social costs of over- inclusion are greater than under-inclusion.[115] This is on the premise that the market is capable of correcting more easily monopoly than it can false positives, where undertakings are erroneously found to have abused their market power. In relation to Mauritius, one has to take into account the main concern that its economic circumstances potentially indicate a tendency towards entrenched monopolistic positions which may not be easily subject to market correction. On this basis, Mauritian competition law might benefit from a

[111] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, 35
[112] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 34
[113] R Nazzini *The Foundations of European Competition Law*: *The Objective and Principles of Article 102* (Oxford University Press, 2011), 62
[114] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, paras 54 and 57
[115] FH Easterbrook, 'The Limits of Antitrust' (1984) 63(1) Texas Law Review 1

potentially over-inclusive approach whilst it develops its competition practice and culture.

A provision that provides for the assessment of conduct by 'object *or* effect' necessarily means that the two elements are distinct from one another. Odudu argues that object as necessary effect, given the level of analysis required, blurs the distinction between object and effect, rendering the object assessment redundant. An example of this is occurs in *Post Danmark II*, where the as-efficient competitor test forms part of assessment of necessary effect. The question seems to turn on how the evidence is weighted. One perspective is that intent is probative evidence of likelihood of effect; the other perspective is that likelihood is probative of effect. This would appear to reflect the position by the European Court of Justice in *AstraZeneca* where in light of the misrepresentation by the defendant undertaking, the probability threshold was deemed to be potential effect. Odudu advocates for intent as the test because it is conceptually distinct from effect; because there is no need to take into account the concrete effects of the conduct if this test established; and subjective intent can be determined from internal and external circumstantial evidence.[116] Furthermore,[117] an intent test is sufficiently strict – whilst it can be applied to different types of conduct, evidence showing how the conduct can 'function legitimately can rebut the presumption that the effect was intended.'[118] Akman, however, disagrees. Her arguments with intent being a test for exclusionary conduct are: i) the difficulty in separating anticompetitive intent from vigorous competitive behaviour; ii) that unilateral conduct rules require some proof of effect and iii) a concern that a test of intent will capture pro-competitive conduct.

Ultimately, the concerns raised by Akman can be addressed. First, the difficulty in separating anticompetitive intent from pro-competitive intent relates to the same difficulty in separating anticompetitive from pro-competitive effect.

---

[116] O Odudu, 'Interpreting Article 81(1): Object as Subjective Intention' (2001) European Law Review 60

[117] O Odudu ''Interpreting Article 81(1): The Object Requirement Revisited' (2001) European Law Review 379

[118] O Odudu ''Interpreting Article 81(1): The Object Requirement Revisited' (2001) European Law Review 379, 389

Second, as demonstrated in *AstraZeneca*, a test for intent does not render effect irrelevant; the possibility of effect provides circumstantial evidence for whether the undertaking acted with predominately anticompetitive intent. Third, a test for intent that requires the i) the establishment of intent; ii) conduct to implement it; iii) and lacks plausible legitimate justification mitigates the risk of false positives. Whilst neither object or intent could be a test for exclusionary conduct in themselves, and thus must be a part of a tiered-approach, it is proposed that the test of intent should constitute the alternative test to effect; given the similarities of assessing object and intent, the fact that intent can address the same issues as object, and that intent provides the conceptual clarity to be the alternative to an effects-based test.

3.3.2.2. Development of an object/intent approach under SACA unilateral conduct rules

As a final point on *per se*, intent and object rules, the explicit *per se* and effects-based provisions of SACA might lead one to assume that an object style of an assessment has not been developed under the South African competition rules. The form of the conduct will determine the applicable SACA provision; this in turn will determine whether it is considered *per se* unlawful or will be assessed for its effects. In addition, the SACA *per se* rules operate on a strict liability basis. Two effects cases, however, have considered the economic objective of the conduct under review. The findings imply an object-based approach is available under the South African unilateral conduct rules.

Nationwide[119] concerned an allegation of inducing customers not deal with competitors. In this case, South African Airways ("SAA") entered into agreements with travel agencies and individual travel agents respectively offering specific financial incentives and benefits in kind to promote SAA products.[120] These incentive agreements had evolved over time, reaching their 'third generation' by the time of the case and which were in issue before ZACT.

---

[119] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010)
[120] SACA section 8(d)(i)

This evolution reflected not only the changing market circumstances, but also the various antitrust actions brought regarding these agreements. The second generation of agreements had been discussed in a previous case for having the overriding rationale of winning the loyalty of customers rather than competing on the merits of products. Following the European decision in *BA/Virgin*,[121] SAA developed its third-generation agreements as the second-generation agreements had similar clauses to those that were found to be anticompetitive under *BA/Virgin*. Whilst SAA would have preferred exclusive dealing arrangements with its customers, its revised scheme compensated its customers for the losses they suffered under the new terms of the agreements. SAA argued that its third-generation agreements had a number of objectives including i) marketing of SAA products, ii) compensating customers for financial losses and iii) safeguarding the legal position of SAA following the finding in *BA/Virgin.* Nevertheless, ZACT found that the *overriding rationale* of the agreements, like their predecessors, was on obtaining the loyalty of their customers through financial incentives.[122]

In *Telkom*[123] ZACT considered the economic objective and vertically integrated undertakings:[124]

> …from an antitrust perspective, the economic objective of pricing conduct by a vertically integrated dominant firm is highly relevant. Such a firm may engage in price discrimination or quality degradation (form of conduct) but its intended effect may be to raise rivals costs or to induce customers not to deal with a competitor. All these would be aimed at placing competitors at a cost disadvantage and be considered exclusionary conduct.

This judicial comment focuses on the economic rationale of the conduct, the importance of its economic context and the intended effect. It highlights the

---

[121] *Virgin/British Airways* (Decision IV/D-2/34.780) [2000] OJ L 30/1
[122] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010), paras 74-76
[123] *Competition Commission v Telkom Ltd* (11/CR/Feb04) [2012] (7 August 2012)
[124] *Competition Commission v Telkom Ltd* (11/CR/Feb04) [2012] (7 August 2012), para 153

distinction between impediment competition and performance competition (competition on the merits) and how competition on the merits could apply to object analysis. Such statements suggest that there might be space for assessing conduct by object under South African law. The defendant undertaking's activities in *Telkom* for example, were geared towards to restricting competition *per se* rather than competing for the market directly. Having completed a sector analysis – its 'WAR Strategy', Telkom found that, notwithstanding its size, it did not have the competency or necessary skills to compete with its downstream rivals for the provision of value added networks; its rivals were able to provide services in the market that it could not, was able provide future services that Telkom could not and that certain rivals would be able to cause customers to switch from Telkom. Furthermore, the WAR Strategy document was particularly telling as it revealed certain aspects of Telkom's 'illegality' strategy and therefore the economic objective of its conduct.[125] First, it revealed that Telkom's interpretation of the regulations was not as unambiguous as it claimed; second, its particular interpretation of the law was required in to order to allow it to carry out activities that would in themselves contravene the regulations.[126] In its conclusions, ZACT highlighted the strategic nature of Telkom's freezing actions: whilst it pleaded justification on the basis of illegal behaviour on part of its rivals, ZACT noted that if this plea were substantial Telkom would have not have enforced its exclusive licences in a selective manner by preventing rivals' expansion, yet maintaining the services to them in order to avoid losing revenues; second, Telkom acted in vexatious manner with regards regulatory applications, appealing each negative decision from the regulator to the South African High Court; third, Telkom's behaviour was aimed at excluding as efficient or more efficient competitors from the market.

3.3.3. The Test of Effect

Taking the discussions above regarding *per se*, intent and object assessments, the test of effect is an assessment of the actual anticompetitive and procompetitive

[125] *Competition Commission v Telkom Ltd* (11/CR/Feb04) [2012] (7 August 2012), paras 35 – 60.
[126] *Competition Commission v Telkom Ltd* (11/CR/Feb04) [2012] (7 August 2012), paras 67-84

effects of the conduct. As demonstrated under CAM, the effects-based test may be described as part assessment of allocative efficiency (the test of exclusionary abuse and the restriction of competition) and part-productive and dynamic efficiency (such as the public-interest test and legitimate justifications).[127]

In their paper, the EAGCP makes the case for a pure-effects based approach i.e. an assessment of exclusionary abuse that is not predicated on the additional tests cited above.[128] The essential arguments for a pure-effects based approach are that i) it focuses the assessment of exclusionary conduct on the correct area of concern, namely whether the conduct has actually resulted in anticompetitive harm; ii) in so doing, it moves the assessment of exclusionary conduct away from the 'form' of the conduct – therefore, in principle, cases should be treated more consistently because of the focus on effect; iii) complex legal concepts such as the dominant position are no longer required: if the anticompetitive effect of the conduct can be proven, this means the undertaking is dominant.

The arguments above for a pure-effects based approach appear logical. However, the informational requirements required mean that a pure effects-based approach would be inappropriate for CAM. Furthermore, an effects-based approach looks at whether the conduct overall leaves a neutral or overall pro-competitive outcome. Both the unilateral conduct rules under CAM and its 2003 predecessor adopted an effects-based approach to abuse of dominance. The Mauritian unilateral conduct rules have undergone significant changes under CAM.

For the purposes of this Chapter, the other relevant changes (apart from the inclusion of object or effect) is the removal of the *explicit* requirements of harm to the economy or consumer. This element is no longer a formal condition precedent for section 46, but a matter to be taken into account. The change

---

[127] see also e.g. O Odudu, 'Interpreting Article 81(1): Demonstrating Restrictive Effect (2001) European Law Review 261

[128] Economic Advisory Group on Competition Policy 'An economic approach to Article 82' (July 2005), 14; see also SC Salop' The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millenium' (2000) 68 Antitrust Law Journal 187

potentially makes the application of section 46 simpler, but if applied, would reduce the normative force of the provision.

The second relevant change relates to the repositioning of the public-interest test. Rather than forming part of the assessment of abuse as it did under section 15 of the 2003 Act, it is a stand-alone assessment in relation to remedies once an abuse finding has been made.

3.3.4. The Case for a Combined Test for Exclusionary Abuse under section 46 CAM – *Intent* or Effect

The above discussion of *per* se rules, intent, object and effect confirmed that these rules are individually insufficient to constitute the only test for exclusionary abuse under CAM. The main issue with *per se* rules are the difficulty in in precisely describing and identifying conduct which absolutely meets the *per se* rule. In the absence of such precision, the *per se* assessment resembles the processes under assessments of intent or object. The primary concern with intent or object as the only rule relates to the ambiguity of conduct. For the purposes of a dual test however, this Thesis argues that intent is the preferred alternative test to effect. It meets the same evidential requirements as object, but asks an alternative question of what was the defendant's knowledge at the time. Sole recourse to an effects-test is resource intensive, but is required for ambiguous conduct. However, when conduct lacks pro-competitive justification or the effect is not apparent, recourse to the alternative test of intent to expedite the assessment of exclusionary conduct should be available. On this basis a dual approach justified, and the argument is that CAM should adopt an intent or effect approach for assessing exclusionary abuses.

The Mauritian unilateral conduct rules and the goal of long-term social welfare are compatible. For example, if we accept the premise that social welfare accounts for the welfare of immediate consumers and producers in the first instance, then the approach taken under the Mauritian unilateral conduct rules accords with this premise. In legislating for harm to the consumer, the rules

under section 46 hold the consumer welfare element. The public interests test under section 50(4) allows for producers to identify their interests.

However, there are some policy choices at hand which shape the application of Mauritius' long-term social welfare goal. First, the Mauritian rules take into account current and future participants in the market. Second, as will be discussed later, the approach adopted by the CCM could be described as one of consumer choice; certain decisions indicate the CCM's willingness to look at the future development of markets. Third, whilst the section 50(4) rules allow to the defendant undertaking to promote its welfare, the requirement that benefit is at least likely to be shared by consumers shows a distributional policy choice. Some might argue that this is not purely in line with long-term societal welfare – the distributional requirement indicates a preference for consumers. However, assuming that a position of dominance means that the undertaking has less incentive to compete, the pass-on requirement creates a degree of incentive and thus is a means to efficient and effective competition. Finally, the Mauritian provision also takes into consideration harm to the economy. If conduct were so significant so as to be harmful to the economy, by definition this could have harmful effects for societal welfare. Therefore the availability of this provision ensures that effects-based rules Mauritian unilateral conduct rules can be applied in a manner concordant with long-term social welfare.

3.3.4.1. The Case for A Disjunctive Tiered Approach under Section 46 CAM

Under Article 101 TFEU, the application of object or effect is disjunctive and tiered. The two elements provide different methodologies for assessing collusive agreements under the European provision;[129] furthermore, the alternative nature of the provision means that the object of the agreement is assessed first,

[129] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958; paras 27 - 34

then its effect.[130] Where it is established that conduct is anticompetitive by object, that conduct is prohibited in principle, with no further recourse to effect required.[131]

The benefits of a tiered approach under Article 101 TFEU are identified as follows: first, it provides predictability and certainty for undertakings regarding certain forms of agreement; second, it provides a deterrent quality to enforcement under Article 101 TFEU; third, it provides procedural economy where, once anticompetitive object is determined, the competition agency is relieved of the burden of conducting a resource-intensive assessment of potential or actual effects on the market.[132]

Unlike Article 101 TFEU, Article 102 TFEU does not contain an explicit 'object or effect' provision. Developments under Article 102 TFEU however have implicitly rendered an object or effect approach, the content of which follows the approach under Article 101 TFEU.[133] Article 102 TFEU object jurisprudence has developed along the lines of certain categories of conduct are, by their nature, anticompetitive.[134] Thus, by extrapolation, this transposes an Article 101 style of reasoning into Article 102 TFEU, in that certain categories of unilateral conduct may be caught by their object.

The SACA provisions are clear, predictable and provide certainty in terms of their overall function. The litigation process will determine which provision applies to the conduct in question. For example, if the undertaking adopts the proscribed conduct under section 8(d), it bears the burden of proof in demonstrating that the pro-competitive aspects of its conduct outweigh the

---

[130] see e.g. *Société Technique Minière (L.T.M) v Maschinenbau Ulm GmbH (M.B.U),* Case 56/65, ECLI:EU:C:1966:38, Beef Industry Development Society and Barry Brothers, para 15

[131] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 33

[132] *Cartes Bancaires* C-67/13 P ECLI:EU:C:2014:1958, para 35

[133] *Post Danmark,* C-23/14, ECLI:EU:2015:651. For inclusion of object or effect under Article 102 TFEU prior to *Post Danmark II* see e.g. *Michelin v Commission*, T-203-01, ECLI:EU:T:2003:250, para 239; *British Airways v Commission,* T-219/99, ECLI:EU:T:2003:343, para 293, upheld on appeal in *British Airways v Commission,* C-95/04 P, ECLI:EU:C:2007:166

[134] Loyalty rebates *prima facie* unlawful: *Post Danmark,* C-23/14, ECLI:EU:2015:651, para 27; *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, para 67 (quantity rebates); *Tomra and Others v Commission*, C-549/10 P, ECLI:EU:C:2012:221, para 71

anticompetitive effects; if its conduct falls under the general exclusionary provision of section 8(c), the plaintiff bears the burden of proof. Certain parts of section 46 are couched in more uncertain terms. For example, CAM states that the CCM shall take into account harm to the consumer or the economy, but it does not stipulate that a breach of section 46 will occur only if the exclusionary conduct is sufficient to cause this type of harm.

Both *IBL* and *Coolers* can be seen as examples of a tiered-approach to object or effect under section 46 CAM, simply because object is assessed first, then effect.[135] However, the structure of this is not clear. None of the four cases that expressly include assessments of object and effect explain why both assessments are relevant to the case at hand. Because agreements provide tangible evidence of purpose and strategy, one can understand why *IBL* and *Coolers* have assessments of object. But this argument does not extend to *AEIK* or *Broadband*. Furthermore, because they are cases of unilateral conduct without agreement behind them, the absence of an object assessment in the other CAM unilateral conduct cases is unexplained.

Using *Coolers* as the example, the CCM's approach to 'object or effect' as a clause of section 46 CAM is formalistic and does not offer any precise guidance to undertakings as to how object or effect under section 46 will be applied. First, in highlighting the exclusion and exploitation elements of section 46, the CCM states that either of these forms of conduct may be abusive '…even if such effects are not intended.'[136] Second, the CCM states that section 46 does not give examples of exclusionary behaviour which will be caught by section 46, but instead places emphasis on the nature of the conduct and whether it has the object or effect of restricting competition.[137] Third, having undertaken a market analysis, the CCM then continues to consider the object of the conduct (an agreement with an exclusionary clause) followed by effect. In its effect analysis,

---

[135] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014) paras 5.34 – 5.43

[136] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014) , para 3.4

[137] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014) , para 3.8

the CCM states that the potential exclusionary effect relates to factors of reduction in rivals' sales, their smaller market shares, and overall trend in the market.[138] In so doing, the CCM sets out what it considers to be the potential exclusionary effect and restriction on competition: thus the CCM sets out to answer the question of what might be the potential exclusionary effect of the conduct. In its analysis of object, however, the CCM does not set out what its potential concern might be, nor does it give an actual conclusion on this requirement of section 46. Instead, one is left to infer that object was not established in this case. Instead of asking the (more) difficult question of what is the restrictive object of this conduct, the CCM subtly posits a significantly different question: it asks 'what is the rationale and object of Quality Beverages of having the clause…?'[139] This question is much easier to answer as it simply invites the defendant undertaking to provide the answer, which Quality Beverages conveniently does.[140] This is not the same as the CCM undertaking its own objective analysis of the relevant circumstances to determine whether the conduct has the object of restricting competition. The point being made here is even in this case which appears to adopt a tiered-approach to object or effect, an approach recommended by this Thesis, the CCM in its investigative function does not engage satisfactorily with a structured object analysis. In their decision, the Commissioners state that they have conducted their own assessment of the findings and conclude that conduct does not have the object or effect of restricting competition.[141] The problem is that the Commissioners do not set out the nature of their assessment or appear to critically engage with the approach before them.[142]

---

[138] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014 paras 5.38 – 5.43

[139] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014, para 5.34

[140] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014, paras 5.35 – 5.36

[141] Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Quality Beverages* CCM/DS/0012 (23 April 2014)

[142] Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Quality Beverages* CCM/DS/0012 (23 April 2014) Section 2 summarises the findings of the investigation. Section 3 presents the conclusions of the Commissioners with no substantive analysis.

3.4. The Proposed Two-Tier Approach for Exclusionary Abuse under CAM

There is support for a single economic test of harm.[143] The arguments for a single test have a degree of intuitive appeal.[144] First, different rules may lead to disputes about how conduct should be categorized or tested. This creates a risk of decisions based on the nature of the conduct rather than its effect. Uncertainties regarding the application of unilateral conduct rules and litigants focusing on technical arguments rather than the competition issues at hand increases litigation and transaction costs. By shifting the focus on to effect of conduct, different forms of conduct may be treated consistently. Second, having different tests may allow dominant undertakings to arbitrate between conduct in order to achieve the anticompetitive effect. This may harm the consumer and be inefficient in the long-term. Third, courts may be liable to make mistakes as each test requires its own specific application. Notwithstanding these issues, this Thesis advocates that an approach to unilateral conduct rules predicated on competition on the merits necessitates a multi-test approach.[145]

In the first instance, the assessment of abuse takes place against the economic context of the case. Thus both the form and the effect of the conduct are relevant as to whether the conduct is anticompetitive, whether by intent or effect. For example, if the conduct does not contribute to creation of efficiencies or simply constitutes a means to consolidate an undertaking's market power, its form may be deemed to have predominantly the nature of restricting competition. An example of this may be *IBL*, where with a persistent and durable 90% market share, IBL sought to instigate shelf-space requirements and shore the market position of its dominant product. In relation to effect, Nazzini raises the point

---

[143] See e.g. P Akman *The Concept of Abuse in EU Competition Law* (Hart Publishing, 2011) AD Melamed, 'Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal' (2005) 20 Berkeley Technology Law Journal 1247; GJ Werden, 'Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test' (2006) 73 Antitrust Law Journal 413; E Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review 253; R O'Donoghue and J Padilla *The Law and Economics of Article 102 TFEU* (2nd Ed, Hart Publishing, 2013) MS Popofsky, 'Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules' (2006) 73 Antitrust Law Journal 435; E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing, 2010)

[144] AD Melamed, 'Exclusive Dealing Agreements and other Exclusionary Conduct: are there Unifying Principles?' (2006) 73 Antitrust Law Journal 375, 376 - 385

[145] OECD, 'Competition on the Merits' (DAF/COMP(2005)27, 2006)

that at an abstract level, different forms of conduct may have the same effect.[146] Giving the comparison of unconditional above-cost discounts versus prices below average-variable cost ("AVC"), Nazzini argues that both forms of conduct are capable of excluding competition: however, unconditional above-cost discounts are less likely to exclude competition and more likely to promote efficiency compared to prices below AVC.[147] On this, basis with some forms of conduct more likely to lead to anticompetitive harm as a matter of principle, the argument can be made that different tests of abuse should be available under unilateral conduct rules.

The second point raises the question of what type of effect is relevant – effect on the consumer? Effect on the as-efficient competitor? Or effect on competition? The Mauritian experience thus far demonstrates the appropriateness of having multiple tests. If consumer welfare were the standard by which conduct is assessed under section 46 CAM, the review of BDM's conduct may not have taken place in *Insurance and Credit Products* (discussed above) as BDM's consumers were obtaining the best price on the market. However, the conduct of BDM and the other banks were found to have breached section 46 by abusing their dominant position and significantly restricting competition in that market. Such cases demonstrate that the nature of the conduct in question, the economic context in which it takes place, and whether it has the object or effect of restricting competition, or exploiting the monopoly situation against this background become prominent questions. Furthermore, an 'as-efficient competitor' standard alone is insufficient. An example of this is *IBL*: in that investigation, the CCM's Executive Director stated in his report that the concern was not protecting the residual competition in the market, but looking instead to the future development of the market.[148] In this particular case, the protection of residual competition and the future development of that market were not incompatible - the conduct of IBL harmed both. One might also look at the policy

---

[146] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 53

[147] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 53

[148] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010, para 7.1.4

considerations in the cement market studies.[149] The first market study undertaken by the CCM and the recommendations that flowed from it were predicated on improving competition in the market by facilitating the entry of efficient competitors. The subsequent conditions that developed did not facilitate such entry as was expected. The second market study recommended policy amendment to facilitate entry based on the minimum viability required to penetrate the market.

The last issue regarding the required judicial expertise remains to be explored under Mauritian competition law. It is one the arguments of this Thesis that CAM should have retained a specialist competition court or tribunal as part of its institutional structure. Nevertheless, given the number of cases that the CCM has completed to date, it may now be in a position to issue further specific guidance as to its treatment of abuses.

A multi-test approach to abuse of dominance is compatible with the structure of the unilateral conduct rules under CAM, its qualified effects-based approach and its ultimate objective of long-term social welfare. Section 46(3)(d) provides the litmus test of when exclusionary or exploitative conduct is anticompetitive – the conduct must harm the Mauritian consumer or be detrimental to the economy. Thus far, these provisions have been interpreted broadly in the CCM's decisional practice, and this gives the space for incorporating different tests for assessing harm to the consumer or harm to the economy. Competition on the merits may serve as a guiding principle for the application of section 46(3)(d). The different tests provide various angles for exploring whether a given scenario constitutes competition on the merits or anticompetitive conduct[150] and whether the Mauritian economy or consumer has been harmed. The five main tests discussed

---

[149] Competition Commission of Mauritius 'Addendum to Executive's Director's Report of the study of the market for cement in Mauritius' (April 2011); Competition Commission of Mauritius 'Advice of the Commission to the Minister of Business, Enterprise, Commerce and Consumer Protection: Study of the cement market' CCM/AS/001/MS001 (2011); Competition Commission of Mauritius 'Cement Market Study – Preliminary Report' MS 002 (4 September 2012) Competition Commission of Mauritius 'Study of the Market for Cement in Mauritius – Preliminary Report' CCM/MS/001 (22 October 2010); Competition Commission of Mauritius 'Study of the Market for Cement in Mauritius' CCM/MS/001 (7 April 2011)

[150] see e.g. OECD, 'Competition on the Merits' (DAF/COMP(2005)27, 2006)

in the literature are: i) the naked restriction/intent test; ii) the no-economic sense test, iii) the profit-sacrifice test, iv) the as-efficient competitor test, v) the consumer welfare/harm test. The central argument of this Chapter is that a structured or tiered approach to section 46 CAM ought to be implemented. CCM support for a tiered approach to object or effect can be found in *Insurance and Credit Products:*

> Because section 46(3)(d) refers to "evidence of action or behaviour of an enterprise…that have or *are likely to have an adverse effect*…" the assessment of the likelihood of an adverse effect does not require the CCM to wait until the actions or behaviour have been successful before it can review the conduct. If the CCM finds that an enterprise in a monopoly situation is engaging in conduct with the object of…restricting competition, it can take action to remedy the situation. In the alternative, if it can be shown that the enterprise in the monopoly situation did not engage in the conduct with that object, but the conduct is likely to have that effect the CCM can also take remedial action.[151]

Adopting multiple economic tests for abuse may provide a means to develop a tiered approach to object or effect under section 46 CAM. The proposed first stage for testing for abuse under CAM (object) may be implemented by either the naked intent/restriction test and/or the no-economic sense test. If the conduct passes one or both these initial screens, then it may be assessed under other tests of effect as appropriate. As will be discussed below, the CCM has adopted a choice-based standard for the assessment of effect.

3.4.1. Intent: the First-Tier for Abuse

In order to maintain fidelity to the text of section 46 CAM, its structure and to increase the transparency of its application, a tiered-approach should be adopted. In particular, given the current trend of Mauritian unilateral conduct

[151] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), para 4.11

cases featuring highly entrenched dominant positions, a tiered-approach ensuring the use of the intent test would focus the application of section 46. Conduct with the overwhelming object of restricting competition would be dealt with summarily and the resources of the CCM used more efficiently.

The application of object or effect under Article 101 TFEU could provide a structural basis for a potential framework under section 46 CAM. Neither CAM itself nor the CCM's guidance or decisional practice yet provides coherent advice of how 'object or effect' will actually be implemented. At present, the CCM has considered the object of an undertaking's conduct when an agreement has been used. It can be inferred therefore that the CCM is likely to consider object in those circumstances. Following an Article 101-type approach i.e. a tiered intent or effect approach would give structure and predictability to this part of section 46. At present, the consideration of object under section 46 is very much at the CCM's discretion. In applying a tiered-approach, the arbitrary application of this part of section 46 would be removed. Further, all conduct caught by section 46 would be subject to this scrutiny – section 46 after all applies to unilateral conduct which restricts competition, whether by agreement or otherwise.

3.4.1.1. The Naked Intent/Exclusion Test

A number of definitions have been offered for conduct that falls under the naked intent test. Two useful definitions revolve around deceitful practice on the one hand, and lack of pro-competitive effect on the other. In relation to the former, unilateral conduct may be deemed to be abusive by conduct if the 'deceit reasonably appears capable of making a significant contribution to its attaining or maintaining monopoly power.'[152] Examples include fraud or deceit,[153] and misuse of 'courts and governmental agencies' to consolidate dominant

[152] ME Stucke, 'How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?' (2010) 63 Southern Methodist University Law Review 1069, 1113
[153] SA Creighton et al. 'Cheap Exclusion' (2005) 72 Antitrust Law Journal 975, 989-990; ME Stucke, 'How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?' (2010) 63 Southern Methodist University Law Review 1069

positions.[154] In relation to conduct lacking pro-competitive effect, such conduct has been described as 'behaviour that unambiguously fails to enhance any party's efficiency, provides no benefits (short or long-term) to consumers, and in its economic effect produces only costs for the victims and wealth transfers to the firms engaging in the conduct…'[155] These definitions set the grounds for two different tests that are available for assessment of intent – naked restriction/exclusion and the no-economic sense test.

3.4.1.1.1. Article 102 TFEU examples of Naked Restrictions – *Intel* and *AstraZeneca*

In *Intel*, the conduct involved the defendant paying its customers to postpone or cancel the launch of rival products and put restrictions in place on their distribution.[156] The European Commission's legal characterisation of the conduct, thus deeming to be abusive by object and caught by Article 102 TFEU considered the object of the conduct, its effect on the decision-making of Intel's customers (original equipment manufacturers) notwithstanding the demand for rival products, and that the conduct formed part of an overall strategy to foreclose the market.[157] The General Court disagreed that the European Commission had failed to establish that the naked restrictions were anticompetitive.[158] First, the conduct made access to the market more difficult: it is not required under Article 102 TFEU that access becomes impossible. Second, as in this case, object of the conduct and its effect may be indistinguishable, targeted as they were, at a specific rival and with payments conditional on the naked restriction being implemented; lastly, the special responsibility of dominant undertaking requires it not to impair competition with conduct that falls outside of competition on the merits – payment to customers to restrict the marketing of the product belonging to a specific competitor goes beyond competition on the merits.

---

[154] RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted by The Free Press, 1993), page 347-364; SA Creighton et al. 'Cheap Exclusion' (2005) 72 Antitrust Law Journal 975, 990-993

[155] SA Creighton et al. 'Cheap Exclusion' (2005) 72 Antitrust Law Journal 975, 982

[156] *Intel v Commission*, Case T-286/09, ECLI:EU:T:2014:547, paras 32 and 198

[157] *Intel v Commission*, Case T-286/09, ECLI:EU:T:2014:547, para 199

[158] *Intel v Commission*, Case T-286/09, ECLI:EU:T:2014:547, paras 201 - 210

The naked intent test was also applied in *AstraZeneca*. In relation to the misrepresentation to the patent offices, the General Court held that the conduct 'constituted a practice based exclusively on the methods falling outside of competition on the merits' and focuses on excluding competitors.[159] The General Court framed the test as:[160]

> …in the absence of grounds connected with the legitimate interests of an undertaking engaged in competition on the merits and in the absence of objective justification, an undertaking in a dominant positions cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market.'[161]

The General Court's framing of the test, based purely on objective assessment, and disregarding intent,[162] has been criticised for being over-inclusive.[163] However, European jurisprudence has consistently held that direct evidence of subjective intent may be taken into consideration as supplementary evidence; furthermore as discussed above, AstraZeneca's conduct was assessed by the General Court against the relevant economic circumstances, including elements that would have objectively pertained to the defendant's intent.

A closer look at the application of the naked intent test and its application in *Intel* for example, suggests that analysis of *IBL* could have been approached differently. One aspect of IBL's store programme was that it required one particular store not to list at all the product of a competitor. The CCM held that this was likely to restrict competition in the market, and may also result in anticompetitive foreclosure, but did not elaborate further.[164] As this conduct was directed to exclude a specific competitor, consideration as to whether this

[159] *AstraZeneca v* Commission, T-321/05, ECLI:EU:T:2010:266, para 608
[160] *AstraZeneca v* Commission, T-321/05, ECLI:EU:T:2010:266, para 817
[161] *AstraZeneca v* Commission, T-321/05, ECLI:EU:T:2010:266, para 817
[162] *AstraZeneca v* Commission, T-321/05, ECLI:EU:T:2010:266, para 356;
[163] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 190
[164] Competition Commission of Mauritius *Importation of slaughter cattle in Mauritius* INV003 (14 September 2011) , para 6.1

constituted a naked intent/restriction example would have been appropriate. The application of the naked intent would also clarify when object and effect can be held to be the same. The General Court held that this would be case when conduct is directed to a specific competitor. In *Broadband and Pay-TV* for example, the CCM held that the conduct had the object and effect excluding competition, but the rationale for this is not stated or implicit within the case.

A further case that might be reviewed differently is *Manhole Covers,* Mauritius Telecom required compliance with non-existent quality standards.[165] Whilst there were legitimate reasons for Mauritius Telecom insisting that manhole covers met certain quality standards, such as meeting basic health and safety requirement, and reducing or mitigating liability for any personal injury claims, it is clearly unfair to require firms to comply with non-existent standards. All manhole covers that complied with the international standard at the time should have had been free to compete for the market without further unreasonable burden imposed unilaterally by the defendant. This would follow the line of analysis taken in *AstraZeneca* – in order to determine whether the test would be applicable, the CCM would have had to confirm Mauritius Telecom's knowledge and understanding of the regulatory requirements at the time, and the requirements it made of its own preferred suppliers.

The naked restriction test therefore is appropriate for conduct which constitutes some form of deceit or misrepresentation as in *AstraZeneca* or a form of conduct directed at a specific competitor as per the conduct in *Intel*. Outside of these narrow parameters, the No- Economic Sense Test would be the next alternative for assessing whether conduct is restrictive by object.

3.4.1.2. No Economic Sense Test

[165] Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* INV012 (11 September 2012); Decision of the Commissioners of the Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* Commission/DS/0012 (26 October 2012).

The 'No Economic Sense' (the "NES") test provides an alternative way of incorporating the 'intent element of section 46. It proposes that conduct is unlawful if the conduct makes no economic sense for the undertaking, but for the elimination of competition. The test follows two lines of enquiry: first, does the conduct have the tendency to exclude; second, does the conduct benefit the undertaking only because of that tendency?[166] According to Werden, the test does not require actual effect, but what may have been reasonably anticipated at the time the conduct was initiated. Thus, neither unexpected efficiencies nor exclusion that occur later or were not expected at the time of when the conduct was initiated should be taken into consideration.[167]

In a way, this would fit the current enforcement structure of Mauritian unilateral conduct rules - the anticompetitive nature of the conduct is assessed at section 46, and efficiencies are taken into consideration at the remedies stage: therefore, if but for the exclusion of undertakings, the conduct makes no economic sense, a breach of section 46 can be made out. If the undertaking then posits efficiencies occurring from the exclusion, this can be taken into account at the remedies stage. One of the benefits of this test is that it places emphasis on competition on the merits by way of improved goods and services, rather than efficiency in itself achieved by way of exclusion. Thus, it promotes the types of efficiency that is shared between the players on the market. This would fall in line with European Court of Justice's object-assessment of the horizontal agreement in *Cartes Bancaires*, where a legitimate objective to prevent free riding was upheld.[168]

3.4.2. Effect as the Second-Tier for Abuse

If the undertaking is able to demonstrate that its conduct does not have the overwhelming intent of restricting competition, the second tier of assessing the conduct for its anticompetitive effect would then come into operation. The CCM's practice overwhelmingly adopts a consumer choice standard,

[166] 'OECD, 'Competition on the Merits' (DAF/COMP(2005)27, 2006), 23
[167] GJ Werden 'Identifying Exclusionary Conduct under Section 2: the "No Economic Sense Test" (2006) 73 Antitrust Law Journal 413, 415-417
[168] *Cartes Bancaires v Commission,* C-67/13 P, ECLI:EU:C:2014:2204, para 75

incorporating assessments of price, efficiency and choice as required. This is appropriate for meeting CAM's long-term social welfare objective as it allows for the consideration of the different parameters by which competition could be affected. An alternative test – the as efficient competitor – is also considered.

3.4.2.1. Consumer Harm – the Consumer Choice Standard

Under CAM, the CCM appears to have adopted a consumer choice standard. One of the benefits of employing the consumer choice standard is that it allows the CCM to assess conduct against its adverse effects on price, efficiency or choice as required. For example, the CCM has used pricing standards in *Broadband and Pay-TV, AEIK,* and *Insurance and Credit Products*. It has considered conduct that has reduced choice or interfered with choice on the market in *IBL, Insurance and Credit Products,* and *Broadband and Pay-TV*. The CCM has also considered product innovation in the cement market studies. A further benefit of the consumer choice standard is that it accounts for the different participants in the market. The decisions of the CCM have interpreted consumer harm as including not only current final consumers, but also customers of the dominant undertaking (*Manhole Covers)* and future consumers *(Broadband and Pay-TV).* It can be seen that consumer harm, defined as consumer choice, gives the CCM flexibility to undertake the necessary assessments when implementing an effects-based approach to undertake a substantive assessment of the conduct whilst remaining faithful to the objectives and fundamental purpose of CAM.

Akman gives three reasons against identifying consumer harm through choice.[169] First, it may simply be shorthand for protecting competitors. Second, the existence of choice (in the sense of product differentiation) may be an indicator of market power. Third, choice is already accounted for in the assessment of dominance. For example, section 46(3) requires an assessment of demand and supply-side substitutability in defining the relevant market: thus considering choice at the abuse stage of analysis (i.e. the harm caused) may lead to the double counting of a factor already considered.

[169] P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart, 2012), 291-298

However, these arguments may be addressed in two ways. First, a criticism of welfare-based rules generally is their difficulty in capturing dynamic aspects of the market. However, looking at consumer harm/choice as anticompetitively limiting innovation may address this in principle. Akman identifies a measurement issue here - whilst static efficiencies can be measured in terms of price and quantity; dynamic efficiency is process driven. Its inherent uncertainty means it is difficult to predict outcomes or measure what constitutes a positive or negative outcome for the market. Therefore this in itself does not justify maintaining or promoting the number of competitors in the market.[170] The dynamic process of competition is uncertain: however, the manner in which a market develops may indicate new products/entrants are ready or could enter the market. An example is the evolution of the relevant market post-*IBL*. Following the CCM's intervention preventing IBL from foreclosing the market, two new entrants entered the market with their own products.[171] Of course, one may conclude that the new entrants might have entered the market even if the CCM had not conducted its investigation. However, the ability of those undertakings to penetrate the market would have been impeded by IBL's requirements that the shelf-space for its dominant product matched its market share. Furthermore, the sole competitor in existence at the time of the investigation would have incurred further difficulties if the shelf-space requirements were imposed. Second, in these circumstances, the application of consumer choice as an abuse has not required the availability of substitutes to be counted twice. Rather the issue has revolved around agency, economic freedom and consumer choice – and the acts of the dominant undertaking to artificially restrict these elements.

3.4.2.1.1. Defining the Consumer Choice Standard

---

[170] P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart, 2012), 296; ILO Schmidt, 'The Suitability of the More Economic Approach for Competition Policy: Dynamic vs Static Efficiency' 2007 28(7) European Competition Law Review 408

[171] Competition Commission of Mauritius 'Evaluation of CCM case: IBL Consumer Goods Sales Contracts with Retail Stores' (18 November 2011)

Consumer choice is about consumer sovereignty and consumers (in the broadest sense) being able to make effective choices.[172] The three elements of this standard are: i) a range of consumer options are available on the market; ii) consumers must be able act freely, and iii) the market constitutes a state of affairs that respond to consumer signals and demand.[173] Dominant undertakings are able to artificially limit choice by taking advantage of imperfect markets and implement practices that impede decision-making.[174] The consumer choice standard does not require that consumer choice is maximized however, but that meaningful choices are available on the market so the market remains competitive, efficient and that long-term social welfare is maintained.[175] The economic insights that inform the consumer choice standard are as follows:[176] first, consumers benefit when there is a meaningful range of choice. Second there are diminishing returns with choice, therefore this standard focuses on ensuring that meaningful choices are available on the market, rather than maximising the amount of choice. Third, whilst the consumer choice standard

---

[172] GT Gundlach, 'Choices as the Focus of Antitrust: A Marketing Perspective' (2001) 62 University of Pittsburgh Law Review 527; NW Averitt and RH Lande, 'Consumer Choice: The Practical Reason for both Antitrust and Consumer Protection Law' (1998) 10 Loyola Consumer Review 44; NW Averitt and RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713; SW Waller, 'Antitrust as Consumer Choice: Comments on the New Paradigm' (2001) 62 University of Pittsburgh Law Review 535. Against the adoption of a consumer choice standard *per se*, see JD Wright and DH Ginsburg, 'The Goals of Antitrust: Welfare Trumps Choice' (2013) 81 Fordham Law Review 2405; cautioning against consumer choices as a starting point: LL Gormsen, 'Antitrust Marathon II' (2008) 4(1) European Competition Journal 213, 249

[173] NW Averitt and RH Lande, 'Consumer Choice: The Practical Reason for both Antitrust and Consumer Protection Law' (1998) 10 Loyola Consumer Review 44, 44; GT Gundlach, 'Choices as the Focus of Antitrust: A Marketing Perspective' (2001) 62 University of Pittsburgh Law Review 527; NW Averitt and RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713, 715; RH Lande, 'A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice' (2013) 81 Fordham Law Review 2349, 2392

[174] NW Averitt and RH Lande, 'Consumer Choice: The Practical Reason for both Antitrust and Consumer Protection Law' (1998) 10 Loyola Consumer Review 44, 46; NW Averitt and RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713, 732; NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 200

[175] NW Averitt and RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713, 713 – 716; NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 191; RH Lande, 'A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice' (2013) 81 Fordham Law Review 2349, 2393; GT Gundlach, 'Choices as the Focus of Antitrust: A Marketing Perspective' (2001) 62 University of Pittsburgh Law Review 527, 531

[176] NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 191

should take into account 'short-term variety in immediate consumption', it also has to take into account long-term changes in innovation as well. Fourth, the nature of the relationship between concentration and availability of choice is unclear. For this reason, competition law should identify markets where lower concentration and greater choice is beneficial to consumers.

Due to its normative content and relative administrative ease[177], the consumer choice standard confers a number of benefits. It incorporates price, efficiency and all other non-price dimensions that are significant to the consumer.[178] Furthermore, it uses aspects of business behaviour like marketing and strategic analysis to underline and reinforce economic assessment of unilateral conduct.[179] As demonstrated in the Mauritian cases below, this means it can be flexibly applied to a wide number of cases. By taking into account these dimensions, and looking at the short- and long-terms implications for the market, it supports and develops an efficient market capable of offering all the benefits of competition to an economy.[180]

Because of its versatility, the main issue for the consumer choice standard is to ensure that it is not over-enforced or used arbitrarily.[181] This is particularly so given that it is not solely implemented by objective measures such as those are available when assessing price for example.[182] To address this, the following controls can be implemented.[183] First, national competition authorities can issue guidance on its use and the manner in which it is implemented. Second, it could

[177] NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 175 and 248

[178] NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 178, 185-189; 81 Fordham Law Review, 2393

[179] SW Waller, 'Antitrust as Consumer Choice: Comments on the New Paradigm' (2001) 62 University of Pittsburgh Law Review 535, 536

[180] NW Averitt and RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713, 717

[181] NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 248; RH Lande, 'A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice' (2013) 81 Fordham Law Review 2349, 2397

[182] NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 237

[183] NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 237, 248

be used as a weighted factor in assessing unilateral conduct. Third, in the alternative, it could be taken into account once price-and efficiency-based assessments have taken place. At present, the CCM appears to have adopted the third approach.

3.4.2.2. Implementing the Consumer Choice Standard under CAM

Nihoul suggests that there may be particular types of cases where the consumer choice is more appropriate such as markets where there is a lack of serious price competition and markets where consumers are led to purchase unsuitable products.[184] The Mauritian unilateral conduct cases however demonstrate broad applicability of a choice standard, particularly if one interprets the choice standard of being able to accommodate price/efficiency and dynamic considerations.

In *IBL*, the CCM's main concern regarding IBL's rebate and shelf-space agreement was its effect on future foreclosure of the market. If the programme was fixing shelf-space to current product market share, new products might find it more difficult to penetrate the market, given the already limited shelf-space and demand was being restricted by IBL's conduct.[185] In the absence of IBL's agreement, the market evolved and new entrants were able to enter with new products.[186] *IBL* also reflects the potential of the choice standard's ability to address unfamiliar conduct which is not directly based on price-based or static efficiency matters. As pointed out by the CCM, the practice of buying shelf-space was a new practice to Mauritius, the merits of which were unclear.[187] However, some guidance as to the potential of the shelf-space requirements to foreclose the market was found in the European Commission's *Coca-Cola* decision, where

---

[184] NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' P Nihoul, N Charbit and E Ramundo (eds) *Choice: A New Standard for Competition Law Analysis?* (Concurrences, 2016), 60

[185] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), paras 5.7.4 – 5.7.7

[186] Competition Commission of Mauritius 'Evaluation of CCM case: IBL Consumer Goods Sales Contracts with Retail Stores' (18 November 2011)

[187] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), para 5.7.8

the European Commission found that those requirements would make it more access conditions more difficult for existing rivals.[188]

Nihoul's point that the choice standard maybe particularly applicable to markets where there is little price competition is relevant to the *Slaughter Cattle* case. The Commission found that in this homogenous market 'the absence of competition is likely to result in detriment to consumers, who will not benefit from the normal advantages provided in a competitive market – lower prices and better quality.'[189] Thus, as a general point, improving the competitiveness of the market, which due to a monopoly had no price competition, would potentially lead to better societal outcomes. However, as pointed out earlier in this Thesis, undertakings need to exercise their economic freedom and compete. The choice standard, simply because there could be more choice on the market, cannot be used to short-cut the competitive process and remove the need for undertakings to participate in the process of rivalry.

In *Broadband and Pay-TV*, there were two pricing concerns. The first was whether Mauritius Telecom was pricing its combined broadband and premium television package below-cost, using cross-subsidy from other parts of its business.[190] When calculating for total loss/consumer saving incurred by Mauritius Telecom, the investigation found that there was potential below-cost pricing taking place.[191] The second pricing issue was the coercion placed on existing consumers of the standalone broadband product. The coercion flowed from the overall pricing relationship between the standalone product and the combined service, and other elements implemented by Mauritius Telecom. This affected consumer choice in two ways. First, it went against consumer demand, withdrawing desired products from the market. Second, Mauritius Telecom introduced measures to affect consumer switching – additional costs were

[188] *Coca-Cola* (Decision COMP/A.39.116/B2)
[189] Competition Commission of Mauritius *Importation of slaughter cattle in Mauritius* INV003 (14 September 2011), para 5.51
[190] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), paras 7.84 – 7.100
[191] This total was made up incremental cost of adding subscription content and the difference in price between Mauritius Telecom's standalone broadband product and its combined service.

introduced to discourage consumers from switching to products which did not support Mauritius Telecom's strategy;[192] other measures were introduced to encourage switching to the products which did support Mauritius Telecom's strategy.[193] The overall aim of Mauritius Telecom was to improve its position with upstream premium television content providers. To be allowed to offer such premium content, Mauritius Telecom had to demonstrate that it had a significant customer base with a sufficient number of subscribers.[194]

Tying and its affect on consumer choice was also the concern in *Image-based Clearing Solutions*. Blanche Birger's distribution solution for cheque clearing technology involved tying together scanners together with software it had developed as one complete package for its customers.[195] The software it had developed was not interoperable with scanners offered by rivals thus preventing them from developing scanner that could compete in the hardware market. The CCM's investigation found that the banks had several criteria for assessing the scanner products, the most important being cost, followed by support and service.[196] Most importantly, the CCM found that were was demand for the alternative software, with 66% of the banks involved being willing to consider purchasing other software, and 'a significant proportion' considering switching in the event of a price increase had there been no tying.[197] Whilst the banks were found to have a degree of buyer power,[198] the switching costs involved with current market context could mean that those costs outweigh the benefits of any

[192] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.47-7.48
[193] see e.g. Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.98
[194] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.69
[195] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), para 4.24
[196] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), paras 4.27 – 4.28
[197] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), para 4.44
[198] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), para 4.84

supplier change. The lack of interoperability was reducing choice in the contestable portion of the market.[199]

Finally, in the CCM's most recent unilateral conduct investigation *Merchant Discounts*, the charges imposed by CIM for providing hire-purchased credit facilities to retailers were examined. The commissions that CIM was charging to its customers (the merchant discount) was considered under price discrimination and predatory pricing analysis. Under the price discrimination analysis, it was found that small to medium retailer enterprises were found to be paying consistently higher merchant discounts compared to much larger retailers. In addition, it was found that CIM was potentially charging below-cost commissions to its large customers, with these possibly being cross-subsidised by the fees being charged to it smaller customers. The CCM found that this could reduce consumer choice in the downstream retail market in two ways. First, by increasing the costs of the smaller companies, reducing their ability to compete with larger retailers who were also customers of CIM, this could cause those smaller undertakings to exit the market;[200] furthermore, if the cost could be passed to consumers, this would cause some consumers to exit the market as the price of affected goods was artificially inflated.[201]

The above cases demonstrate the consideration of the choice standard in the CCM's decisional practice. However, because those cases have involved a degree of price-based anticompetitive conduct, the CCM has not had to full engage with the choice-based standard and demonstrate the extent to which apples the long-term social welfare standard. This opportunity came up in *Insurance and Credit Products.*

---

[199] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), paras 5.18-5.20

[200] Competition Commission of Mauritius *Merchant Discount by Cim Finance Ltd* INV035 (13 April 2017), para 5.21-5.24

[201] Competition Commission of Mauritius *Merchant Discount by Cim Finance Ltd* INV035 (13 April 2017), para 5.22

3.4.2.2.1. Confirming CAM's Consumer Choice Standard

Perhaps the clearest demonstration that consumer choice is the overriding effects-standard under CAM is *Insurance and Credit Products*. In the first instance denial of 'free choice' was a running theme of the investigation. The main concern was that a significant percentage of consumers were being coerced into paying prices higher than they would have to by going to the market,[202] with analysis showing that consumers tended to take the insurance offered by the banks with whom an agreement was in place.[203] A number of factors demonstrated that consumers' ability to choose the life insurance when buying a mortgage was impeded by the dominant banks. Contextually, the banks had taken advantage of permissive legislation stating that consumers may be required to take life insurance when purchasing a mortgage to be interpreted (from a consumer perspective) as insurance must be taken.[204] Consequently, from the outset the majority of consumers were under the impression that they were legally required to take such insurance *and* were also unaware of their free choice, not only to take insurance, but also who they could take insurance from, believing that they had to take the insurance on offer from the bank.[205] Ten banks were investigated – nine of them were found to have breached section 46 CAM as their customers could have obtained cheaper insurance premiums going elsewhere.

However, it is the decision regarding BDM, the tenth bank, that really confirms choice as the overriding effect standard. BDM disputed the finding of foreclosure on the basis that its consumers had the most competitive price on the market. The investigation found BDM's conduct to be the following: first, BDM had an agreement with a specific insurance provider. Whilst it was not clear whether BDM was receiving commission for sales, it was identified that a certain

[202] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), paras 1.4 and 6.55
[203] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), para 1.3
[204] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), para 3.56
[205] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014), para 5.100

percentage of BDM's consumers did purchase insurance from the named provider. Second, notwithstanding the agreement, BDM's consumers benefitted from the best prices on the market. Third, BDM did not charge a fee if the consumer decided to purchase insurance from elsewhere. The investigation concluded that whilst BDM was not exploiting its consumers, its conduct amounted to anticompetitive foreclosure and thus breached section 46 CAM. The CCM upheld the finding of anticompetitive foreclosure. Taking a literal approach to the application of section 46(2)(a) CAM, the Commissioners found that foreclosure takes place where the effect of the agreement is to prevent rivals from entering the market as evidenced by both i) the nature of the agreement with a specific provider and ii) that the vast majority of BDM's consumer purchased insurance with the named provider. In its BDM decision, the CCM confirmed that anticompetitive foreclosure of the market may take place notwithstanding that consumers appear to benefit from the market restriction. Though BDM's consumers received the most competitive prices on the market, the protection of the market and restriction of consumer choice outweighed this pro-competitive benefit. This decision demonstrates that price/efficiency-based decisions will not and should not always trump reduction of choice if long-term social welfare is affected.

The use of the consumer choice standard under CAM is apparent from the cases above. Those cases demonstrate the link between the facets of price, efficiency and choice. As noted above, if price or efficiency-based conduct is to outweigh reductions in meaningful consumer choice, the conduct must demonstrate the least restrictive method of achieving those goals. The key aim for the CCM will be to make transparent its use of the consumer choice standard. This is not referred to in any of its guidance. Following these cases, the CCM should issue guidance about its implementation. This should include two matters. First, there should be information about how evidence regarding choice is collected. For example, this might include interviews, quantitative assessment or other types of information.[206] Second, the CCM should issue guidance about the procedural

[206] see e.g. NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175, 240

safeguards in place to manage the implementation of the consumer choice standard. As suggested, proportionality could be one of the filters and this seems to be the case under CAM– but the CCM needs to make this explicit.

3.4.2.3. Consumer Choice under Article 102 TFEU

It has been argued that the jurisprudence under Article 102 TFEU is the most developed body of case law regarding consumer choice, with a number of cases demonstrating the application of a consumer choice standard.[207] Four cases in particular show the application of a consumer choice standard under the European unilateral conduct rules.

In *France Télécom*, one can find a similar set of consumer outcomes to that of *Insurance Products* under CAM. Choice may have been eliminated (in this case, the exiting of rivals) but France Telecom argued that consumers would have continued to benefit from lower prices than if the competition remained on the market. The case concerned France Télécom's dominant position in the telecommunications market and alleged predatory pricing by selling its products at a loss. Under Article 102 TFEU, predatory pricing is anticompetitive if products are sold below marginal costs and they form part of a plan to eliminate competition. As part of its defence, France Télécom argued that pricing below cost could be found anticompetitive only if recoupment was possible i.e. it could recoup the losses it had initially incurred as part of its pricing strategy. This argument was rejected by European Court of Justice, with one of those grounds based on the loss of consumer choice:

> [t]he lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the

[207] P. Nihoul, 'Freedom of Choice": the Emergence of a Powerful Concept in European Competition Law', in P Nihoul, N Charbit and E Ramundo (eds) *Choice: A New Standard for Competition Law Analysis?* (Concurrences, 2016), 10

> undertaking concerned, is further reduced and customers suffer loss as a result of the limitation of choices available to them.[208]

Microsoft involved two forms of conduct: i) the withholding of information required to ensure the interoperability of its dominant product, and ii) bundling products with its dominant product, thus preventing customers from purchasing one product without the other.

In the first example, Microsoft was withholding information regarding its server software; the result being that rivals were unable to make products able to communicate with servers using Microsoft software. Due to Microsoft's dominance, this left consumers with the choice of either purchasing competing products and risk facing technical flaws in using Microsoft-dominated environments or purchased Microsoft-products and have face the trade-off of having to forgo software which might better suited for their needs?[209] The European Commission's position on this point was that Microsoft's conduct was anticompetitively foreclosing the market by 'locking' them to a particular product group and thereby[210]

> …stifling innovation in the impacted market and diminishing consumer's choices by locking them into a homogenous Microsoft solution. As such, it is…inconsistent with Article 102…

This bundling aspect of Microsoft's conduct involved it providing other pieces of software, namely Windows Media Player and Internet Explorer, pre-installed with its Windows operating system. At the time of the case, Microsoft had a 90% market share in the global operating system market. [211] Thus, unless particularly motivated, there was no need for consumers to source alternative media or internet browser programmes, notwithstanding that those alternative

---

[208] *France Télécom v Commission,* C-202/07 P, ECLI:EU:C:2009:214, para 112
[209] *Microsoft* (COMP/C-3/37.792), para 694
[210] *Microsoft* (COMP/C-3/37.792), para 782
[211] *Microsoft* (COMP/C-3/37.792), para 431

programmes may have offered better quality functionality in aspects like security or user interface. In this instance, consumers were not locked into their choice, but European Commission and Courts found that restriction on choice had been anticompetitively reduced. First, with pre-installed products, consumers did not have the incentive to explore other products. Second, with Microsoft's ubiquity on the market, rivals could not produce competing software to offer consumers. In addition and as a result, content providers were concentrating on producing code compatible with the Microsoft architecture. They were not producing content compatible with rival software. This in turn affected the ability of rivals to develop competing products which consumers could use. Thus the European Commission held that Microsoft's conduct deprived 'the customer of the ability to choose freely his sources of supply and denies other producers access to the market.'[212]

In *Intel*, the European Commission again returned to the adverse effect on choice resulting from anticompetitive unilateral conduct. It will be recalled that Intel's conduct involved i) naked restrictions – paying its customer to delay or cancel the sale of products belonging to a specific rival and ii) conditional rebates offered to customers inducing them to purchase more Intel's products. In relation to the naked restrictions, the Commission found that each original equipment manufacturer actually had AMD (Intel's rival) products in the pipeline. There was consumer demand for AMD products.[213] Intel's conduct interfered with the delivery of those products to market,[214] the result of which that consumers were deprived of a choice they would otherwise have had.[215]

The conditional rebates were also held to affect consumer choice. Again, there was consumer demand for AMD products. With rebates reducing the amount fo AMD chips purchased by the original equipment manufacturers, AMD was

---

[212] *Intel* (Decision COMP/37.990), para 835
[213] *Intel* (Decision COMP/37.990), para 1677
[214] *Intel* (Decision COMP/37.990), para 1678
[215] *Intel* (Decision COMP/37.990), para 1679

directly harmed, and consumers were deprived of choice of goods on the market for which there was demand:[216]

> As a result of Intel's rebates and payments, end-customers were artificially prevented from choosing other products on the merits…since Intel's conduct prevented the competitor's product from being offered…As such, Intel's exclusionary practices had a direct and immediate negative impact on those customers who would have had a wider price and quality choice if they had also been offered the product of their favourite OEM...with…CPUs from Intel's competitors.

In *Post Danmark II*, the European Court of Justice was asked to consider what circumstances would be relevant to determining whether Post Danmark's conditional rebates were capable of breaching Article 102 TFEU. The Court considered Post Danmark's statutory monopoly in the postal market, and the availability of the remaining contestable market. Finding that the rebates applied without distinction across the contestable and non-contestable markets,[217] the Court held that if it could be demonstrated, as alleged, that two-thirds of the contestable market could not be transferred to Post Danmark's competitors without an adverse impact on the rebates available,

> 'the incentive to obtain all or a substantial proportion of their supplies from Post Danmark would be particularly strong, reducing significantly customers' freedom of choice as to their sources of supply.[218]

3.4.2.4. Consumer Choice under SACA

Nationwide[219] concerned the schemes put in place to by South African Airways to promote sales of its airline tickets.

---

[216] *Intel* (Decision COMP/37.990), para 1602
[217] *Post Danmark,* C-23/14, ECLI:EU:2015:651, para 35
[218] *Post Danmark,* C-23/14, ECLI:EU:2015:651, para 36
[219] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010)

ZACT found the operation of the retroactive commissions harmed consumer choice in the following way: first, travel agents are an important channel for the distribution of airline tickets. Alternative channels such as online sales or over-the-counter sales were not effective subsititutes for consumers looking to explore their choices; alternative channels did not offer the same advice and expertise as the travel agents who were subject to the conditional rebates; SAA's revenue share was higher than its passenger share because it carried more higher yielding passengers suggests that consumer choice was harmed;[220] the combination of the incentive agreements and the travel agent's ability to influence consumers' choices would have led to some form of consumer harm in terms of higher prices or reduced choice.[221]

3.4.2.5. An Alternative Effect Test - As Efficient Competitor Test

The As Efficient Competitor test proposes that anticompetitive conduct occurs where the conduct impedes competitors as efficient as the dominant undertaking. The test is based on a hypothetical competitor having the same costs as the dominant undertaking and looks at whether the undertaking is pricing below its costs.

The test excludes the competitive constraint offered by less-efficient competitors and their contribution to an effective competitive process. If the CCM were to adopt the test as a method for analysing price-based exclusionary conduct, it would have to consider whether or not to allow for intervention in cases where less-efficient competitors are harmed. Given that the current lines of section 46 cases have focused predominantly on undertakings with entrenched and substantive dominant positions, and are therefore cases involving marginal

---

[220] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010), para 248

[221] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010), para 189

competition, I submit the CCM would have to seriously consider the extent to which this test is appropriate for Mauritius.

The application of the test was discussed by the European Court of Justice in *Post Danmark II.* The Court confirmed that it is an available test, but not a prescribed one. This is on the basis that, subject to the facts, it may not always be reasonable to apply the test. In *Post Danmark*, the market conditions of the case, namely the defendant's dominant position, the high barriers to entry, and the duopolistic nature of the market meant that it would not be possible for a competitor to be as efficient as Post Danmark in the short term.[222] As a result of those factors it would be unreasonable to apply the as efficient competitor test.

This logic can be extended to the current run of Mauritian section 46 cases. It can be argued that a number of that they have demonstrated similar circumstances to render the application of an alternative effects-test like the as efficient competitor test unreasonable at this stage. It assumes consumers value price only and that harm is only caused by selling at a loss: but it is not appropriate policy to safeguard just the interests of as-efficient competitors only.[223] Accepting that Mauritian markets justify intervention to promote the competition interests of less-efficient undertakings, the following questions need to be addressed. The intervention would take place where conduct harms less efficient competition, but when should such intervention take place? One suggestion is where the dominant undertaking enjoys non-replicable advantages and/or economies of scale and where new entry can only take place below the minimum efficient scale. The liberalisation of the Mauritian cement market is a good example of where these considerations took place: the markets studies looked at the non-replicable advantages enjoyed by the dominant undertakings such as access to the Mauritian port infrastructure and that promoting competitiveness in the market would require encouraging new entrants that they could compete at the minimum viable scale. An outstanding issue is the

---

[222] *Post Danmark,* C-23/14, ECLI:EU:2015:651, para 59
[223] W Wils, 'The Judgment of the EU General Court in Intel and the so-called "More Economic Approach" to Abuse of Dominance" (2014) 37(4) World Competition 405

approach to be taken when comparing the dominant undertaking that has achieved economies of scale through its own initiative and investment to the dominant undertaking that has gained its dominant position through holding a state monopoly or special privileges. Intervention in the first instance might be considered as punishing efficiencies. Intervention in the second might be justified as the monopoly position might not necessarily have been gained through risk and innovation. Another way of considering the issue is that (price/cost) efficiency is a prime consideration, but not the only consideration for competition law. If the dominant undertaking is efficient but increasing competition would force (encourage?) further price competition, or improve dynamic aspects of the market, this will have greater overall impact for long-term social welfare. Whilst there may be arguments for ensuring that there are limits to intervention on behalf of less efficient undertakings, there also ought to be limits on non-intervention for reasons for efficiency. This leads back to the adoption of a choice-based standard.

3.4.2.6. Scoping the reach of section 46 CAM

The importance of section 46(3)(d) to CAM's unilateral conduct rules cannot be overstated. First, it designates when dominant unilateral conduct becomes anticompetitive. The same provision was available under section 11 2003 Act. However, like dominance under that Act, the provision was a requirement of the assessment of unilateral conduct: like dominance under CAM, this is now a matter to be considered. The requirements of section 46(3)(d) – that the CCM takes into account whether the conduct has or is likely to adversely affect the competitiveness of the economy or be detrimental to the consumer - ensures that the application of section 46 CAM is not triggered by harm to competitors *per* se. Second, the need for qualifying or guiding principles regarding the overall scope of section 46 is amplified as the assessment of public-interests and pro-competitive effects has effectively been removed from the assessment of abuse by section 50 CAM. By comparison, the assessment of an abuse under Article 102 TFEU or SACA will take into account the existence of efficiencies where

appropriate. Third, the decisional practice under CAM appears to interpret the provision as assessing conduct from the perspectives of the competitor, customer and consumer. Thus section 46(3)(d) encapsulates the social welfare objective of CAM. It recognizes explicitly that significant (irreparable) harm to competition is anticompetitive itself, not just harm to consumers and that harm requiring intervention may occur at different parts of the supply chain. Fourth, it is important for the future application of section 46 that harm to the consumer, as understood under section 46(3)(d), does not become reduced to exploitation of the consumer. This would create the risk of blurring the distinction between the exclusionary and exploitative elements of section 46 and thus prevent the optimal operation of section 46.

3.4.2.6.1. The nature and scope of effect under section 46(3)(d)

Proof of actual anticompetitive effect is not required under section 46. Section 46(3)(d) requires as a minimum that the conduct is *likely* to have an adverse effect on the Mauritian economy or consumer. This is appropriate for a number of reasons. First, this supports the nascent development of Mauritian competition law and its competition culture, particularly in setting the standards for precompetitive conduct; second, to require otherwise would deprive section 46 of its efficacy.[224] Undertakings would then risk liability only if their conduct was successful – the intervention available under CAM may not be sufficient to restore the market to competitive levels if rivals have been forced to exit the market before the CCM can intervene. Third, the CCM is unable to fine undertakings for anticompetitive unilateral conduct and is thus deprived of the one of the main forms of deterrence.

Whilst the decisional practice has done much to develop to the concept of consumer harm under section 46 CAM, little has been said as regards harm to the Mauritian economy and how this should be interpreted. It has already been argued that the main benefit emanating from section 46(3)(d) is that it qualifies

[224] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 204

the operation of section 46 CAM. Unilateral conduct rules generally struggle to address the anticompetitive abuses of informal undertakings: however, informal undertakings also deserve to be beneficiaries of these rules. In particular, the arguments put forward regarding section 46(3)(d) have been ones of legitimacy e.g. discerning anticompetitive conduct from normal conduct and limiting the potential over-application of an object-test for exclusion. However, harm to the consumer and harm to the economy, broadly interpreted, would support the application of CAM in relation to its various goals. If unilateral conduct rules can address problems with the informal economy by i) facilitating market access (thus breaking down monopolized and concentrated markets) and ii) protect such undertakings from exploitative conduct,[225] the requirement of harm to the economy could be a positive way of capturing this analysis under section 46.

Insurance and Credit Products is a good example of a case under section 46 where the final decisions of the CCM demonstrated a finding of both exclusionary conduct and anticompetitive effect. The investigation found that the agreements would have restrictive effects on the market and adverse effects on the consumer.[226] Together with other aspects of the banks' conduct, the dominant banks restricted competition on the market by entering into exclusive agreements with certain insurers. The agreements would artificially deny rivals access to the market. This harmed consumers:

> '[t]his may dull competition based on incentives which satisfy consumer needs, including price competition, and substitute instead the commercial objectives of the banks as the immediate determinant of how the market for DTA operates'.[227]

---

[225] Mor Bakhoum 'The Informal Economy and its Interface with Competition Law and Policy' in 'Competition Law and the Economic Characteristics of Developing Countries in MS.Gal, M Bakhoum, J Drexl, EM Fox and DJ Gerber (eds), *The Economic Characteristics of Developing Jurisdictions: their Implications for Competition Law* (Edward Elgar, 2015), 192

[226] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), paras 6.43 – 6.57

[227] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), para 6.55

The conduct in *Broadband Internet Access and Pay-TV* is a further example of the CCM assessing conduct restricting competition and its anticompetitive effect. The aim of Mauritius Telecom's conduct was to secure a customer base sufficient so that it could access subsequent content rights.[228] As a result competition in the market was restricted due to the disadvantage caused to other pay-TV providers.[229] In the first instance, and in the immediate short-term of MT's actions, the market for retail supply of pay-TV was distorted as MT leveraged its dominant position from the broadband market and built its subscriber base. The effects of Mauritius Telecom's conduct also extended into the long-term[230] as Mauritius Telecom effectively tied-up the consumer base in both the broadband and pay-TV markets, just as a number of undertakings were preparing to enter the broadband market.[231] Other service providers might have been unable to substitute competing bundles.[232] Thus, the conclusions of the investigation focused on the possible long-term outlook of the pay-TV market, in particular the loss of competition, fairness and preserving competitive opportunity.[233] The loss might have affected efficient competition and their exit from the market might lead to higher prices for consumers. Other service providers might have been unable to substitute competing bundles.[234]

Likewise, *Merchant Discounts* involved harm to the consumers (increased prices and reduced choice) and potential harm to competitors (existing and future) who would either be forced to the leave the market due to inflated costs and not being able to compete, or would find the market unviable to enter.

---

[228] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.71

[229] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.72

[230] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.75

[231] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), paras 7.101 – 7.121

[232] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.82

[233] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), paras 2.16 and 7.81

[234] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.82

These cases suggest that adverse effect to the Mauritian economy can be demonstrated when a dominant undertaking levers its market power from one market into another causing either foreclosure or preventing further entry as then the dominant undertaking is starting to spread the effects of its dominance beyond the source market. This broad understanding of section 46(3)(d) would support CAM's long-term social welfare objective by protecting both the choice standard for consumers but also the opportunity to compete for rivals.

3.5. Conclusion

The aim of this Chapter is to make the argument that the exclusionary test of abuse under section 46 CAM should be a tiered, disjunctive assessment of intent or effect. To establish this proposition, the first part of this Chapter rejected single approaches to exclusion based on *per se* rules (section 3.3.1); the test of intent or object (3.3.2) and the test of effect (3.3.3). This set the foundation for the second part of this Chapter which argued for a dual test of exclusion, based on a tiered application of intent or effect(3.3.4 and 3.3.4.1).

The third part of this Chapter considered the first-tier of the revised approach to section 46 advocated by this Thesis (3.4.1 and 3.4.1.1). The assessment of unilateral conduct requires a sophisticated analysis which is better served by adopting a number of tests to meet this need, rather than trying to achieve the aims of CAM with a single test of abuse. Under the first-tier of intent for assessing exclusionary unilateral conduct under CAM, this Thesis proposes that the tests of naked intent and no-economic sense are appropriate. Whilst fairly similar, the main distinction between the two would depend on whether the cases constitutes deliberate anticompetitive intent aimed for example at a particular competitor (*Intel*) or misuse of regulatory process (*AstraZeneca*) – such cases would be assessed under a naked intent test.

The fourth part of this Chapter considered the second-tier of the proposed intent or effect test of exclusionary abuse under section 46. Sections 3.4.2.1 – 3.4.2.4 confirmed that the consumer choice standard is the current test of effect used by

the CCM; it is the appropriate test as it allows the CCM to consider anticompetitive effects on price, efficiency and broader dynamic choice a) in that order of priority and b) as the circumstances of the case at hand dictate. The final part of this Chapter (3.4.2.6) confirmed that the requirement to consider the effect upon the Mauritian consumer or economy provides a means to scope the consumer standard test of effect.

4. Dominance under Section 46 CAM

4.1. Introduction

This Chapter confirms that notwithstanding CAM's effects-based approach, dominance remains a condition precedent for assessing abusive unilateral conduct. The extent of the undertaking's position of dominance helps determine the strength of the exclusionary effect upon rivals,[1] the extent to which the foreclosure is complete, partial or extends its effects into the future,[2] and whether the conduct is likely to harm consumers or the economy. The application of CAM should be concerned only with undertakings who are capable of acting independently of competitive constraint- only these undertakings are capable of harming competition to the detriment of long-term social welfare.

The Chapter is structured as follows: the first part of this Chapter confirms that the substantive first step in assessing unilateral conduct under CAM is the dominance test. The second part of this Chapter looks at the requirements of section 46(3) CAM and confirms that dominance as interpreted under CAM is different from monopoly, but there are concerns with the set market share thresholds. The third part of this Chapter pulls together the discussion so far and confirms that, all things being equal, a finding of dominance is required as the first step for establishing exclusionary abuse, notwithstanding its relegated position under the current CAM unilateral rules. Part four of the Chapter turns to the key sources of dominance identified under CAM and the implications of their assessment for assessing dominance in Mauritius. The final part of this Chapter looks at the concepts of special responsibility and competition on the merits: it argues that these guiding principles are relevant for determining

[1] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 3.10

[2] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 3.8

whether conduct is anticompetitive by intent or whether an effects-based assessment is required.

4.2. Dominance and the Monopoly Situation - Dominance is the 'real' first test under CAM.

Under the 2003 Act, a monopoly situation existed if the undertaking faced non-existent competition or was in a dominant position.[3] It was dominant if it had the 'ability to influence unilaterally the price or output of goods or services…'[4] A monopoly situation existed if the undertaking was dominant. This was criticised for not providing a separate definition of monopoly.[5] To address this, and perhaps reflect the general discussions regarding more economics-based rules, CAM was drafted to separate the definition of the monopoly situation from that of dominance, the monopoly situation was defined by market share thresholds, and the dominant position became a matter to be taken into account.

Under section 10 of the 2003 Act, the monopoly situation existed if the undertaking was in a dominant position. Possessing a dominant position was therefore a condition precedent for finding an abuse of monopoly position under that Act. The linking of dominance and monopoly situation together, as opposed to market shares (at 30%) and monopoly situation, is more logical. As demonstrated by the decisional practice under CAM, the monopoly situation is characterised by whether or not the undertaking is dominant. A market which affords the undertaking a dominant position may have features of monopoly. A 30% market share does not denote the market has monopoly features *per se.* Whilst such bright line rules have their administrative advantages, the separation of monopoly situation from dominance leads to conceptual confusion. Further assessment of the market context and the degree of dominance held by the undertaking is required. If the undertaking has a distinct product for example, and the market has substantive barriers to entry, these give the market

[3] Competition Act 2003, sections 2 and 10
[4] Competition Act 2003, section 10(4)
[5] The Competition Bill (No VI of 2003) Debate No. 3 of 01.04.2003

in question features of monopoly and a degree of dominance to the undertaking. This description perhaps captures the essence of what is meant by monopoly situation under CAM. Unlike a monopoly however, the dominant undertaking's profitability is limited by the fringe. As a result, the dominant undertaking has the incentive to focus its conduct on its rivals rather than the competitiveness of its products. Returning to the cases considered by the CCM, we can see that the cases, whilst in some situations bordering on near monopoly, remain cases of dominance and the abuse of that dominant position.

As discussed in Chapter 2, theoretically a monopoly is ambiguous in terms of competitive harm: whilst monopolies might inherently have a risk of poor competitive performance, anticompetitive harm by a monopolist still needs to be proven. If the market conditions indicate that undertaking is not dominant, then the unilateral conduct rules will not apply as either supply-side or demand-side constraints ought to be sufficient to control any exercise of market power. Furthermore, depending on the market conditions, monopoly may be an efficient market structure, delivering long-term social welfare. In *Slaughter Cattle* for example, the argument was made that the market for importing slaughter cattle to Mauritius was capable of effectively supporting one undertaking and stability in this market was required to ensure consistent supply of this desired good to Mauritius. The question was whether Socovia was dominant in this monopoly position and if it was abusing its dominant position. It is the abuse of the dominant position that is the subject matter of the Mauritian unilateral conduct rules, not the holding of the dominant position *per se*. As part of the long-term social welfare objective, undertakings need to be allowed to compete for the market. A key aspect of assessing the dominant position is the contestability of the market and the extent to and manner in which the dominant undertaking is able to leverage its dominant power into the contestable portions. Notwithstanding the move to a qualified-effects based approach, the application of section 46 by the CCM confirms that dominance is a prescribed element of the Mauritian unilateral conduct rules.

4.2.1. The Starting Point: Section 46(3) CAM

Under section 46(3)(d) CAM, dominance is defined as:

> the extent to which an enterprise enjoys…such a position of dominance in the market as to make it possible for that enterprise…to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors.[6]

The drafting of the definition makes it ambiguous as to whether the ability to affect price and output is a requirement for finding dominance in the first instance. At first glance, this may appear to be the case as the definition refers to the ability of the undertaking to operate in the market *and* adjust prices or output. However, the requirement of being able to adjust prices or output is inserted between two commas and thus forms a separate clause as part of the CAM definition of dominance. Nevertheless, this ambiguity has perhaps been to the benefit of the current decisional practice under section 46 CAM: the CCM has been able adopt a broader approach to dominance regarding the ability to act independently of constraint. This has also included the ability to harm competition. Thus the decisional interpretation of dominance under CAM has developed a degree of flexibility along these two dimensions of dominance. For example, the decisional practice has demonstrated dominance as the ability to harm competition. This has allowed for the economic concept of market power to be adjusted appropriately for the CAM unilateral conduct rules with the use of section 46(3)(d) CAM.

Using a broad test of dominance i.e. one that is not predicated on the economic definition of market power or strictly tied to demand/supply substitutability is preferable for three reasons: first, it would emphasize that section 46 is not geared towards dominance *per se* but abuse of dominance. Second it would clarify that dominance and market power are two related but distinct concepts.

[6] CAM, section 46(3)(a)

The 2003 Act was quite narrow: it defined dominance as 'an ability to influence unilaterally price or output of goods or services in a given market.'[7] Thus this definition of dominance remained restricted to the economic concept of market power. However, the focus of dominance is on independence from competitive constraint *or* the ability to harm competition. It is when this ability is abused that the Mauritian unilateral conduct rules are triggered. As will be discussed below, cases like *Broadband and Pay*-TV and *Image-based Clearing* Solutions demonstrate this were the undertakings were able to act independently of existing demand. This creates a clear frame for analysing unilateral conduct and creates a balance between assessing dominance and abuse. Stating that dominance includes the ability to raise prices above the significantly above the competitive level frontloads too much emphasis on the dominance assessment. The importance is to build a clear, internally coherent and applicable section 46 provision. Using a broad definition of dominance would capture content of section 46(2) whilst leaving separate the question of abuse to section 46(3)(d).

4.2.2. Adopting Consistent Dominance 'Terminology'

A small but significant change of practice will be for the CCM to be consistent in its language. Throughout its decisional practice, the CCM uses the terms 'dominance', 'market power' and 'substantial market power' interchangeably. Given that market power has a specific economic definition, and is but one part of the definition of dominance under CAM, the inconsistency impedes the clarity of decisional practice.[8] In principle, this would not present such an issue if it was

---

[7] Competition Act 2003, section 10(4)

[8] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010)*;* Competition Commission of Mauritius *Importation of slaughter cattle in Mauritius* INV003 (14 September 2011); Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012)*;* Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012)*;* Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* INV012 (11 September 2012); Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013); Competition Commission of Mauritius *Alleged Monopoly Abuse in the Supply of Secondary School Books in Mauritius* INV016 (20 January 2014)*;* Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd* CCM/INV/019 (14 March 2014

clear that CCM's interchangeable terminology had the same definition, but this does not always appear to be the case. For example, the *IBL* investigation refers to the dominant product as having 'market power', and that the dominant undertaking must have 'substantial market power' over the consumers' demand.[9] Listed in the footnotes of the report, 'substantial market power' is defined as i) being 'broadly equivalent' to the monopoly situation under CAM, which is also ii) similar to the European Union concept of dominance – defined in *United Brands* as a position of economic strength which allows the undertaking to act independently of competitive constraint (discussed in more below).[10]

In the first instance, the juxtaposition of substantial market power to the monopoly situation under CAM (30% market shares or above) cannot be correct. The legislation as it currently stands does not formally equate the monopoly situation to a position of dominance. The comparison of substantial market power with dominance under Article 102 TFEU further confirms that substantial market power and the CAM monopoly situation are not equivalent. The definitions of dominance under CAM and Article 102 TFEU both focus on the ability of the undertaking to act independently of competitive constraint – thus 'substantial market power' in the context of *IBL* must be equivalent to the concept of dominance under CAM rather than the market share-defined 'monopoly situation'.

Dominance as the ability to act independently of competitive constraint is the common element between the definitions under CAM, Article 102 TFEU and SACA. Thus under Article 102 TFEU, dominance is defined as:

> as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition in being maintained on the

---

Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014)

[9] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), paras 2.1.1 and 3.3.6

[10] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), fn 8; *United Brands v Commission*, Case 27/76, ECLI:EU:C:1978:22, para 63

> relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[11]

Under SACA, market power is defined as:

> the power of a firm to control prices, to exclude competition or to behave to appreciable extent independently of its competitors, customers or suppliers.[12]

Generally speaking, dominance, substantial market power and monopoly power seem broadly similar definitions, though their contextual assessment may reveal differences.[13] They differ from the concept of market power which is the ability of undertakings to raise prices over competitive levels; dominance looks at the sustainability and the durability of that market power, for example the level to which the price can be raised above the competitive level and for how long.[14] On the basis of non-homogenous products and competitive, rather than perfect markets, monopolisation (market power) may take place at a lower market share than dominance.[15] This relates to the main Parliamentary concern raised regarding the monopoly situation set at 30% under CAM. Based on the Mauritian market characteristics, dominance might be possible at market share portions lower than the 30% market share jurisdictional threshold – the implication being that CAM therefore is not capable of reviewing all harmful dominant positions.

4.2.3. Dominance is required for Abuse

[11] *United Brands v Commission*, Case 27/76, ECLI:EU:C:1978:22, para 65
[12] SACA, section 1(1)(xiii)
[13] see e.g. OECD 'Evidentiary Issues in Proving Dominance' (DAF/COMP(2006)35, 2008); OECD 'Abuse of Dominance and Monopolisation' (OCDE/GD(96)131,1996)
[14] OECD 'Abuse of Dominance and Monopolisation' (OCDE/GD(96)131,1996)
[15] OECD 'Abuse of Dominance and Monopolisation' (OCDE/GD(96)131,1996)

The Mauritian unilateral conduct rules are not a pure effects-based approach; first, anticompetitive conduct by object may be caught by section 46. Second, whilst not a formal requirement as it was under the 2003 Act, dominance has been retained as a matter for consideration. A revision of CAM should reinstate dominance formally as a requirement of CAM. This would ensure that the application of the Mauritian unilateral conduct rules are properly understood and their application is formally transparent and consistent. CAM is concerned with the conduct of undertakings whose market power is sufficient for them to act independently of market constraints and abuse their market power. Therefore, the reasons why dominance should form the first step of unilateral conduct assessment under CAM are as follows: i) the current market share threshold of 30% does not offer sufficient normative value; ii) dominance analysis assists the CCM in identifying cases where anticompetitive intent effects are unfeasible or unlikely; iii) a dominance enquiry is a necessary first step in assessing intent or effects; iv) a failure to assess dominance coupled together with a low threshold of harm could harm welfare.[16] Furthermore, the CCM has stated that assessment and review of dominance under section 46 is focused more on the future effects of the conduct, rather than the past.[17] An effects-based approach looking at effects on price and output would not be able to assist with this assessment; an assessment of dominance will be required in order to explore the probable effects and development of the market.[18] Finally, the degree of market power is important. Whilst anticompetitive harm may be easier to assess in cases of monopoly or near-monopoly, the same cannot be said of lower thresholds in the market. [19]

To explain their theories of harm, the CCM has had to explain firstly how the undertaking is dominant and thus is in a position that makes it *possible* for it to harm or act independently of competition. Whether it does so, and to an

[16] see e.g. OECD ‘Evidentiary Issues in Proving Dominance’ (DAF/COMP(2006)35, 2008), 10
[17] see e.g. Competition Commission of Mauritius *Importation of slaughter cattle in Mauritius* INV003 (14 September 2011) , para 5.45
[18] OECD ‘Evidentiary Issues in Proving Dominance’ (DAF/COMP(2006)35, 2008), 47; MS McFalls, ‘The Role and Assessment of Classical Market Power in Joint Venture Analysis’ (1998) 66 Antitrust Law Journal 651, 657-658
[19] A Majumdar, ‘Whither dominance?’ (2006) 27(4) European Competition Law Review 161

anticompetitive degree, is a question of whether an abuse of that dominant position has taken place. In addition, the public-interest test only applies to remedies, not to justify or exonerate conduct. Finally, given the Mauritian economic characteristics including, but not limited to, entrenched dominant positions not previously subject to competition regulation, the focus on foreign direct investment, and the need to support broader socio-economic goals, the separate assessment of dominance is appropriate.

The decisional practice makes it clear that having a position of dominance is fundamental to identifying an abuse under the Mauritian unilateral conduct rules. This position is contrary to that articulated by the EAGCP regarding the effects-based approach: under such an approach, a separate assessment of dominance is not required.[20] Whilst this may be sound in theory, the practical elements required to implement a comprehensive effects-based approach so far elude unilateral conduct assessment.

In each of the cases completed under section 46 so far, the undertaking's position of dominance has been critical to the finding that the undertaking has committed an abuse. In *IBL*, the exclusionary effect was possible only because of the undertaking's dominant product and the hold it had on the consumer demand.[21] The dominant position was established through the undertaking's strong brand, its long history in Mauritius, its marketing activities and its market shares.[22] Likewise, in *Broadband and Pay-TV,* the undertaking's ability to harm competition *and* act independently of the market stemmed from its monopolistic product. It was able to harm competition by leveraging its market power from one horizontal market to another (through tying); and act independently of competition by pulling an in-demand service (thus co-oercing consumers take a undesired substitute). When looking at the ability of dominant undertakings, typical factors identified include high market share, weak market structure (in

---

[20] Economic Advisory Group on Competition Policy 'An economic approach to Article 82' (July 2005)

[21] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), para 3.3.6

[22] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), para 5.2.1

terms of alternative competitors or supply-side substitutability) and high barriers to entry.[23] As discussed in section 3.5.2.1, the CCM listed some of the factors in *AEIK* that it will consider when determining whether an abuse has taken place.[24] As can been seen, indicators of dominance are an essential part of the CCM's approach for assessing whether or not anticompetitive unilateral conduct has occurred. This demonstrates that dominance is not only a factor that should be more than 'taken into account' under section 46 but that dominance, notwithstanding the drafting of section 46, is a discrete, substantive element of the Mauritian unilateral conduct rules. Thus, reflecting the approach taken by the CCM, dominance, rather than the monopoly situation as per the current definition, should be both the jurisdictional threshold for the application of section 46 and also the first substantive test under the Mauritian unilateral conduct rules.

4.3. Indicators of Dominance under CAM

The most important indicators of dominance under section 46 are market shares, supply and demand-side constraints, limited demand, and geography,. These reflect a number of aspects pertinent to Mauritius both as a small developing island state and its competition culture. This is emphasised by the dynamic assessment of dominance under section 46(3) which requires an assessment of demand and supply-side substitutability. This in turn places the focus on barriers to entry. An undertaking is able to harm competition if it artificially raises barriers to expansion and entry, and is able to act independently of competitive constraint if barriers (whether artificially raised by the undertaking or not) persist. This approach to dominance is appropriate for the Mauritian unilateral conduct rules. As noted earlier in this Thesis, the Mauritian economic characteristics skew towards concentration and continuing entrenchment of economic power.

---

[23] see e.g. Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013); Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014)

[24] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 3.4.1

4.3.1. Market Shares and Barriers to Entry

As noted above, the majority of the section 46 cases have involved the possession of significant market shares. These have ranged from brand loyalty and recognition in *IBL*, the previous possession of a statutory monopoly in *Manhole Covers* to first-mover advantage in *Image-based Clearing Solutions*. One particular matter identified in the Parliamentary debates was the potential for the competition rules to create a level-playing field, and to allow undertakings to compete on the merits of their products, and how the persistence of long-held concentrated economic positions might be made subject competitive pressure.[25]

In this regard, the ability of dominant undertakings to extend their power into horizontal markets and/or erect barriers to entry becomes particularly important. *IBL*, *Broadband and Pay-TV*, and *Image-Based Clearing Solutions* are the main examples where the dominant undertakings sought to extend their dominance into horizontal markets. IBL sought to achieve this through its rebate and shelf-space programme, linking its dominant product to weaker products in its portfolio. Furthermore, its dominant position allowed it to impose a commercial practice which was new to Mauritius. As identified by the CCM, and later proven in its case evaluation, the practices raised barriers to entry for the future development of the market and would have continued to do so, but for the intervention under CAM. Likewise, in *Broadband and Pay-TV*, Mauritius Telecom sought to lever its dominant position in the broadband market into the premium television sector, to the detriment its consumers.

However, regulating substantive dominant positions was not the only concern of Parliament. One of the most criticised aspects of section 46 in the Parliamentary readings leading up to CAM was its market share threshold.[26] On the one hand,

---

[25] The Competition Bill (No VI of 2003) Debate No. 3 of 01.04.2003; The Competition Bill (No. XXV of 2007) Debate No. 33 of 20.11.2007

[26] The Competition Bill (No. XXV of 2007) Debate No. 33 of 20.11.2007

given Mauritius's small market characteristics, higher shares may be required in order for companies to deliver economies of scale. On the other hand, dominance may be possible with smaller market shares if the fringe consists of relatively smaller competitors. This was the main criticism of the threshold: an undertaking need not be in a monopoly situation in the Mauritian economy in order to have a dominant position. One of the speakers described the 30% threshold as being the definition of monopoly under the Act.[27] The problem with this position is that it conceptually equates dominance with monopoly and, as stated, the main concern is that a dominant position can be achieved without achieving a monopoly in the first instance. In order to meet its long-term social welfare objective, Mauritian competition law needs to be applicable to situations of dominance, not restricted to solely monopolistic positions.

There are two administrative arguments for setting a legislative market share threshold: to i) ensure appropriate use of CCM resources with regards its capacity and ii) predictability. However, without being to able to demonstrate why the Mauritian unilateral conduct threshold should be set at 30%, the first argument has not been made out. A strict 30% threshold suggests that undertakings with market shares less than 30% are unable to abuse their position in way which harms the Mauritian consumer or adversely affects the Mauritian economy – but no rationale is apparent to suggest how this figure has been calculated. The second argument – predictability based on a single market share threshold is also not persuasive for the purposes of the Mauritian unilateral conduct rules. Given its long-term social welfare objective, CAM should be applicable to all instances where abuse of dominant positions leads to harm, whether harm to the Mauritian consumer or the economy. If the open – textured approach taken under Article 102 TFEU is considered too unpredictable, then the SACA market share thresholds demonstrate how a balance between predictability and application legal rules can be achieved.

---

[27] The Competition Bill (No. XXV of 2007) Debate No. 33 of 20.11.2007, then Deputy Prime Minister Duval

Whilst Article 102 TFEU does not have Treaty enshrined fixed market share thresholds, its case law has developed a number of thresholds. The lowest market share with which an undertaking has been found dominant, subject other market factors, is 39.7%.[28] In that case, the market share of the that undertaking and the relatively smaller market shares held by its rivals was a key factor in finding BA to be dominant. In addition, Article 102 TFEU has developed further market share presumptions: it was held in *Hoffmann-La Roche* that, without 'exceptional circumstances' such as the absence of barriers to entry, 'very large market shares' in themselves indicate dominance.[29] In *Hilti*[30] and *Tetra-Pak II*,[31] market shares of 70-80% have been upheld as evidence of a dominant position. Finally, interpreting the *Hoffmann-La Roche* phrase of 'very large market shares', *AKZO*[32] held that market shares of 50% in the absence of exceptional circumstances could constitute a dominant position.

By contrast, SACA does set market share thresholds for the application of its unilateral conduct rules. For an undertaking subject to SACA, the general position is more clear than CAM. If it meets the market share thresholds, it is considered 'dominant'. The clearest threshold is at 40% - if an undertaking subject to SACA has a market share of 40% it is automatically presumed dominant. But SACA also applies to smaller undertakings too: i) if an undertaking has at least 35% market share, but less than 45%, it will be considered dominant unless *it* can show that it does not have market power; ii) if an undertaking has a market share of less than 35%, it will be subject to SACA only if the South African Competition Commission can be prove that the undertaking also has market power.[33] On this basis, a revision of the 'monopoly situation' as defined under section 46 CAM will do the following: first, the monopoly situation will be defined by having a dominant position on the market. Second, this definition could adopt the market share/dominance approach taken

---

[28] *British Airways v Commission,* C-95/04 P, ECLI:EU:C:2007:166
[29] *Hoffmann-La Roche v Commission,* Case 85/76, ECLI:EU:C:1979:36, para 41
[30] *Hilti v Commission,* Case T-30/89, ECLI:EU:T:1991:70, paras 91-4, upheld by the ECJ, *Hilti v Commission*, C-53/92 P, ECLI:EU:C:1994:77
[31] *Tetra Pak v Commission,* T-83/91, ECLI:EU:T:1994:246, paras 109-110, upheld by the ECJ, *Tetra Pak v Commission*, C-333/94 P, ECLI:EU:C:1996:436
[32] *AKZO v* Commission, C-62/86, ECLI:EU:C:1991:286, para 60
[33] SACA, section 7

under SACA: a specific market share threshold creates a rebuttable presumption of dominance; markets shares below this threshold require a formal assessment of dominance. In relation to SACA, the operation of its dominance provision (section 7) has been confirmed in a number of cases. In both *Nationwide* cases for example, the South African Competition Commission confirmed that an undertaking is dominant if it has a market share if 45% or more, a rebuttable presumption exists where firms have a market share of between 35 and 45%, and the an undertaking is dominant if its market share is less than 35% but it has market power. A dominance enquiry is required under section 7 SACA only when the undertaking's market share is below 45%.[34] A revision of section 46 in this manner would still provide a degree of certainty whilst addressing the shortcomings of the application market shares and dominance under CAM in their present form.

4.3.2. Constraints offered by Competitors

The constraint offered by competitors is the most significant element of the CAM definition of dominance. This is for the following reasons. First, the definition of dominance under section 46(3)(a) refers specifically to the ability of the undertaking to act 'without effective constraint from competitors or potential competitors.' Second, sections 46(3)(b) and (c) provide that the CCM shall take into account in demand and supply substitutability: the CCM has interpreted this as providing the main means for assessing dominance in the first instance. This is appropriate as it results in a dynamic assessment of the undertaking's position in the market and its ability to either act independently of competitive constraint or harm competition by looking at the position of current rivals and their offerings, the position of potential competitors, and barriers to entry. Third, the

[34] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010), paras 136-137. See also *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

ability to act independently of competitive constraint is the common element between the definitions of dominance under CAM, Article 102 TFEU and SACA.[35]

The sole focus on competitors might suggest, at this point and time, that the checking of abusive dominant unilateral conduct within the Mauritian economy is best or really achieved only by competitors: Mauritian customers and consumers are not in a position to counter such conduct. This may be for a number of reasons – the development of competition culture, the education of market participants, and entrenched economic power. Therefore, the contribution of the Mauritian unilateral conduct rules to the competitiveness of the Mauritian economy and the needs of Mauritius as a developing country, and their emphasis on competition as a value in itself and as a means of obtaining the benefits such as efficiency and responsive markets is the correct focus of the those rules.

As articulated under CAM, constraints offered by competitors is the *availability* or *non-availability of* substitutable goods, services or nearby competitors for consumers in the short-term.[36] In *IBL*, for example, the terms of the agreement offering discounts on the dominant product in return for shelf-space related to its market share (90%): the inherent lack of competition on the market, and the undertaking's ability to harm competition by further hindering competitive constraint demonstrated its dominant position. In *Image-based Clearing Solutions* the ability of Blanche Birger to act independently of its existing competitors in the hardware market for cheque scanning solutions was quite clear. As Blanche Birger sold the market leading software, and this software was compatible only with Blanche Birger's hardware, Blanche Birger was able to tie consumers to its products and thus act independently of its competitors. This was perhaps best demonstrated that, but for the lack of interoperability, the market was contestable: consumers would have purchased hardware from Blanche Birger's competitors, but could not due to the lack of interoperability.

[35] CAM, section 46(3)(a); SACA, section 1(1)(xviii); *United Brands v Commission*, Case 27/76, ECLI:EU:C:1978:22

[36] Nearby competitors would include competitors able to enter the market in the short-term.

Finally, a theme of the cement market studies was to improve competitiveness in the market by liberalising the market and reducing the onerous burdens of the regulatory framework. The aim was to make the market more competitive by allowing more entrants to participate and for innovative cement products to be developed. However, as the second market study demonstrated,[37] liberalisation in itself does not lead to more competition - competition rules to promote competition and safeguard those opportunities are also required.

4.3.3. Consumer Power, Inertia and Information Asymmetry

As discussed above, the Mauritian definition of dominance refers to the competitive constraint imposed by competitors, but does not include that offered by customers or consumers (in this section, consumers will refer to both customers and consumers unless specifically stated). This Thesis argues the definition of dominance under CAM possibly reflects the perceived bargaining position of participants in Mauritian markets generally i.e. that the main form of competitive constraint will come only from rivals. This emphasis is probably correct, particularly given the Mauritian focus on promoting a competition as goal of CAM and the CCM's prescribed responsibility in delivering this outcome. This thus supports a more interventionist approach. Nevertheless, the omission to refer to the constraints offered by customers or consumers is a critical element missing from the legislative definition of dominance. Though it might be sufficient in many cases that substitutes are or might be available, this alone may not always be sufficient to determine if the undertaking has dominant position. If alternative goods and competitors are available but consumers will not turn to these alternatives, the dominant undertaking will be able to act without effective constraint and is therefore in a dominant position.

The relationship between dominance, the *locus* of the dominant position, consumer inertia and information asymmetry can be seen for example in

---

[37] Competition Commission of Mauritius 'New Cement Market Study' CCM/MS/002 (15 October 2012)

Insurance and Credit Products. The two possible market definitions available were the housing loan market and the market at point of sale.[38] The CCM concluded that the point of sale market definition was the relevant market on the basis that it constituted the i) the narrowest market definition; ii) the application of economic tools such as the SSNIP-test[39] to determine substitutability, and iii) the position of consumers. Regarding the last element, it was this that possibly carried the most weight in determining the market definition and the dominant position. It was at the point of sale, when the consumer for practical purposes was all but guaranteed the mortgage that the choice and sale of the secondary insurance took place.

The banks and selected insurance providers were able to operate independently of competitive constraints offered by cheaper products on the market. They were able to do this for the following reasons: i) the importance to the consumer of obtaining the primary product (the mortgage), and the conditions attached to obtaining the primary product (the requirement to take out insurance); ii) a high percentage of consumers had already made the decision to purchase insurance with the bank based on perceived reputation and trust with the banks, notwithstanding first, that the banks involved were failing to inform their consumers of their right to choose their insurer; second, the banks had not obtained the best deals for their consumers on the market; third, the banks nevertheless received commission from the selected insurers and, in many cases, included financial penalties to encourage consumers to take insurance through their preferred providers. These consumer factors all contributed to the ability for the banks and insurers to act independently of market constraint. Critical to this was the consumers' inability or refusal to exercise their rights and making decisions based on limited information.

In *AEIK*, the CCM ultimately concluded that the defendant undertakings were not abusing their dominant position regarding the pricing of replacement of

[38] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), para 5.123

[39] Small but significant and non-transitory increase in price.

electronic car keys.[40] On the evidential balance, it appeared that the pricing of the relevant products was reasonable. However, the CCM noted that the pricing was independent of consumer pressure on the basis that the consumers in question were unable to make 'sophisticated' decisions. The sophisticated decision in this instance is as follows: when consumers purchase cars, they are often more interested in the showroom price of the car and negotiating this down often forgetting or omitting to account for lifetime costs of the car, such as replacement tyres or, as in this case, replacement electronic keys. In such instances, this could render consumers vulnerable or susceptible to exploitative conduct: at the very least, (dominant) undertakings face reduced demand-pressure on their pricing for these aftermarket products as consumers would be 'locked-in' to certain requirements once the car has been purchased.

A further example can be seen in *Secondary School Books.* As a vertically integrated undertaking in the distribution (upstream) and retail (downstream) markets for secondary school books, ELP's dominance resulting from information asymmetry occurred in the following way: as a distributor, ELP would have access to the list of prescribed books from the Mauritian Ministry of Education. This list would confirm both a) which titles are required by the market and b) the numbers required in different parts of Mauritius. Thus, ELP (and other such vertically integrated undertakings) would benefit from an information advantage, not available to the independent retailers and not obtained on the downstream market through competitive conduct, by being able to direct the activities of their downstream retail undertakings in immediate response to prescribed list set by the government.[41] Whilst ELP was dominant, the facts did not sustain conclusively that it was refusing to supply or acting in

---

[40] Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Automatic Electronic Ignition Keys and related synchronizing services* CCM/DS/0010 (3 January 2014)

[41] Competition Commission of Mauritius *Alleged Monopoly Abuse in the Supply of Secondary School Books in Mauritius* INV016 (20 January 2014), para 6.4 It would often happen that the prescribed Ministry of Education lists were delayed: nevertheless, as vertically integrated undertakings like ELP, would be able to use their knowledge and experience of supplying the whole market to their advantage (para 5.78). Furthermore, ELP created further information asymmetry between it and its consumers when it started to refuse customers access to its warehouse: such access had been available in the past, and it was a practice maintained by its competitors (para 5.80).

anticompetitive manner. Nevertheless, the investigation found the information asymmetry between wholesale distributors and retailers was potentially contributing to market distortion.[42] With distributors under no obligation to share this information, the investigation undertaken by the Executive Director recommended that the CCM consider reviewing the impact of making the information publicly available may have on SSB competition and advise the Ministry of Education. In their decision the Commissioners did not follow the recommendation of the investigation for reviewing the information symmetry in the market on the grounds that it did not have sufficient information,[43] notwithstanding that ELP by law receives information in its position as an upstream distributor which places its downstream retailers at a competitive advantage compared to rivals.

The CCM's position in *Secondary School Books* is disappointing. First, information asymmetry is a key non-welfare factor affecting the competitiveness of markets. Second, it could be argued that the information asymmetry was being artificially created. If ELP was not vertically integrated, for example, it is possible that it would have shared such information with its customers. However, it had the incentive to withhold such information as it was in downstream competition with its customers. Third, given that this was the second investigation regarding competitiveness of the import of secondary school books to come to the CCM, the Commissioners could have offered an opinion on the Executive Director's recommendation. This links back to the CCM's role in promoting competition and establishing a competition culture in Mauritius and the wider role of competition law in Mauritian economic growth.

A final example of lack of consumer power and dominance is *Broadband and Pay-TV*. Consumers who wanted to stay on specific broadband products were unable to demand that Mauritius Telecom provide better pricing or service that

---

[42] Competition Commission of Mauritius *Alleged Monopoly Abuse in the Supply of Secondary School Books in Mauritius* INV016 (20 January 2014) , paras 6.12-6.13. Distributors such as ELP have access to book-stock information which is essential to retailers for assessing stocks ahead of peak time demand.

[43] Decision of the Commissioners of the Competition Commission of Mauritius *Alleged Monopoly Abuse in the Supply of Secondary School Books in Mauritius* CCM/DS/0011 (17 April 2014)

company was providing across other products. In spite of their demand for that product and better conditions, Mauritius Telecom exploited its dominant position to try and coerce its existing and prospective consumers onto new products through various inducements, disincentives and hurdles.[44] It did this by deliberately halting the availability of standalone broadband products to new users; maintaining the high price of standalone broadband products for existing products, whilst offering tied broadband and premium television products at significantly lower prices; and ensuring that those existing consumers would not benefit from bandwidth doubling or price reductions that were being implemented for other products.[45]

4.3.4. Limited Demand and Geographical Location

The limited demand of certain Mauritian markets means that dominant positions are easier to establish in relative terms when compared to dominant positions in larger jurisdictions/economies. This is because there is less contestable market available in actual numbers/demand. This supports Gal's argument that small economies ought to consider setting comparatively lower market share thresholds for the dominant position. In *Slaughter Cattle*, the limited demand of the market meant that the financial viability of the competing undertakings, from their perspective, was unsustainable: the non-collusive agreement allowed those undertakings to allocate amongst themselves the relevant vertical activities required to import slaughter cattle to Mauritius. Furthermore, Mauritius' geographical location meant only airplanes were suitable as a means of transporting livestock to Mauritius. The fixed limited monthly demand and the ability of the parties to procure a cattle carrier that could cater for the Mauritian demand in its entirety meant that the main undertaking in question – Socovia – was not only dominant but also held a *de facto* monopoly.[46]

---

[44] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), paras 7.27 – 7.28
[45] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), para 7.43
[46] Competition Commission of Mauritius *Importation of slaughter cattle in Mauritius* INV003 (14 September 2011)

4.4. CAM, Special Responsibility & Competition on the Merits

Like the jurisprudence under Article 102 TFEU and SACA, the CCM's guidance and decisional practice have used the concepts of special responsibility and competition on the merits as a means to distinguish exclusionary conduct from that of normal competition and thus determine when a dominant undertaking's conduct has breached the unilateral conduct rules. In its guidance on monopoly situations, the CCM states that a dominant undertaking has a responsibility to ensure that it is not abusing or exploiting the market power conferred upon them by dint of their dominant position:[47] this is also expressed later as a responsibility to consider whether its conduct might be an abuse under section 46 CAM.[48] In its decisional practice, the CCM has stated:

> The standard to be adopted has to meet the CCM's aim of 'safeguarding the competitive process and ensuring that enterprises which hold a monopoly position do not exclude their competitors by other means than competing on the merits…'[49]

Both concepts have been criticised for i) being vague and leading to forms-based analysis of conduct and ii) for being without sufficient limiting principles.[50] As discussed in the previous Chapter, a number of economic tests have been developed to determine whether conduct constitutes competition on the merits or otherwise on a given set of facts. This moves the assessment of conduct away from form to placing the conduct in its economic context e.g. the market

---

[47] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 1.3

[48] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 2.10

[49] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 3.34

[50] See e.g. OECD, 'What is Competition on the Merits?' (2006); P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart, 2012), 134; P Akman, 'Article 82 reformed? The EC Discussion Paper on Exclusionary Abuses' (2006) Journal of Business Law 816, 822-823; R O' Donoghue, and J Padilla, *The Law and Economics of Article 102 TFEU'* (2nd Ed, Hart Publishing, 2013); P Jebsen and R Stevens, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union' (1996) 64 Antitrust Law Journal 443

circumstances pertaining at the time; the nature of the conduct, and its effect. In this way, particularly when seeking to entrench a competition culture, certain cases will present without economic rationale and thus will be caught by the unilateral conduct rules without the requirement for further assessment of effect.

The concepts of special responsibility and competition on the merits ask fundamental questions about the type of conduct permitted in a free market when an undertaking achieves a position of dominance. Special responsibility has been dismissed as a meaningful concept, meaning no more than a dominant undertaking should not abuse its dominant position.[51] However, given the dynamic nature of dominance, the concept of special responsibility has merit: the unilateral conduct rules under CAM are not predicated on laissez-faire approach. The dominant undertaking will be best placed in the first instance to consider whether its conduct has the object or effect of restricting competition; this also applies to whether any elements of the section 50 public benefits test are being satisfied. This reflects the informational and resource advantage available to undertakings in (self-) appraising their conduct. The concept of special responsibility thus supports the overall objective of CAM and the CCM's overriding duty to maintain and promote the competitive process.

Competition on the merits provides further guidance to dominant undertakings. By asking whether conduct is based on price or quality for example, it gives simple parameters which may serve two purposes: first, dominant undertakings may use this to regulate their own conduct; second, it provides a defining line of enquiry to apply the Mauritian unilateral conduct rules e.g. for separating intent and effect analysis. In expanding the definition of competition on the merits, the UNCTAD Model On Competition Law (the "UNCTAD Model") states abuse occurs when a dominant undertaking restricts competition by performing 'acts that

[51] R Nazzini, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 174-176

increase its economic power and are not responsive to consumers and/or the market'.[52]

A key question in assessing competition on the merits is whether the conduct consolidates the undertaking's dominant in position, or whether the foreclosure is in an incidental effect in *response* to the needs of the market. The UNCTAD Model notes that some jurisdictions broaden this to protect smaller rivals from unfair exclusion by more efficient firms.[53] This final point is particularly relevant to Mauritius and other countries with similar economic characteristics: efficient positions may arise from high barriers to entry or previous non-competitive advantage, as well as through competitive forces. In *AEIK* for example, concerning an allegation of excessive pricing, the CCM stated:

> The CCM is not a price regulator, and the Competition Act does not require or empower it to examine all prices to test whether they are cost-related or, more broadly, fair. However, in a small and isolated economy, strong monopolies can persist without any specifically exclusionary behaviour to create or preserve that position on the part of monopolists. In situations of substantial market power which are not expected to be eroded by entry or expansion by rivals, persistent pricing substantially in excess of cost may be considered exploitative.[54]

Efficiency arising from high barriers to entry or previous non-competitive advantage in themselves are not necessarily for regulation by unilateral conduct rules; but the mere fact of being more efficient than smaller rivals should not in itself be a defence to anticompetitive conduct or failing to compete on the merits. This point is further emphasised if one makes a distinction between 'performance competition' on the one hand, and 'impediment competition' on

[52] UNCTAD 'Model Law on Competition (2015) Revised Chapter IV' Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, 6-10 July 2015), paras 10-11
[53] UNCTAD 'Model Law on Competition (2015) Revised Chapter IV' Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, 6-10 July 2015), paras 10-11
[54] Competition Commission of Mauritius *Investigation into the supply of Automatic Electronic Ignition Keys and related synchronizing services* INV014 (19 November 2013), para 5.92

the other. The former includes conduct that improves the quality of a product or lowering their prices; the latter to hinder rivals' capacity to perform. This distinction has been criticised as difficult to apply to actual cases.[55] This is correct where dominant positions and/or the effects of the abuse are considered marginal. Nevertheless, it has been accepted that there are cases where competition on the merits is fairly easy to identify.[56] There may be a particular policy choice where conduct overlaps across is based purely on the efficiency of the undertaking. Such conduct would be performance-based as it stems from the undertaking's efficient operations and it is impediment-based as it will hinder the market. The outcome would depend on whether one views competition on the merits as focusing externally on the goods and services produced and the efficiency with which they are provided, rather than the efficiency of the undertaking *per se*. This could be the position taken once an undertaking reaches a dominant position. It has been suggested that this may lead to the 'perverse' scenario where undertakings may be punished for taking advantage of their efficiencies.[57] This issue could be addressed in two ways. First, the argument has been well made that markets should tolerate a degree of inefficiency to prevent concentrations of economic power and allow dynamic aspects of the market to flourish.[58] This represents the need for balance and indicates that the promotion of long-term social welfare tolerates some inefficiency in the market in order to maintain competition. Alternatively, another way of addressing this is through a pass-on requirement to customers and consumers. This does not mean that consumers' interests are accorded more value than that of producers – that would contradict the long-term social welfare objective of CAM. It merely reflects the imbalances in market power that typically occurs between producers and consumers. Of the two suggestions, the pass-on requirement is immediately compatible with CAM givens it inclusion under section 50. However, both propositions relate to the one of the broader

---

[55] E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, 2010), 68; LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 45

[56] OECD, 'Competition on the Merits' (DAF/COMP(2005)27, 2006), 2

[57] E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, 2010), 6868

[58] see e.g. FA Hayek *The Road to Serfdom* (Routledge, 1944); AE Rodriguez and MB Coate, 'Limits to Antitrust Policy for Reforming Economics' (1996) 18 Houston Journal of International Law 311

arguments in this Thesis that, rather than focusing on efficiency in itself, Mauritius should focus on competitive markets and promoting competition as a means to achieve benefits such as efficient competition.

IBL, *Manhole Covers*, and *Insurance and Credit Products* represent three Mauritian unilateral conducts where failure to compete on the merits was a defining factor and the undertakings were using impediment-based conduct to exercise their dominance. For transparency and proper location of the concepts, the tiered-approach advocated by this Thesis may provide a reasonable solution. It was noted earlier in this section of the Thesis that competition on the merits and special responsibility might form part of the intent or effect divide. If, as argued in the previous Chapter, intent constitutes conduct without pro-competitive explanation or economic rationale, then it is in the intent-assessment of conduct that the concepts of competition merit and the special responsibility are most useful. It could be argued that an undertaking has clearly failed to respect its special responsibility if it commits conduct caught by intent. By contrast, if an undertaking argues that its conduct has merit or justification, this comes down to an assessment of effect and whether those counter-arguments are substantiated and sufficient. This would support the distinction in the first instance between cases like *Manhole Covers*, which arguably falls on the object-side of assessment regarding its use of the safety rules; and *Insurance and Credit Products* where BDM's consumers received the most competitive market prices.

4.4.1. Special Responsibility & Competition on the Merits under Article 102 TFEU and SACA

The principles of special responsibility, super-dominance, and competition on the merits express the ordoliberal underpinnings of Article 102 TFEU. In particular, they capture the objective of protecting economic freedom for both

demand and supply competition.[59] In *Michelin*, the European Court of Justice expressed the idea of special responsibility in the following terms:

> A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has s special responsibility not to allow its conduct to impair genuine undistorted competition…[60]

In *Tetra Pak I*, the European General Court defined special responsibility as requiring the dominant undertaking not to engage in conduct that 'had the effect of preventing, or at the very least considerably delaying, the entry of a new competitor into a market where very little if any competition is found.' [61] Special responsibility thus implies a positive duty: dominant undertakings should conduct themselves as if they were faced with effective competition – if faced with effective competition, dominant undertakings therefore have to compete on the merits of their products,[62] and not allow their conduct by other means to 'impair genuine undistorted competition on the market'.[63] Where relevant this, may also include taking into consideration the source of the undertaking's dominant position e.g. legal monopoly.[64] Thus, special responsibility reflects considerations about degrees and contextual assessments of dominance; with

---

[59] LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 45;

[60] *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, para 57. See also e.g. *Microsoft v Commission,* T-201/04, ECLI:EU:T:2007:289, para 229; *France Télécom v Commission,* C-202/07 P, ECLI:EU:C:2009:214, para 105; *TeliaSonera Sverige,* C-52/09, ECLI:EU:C:2011:83, para 24; *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, para 134

[61] *Tetra Pak v Commission*, T-51/89, ECLI:EU:T:1990:41

[62] LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 46 -47

[63] Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7 ('Guidance on Article 102'); para 1; *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, para 57; *Tetra Pak v Commission,* T-83/91, ECLI:EU:T:1994:246, para 114; *ITT Promedia v Commission,* T-111/96, ECLI:EU:T:1998:183 , para 139; *Irish Sugar v Commission,* T-228/97, ECLI:EU:T:1999:246, para 112; and *Michelin v Commission*, T-203/01, ECLI:EU:T:2003:250, para 97

[64] *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, para 23

the nature and scope of the special responsibility determined on a case-by-case basis.[65]

This in turn has led to the development of the notion of 'super-dominance'. This has been defined as the 'quasi-monopolistic position on the market' and may be considered part of the circumstances in determining whether or not Article 102 TFEU has been breached.[66] In *TeliaSonera*, the European Court of Justice stated that the relevance of an undertaking's super-dominant or quasi-monopolistic position relates 'to the extent of the effects of the conduct…'[67]

Whilst the one of the key themes of the review of Article 102 TFEU is the extent to which it should it give primacy to consumer welfare over other objectives, the application of these ordoliberal principles remain. The European Commission's Guidance on Article 102 TFEU, for example, states that the Commission will continue to focus on ensuring that dominant undertakings do not foreclose their competitors by means other than competition of the merits of their products or services: the purpose being to protect an effective competitive process.[68] This also means that competitors who themselves do not compete on the merits of their products e.g. with regards price, choice, quality and innovation may leave the market.[69] The main criticisms regarding the concept of super-dominance under Article 102 TFEU are i) there is no provision for the concept under Article 102 TFEU; ii) it is not clear why a super-dominant undertaking should bear more burden under the unilateral conduct rules than a dominant undertaking; iii) there is no objective means of determining when an undertaking is super-

[65] V Rose and D Bailey (eds) *Bellamy and Child: European Union Law of Competition* (7th Ed, Oxford, 2013), section 10.019
[66] *Tetra Pak v Commission*, C-333/94 P, ECLI:EU:C:1996:436, paras 28-31
[67] *TeliaSonera Sverige,* C-52/09, ECLI:EU:C:2011:83, para 81. See also *Tomra and Others v Commission*, C-549/10 P, ECLI:EU:C:2012:221, para 39
[68] Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7 ('Guidance on Article 102'), paras 1 and 6
[69] Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7 ('Guidance on Article 102'), para 6

dominant; iv) the concept of super-dominance is of little utility if based on a static analysis of an undertaking's market shares.[70]

Addressing these concerns in relation to the Mauritian unilateral conduct rules, the decisional practice under the Mauritian unilateral conduct rules hitherto has not referred to a concept of super-dominance. Nevertheless, the majority of cases have exhibited positions of significant dominance or quasi-monopoly structure. Furthermore, the assessment of these positions has taken place against the economic context of the market, looking for example at the relative positions of market shares between the dominant incumbent and its rivals, and demand/supply substitutability. Whilst the concept of super-dominance need not be a trigger for a lowered threshold of the Mauritian unilateral conduct rules, the proposition that quasi-monopolistic Mauritian undertakings should be more aware that their conduct is more likely to have anticompetitive effect is a useful guide for the application of the Mauritian unilateral conduct rules. This is particularly applicable where positions of dominance have resulted from liberalisation such as those dominant positions gained from the privatisation of state monopolies or benefits resulting from foreign direct investment. In such circumstances the dominant has been achieved not from positive risk taking in the market, but from the use of legal mechanisms to gain this position. Thinking about the concepts of super-dominance, special responsibility (e.g. as preventing the entry of rivals into a market with little competition at present,) and competition on the merits, a notable Mauritian example is *IBL*. As discussed above generally and in relation to that case, the notions of special responsibility and competition on the merits have to be taken on a case-by-case basis: this in turn will determine which are the most reasonable tests of abuse to apply.

In this regard, the possibility that the concepts of special responsibility and competition on the merits might be used to separate object or effect assessment finds further support. In her opinion in *Post Danmark II*, Advocate General Kokott stated that undertakings in a dominant position i) have a particular

---

[70] R O'Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (2nd Edition, Hart, 2013), 206-208

responsibility to ensure that their conduct does not undermine effective competition; ii) for example, not every form of price competition will be available to the dominant undertaking; iii) the distinction to be drawn is legitimate competition on the one hand and other anticompetitive commercial conduct on the other.[71] The Court confirmed the relationship between object and competition on the merits in its judgment: where a dominant undertaking engages in conduct which is anticompetitive by object, whether the conduct is appreciable is irrelevant – the structure of the market is already weakened due to its presence on the market and the undertaking has a special responsibility not to impair further competition.[72] The same position has been adopted by the General Court in *Intel*,[73] and the European Court of Justice in *AstraZeneca*.[74]

Under South African jurisprudence, two cases show the usefulness of special responsibility and competition on the merits in discerning anticompetitive behaviour and one case demonstrates their possible limitations. The cases of *Nationwide*[75] and *Telkom*[76] are both instances where the defendant undertakings were found to not be competing on the merits of their products or services. In *Nationwide*, the incentive schemes put in place by South African Airways in order to encourage travel agents to sell more of its products were found to be anticompetitively restricting competition. This was on the grounds of i) SAA's persistence with such incentive agreements (notwithstanding preceding unilateral conduct decisions on its agreements); ii) the revisions made to the agreements subject to the instant case sought to reward agents for maintaining base or reducing the decline in SAA's sales; iii) SAA failed to produce a single internal strategic document relating to the relevant time period.[77]

---

[71] *Post Danmark,* C-23/14, ECLI:EU:C:2015:343, paras 23 - 28
[72] *Post Danmark,* C-23/14, ECLI:EU:2015:651; *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, para 23
[73] *Intel v Commission*, Case T-286/09, ECLI:EU:T:2014:547, para 205
[74] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, paras 134 and 149
[75] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010)
[76] *Competition Commission v Telkom SA Ltd* (11/CR/Feb04) [2012] 7 August 2012
[77] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010), para 236.

In *Telkom*,[78] the defendant undertaking was the monopoly provider of telecommunications infrastructure and certain core services.[79] The challenge was brought by competitors in the downstream 'value added network' ("VANS") market, in which the defendant undertaking's subsidiary and a number of competitors provided internet and virtual private network services. Rather than compete on the merits of its network services, where its rivals were more innovative and better able to serve consumers,[80] Telkom devised its "WAR" strategy of both vexatious litigation and unilateral decisions that its rivals were conducting business unlawfully, in order that it could 'freeze' the networks of its rivals and thus hinder their growth and innovation.[81]

The facts of *Sasol Chemical*[82] however demonstrate an example of the potential limitations of such ordoliberal principles. The case considered the appropriate course of action when a historical cost advantage afforded to the undertaking (e.g. through the State) means that the costs of the dominant undertaking is less than its rivals (who do not benefit from such an advantage), and the market dynamics mean that the dominant undertaking is not forced to price at its cost point, but instead can price at higher point which remains competitive because it is the same or slightly cheaper than its rivals? The defendant is thus not competing on the merits or products of its services or using a cost advantage gained from risk or innovation to determine its prices, but uses a historical cost advantage and market dynamics to price excessively (in relation to its costs) but competitively, in relation to the market. Thus the scenario where the i) market could be more competitive or there is evidence that the undertaking could compete on the merits of its product e.g. in terms of pricing, but ii) the dominant undertaking chooses not to or is able to take advantage of the dominant position

[78] *Competition Commission v Telkom Ltd* (11/CR/Feb04) [2012] (7 August 2012)
[79] These core services included national/international long distance services, local access and public payphone services. Telekom's infrastructure monopoly rights also included the right to supply telecommunications equipment, install, maintain and repair parts of the network used by licencees i.e. those who required access to the infrastructure in order to provide their services were required to purchase licences and accept the services provide by the defendant.
[80] *Competition Commission v Telkom SA Ltd* (11/CR/Feb04) [2012] 7 August 2012, para 160
[81] *Competition Commission v Telkom SA Ltd* (11/CR/Feb04) [2012] 7 August 2012, paras 5, 162-163
[82] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4 22 June 2015

indicates the limitations of these principles. A Mauritian example of this situation is *Secondary Schools* Books: the CCM noted that there was an absence of price competition in the market – retailers were receiving discounts from the publishers but these were not being passed to the consumer. This case demonstrates the present need for Mauritian competition law to focus promoting competition as a mechanism for shaping the market and promoting competition culture. In cases like *Secondary School Books*, the undertakings could compete more vigorously on price if they wanted to but instead have arrived at a market position where their prices are not responsive to developments in the market such as discounts on the retail price.

Finally, reference ought to be made to *British American Tobacco South Africa*.[83] The competition on the merits issue was the complainant's failure to compete on the merits of their product in light of increased competition from the dominant undertaking. As a result of stricter legislation regarding cigarette advertising, BATSA increased its cigarette promotion activities. As the dominant undertaking, BATSA had the resources to become the market leader with regards commercial agreements for cigarette promotions in various outlets. In this case, ZACT criticised the complainant, JTI, for not competing on the merits of its products but using the litigation to circumvent the competitive process.[84] Thus the South African courts would not uphold an abuse of unilateral conduct claim in the event of the complainant *inter alia* a) not exercising what the South African courts considered to be reasonable opportunities to compete whilst b) at the same time being able to 'free-ride' on the defendant undertaking's activities which benefitted its rivals and the sector as a whole. In a manner of speaking, this suggests that a requirement to compete, whether on the merits or otherwise, extends to non-dominant undertakings. This may be a particular feature of the BATSA case, given that it was brought by directly by the complainant rather than the South African Competition Commission. Nevertheless, a dynamic consideration of the market circumstances and a thorough assessment of supply-

[83] *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) [2009] ZACT 46 (25 June 2009)
[84] *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) [2009] ZACT 46 (25 June 2009), para 314

side competition is required for a reasonable application of unilateral conduct rules. In this regard the promotion of competition values, long-term social welfare and the legitimacy of competition law would require a demonstration that rivals have sought to compete and have been unable to. This may be demonstrated for example by competing and finding that the opportunities to compete have been restricted by the anticompetitive unilateral conduct – i.e. a *de facto* breach of unilateral conduct rules, or that it has not been feasible to duplicate an asset and the circumstances suggest access to the undertaking's facility is an indispensable one required for participating in the market.

4.5. Conclusion

The aim of this Chapter was to establish a) that dominance is a required test for exclusionary abuse under CAM; b) that its formal status as a condition precedent should be reinstated and c) an assessment of dominance contributes to the proposed exclusionary test of intent or effect advocated by this Thesis.

The first part of the Chapter in sections 4.2 – 4.2.2 confirms that notwithstanding the qualified effects test under CAM, dominance remains the starting point for assessing unilateral conduct under section 46 CAM. The second part of this Chapter confirms that not only is dominance the first condition precedent for section 46 CAM but, given the complexity of unilateral conduct assessment, the separate assessment of dominance is required as a preliminary step for establishing abuse (4.2.3).

Sections 4.3.1 – 4.3.4 looks at the sources of dominance identified under CAM. This third part of the Chapter concludes as follows. First, all of the cases completed under CAM so far demonstrate significant market shares and barriers to entry. However, controlling substantive positions of dominance was not the only concern of Parliament. Whilst there are good administrative reasons for adopting a market share threshold, CAM's long-term social welfare objective requires that all dominant positions which give rise to a competition concern should be subject to section 46. This would require a revision to the 30% market

share threshold – introducing a rebuttable presumption would maintain administrative efficiency whilst meeting its ultimate objective. Holding a dominant position does not breach section 46, but potential abuses of demonstrable dominant positions should be subject to the CAM rules. Second, competitor and consumer constraints are the other 'general' forms of dominance criteria considered under section 46. Where the dominant undertaking is leveraging its power into other markets, or acting contrary to demand, the cases demonstrate the inability of supply and demand side constraints to check the undertaking's dominant power. Interestingly, the Mauritian definition of dominance does not include consumer constraint, but this has not prevented the CCM from including this as part of its assessment of dominance. Third, the assessment of limited demand and geographical location are two factors which are quite specific to Mauritius in terms of its economic context. The cases which have considered these have confirmed the tendency of the Mauritian economy to skew towards concentrated economic structures. Taking all of these into consideration suggests that there will be an ongoing tension between efficiency and choice based considerations in principle. However, as demonstrated in *Insurance and Credit Products,* providing an efficient outcome will not necessarily save an undertaking from a breach of section 46 if that outcome was achieved anticompetitively.

The final part of this Chapter under sections 4.4 and 4.4.1 considers the concepts of special responsibility and competition on the merits. Whilst useful guiding principles for both the CCM and market participants, they do not provide workable standards in themselves. However, as demonstrated in Article 102 TFEU cases, they might be used to distinguish intent from effect cases – cases without plausible legitimate explanation could be deemed as *de facto* not competition on the merits.

Overall, the CCM's assessment of dominance seems reasonable and in-line with CAM's long-term social welfare objective. Revisions to dominance to support the CCM's application of the concept would be to i) reinstate dominance as a formal condition precedent assessing abuse; ii) include consumer constraint as part of

the dominance definition and iii) consider the relevance of special responsibility and competition on the merits as guiding principles under the First Tier assessment of object proposed by this Thesis.

5. The Public-Interest Test under CAM

5.1. Introduction

Section 50 CAM provides the public-interest factors that the CCM may take into consideration when determining remedies for breaches of section 46 CAM and forms the second part of the Mauritian unilateral conduct rules.[1] The inclusion of a public-interest serves a number of functions supportive of the long-term social welfare objective of CAM. It provides for a proper effects-based assessment of conduct where pro-competitive claims are made. However, as the test currently stands under section 50, the operation of the Mauritian unilateral conduct rules is impaired. Furthermore, the failure to include a proportionality requirement renders the test somewhat abstract given the difficulties in quantifying public-interest generally and the requirement that they must outweigh the anticompetitive effects of the relevant conduct. The first part of this Chapter looks at the public-interest test in general and its specific provision under CAM. Having identified what works well and which areas potentially require improvement, the second part of this Chapter looks at the European and South African public-interests tests. These confirm the point made regarding proportionality, which is perhaps even more important given the choice-based standard applied in Mauritian competition law. Furthermore, whilst beyond the scope of this Thesis, the South African proportionality test protecting the rights of historically disadvantaged people suggests an avenue of future research regarding the transformative potential of Mauritian competition law.

5.2. The Rationale for Public-Interest Tests

Many see competition law as a means to promote economic ends and efficiency-based goals. Thus, for example, competition law is seen as part of the standard package of reforms used by developing countries to liberalise their economies

[1] In this Chapter, public-interest is used to refer to welfare and non-welfare considerations unless specifically stated.

and achieve growth. Nevertheless, in capturing both the technocratic choices *and* the values of the market in question,[2] competition law is also recognised for its transformational potential. Thus Lewis describes competition law as public interest law,[3] but what public interest means is not necessarily fixed. Two definitions are i) public interest as the correction of market deficiencies[4] and ii) the sum of private interests.[5] This in turn means there are variations of what constitutes specific public-interest (or benefit) factors and tests to implement them.[6]

Provision for and expansive application of the test is required for developing countries.[7] Nevertheless there are certain matters to be addressed regarding its application in the future. Reasons in favour of public-interests tests for the Mauritius and other developing countries are as follows: first, it complements and promotes the role of industrial policy implemented to liberalise those economies; second, by allowing different interests to be accounted for, the credibility and legitimacy of competition provisions is increased;[8] third, this may include convergence between those interests where appropriate.[9] This raises the question as to whether competition law and the relevant authorities are the

---

[2] S Roberts and J Tapia, 'Abuses of Dominance in Developing Countries: A View from the South with an Eye on Telecoms' (UCL Centre for Law and Economics Society Working Paper 1/2013, 2013), 3

[3] D Lewis, *Thieves at Dinner Table*: *Enforcing the Competition Act – A Personal Account* (Jacana Media, 2012), 37

[4] R Posner, 'Theories of Economic Regulation' (1974) 5(2) The Bell Journal of Economics and Management Science 335

[5] ES Miller, 'Economic Efficiency, the Economics Discipline, and the "Affected-with-a-Public-Interest"' (1990) 24(3) Journal of Economic Issues 719; see also TJ DiLorenzo, 'The Origins of Antitrust: An Interest-Group Perspective' (1985) 5(6) International Review of Law and Economics 73; DJ Bordeaux and TJ DiLorenzo, 'The Protectionist Roots of Antitrust' (1993) 6(2) The Review of Austrian Economics 81; describing public interest in its widest sense as including the protection of public and private interests.

[6] P Smith and A Swan, 'Public Interest Factors in African Competition Policy' (2014) The African and Middle Eastern Antitrust Review 1

[7] M Griffiths and W Gumbie, 'The Public Interest Test in the South African Merger Control Regime' (2015) 3(2) Journal of Antitrust and Enforcement 408

[8] OS Sibanda Sr., 'Public Interest Considerations in the South African Anti-Dumping and Competition Law, Policy and Practice (2015) 14(5) International Business and Economics Research Journal 735; J Balkin and M Mbikiwa, 'Public Interest in the Competition Act: Have the Competition Authorities Applied the Test Correctly?' (2014) Supplement B Mercury 2

[9] V Chetty, 'The Place of Public Interest in South Africa's Competition Legislation – some Implications for International Antitrust Convergence' (ABA Section of Antitrust Law, 53rd Spring Meeting, Washington D.C., 2005); J Balkin and M Mbikiwa, 'Public Interest in the Competition Act: Have the Competition Authorities Applied the Test Correctly?' (2014) Supplement B Mercury 2

correct forums for this assessment to take place. It is argued that this is appropriate as it provides a unified forum and a place for holistic enquiry. It also serves to minimise the impact of lobbying in different areas of regulation[10] and facilitates convergence through economic analysis.[11] As will be discussed below, the Mauritian public-interest test is notable because it does not provide a defence or justification as such: raising a successful public-interest case does not overturn a finding of anticompetitive abuse under section 46 - it *might*, however, mitigate the remedy imposed.

Various concerns with public-interest tests have also been raised. Whilst these are all relevant to the Mauritian unilateral conduct rules, Mauritius is not alone in facing these issues. The first issue is procedural and queries how public-interests are assessed.[12] In the first instance, this seems to be resolved under CAM. Section 46 is the assessment of the anticompetitive effects of unilateral conduct; section 50 provides that any public-interests or pro-competitive effects are taken into account at the remedies stage. However, section 50 requires the CCM to consider if any of the public benefits are available and, whether and to what extent they should be taken into consideration.[13] As will be discussed below, the cases so far demonstrate, where section 50 appears relevant, that the CCM's approach is to i) state the requirements of section 50; and ii) explain the specific spillovers identified. In a rudimentary way the requirement to consider the public-interest factors is satisfied. However the examples so far are lacking in substance. The CCM does not take the step of stating which public benefit(s) it deems to be relevant, nor to state under which public-interest the identified benefit falls. The second issue relates to quantification and probative weight:[14] any principles used to address these issues remain obscure and unclear. The CCM is required to consider the *extent* to which that benefit should be taken into

---

[10] J Balkin and M Mbikiwa, 'Public Interest in the Competition Act: Have the Competition Authorities Applied the Test Correctly?' (2014) Supplement B Mercury 2

[11] V Chetty, 'The Place of Public Interest in South Africa's Competition Legislation – some Implications for International Antitrust Convergence' (ABA Section of Antitrust Law, 53rd Spring Meeting, Washington D.C., 2005);

[12] OECD 'The Role of Efficiency Claims in Antitrust Proceedings' (DAF/COMP(2012)23, 2013)

[13] CAM, section 50(3)

[14] see e.g. D Poddar and G Stooke 'Consideration of Public Interest Factors in Antitrust Merger Control' (2014) Competition Policy International 1, 4 discussing the South African Merger Guidelines

account when setting the remedy. In order for this duty to be triggered, however, the gains of the public-benefit must outweigh the anticompetitive effects of the conduct. In *Insurance and Credit Products*, the customers of BDM benefitted from the cheapest prices on the market: the anticompetitive effect was the loss of the right to choose. How does one weigh up consumer surplus against the loss of agency? In those circumstances where consumers were not informed of their right to choose their supplier, should consumer surplus outweigh loss of agency? The CCM is silent on these issues, though this specific decision in *Insurance and Credit Products* suggests that the loss of agency will outweigh competitive prices under Mauritian unilateral conduct law. The banks involved including BDM were found to have breached section 46, and certain remedies put in place. As discussed below, the CCM's approach looks at whether consumers are 'better-off'. This does not answer the issue posed by cases such as *Insurance and Credit Products* and thus leaves overall operation of section 50 CAM uncertain.

This leads to the last general substantive issue identified for public-interest tests: namely ensuring sufficient 'safeguards' in the tests to prevent their arbitrary application, minimise regulatory opportunism, and increase transparency.[15] Under South African merger rules, the public-interest consideration has to be 'substantial' in order to affect the merger.[16] Under section 8 SACA, the effects of one factor must outweigh the other. Under section 50 CAM, public-benefit must outweigh the anticompetitive effect. As discussed, we run into problems of measurement. The criticism relating to safeguards and public-interests tests is not that public-interest considerations should be disregarded, but that limits should be in place to prevent their arbitrary application. A strict interpretation of section 50 CAM, however, could mean that benefits are not taken into account

---

[15] see e.g. J Balkin and M Mbikiwa, 'Public Interest in the Competition Act: Have the Competition Authorities Applied the Test Correctly?' (2014) Supplement B Mercury 2, Supplement B 2; M Griffiths and W Gumbie, 'The Public Interest Test in the South African Merger Control Regime' (2015) 3(2) Journal of Antitrust and Enforcement 408; P Smith and A Swan, 'Public Interest Factors in African Competition Policy' (2014) The African and Middle Eastern Antitrust Review 1
[16] J Balkin and M Mbikiwa, 'Public Interest in the Competition Act: Have the Competition Authorities Applied the Test Correctly?' (2014) Supplement B Mercury 2

very often at all, notwithstanding that there may be significant benefits in certain cases. Whilst 'outweigh' might seem more predictable than other tests such as 'substantial': requiring this at the remedies stage of unilateral conduct rules, rather than the abuse stage, removes an important strand of decision making for the CCM.

The final point regarding section 50 CAM is that the public-benefits listed within must outweigh the anticompetitive effects of the conduct in order to be taken consideration for any *remedies* issued. This means none of the grounds available, as a matter of statutory interpretation and logic, are available to rebut a section 46 finding of anticompetitive conduct. This adversely affects both the application of the object or effect test, as these pro-competitive aspects cannot be raised to challenge a finding of object, or contest a finding of anticompetitive effect. As will be discussed below, this is contra the long-term social welfare objective of CAM.

5.3. The Public-Interest Test under CAM

Section 50 CAM confirms that competition and the competitive process is valued in itself and is seen as the primary means for achieving efficiencies, low prices and better quality products. It has two elements. First, it sets the specific benefits that may be considered for constructing remedies under section 50. The four grounds of public benefit under CAM are a) the safety of goods and services, b) the efficiency with which goods are produced, supplied or distributed or services are supplied or made available, c) the development and use of new and improved goods and services in the means of production and distribution, and d) the promotion of technological and economic progress.[17] If a section 46 breach occurs the CCM shall consider i) whether any of the benefits listed are present and ii) whether and to what extent those benefits should be taken into account

[17] CAM, Section 50(4)

when deciding on the appropriate course of remedial action.[18] Second it sets a pass-on requirement, requiring that the public-interest benefits are shared or are likely to be shared by consumers or businesses.

The adoption of a legislated public-interests test confirms that the Mauritian unilateral conduct rules are predominantly effects-based. It also confirms that section 46 is concerned with anticompetitive nature or effect of the conduct; the consideration of public-benefits is reserved purely for section 50 and remedies. This does provide clarity within the unilateral conduct rules – the assessment of anticompetitive effect and the assessment of pro-competitive benefit are distinct and separate. Furthermore, it can be said to contribute to developing the normative aspects of the Mauritian competition culture - exclusionary conduct which restricts competition and adversely effects the consumer or economy will be deemed anticompetitive and breach section 46, irrespective of the benefits that may also come with it. The consideration of these benefits is reserved purely for the section 50 assessment of remedies, assuming they meet one or more the factors listed therein. Furthermore, an assessment of abuse, discrete from efficiencies, protects economic freedom.[19] This can be compared to the position under the 2003 Act where the assessment of public-interests was part of the overall investigation as to whether an abuse of dominance had occurred.[20]

---

[18] CAM, section 50(3)

[19] LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 56

[20] I arrive at this conclusion based on the relationship between section 15 and section 16 CAM 2003. Section 15 entitled 'Undertakings and Directions' provides that should the Executive Director of the Mauritian NCA have found an abuse of monopoly to have occurred, the undertaking subject to investigation may offer commitments as it sees fit to address the concerns. Assuming that the commitments are suitable, the Director would have adopted a monitoring and compliance role. If no such commitments were offered, the Director's responsibility would have been to escalate the case through the institutional framework of the 2003 Act. Section 16 then provides that the Executive Director shall have regards to its public interest test for the purposes of applying section 15 as necessary. Whilst thus the consideration of public interests under CAM 2003 is directed at the point when commitments are given by the dominant undertaking, the fact that the dominant undertaking may give commitments at any point of an investigation suggests that explicit consideration of the public interest requirements would have been more 'upstream' in the decision making process in comparison to its CAM 2007 equivalent.

Overall, the trade-off made separating the assessment of abuse from public-interests benefits has weakened CAM. Mention has already been made of the impact this has on the assessment of object under section 46 CAM. Furthermore, whilst the separation may appear to strengthen its normative force, it would be a legitimate question for an undertaking to ask, having presented credible evidence of the pursuit of a public-interest benefit, on what grounds can their conduct be deemed wholly anticompetitive (as is the case, under the structure of section 46?).

However, the following issues arise. First, one might query whether the Mauritian unilateral conduct rules properly promote long-term social welfare if they do not allow for efficiencies and public-benefits to be considered as defences. A legitimate competition culture should value the activities of all market participants equally and thus allow undertakings to plead pro-competitive advantages. For example, an assessment of consumer harm should include an assessment of both the negative and positive effects on the consumer in order to arrive at a reasonable conclusion. Second, by not allowing public-interest considerations to be formally part of the assessment under section 46 CAM, the object-element of CAM is made redundant. This issue becomes more apparent when comparing section 46 and 50 CAM with their 2003 equivalents. Under the 2003 legislation, the abuse of dominance provision was geared solely towards the anticompetitive effect of unilateral conduct; but the public-interest test was drafted in such a manner that its elements could be taken into account when assessing whether conduct or not was anticompetitive.

By contrast, CAM now separates the assessment of anticompetitive conduct from the assessment of public benefits. One way of determining whether or not a form of conduct is restrictive by intent is to consider its potential for off-setting benefits. The structure of CAM does not allow for this. Thus the revised unilateral rules under CAM lack internal coherence. Nevertheless, the inclusion of public-interests considerations under section 46 should not undermine the general objective of the Mauritian unilateral conduct rules to promote competition and safeguard economic opportunity. For this reason, pro-

competitive considerations should only serve as a defence to an action under section 46 if their positive effects outweigh the anticompetitive effects of the conduct.

To address these issues, the revision of CAM could follow two paths. One form of revision could include separate provisions for the assessment of abuse, defences and remedies. The second form of revision could provide for a 'global integrated assessment' of conduct/efficiencies,[21] with remedies assessed separately if, after the integrated assessment, the conduct still breaches the unilateral conduct rules.

5.3.1. The CCM's approach to Public-Interest

Under CAM, the dominant undertaking will have to demonstrate the following: first, one or more of the prescribed benefits is present; second, the benefits provides a specific gain; third, the specific gain outweighs the restriction of competition caused by undertaking's anticompetitive conduct and fourth, the benefits have been or are likely to be shared consumers or businesses. The following principles shape the CCM's application of that framework: i) the benefits permissible for consideration are limited to those listed in section 50(4) CAM; ii) the key test will normally be whether customers of the undertaking will be better off. For example, if it is claimed that costs are lower as a result of the practice, that cost savings will be passed to consumers; iii) the benefits claimed must be specific to the conduct in question and not available in its absence; iv) the benefits must be timely and reasonably certain to materialize; and v) the benefits claimed must flow from the conduct in question - the undertaking is not permitted to offer an unrelated efficiency gain in compensation for its anticompetitive conduct.[22]

---

[21] see e.g. LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 55; P Marsden and LL Gormsen, 'Guidance on abuse in Europe: The continued concern for rivalry and competitive structure' (2010) 55(4) The Antitrust Bulletin 875, 910; *Microsoft v Commission,* T-201/04, ECLI:EU:T:2007:289; *Syfait and Others*, C-53/03, ECLI:EU:C:2005:333

[22] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.27

The assessment of public-interests and the application of the principles outlined by the CCM ought to promote the competition culture of Mauritius and the long-term social welfare goal of CAM. In order to achieve this, the CCM should include a proportionality test as part of its overall assessment of benefits. Assessing the proportionality of the conduct in relation to its benefits will raise two questions: first is the conduct aimed at achieving the benefit or efficiency put forward (the objective limb); second, does it constitute the least restrictive way of achieving that aim (the least restrictive limb). The inclusion of a proportionality test would have the following benefits in promoting social welfare and provisions of CAM. As it currently stands, the claim of a benefit by a dominant undertaking could be merely incidental to its anticompetitive conduct. In other words, an undertaking restricts competition - this causes anticompetitive harm and triggers a section 46 CAM review. As a result of the investigation, the undertaking seeks to minimize or negate a possible penalty by adducing evidence of a benefit. Including a proportionality test has the advantage of 'pushing' the consideration (and delivery) of benefits more upstream in an undertaking's decision making. This in turn supports the pro-competitive elements of section 50. The objective limb encourages undertakings to focus on delivering efficiencies as part of their conduct. Furthermore the last principle of the CCM's approach to benefits is that they must flow from the conduct. Prescribing that conduct must aim at achieving that benefit will strengthen this principle and ensure that the claim of a benefit is not incidental to a section 46 action. This will also embed the requirement that the benefit outweighs the anticompetitive harm caused by the conduct.

5.3.2. Burden of Proof

The operation of the burden of proof under CAM's unilateral conduct rules remains unclear. The burden of proof has two components: the factual (or legal) burden and the evidential burden. The party that bears the factual burden for a legal issue thus bears the risk that he will lose the argument on the issue if he is unable to persuade the tribunal to the required standard that an issue is proved

or disproved.[23] The evidential burden is the obligation to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in question. Under section 50, it appears that the undertaking bears the evidential responsibility regarding the benefit and the CCM bears the responsibility for the final assessment on whether the benefits outweigh the adverse effects of the conduct.

To expand on these issues, it will be useful to set out the overall process for establishing a claim under section 46 CAM. If the CCM's Executive Director has a reasonable belief that a contravention of section 46 is taking place, he may undertake an investigation to explore these issues. In the first instance, the Executive Director will issue a preliminary report and notice of provisional findings to the investigated parties. The parties will then have the opportunity to make representations and submit evidence to the Executive Director. Following this, the Executive Director will produce his final report and recommendations to the CCM Commissioners. If there is a possibility of the Commissioners issuing directions, they must hold a hearing before making their final decision. The procedures of the hearing follow what one would usually expect from litigation e.g. the submission of skeleton arguments, the opportunity to make oral submissions and conduct cross-examination.

In proving the first part of a unilateral conduct claim i.e. a cause of action under section 46, the Executive Director bears the factual burden and the initial evidential burden of proving his case. Thus, the Executive Director must persuade the Commissioners that the undertaking is in a monopoly situation, is in a dominant position, that its conduct has distorted the market, and that the conduct has adversely affected the Mauritian economy or consumer. Having issued a preliminary report and provisional findings, the investigated parties bear the evidential burden of raising sufficient evidence to keep an issue live.[24] Having issued provisional findings and receiving the counter-arguments and

---

[23] As well being referred to as the legal burden, the factual burden is also known as the persuasive burden.

[24] By adducing evidence, for example, that it has less than 30% market share and is thus not in a monopoly situation.

evidence of the investigated parties, the Executive Director must then decide if he has sufficient evidence overall to discharge the factual burden under section 46.

In relation to the second part of a unilateral conduct claim i.e. the public-interest test under section 50(4), the operation of the burden of proof becomes less clear. This is because the public-benefits are not defences in themselves, but serve to trigger the discretion of the CCM when deciding the strength of remedy or intervention. There are two stages to the burden of proof under section 50. The defendant undertaking bears the burden of raising a defence under section 50(4) CAM. However, it is unclear whether this is an evidential burden only or whether the persuasive burden has to be met. As CAM requires that the public interest factor be 'present',[25] it could be argued this requires satisfaction of the persuasive burden. Furthermore, given that a successful submission may potentially negate the application of a remedy or direction, requiring the defendant undertaking to bear the persuasive burden would be appropriate. The problem however is that even if a public interest factor is present, the CCM retains discretion to decide whether and to what extent that factor should be taken into consideration. This will be initially assessed at the investigation/reporting stage by the Executive Director, whose recommendations remain subject to the Commissioners' final decision.

5.3.3. Pass-on requirement

Section 50(4) has a pass-on requirement: it requires that benefits have or are likely to be passed on to either the Mauritian consumer or business. As per the drafting of section 50(4), it is not sufficient merely that the effects upon the consumer or business be neutral: it is required that the sufficiency of the public-interest factor outweighs the anticompetitive conduct. Nevertheless it has been argued in this Thesis that promoting competition and maintaining competitive market structures should be the overall aim when applying sections 46 and 50

[25] CAM, section 50(3)(a)

CAM in order to promote efficiency, innovation and the social welfare objective of CAM.

However, the public-interest factors are broadly phrased with no clear guidance or limitations on their normative content. This may incentivise dominant firms to act anticompetitively if the threshold for public-interest factors is seen as being low. Furthermore, not only is a relatively wide spectrum of public-interest factors considered, but those factors need not be passed to the consumer as long as it is 'likely'. Unless the CCM prescribes a remedy (or obtains a commitment from the undertaking) which captures the passing-on of that benefit (and is monitored by the CCM) there is no obligation for that likelihood to become actual. This is particularly an issue where the test for object captures conduct which is only profitable for the dominant undertaking because of its exclusionary nature - if conduct is restrictive by object, it is overwhelmingly so and thus either benefits are non-existent or are negligible. *IBL* is a good example. The undertaking's product had such dominant power that the efficiencies to be gained in its own market were marginal, and the efficiencies to be gained from leveraging its market power into non-dominated areas were not obtained by competition on the merits of improved product quality or choice. It could be argued that efficiencies would be generated by economies of scale. However, in the face of such overt exercise of anticompetitive dominance that affects both the competition culture and social welfare, efficiency should not trump the primacy of competition.

5.3.4. CAM Examples of Public-Interest Considerations

To summarise, there are a number of outstanding elements of section 50 to be determined: i) what constitutes the content of the grounds listed as public-interest; ii) what are their limits of application; iii) how the CCM would determine whether a gain outweighs an anticompetitive effect; and iv) the parameters around what constitutes 'likely to be shared'.

IBL, *Slaughter Cattle, Insurance and Credit Products,* and *Broadband Internet Access* are the four Mauritian unilateral conduct cases that have explicitly considered section 50 CAM so far.

IBL and *Broadband Internet Access* both involved conduct which, from a unilateral conduct perspective, are ambiguous in their effects.[26] As pointed out by the CCM, whether such conduct is capable of being anticompetitive by object or nature turns very much on the context of those cases.[27] Nevertheless, these cases confirm the split between the assessment of anticompetitive object or effect under section 46 and the assessment of public benefits under section 50. In other words, because the assessment of public benefit, including efficiencies, is reserved for assessing remedies, conduct where the public benefit effect outweighs its anticompetitive concerns will still breach section 46; however, the remedies may take those benefits into consideration.

In *Slaughter Cattle*, the CCM identified two specific benefits resulting from the conduct. Having first reiterated the prescribed public-interests listed in section 50 CAM, the CCM identified two beneficial aspects of the conduct as i) it created a stable supply and a stable market structure; and ii) it potentially improved economies of scale by lowering costs per unit.[28] The same approach was followed in *Insurance and Credit Products*. In that case, the agreements between the banks and insurers created consumer benefits in the following ways. First of all, it created a 'one-stop shop', thereby improving the timeliness and ease of procedure for purchasing insurance and credit; second, the arrangements appeared to lead an overall decrease in insurance premium prices.[29] However it was noted that at least 22% of consumers paid more expensive premiums than if

---

[26] such as rebates and tying.
[27] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), paras 3.2.1 – 3.2.2; Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), paras 2.15, 3.12 and 7.15
[28] Competition Commission of Mauritius *Importation of slaughter cattle in Mauritius* INV003 (14 September 2011), para 6.13
[29] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), para 7.15

they had approached the relevant insurer directly.[30] Furthermore, as discussed earlier in this Thesis, the finding that a particular bank was providing its consumers with the cheapest prices was insufficient for it to defend the claim that it had breached section 46 CAM. Of the cases noted above, *Insurance and Credit Products* is the most pertinent example. This is because of the decision involving BDM; the bank was found to have breached section 46, notwithstanding that its customers had the most competitive prices and received at least some of the benefits listed above. One could infer that this decision turned on the issue of proportionality – the measures adoped by BDM were not the least restrictive way of giving competitive prices to its consumers, but as stated, this would only be an inference. The use of such a proportionality test has yet to be confirmed in Mauritian competition law.

Unfortunately, in neither of those cases does the CCM present how it weighs benefit against anticompetitive effect. As an alternative to the proportionality suggestion, one could surmise that the specific benefits identified in *Insurance and Credit Products* did not outweigh the anticompetitive effect of reducing the consumers' free choice. Nevertheless, the investigation should have stated the CCM's initial position on the following. In the first instance, to which category or categories of public-interest do the specific benefits belong. For example, does the creation of the 'one-stop shop' belong to the public benefit of the 'efficiency with which goods are…supplied'?[31] If so, how does the 'efficiency' of competitive prices balance against the lost opportunities for decision-making? If more expensive premiums offered more favourable conditions, is the lowest priced-premium still an 'efficient' choice? Furthermore, in order for a public benefit to be considered, section 50 *requires* that it specifically outweighs the anticompetitive effect of the conduct. How might the CCM conduct this assessment? Providing these statements would allow the parties (i.e. the dominant undertaking and the CCM's Executive Director) to either dispute the methodology during the preliminary stages of the investigation or later on if a hearing is held before the Commissioners of the CCM. At present, what is

[30] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), para 7.18
[31] CAM section 50(4)(b)

publicly presented is an abbreviated section 50 analysis which consists of a) stating the contents of section 50; b) stating the benefits of the conduct where identified; and c) moving straight to the remedies.[32] Such an approach does not reflect the CCM's principles for assessing public-interest and clarifying the relationship between the conduct and benefits claimed in the respective cases, or how they are taken into account when determining the appropriate remedy.

Manhole Covers is an interesting case. This is because the facts revolved around safety standards and Mauritius Telecom's conduct in enforcing these standards. On the basis that Mauritius Telecom sought to justify its conduct on 'safety' grounds, section 50 should been applied in this case, but neither the investigation or the CCM's decision takes this into account. Nevertheless, the case provides some insight into the CCM's approach to assessing safety arguments.

The issue at hand is as follows. Manhole covers have to comply with certain international standards in order to be sold. Where Mauritius Telecom was

---

[32] see e.g. Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to ABC Banking Corporation* Commission/HG/004/01 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to AfrAsia Bank Ltd* Commission/HG/004/02 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Barclays Bank Plc* Commission/HG/004/05 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Bank of Baroda* Commission/HG/004/06 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Banques des Mascareignes Ltee* Commission/HG/004/04 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Habib Bank* Commission/HG/004/08 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to HSBC* Commission/HG/004/09 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Mauritius Commercial Bank* Commission/HG/004/10 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Mauritius Post and Cooperative Bank* Commission/HG/004/11 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to State Bank of Mauritius Ltd* Commission/HG/004/13 (5 November 2012)

involved a telecommunications infrastructure project, whether as a direct owner or third party, it imposed its own safety requirements. The concern was that this foreclosed the supply market for manhole covers to the advantage of suppliers preferred by Mauritius Telecom. Whilst the case explored whether non-preferred suppliers could comply with the requirements imposed by Mauritius Telecom, it did not explore whether Mauritius Telecom also required its *preferred* suppliers to comply. This comparison is critical to establishing whether or not Mauritius Telecom acted with the object of restricting the market. In relation to reasonable safety standards and Mauritius Telecom's conduct, the investigation stated:

> [t]he conduct, as described…is likely to result in the exclusion of suppliers…who can compete effectively in terms of quality, features or prices, provided that their products satisfy reasonable safety standards. In this case, setting an unreasonable safety standard or requiring unachievable methods of proving those standards may lead to exclusion of potential competitors on the market. As a result, developers will be harmed from the restricted choice.'[33]

Mauritius Telecom argued it had to impose its own safety requirements in addition to the international standards on the basis that if an accident were to occur due to a manhole cover installed by Mauritius Telecom, it would be fully liable for the accident.[34] Manhole covers that did not meet those additional standards were therefore excluded from infrastructure projects in which Mauritius Telecom was involved. Under section 50 CAM, it has to be demonstrated that positive outcomes for ensuring safety outweigh the anticompetitive foreclosure. Notwithstanding the commercial plausibility of the reason offered by Mauritius Telecom, the CCM investigation or decision did not explore this matter further. First, why should competitors who sell products which meet internationally-recognised safety standards from the manhole cover

---

[33] Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* INV012 (11 September 2012), para 5.5

[34] Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* INV012 (11 September 2012), para 5.7

market be excluded from the markets, particularly when the additional standards they are asked to meet cannot actually be met. Mauritius Telecom required retailers to obtain safety certificates from the Mauritian Standards Bureau – but the Bureau did not in fact issue such certificates. Therefore this raises the issue of how these standards were set and, as noted, how the preferred providers met them. This is important given a) that Mauritius Telecom was prepared to pay a higher price for their covers, and b) private developers 'were less inclined to accept competitive quotes for manhole covers from other manufacturers, which restricted competition and reduced pressure on suppliers of MT's preferred manhole covers to charge competitive prices.'[35]

5.4. Public-Interest considerations under Article 101(3) TFEU

Article 101(3) provides the public-interest grounds applicable under Article 101 TFEU. It has four cumulative criteria which the defendant undertakings must meet in order for their agreement to be protected under the provision. The criteria are: i) the agreement must lead to the improvement in the production of goods, technological or economic progress; ii) consumers must be allowed a fair share of the benefit; iii) the agreement must be indispensable to achieving the benefits; iv) the agreement must not lead to the possibility of eliminating competition. From the content alone, one can see that the Article 101 TFEU public-interest test is more sophisticated than Section 50 CAM. It is not enough for the defendant undertaking to show that the conduct provides one of the prescribed benefits under Article 101 TFEU and that the benefit is shared with consumers, it must also be indispensable to that objective and not harm competition in the long-term. The two relevant elements here for discussion are Article 101(3)'s requirement of indispensability and that the agreement must not lead to the possibility of eliminating competition.

From a practical perspective, the indispensability requirement imports a proportionality test into the assessment under Article 101 TFEU. The test has

[35] Competition Commission of Mauritius *Manhole Covers for the Telecommunications in Private Sector Projects* INV012 (11 September 2012), para 5.4(b)

two limbs. First, the conduct must be reasonably necessary to achieve the benefits. Second, the agreement must not go beyond what is necessary to achieve the efficiencies – 'whether more efficiencies are produced with the restriction…'than in its absence.[36] Like the assessment of object of Article 101(1), the assessment of indispensability takes place against the context of the agreement in place.[37] In *P&O Stena Line*, for example, the Commission held that the efficiencies resulting from a joint venture between the parties to combine their services could not be achieved by less restrictive means such as pooling or joint scheduling of services.[38] Where quantifying the public-interest consideration is difficult, a proportionality test may serve as a workable, if imperfect proxy for this assessment.

The last requirement of Article 101(3) is that the agreement must not lead to an elimination of competition. In this regard, the European Commission states that

> '[u]ltimately, the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements.'[39]

This is on the basis that competition itself is the driver of efficiency- the elimination of competition means that the short-term gains from the efficiencies will be outweighed by the long-term losses caused by potential rent-seeking activities of the monopolist, reduced innovation and higher prices.[40] The assessment of this requirement looks at the competitive constraints and incentives in the market, and the possibility of entry into the market.[41] Section 50(2) CAM specifically requires the CCM to have regard to the 'desirability' of

---

[36] Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97 ('Guidelines on Article 101(3)'), paras 73-74.
[37] Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97 ('Guidelines on Article 101(3)'), para 80
[38] *P & O Stena Line* [1999] OJ L163/61
[39] Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97 ('Guidelines on Article 101(3)'), para 105
[40] Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97 ('Guidelines on Article 101(3)'), para 105
[41] Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97 ('Guidelines on Article 101(3)'), para 115

competition and the competitive process as the main driver for efficiencies and other benefits that may derive from the competitive process.

5.5. Public-Interest considerations under Article 102 TFEU

Whilst Article 102 TFEU itself does not specifically provide for defences, the case law has developed three grounds on which a defence may be raised: proportionality, efficiency, and social welfare.[42] As noted above, neither section 50 CAM nor the approach of the CCM adopts a proportionality test as of the assessment of public interest: the decision in *Insurance and Credit Products* suggests, however, that there may be a proportionality assessment that takes place with regards whether the conduct represents the least restrictive way method to achieve the claimed benefit or gain. If this is part of the CCM methodology, the CCM needs to make this transparent.

The issue of proportionality also relates to whether an undertaking may raise in its defence that its conduct constitutes meeting competition – i.e. a reasonable and proportionate reaction to the activities of its competitor.[43] This was alluded to in *IBL*, where it was suggested that the defendant undertaking commenced its shelf-space requirements in response to similar conduct by a rival.[44] This matter was not explored further. If such a defence were to be read into the Mauritian unilateral conduct rules, the question raised would be whether it would constitute a defence proper to section 46, or be part of the assessment of remedies of section 50. If the claim is that the facts of a case should be interpreted as a legitimate and proportionate response to competitors' activities on the market, as opposed to anticompetitive unilateral conduct *per se*, this would suggest that the application of a proportionality defence would find its correct position in the application of section 46. However, irrespective of its

[42] R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 300 - 321
[43] R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 300
[44] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010)

position in Mauritian unilateral conduct rules, the development of such a defence must be considered reasonable if one accepts that dominant undertakings are entitled to compete on the merits of their goods and services, particularly in *response* to competition.

In this regard, the two elements of a proportionality/meeting competition defence are: i) the objective pursued is 'consistent with a profit-maximising non-dominant undertaking'; and ii) the conduct constitutes a reasonable and proportionate response.[45] The assessment of this would depend on the economic context of the case. In this regard, all of the unilateral conduct cases undertaken by the CCM bar one so far could be considered cases of super-dominance. In *IBL*, with its position of durable and entrenched near-monopoly on the market at the time of the investigation, one might consider that the dominant undertaking's response to its competitor with like-for-like conduct as was disproportionate.

The European Court of Justice has confirmed the availability of efficiency defences under Article 102 TFEU:[46]

> In particular, a dominant undertaking may demonstrate that the exclusionary effect arising from its conduct may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer…
>
> …it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought

[45] R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 300 - 301

[46] *Post Danmark,* C-23/14, ECLI:EU:2015:651, paras 47-49; See also *British Airways v Commission,* C-95/04 P, ECLI:EU:C:2007:166, para 86; *TeliaSonera Sverige,* C-52/09, ECLI:EU:C:2011:83, para 76; *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, para 42; Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7 ('Guidance on Article 102'), para 30

about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

Thus the four elements of the efficiency defence under the European unilateral conduct rules are i) efficiencies are likely to outweigh the anticompetitive effects of that conduct; ii) that the gains result conduct; iii) the conduct is necessary to achieve those gains; and iv) the conduct does not eliminate effective competition.

The cases demonstrate the broad gamut of efficiency defence under Article 102 TFEU:[47] the inclusion of matters such as product 'safety'[48] suggests that Article 102 TFEU may also be interpreted as interpreted as including a 'public-interests' defence. However, in comparison to the CAM equivalent which provides only for the safety of goods and services – the rest of the factors under section 50 relate to efficiency,[49] the public interest defence under Article 102 TFEU arguably goes further to include matters which contribute to the 'well-being of the European Union.'[50] At the same time, the success of these defences under Article 102 TFEU has been limited, with the justifications falling at various hurdles. The clearest examples have been where the justifications have failed the proportionality test or where the conduct and benefits claimed did not sufficiently align. In *Wanadoo*, the Commission rejected the claim that the predatory conduct improved economies of scale on the basis that this was not necessarily the least restrictive

---

[47] Allocative efficiency see e.g. *Wanadoo Interactive* (Decision COMP/38.233), upheld in *France Télécom v Commission,* T-340/03, ECLI:EU:T:2007:22, appeal dismissed in *France Télécom v Commission,* C-202/07 P, ECLI:EU:C:2009:214; *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313; *Intel* (Decision COMP/37.990) OJ C 227; *Wanadoo Espana vs Telefonica* (Decision COMP/38.784); *Microsoft v Commission,* T-201/04, ECLI:EU:T:2007:289; Productive Efficiency see e.g. *Irish Sugar v Commission,* T-228/97, ECLI:EU:T:1999:246*; British Airways v Commission,* T-219/99, ECLI:EU:T:2003:343*; British Airways v Commission,* C-95/04 P, ECLI:EU:C:2007:166*; Hoffmann-La Roche v Commission,* Case 85/76, ECLI:EU:C:1979:36; *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313; Case *Michelin v Commission*, T-203/01, ECLI:EU:T:2003:250; *Prokent-Tomra* (Decision COMP/E-1/38.113); *Intel* (Decision COMP/37.990) *;* Dynamic Efficiency see e.g. *Microsoft v Commission,* T-201/04, ECLI:EU:T:2007:289; *Wanadoo Espana vs Telefonica* (Decision COMP/38.784); Public Interests see e.g. *TeliaSonera Sverige,* C-52/09, ECLI:EU:C:2011:83; *Hilti v Commission,* Case T-30/89, ECLI:EU:T:1991:70

[48] *Hilti v Commission,* Case T-30/89, ECLI:EU:T:1991:70

[49] CAM, section 50(4)(a)

[50] *TeliaSonera Sverige,* C-52/09, ECLI:EU:C:2011:83, para 22

means of achieving that objective.[51] In relation to conduct and efficiencies claimed, this was also rejected by the European Commission in *Intel* as the defendant undertaking had failed to demonstrate the precise efficiencies at hand.[52] In *British Airways*, the Court of First Instance held that retroactive nature of the rebates bore no objective relation to the efficiencies claimed.[53] This suggests that a workable test for assessing public-interests and efficiencies is the proportionality test looking at whether the conduct is suitable for the objective claimed, and it is the least restrictive means of achieving that objective.

5.6. Public-Interest considerations under SACA

The competition law of South Africa is noted for its explicit incorporation of equitable and distributive principles into its competition legislation. The two drivers for the socialist aspects of South African competition law are its apartheid legacy and its subsequent marginalization from the global economy.[54]

Section 2 SACA explicitly sets out the purpose of the South African competition rules:

> Purpose of the Act
>
> The purpose of *this Act* is to promote and maintain competition in order –
>
> (a) to promote the efficiency, adaptability and development of the economy;
>
> (b) to provide consumers with competitive prices and product choices;

[51] *Wanadoo Interactive* (Decision COMP/38.233) ,recital 312

[52] *Intel* (Decision COMP/37.990), recital 1637-1638

[53] *British Airways v Commission,* T-219/99, ECLI:EU:T:2003:343, paras 281-285 and 290*;* upheld in *British Airways v Commission,* C-95/04 P, ECLI:EU:C:2007:166, paras 84-90

[54] T Hartzenberg, 'Competition Policy and Enterprise Development: Experience from South Africa', UNCTAD, 'Competition, Competitiveness and Development: Lessons from Developing Countries' (UNCTAD/DITC/CLP/2004/1, 2004), 208

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and recognised the role of foreign competition in the Republic;

(e) to ensure that small and medium-size enterprises have an equitable opportunity to participate in the economy; and

(f) to promote greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

Under South African unilateral conduct rules the public-interest considerations (in the form of exceptions to Section 8 or 9 action) and the efficiency-defences are two discrete elements of the statute. In the first instance, an undertaking which engages in anticompetitive conduct may apply under section 10 SACA to have such conduct exempted from the application of the Act provided it meets the specific public-interest criteria. Under section 10 SACA, the public-interest exceptions which are applicable to the South African unilateral conduct provisions are i) the maintenance or promotion of exports, ii) the promotion of the ability of small businesses, or undertakings controlled or owned by historically disadvantaged people, to compete; iii) change in productive capacity necessary to stop decline in industry; iv) the economic stability of any industry designated by the Minister.[55] The exceptions are considered to balance the prohibitions contained within SACA:[56] whilst applicable to the SACA dominance provisions, there appears to be little evidence of South African undertakings seeking to use the exceptions for unilateral conduct purposes. If a section 10 public-interest exception is successful, the South African Competition Commission must grant it:[57] the provision operates independently of the anticompetitive effect that such conduct may have.[58] These considerations have yet to be applied substantially to South African unilateral conduct cases, the

[55] SACA, section 10(3)
[56] OECD, 'Competition Law and Policy in South Africa: An OECD Peer Review' (2003), 21 and 25
[57] SACA, section 10(2); OECD, 'Competition Law and Policy in South Africa: An OECD Peer Review' (2003), 21
[58] OECD, 'Competition Law and Policy in South Africa: An OECD Peer Review' (2003), 21

experience with regards merger cases captures the convergence between pure efficiency considerations and broader public considerations that Chetty identifies and that the two are not mutually exclusive.[59]

The public-interest considerations applicable to the South African unilateral conduct rules have a more restricted role than they do in merger control. This is for three reasons. First, the texts of 8(c) and (d) focus on purer economic justifications, essentially providing that *prima facie* abusive conduct may be justified if its technological, efficiency, or other pro-competitive gains outweigh the anticompetitive effect of the conduct. Second, public-interest concerns can prevent a merger, even if it does not substantially reduce competition, or save a merger even if it has that effect; by contrast the public-interest concerns that are applicable to unilateral conduct apply only by way of exemption.[60] Third, the public-interest considerations applicable to unilateral conduct differ from those relevant to South African merger analysis.

The promotion of the economic opportunities for historically disadvantaged people is perceived as a controversial aspect of the South African public-interest test.[61] However, its incorporation has been within the framework of sound economic analysis.[62] An example of this is *Shell/Tepco* – a merger that considered the ground of promoting the competitiveness of firms owned or controlled by historically disadvantaged persons.[63] Thebe Investment Company, a black empowerment investment company, was set up to use economic opportunities and mechanisms to benefit historically disadvantaged persons and communities. Thebe sought to sell its struggling subsidiary, Tepco, to Shell South Africa in return for a share transfer of 17.5%. At the time, Tepco employed 38

[59] V Chetty, 'The Place of Public Interest in South Africa's Competition Legislation – some Implications for International Antitrust Convergence' (ABA Section of Antitrust Law, 53rd Spring Meeting, Washington D.C., 2005)
[60] SACA, section 10
[61] V Chetty, 'The Place of Public Interest in South Africa's Competition Legislation – some Implications for International Antitrust Convergence' (ABA Section of Antitrust Law, 53rd Spring Meeting, Washington D.C., 2005), para 28
[62] V Chetty, 'The Place of Public Interest in South Africa's Competition Legislation – some Implications for International Antitrust Convergence' (ABA Section of Antitrust Law, 53rd Spring Meeting, Washington D.C., 2005), para 34
[63] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [ZACT] 13 (22 February 2002)

people, 80% of whom were from historically disadvantaged communities. The overriding rationale for Shell South Africa's purchase of Tepco was to 'lay the foundation for the involvement of previously disadvantaged persons in the company.' Shell South Africa's further intention was to maintain Tepco as a distinct, separate brand, develop it in the market for as long as it remained viable and profitable, and retain the existing management team, which was predominantly black.[64] The South African Competition Commission approved the merger subject to two conditions: i) Tepco continue to exist in the market jointly controlled/owned by Thebe and Shell South Africa; ii) that the Tepco brand be maintained as a viable brand in the market place. Both of these conditions were overturned by ZACT. First, it forced an unwanted and undesired business structure on the parties involved – '[e]mpowerment is not furthered by obliging firms controlled by historically disadvantage persons to continue to exist on a life support machine.'[65] Second, both parties were willing to maintain the brand for as long as it was financially viable – the public interest would not be met by requiring Tepco to continue indefinitely irrespective of its financial performance.[66]

If the section 10 application were to fail and a subsequent action brought under section 8(c) or (d) of SACA, the defendant undertaking may then apply the efficiency defences available under those provisions. Anticompetitive conduct caught under sections 8(c) and (d) may be justified (and thus defended) if their beneficial effect – by way of technological, efficiency or other pro-competitive gain – outweighs the anticompetitive effect of the conduct. The burdens of proof regarding the defences shifts depending on which provision is applicable: but it is felt that this makes little substantive difference to the decision required.[67]

[64] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [ZACT] 13 (22 February 2002), paras 6 – 13, 40
[65] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [ZACT] 13 (22 February 2002), para 42
[66] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [ZACT] 13 (22 February 2002), para 43
[67] Under 8(c), which captures general exclusionary conduct, the defendant bears the initial evidential burden of raising an efficiency or pro-competitive defence the burden of proof lies on the claimant to prove that the anti-competitive effect outweighs by the pro-competitive gains. Under 8(d), which captures specific forms of exclusionary conduct, the defendant bears the evidential and legal burden of proof of demonstrating that benefits of its conduct outweigh the

Second, the South African courts will not conduct a pro-competitive analysis if the claimant fails to prove anticompetitive effect.[68] This can be compared to the merger rules: a public-interests assessment of the merger will be conducted whether or not the merger leads to a substantial lessening of competition.

The two main South African cases regarding the assessment of pro-competitive effects in unilateral conduct cases are *South African Airways* and *BATSA*. *South African Airways* concerns the conduct of South African Airways (SAA) and the retroactive rebate schemes it set up with various travel agencies. The schemes were subject to two separate cases, *SAA I*[69] and *SAA II.*[70] Effectively, the case against SAA was brought under section 8(d)(i) - requiring or inducing a customer to not deal with a competitor. Thus the burden was on SAA to demonstrate that the benefits from its retroactive commissions scheme outweighed the anticompetitive effect of its conduct. SAA raised two pro-competitive benefits in its defence:[71] i) the commissions incentivised agents to learn about the SAA product; ii) agents had an interest in improving SAA performance. Whilst ZACT accepted these propositions generally, it held that SAA was unable to defend its conduct. First, SAA was not able to establish a link between its anticompetitive conduct and the efficiencies claimed; in particular, the commissioning scheme was not the least restrictive way of achieving the

---

anticompetitive effects. However, it has been argued that inquisitorial nature of South African unilateral conduct inquiries means that the textual shifts in the burden of proof are of little consequence see e.g. *Senwes Ltd v Competition Commission of South Africa* (87/CAC/Feb09) [2009] ZACAC 4) (13 November 2009), para 68; *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) [2009] ZACT 46 (25 June 2009), para 312; N Mackenzie, 'Rethinking Exclusionary Abuses in South Africa' (No Date) < http://www.compcom.co.za/wp-content/uploads/2014/09/Rethinking-Exclusionary-Abuse-in-SA.pdf > accessed 30 September 2015, 9

[68] *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) [2009] ZACT 46 (25 June 2009), para 313

[69] *Competition Commission v South African Airways* (Pty) Ltd (18/CR/Mar01) [2005] ZACT 50 (28 July 2005)

[70] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010). The *SAA I* decision covered the 19 month time period between the start of SAA's conduct (October 1999) and its referral to ZACT by ZACC (May 2001). Up until *SAA I* was decided by ZACT (March 2005) SAA continued its retroactive commission scheme, whereupon it subsequently removed the retroactive elements. The complaint in *SAA II* was raised by competitors to cover the time period when the retrospective anticompetitive conduct remained in placed between May 2001 and March 2005.

[71] *Competition Commission v South African Airways* (Pty) Ltd (18/CR/Mar01) [2005] ZACT 50 (28 July 2005), paras 243 - 258

claimed benefits.[72] Second, the anticompetitive effects were not so overwhelming so as to outweigh the exclusionary conduct.[73] Third, it was not clear how the consumer benefitted from the arrangement in place.[74] The approach adopted in *SAA I* was subsequently followed by ZACT and upheld on appeal in *SAA II* and subsequent cases such as *BATSA*.[75] Having rejected the claim that BATSA's conduct was anticompetitive, ZACT also considered the benefits from the defendant's conduct. It identified benefits such as the provision of cigarette dispensing units, the orderly maintenance of point of sale, and the significant reduction in 'out of stock' situations was passed on to its customers.[76] This suggests a broad interpretation of the efficiencies and pro-competitive benefits that ZACT will consider under section 8 SACA. That BATSA's rivals were able to take advantage of these aspects and free-ride on BATSA's conduct may have been one of the reasons for this wide interpretation.

As noted above, whilst public-interest (and efficiency) requirements are relatively straightforward to articulate, the main difficulty remains in operationalising these standards. From an economics perspective, certain efficiency justifications such as allocative efficiency are more readily describable: whereas others such as dynamic efficiency are less easily captured. Nevertheless, the principles behind them remain sound and provide useful guidance for the application of unilateral conduct rules. Under SACA, the public-interest and efficiency grounds that may be taken into account when assessing abuses of dominance are prescribed – but the actual application remains subject to judicial development. Whilst SACA requires, for example, that the efficiency considerations outweigh the anticompetitive effects of unilateral conduct, operational methods for assessing this have yet to be developed under South African law. Nevertheless, proxies by way of proportionality and pass-on

[72] *Competition Commission v South African Airways* (Pty) Ltd (18/CR/Mar01) [2005] ZACT 50 (28 July 2005), paras 250 - 252
[73] *Competition Commission v South African Airways* (Pty) Ltd (18/CR/Mar01) [2005] ZACT 50 (28 July 2005), para 250
[74] *Competition Commission v South African Airways* (Pty) Ltd (18/CR/Mar01) [2005] ZACT 50 (28 July 2005), para 249
[75] *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) [2009] ZACT 46 (25 June 2009)
[76] *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) [2009] ZACT 46 (25 June 2009), para 314

requirements have been introduced by *SAA I*, *SAA II* and *BATSA*: these have introduced some methodology for incorporating the assessment of pro-competitive effect into unilateral conduct analysis.

Notwithstanding, the significant economic growth that Mauritius has demonstrated over the last 50 years or so, concerns remain about addressing the wealth disparity stemming from both Mauritius' economic history and its liberalisation. In addition there has been some concern about the marginalisation of certain areas of society as a result of the rapid market liberalisation of the Mauritian economy. The concern relates not so much to addressing the source of that disparity but rather in facilitating economic opportunities for Mauritians generally, and ensuring that opportunities do not remain mainly in the preserve of those whose wealth and economic power stems from historical advantage. In Mauritius, a future development could look at the competition performance of the informal sector, where changes in the loss of preferential agreements and ensuing capitalist actions have resulted in job losses and reduced welfare and security for particular sectors of Mauritian society.[77]

5.7. Conclusion

The purpose of this Chapter was to review and propose specific changes to the public-interest under section 50 CAM. The first part of this Chapter (section 5.2) sets out the rationale for the public-interest, particularly for developing countries. It proposes that the public-interests test needs to be reincorporated into section 46 in order for the intent or effect test of exclusionary conduct to be workable and to meet the long-term social welfare objective of CAM. The second

[77] see e.g. United Nations Economic Commission for Africa 'Contribution to the 2015 United Nations Economic and Social Council (ECOSOC) Integration Segment' (No Date) < http://www.un.org/en/ecosoc/integration/2015/pdf/eca.pdf> accessed 11 November 2015, 2; A Gopaul, 'Negotiating the Complexities of Trade: An analysis of the Feminization of Informal Sector Workers Poverty in Mauritius' (2nd International Conference on Trade and Investment in Developing Countries, Mauritius, 2012), 3; HKV Tandrayen- Ragoobur, 'Women in the Informal Sector in Mauritius: a Survival Mode' (2014) 33(8) Equality, Diversity and Inclusion: An International Journal 750, 751

part of this Chapter (5.3.1 – 5.3.4) reviews the CCM's application of section 50. It concludes that the CCM needs to issue further guidance regarding the overall application of the test including its burden of proof and the pass-on requirement. If further identifies under 5.3.1 that a significant omission, particularly given the consumer choice standard applied under the section 46 CAM, is test of proportionality.

The third part of this Chapter (sections 5.4 and 5.5) examines the equivalent public-interests tests and assessments under Articles 101(3) TFEU and Article 102 TFEU. A significant conclusion of this Chapter confirms that the revision of section 50 requires an assessment of proportionality.

The final part of this Chapter under section 5.6 notes the content of South Africa's public-interests test incorporating the interest of historically disadvantaged people into its assessment. Whether Mauritius seeks to incorporate a similar provision sits outside the scope of this Thesis. However, this theme was raised in the Parliamentary debates leading to the Act, and it has been noted that Mauritius' relatively rapid market liberalisation and economic growth has left certain parts of its community at a disadvantage. The use of the public-interest to further the development goals of Mauritius constitutes an area of potential future research.

6. CAM's Institutional Structure, Enforcement and Remedies

6.1. Introduction

The institutional structure of CAM contains many positive elements. It has provided an independent national competition agency with a broad remit for competition advocacy and enforcing competition law. Its competition rules reflect a modern and relatively sophisticated set of rules. This is evidenced for example in the statutory provision for public-interest considerations. That there is some divergence procedurally between the Mauritian unilateral conduct rules and others should probably come as no surprise: it is suggested that it is the procedural rules that demonstrate the most divergence amongst international practice.[1] However, there are two main issues that affect the overall efficacy of CAM's institutional structure and the enforcement of its unilateral conduct rules under sections 46 and 50.

First, the CCM is the only dedicated institutional body set up under CAM. As has been set out in various parts of this Thesis, the CCM is charged with undertaking a number of responsibilities: enforcement, of course, is a key staple of this. However, whilst there is a division between the investigatory role (the CCM's Executive Director and Executive team) and the final decision (the Commissioners of the CCM) – this nevertheless renders the decision internal to the CCM. It retains both a prosecutorial and judicial role. This would not necessarily be an issue if the appeal structure was clear and provided sufficient judicial space. To give a comparative example, if an undertaking in a European case disagrees with a European Commission enforcement decision, it may appeal

---

[1] E Alemani and others, 'New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries' (No. 1104, OECD Economics Department Working Papers, 2013). The difference appears to manifest itself in relation to the probity of investigation (independence, accountability, procedural fairness), in particular the guidelines issued by national competition agencies; and advocacy with regards a) government obligations to act upon market study recommendations and b) assessment of new regulation (E. Alemani et al, 7).

through the CJEU structure.[2] By contrast under Mauritian competition law, CAM provides that an undertaking can appeal only an order (financial) or direction (e.g. remedies) to the Supreme Court of Mauritius. In the first instance, one might query why financial orders or remedial directions of the CCM should be appealed to the Supreme Court in the first instance; second, it fails to state the appeal route for challenging a *decision* of the CCM. The comparatively flat institutional structure under CAM can be further compared to the interstitial South African model that involves South Africa's Competition Commission, Competition Tribunal, Competition Appeal Court and the Supreme Court. A key feature of South African model is that if the Commission finds a breach of the South African competition law, the Competition Tribunal must review the decision. Thus there is a clear separation of roles between investigation and decision-making in the first instance; the enforcement roles are given greater legal space, and competition decisions are given binding status in South African competition law.

Second, specifically relating to the section 46 unilateral conduct rules are i) the spirit with which anticompetitive unilateral conduct is viewed and ii) perhaps more importantly, the inability to fine an undertaking for abusive section 46 conduct. This Thesis is not arguing that each breach of section 46 should attract a pecuniary penalty, but argues that the failure to even allow a margin of discretion to order a financial penalty for abusive section 46 conduct is a significant omission under CAM.

Like its European and South African counterparts, section 46 CAM does not prohibit monopoly, but prohibits the abuse of that dominant power.[3] However, the CCM states that the application and enforcement of section 46 differs substantially from more established models of competition law:

---

[2] Courts of Justice of the European Union comprising of its specialist courts, the General Court as the first court of appeal, and the European Court of Justice as the supreme court. A competition decision of the European Commission is appealed to the General Court in the first instance.

[3] see e.g. Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 1.3

> These sections of the Competition Act adopt a rather different approach from that taken…in the EU…There are similarities…However, there is a key difference in approach…these laws treat abuse of monopoly as an offence, to be deterred through penalties. The approach of…the Competition Act 2007 is quite different: abuse of monopoly is treated instead as problem to be remedied, not an offence to be penalised. Abuse of monopoly can only be identified and dealt with following a formal investigation by the CCM, which might then seek to remedy the situation but cannot impose fines or other penalties. As a result, the CCM's investigation will be more focused on the effects of any abuse of a monopoly situation, compared to the EU…and less on proving specific behaviour…[4]

Thus the CCM will work to improve the functioning of Mauritian markets *per se* rather than enforce a prohibition.[5] In some circumstances, this may mean that the CCM will also refrain from taking action if it believes that to do so would be more beneficial to the market. Thus, just as the CCM has a margin of discretion not to propose a remedy, it should have been given a margin of discretion to apply financial penalties.

The effectiveness of enforcement can be measured against i) scope of action and ii) probity of investigation. Scope of action takes into account the powers that a competition authority has to 'deter, discover, stop and punish'[6] unilateral conduct. This is complemented by considering a) what exemptions from the competition rules exist, b) the powers available to the competition authority to investigate and impose sanctions, and c) the possibility for private individuals to initiate legal action (private enforcement) as a result of economic or financial

---

[4] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 1.4

[5] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 1.5

[6] E Alemani and others, 'New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries' (No. 1104, OECD Economics Department Working Papers, 2013), 9

harm.[7] Probity of investigation looks at the legal quality of the actions taken by the competition authority, and the extent to which the actions of the competition authority are free from the government interference, are fair and correspond with due process, and the transparency of the decisions of the competition authority and whether they can be appealed.[8] These two factors will determine the probability of whether or not business will engage in anticompetitive conduct.[9] Taking this into account, the nature of the CCM's general position – that monopoly is a problem to be remedied, not an offence to be penalised[10] – and the fact that the CCM lacks the power to administer financial penalties for abusive unilateral conduct requires further reflection.

The first part of this Chapter looks at competition institutions generally before exploring the institutional structure under CAM. The main issue identified is the CCM's combined investigatory and judicial role: the Thesis argues that these should be separated between the CCM and a specialist competition court. The second part of this Chapter moves on to consider the remedies under CAM and makes the argument that the enforcement of the CAM unilateral conduct rules is undermined without the ability to impose fines. The inclusion of such a provision would support the functionality of the 'object or effect' test of section 46. Finally, the Chapter looks at the use of commitments and self-regulation as the main form of enforcement used under the Mauritian unilateral conduct rules so far.

6.2. Competition Institutions

[7] E Alemani and others, 'New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries' (No. 1104, OECD Economics Department Working Papers, 2013), 9
[8] E Alemani and others, 'New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries' (No. 1104, OECD Economics Department Working Papers, 2013), 10
[9] DS Evans, 'Why Different Jurisdictions Do Not and Should Not) Adopt the Same Antitrust Rules' (2009) 10(1) Chicago Journal of International Law 161, 170
[10] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 1.4

Smallness of an economy, its level of development and growth priorities affects the way competition laws should be implemented and institutions developed.[11] In particular it has been argued that it is the development of effective institutions and enforcement that is the primary challenge, rather than adoption.[12]

This Thesis argues that the ultimate objective of Mauritian competition law and its unilateral conduct rules is to promote long-term social welfare. From a developing country perspective this is achieved through promoting and maintaining competition (both as a value in itself and also to achieve the benefits that arise from a competitive process). To generate competition, certain institutional conditions are required. These include, for example, an independent competition authority, investment in competition advocacy and the provision of judicial review.[13] The development of effective competition institutions is a significant challenge facing young competition law jurisdictions. In this regard, Kovacic has identified certain elements which, if developed properly may constitute the basic institutional foundations for (Western) competition law or, if addressed inadequately, may be inimical to the adoption and enforcement of those provisions.[14]

This particular aspect of competition research is gaining more ground, with particularly fruitful research being undertaken with regards a) the factors that should influence the design of a national competition authority and b) how performance of a national competition authority can be measured. In relation to

---

[11] OECD, 'Competition policy and small economies - Note by the Secretariat CCNM/GF/COMP(2003)5' (OECD Global Forum on Competition, February 2003), 1

[12] WE Kovacic,'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) 23 Brooklyn Journal of International Law 403, 404; WE Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: the Case of Competition Policy and Antitrust Enforcement' (2001) 77 Chicago-Kent Law Review 265; AF Ghoneim, 'Competition law and competition policy: what does Egypt really need?' Economic Research Forum Working Paper 0239 <http://www.mafhoum.com/press5/158E13.pdf> accessed 13 April 2011

[13] O Budzinski and MHA Beigi, 'Generating instead of protecting competition' in MS Gal, M Bakhoum, J Drexl, EM Fox, and DJ Gerber (eds) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015), page 231

[14] WE Kovacic,'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) 23 Brooklyn Journal of International Law 403; 'RH Lande, Creating Competition Policy for Transition Economies' (1997) 23 Brooklyn Journal of International Law 339; MS Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement Developing Countries' (2004) Competition, Competitiveness and Development 20

the design of a national competition authority, factors include i) autonomy and accountability; ii) leadership structure; iii) whether it is a stand-alone or subsidiary body, iv) whether there are one or more enforcement agencies; v) if the legislation or authority has single-purpose or multi-purpose; vi) whether the jurisdiction opts for competition enforcement or competition policy only; vii) remedies; and finally viii) internal design.[15]

With regards performance, Kovacic argues that measurement of national competition authority performance needs to shift from a narrow focus on legalistic measures of substantive results and process[16] to a broader perspective that actually measures organizational performance. This broader performance perspective would take into consideration: i) the clarity of the national competition authority's process and objectives; ii) the strategy and programme for achieving the purpose and objectives; iii) the degree to which the competition authority adopts a problem-solving approach; iv) the extent to which it invests and retains capital; v) the extent to which it invests in knowledge; vi) processes it adopts for internal quality control; vii) the degree to which it invests in infrastructure and viii) the extent to which it evaluates the effectiveness of its programme and processes.[17]

6.3. The Institutional Structure under CAM

The CCM is a stand-alone institution with the sole purpose of carrying out certain functions as designated to it under CAM. Whilst the appointment of the Commissioners and the Executive Director might be considered as being political appointments to some degree,[18] the CCM is an 'impartial' organ instructed to

[15] see e.g. WE Kovacic and DA Hyman, 'Competition Agency Design: What's on the Menu?' (Illinois Public Law and Legal Theory Research Papers Series No. 13-26, 2012); See also MS Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement Developing Countries' (2004) Competition, Competitiveness and Development 20
[16] The substantive legal results of the CCM are considered in the subsequent chapters on Abuse.
[17] W Kovacic, 'Rating Competition Agencies: What Constitutes Good Performance? (2009) 16 George Mason Law Review 603
[18] in that the appointments are made by the President of Mauritius on the advice of the Prime Minister following consultation with the leader of the opposition.

'perform its duties without fear, favour or prejudice;'[19] and the Executive Director is required to act independently when conducting investigations.[20] The CCM has a two-tier leadership structured consisting of the Executive Director[21] and the staff of the Commission on the one hand, and a five-member Commissioner 'board' on the other.[22] The Executive Director and staff have a broad operational remit within the CCM. As well as holding the prosecutorial function i.e. reviewing alleged breaches of CAM and making recommendations regarding the nature of such breaches and penalties, the operational team also undertakes the wider competition policy activities outlined above. Furthermore, whilst the CCM is the sole body responsible for the application of CAM, the work of the CCM may be expanded from time to time to take into account other public policy considerations as directed by the Minister responsible for the competition rules.[23] In terms of accountability, the CCM is held accountable in the following ways: it is required to i) provide an annual accounts report to the relevant Minister; ii) publish an annual report outlining its performance.[24]

Based on the different requirements proposed that make good competition institutions, CAM has positive attributes. However, in comparison to the institutional framework under the TFEU or SACA, and the previous framework envisaged under the 2003 Act, the CAM institutional structure is normatively weaker. The key issue is that the CCM is the main institution for competition governance under CAM. It undertakes a number of activities related to the promotion of competition e.g. the investigation and prosecution of anticompetitive behaviour, conducting market studies, publishing guidance and engaging in competition advocacy. However, the development of the unilateral conduct rules has been hindered because of the fact that it remains within the sole remit of the CCM. This type of internal decision-making process has two main criticisms: first, the internalising of a decision at first instance prevents

[19] CAM, section 4(2)
[20] CAM section 32.
[21] CAM, sections 20- 26
[22] CAM, sections 4 - 15
[23] CAM, section 37
[24] The last Annual Report to be published by the CCM was in 2013.

external review and thus impedes learning at this early stage.[25] Second, a risk may be created that the general enforcement approach of the NCA becomes biased towards its investigations per se,[26] which in turn may undermine public confidence in the enforcement process.

Having a taller and thicker competition institutional structure (as per the 2003 Act) would significantly address the issues within CAM. The 2003 Act had three institutions responsible for the implementation, enforcement and development of the legislation – the Office of Fair Trading, the Competition Advisory Council and the Competition Appeal Tribunal. Each of the institutions had their discrete responsibilities under the Act, thus establishing a clear separation of powers. Under the 2003 Act, the Office of Fair Trading held the investigatory and prosecution function;[27] the Competition Advisory Council was responsible for competition advocacy activities, including liaising with the relevant Minister, business and consumers on competition matters;[28] and the Competition Appeal Tribunal would have been responsible for judicial adjudication and review of investigations undertaken by the Office of Fair Trading.[29] Of particular importance here is the separation of powers between the competition authority and judicial decision at first instance: this establishes a clear remit for the national competition authority and serves to legitimise its investigatory findings by subjecting those conclusions to independent review. Furthermore, establishing a specialist competition court would address concerns regarding the expertise of the judiciary in deciding competition matters. It could be argued that the Competition Act 2003 was particularly notable in this respect: it required both the Competition Appeal Tribunal and the Advisory Council to have multi-

[25] DS Evans, 'Why Different Jurisdictions Do Not and Should Not) Adopt the Same Antitrust Rules' (2009) 10(1) Chicago Journal of International Law 161, 170;

[26] R Adhikari 'Prerequisite for Development-Oriented Competition Policy Implementation: A Case Study of Nepal', in UNCTAD, 'Competition, Competitiveness and Development: Lessons from Developing Countries' (UNCTAD/DITC/CLP/2004/1, 2004), 80; WPJ Wils, *Principles of European Antitrust Enforcement* (Hart, 2005), 161- 169

[27] Competition Act 2003, sections 4 and 5

[28] Competition Act 2003, sections 8 and 9

[29] Competition Act 2003, section 6

disciplinary expertise in areas of law, economics, consumer affairs and business.[30]

It should be noted that where the CCM wishes to issue a direction or order, it must hold a hearing[31] – the procedures for the hearing follow what one might expect from usual court proceedings, follow the principles set out in the Mauritian Constitution.[32] Nevertheless, the main proposal for reform in this instance is to reinstitute a specialist competition court or Tribunal. This is compatible with the Mauritian two-tier court structure that consists of the Supreme Court and various subordinate courts.[33] As discussed, establishing a separate competition court has a number of cumulative advantages: first, it would provide an independent review of CCM decisions; second it would have or develop the appropriate expertise for applying the complex law and economics which underpin competition rules; third, it would facilitate institutional dialogue to develop competition law; fourth, an authoritative body of decisional practice would be developed; this would lead to the fifth effect of giving greater weight to decisions under CAM.

6.4. Constitutional Issues in the CAM Procedure

There are two constitutional issues regarding CAM's procedural rules:[34]the first concerns an undertaking's right of appeal; the second concerns the procedure

[30] Specific representation on the Competition Advisory Council was also required from consumer organisations and the Mauritian Chamber of Commerce and Industry.
[31] CAM section 56
[32] Competition Commission Rules of Procedure 2009; Competition Commission (Amendment) Rules of Procedure 2011
[33] see e.g. https://supremecourt.govmu.org/scourt/cjei/index.html; The Mauritian Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law. Where it sits as a court of first instance, appeals against its civil or criminal decisions are heard by its two appellate divisions: the Court of Civil Appeal and the Court of Criminal Appeal. It will hear appeals from the sub-ordinate courts: these consist of the District Courts, Division, the Intermediate Court, the Industrial Court, a Magistrate, any other court or body established under another enactment – Article 82, Constitution of Mauritius; Section 69, Courts Act 1945. Section 83 of the Constitution provides that the Supreme Court has original jurisdiction in the interpretation of the Constitution.
[34] Competition Commission Rules of Procedure 2009; Competition Commission (Amendment) Rules of Procedure 2011.

followed when an undertaking does not comply with an order or direction of the CCM.

First, the right of appeal under CAM from the CCM to the Mauritian Supreme Court requires clarification. Article 82 of the Mauritian Constitution provides the Supreme Court with jurisdiction to hear appeals from subordinate courts in cases such final decision of civil proceedings or cases as may be prescribed by other laws. The appellate jurisdiction of the Supreme Court has been extended to include any other court or body established by any other statute.[35] Thus the first question is whether the CCM constitutes a subordinate court or 'any other court or body' for the purposes of appeal to the Supreme Court. CAM is not explicit about the status of the CCM in this regard: however, the fact that Part VIII contains specific provision for appeal to the Supreme Court clearly implies that the CCM comes within this broad category of bodies who come within the Supreme Court's appellate jurisdiction. The second question concerns the permitted subject matter which may be appealed to the Supreme Court: CAM limits the right of appeal to challenging the imposition of a financial penalty order or directions issued by the Commission.[36] It is clear that CCM directions and CCM decisions are not the same. For example section 60 governs directions provided for anticompetitive conduct which restrict competition.[37] The drafting of section 60(1) CAM provides that if *after a review* of the case the Commission determines that the conduct falls within section 46, it may give directions as required to remedy or mitigate the situation. Therefore the right to appeal a direction is the right to appeal the remedial order rather than the substance of the decision *per se*. The right to appeal a decision that the undertaking has acted anticompetitively is not provided for within the Act or the rules of procedure. Thus the relationship with the Mauritian Constitution and the Courts Act 1945 needs to be clarified. Is the CCM a body for the purposes of the Courts Act 1945? If so, it is not clear why CAM limit rights of appeal to orders and directions

[35] Courts Act 1945, section 69
[36] CAM Part VIII; Competition Commission Rules of Procedure 2009 Part VI
[37] Thus section 60 CAM is the provision for CCM directions relating to unilateral conduct.

Second, the Commission has a duty to monitor compliance with orders or directions. In the event that an undertaking fails to comply with directions or a financial order, the Commission must hold a hearing before it can take any further enforcement action.[38] Where the Commission determines that an undertaking has failed to comply with a direction without reasonable excuse it may apply to a Judge in Chambers for a mandatory order for the undertaking to make good the default that has occurred.[39] These provisions comply with Article 10 of the Mauritian Constitution - 'Provisions to Secure the Protection of Law'. However, given issues raised regarding a) the role of the CCM as both prosecutor and decision maker and b) the lack of clarity regarding the precise nature of the CCM as a court or body for the purposes of the Mauritian court structure, the constitutionality of this provision could be strengthened. The main issue here is that the CCM unilaterally determines the extent of the undertaking's obligations for breaching CAM and what constitutes 'reasonable excuse' or not for meeting those obligations. If, following a CCM hearing, reasonable excuse is not found, the CCM can make a unilateral application to a Judge in Chambers: to strengthen the constitutionality of this rule and give fair review to the undertaking for failure to comply, the proposal is that both parties should be able to make submissions to the Judge in Chambers and for that independent review to take place.

6.5. The SACA Institutional Structure

South Africa has a five-part institutional structure: the Competition Commission, the Competition Tribunal, the Competition Appeal Court, the Supreme Appeal Court, and the Constitutional Court. The South African Competition Commission acts a 'gatekeeper' to the adjudication system: it is the investigator of first instance; has the discretion whether or not to refer the case to the Competition Tribunal; where it makes such a referral it has the 'preferential entitlement to

[38] CAM sections 64 – 65; Competition Commission Rules of Procedure 2009 rule 22(4)
[39] CAM section 65(1)

prosecute'.[40] The Competition Tribunal and the Competition Appeal Court have exclusive jurisdiction to consider and interpret substantive competition issues relating to anticompetitive conduct;[41] the Competition Appeal Court also has jurisdiction over i) whether an action of the Commission or the Tribunal is within their respective jurisdictions; ii) any constitutional matter raised in relation to the Act and iii) the question whether a matter falls within its exclusive jurisdiction in relation to restrictive practices, mergers, and investigation and adjudication procedures.[42] The questions raised in section 62(2) SACA may also be appealed to either Supreme Court of Appeal or the Constitutional Court.[43] The main benefits of this system are two-fold. First and most importantly is the separation of the investigation and decision-making functions. Second, is the provision of specialist judicial forums.

An example of the benefits of a taller institutional structure and the ensuing interstitial dialogue relates to excessive pricing and the two key cases of *Mittal*[44] and *Sasol.*[45] *Mittal* is the first case to deal with the SACA excessive pricing provision, and concerns the interpretation and application of that section: *Sasol* concerns the interpretation of the *Mittal* decision.

In *Mittal*, the salient facts are as follows: the defendant undertaking (Mittal) was investigated for selling steel on the domestic market at an excessive price. The complainants referred the case to the ZACT (and won) with Mittal winning on appeal at the South African Competition Appeal Court ("ZACAC"). For the

---

[40] *Linpac Plastics (SA) Pty Ltd and Another v Du Plessis and Another, In Re: Linpac Plastics Ltd and Others v Du Plessis and Others* (019513) [2014] ZACT 64 (6 November 2014), paras 27-29. *LInpac* discusses the situation where a civil suit involves ancillary competition issues and where, for example, the South African High Court makes a referral to the Competition Tribunal. In this process of 'court referral' the Commission's role as gatekeeper is bypassed and the referral to the Tribunal is thus made by the 'side door', para 29.

[41] SACA, s. 62(1). See *Linpac Plastics (SA) Pty Ltd and Another v Du Plessis and Another, In Re: Linpac Plastics Ltd and Others v Du Plessis and Others* (019513) [2014] ZACT 64 (6 November 2014); *Astral Operations Ltd and Others v Competition Commission, In re: Competition Commission v Astral Operations Ltd and Others* (74/CR/Jun08) [2011] ZACT 83 (20 October 2011), para 8

[42] SACA ss 62(1) and (2)

[43] SACA s.62(4), the rights of appeal to those two courts which are governed by their respective rules and section 63 SACA.

[44] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

[45] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4 (17 June 2015)

purposes of the Thesis, the case is notable for the different positions between the structural/conduct approach adopted by ZACT one the one hand and the economic approach adopted by ZACAC on the other.[46]

The dialogue between the ZACT and ZACAC is particularly insightful as to the tensions of implementing an effects-based approach for dominance rules. The complainants were successful in the first instance ("Merits") decision. The structural/conduct approach adopted by ZACT focused on the dominant position of Mittal, the impact of Mittal on the competitiveness of the market and how these considerations shaped the 'calculation' of an excessive price. As will be recalled, excessive pricing cases are *per se* unlawful under section 8(a) SACA. However, it should not be assumed that ZACT set a low threshold for the application of section 8(a) because it followed a structure/conduct approach. On the contrary, ZACT emphasized excessive pricing could occur only in very rare cases characterized by uncontested, incontestable and unregulated markets with a super-dominant firm.[47] Having outlined its opinion on the market structure required for excessive pricing, ZACT set out the conduct requirements. It held that whether a price was related to the economic value of the product (and thus not be anticompetitive) could be determined by assessing whether it resulted from 'cognisable competition considerations.'[48] In this regard, ZACT took into account certain market conditions and conduct of Mittal e.g. that Mittal participated in an arrangement which prevented parallel imports of its products, thus reducing supply and allowing it to maintain price at a monopoly level. On this basis ZACT held that it was unnecessary to undertake an empirical quantitative study of prices. The market segmentation effected by Mittal meant that its prices did not bear a reasonable relationship to the economic value of its products.[49]

---

[46] The case also explains the influence of Article 102 TFEU on the South African provision of excessive pricing and how South African law differs and provides a framework for determining what constitutes an economic price.

[47] Harmony Gold Mining Company Ltd & Another and Mittal Steel South Africa Ltd and Another (13/CR/FEB04) [2007] ZACT 21 (27 March 2007), paras 96 and 106.

[48] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), para 21.

[49] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), para 23.

Adopting a literal approach to SACA's dominance provisions, the structure/conduct approach was soundly rejected by ZACAC on appeal. First, it stated the dominance rules apply to *all* undertakings which meet the turnover and market share thresholds; therefore a) the concept of super-dominance cannot be read into section 8 for which there is no provision and b) nor can additional thresholds be added. [50] Thus, there is no support for the structure/conduct approach under SACA.[51] Rejecting the first instance approach allowed ZACAC to put forward its assessment of economic value. First, as was held at first instance, the assessment is about the relationship between a price and economic value.[52] Second, that relationship is determined by an empirical enquiry into costs: however, it is the costs of the 'notional competitive norm' i.e. the costs borne in a competitive market that are the benchmark, not the undertaking's own peculiar costs.[53] If the undertaking's price in relation to competitive market constitute normal profit, there is no breach of section 8(a): however, a test of reasonableness applies: if the empirical assessment indicates pure profit is being made and that rents are being extracted from the market. It is at this point that the specific circumstances pertaining to the dominant undertaking can be taken into account.[54]

---

[50] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), para 30

[51] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), para 33

[52] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), para 34

[53] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), para 43. The importance of establishing economic value in South African excessive pricing cases appears to have been accepted by ZACT see *Normandien Farms (Pty) Ltd v Komatiland Forests (Pty) Ltd* (018507) [2014] ZACT 31 (4 June 2014). Interestingly, both the decision at first instance and at appeal were influenced by *United Brands*, albeit at differing judicial levels. The ZACT structure/conduct approach was influenced by the European Commission's decision in *United Brands;* ZACA's decision by that of the European Court of Justice – see *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), paras 37 – 43.

[54] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009), para 43

The issue of economic value was revisited by ZACAC in *Sasol*.[55] Like *Mittal*, the case involved the defendant undertaking pricing its domestic goods higher than its goods for export. ZACAC drew the following distinction between the two cases:[56]

> In the *Mittal* case, this Court was concerned to deal with the pricing policy adopted by *Mittal*. In this case, the Tribunal had, in essence, taken the view that, once a firm is super dominant, a price that cannot be found to be 'based on cognisable competition considerations is excessive, in that it will not have been determined by the free interaction of demand and supply in a competitive market. Faced with a Tribunal decision that totally ignored all the detailed evidence led before it, this Court in *Mittal* sought to provide a framework to evaluate this evidence and thereby determine whether the price so charged was excessive…In the present case, the key question turned on a different issue: the refusal to pass on a cost advantage which turned not on the pricing policy of appellant alone but also on Synfuels, which was not a party to these proceedings. In this case therefore, if the cost of an essential component of the production of product/s, whose prices are under scrutiny, can be justified on rational grounds, that should be the yardstick employed in the primary inquiry with which the Court is engaged…

As a result of vertical integration, Sasol was able to produce at a cheaper cost compared to its rivals. However, it maintained its price at or just below that of its rivals.[57] There are a number of parallels between the judicial approaches and tensions at first instance and at appeal in *Mittal* and *Sasol*. Again at first instance, ZACT sought to apply a conduct-based approach to section 8a – in this case that Sasol should have passed its cost advantages to consumer, again this was rejected by at appeal. ZACT grounded its conduct-based approach in the *Mittal* ruling, but was criticised at appeal for a partial reading of *Mittal* that ignored the

---

[55] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4 (17 June 2015)

[56] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4 (17 June 2015), para 111

[57] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4 (17 June 2015), para 3 -18

decision i) that economic value is based on the cost levels of a competitive market and ii) specific cost advantages of a dominant undertaking are relevant only in instances of pure profit.[58] Bleazard strongly criticises the overly-formalistic approach adopted by ZACAC for the following reasons.[59] SACA is a multifaceted provision with both social and economic objectives: its successful implementation is critical to South Africa's socio-economic performance. In order to achieve this, the South African Competition Commission and ZACT have complex mandates to fulfill, which may be in part be satisfied by adopting a purposive approach to the SACA provisions. However, the development of a successful South African competition culture may be stymied by a judicial approach focusing on strict procedural legality that simultaneously a) prevents the balancing of interests pursued under SACA and b) invites well-funded undertakings to exploit the legal framework and prevent competition.[60] Again this relates to Mauritius and the risk that an overly technocractic application of competition rules may allow wealthier/incumbent undertakings to exploit the regulatory frameworks and impede competition.

6.6. Remedies for breaches of Section 46 CAM

The remedies that are available for abuses of dominance under CAM are governed by section 60, which stipulates the directions the CCM may give in relation to conduct which restricts competition. The construction of the remedies under section 60 is in three parts.[61] First, the CCM may issue such directions as are reasonable to remedy, mitigate or prevent i) the adverse effects on competition or ii) such detrimental effects on consumers or users that result, or are likely to result from the adverse effects on or absence of competition.

[58] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4 (17 June 2015), paras 98 – 116. ZACAC assessed a number of cost bases it deemed relevant to the assessment of economic value e.g. capital assets, capital reward, group costs, and allocation of common costs

[59] J Bleazard, 'Pigeon-holed by Precedent: Form versus Substance in the application of South African Competition Law' in D Lewis (ed), *Building New Competition Law Regimes: Selected Essays* (Edward Elgar, 2013), 81

[60] J Bleazard, 'Pigeon-holed by Precedent: Form versus Substance in the application of South African Competition Law' in D Lewis (ed), *Building New Competition Law Regimes: Selected Essays* (Edward Elgar, 2013), 99

[61] Section 60 CAM

Second, the remedy should have regard to the public-interest test under section 50. Third, the direction may take the form of structural or behavioural directions such as given in section 60(3) CAM: these include requiring the undertaking to cease a course of conduct; granting access to facilities; separating itself from an enterprise; and continuing to provide the CCM with information as required.

The CCM identifies a broad approach in the design and implementation of remedies in which it aims to improve the future functioning of the market and address the 'root cause' of anticompetitive unilateral conduct.[62] The reference to the root cause of anticompetitive conduct is notable: to really address the root cause of an issue one has to identify the factors which if addressed will prevent reoccurrence of the problem. If the CCM really wants to address root causes of anticompetitive conduct, its focus on the long-term social welfare objective of the CAM and the promotion of competition culture takes greater importance. Structural remedies are tangible and have a more immediate impact than behavioural remedies. However, it is behavioural remedies which are more likely to address the root causes of anticompetitive conduct: it is the values and culture underpinning the conduct which will have led to the anticompetitive structure and effect in the first place. An example of this approach is taken in *Insurance and Credit Products* – this is discussed later in this Chapter.

In addressing harm to users or consumers, the CCM is not required to link its remedy back to detrimental harm to those participants *per se,* but may base its remedy on the adverse effect to competition or absence thereof. Whilst this does provide for administrative efficacy, it could be argued that the provision may adversely affect the competitive process overall if harm to the consumer is not taken into consideration. Akman argues this in her proposal that a test for abuse must account for harm to competition and harm to the consumer.[63] However, this concern is checked by the requirement that the CCM, when constructing its

[62] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.2
[63] P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart, 2012)

remedy takes into account the efficiencies prescribed by CAM. This allows the CCM the option of not taking any enforcement action if the efficiencies are significant.

When drawing up its remedies, the CCM will also take into account three factors alongside the specific requirements under section 60: i) effectiveness, ii) timeliness, and iii) proportionality of implementation costs against expected benefits. The effectiveness of remedies will principally be measured against its effects on competition in the market.[64] Thus in the first instance, the CCM prefers to adopt remedies which seek to improve the competitiveness of the market rather than those which deal with the adverse effects of competition.[65] This is on the basis that competition (through the operation of the market) is more likely to produce beneficial outcomes for consumers and the efficient operation of the market.[66] Only when such measures are unavailable, the costs are disproportionate to expected benefit, or if an interim measure is required (as the market may take time to strengthen) will the CCM consider measures which address weak competition.[67] Finally, the CCM will consider whether the remedy is proportional by comparing its implementing cost against the anticipated effects of the intervention. In terms of evidencing its analysis, the CCM expects to be able to provide a comprehensive analysis of costs.[68] It will not, however, seek to quantify the expected benefit in relation to that cost.[69] In the event that the costs are deemed to be greater than expected benefits, the CCM will consider what alternatives are available: if no further alternatives available, the CCM retains the discretion not to take action.[70] It is notable that the CCM will check

[64] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.5
[65] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.9
[66] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.9
[67] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.9
[68] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.19- 3.23. The CCM will not take into account any loss of profit or other value resulting from the possession of monopoly power.
[69] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.20
[70] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 3.17

its own action against a test of proportionality, but the same is not required for the assessment of public-benefit (as discussed in the previous Chapter.) In any case, whilst it is important that the CCM's action is proportional, the test of cost versus effect is a useful starting point. This is particularly so when one considers the current trend of CAM unilateral conduct cases which have concerned undertakings possessing entrenched and significant positions of dominance. However, complex cases may require a more subtle proportionality test, such as one based around least restrictive intervention, in order to account for cost versus effect.

6.6.1. Structural Remedies under CAM

Structural remedies are interventions that alter the structure the market, usually to make the market more competitive. There is an increased inherent tension for small economies between fostering competition and being generally permissive towards large size of undertakings.[71] On the one hand, particularly in the face of oligopolistic competition, structural interventions to reduce concentration, and therefore minimise the impact of market power and interdependence may improve the competitiveness of the market. In certain cases on the other hand, the market may only be able to efficiently support a limited number of firms. Thus it is argued that structural remedies constitute inefficient intervention if it is unlikely that smaller firms remaining in the market are unlikely to reach scale efficient size.[72] Adhikari argues however that structural measures, geared towards to keeping a 'watchful' eye on market structure and tendency towards market exploitation may, when taking into account institutional and capacity factors, be a better tool to prevent anti-competitive practice.[73] Given the choice, where the competition environment tends to skew towards market concentration, young competition jurisdictions

---

[71] MS Gal, 'Size does matter: The Effects of Market Size on Optimal Competition Policy' (2001) 74 Southern California Law Review 1437, 1468

[72] MS Gal, 'Size does matter: The Effects of Market Size on Optimal Competition Policy' (2001) 74 Southern California Law Review 1437, 1468;

[73] R Adhikari 'Prerequisite for Development-Oriented Competition Policy Implementation: A Case Study of Nepal', in UNCTAD, 'Competition, Competitiveness and Development: Lessons from Developing Countries' (UNCTAD/DITC/CLP/2004/1, 2004), 80

like Mauritius should err on the side of promoting and maintaining competition and improving the dynamic aspects of the market. If there are additional structural factors affecting the achievement of scale economies, policy makers should focus efforts on mitigating the effects of these factors so that the competitive process drives efficient behaviour, rather than competition regulators substituting what it considers efficient for competitive market structures.

The CCM identifies two basic structural remedies it may take under section 46 CAM: divestment and IP remedies.[74] Notwithstanding the effectiveness of divestment, its highly interventionist nature means that the CCM will generally use divestment as a remedy where it is satisfied 'no other equally effective remedy exists, and that such intervention is not disproportionate to the expected benefits.'[75] Whilst the CCM seeks to grant the undertaking as much discretion where practicable in selecting the manner of divesting its assets, the CCM makes the divestiture subject to certain strict requirements. In the first instance, the divestment must be viable in i) providing effective competition in the market and ii) remaining a profitable enterprise.[76] Second, the CCM may also set conditions and/or requirements relating to the timing of the divesture and to whom the assets may be sold.[77]

6.6.2. Conduct and Behavioural Remedies under CAM

Unlike structural remedies, conduct remedies seem to be less controversial for adoption by small economies in regulating their predominantly oligopolistic/monopolistic structures. This is perhaps due to their 'softer' nature. Whilst structural (and financial) remedies provide short-term changes in the functioning the market, this Thesis argues that conduct remedies have the

[74] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), paras 4.4 – 4.13
[75] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), 4.4
[76] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), paras 4.5-4.6
[77] This may include the divestment of IP rights in certain circumstances – see CCM6 paras 4.12-4.13

greatest potential over the long-term for bringing the cultural values and principles required to sustain both fair and efficient competition over the long-term. As discussed earlier in this Thesis, this requires a clear articulation of the values and behaviours that constitute a competition culture and, in addition, a proper analysis of the root causes of anticompetitive conduct, the importance of which has been identified by the CCM in its approach to enforcement.

This type of remedy promotes dialogue between the CCM and the undertakings involved. First, the suggested remedy may come either from an order of the CCM or a commitment from the undertaking itself. Second, the CCM recognises the importance of effective monitoring and ensuring that the undertaking implements the order imposed. In this instance, it appears that an element of self-regulation is involved: the behavioural order may contain arrangements for review based on time and/or objective circumstances, but the review itself will not be as comprehensive as the investigation.[78]

The CCM distinguishes between three types of conduct measures: i) those that seek to improve market access or smaller competitor expansion (enabling measures), ii) informational remedies, and iii) price control remedies. Enabling measures may increase market access by compelling the undertaking to deal with certain competitors. Such 'access' measures may be implemented where the undertaking in question is vertically integrated; restricting a monopolist's ability to conclude exclusive contracts with customers or supplies; or restricting other types of activity such as the use of discounts and bundling.[79]

The informational remedies that can be adopted by the CCM aim at correcting the informational asymmetries that exist in a market. Amongst other things, this may include requiring dominant incumbents to provide information about other competitors or about methods of switching between competitors.[80] However, the

[78] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 4.16
[79] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), paras 4.17-4.18
[80] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 4.22

CCM states that informational asymmetries might be better addressed by general consumer regulations rather than decisions from the CCM which are applicable only to the undertakings concerned.[81]

Finally, in relation to the price control remedies, CAM permits the CCM to order an undertaking to amend or cease its conduct, which may include conduct in relation to pricing. The CCM envisages such intervention as being used to immediately curb excessive pricing resulting from abuse of dominant positions. Notwithstanding, this extensive power to regulate conduct, the CCM reiterates its position that it considers the market to be the best regulator of pricing for the benefit of Mauritian consumers and the Mauritian economy: thus in general it prefers remedies that focus on protecting or improving competition.[82]

6.6.3. Examples of CCM Remedies

Of the cases completed so far, *IBL* and *Insurance and Credit Products* are the two cases where the CCM has specified directions under section 60 CAM.

In *IBL*, the Executive Director advised that behavioural remedies would be the most appropriate method to address the restriction of competition caused by the defendant's contracts involving volume-related rebates and shelf-space purchasing.[83] Identifying five possible options for intervention,[84] the Executive Director suggested that a direction or combination thereof which required IBL to a) cease the anticompetitive agreement and b) refrain from engaging in further anticompetitive conduct by way of retroactive rebates for its dominant product

[81] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 4.23
[82] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), para 4.26
[83] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010), para 7.1.6
[84] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010, para 7.1.8: i) do nothing; ii) terminating the contract in whole or in part; iii) direct IBL to cease offering retroactive rebates related to its dominant product; iv) direct IBL to cease offering retroactive rebates on any of its products; v) issue a direction under section 60(3)(b) CAM in relation to any sale contracts

would be appropriate.[85] This recommendation was adopted the Commissioners, with the direction requiring IBL to refrain immediately from engaging in such conduct.[86] As has been noted, the CCM's action had a positive effect on the competitiveness of the market: following its intervention, two undertakings entered with rival products.[87]

In *Insurance and Credit Products*, the Executive Director also recommended behavioural remedies. Having deemed the tying agreements of mortgage products and life insurance to be both capable of market foreclosure and being exploitative nature, the Executive Director recommended two principal remedies. The first remedy recommended that all banks found to have breached section 46 as part of the investigation be required at the insurance point of sale to provide at least three quotes from other insurance providers and provide more information about the consumers' legal rights, including the right to choose their insurer.[88] The second requirement was for the banking industry to develop and adopt a banking code of practice. These recommendations were followed by the Commissioners.[89]

Earlier in this Chapter, reference was made to the importance of behavioural remedies for promoting competition and a pro-competitive Mauritian competition culture. *Insurance and Credit Products* captures the normative aspect of behavioural remedies in two ways. First, the requirement of developing a banking code of practice applies to the Mauritian banking industry

---

[85] Competition Commission of Mauritius *IBL Consumer Goods' sales contracts with retail store investigation* CCM/INV/001 (23 June 2010, section 7.2

[86] Decision of the Commissioners of the Competition Commission of Mauritius *IBL Consumer Goods' Sales Contract with Retail Stores* CCM/HG/INV 001 (9 September 2010), section 4

[87] Competition Commission of Mauritius 'Evaluation of CCM case: IBL Consumer Goods Sales Contracts with Retail Stores' (18 November 2011)

[88] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), section 7, in particular paras 7.11 – 7.31

[89] Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Barclays Bank Plc* Commission/HG/004/05 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to Banques des Mascareignes Ltee* Commission/HG/004/04 (5 November 2012); Decision of the Commissioners of the Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector – relating to HSBC* Commission/HG/004/09 (5 November 2012)

as a whole and thus presents a sector-wide measure aimed at improving the competition standards, values and behaviour throughout the sector. Second, in relation to behavioural remedies, it is worth noting the behavioural changes triggered by the Executive Director's investigation preceding the Commissioners' decision. Measures included: front-line staff being trained on making consumers aware of their free choice regarding life insurance and a consumer form introduced for individuals to confirm that they have been informed of their right to choose; broader agreements being adopted with inclusion of more insurers to be promoted at point of sale; ensuring that at the beginning of the loan process, consumers are informed of the need to take insurance, that they have a free choice and that a list of providers is given.[90]

6.7. Financial penalties

This Thesis argues that the inability to impose fines for abuse of dominance is a critical and detrimental lacuna to the unilateral conduct rules under CAM. Whether or not intended, the omission indicates a political choice that undermines the legitimacy of CAM, weakens the normative and deterrent effect of unilateral conduct provisions and is inconsistent with the overall Mauritian competition law framework. These issues are considered in turn.

In the first instance, the availability of fines (or not) for unilateral conduct communicates something about the moral values which inform both that aspect of CAM, and the legislation overall. Thus, the fact that fines are available for anticompetitive collusive agreements but not for anticompetitive unilateral conduct indicates a certain moral choice with regards unilateral conduct under CAM. Thus the choice is whether such unilateral conduct is immoral (*mala in se)*, amoral (*mala prohibita*) or moral and thus part of normal human behaviour (thus rendering competition law immoral).[91] The moral status assigned to unilateral conduct under CAM is multilayered and ambiguous. The fact that

[90] Competition Commission of Mauritius *The Bundling of Insurance and Credit Products in the Banking Sector* INV007 (30 August 2012), para 7.19
[91] ME Stucke 'Morality and Antitrust' (2006) 3 Columbia Business Law Review 443, 444

anticompetitive unilateral conduct is prohibited suggests in the first instance that unilateral conduct is considered amoral. This is the correct position. The *prima facie* ambiguous nature of unilateral conduct (in general) without further assessment means that such conduct should be seen as amoral to begin with. This does not prevent certain types of conduct being made *per se* illegal if case law develops a particular line of analysis or the legislature identify a policy requirement. On a scale of immoral to moral values, two aspects of CAM nudge the unilateral conduct to the 'immoral' end of the scale. First, section 46 is capable of capturing conduct by object. This recognises therefore that there may be cases of unilateral conduct which are by their nature contrary to competition and thus more immoral. Second, public interests and efficiencies may mitigate the terms of the remedy which may be imposed, but are not available to exculpate conduct from the remits of section 46. However, nudging the position of unilateral conduct under CAM to the moral side of the scale are two other factors: first, the fact that fines cannot be imposed for section 46 abuses, notwithstanding the degree of anticompetitive object or effect that may exist. Second is the CCM's position on unilateral conduct – that *anticompetitive* unilateral conduct is merely 'a problem to be remedied, not an offence to be penalised.'[92] Given the broad scope of unilateral conduct, and the social welfare aims of Mauritius in relation to its competition law, this perspective seems premature. The current decisional practice under the Mauritian unilateral conduct rules bears this out: in cases of blatant naked restriction – such as requiring competing contractors, should they wish to participate in tenders, to obtain safety certificates which do not in fact exist (*Manhole Covers*), indicates that there will be cases under Mauritian unilateral conduct law where the anticompetitive issue is of such a degree that it is reasonable to impose a fine, or at least have the option to impose such terms if necessary.

The second key issue is deterrence. Like morality, this is a complex factor and, like many matters regarding unilateral conduct, not easily measured.[93] Intuitively, the imposition of fines would increase or amplify the deterrent

[92] Competition Commission of Mauritius 'Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009), para 1.4

[93] ME Stucke 'Morality and Antitrust' (2006) 3 Columbia Business Law Review 443, 475

nature of CAM by providing a complete suite of remedies for the CCM: this Thesis advocates that this principle is sound. The ability to impose financial penalties for inimical acts of unilateral conduct (whether by object or effect) would support the development of pro-competitive culture, and support the legitimacy of the CAM. Nevertheless, the imposition of fines raises a number of questions. The first issue is how such fines should be calculated. Bageri *et al.* demonstrate that no matter the methodology selected e.g. whether one calculates the fine in reference to total revenue for example, or by revenue in the relevant market, distortions and disincentives to comply may occur.[94] For example, the starting point for creating the deterrent effect of fines is when fines are sufficiently larger than the extra profits that may be earned through anticompetitive behaviour.[95] Adhkari proposes that such fines, from a developing country perspective, should be based on a percentage of turnover rather than an 'absolute limit': this should support the deterrent effect felt by larger organisations whilst ensuring that smaller undertakings are not bankrupted by competition law enforcement:[96] nevertheless, the deterrent effect on larger firms is by no means guaranteed if they are at or close to the beginning of the supply chain where the deterrence utility of the fine is reduced.[97]

Given the limited resources available for enforcement, a further specific issue for developing economies is the relationship between the size of fines and levels of

---

[94] V Bageri, Y Katsoulacos and G Spagnolo, 'The Distortive Effects of Antitrust Fines based on Revenue' (2013) 123 (572) The Economic Journal 545

[95] see e.g. W Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 2 World Competition 183; RS Khemani, 'Competition Law: Some Guidelines for Implementation' in Liberalised Trade and Fair Competition, (CUTS, Calcutta, 2005); R Adhikari 'Prerequisite for Development-Oriented Competition Policy Implementation: A Case Study of Nepal', in UNCTAD, 'Competition, Competitiveness and Development: Lessons from Developing Countries' (UNCTAD/DITC/CLP/2004/1, 2004), 80. Wils acknowledges an alternative approach to deterrence known as internalisation. A financial penalty based on the principle of internalisation seeks to make the offender internalise the benefits and costs of their action by committing them to their efficient violations (benefits exceed costs) and avoiding inefficient violations (costs exceed benefits) – see GS Becker 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169; WM Landes 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652

[96] R Adhikari 'Prerequisite for Development-Oriented Competition Policy Implementation: A Case Study of Nepal', in UNCTAD, 'Competition, Competitiveness and Development: Lessons from Developing Countries' (UNCTAD/DITC/CLP/2004/1, 2004), 80

[97] V Bageri, Y Katsoulacos and G Spagnolo, 'The Distortive Effects of Antitrust Fines based on Revenue' (2013) 123 (572) The Economic Journal 545, 554. See also MK Block and JG Sidak 'The Cost of Antitrust Deterrence' (1980) 68(5) Georgetown Law Journal 1131

detection. Again, where resources are scarce, the intuitive response might be to impose high fines as a matter of principle. However, this approach is considered to be a 'sub-optimal' approach to for imposing financial penalties.[98] Large fines might not deter dominant undertakings if risk of detection is low, but this is subject to the degree that dominant undertakings are risk-averse.[99] Overall, the better approach, within transparent parameters, appears to be to scale the size of the fine in relation to the gravity of the offence,[100] with different methodology allowed for unilateral conduct offences where appropriate.[101]

The last matter relates to the internal coherence of CAM. Even if the above discussions were not taken into account, CAM already has a financial penalties framework in place for horizontal agreements. With regards the deterrent effect of fines and their relationship to horizontal agreements:[102]

> …the CCM regards breaches Sections 41 and 42 as particularly serious breaches of the Act. The greater the damage to customers of colluding enterprises, resulting from the increase in price over levels that would otherwise have obtained, the larger the CCM will normally set the penalty, up to the maximum limit imposed by the Act.
>
> By its clear prohibition of collusive agreements, and the penalty regime it introduces, the Act establishes the principle that collusive agreements are no longer acceptable as a way of doing business...

---

[98] see e.g. MK Block and JG Sidak 'The Cost of Antitrust Deterrence' (1980) 68(5) Georgetown Law Journal 1131, 1133

[99] MK Block and JG Sidak 'The Cost of Antitrust Deterrence' (1980) 68(5) Georgetown Law Journal 1131, 1135; W Breit and KG Elzinga, 'Antitrust Penalties and Attitudes Towards Risk: An Economic Analysis' (1973) 86 Harvard Law Review 693, 705

[100] G Stigler, 'The Optimum Enforcement of Laws' (1970) 78 Journal of Political Economy 526; E Motchenkova, 'Determination of Optimal Penalties for Antitrust Violations in a Dynamic Setting' (2008) 189 European Journal of Operational Research 269; RH Lande 'Why Antitrust Damage Levels should be Raised' (2004) 16 Loyola Consumer Law Review, 329

[101] For example, A Heimler and K Mehta suggest that an alternative approach for abuse of dominance fines could be based on changes in the Lerner Index. One potential implication of this assessment is that firms with a lower degree of dominance should face higher fines than those with higher degrees of dominance, who gain less from the elimination of (marginal) competition: A Heimler and K Mehta, 'Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence' (2012) 35(1) World Competition 103

[102] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), paras 2.12-2.13

As argued above, there have been unilateral conduct cases under CAM, and there may be more in the future, where the breaches in question under section 46 might have been considered sufficiently serious so as to attract a financial penalty. The statutory framework itself provides the following. First, as with unilateral conduct, the CCM can issue directions to address the structural or behavioural issues for offences under sections 41 and 42.[103] Where required, a financial penalty can be issued in addition to a direction or in the alternative.[104] Where a financial penalty is issued, it is limited to a) 10% of the turnover of the undertaking's operations in Mauritius and b) up to five years' worth of conduct prior to the case. Subject to this maximum, the CCM will take into account the extent seriousness of the breach upon competition and the consumer, the deterrent effect of the penalty, and other aggravating or mitigating factors. Aggravating factors include the involvement of executives and senior management, and whether the breach was committed intentionally.[105] Mitigating factors include whether there was genuine uncertainty on the part of the undertaking as to whether its conduct constituted a breach of the Act, whether adequate steps were taken to ensure compliance with the Act, and whether the undertaking terminated its activities immediately following CCM intervention, and co-operated with the CCM so as to facilitate expeditious enforcement. As CAM authorizes fines for certain types of conduct, and the CCM has established principles for assessing fines, there exists a framework for including this type of penalty under section 46.

6.7.1. Fines under Article 102 TFEU and SACA

Under Article 102 TFEU, the guidance for fines is given in secondary legislation and guidance, namely Regulation 1/2003. The basic approach for setting fines under Article 102 TFEU is essentially three-fold: first, identify a base-line figure, second, apply a multiplier e.g. in relation to the number of years that the conduct has been in place; third, adjust for aggravating or mitigating factors as

[103] CAM, section 58
[104] CAM, section 59
[105] Competition Commission of Mauritius 'Guidelines: Remedies and Penalties CCM 6' (2009), paras 2.11-2.18

required.[106] A controversial issue is the EU1.06 billion fine issued by the European Commission in *Intel*.[107] There are two reasons for this controversy. Size of the fine is one reason; consistency of Article 102 TFEU application is the other. The debate regarding the size of fines has already been discussed above and will not be repeated here. As concluded, should Mauritius decide to revise CAM and permit fines for abusive unilateral conduct (which it should), the legislature will have to either decide or delegate that framework. The more interesting point here is that the size of the fine issued in *Intel* is incongruent with an effects-based approach under Article 102 TFEU.[108] This concern is based around the argument that the level of fine should be proportionate to the effect of the anticompetitive conduct. However, as discussed above, the relationship between fines and the anticompetitive effect is but one factor that ought to be taken into consideration. The *Intel* decision is criticised for taking into consideration the object of the defendant undertaking's conduct.[109] However, as has been confirmed, Article 102 TFEU captures anticompetitive unilateral conduct by object where the case arises, and thus the naked restrictions applied in *Intel* would render object a legitimate consideration for the assessment of the imposed fine. Furthermore, if one accepts that the imposition of fines is suitable for unilateral conduct violations that are immoral – such as naked restrictions of competition – the assessment of fines by way of object may be appropriate.[110]

Section 61 SACA governs the imposition of fines under South African competition law, including the rules applicable to the unilateral conduct rules. In all instances where there is a contravention of section 8 SACA, the dominant undertaking may be fined up to 10% of its turnover in South Africa.[111] The two most important points relate to a) the factors that influence the severity of the

[106] F Dethmers and H Engelen, 'Fines under Article 102 on the Treaty on the Functioning of the European Union' (2011) 31(2) European Competition Law Review 86, 86
[107] *Intel* (Decision COMP/37.990)
[108] F Dethmers and H Engelen, 'Fines under Article 102 on the Treaty on the Functioning of the European Union' (2011) 31(2) European Competition Law Review 8686
[109] F Dethmers and H Engelen, 'Fines under Article 102 on the Treaty on the Functioning of the European Union' (2011) 31(2) European Competition Law Review 8690
[110] ME Stucke 'Morality and Antitrust' (2006) 3 Columbia Business Law Review 443,489. Stucke identifies three elements for determining whether a competition law violation is immoral: i) the intent (or object) behind the conduct; ii) the moral values held by society; and iii) the social harm resulting from the conduct.
[111] SACA, section 61(2)

fine and b) the distinction between prohibitions of specific unilateral conduct – sections 8(a), (b) and (d) – and the general prohibition under 8(c).

Under section 61(3), ZACT must consider a number of factors including the nature, duration, gravity and extent of the conduct; the market circumstances; and whether the undertaking has previously contravened the Act.[112] Returning to CAM and the absence of fines, the point is quite simple: such factors could have been included in the consideration of fines of breaches of section 46.

Regarding fines and the distinction between SACA specific prohibitions and general provisions, section 61 provides that fines are immediately available for breaches of the specific prohibitions. Where the undertaking breaches the general prohibition, fines are available only if the undertaking is engaging in 8(c) SACA conduct which is a 'substantial' repeat by the *same* undertaking of conduct which ZACT has previously prohibited. Mackenzie argues this substantially weakens the deterrent value of section 8(c) SACA.[113] Nevertheless, if established, the South African provision allows for recidivist conduct to be accounted for and thus serves to enhance the deterrent nature of those fines.

6.8. Commitments and self-regulation

Under section 63 CAM, an undertaking in a monopoly situation may voluntarily offer commitments or obligations to address any competition concerns that arise from an investigation. The Executive Director will review the commitments as part of his investigation and offer his recommendations on them to the Commissioners. It is then for the Commissioners to decide whether the undertakings are acceptable.

[112] The full list of factors under section 61(3) SACA are: a) the nature, duration, gravity and extent of the conduct; b) loss or damage caused; (c) the undertaking's behaviour; d) the circumstances of the market; e) level of profit; f) degree of co-operation from the undertaking; g) whether the undertaking has previously contravened the Act.

[113] N Mackenzie, 'Rethinking Exclusionary Abuses in South Africa' (No Date) < http://www.compcom.co.za/wp-content/uploads/2014/09/Rethinking-Exclusionary-Abuse-in-SA.pdf > accessed 30 September 2015, 8

Hitherto, four section 46 cases have been settled on the basis of commitments offered by the undertakings. These have formed an expeditious method for resolving Mauritian unilateral conduct decisions. Two issues that relate to commitments are as follows: First, generally speaking, the CCM will usually be at an information-disadvantage compared to the undertaking. Therefore it is always possible for a dominant undertaking to game the process by offering commitments which address currently identified competition issues, but masks others that the CCM has yet to highlight. Thus the CCM's review of these commitments is important not only for ensuring that the commitments address the issues at hand, but also to i) promote the Mauritian competition culture and ii) support Mauritian businesses to compete in a manner which benefits both the Mauritian economy and encourages critical awareness of CAM and self-regulation. The second issue is whether the provision of commitments might hinder the development of Mauritian rules by preventing a formal decision being adopted. This might be considered a risk in principle: however, in the decisions advanced so far, the CCM has still produced an investigative report and decision where necessary, even where an undertaking has taken corrective action between preliminary findings and conclusion of the formal investigation.[114] The four cases of commitments made under the Mauritian unilateral conduct rules make for interesting reading and may be split into two categories. The first category (*Broadband and Pay-TV; Image-Based Clearing Solutions,*) demonstrate commitments which explicitly address the conduct of the dominant undertakings and thus implicitly communicate matters on long-term social welfare and the Mauritian competition culture. The second category (*Manhole Covers,* and *Coolers*) represents the case where the commitments perhaps do not fully address the competition concerns at hand and provide an example where the CCM might need to give more considered analysis.

In *Broadband and Pay TV*, Mauritius Telecom was subject to section 46 investigation for two aspects of its conduct. First, Mauritius Telecom removed an in-demand stand-alone broadband service, replacing it with a tied broadband

[114] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012)

and television subscription product. Second, it priced its new products in a manner which existing subscribers felt was coercing them to take this new product even though it was not wanted. During the investigation, and subsequently confirmed in its commitments, Mauritius Telecom undertook a number of corrective measures: i) to reinstate the standalone broadband service; ii) maintain service quality to all consumers (customer service and signal quality) regardless of subscription package; and iii) price its products appropriately. In assessing the efficacy of these commitments, the CCM concluded that the measures would address the exclusionary and exploitative issues at hand, provide choice to both existing and potential subscribers (in relation to Mauritius Telecom and the market overall), and remove consumer coercion.[115]

Like *Broadband and Pay-TV*, the commitments given in *Image-Based Clearing Solutions* primarily address the conduct at hand. The issue concerned Blanche Birger tying its hardware with its dominant software together: thus restricting the ability of competitors to compete in the hardware market as their products did not work with Blanche Birger's software. Blanch Birger's commitments were: i) be willing to consider integration/interoperability requests from hardware competitors; ii) where such integration is possible, to integrate in good faith; iii) to provide the integration on fair, reasonable and non-discriminatory terms; iv) to notify the CCM of any request and its response. The terms of the commitments, including reporting on the cost/price elements of any agreement, were deemed to facilitate and improve supply-side substitution.[116]

By contrast, the second category of cases concerning *Manhole* Covers and *Coolers* demonstrate where the commitments need to be reviewed with more attention by the CCM.

---

[115] Competition Commission of Mauritius *Tying of Broadband Internet Access and Pay-TV* INV009 (3 September 2012), section 9

[116] Competition Commission of Mauritius *Investigation into Image-based clearing solutions* INV024 (13 November 2014) , para 7.17

Manhole Covers again involved Mauritius Telecom as the providing party. Mauritius Telecom's conduct as the monopoly provider for telecommunications infrastructure was restricting competition in the downstream market for the provision of manhole covers for telecoms projects. The commitments offered were for Mauritius Telecom to i) ensure it does not suggest that internationally compliant covers cannot be used in private projects; ii) take measures to ensure that its employees do not make similar representations or give brand advice generally; and iii) not advise on such products where it is not the service provider. However, in instances where Mauritius Telecom has involvement in a telecomunnications infrastructure project, these commitments *do not* apply. The main issue with these commitments and the limitation on their operation is that neither the investigation nor decision adequately explored the reasonableness of Mauritius Telecom's additional safety requirements in the first instance. Thus the commitments do not appear to address the main competition concern, namely the anticompetitive foreclosure of downstream market by an upstream monopolist applying onerous additional requirements.

In *Coolers,* Phoenix Beverages agreed to allow its customers to use chiller space for competing products under certain conditions. In relation to its commitment to provide customers with chiller cabinets and permitting its customers to use 20% of the cabinet space to stock products of other competitors where it provided its cabinet free of charge *and* the customer had no other cabinets available,[117] certain exceptions were also included. It does not apply to drinks or beverages with a 30% market share or above; nor, for a two-year period, any competitors to a new Phoenix Beverages product. Finally regarding soft beverages, the commitment does not apply where the retailer has another cooler or cabinet on-site for storage e.g. in a back room or the retailer's home (the "home storage condition").[118] Specific to alcoholic beverages, the 20% rule does not apply if within 200 metres of the off-licence customer-retailer, there is another off-licence retailer selling competing alcoholic beverages.

---

[117] Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Phoenix Beverages* CCM/INV/019 (19 March 2013). Phoenix Beverage commitments – applies only to stores with an area of 20m^2 or less.
[118] i.e. where the retail premises are annexed to the retailer's home.

Noting that the commitments followed those provided by Coca-Cola to the European Commission in a similar case under European competition law,[119] the efficacy of Phoenix Beverages' commitments, including its exceptions, were accepted by both the Executive Director and the Commissioners of the CCM[120] on the following grounds:[121] first, permitting a 20% share of cabinet space (under certain circumstances) would foster a level playing field; second, if a competing drink or beverage has a 30% market share, this indicates it has sufficient market share already to exercise a competitive constraint on Phoenix Beverages; third; new products need to time to penetrate the market, thus it would seem reasonable for a limited period for Phoenix Beverages to restrict the use of its cabinets for this purpose.

In relation to a) the specific exception for alcoholic beverages and competing products sold within 200m of the customers' premises and b) the 'home-storage' condition, the efficacy considerations are less convincing. Regarding the former, the Executive Director identifies Mauritian legislation regulating the premises where alcohol may be consumed, and the relationship between the distance of a private area to consume alcohol and the off-licence retailer. However, the competitive purpose served by preventing customers from implementing Phoenix Beverage's commitment is not articulated. The competition rationale behind this commitment is not explained. This lack of competitive analysis also extends to the home storage condition. The efficacy of this exception was identified on the basis that chilled storage for competitor drinks was available, and such chilled drinks were therefore available to consumers if they wished.

---

119 Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Phoenix Beverages* CCM/INV/019 (19 March 2013), paras 3.13-3.16, 7.4; *Coca-Cola* (COMP/A.39.116/B2)

120 Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Phoenix Beverages* CCM/INV/019 (19 March 2013), section 7; Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Phoenix Beverages* CCM/DS/0008 (30 April 2013) e.g. paras 7.9 and 7.11; Decision of the Commissioners of the Competition Commission of Mauritius *Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Quality Beverages* CCM/DS/0012 (23 April 2014)

121 Competition Commission of Mauritius *Investigation into the Supply of Coolers to Retailers by Phoenix Beverages Ltd and Quality Beverages Ltd – Phoenix Beverages* CCM/INV/019 (19 March 2013), paras 7.5 – 7.16

However, the efficacy of this provision is questionable as it confuses storage with promotion or point of sale, and assesses efficacy from supply-side but not demand. Being able to buy a chilled beverage was identified as an important part of the market: this was one of the reasons why this exception was passed. However, the difference between the additional storage identified for this exception to the commitment and the Phoenix Beverages cooler is that the additional storage will not necessarily be in easy sight nor visible in the retail area or near/or at point of sale. By contrast the Phoenix Beverages cooler would be visible in these areas and thus act not only as storage but also promotion. Thus an assumption is made about efficacy of the provision, behaviour of consumers and products not readily visible. The investigation notes that the Executive Director conducted an analysis of this exception, but does not provide the methodology or explain how the conclusion was reached.

6.9. Conclusion

The purpose of this Chapter was to propose the following reforms to CAM's institutional structure: i) the introduction of a specialist competition tribunal; ii) clarity around the constitutional rights of appeal under CAM and iii) a recommendation that the option for fines be made available for penalising anticompetitive unilateral conduct.

Part one of this Chapter under sections (6.2 – 6.4) looked at CAM's institutional structure and two arguments were made. First, the investigatory/prosecutorial functions and judicial functions need to be separated. A specialist competition court or tribunal should be introduced. This will improve the legitimacy of CCM's actions and will have the additional effect of elevating the decisions taken under CAM. Second, the routes of appeal for decisions made under CAM should be clarified.

Part two of this Chapter explored the remedies and penalties available under CAM (sections 6.5 – 6.7). It is an argument of this Thesis that the normative

force of CAM's unilateral conduct rules is diminished by the unavailability of fines, particularly where assessment of conduct by intent is available. As discussed in Chapter 3, a properly formulated intent-assessment may have led to certain CCM cases being assessed differently under the naked restraint test. Furthermore, the use of commitments has been the main form of remedy used so far. The use of these contributes to the efficient use of the CCM's resources and the publication of these commitments support the development of a competition culture: however, this requires the CCM to ensure that the commitments proposed do in fact address the competition issues at hand.

7. Conclusion: Reforming the Mauritian Unilateral Conduct Rules

7.1. Introduction

This Chapter brings the conclusions of this Thesis together and sets out the proposals for reform.

7.2. Confirming the Objectives and Goals of CAM

Chapter Two argued and confirmed that the ultimate objective of CAM is the pursuit of long-term social welfare. This was demonstrated by looking at the theoretical underpinnings of competition law (sections 2.2 – 2.2.2), the static and dynamic explanations of competition and their efficiencies and the concepts of social and consumer welfare. From a theoretical point of view, this confirmed the normative superiority of the long-term social welfare objective over consumer welfare and why, as a matter of approach, Mauritian competition law should adopt an approach geared towards intervention to protect the competitive process (2.3.1 and 2.3.2).

Potential non-welfare goals within CAM were then considered, including protecting competition, protecting competitors, economic freedom, fairness and market liberalisation (2.4.1 – 2.4.5). The conclusions were that whilst each was able to inform the thick application of the Mauritian unilateral conduct rules, none of these individually or together are capable of forming the ultimate objective of CAM. This is because of their level of abstraction and the fact that they cannot be defined without reference to an overarching objective. For example, fairness should be defined with reference to long-term social welfare, which is the only welfare objective which seeks to accommodate the value of all market participants current and future.

The findings of Chapter 2 confirm precisely the ultimate objective of CAM, and clarifies more accurately statements that CAM pursues social/total welfare. A simple reading of the CAM provisions might lead one to conclude that its pursues a consumer welfare objective, however this research confirms that it is only long-term social welfare which is capable of supporting the aims and complexity of the Mauritian unilateral conduct rules.

7.3. A Tiered-Approach to 'Object or Effect'

Chapter 3 is the substantive chapter of this Thesis. It argues that the long-term social welfare objective of CAM both accommodates an intent or effect-based approach to unilateral conduct and ultimately requires such an approach for assessing exclusionary conduct. The qualified effects-based test is compatible with long-term social welfare under CAM. The content of CAM seeks to balance the competing interests of the Mauritian producer, consumer, economy and future participants – as confirmed in Chapter 2, this falls within the remit of long-term social welfare. Chapter 3 also examines the application of the object or effect assessment hitherto by the CCM and argues that the proper test for exclusion should be 'intent or effect' (3.3.4 – 3.3.4.1)

This allows Chapter 3 to move to the core proposal of this Thesis: that the unilateral conduct rules should formally adopt a two-tier approach to the Mauritian unilateral conduct rules, with a structured framework for the application of intent or effect (3.4 onwards).

The Thesis proposes that the Naked Restriction test (3.4.1.1) and the No Economic Sense test (3.4.1.2) should constitute the First-Tier assessment of intent. The Thesis argues that this would be in line with CAM's long-term social welfare objective as it would allow egregious conduct to be caught whilst maintaining a distinction between conduct executed either deliberately against a specific competitor or conduct that more broadly has the intent of restricting competition.

The Second-Tier of assessment would be an effect analysis, weighing up the anticompetitive effects of the conduct against its pro-competitive benefits. The Thesis argues that the appropriate standard is the consumer choice standard, and that the CCM's decisional practice can be interpreted as implementing this standard already. Structuring the second tier in this way meets the ultimate objective of CAM as it examines conduct which is not subject to the First-Tier by way of legitimate justification and incorporates a standard which looks at price, efficiency and choice, thus capturing aspects of competition which contribute to long-term social welfare (3.4.2.1 – 3.4.2.4).

The findings and recommendations in Chapter 3 achieve the following: they provide a structured framework for the application of the object or effect Mauritian unilateral conduct rules; they confirm which tests ought to be applied under each type of assessment; and they improve the certainty and predictability by which the provision is applied. Furthermore, the structure proposed sets the foundation for making the unilateral rules workable by incorporating the assessments of dominance and public interests into their appropriate spaces within the overall framework for assessing exclusionary conduct.

7.4. Dominance as the 'Monopoly Situation' under CAM

The substantive findings of Chapter 4 relate to the two-tier framework proposed in Chapter 3: first, dominance is a formal condition precedent of the Mauritian unilateral conduct rules (4.2). Second, based on the Mauritian cases so far, dominance should be interpreted as the ability to act independently of competitive constraint, including of consumers (4.2.2 – 4.2.3). Overall, the assessment of indicators of dominance seems reasonable. However, two concepts that require further clarification within the Mauritian rules are special responsibility and competition on the merits. The Thesis argues that these can be incorporated into the first-tier intent assessment and used as guiding principles to determine the application of the Two-Tier approach advocated by this Thesis (4.4 – 4.4.1).

7.5. Redrafting section 50 and its Public-Interest Factors

As stated in Chapter 3, a key reform proposed by this Thesis is the re-incorporation of the public-interest factors into the assessment of abuse of dominance. In considering the CCM's application of the test so far and the equivalent European and South African provisions, the Thesis finds the omission of a proportionality requirement is significant (see 5.3.1, and 5.4 – 5.5) – it can be used to check the appropriateness of the consumer choice standard and also be used as a proxy for confirming the appropriateness of public-interest justifications where measurement is not possible. In this regard, the test of proportionality contributes to the long-term social welfare objective by facilitating the adequate consideration of pro-competitive benefits.

7.6. Two Key Institutional Reforms

The last set of reforms set out in Chapter 6 of this Thesis relate to the institutional structure of CAM. The first reform proposes that a specialist Mauritian competition tribunal be created. The Tribunal would have the following aims: first, it would separate the investigatory/prosecutorial and judicial objectives which currently reside with the CCM. This would have the dual benefit of i) making Mauritian competition law-making more transparent and ii) promoting Mauritian competition culture by creating binding decisions thus pushing the development of Mauritian competition law higher up the legal agenda. In terms of appellate structure, the proposed Tribunal could be one of compulsory jurisdiction i.e. the Tribunal automatically holds a hearing if, following an investigation, the CCM deems a breach of CAM has occurred – this would follow the South African model. Alternatively, the Tribunal could be a court of first appeal following a CCM decision. However, apart from providing a *de facto* specialist Tribunal, this would do little to change the current system as an initial investigatory/judicial function would still reside with the CCM - decisions would only reach the Tribunal upon appeal (6.2 – 6.3).

The second set of reform relates to statutory clarification regarding the right of appeal. CAM formally provides that a direction or order of the Commission can be appealed, but not a decision, such as a decision that section 46 has been breached. (6.4)

The third institutional reform would be the introduction of financial penalties for abusive unilateral conduct cases. The majority of CAM cases have related to unilateral conduct. This Thesis argues that some cases represent instances where it would have been reasonable to consider the imposition of a fine in light of the predominant anticompetitive nature of these cases. Furthermore, the availability of fines could be used to support the 'intent or effect' nature of section 46: the application of the intent-test and availability of fines could be limited to the most egregious examples of abusive unilateral conduct (6.7 – 6.7.1).

7.7. Future research areas

As a result of this Thesis, the two areas present themselves as viable areas of research: first, this Thesis focuses specifically on the legal rules and tests of the Mauritian unilateral conduct rules; however, a core area of competition law research regarding developing countries concerns the transformative and developmental nature of competition law. The Parliamentary debates leading to both Mauritian Competition Acts identify the developmental nature of competition law to improve the overall economic and social environment of Mauritius. The extent to which CAM meets this objective or has the potential to do so is an area to be explored (5.6);

Second, consideration might be given to whether there are specific aspects of the Mauritian economic context that would justify specific *per se* unilateral conduct rules. As noted in the Thesis, the cement market study suggested that there might be areas of the Mauritian economy which are vulnerable to particular

abuses of dominance so as to potentially justify the adoption of certain *per se* rules (3.3.1 – 3.3.1.1);

7.8. Conclusion

The Competition Act 2007 of Mauritius came into force in November 2009. This took place against a backdrop of liberalisation and significant growth spurred by economic diversification.

The Mauritian unilateral conduct rules contained in sections 46 and 50 are sophisticated: they attempt to embody a predominantly effects-based approach to assessing abusive conduct. This Thesis argues that an effects-based approach requires the development of a competition culture that promotes long-term social welfare, competition on the merits and efficient competition. A pure effects-based approach might be something to which Mauritian competition law aspires to in the future. For now, however, the application of CAM and the Mauritian unilateral conduct rules should adopt a more holistic approach to their function. The recommendations of the Thesis can help achieve this goal.

Appendix A: Competition Act 2007

An Act

To set up a Competition Commission, to make better provisions for the regulation
of competition and for matters incidental thereto and connected therewith

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Competition Act 2007.

2. Interpretation

(1) In this Act -

“agreement” means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Mauritius or in a part of Mauritius, and includes an oral agreement, a decision by an association of enterprises, and any concerted practice; “assets”, in relation to an enterprise, means –

(a) all the tangible assets of the enterprise, including its shares, other financial securities and
brands;

(b) all the intangible assets of the enterprise, including its goodwill, intellectual property rights and
know-how;

“business” includes a professional practice or any other activity which is carried out for gain or reward;

“collusive agreement” means an agreement referred to in section 41, 42 or 43;

“Commission” means the Competition Commission established under section 4;

“Commissioner” means a person appointed as such under section 7;

“company” means a body corporate incorporated, with or without limited liability, in any part of the world;

“concerted practice” means a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them;

“consumer” means any direct or indirect user of a product or service supplied by an enterprise in the course of business, and includes –

(a) another enterprise that uses the product or service thus supplied as an input to its own business;

(b) a wholesaler, a retailer and a final consumer;

“document” includes information recorded in written, electronic or any other form, together with access to the technology enabling information in electronic form to be retrieved;

“enterprise” means any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them;

“Executive Director” means the person appointed as such under section 20 or a person fulfilling the functions of that office;

“financial penalty” means a financial penalty imposed under section 59;

“goods” includes buildings and other structures;

“group” in relation to an enterprise that is a company, means that company, any other company that is its holding company or subsidiary and any other company that is a subsidiary of the holding company;

“horizontal agreement” means an agreement between enterprises which, for the purpose of that agreement, operate in the same market and are actual or potential competitors in that market;

“immunity” means a total exemption from a financial penalty;

“market” means a market for goods or services in Mauritius or part of Mauritius;
“leniency” means a partial exemption from a financial penalty;

“Minister” means the Minister to whom responsibility for the subject of competition matters is assigned;

“monopoly situation” means the situation that exists in the circumstance specified in section 46;

“premises” includes land, any building, structure, vehicle, vessel, aircraft or container;

“price” includes any charge or fee;

“prohibited agreement” means an agreement prohibited by virtue of the application of section 41, 42 or 43;

“publish” includes on-line publication;

“regulator” means a regulatory body or agency, or a Government Department that exercises functions of prudential or economic regulation on the basis of statutory powers;

“resale price maintenance” means an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers;

“restrictive business practice” means any situation falling within the terms of Part III;

“services” includes the acceptance and performance of any obligation, whether professional or not, for gain or reward, other than the supply of goods, but does not include the rendering of any services under a contract of employment;

“subsidiary” has the meaning assigned to it in the Companies Act 2001;

“supply” includes, in relation to –

(a) goods, the supply or re-supply, by way of sale, exchange, lease, hire or hire-purchase; and
(b) services, the provision by way of sale, grant or conferment of the services;

“undertaking” means an obligation or commitment as provided under section 63 given in writing by an enterprise to, and accepted by, the Commissioners, to prevent or terminate a restrictive business practice;

“vertical agreement” means an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

(2) For the purposes of this Act, any 2 bodies corporate shall be treated as interconnected or as one person if either of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

3. Application of Act

(1) Any reference in this Act to the supply of –

(a) goods, shall be construed as the supply of goods in Mauritius;
(b) services, shall be construed as the supply of services in or from Mauritius.

(2) Save as otherwise provided for in this section or elsewhere in this Act, this Act shall apply to every economic activity within, or having an effect within,

Mauritius or a part of Mauritius.

(3) This Act shall bind the State to the extent that the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market in Mauritius which is open to participation by other enterprises.

(4) This Act shall not apply to matters listed in the Schedule.

PART II – THE COMPETITION COMMISSION

…

PART III - RESTRICTIVE BUSINESS PRACTICES

Sub-Part I - Collusive agreements

41. Horizontal agreements

(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if
-

(a) it exists between enterprises that supply goods or services of the same description, or acquire goods or services of the same description;

(b) it has the object or effect of, in any way -
(i) fixing the selling or purchase prices of the goods or services;
(ii) sharing markets or sources of the supply of the goods or services; or
(iii) restricting the supply of the goods or services to, or the acquisition of them from, any person; and
(c) significantly prevents, restricts or distorts competition.

(2) Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

42. Bid rigging

(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if one party to the agreement -
(a) agrees not to submit a bid or tender in response to an invitation for bids or tenders; or
(b) agrees upon the price, terms or conditions of a bid or tender to be submitted in response to such a call or request.

(2) Subject to subsection (3), any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.
(3) This section shall not apply to an agreement the terms of which are made

known to the person making the invitation for bids or tenders at, or before, the time when any bid or tender is made by a party to the agreement.

43. Vertical agreements involving resale price maintenance

(1) Subject to subsections (2) and (3), a vertical agreement between enterprises shall, to the extent that it involves resale price maintenance, be prohibited and void.

(2) A supplier or producer may recommend a minimum resale price to a reseller of goods or services provided that the recommendation is not binding**.**

(3) Where a supplier or producer has recommended a minimum resale price to a reseller of goods and the resale price appears on the goods, the words "recommended price" shall appear next to the resale price.

Sub-Part II – Other restrictive agreements

44. Non-collusive horizontal agreements

A horizontal agreement that is not collusive under section 41 may be reviewed by the Commission where –

> (a) the parties to the agreement together supply 30 per cent or more, or acquire 30 per cent or more, of goods and services of any description on the market; and
> (b) the Commission has reasonable grounds to believe that the agreement has the object or effect of preventing, restricting or distorting competition.

45. Other vertical agreements

A vertical agreement that does not involve resale price maintenance may be reviewed where the Commission has reasonable grounds to believe that one or more parties to the agreement is or are in a monopoly situation that is subject to review under section 46.

Sub-Part III – Monopoly situations

46. Existence of monopoly situation
(1) A monopoly situation shall exist in relation to the supply of goods or services of any description where
-

> (a) 30 per cent or more of those goods or services are supplied, or acquired on the market, by one enterprise; or
> (b) 70 per cent or more of those goods or services are supplied, or acquired on the market, by 3 or fewer enterprises.

(2) A monopoly situation shall be subject to review by the Commission where

the Commission has reasonable grounds to believe that an enterprise in the monopoly situation is engaging in conduct that

(a) has the object or effect of preventing, restricting or distorting competition; or
(b) in any other way constitutes exploitation of the monopoly situation.

(3) In reviewing a monopoly situation, the Commission shall take into account –

(a) the extent to which an enterprise enjoys or a group of enterprises enjoy, such a position of dominance in the market as to make it possible for that enterprise or those enterprises to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;
(b) the availability or non-availability of substitutable goods or services to consumers in the short term;
(c) the availability or non-availability of nearby competitors to whom consumers could turn in the short term; and
(d) evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, a party to the monopoly situation where such actions or behaviour that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.

…

50. Assessment of restrictive business practices

(1) The Commission shall, in relation to every agreement falling under Sub-Part I of this Part, establish whether, on the facts of the case, the parties to the agreement have infringed the prohibition imposed under that Sub-Part.

(2) When reviewing a matter falling within Sub-Parts II, III and IV of this Part, the Commission shall have regard to the desirability of maintaining and encouraging competition and the benefits to be gained in respect of the price, quantity, variety and quality of goods and services, and shall first determine whether competition in any market is adversely affected in that, in the case of –

(a) a reviewable restrictive agreement, the agreement has the object or effect of preventing, restricting or distorting competition;
(b) a monopoly situation, the conduct of one or more parties -
    (i) has the object or effect of preventing, restricting or distorting competition; or
    (ii) in any other way constitutes exploitation of the monopoly situation, having regard to the factors set out in section 46;
(c) a merger situation, the creation of a merger situation has resulted, or is likely to result, in a substantial lessening of competition within any market or markets for goods and services.

(3) Where the review of the matters described in subsection (2) leads to a

finding by the Commission that there are adverse effects for competition in a particular case, it shall, before deciding on any appropriate remedial action to be taken as provided for under Part VI, consider –

(a) if any of the offsetting public benefits specified in subsection (4) are present; and
(b) whether and to what extent the benefits, if they are present, should be taken into account in determining the remedial action to be taken.

(4) A benefit shall be considered for the purposes of subsection (3)(a) if it is shown that the effects of any absence, prevention, restriction or distortion of competition are outweighed by specific gains in respect of -

(a) the safety of goods and services;
(b) the efficiency with which goods are produced, supplied or distributed or services are supplied or made available;
(c) the development and use of new and improved goods and services and in the means of production and distribution; or
(d) the promotion of technological and economic progress, and the benefits have been or are likely to be shared by consumers and business in general.

PART IV - INVESTIGATIONS

…

PART V – HEARINGS BEFORE THE COMMISSION

…

56. Penalties and directions

(1) The Commission shall not impose a penalty on, or give a direction to, an enterprise, under Part VI, unless it has held a hearing in relation to that enterprise.

(2) Notwithstanding subsection (1), the Commission may impose a penalty or make a direction if the enterprise concerned has elected not to attend a hearing requested by the Commission or has failed to attend a hearing when required to do so by the Commission.

…

PART VI – DETERMINATION OF CASES BY COMMISSION, PENALTIES AND REMEDIES

58. Directions by Commission

(1) Where a restrictive agreement falls within the scope of sections 41, 42 and 43, the Commission may give the enterprise such directions as the Commission considers appropriate to ensure that the enterprise ceases to be a party to the restrictive agreement.

(2) A direction under subsection (1) may, in particular, require the enterprise to terminate or modify the agreement within such period as may be specified by the Commission.

(3) A direction given under this section shall be in writing.

59. Financial penalty

(1) The Commission may, in relation to a restrictive agreement falling within the scope of sections 41, 42 and 43, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise.

(2) The Commission shall not impose a financial penalty unless it is satisfied that the breach of the prohibition was committed intentionally or negligently.

(3) Where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Mauritius during the period of the breach of the prohibition up to a maximum period of 5 years.

(4) An order imposing a penalty under subsection (1) shall be in writing and shall specify the date before which the penalty is required to be paid.

(5) The date specified under subsection (4) shall not be earlier than the end of the period within which an appeal against the order may be brought under Part VIII.

(6) Where a penalty has not been paid within the specified date and -

(a) no appeal against the order was brought under Part VIII; or

(b) an appeal was made but dismissed or withdrawn,

the Commission may apply to the Judge in Chambers for a mandatory order to enforce the payment of the penalty against the enterprise concerned.

(7) The Commission may grant immunity or leniency to any person in such circumstances as may be prescribed.

60. Directions relating to distortion, prevention or restriction of competition

(1) Where the Commission determines, after review, that an enterprise is a party to a restrictive agreement falling within the terms of section 44 or 45 or that it is a party to a monopoly situation falling within the terms of section 46, and that -

(a) in relation to the restrictive agreement, the agreement has the object

or effect of preventing, restricting or distorting competition; or

(b) in relation to the monopoly situation, any conduct of the enterprise -

(i) has the object or effect of preventing, restricting or distorting competition, or

(ii) in any other way, constitutes exploitation of the monopoly situation,

the Commission may give the enterprise such directions as it considers necessary, reasonable and practicable to –

(A) remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or

(B) remedy, mitigate or prevent any detrimental effects on users and consumers so far as they have resulted from, or are likely to result from, the adverse effects on, or the absence of, competition.

(2) In determining, in any particular case, the remedial measures required to be taken, the Commission shall have regard to the extent to which any of the offsetting benefits specified in section 50(4) are present in that case.

(3) Subject to subsections (1) and (2), a direction under this section may include, but is not limited to, a requirement that the enterprise to which it is given shall -

(a) terminate or amend an agreement;

(b) cease or amend a practice or course of conduct, including conduct in relation to prices;

(c) supply goods or services, or grant access to facilities;

(d) separate or divest itself of any enterprise or assets;

(e) provide the Commission with specified information on a continuing basis.

(4) A direction given under this section shall be in writing.

…

63. Undertakings

(1) An enterprise may offer a written undertaking to the Commission to address any concern that has arisen, or is likely to arise, during an investigation in respect of a restrictive agreement subject to investigation, a monopoly situation or a merger situation.

(2) The undertaking may be offered before the start of the investigation or at any stage during the investigation.

(3) The Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction distortion or substantial lessening of competition.

(4) An undertaking accepted by the Commission shall be published by the

Commission in the form of a decision of the Commission.

(5) An undertaking accepted by the Commission shall have effect as if it were a direction under section 60.

64. Keeping directions and undertakings under review

(1) The Commission shall keep under review the compliance with directions given by it and the performance of undertakings given by an enterprise.

(2) The Commission may, where it is satisfied that there has been a material change of circumstances -

(a) agree to vary or terminate a direction; or

(b) accept a variation to an undertaking or release an enterprise from an undertaking.

65. Enforcement of directions and undertakings

(1) Where the Commission determines that an enterprise has failed, without reasonable excuse, to comply with a direction or undertaking, the Commission may, subject to subsection (2), apply to the Judge in Chambers for a mandatory order requiring the enterprise to make good the default within a time specified in the order.

(2) The Commission shall consider any representations the enterprise wishes to make before making an application under subsection (1).

(3) The Judge in Chambers may provide in the order that all the costs of, or incidental to, the application shall be borne by the enterprise in default.

PART VII – RELATIONSHIP BETWEEN COMMISSION AND OTHER REGULATORS

…

PART VIII – APPEALS

67. Appeal to Supreme Court

(1) (a) Any party who is dissatisfied with an order or direction of the Commission may appeal to the Supreme Court against that order or direction.

(b) Any party wishing to appeal to the Supreme Court under paragraph (a) shall, within 21 days of the date of the order or direction of the Commission, lodge with the Registry of the Supreme Court and the Commission a written notice of appeal.

(2) An appeal under this section shall be prosecuted in the manner provided by rules made by the Chief Justice.

68. Powers of Supreme Court on appeal

On appeal, the Supreme Court may –

(a) affirm, reverse, amend or alter an order or direction of the Commission;

(b) remit the matter to be further determined by the Commission with its opinion on the matter; or

(c) make such orders as it thinks fit.

…

PART IX – MISCELLANEOUS

…

Appendix B: Competition Act 2003

To provide for the control of restrictive business practices and to promote competition

ENACTED by the Parliament of Mauritius, as follows –

PART I - Preliminary

1. Short title

This Act may be cited as the **Competition Act 2003.**

2. Interpretation

(1) In this Act –

"abuse of monopoly situation" means a situation as defined under section 11;

"agreement" means any agreement or arrangement, in whatever way or form it is made;

"anti-competitive agreement" means an agreement defined under section 13**;**

'authorised officer" means the officer designated under section 4;

"business" includes a professional practice or any other activity which is carried on for gain or reward;

"collusive agreement" means an agreement defined under section 12**;**

"consumer" means a person to whom goods are supplied or services are rendered;

"Council" means the Competition Advisory Council established under section 8;

"Court" means the District Court of the district where the aggrieved person resides;

"direction" means a direction given by the Tribunal under section 15**;**

"Director" means the Director of Fair Trading appointed under section 4;

"document" includes information recorded in any form whatsoever;

"enterprise" means any firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them;

"goods" includes buildings and other structures;

"member" means a member of the Council or the Tribunal including the Chairperson and the Vice-Chairperson as the case may be;

"Minister" means the Minister responsible for the subject of commerce;

"monopoly situation" means a situation as defined under section

10;

"Office" means the Office of Fair Trading established under section 4;

"price" includes any charge or fee;

"restrictive business practice" means any situation as defined under Part III;

"services" includes the acceptance and performance of any obligation, whether professional or not, for gain or reward, other than the supply of goods, but does not include the rendering of any services under a contract of employment;

"subsidiary" has the same meaning as is assigned to it in the Companies Act 2001;

"supply", in relation to the supply of goods, includes supply by way of sale, lease, hire or hire-purchase;

"Tribunal" means the Competition Appeal Tribunal established under section 6;

"undertaking" means an obligation or commitment as provided under section 15 given in writing by an enterprise to, and

accepted by, the Director, to prevent or terminate a restrictive business practice.

(2) For the purposes of this Act, any 2 bodies corporate shall be treated as interconnected or as one person if either of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

3. Application

(1) Any reference in this Act to the supply of goods or services shall be construed as the supply of goods or services in Mauritius.

(2) This Act shall not apply to the matters listed in the First Schedule.

PART II – INSTITUTIONAL FRAMEWORK

4. Establishment of the Office of Fair Trading

(1) There is established for the purposes of this Act, an Office of Fair Trading.

(2) There shall be a Director of Fair Trading whose office shall be a public office.

(3) The Director shall -

(a) be responsible for the control, operation and management of the day-to-day business of the Office; and

(b) carry out the duties and functions of the Office under this Act.

(4) The Office shall, in the conduct of its business under this Act, be assisted by such public officers as may be required or by such specialized persons as may be appointed by the Office in a temporary capacity under a contract on non pensionable terms.

(5) The officers posted to the Office shall be under the direct administrative control of the Director.

(6) Anything authorised or required to be done by the Director may be done by any officer who is authorised generally or specifically in writing by the Director.

(7) The Office shall establish its own procedures.

5. Functions of Director

(1) The Director shall, subject to the other provisions of the Act,

(a) investigate any allegation or suspicion of restrictive business practices or any matter relating to such allegation or suspicion -

(i) either on his own initiative; or

(ii) on receiving complaints or information which give rise to such suspicion;

(b) gather, process and evaluate information relating to such allegation or suspicion; and

(c) take such measures as may be necessary to prevent or terminate any restrictive business practices, including the issue of directives and proposals for remedial action.

(2) The Director shall, before starting an investigation into an allegation or suspicion of restrictive business practice, apprise the Minister, in writing, of the matter.

(3) Where the Director has referred any matter under section 15(5) to the Tribunal, he shall provide the Tribunal with any information relating to that matter.

(4) The Director shall arrange for the dissemination of any information and reports that he may consider necessary for the discharge of his duties under this Act.

6. Competition Appeal Tribunal

(1) There is established for the purposes of this Act, a Competition Appeal Tribunal which shall consist of –

(a) a Chairperson and a Vice Chairperson, each of whom shall be either a barrister or an attorney-at-law of not less than 10 years' standing, appointed by the Prime Minister after consultation with the Leader of the Opposition; and

(b) 4 other members who shall be persons knowledgeable in consumer affairs, business, finance, economics, or management, appointed by the Minister;

for a period not exceeding 2 years, which shall be renewable, and on such other terms and conditions as the Prime Minister or the Minister, as the case may be, thinks fit.

(2) The Tribunal shall give such directions as it deems fit for the purpose of preventing or terminating such practice, including a direction that any line of business or area of activity of any person engaging in such practice, be separated and carried out by another person.

(3) For the purposes of hearing and determining any matter under this Act, the Tribunal shall consist of the Chairperson or, where the Chairperson is unable to sit, the Vice-Chairperson, and not less than 2 members.

(4) There shall be a Registrar of the Tribunal who shall be a public officer.

(5) The Minister may designate such public officers as he thinks fit to assist in the conduct of the business of the Tribunal.

(6) The members of the Tribunal shall be paid such fees as the Minister may approve.

7. Proceedings of the Tribunal

(1) The Tribunal shall sit at such place and time as the Chairperson shall determine.

(2) Subject to the provisions of this Act, the Tribunal –

(a) shall establish its own procedures;

(b) shall act expeditiously, taking into account the interests of the parties;

(c) may make such orders for requiring the attendance of persons and the production of articles or documents, as it thinks expedient or necessary;

(d) may act in an informal manner; and

(e) may take evidence on oath and, for that purpose, administer oaths.

(3) For the purposes of hearing and determining any matter under this Act, the Tribunal may request the Director or any public officer or other person to be present and produce any document or evidence that may be required.

(4) The directions of the Tribunal shall be given in writing together with an account of the reasons for its decision.

(5) The directions of the Tribunal shall be published in the Government Gazette.

(6) Notwithstanding any other enactment, any documents produced before the Tribunal shall be exempt from registration and stamp duties.

8. Competition Advisory Council

(1) There is established for the purposes of this Act, a Competition Advisory Council which shall consist of –

(a) a Chairperson appointed by the Minister;

(b) a representative of the Ministry responsible for commerce;

(c) the Director or his representative;

(d) a representative of the Attorney-General's Office;

(e) a representative of the Mauritius Chamber of Commerce and Industry;

(f) a representative of the Joint Economic Council;

(g) 2 representatives of consumer organisations; and

(h) not more than 5 members who shall be persons knowledgeable in consumer affairs, business, finance, law, public affairs or economics appointed by the Minister.

(2) The Chairperson and members of the Council shall be paid such fees as the Minister may approve.

(3) The Council shall establish its own procedures.

(4) The Council shall sit at least 4 times in a year, provided that not more than 3 months shall elapse between any 2 meetings.

(5) Every member shall hold office for a period of not less than 2 years.

9. Objects of the Council

The objects of the Council shall be to –

(a) advise the Minister on matters relating to restrictive business practices with emphasis on consumer protection;

(b) promote activities to raise the awareness of the business community and consumers on competition and related matters;

(c) maintain effective communication with the business community and consumers' associations; and

(d) promote research in emerging trends in the field of fair competition and best business practices.

PART III - RESTRICTIVE BUSINESS PRACTICES

10. Monopoly situation

(1) For the purposes of this Act, and subject to subsection (2), a monopoly situation exists in relation to the supply or acquisition of goods or services of any description where competition is non-existent or where the enterprise enjoys a dominant position in a given market.

(2) In determining whether a monopoly situation exists under subsection (1), account shall be taken of the availability of substitutable goods or services and all nearby competitors to which consumers could turn in the short term.

(3) Subsection (1) does not apply to goods and services listed in the Second Schedule.

(4) For the purposes of this Act, a "dominant position" means an ability to influence unilaterally price or output of goods or services in a given market.

11. Abuse of monopoly situation

(1) Subject to subsection (2), an abuse of monopoly situation occurs where an enterprise-

(a) which is in the position defined under section 10; and

(b) by itself or together with other enterprises -

(i) acts or behaves in such a manner as to unduly limits the ability of other persons to supply or acquire goods or services of the same description; and

(ii) such acts or behaviour either have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy, or are, or are likely to be, detrimental to the interests of consumers.

(2) For the purposes of subsection (1), any act or behaviour which -

(a) directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions such as below-cost pricing;

(b) limits supply, production, markets or technical development to the prejudice of consumers;

(c) amounts to applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them in a competitive disadvantage; or

(d) makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of the contracts,

shall be taken into consideration in determining whether an abuse of monopoly situation has arisen.

PART IV - CONTROL OF RESTRICTIVE BUSINESS PRACTICES

...

The Director or the Tribunal, as the case may be, shall, for the purposes of section 15, have regard to –

(a) the desirability of maintaining and encouraging competition and the benefits to be gained in respect of the price, quantity, variety and quality of goods and services;

(b) whether the effects of any absence, prevention, restriction or distortion of competition are outweighed by any specific benefits in respect of –

(i) the safety of goods and services;

(ii) the efficiency with which goods are produced, supplied or distributed or services are supplied or made available; or

(iii) the development and use of new and improved goods and services and means of production and distribution; and

(c) the extent to which any benefits have been, are or are likely to be shared by consumers and business in general.

...

19. Appeals to the Supreme Court

(1) Any party dissatisfied with the determination of the Tribunal may appeal to the Supreme Court.

(2) Any party wishing to appeal to the Supreme Court under subsection (1), shall within 21 days of the date of the determination of the Tribunal -

(a) lodge with, or send by registered post to, the Chairman of the Tribunal a written notice to that effect stating the grounds on which the appeal is made;

(b) give written notice to the other party of its decision to appeal against the determination of the Tribunal together with the grounds of appeal;

(c) lodge the appeal at the Registry of the Supreme Court.

(3) An appeal under this section shall be prosecuted in the manner provided by the rules made for appeals from the District and Intermediate Courts to the Supreme Court.

...

Appendix C: South African Competition Act No. 89 1999

ACT

To provide for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court; and for related matters.

PREAMBLE

The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

This paragraph was amended to its present form by section 22 of The Competition Second Amendment Act, 2000.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.

IN ORDER TO –

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

establish independent institutions to monitor economic competition;
and
give effect to the international law obligations of the Republic.

BE IT THEREFORE ENACTED BY THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, AS FOLLOWS:

CHAPTER 1

DEFINITIONS, INTERPRETATION, PURPOSE AND APPLICATION OF ACT

1. Definitions and interpretation

(1) In this Act –

…

(viii) 'essential facility' means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;

(ix) 'excessive price' means a price for a good or service which –
(aa) bears no reasonable relation to the economic value of that good or service; and
(bb) is higher than the value referred to in subparagraph (a);

(x) 'exclusionary act' means an act that impedes or prevents

…

(xiv) 'market power' means the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers;

…

2. Purpose of Act
The purpose of this Act is to promote and maintain competition in the Republic in order –
(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social and economic welfare of South Africans;
(d) to expand opportunities for South African participation in world

markets and recognise the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

…

CHAPTER 2

PROHIBITED PRACTICES

…

PART B – Abuse of a Dominant Position

7. Dominant firms
A firm is 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.

8. Abuse of dominance prohibited
It is prohibited for a dominant firm to –
(a) charge an excessive price to the detriment of consumers;
(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –
(i) requiring or inducing a supplier or customer to not deal with a competitor;
(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
(iv) selling goods or services below their marginal or average variable cost; or
(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

9. Price discrimination by dominant firm prohibited
(1) An action by a dominant firm, as the seller of goods or services is prohibited

price discrimination, if –

(a) it is likely to have the effect of substantially preventing or lessening competition;

(b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and

(c) it involves discriminating between those purchasers in terms of –

(i) the price charged for the goods or services;

(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;

(iii) the provision of services in respect of the goods or services; or

(iv) payment for services provided in respect of the goods or services.

(2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant firm establishes that the differential treatment –

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or

(c) is in response to changing conditions affecting the market for the goods or services concerned, including –

(i) any action in response to the actual or imminent deterioration of perishable goods;

(ii) any action in response to the obsolescence of goods;

(iii) a sale pursuant to a liquidation or sequestration procedure; or

(iv) a sale in good faith in discontinuance of business in the goods or services concerned.

PART C – Exemptions from Application of Chapter

10. Exemption

Section 10 was amended to its present form by section 5 of The Competition Second Amendment Act, 2000.

(1) A firm may apply to the Competition Commission to exempt from the application of this Chapter –

(a) an agreement or practice, if that agreement or practice meets the requirements of subsection (3); or

(b) category of agreements or practices, if that category of agreements or practices meets the requirements of subsection (3).

(2) Upon receiving an application in terms of subsection (1), the Competition Commission must –

(a) grant a conditional or unconditional exemption for a specified term, if the agreement or practice concerned, or category of agreements or practices concerned, meets the requirements of subsection (3); or

(b) refuse to grant an exemption, if –

(i) the agreement or practice concerned, or category of agreements or practices concerned, does not meet the requirements of subsection (3); or

(ii) the agreement or practice, or category of agreements or practices does not constitute a prohibited practice in terms of this Chapter.

(3) The Competition Commission may grant an exemption in terms of subsection (2)(a) only if –

(a) any restriction imposed on the firms concerned by the agreement or practice concerned, or category of either agreements or practices concerned, is required to attain an objective mentioned in paragraph(b); and

(b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports;

(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;

(iii) change in productive capacity necessary to stop decline in an industry; or

(iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.

(4) A firm may apply to the Competition Commission to exempt from the application of this Chapter an agreement or practice, or category of agreements or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Plant Breeder's Rights Act, 1976 (Act No. 15 of 1976), the Patents Act, 1978 (Act No. 57 of 1978), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 (Act No. 194 of 1993) and the Designs Act, 1993 (Act No. 195 of 1993).

(4A) Upon receiving an application in terms of subsection (4), the Competition Commission may grant an exemption for a specified term.

(5) The Competition Commission may revoke an exemption granted in terms of subsection (2)(a) or subsection (4A) if –

(a) the exemption was granted on the basis of false or incorrect information;

(b) a condition for the exemption is not fulfilled; or

(c) the reason for granting the exemption no longer exists.

(6) Before granting an exemption in terms of subsection (2) or (4A), or revoking an exemption in terms of subsection (5), the Competition Commission –

(a) must give notice in the Gazette of the application for an exemption, or of its intention to revoke that exemption;
(b) must allow interested parties 20 business days from the date of that notice to make written representations as to why the exemption should not be granted or revoked; and
(c) may conduct an investigation into the agreement or practice concerned, or category of agreements or practices concerned.

(7) The Competition Commission, by notice in the Gazette, must give notice of any exemption granted, refused or revoked in terms of this section.
(8) The firm concerned, or any other person with a substantial financial interest affected by a decision of the Competition Commission in terms of subsection (2), (4A) or (5), may appeal that decision to the Competition Tribunal in the prescribed manner.
(9) At any time after refusing to grant an exemption in terms of subsection (2)(b)(ii), the Competition Commission –

(a) may withdraw its notice of refusal to grant the exemption, in the prescribed manner; and
(b) if it does withdraw its notice of refusal, must reconsider the application for exemption.

…

12A. Consideration of Mergers
(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –

(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine –

(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
(ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

(b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including –

(a) the actual and potential level of import competition in the market;
(b) the ease of entry into the market, including tariff and regulatory

barriers;
(c) the level and trends of concentration, and history of collusion, in the market;
(d) the degree of countervailing power in the market;
(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
(f) the nature and extent of vertical integration in the market;
(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
(h) whether the merger will result in the removal of an effective competitor.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) a particular industrial sector or region;
(b) employment;
(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
(d) the ability of national industries to compete in international markets.

...

Appendix D: Articles 101 and 102 Treaty on the Functioning of the European Union

Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

List of Abbreviations

ATC	Average Total Cost
AVC	Average Variable Cost
BDM	Banques Des Mascareignes
CAM	Competition Act 2007 (Mauritius)
CCM	Competition Commission of Mauritius
ICN	International Competition Network
MCCI	Mauritius Chamber of Commerce and Industry
OECD	Organisation for Economic Cooperation and Development
SACA	Competition Act No. 89 1999 (South Africa)
SIDS	Small Island Developing State
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
ZACAC	South African Competition Appeal Court
ZACT	South African Competition Tribunal

Bibliography

Abel AB; Mankiw N, Gregory, S; Lawrence H and Zeckhauser, RJ, 'Assessing Dynamic Efficiency: Theory and Evidence' (1989) 56 Review of Economic Studies 1

Abeles,TP, 'Backing into Change' (2005) 13(1) On the Horizon 3

Acs ZJ; Morck R; Shaver, J; Myles YB, 'The Internationalisation of Small and Medium Sized Enterprises: a Policy Perspective' (1997) 9(1) Small Business Economics 7

Ackbarally N, 'Mauritius: Social Ills Prevail Despite Meeting MDGs' *Inter Press Service* 19 October 2010

Ahlborn C, 'Competition Policy in the New Economy: Is European Competition Law up to the Challenge?' (2001) 22(5) European Competition Law Review 156-167

Ahn S, 'Competition, innovation and productivity growth: A review of theory and evidence' (No. 317, OECD Economics Department Working Papers, 2002)

Albert,M, *Capitalism against Capitalism* (Whurr Publishers Ltd, 1993)

Akman P, 'Article 82 reformed? The EC Discussion Paper on Exclusionary Abuses' (2006) Journal of Business Law 816

Akman P, 'Exploitative abuse in Article 82EC: Back to basics?' (2008) <http://www.uea.ac.uk/polopoly_fs/1.105848!ccp09-1.pdf> accessed 6 January 2012

Akman, P, 'Searching for the long-lost soul of Article 82 EC' (2009) 29(2) Oxford Journal Legal Studies 267

Akman P, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart, 2012)

Akman P, 'The Role of Intent in the EU Case Law on Abuse of Dominance' (2014) 39(3) European Law Review 316

Allan B, 'The effects-based approach under Article 102 TFEU: History and state of play' (2011) <http://www.coleurop.be/file/content/gclc/documents/7th_conference/3.%20 B._Allan_-_The_Effects-Based_Approach_under_Article_102_TFEU_-_History_and_State_of_Play.pdf.> accessed 8 May 2012

Alemani E and others 'New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries' (No. 1104, OECD Economics Department Working Papers, 2013)

Allibert B and others 'Commission finds Abuse of Dominance in Intel Case (2009) 3 Competition Policy Newsletter 31

Aoki M, 'What are Institutions? How Should We Approach Them?' (The Institutional Foundations of a Market Economy World Development Report 2001/2, 2001) < http://siteresources.worldbank.org/INTWDRS/Resources/477365-1257315064764/3070_aoki.pdf> accessed 24 March 2012

Appleby 'Guide to the Mauritius Competition Act 2007' (2009) <www.applebyglobal.com/uploaded/Publication/1281_File_5.pdf> accessed 2 June 2011

Apon J, 'Cases against Microsoft: Similar Cases, Different Remedies' (2007) 28(6) European Competition Law Review 327

Arnull A, 'Competition, the Commission and some Constitutional Questions of More than Minor Importance' (1998) 23 European Law Review 1

Arnull A and Wincott D (eds,) *Accountability and Legitimacy in the European Union* (OUP, 2002)

Areeda P and Turner DF, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review 697

Arestis P, McCombie JSL, Vickerman RW and Thirwall AP, (eds) *Growth and Economic Development*: *Essays in Honour of AP Thirlwall* (Edward Elgar, 2006)

Arezzo, E., 'Is there a role for market definition and dominance in an effects-based approach?' (2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964199> accessed 4 January 2012

Arrow K, 'Economic Welfare and the Allocation of Resources to Invention' in Universities-National Bureau Committee for Economic Research and the Committee on Economic Growth of the Social Science Research Councils (eds) *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press, 1962)

Atkinson SE and Cornwell C, 'Parametric Estimation of Technical and Allocative Efficiency with Panel Data' (1994) 35(1) International Economic Review 231

Averitt NW and Lande RH, 'Consumer Choice: The Practical Reason for both Antitrust and Consumer Protection Law' (1998) 10 Loyola Consumer Review 44

Averitt NW and Lande RH, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713

Averitt NW and Lande RH, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175

Baden-Fuller CW, 'Article 86 EEC: Economic Analysis of the Existence of a Dominant Position' (1979) 4 European Law Review 423

Badunenko O, Fritsch M, Stephan, A, 'Allocative efficiency measurement revisited: do we really need input prices?' (2006) <http://www.diw.de/documents/publikationen/73/diw_01.c.44394.de/dp591.pdf> accessed 11 April 2012

Bageri V, Katsoulacos Y, and Spagnolo G, 'The Distortive Effects of Antitrust Fines based on Revenue' (2013) 123 The Economic Journal 545

Bagheri M and Nakajima C, 'Competition and Integration among Stock Exchanges: The Dilemma of Conflicting Regulatory Objectives and Strategies' (2004) 24 Oxford Journal of Legal Studies 69

Bain JS, *Barriers to New Competition* (Harvard University Press, 1956)

Bain JS, *Industrial Organization* (2nd Edition, John Wiley, 1968)

Baker JB and Bresnahan TF, 'Empirical Methods of Identifying and Measuring Market Power' (1992) 61 Antitrust Law Journal 3

Baldwin W and Childs G, 'The Fast Second and Rivalry in Research and Development' (1969) 36 Southern Economic Journal 18

Balkin J and Mbikiwa M, 'Public Interest in the Competition Act: Have the Competition Authorities Applied the Test Correctly?' (2014) Supplement B Mercury 2

Bartolini D and Zazzaro A, 'Are Antitrust Fines Friendly to Competition? An Endogenous Coalition Formation Approach to Collusive Cartels' (1 July 2008) < http://ssrn.com/abstract=1133098 > accessed 10 January 2016

Batchelor B and Jebelli KH, 'Rebates in a State of Velux: Filling in the Gaps in the Article 102 TFEU Enforcement Guidelines' 2011 32(11) European Competition Law Review 545

Beaton-Wells C 'Australia: Anticompetitive Practices - Banking' 2011 32(9) European Competition Law Review 155

Becker GS, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169

Behrens P, 'The "Consumer Choice" Paradigm in German Ordoliberalism and its Impact on EU Competition Law' (No 1/14, Discussion Paper, Europa-Olleg Hamburg Institute for European Integration, 2014)

Bejcek J, 'Mergers and New Technologies' (2005) 36(7) International Review of Intellectual Property and Competition Law 809

Bergman MA, 'Competition Law, Competition Policy, and Deregulation' (2002) 9 Swedish Economic Policy Review 93

Berry MN, 'The Uncertainty of Monopolistic Conduct: a Comparative Review of Three Jurisdictions' (2001) 32 Law and Policy in International Business 263

Bigoni M, Fridolfsson S-O, Le Coq C, Spagnolo G, 'Fines, Leniency and Rewards in Antitrust' (2012) 43(2) RAND Journal of Economics 368

Bittlingmayer, G, and Hazlett, TW 'DOS Kapital: Has Antitrust Action Against Microsoft Created Value in the Computer Industry?' (2000) 55 Journal of Financial Economics 329

Bizclim, 'Competition laws are needed in Africa' (2007) <http://www.competitionlaw.cn/upload//temp_08031723148214.pdf> accessed 21 February 2011

Black O 'Per se rules and the rule of reason: what are they? (1997) 18 European Competition Law Review 145

Block MK and Sidak JG, 'The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?' (1980) 68(5) Georgetown Law Review 1131

Bloomfield R, and O'Hara M, 'Can Transparent Markets Survive?' (2000) 55 Journal of Financial Economics 425

Bordeaux DJ and DiLorenzo TJ, ' The Protectionist Roots of Antitrust' (1993) 6(2) The Review of Austrian Economics 81

Bork RH, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted by The Free Press, 1993)

Borell, J-R and Tolosa M, 'Endogenous Antitrust: Cross-Country Impact on the Impact of Competition-Enhancing Policies on Productivity (2008) 15 Applied Economics Letters 827

Boubakri N; Guedhami O; Mishra D; and Walid S, 'Political Connections and the Cost of Equity Capital (2012) 18(3) Journal of Corporate Finance 541

Bowsher M, 'Competition law and national champions: a happy marriage or clash of incompatible policies?' Second Asian Competition Law and Policy Conference, Asian Competition Forum (December 2006)

<www.monckton.com/docs/library/HKPaperDec06MB.pdf> accessed 11 April 2011

Braithwaite J, *Markets in Vice, Markets in Virtue* (OUP, 2005)

Breit W and Elzinga KG, 'Antitrust Penalties and Attitudes towards Risk: An Economic Analysis' (1973) 86 Harvard Law Review 693

Brill J, 'Competition and consumer protection: Bedfellows or best friends?' (The Antitrust Source 1 2010) < http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Brill12_21f.authcheckdam.pdf> accessed 5 April 2012

Brodley JF, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress; (1987) 62 New York University Law Review 1020

Brusick P. and Evenett SJ. 'Should Developing Countries worry about Abuse of Dominant Power?' (2008) 2 Wisconsin Law Review 269

Brunt M, '"Market Definition" Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 Australian Business Law Review 86

Buccirossi P; Ciari, L; Duso T; Spagnolo G; and Vitale C; 'Competition Policy and Productivity Growth: An Empirical Assessment' (2013) 7 The Review of Economics and Statistics 1

Budzinski O, 'Monoculture versus diversity in Competition Economics' (2008) 32(2) Cambridge Journal of Economics 295

Caminal R and Vives X, 'Why Market Shares Matter: an Information-Based Theory' (1996) 27(2) RAND Journal of Economics 221

Carey S, 'Mauritius Gets It's First Female President' (New African Magazine, 4 June 2015)

Caves RE and Porter ME, 'Market Structure, Oligopoly and the Stability of Market Shares' (1978) 26(4) Journal of Industrial Economics 289

Callol P, 'Spain: Abertis Telecom – Abuse of Dominant Position – Television' (2012) 33(6) European Competition Law Review 93

Central Intelligence Agency 'The World Factbook' (2012) <https://www.cia.gov/library/publications/the-world-factbook/> accessed 5 April 2012

Chakravarthy, S, 'Economic reforms and competition policy and law in developing countries' (2007) <http://www.cuts-international.org/Mauritius/doc/Paper-1.doc> accessed 9 June 2011

Chang HF, 'A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle' (2000) 110 The Yale Law Journal 173

Chang H-J (ed), *Institutional Change and Economic Development* (United Nations University Press, 2007)

Chen E and Lin P. 'Competition Policy in Small Open Economies: the Case of Hong Kong' (2006) < asiancompetitionforum.org/presentation/.../2.4%20Lin%20Ping.doc> accessed 1 December 2012

Chetty V, 'The Place of Public Interest in South Africa's Competition Legislation – some Implications for International Antitrust Convergence' (ABA Section of Antitrust Law, 53rd Spring Meeting, Washington D.C., 2005)

Chirita AD, 'Recent Abuse of Dominance and Cartel Cases' (2012) 33(5) European Competition Law Review 227

Clark JM, 'Towards a Concept of Workable Competition' (1940) 30(2) The American Economic Review 241

Clarke J, 'The Dawson Report and Merger Regulation' (2003) 8 Deakin Law Review 8

Clarke P; Corones, S; Clarke, J, *Competition Law and Policy* (3rd Edition, Oxford University Press, 2010)

Claxton M, 'Mauritius – A Universal Model of Development?' (No Date) < http://www.normangirvan.info/wp-content/uploads/2011/03/claxton-mauritius-a-universal-model-of-democracy-development.pdf> accessed 14 November 2015

Coe PJ and Krause D, 'An Analysis of Price-Based Tests of Antitrust Market Delineation' (2008) 4(4) Journal of Competition Law and Economics 983

Colomo PI, Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' (29/2014, LSE Law, Society and Economy Working Papers, 2014)

Colomo PI, 'Post Danmark II, or the Quest for Administratability and Coherence in Article 102 TFEU (LSE Law, Society and Economy Working Papers 15/2015, 2015)

Comanor WS and Leibenstein H, 'Allocative efficiency, X-efficiency and the Measurement of Welfare Losses' (1969) 36(143) Economica 304

COMESA 'Overview of COMESA: COMESA's priorities and objectives' <http://about.comesa.int/index.php?option=com_content&view=article&id=75&Itemid=106> accessed 1 May 2012

Competition Commission of Mauritius ‘Annual Report 2009/2010’ (2010

Competition Commission of Mauritius ‘Annual Report 2010/2011’ (2011)

Competition Commission of Mauritius ‘Annual Report 2011/2012 (2012)

Conway P; de Rosa D; Nicoletti G and Steiner F, ‘Regulation, competition and productivity convergence’ (No. 509, OECD Economics Department Working Papers, 2006)

Craig P and de Burca G, *EU Law: Text, Cases and Materials* (5th Edition, OUP, 2011)

Creighton SA et al. ‘Cheap Exclusion’ (2005) 72 Antitrust Law Journal 975

Crew MA and Rowley CK, ‘On Allocative Efficiency, X-Efficiency, and Measurement of Welfare Loss’ (1971) 38(150) Economica 199

David R and Brierly J, *The Major Legal Systems in the World Today* (3rd Edition, Stevens, 1985)

de Soysa I and Jutting J, ‘Informal Institutions and development: think local, act global’ <http://www.oecd.org/dataoecd/52/16/37790393.pdf> accessed 20 April 2012

Defraigne P, 'EU New Regulatory Framework - is it Working?' (2005) 26(11) European Competition Law Review 597

Dethmers F and Engelen H, ‘Fines under Article 102 on the Treaty on the Functioning of the European Union’ (2011) 31(2) European Competition Law Review 86

Devlin A, ‘Antitrust in an Era of Market Failure’ (2010) 33 Harvard Journal of Law and Public Policy 557

DiLorenzo TJ, ‘The Origins of Antitrust: An Interest-Group Perspective’ (1985) 5(6) International Review of Law and Economics 73

Dimgba N, ‘Introduction to Competition Law: a Sine Qua Non to a Liberalised Economy’ (May 2006) <http://www.globalcompetitionforum.org/regions/africa/Nigeria/INTRODUCTION%20TO%20COMPETITION%20LAW.pdf> accessed 10 May 2012

Disney RJ and Heden Y, ‘Restructuring and Productivity Growth in UK Manufacturing’ (No.2463, CEPR Discussion Paper, 2000)

Do KT, 'On the Normative Foundations of the Global Competition Governance' < http://ssrn.com/abstract=2563685> accessed 4 October 2015

Dreher M and Adam M, 'Abuse of Dominance under Reform - Sound Economics and Established Case Law' (2007) 28(4) European Competition Law Review 278

Drexl J, Hilty RM, Boy L, Godt C, Remiche B (eds) *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Larcier, 2009)

Dwan R, 'Jean Monnet and the Failure of the European Defence Community' (2001) 1 Cold War History 141

Duke A and Richardson M, 'Music Markets and Bad actors in Copyright and Competition Law' (2008) 16 Competition and Consumer Law Journal 203

Dutz MA. and Hayri A, 'Does more intense competition lead to high growth' (World Bank Policy and Research Working Paper No. 2320 and CEPR Discussion Paper No 2259, 2000) < http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/05/25/000094946_00050405325137/Rendered/PDF/multi_page.pdf > accessed 20 April 201

Easterbrook FH, 'Antitrust and the Economics of Federalism' (1983) 26(1) Journal of Law and Economics 23

Easterbrook FH, 'The Limits of Antitrust' (1984) 63(1) Texas Law Review 1

Easterbrook FH, 'Predatory Strategies and Counterstrategies' (1981) 48(2) University of Chicago Law Review 263

Easterbrook FH, 'Vertical Arrangements and the Rule of Reason' (1985) 53 Antitrust Law Journal 135

Economist 'Small is not beautiful: why small firms are less wonderful than you think' (May 2012)

Economist, 'The Tail that Wags the Elephant' (12 May 2012)

Edelman B, 'Does Google Leverage Market Power through Tying and Bundling?' (2015) 11(2) Journal of Competition law and Economics 365

Eilmansberger T, 'Dominance - the Lost Child? How Effects-based Rules Could and Should Change Dominance Analysis' (2006) 2 European Competition Journal 15

Electoral Institute for the sustainability of democracy in Africa, 'Mauritius: the road to independence (1945-1968)' (2009) <http://www.eisa.org.za/WEP/mauoverview7.htm> accessed 29 April 2012

Elhauge E, 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review 253

Emerging Markets Group 'Mauritius: Study on trade-related issues in the context of the Economic Partnership Agreement Negotiations' (2009) <www.tradecom-acpeu.org/.../FINAL%20REPORT%20TRI-STUDY_EU-ESA _EPA_Negotiation.pd> accessed 6 June 2011

Evans DS, 'Why Different Jurisdictions Do Not and Should Not) Adopt the Same Antitrust Rules' (2009) 10(1) Chicago Journal of International Law 161

Evans DS and Jenny F (eds) *Trustbusters: Competition Authorities Speak Out* (Competition Policy International, 2009

Evenett SJ 'Five Hypotheses concerning the Fate of the Singapore Issues in the Doha Round' (2003) 23 Oxford Review of Economic Policy 392

Evenett SJ, 'Links between development and competition law in developing countries' (October 2003) <www.alexandria.unisg.ch/export/DL/22249.pdf> accessed 10 May 2012

Ezrachi A (ed), *Article 82 EC: Reflections on its Recent Evolution* (Hart Publishing, 2009)

Ezrachi, A (ed), *Research Handbook on International Competition Law* (Edward Elgar, 2012)

Faull J and Nikpay A. *The EC Law of Competition* (2nd Edition OUP, 2007)

Farrell J and Katz ML, 'The Economics of Welfare Standards in Antitrust' (Competition Policy Centre, Institute of Business and Economic Research' UC Berkeley, 2006)

Farrell M, 'The Measurement of Productive Efficiency' (1957) 120(3) Journal of Royal Statistical Society Series A (General) 253

Fejø J, *Monopoly Law and Market* (Kluwer, 1990)

Fellstrom, C 'Ex-Prime Minister of Mauritius under Investigation by UK Anti-Corruption Unit' *The Independent* (4 October 2015)

Federal Trade Commission, 'How do Courts and Agencies evaluate Market Power?' (2007)

Federico G, 'SAA II: Abuse of Dominance in the South African Skies' Journal of Competition Law and Economics, first published online 10 May 2013

Fletcher GP, *Basic Concepts of Legal Thought* (OUP, 1996)

Foster SE, 'While America Slept: the Harmonization of Competition Laws Based on the European Union model' (2001) 15 Emory International Law Review 467

Fox EM, 'Antitrust and Institutions: Design and Change' (2010) 41 Loyola University Chicago Law Review 473

Fox EM, 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries' (New York University School of Law, Law and Economics Research Paper Series Working Paper No. 11-04, 2012)

Fox EM, 'Economic Development, Poverty and Antitrust: the Other Path' (2007) 13 Southwestern Journal of Law and Trade in the Americas 211

Fox EM, 'The Central European Nations and the EU Waiting Room - Why Must the Central European Nations Adopt the Competition Law of the European Union? (1998) 23 Brooklyn Journal of International Law 351

Fox EM, 'The Battle for the Soul of Antitrust' (1987) 75 California Law Review 917

Fox EM, 'The Market Power Element of Abuse of Dominance: Parallels and Differences in Attitudes US and EU' (12th Annual Competition Law and Policy Workshop, EUI , 2007) < http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Fox.pdf > accessed 5 September 2012

Fox EM, 'What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect' (2002) 70 Antitrust Law Journal 371

French RS, 'Competition law - Covering a Multitude of Sins' (2004) 12 Competition and Consumer Law Journal 125

Frediani AA, 'The World Bank, Turner and Sen – Freedom in the Urban Arena' (UCL, DPU Working Paper No.136, 2009)

Fuller CB, 'Article 86 EEC: Economic Analysis of the Existence of a Dominant Position' (1979) 4 European Law Review 423

Furse M, 'Abusive dynamics' (2005) 26(4) European Competition Law Review 199

Gal MS, *Competition Policy for Small Market Economies* (Harvard University Press, 2003)

Gal, MS, 'Market Conditions Under the Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies' (2002) 50 American Journal of Comparative Law 303

Gal MS, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement Developing Countries' (2004) Competition, Competitiveness and Development 20

Gal MS, 'Size does matter: The Effects of Market Size on Optimal Competition Policy' (2001) 74 Southern California Law Review 1437

Gal MS, 'The "cut and paste" of Article 82 of the EC Treaty in Israel: Conditions for a successful transplant' (2007) 9 European Journal of Law Reform 467

Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015)

Gale D and Sabourian, H, 'Complexity theory and competition' (2005) 73(3) Econometrica 739

Garg A *International Microeconomics and Finance: Theory and Econometric Methods* (Global Media, 2010)

Gasparikova S. and Sengupta R., 'Taking the right steps: Competition administration in Eastern and Southern Africa' (No 1/2008 CUTS Centre for Competition, Investment & Economic Regulation, 2007) <www.cuts-ccier.org/7up3/pdf/BriefingPaper01-2008.pdf> accessed 2 June 2011

Gellhorn E; Kovacic WE; Calkins S; *Antitrust Law and Economics* (5th Edn, Thomson and West 2004)

George KD; Joll C and Lynk EL, *Industrial Organisation: Competition, Growth and Structural Change* (4th Ed, Routledge Publishing, 1992)

Geradin D, 'Competition law and Regional Economic Integration: an Analysis of the Southern Mediterranean Countries' (No.35, World Bank Working Paper, 2004) <www.stopnwo.com/docs/Competition_Law_and_Regional_Economic_Integration.pdf> accessed 6 April 2011

Geradin D and Girgenson I, 'The counterfactual method in EU competition law: the cornerstone of the effects-based approach' (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970917> accessed 1 May 2012

Geradin D, Hofer P, Louis F, Petit N, and Walker, M. 'The concept of dominance' (2005) Global Competition Law Centre 'GCLC Research papers on Article 82' <http://www.coleurope.eu/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf> accessed 10 April 2011

Geradin D, 'The Opinion of AF Wahl in Intel: Bringing Coherence and Wisdom into the CJEU's Pricing Abuses Case-Law' (No 18/2016, Tilburg Law School Legal Studies Research Paper Series (2016)

Gerber DJ, *Global Competition Law: Law, Markets, and Globalisation* (Oxford University Press, 2010)

Gerber DJ, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998)

Gestrin M, 'A Policy Framework for Investment: Competition Policy' (Rio De Janeiro, Brazil, 2005) < http://www.oecd.org/investment/investmentfordevelopment/35488898.pdf> accessed 15 November 2012

Ghoneim AF, 'Competition law and competition policy: what does Egypt really need?' Economic Research Forum Working Paper 0239 <http://www.mafhoum.com/press5/158E13.pdf> accessed 13 April 2011

Glassman ML, 'Market definition as a practical matter' (1980) 49 Antitrust Law Journal 1155

Goetyn G, Mavroghenis S, Piergiovanni M, Reed E and Ridyard, D, 'Predatory Pricing' (Global Competition Law Centre 'GCLC Research papers on Article 82' , 2005)

Gopaul A, 'Negotiating the Complexities of Trade: An analysis of the Feminization of Informal Sector Workers Poverty in Mauritius' (2nd International Conference on Trade and Investment in Developing Countries, Mauritius, 2012)

Gormsen LL, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010)

Gormsen LL, 'Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU? (2013) 36(2) World Competition 223

Gormsen LL, 'Antitrust Marathon II' (2008) 4(1) European Competition Journal 213

Gormsen LL, 'The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3(2) European Competition Journal 329

Gormsen LL, 'The Parallels between the Harvard Structural School and Article 82 EC and the Divergences between Chicago-and Post-Chicago Schools and Article 82 EC' (2008) 4(1) European Competition Journal 221

Gormsen LL, 'Why the European Commission's enforcement priorities should be withdrawn' (2010) 31(2) European Competition Law Review 45

Government of Mauritius, 'Republic of Mauritius Millennium Development Goals: Status Report' (2010, edited 2012)

Grassani S, 'Price discrimination and exclusionary abuses of dominance: A call for effects-based enforcement' (2011) <http://kluwercompetitionlawblog.com/2011/06/15/price-discrimination-and-exclusionary-abuses-of-dominance-a-call-for-effects-based-enforcement-2/> accessed 4 Jan 2012

Grave C and Trafkowski A, 'Sector inquiries by the EC Commission' (2005) 11 International Energy Law and Taxation Review 288

Griffiths M and Gumbie W, 'The Public Interest Test in the South African Merger Control Regime' (2015) 3(2) Journal of Antitrust and Enforcement 408

Grynberg R, 'Mauritius' economy "miracle" not all it seems' *Mail and Guardian* (15 March 2013)

Gundlach GT, 'Choices as the Focus of Antitrust: A Marketing Perspective' (2001) 62 University of Pittsburgh Law Review 527

Halal WE, 'Central Features of Institutional Change' (2005) 13(1) On the Horizon 11

Hahn, R. W., 'A Primer on Competition Policy and the New Economy' (AEI-Brookings Joint Center for Regulatory Studies, 2001) <http://ssrn.com/abstract=286918> accessed 23rd December 2010

Harberger A.C, 'Monopoly and Resource Allocation' (1954) 44(2) American Economic Review 77

Harbord D and Hoehn T, Barriers to Entry and Exit in European Competition Policy' (1994) 14 International Review of Law and Economics 411

Harbord D and Riascos A, 'The BAT/Protabaco Merger: Unilateral Effects, Tacit Collusion and Multimarket Oligopoly' (2011) ECLR 32(11) 539

Harlow C, 'Voices of Difference in a Plural Community' (2002) 50(1) American Journal of Comparative Law 339

Haupt H, ‘Collective Dominance under Article 82 EC and EC Merger Control in the light of the Airtours Judgment’ (2002) ECLR 23(9) 434

Hay GA, ‘Market Power in Antitrust’ (1991) 60 Antitrust Law Journal 807

Havrylyshyn,O, ‘Trade Policy and Productivity Gains in Developing Countries: a Survey of the Literature’ (1990) 5(1) World Bank Research Observer 1

Hayek FA *The Road to Serfdom* (Routledge, 1944)

Hawthorne, R, ‘Has the Conduct-Based Approach to Competition Law in South Africa Led to Consistent Interpretations of Harm to Competition? (2008) 11(3) South African Journal of Economic and Management Sciences 292

Heimler A and Mehta K, ‘Violations of Antitrust Provisions: the Optimal Level of Fines for Achieving Deterrence’ (2012) 35(1) 103

Holmes OW, ‘The Path of the Law’ (1997) 110 Harvard Law Review 991

Hughes P ‘Business Strategy and EC Competition Law - Two Systems Separated by a Common Language’ (2009) 20(11) International Company and Commerical Law Review 387

Hunt S *A General Theory of Competition* (Sage Publications, 2000)

Hutchings M, ‘The Competition Between Law and Economics’ (2004) 25(9) European Competition Law Review 531

Hyman DA and Kovacic WE, ‘Institutional Design, Agency Life Cycle, and the Goals of Competition Law’ (2013) 81 Fordham Law Review 2163

Ifejika N, ‘Why Mauritius is good for Foreign Investors’ *BBC News* (12 September 2014)

Intergovernmental Committee on European Integration ‘The Brussels Report on the General Common Market’ (the “Spaak Report”) (June 1956)

International Competition Network ‘Advocacy Toolkit Part I: Advocacy Processes and Tools (10th Annual Conference of the ICN, The Hague, 2011)

International Competition Network, ‘Competition and the Judiciary’ (Competition Policy and Implementation Working Group, 6th Annual Conference of the ICN, Moscow, 2007)

International Competition Network ‘Competition Enforcement and Consumer Welfare: Setting the Agenda (10th Annual Conference, The Hague, 2011)

International Competition Network, ‘Competition Culture Project Report’ (ICN Advocacy Working Group, 14th Annual Conference of the ICN, Sydney, 2015)

International Competition Network, 'Dominance/Substantial Market Power analysis pursuant to Unilateral Conduct Laws' (No Date) <http://internationalcompetitionnetwork.org/uploads/library/doc317.pdf> accessed 1 August 2012

International Competition Network 'Framework of Competition Assessment Regimes' (ICN Advocacy Working Group, 14th Annual Conference of the ICN, Sydney, 2015)

International Competition Network, 'Interim Report on Explaining the Benefits of Competition Project' (ICN Advocacy Working Group, 2012)

International Competition Network 'ICN Unilateral Conduct Workbook: Chapter 1 – the Objectives and Principles of Unilateral Conduct Laws', (2012) <http://www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf>accessed 8 September 2012

International Competition Network, 'Lessons to be Learnt from the Experiences of Young Competition Agencies' (Competition Policy Implementation Working Group, Capetown, 2006)

International Competition Network 'Unilateral Conduct Workbook: Chapter 3: Assessment of Dominance' (2011)< http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf > accessed 8 September 2012

International Competition Network, 'Report on the Interface between Competition Policy and other Public Policies (9th Annual ICN Conference, 2010)

International Competition Network, 'Report on the objectives of unilateral conduct laws, assessment of dominance/substantial market power, and state-created monopolies' (2007) <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> accessed 13 March 2011

Jebsen P and Stevens R, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union' (1996) 64 Antitrust Law Journal 443

Jenkins M, 'Overview of Corruption in Mauritius' (Transparency International, 20 October 2014)

Johnsen DB, 'Wealth is Value' (1986) 15 Journal of Legal Studies 263

Jones A and Sufrin B. *EU Competition Law : Text, Cases and Materials* (4th Ed, OUP, 2011)

Jorde T and Teece D(eds), *Antitrust, Innovation, and Competitiveness* (OUP, 1992)

Kallaugher J and Weitbrecht A, 'Developments under Articles 81 and 82 EC - the Year 2005 in Review' (2006) 27(3) European Competition Law Review 137

Kallaugher J and Weitbrecht A, 'Articles 81 and 82 EC in 2006 - the Year in Review' (2007) 28(5) European Competition Law Review 316

Kamien MI and Schwartz N *Market structure and Innovation* (Cambridge University Press, 1982)

Kaplow, Louis, 'Market share thresholds: conflation of empirical assessments and legal policy judgments' (Harvard Law and Economics Discussion Paper 692, 2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873431> accessed 18 September 2012

Kaplow, L, 'Extension of Monopoly Power through Leverage' (1985) 85 Columbia Law Review 515

Kaplow L, 'Why (Ever) Define Markets?' (2011) 124 Harvard Law Review 437

Kaplan M, 'Mauritius: A Place in the Sun' (1967) 28 Transition 28

Kattan J, 'Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Efficiency' (1993) 61 Antitrust Law Journal 937

Kauper TE, 'The Problem of Market Definition under EC Competition Law' (1996) 20 Fordham International Law Journal 1682

Kemp K, 'The South African Example: A Legislated Effects-Based Test and Efficiency Test for Misuse of Market Power' (Submission to the Competition Policy Review Committee, 29 May 2014) < http://competitionpolicyreview.gov.au/files/2014/06/Kemp_K.pdf> accessed 4 October 2015

Kerber, Wolfgang, 'Should competition law promote efficiency? - some reflections of an economist on the normative foundations of competition law' (2007) <http://papers.ssrn.com/soL3/papers.cfm?abstract_id=1075265> accessed 12 April 2012

Khemani RS, 'Competition Law: Some Guidelines for Implementation' in Liberalised Trade and Fair Competition, (CUTS, Calcutta, 2005)

Khemani RS, *Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries* (World Bank, 2007)

Kingsbury A, 'Competition Law and Economic Inequality: Distributional Objectives in New Zealand Competition Law' (2012) 33(5) European Competition Law Review 248

Kloub J, 'Commission Issues Guidance Paper on Application of Article 82 EC' (2009) 15 Columbia Journal of European Law Online 19

Korah V, 'Concept of a Dominant Position within the Meaning of Article 86' (1980) 17 Common Market Law Review 395

Kovacic WE, 'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) 23 Brooklyn Journal of International Law 403

Kovacic WE, 'Institutional Foundations for Economic Legal Reform Transition Economies: The Case of Competition Policy and Antitrust Enforcement' (2001) 77 Chicago-Kent Law Review 265

Kovacic WE, 'Rating the Competition Agencies: What Constitutes Good Performance?' (2009) 16 George Mason Law Review 903

Kovacic WE and Cooper JC, 'Behavioural Economics and Its Meaning for Antitrust Agency Decision Making' (2012) 8 Journal of Law, Economics and Policy 779

Kovacic WE and Cooper JC, 'Behavioural Economics: Implications for Regulatory Behaviour' (2012) 41(1) Journal of Regulatory Economics 41

Kovacic WE and Hyman DA, 'Competition Agency Design: What's on the Menu?' (Illinois Public Law and Legal Theory Research Papers Series No. 13-26, 2012)

Krattenmaker TG, Lande, RH, and Salop, SC., 'Monopoly Power and Market Power in Antitrust Law' (1987) 76 Georgetown Law Journal 241

Kroes N., 'Competition policy in a Lisbon context - the State of Play Speech/06/439' (July 2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/439&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 25 October 2011

Kroes, N., 'Public discussion on Article 82 Discussion Paper: Closing remarks at public discussion on Article 82 (abuse of dominance) Speech/06/376' (June 2006) <http://ec.europa.eu/competition/antitrust/art82/kroes.pdf> accessed 25 October 2011

Kumbhakar SC, 'The Measurement and Decomposition of Cost-Inefficiency: the Translog Cost System' (1991) 43(4) Oxford Economic Papers New Series 667

Lande RH, 'A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice' (2013) 81 Fordham Law Review 2349

Lande RH, 'Consumer Choice as the Ultimate Goal of Antitrust' (2001) 62(3) University of Pittsburgh Law Review 503

Lande RH, 'Creating Competition Policy for Transition Economies' (1997) 23 Brooklyn Journal of International Law 339

Lande RH, 'Market Power without a large Market Share: the role of imperfect information and other "Consumer Protection" failures' (American Antitrust Institute Working Paper No 07 – 06, 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103613> accessed 1 August 2012

Lande RH, 'Proving the Obvious: The Antitrust Laws were Passed to Protect Consumers (Not Just To Increase Efficiency) (1999) 50 Hastings Law Journal 959

Lande RH, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings Law Journal 65

Lande RH, 'Why Antitrust Damage Levels Should Be Raised' (2004) 16 Loyola Consumer Law Review 329

Landes WM, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652

Landes WM and Posner, RA, 'Market power in antitrust cases' (1981) 94(5) Harvard Law Review 937

Langhammer RJ, 'Changing Competition Policies in Developing Countries: From Policies Protecting Companies against Competition to Policies Protecting Competition' (2000) < http://siteresources.worldbank.org/INTWDRS/Resources/477365-1257315064764/3199_langhammer.pdf> accessed 27th March 2013

Lavey WG, 'Patents, copyrights, and trademarks as sources of market power in antitrust cases' (1982) 27 Antitrust Bulletin 433

Leary TB, 'Competition Law and Consumer Protection Law: Two wings of the same house' (2005) 72 Antitrust Law Journal 1147

Legh R, 'Competition Law' (Competition SG 3/2006, 2006) < http://www.bowman.co.za/FileBrowser/ArticleDocuments/SG%20CL%202006%20-%203.pdf> accessed 4 October 2015

Legrand P, 'European Legal Systems are not Converging' (1996) 45 International and Comparative Law Quarterly 52

Leibenstein H, 'Allocative Efficiency vs. "X-Efficiency"' (1966) 56(3) The American Economic Review 392

Leino, J 'Formal and Informal Microenterprises' (Enterprise Note No. 5, World Bank Group, 2009)

Levy N, 'Kimberley-Clark/Scott and the power of brands' (1996) 17(7) European Competition Law Review 403

Levy S and Walton M (eds), *No Growth without Equity* (World Bank, 2009)

Lewis D (ed), *Building New Competition Law Regimes: Selected Essays* (Edward Elgar, 2013)

Lewis D, *Thieves at Dinner Table*: *Enforcing the Competition Act – A Personal Account* (Jacana Media, 2012)

Lianos I and Kokkoris I (eds) *The Reform of EC Competition Law* (Kluwer Law International, 2010)

Lipsey RG and Lancanster K. 'The General Theory of Second Best' (1957) 24(1) The Review of Economic Studies 11

Lowe P, 'Consumer Welfare and Efficiency: New Guiding Principles of Competition Policy?' (2007) <http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf> accessed 30 March 2012

Lunn J, 'Disputes over the British Indian Ocean Territory: April 2016 Update' (House of Commons Briefing Paper, No. 6908, 20 April 2016)

Ma T-C, 'The effect of competition law enforcement on economic growth' (2011) 7(2) Journal of Competition Law and Economics 301

Mackenzie N, 'Rethinking Exclusionary Abuses in South Africa' (No Date) < http://www.compcom.co.za/wp-content/uploads/2014/09/Rethinking-Exclusionary-Abuse-in-SA.pdf > accessed 30 September 2015

Madani, Dorsati 'A review of the role and impact of export processing zones' (1999) <http://siteresources.worldbank.org/INTRANETTRADE/Resources/MadaniEPZ.pdf> accessed 13 May 2012

Majumdar A., 'Whither dominance?' (2006) 27(4) European Competition Law Review 161

Makhaya G and Roberts S, 'Expectations and outcomes: Considering Competition and Corporate Power in South Africa under Democracy' (2013) 40(108) Review of African Political Economy 556

Makhaya G, Mkwananzi W and Roberts S, 'How Should Young Institutions Approach Competition Enforcement? Reflections on South Africa's Experience' (2012) 19(1) South African Journal of International Affairs 43

Makowski L and Ostroy JM, 'Perfect Competition and the Creativity of the Market' (2001) 39 Journal of Economic Literature 479

Marcos F, 'Do Developing Countries need Competition Laws and Policy' (Eale Conference, Madrid, 2006) http://ssrn.com/abstract=930562 accessed 13 January 2014

Marcos F, 'How Foreign Investment and Multinational Enterprises May Help Out In Competition Law Adoption and Enforcement in Developing Countries' (2012) 6 Mediterranean Competition Bulletin 44

Markham JW, 'An Alternative Approach to the Concept of Workable Competition' (1950) 40(3) The American Economic Review 349

Markovits RS, 'The limits to simplifying the application of US antitrust law' (2010) 6(1) Journal of Competition Law and Economics 51

Marsden P and Gormsen LL, 'Guidance on abuse in Europe: The continued concern for rivalry and competitive structure' (2010) 55(4) The Antitrust Bulletin 875

Massey P, 'Market Definition and Market Power in Competition Analysis: Some Practical Issues' (2000) 31(4) The Economic and Social Review 309

Masuku MB, 'Tying, Bundling or Packaging of Pay Television Channels: Who Benefits – the Consumer, Service Provider or Programme Content Provider?' (2010) Comparative and International Journal of South Africa 43(2) 260

Mauritius Chamber of Commerce and Industry, *The Mauritian Legislation on Competition: A Practical Guide for the Business Community* (2011)

McEwin RI, 'Competition Law in a Small Open Economy' (2003) 26(1) University of New South Wales Law Journal 246

McFalls MS, 'The Role and Assessment of Classical Market Power in Joint Venture Analysis' (1998) 66 Antitrust Law Journal 651

McMahon K, 'Developing Countries and International Competition Law and Policy' (University of Warwick School of Law Legal Studies Research Paper No.2009-11, 2009) < http://ssrn.com/abstract=1523143>

McNulty PJ, 'Economic Theory and the Meaning of Competition' (1968) 82(4) The Quarterly Journal of Economics 639

Meade JE, 'Mauritius: a case study in Malthusian economics' (1961) 71(283) The Economic Journal 521

Meese AJ, 'Reframing antitrust in light of scientific revolution: accounting for transaction costs in rule of reason analysis' (2011) 62(2) Hastings Law Journal 457

Meetarbhan KN, 'Competition law: Doing business differently' (2010) <www.lexpress.mu/.../14556-competition-law-doing-business-differently.html> accessed 6 June 2011

Meetarbhan KN, 'Mauritius: Competition Commission' (2015) The African and Middle Eastern Antitrust Review 29

Meetarbhan KN, 'Mauritian Business Landscape must ensure Equal Opportunities to Compete' *Ion News* (22 May 2010)

Melamed AD, 'Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal' (2005) 20 Berkeley Technology Law Journal 1247

Mertikopoulou V, 'DG Competition's Discussion Paper on the application of Article 82 of the EC Treaty to exclusionary abuses: the proposed economic reform from a legal point of view' (2007) 28(4) European Competition Law Review 241

Miller ES, 'Economic Efficiency, the Economics Discipline, and the "Affected-with-a-Public-Interest"' (1990) 24(3) Journal of Economic Issues 719

Monti G, 'Article 82 EC: What future for the effects-based approach?' 1(1) (2010) Journal of European Competition Law and Practice 2

Monti G., 'The concept of dominance in Article 82' (2006) <https://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/monti/ECJdominancepaper.pdf> accessed 23 November 2011

Monti G, 'The scope of collective dominance under Article 82' (2001) 38 Common Market Law Review 131

Monti M, 'Competition for consumers' benefit' (2004) <http://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf> accessed 25 October 2011

Monti M, 'Policy Market Definition as a Cornerstone of EU Competition Policy' Workshop on Market Definition, (2001)< http://europa.eu/rapid/press-release_SPEECH-01-439_en.htm>accessed 18 September 2012

Motchenkova E, 'Determination of Optimal Penalties for Antitrust Violations in a Dynamic Setting ' (2008) 189 European Journal of Operational Research 269

Motta M, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004)

Murad M, 'The role of competition policy and law in foreign direct investment: issues and future developments (ND) <http://slconf.uaeu.ac.ae/images/مؤتمر%2019%20%20الاستثمار/part%204%20E/10.pdf> accessed 10 May 2012

Murgatroyd RM and Bishop, S, 'Grand Theft Antitrust: lessons from the GAME/Gamestation transaction' (2009) 30(2) European Competition Law Review 53

Murray A, 'India and Mauritius row over differing tax rates' *BBC News* (12 September 2014)

Nazzini R, *The Foundations of European Competition Law: The Objective and Principles of Article 102* (OUP, 2011)

Nickell JS, 'Competition and Corporate Performance' (1996) 104 Journal of Political Economy 724

Nicodeme G and Sauner-Lero, J-B, 'Product Market Reforms and productivity: A review of the theoretical and empirical literature on the transmission channels' (2007) 7(1) Journal of Industry, Competition and Trade 53

Nicoletti G., and Scarpetta S., 'Regulation, productivity and Growth: OECD Evidence' (2003) 18 Economic Policy 9

Niemeyer J, 'An Economic Analysis of Securities Market Regulation and Supervision: Where to go after the Lamfalussy Report?' (No. 482, Working Paper Series in Economics and Finance, Stockholm School of Economics, December 2001)

Nihoul P, Charbit N and Ramundo E (eds) *Choice: A New Standard for Competition Law Analysis?* (Concurrences, 2016)

North DC, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990)

Nyirongo, Venge. 'Is the issue "Competition policy vis-a-vis development"?' <http://www.cuts-international.org/Mauritius/doc/Paper-2.doc> accessed 21 April 2011

O' Donoghue R, and Padilla J, *The Law and Economics of Article 102 TFEU'* (2nd Ed, Hart Publishing, 2013)

Odudu O, 'Interpreting Article 81(1): Demonstrating Restrictive Effect (2001) European Law Review 261

Odudu O, ‘Interpreting Article 81(1): Object as Subjective Intention’ (2001) European Law Review 60

Odudu O, ‘‘Interpreting Article 81(1): The Object Requirement Revisited’ (2001) European Law Review 379

OECD ‘Abuse of Dominance and Monopolisation’ (OCDE/GD(96)131,1996)

OECD, ‘Competition on the Merits’ (DAF/COMP(2005)27, 2006)

OECD, ‘Competition and Poverty Reduction’ (DAF/COMP/GF(2013)12, 2013)

OECD, ‘Competition Law and Policy in South Africa: An OECD Peer Review’ (2003)

OECD, ‘Competition Policy and the Informal Economy’ (DAF/COMP/GF(2009)10, 2010)

OECD, ‘Competition policy and small economies - Note by the Secretariat CCNM/GF/COMP(2003)5’ (OECD Global Forum on Competition, February 2003)

OECD, ‘Competition policy and small economies’ (CCCNM/GF/COMP(2003)5, 2003)

OECD, ‘Competition policy in subsidies and state aid’ (2001)

OECD, ‘Dynamic efficiencies in merger analysis (DAF/COMP/2007/41, 2008)

OECD ‘Economic Efficiency, Growth and Opportunity’ (2004)

OECD ‘Evidentiary Issues in Proving Dominance’ (DAF/COMP(2006)35, 2008);

OECD ‘Global Forum on Competition: Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity’ (2004)

OECD, Mauritius, (2006) < https://www.oecd.org/dev/38562882.pdf> accessed 12 November 2010

OECD, ‘Mauritius’ (African Economic Outlook, 2003)

OECD ‘The Role of Efficiency Claims in Antitrust Proceedings’ (DAF/COMP(2012)23, 2013)

OECD *Regulatory Reform, Privatisation and Competition Policy* (OECD, 1992)

OECD, ‘Small economies and competition policy: A background paper’ (OECD Global Forum on Competition, CCNM/GF/COMP(2003)4, 2003)

OECD, 'Substantial Market Power and Competition: Policy Brief' (2008)

OECD, 'What is Competition on the Merits?' (2006)

Office of Fair Trading, 'Assessment of market power: understanding competition law' (2004)

Office of Fair Trading 'Barriers to Entry and Exit in Competition Policy: Office of Fair Trading, 'OFT Research Paper 2: Barriers to Entry and Exit in UK Competition Policy' (March 1994)

O'Hearn D, 'Amartya Sen's Development as Freedom: Ten Years Later' (2009) 8 Policy and Practice: Education for Sustainable Development 9

Orbach BY, 'The antitrust consumer welfare paradox' (2010) 7(1) Journal of Competition Law and Economics 133

Owen BM, Sun S and Zheng W, 'China's Competition Policy Reforms: the Antimonopoly law and beyond' (Stanford Institute for Economic Policy Research Discussion Paper, 2007) <http://www-siepr.stanford.edu/repec/sip/06-032.pdf> accessed 31 March 2012

Pace LF (ed) *European Competition Law: The Impact of the Commission's Guidance on Article 102*' (Edward Elgar Publishing, 2011),

Pappalardo, K and Suzor N, 'Standardisation and patent ambush: Potential liability under Australian competition law (2011) 18 Competition and Consumer Law Journal 267

Peeperkorn L and Viertio, K 'Implementing an effects-based approach to Article 82' (2009) 1 Competition Policy Newsletter 17

Peerun R, Bundoo S. and Jankee K, 'Mauritius' in Competition Regimes in the World: A Civil Society Report Consumer Unity and Trust Society (2006) <competitionregimes.com/pdf/Book/Africa/48-Mauritius.pdf> accessed 6 June 2011

Peerun-Fatehmamode R, Bundoo S and Jankee, K 'Competition Scenario in Mauritius' (2006) <www.cuts-international.org/7up3/Mauritius_CRR.DOC> accessed 5 April 2012

Peerun R., Jankee K. and Bundoo S., 'Competition scenario in Mauritius: Capacity building on competition policy in select countries of Eastern and Southern Africa (7Up3 project)' <www.cuts-international.org/7up3/Mauritius-Final.DOC> accessed 21 April 2011

Pera A, 'Changing Views of Competition, Economic Analysis and EC Antitrust Law' (2008) 4(1) European Competition Journal 127

Poddar D and Stooke G, 'Considerations of Public Interest Factors in Antitrust Merger Control (2014) Competition Policy International 1

Pistor K 'The Standardization of Law and its Effect on Developing Economies' (2002) 50(1) American Journal of Comparative Law 97

Pitofsky R, 'Commentary: In Defense of Encounters: The No Frills of a *Per* Se Rule Against Vertical Price Fixing' (1983) 71 Georgetown Law Journal 1487

Pittman R 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) Competition Policy International 205

Popovic D., 'Merger Remedies and regulatory measures in the EU electronic communications sector: a critical assessment' (2009) 10(4) European Business Organization Law Review 575

Popofsky MS, 'Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules' (2006) 73 Antitrust Law Journal 435

Porter M, *Competitive Advantage of Nations* (The Free Press, New York, 1990)

Posner R, 'A Statistical Study of Antitrust Enforcement' (1970) 13(2) The Journal of Law and Economics 365

Posner R, 'Theories of Economic Regulation' (1974) 5(2) The Bell Journal of Economics and Management Science 335

Ramgoolam N, Speech at the Workshop on 'Competition Regime in Mauritius - one year on' 25 November 2010 http://www.gov.mu/portal/site/pmsite/menuitem.ade81d8b85e53623040d013400b521ca/?content_id=91029ef91a18c210VgnVCM1000000a04a8c0RCRD <http://www.gov.mu/portal/site/pmsite/menuitem.ade81d8b85e53623040d013400b521ca/?content_id=91029ef91a18c210VgnVCM1000000a04a8c0RCRD> accessed 5 March 2011

Ramsurrun, B and Dalrymple, JF. 'Global Competitiveness within small and medium manufacturing enterprises in Mauritius' (November 2000) < http://www.cmqr.rmit.edu.au/publications/srjdicit02.pdf> accessed 7 April 2012

Rapp RT, 'The application of economic argument in anti-trust cases: recent American trends' (1988) 9(2) European Competition Law Review 207

RBB Economics 'RBB Brief 14: Assessing unilateral effects in practice: Lessons from GE/Instrumentarium (May 2004) <http://www.rbbecon.com/publications/downloads/rbb_brief14.pdf> accessed 12 September 2011

RBB Economics 'RBB Brief 31: the role of economics in the assessment of information exchanges under Article 81' (September 2008) <http://www.rbbecon.com/publications/downloads/rbb_brief_31.pdf> accessed 7 May 2012

Reed J, 'Politics: Democracy thrives amid the intrigues' Financial Times, 7 September 2012

Republic of Mauritius, 'Millennium Development Goals: Report 2015' (2015)

Rey P, 'Competition Policy and Development' (Toulouse School of Economics, 1997)

Robinson J, 'What is Perfect Competition?' (1934) 49(1) The Quarterly Journal of Economics 104

Roberts S, 'Administrability and Business Certainty in Abuse of Dominance Enforcement: an Economist's Review of the South African Record (2012) 35(2) World Competition 273

Roberts S and Tapia J, 'Abuses of Dominance in Developing Countries: A View from the South with an Eye on Telecoms' (UCL Centre for Law and Economics Society Working Paper 1/2013, 2013)

Roe MJ, 'Chaos and Evolution in Law and Economics' (J1996) 109(3) Harvard Law Review 641

Rodriguez AE. and Coate MB, 'Competition Policy in Transition Economies: The Role of Competition Advocacy' (1998) 23 Brooklyn Journal of International Law 367

Rodriguez AE and Coate MB, 'Limits to Antitrust Policy for Reforming Economics' (1996) 18 Houston Journal of International Law 311

Rose V and Bailey D, (eds) *Bellamy and Child: European Union Law of Competition* (7th Ed, Oxford, 2013)

Rotondo El, 'European Commission initiates proceedings against Samsung for abuse of dominance by failing to license its standard-essential patents on fair, reasonable and non-discriminatory terms' (2012) 33(8) European Competition Law Review 347

Rousseva E, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, 2010)

Rowe FM, 'The Decline of Antitrust and the delusions of models: the Faustian pact of law and economics' (1984) 72 Georgetown Law Journal 1511

Rudman D and Ostrovsky S, 'Dominance test: a superfluous jurisdictional hurdle?' (2010) <http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conferece/Session-4B/article-dominance-test.pdf> accessed 4 January 2012

Sacco PL and Scarpa C, 'Critical mass effect and restructuring in the transition towards a market economy' (2000) 44 European Economic Review 587

Sahebdin M, 'Competition Advocacy in Mauritius' <www.cuts-ccier.org/Gaborone/ppt/S-2Mauritius.ppt> accessed 13 June 2011

Sahebdin M, 'Political economy constraints in implementing competition regimes: Experience from Mauritius' (2007) <http://www.cuts-international.org/Mauritius/doc/Paper-3.doc> accessed 10 June 2011

Sahebdin M, 'Should the competition authority coordinate the activity of sectoral regulators?' UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 30 October - 2 November 2006 <http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p43_en.pdf> accessed 16 June 2011

SC Salop' The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millenium' (2000) 68 Antitrust Law Journal 187

Schmidt H., 'Article 82's "exceptional circumstances" that restrict intellectual property rights" (2002) 23(5) European Competition Law Review 210

Schmidt ILO, 'The Suitability of the More Economic Approach for Competition Policy: Dynamic vs Static Efficiency' 2007 28(7) European Competition Law Review 408

Schmidt-Trenz H. and Schmidtchen D., 'Enlargement of the European Union and the approximation of law: lessons from an economic theory of optima legal areas' (Centre for the study of Law and Economics Discussion Paper 9908, 1999) <http://www.econstor.eu/bitstream/10419/23059/1/9908enlar.pdf> accessed 5 May 2011

Schumpeter J *'Capitalism, Socialism and Democracy* (Harper Brothers, 1942)

Schwartz WF and Wickelgren AL, 'Optimal Antitrust Enforcement: Competitors suits, Entry, and Post-Entry Competition' (2011) 95 Journal of Public Economics 967

Seetah K, ' Our Struggle – Mauritius: an Exploration of Colonial Legacies on an "Island Paradise" (2010) 4(1) The International Journal of Research into Island Cultures 99

Sen A, *Development as Freedom* (OUP, 1999)

Sen A, Inequality, unemployment and contemporary Europe' (1997) 136(2) International Labour Review 155

Sen A, 'Markets and Freedoms: Acheivements and Limitations of the Market Mechanism in Promoting Individual Freedom' (1993) 45 Oxford Economic Papers, 519

Sengupta R. and Mehta US, 'Competition reforms - An essential element to evolving a sound business environment in Eastern and Southern Africa' <www.businessenvironment.org/dyn/be/docs/154/Sengupta.pdf > accessed 6 June 2011

Sibanda Sr. OS, 'Public Interest Considerations in the South African Anti-Dumping and Competition Law, Policy, And Practice' (2015) 14(5) International Business and Economics Research Journal 735

Siberson SC, 'The Proposed EU Constitution: Will it eliminate the EU's democratic deficit?' (2004) 10(2) Columbia Journal of European Law 173

Sinclair D., 'Abuse of dominance at a crossroads - potential effect, object and appreciability under Article 82 EC' (2004) 25(8) European Competition Law Review 491

Singh A, 'FDI, globalisation and economic development: towards reforming national and international rules of the game' (ESRC Centre for Business Research Working Paper No. 304, 2005) <http://www.econ.cam.ac.uk/cgi-bin/cbr_wp3.pl?conf_file=cbr.conf&terms=&series=camdae&criteria=none&boolean=AND&case=Insensitive> accessed 10 May 2012

Smith *A*, *The Wealth of Nations* (Glasgow, 1776)

Smith P and Swan A, ''Public Interest Factors in African Competition Policy' (2014) The African and Middle Eastern Antitrust Review 1

Smith RL, 'Market definition: Going, going, gone? Developments in the United States' (2010) 18 Competition and Consumer Law Journal 119

Sosnick S.H, 'A critique of the concepts of Workable Competition' (1958) 72(3) The Quarterly Journal of Economics 380

Souam S, 'Optimal Antitrust Policy Under Different Regimes of Fines' 19 (2001) International Journal of Industrial Organisation 1

Srinivasan TN, 'The Costs and Benefits of Being a Small, Remote, Island, Landlocked or Ministate Economy' (1986) Research Observer 1(2) 205

Steiner RL, 'Intrabrand competition - stepchild of antitrust' (1991) 36 The Antitrust Bulletin 155

Steinwall R, 'Melway and monopolisation - some observations on the High Court's decision' (2001) 9 Competition and Consumer Law Journal 93

Steinwall R, 'The use of cost based tests and the test of recoupment by Australian courts in predatory pricing cases: some further insights from the recent Federal Court decision in Boral Ltd' (1999) 7 Competition Consumer and Law Journal 140

Stewart T, Clarke J and Joekes S, *Competition Law in Action: Experiences from Developing Countries* (Ottawa International Development Research Centre, 2007)

Stigler GJ, 'Economic Competition and Political Competition' (1972) 13 Public Choice 91

Stigler GJ. 'Perfect Competition, Historically Contemplated' (1957) 65(1) The Journal of Political Economy 1

Stigler GJ, 'The Optimum Enforcement of Laws' (1970) 78 Journal of Political Economy 526

Stiglitz JE and Charlton A, *Fair Trade for All* (Oxford University Press, 2005)

Stiglitz JE, 'The Mauritius Miracle' (7 March 2011) < https://www.project-syndicate.org/commentary/the-mauritius-miracle?barrier=true> accessed 10 October 2015

Stucke ME, 'How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?' (2010) 63 Southern Methodist University Law Review 1069

Stucke ME, 'Morality and Antitrust' (2006) 3 Columbia Business Law Review 443

Strand N, 'A simple critical loss test for the geographical market' (2006) 2(4) Journal of Competition Law and Economis 697

Surendar V; Appannaiah HR; Madhavi P and Reddy PN, *Industrial organisation and management* (Himalaya Publishing House, 2010)

Svetlicinii A, 'Competition law enforcement in Serbia: problems and prospects' (2012) 33(6) European Competition Law Review 273

Tandrayen- Ragoobur HKV, 'Women in the Informal Sector in Mauritius: a Survival Mode' (2014) 33(8) Equality, Diversity and Inclusion: An International Journal 750

Taylor M, 'Reforming Chinese Telecommunications Law: An incremental approach' (2003) 25 Sydney Law Review 325

Temple Lang J. and O'Donoghue R, 'The concept of an exclusionary abuse under Article 82 EC' (Global Competition Law Centre 'GCLC Research papers on Article 82' 2005) <http://www.coleurope.eu/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf> accessed 10 April 2011

Theron N, 'The effects-based approach to abuse of dominance competition enquiries: the recent BATSA/JTI case' (2009) <http://www.compcom.co.za/assets/Uploads/events/10-year-review/parallel-2a/CompCom-conf-2009-Nicola-Theron-PDF.pdf> accessed 4 January 2012

Thomas III LG, 'Implicit Industrial Policy: The Triumph of Britain and the Failure of France in Global Pharmaceuticals' (1994) 3(2) Industrial and Corporate Change 451

Thomas III LG, 'The Two Faces of Competition: Dynamic Resourcefulness and the Hypercompetitive Shift' (1996) 7(3) Organization Science Special Issue Part 1 of 2: Hypercompetition 221

Tritell R, 'Objectives of Unilateral Conduct' (No Date) < http://www.internationalcompetitionnetwork.org/uploads/library/doc395.pdf > accessed 13 March 2011

Trubek DM and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006),

Tsang S, 'The Case for a Competition Institution in Hong Kong' (November 2000) < http://www.sktsang.com/ArchiveII/tsang021100.PDF> accessed 1 December 2012

Turner G, 'The Bar and the Competition Commission '(2001) 14(2) Advocate 25

Turner DF, 'The role of the "market concept" in antitrust law' (1980) 49 Antitrust Law Journal 1145

UNCTAD, 'Competition, Competitiveness and Development: Lessons from Developing Countries' (UNCTAD/DITC/CLP/2004/1, 2004)

UNCTAD 'Model Law on Competition (2015) Revised Chapter IV' Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, 6-10 July 2015)

United Nations Economic Commission for Africa 'Contribution to the 2015 United Nations Economic and Social Council (ECOSOC) Integration Segment' (No Date) < http://www.un.org/en/ecosoc/integration/2015/pdf/eca.pdf> accessed 11 November 2015

Uteem C, 'Millennium Development Goals: The Post-2015 Development Agenda' *L'express Mauritius* (6 March 2014)

Veljanovski C, 'Counterfactual tests in competition law' (November 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1714706> accessed 1 May 2012

Vickers J, 'Concepts of Competition' (1995) 47(1) Oxford Economic Papers 1

Villiers C, *European Company Law – Towards Democracy* (Ashgate, 1998)

Von Graevenitz G and Harbord D, 'Market definition in oligopolistic and vertically related markets: some anomalies' (2000) 21(3) European Competition Law Review 151

Waelbroeck, Denis 'The assessment of efficiencies under Article 102 and the Commission's Guidance Paper' <http://www.intertic.org/BookPapers/Waelbroeck.pdf> accessed 6 January 2012

Waldron J, *The Law* (Routledge 1990)

Walker M. and Azevedo JP, 'Dominance: meaning and measurement' (2002) 23(7) European Competition Law Review 363

Waller SW, 'Antitrust as Consumer Choice: Comments on the New Paradigm' (2001) 62 University of Pittsburgh Law Review 535

Waller SW, 'Comparative Competition Law as a form of Empiricism' (1997) 23 Brooklyn Journal of International Law 455

Wan, J 'Changing Fortunes of Mauritius Ousted Leaders' *Al Jazeera* (17 March 2015)

Werden GJ, 'Market Delineation and the Justice Department's Merger Guidelines' (1983) Duke Law Journal 514

Werden GJ. 'The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm' (2003) 71 Antitrust Law Journal 253

Werden GJ, 'Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test' (2006) 73 Antitrust Law Journal 413

Wernhard M, 'The future regulatory framework for telecommunications: general competition law instead of sector-regulation - a German perspective' (2009) 10(1) European Business and Organization Law Review 149

Westin J, 'Defining relevant market in the pharmaceutical sector in the light of the Losec case- just how different is the pharmaceutical market?' (2011) 32(2) European Competition Law Review 57

Whish R, *Competition Law* (6th Edition, Oxford University Press, 2009)

Williams M, 'The Effectiveness of Proposed Antitrust Programmes for Developing Countries' (1994) North Carolina Journal of International Law and Commercial Regulation 19

Williamson OE. 'Allocative efficiency and the limits of antitrust' (1969) 59(2) American Economic Review 105

Williamson OE, 'Economies as antitrust defence: the welfare tradeoffs' (1968) 58 American Economic Review, 18

Wils W, 'The Judgment of the EU General Court in Intel and the so-called "More Economic Approach" to Abuse of Dominance" (2014) 37(4) World Competition 405

World Bank Competition Law Database <http://go.worldbank.org/QD9YV1RL10> accessed 6 June 2011

World Bank 'Export Competitiveness and Export Processing Zones' (ND) <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:20540534~pagePK:148956~piPK:216618~theSitePK:239071,00.html> accessed 12 May 2012

World Bank 'Data & statistics' (2010) < http://econ.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20399244~menuPK:1390200~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> accessed 20 April 2012

World Bank 'World Development Report 1999/2000: Entering the 21st Century' (1999),

Wright R and Painter, M, 'Recent developments in the application of s.46: Melway and Boral considered' (2001) 21(1) Australian Bar Review 105

Whish, R., *Competition Law* (6th Edition, Oxford University Press 2009)

Wills H, 'Market definition: how stationarity tests can improve accuracy' (2002) 23(1) European Competition Law Review 4

Wils, WPJ, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) World Competition 183

Wils WPJ, *Principles of European Antitrust Enforcement* (Hart, 2005)

Wils WPJ, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30(2) World Competition 197

Wilson I, 'Institutional change in the corporation: the new social charter' (2005) 13(1) On the Horizon 20

Wright JD 'The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other' (2012) 121 Yale Law Journal 2216

Wright JD and Ginsburg DH, 'The Goals of Antitrust: Welfare Trumps Choice' (2013) 81 Fordham Law Review 2405

Wu Q, *Competition Laws, Globalization and Legal Pluralism: China's Experience* (Hart, 2013

YeungLamKo, Louis, 'The economic development of Mauritius since Independence' (1998) <http://wwwdocs.fce.unsw.edu.au/economics/Research/WorkingPapers/1998_6.pdf> accessed 30 April 2012

Zafar, Ali, 'Mauritius: an economic success story (January 2011) <http://siteresources.worldbank.org/AFRICAEXT/Resources/Mauritius_success.pdf> accessed 5 April 2012

Zimmer D (ed) *The Goals of Competition Law* (Edward Elgar, 2012)