**Chapter 2**

**2.1 Introduction**

The economic analysis of law is a method of observing the real effects of legal provisions.[[1]](#footnote-2) Accordingly, the economic analyses of law can be defined as “the application of economic theory and econometric methods to examine the formation, structure, processes and impact of law and legal institutions.”[[2]](#footnote-3)

The usefulness of applying economics to law originates from the fact that economics provides a different and a fresh perspective on law.[[3]](#footnote-4) More specifically, economics can be used to analyse the efficiency and effectiveness of legal provisions.[[4]](#footnote-5) This in turn could potentially increase the effectiveness and efficiency of legal provisions.[[5]](#footnote-6) Accordingly, the application of economics on law could potentially avoid or decrease the drafting of unnecessary and/or ineffective legal provisions and hence save an enormous amount of time and costs associated with formulating ineffective legal provisions.[[6]](#footnote-7)

Economic analysis and econometric models have been used extensively in Competition Law.[[7]](#footnote-8) This lead to Competition Law being defined as “Economic Law.”[[8]](#footnote-9) Competition Law is founded upon economic ideas, concepts and principles and accordingly it is the economist’s perception of effective competition that is applicable to Competition Law.[[9]](#footnote-10) For this reason, the study of Competition Law without a basic knowledge of its economic foundations is futile.[[10]](#footnote-11)

Accordingly, this chapter will provide a brief overview of the economic principles underlying Competition Law. This chapter will also provide a brief overview of the historical development of Competition Law in South Africa. After reading this chapter the reader should have the basic knowledge required to comprehend the necessity and functioning of Competition Law in South Africa which in turn is necessary for understanding the relevance of the subsequent chapters and hence the object of this paper.

**2.2 The necessity for Competition Law**

2.2.1 The economising problem

Central to economics is the problem of scarcity which derives from the fact that society’s demand for goods and services are unquenchable, yet any given society has only a limited quantity of economic resources[[11]](#footnote-12) available to its disposal.[[12]](#footnote-13) Accordingly, economic resources are scarce relative to the demand thereof.[[13]](#footnote-14) This in turn implies that goods and services are limited and hence society is forced to make decisions on the goods and/or services it is going to demand and produce.[[14]](#footnote-15)

This decision process is known as the economising problem.[[15]](#footnote-16) The economising problem, which is caused by the relative scarcity of economic resources lead to economics being defined as “the social science concerned with how individuals, institutions and society make optimal choices under conditions of scarcity.”[[16]](#footnote-17) Economics can also be defined as a “philosophical inquiry...which outlines how society allocates its scarce resources to achieve prosperity and well-being for its citizens.”[[17]](#footnote-18) These definitions of economics imply that economics is concerned with maximising the social welfare of a country’s citizens.[[18]](#footnote-19) Social welfare in turn is defined as the happiness of society which is measured by the total satisfaction (utility) consumers derive from consuming a particular combination of goods and services subject to limited resources.[[19]](#footnote-20)

In order to govern the economising problem every country (society) requires an economic system.[[20]](#footnote-21) Consequently, an economic system can be described as “a particular set of institutional arrangements and a coordinating mechanism designed to respond to the economising problem.”[[21]](#footnote-22) Stated differently, the economic system of a country is that country’s economic policy determining among other things, which goods and services are to be produced within that country and who is going to produce them.[[22]](#footnote-23)

2.2.2 Types of economic systems

Broadly speaking there are 3 types of economic systems each varying with regard to the owners of the factors of production[[23]](#footnote-24) and the method used to motivate, coordinate and direct economic activity.[[24]](#footnote-25)

2.2.2.1 The planned system

The first type of economic system is called the command or planned system.[[25]](#footnote-26) In this economic system, property resources[[26]](#footnote-27) are owned by the government and decisions regarding the use of economic resources, the distribution of goods and services and also prices are made by the government.[[27]](#footnote-28)

Accordingly, in the planned system the economy is controlled and directed by the government and therefore the market forces[[28]](#footnote-29) play an insignificant role in that economy.[[29]](#footnote-30) The allocation of resources between consumer goods and capital goods is also determined by the government.[[30]](#footnote-31)

The command or planned economic system is sometimes referred to as socialism or communism.[[31]](#footnote-32) The most important failure of the planned system is its failure to determine the efficient allocation[[32]](#footnote-33) of the scarce economic resources.[[33]](#footnote-34)

2.2.2.2 The market system

The second type of economic system is called the market system.[[34]](#footnote-35) The market system is “characterised by private ownership of property resources and the use of markets and prices to coordinate and direct economic activity.”[[35]](#footnote-36) More specifically, this economic system permits the private ownership of capital, it communicates through prices and coordinate and direct economic activity through markets.[[36]](#footnote-37) The result of this economic system is the creation of competition between the individual consumers and the individual firms.[[37]](#footnote-38)

More importantly, this economic system creates what is called “free competition” because it ensures that anyone who wants to participate in the economy is able and permitted to do so.[[38]](#footnote-39)

Of primary importance for the market system (free market) is the idea of *laissez –faire[[39]](#footnote-40)* which implies little or no government interference within the economy.[[40]](#footnote-41) The reason for this limitation on government interference within the economy is the idea that if markets are organised by their market forces[[41]](#footnote-42) and not by government, then this will lead to the most efficient allocation of the scarce economic resources.[[42]](#footnote-43) Government interference within the economy is limited to the protection of private property and the creation of an appropriate environment for the proper functioning of the market system.[[43]](#footnote-44)

This type of economic system is also commonly referred to as capitalism.[[44]](#footnote-45) The reason being that capitalism is defined as “An economic system characterized by a predominance of privately owned wealth, individual initiative, freedom of contract and a free market system.”[[45]](#footnote-46)

To avoid confusion it should be noted that capitalism includes the idea of the market system but in essence capitalism is “a social system based on private ownership of the means of production. It is characterized by the pursuit of material self-interest under freedom and it rests on a foundation of the cultural influence of reason. Based on its foundations and essential nature, capitalism is further characterized by saving and capital accumulation, exchange and money, financial self-interest and the profit motive, the freedoms of economic competition and economic inequality, the price system, economic progress, and a harmony of the material self-interests of all the individuals who participate in it.”[[46]](#footnote-47) In view of this, it is clear that the term “capitalism” stretches much further than the term “the market system.”

The market system does however contribute to capitalism since it enhances “political freedom because it separates economic power from political power and in this way enables the one to offset the other.”[[47]](#footnote-48)

2.2.2.3 Mixed system

The third type of economic system is called the mixed economic system.[[48]](#footnote-49) This economic system encompasses components of both the planned economic system and the market economic system.[[49]](#footnote-50) In practices, this means that a country’s economic system will predominantly mimic either the planned economic system or the market economic system but also contain elements of the other type of economic system.[[50]](#footnote-51)

Countries following a mixed economic system will more often than not be a country which predominantly follows the market economic system but where the government plays a significant role in the economy.[[51]](#footnote-52) What is important is that although the government plays a significant role in the economy it is not the dominant economic force coordinating and directing the economic activity.[[52]](#footnote-53) That role still belongs to the market force i.e. supply and demand.[[53]](#footnote-54)

Of primary importance to this paper is the market system. As a result, several elements of this system will be discussed in the subsequent sections in order to give the reader an improved understanding of the market system and the importance thereof.

2.2.3 Characteristics of the market system

The market system has several characteristics.[[54]](#footnote-55) Following here after are those that are most relevant to this paper.

2.2.3.1 The right to private property

As mentioned earlier, in contrast to the planned economic system where property resources are owned by the state, the market system allows for private ownership of these property resources.[[55]](#footnote-56) This right to private property together with the right to conclude binding contracts enables firms and individuals to acquire, use and dispose of their property resources as they want to.[[56]](#footnote-57) This right to private property also has several positive economic consequences such as that it promotes among other things exchange, investment, innovation and economic growth.[[57]](#footnote-58)

2.2.3.2 Freedom of enterprise and choice

Another important characteristic of the market system is that it requires 2 very important freedoms namely the freedom of enterprise and the freedom of choice.[[58]](#footnote-59)

The freedom of enterprise requires that entrepreneurs and firms are free to obtain and use economic resources, to produce that combination of goods and/or services that they wish and lastly to sell their products in any market they choose.[[59]](#footnote-60)

The freedom of choice on the other hand requires that the owners of property are free to obtain, use and dispose of their property and money as they choose.[[60]](#footnote-61) It also allows individuals to perform any work for which they are qualified to do and lastly it also requires that consumers are free to buy, within their budget constraints, that combination of goods and services from which they derive the most satisfaction (utility).[[61]](#footnote-62)

The right to private property coupled with the freedoms of enterprise and choice are the building blocks for the market system.[[62]](#footnote-63)

2.2.3.3 Laissez –faire

Another important characteristic of the market system is the idea that consumers and property owners should be left alone by government so that they can exercise their right to private property, their right to freedom of enterprise and their right to freedom of choice in pursuit of their self interest.[[63]](#footnote-64) Self interest is the motivating factor in the market economy and it is thought that only when consumers and property owners pursue their self interest would the market system obtain a position of equilibrium.[[64]](#footnote-65)

It is also this endeavour to achieve one’s own self interest which causes employees and property owners to engage in economic activity since this endeavour requires employees and property owners to exchange something in order to obtain something else so as to enhance their own self interest.[[65]](#footnote-66)

2.2.4 The functioning of the market system

The right to private property, the freedoms of enterprise and choice and ultimately the right to advance one’s own self interest lead to the creation of the competition process between the various economic agents.[[66]](#footnote-67) It is this competition process between the various economic agents that is argued to cause the market system to achieve the most efficient allocation of resources[[67]](#footnote-68) within the economy.[[68]](#footnote-69) This competition process will however only lead to the market equilibrium if this competition process is left to the market forces.[[69]](#footnote-70) Accordingly, government interference within the economy is viewed unfavourably.[[70]](#footnote-71) Hence, the term “free markets” is derived from the limited government interference within the economy i.e. the market forces are free to determine the most efficient allocation of resources.[[71]](#footnote-72)

As stated earlier, the market system coordinates and directs economic activity in order to obtain the most efficient allocation of resources. The question now is, how does the market system go about obtaining the most efficient allocation of resources in a situation where there is no government interference and where every consumer and firm only strives to achieve his/her own self interest i.e. maximise his/her own satisfaction? The answer lays in the creation of markets and prices.[[72]](#footnote-73)

The market is a place where buyers and sellers meet to exchange goods and/or services.[[73]](#footnote-74) Accordingly, the market facilitates the flow of information between buyers and sellers regarding the different choices that the buyers and sellers have made with regard to their demand and supply.[[74]](#footnote-75) These choices, regarding the type of goods and services which are requested by the buyers and the way in which sellers have chosen to use their resources, in turn determine the price for the different products and resources.[[75]](#footnote-76) These prices in turn, direct the various choices that the different economic agents make in the pursuit of their own self interest.[[76]](#footnote-77)

Stated differently, the market brings the buyers and sellers together and allows them to communicate with each on what goods and services are available (supplied) and what goods and services are requested (demanded).[[77]](#footnote-78) The demand and supply for the various goods and services in turn determines the market price thereof.[[78]](#footnote-79) The market price of goods and services in turn determines the market demanded for that good and/or service and the market demanded in turn, determines the market supply i.e. demand and supply determine the price and output in any given market.[[79]](#footnote-80) Accordingly, the price in the market coordinates and directs economic activity by using the market as a communication instrument.[[80]](#footnote-81) The price therefore enables the market economy to coordinate and direct the use of economic resources.

Furthermore, the market price also keeps firms accountable to consumers[[81]](#footnote-82) because the market price determines the quantity demanded and hence also the quantity of goods and services which a firm can sell.[[82]](#footnote-83) The reason for this is due to the fact that consumers generally have the freedom to decide what they want to consume and also what quantity they want to consume given the market price and their budget constraints.[[83]](#footnote-84) Consumer sovereignty coupled with the firm’s incentive to obtain profit leads to competition between the different firms where each of them strives to increase their profits i.e. to convince more buyers to buy their products.[[84]](#footnote-85)

Competition on the other hand, is regarded as the regularity force of the market system because it prohibits firms from asking more than the market price for any specific good or service.[[85]](#footnote-86) If for example a firm does ask more than the market price, then that firm will lose sales to other firms. In addition if a firm pays lower wages than the market wage then that firm will lose skilled employees to other firms.[[86]](#footnote-87)

Accordingly, the process of competition ensures that firms need to maximise their efficiency if they want to provide their products at the competitive market price.[[87]](#footnote-88) If not, they face losing sales (profits) to other more efficient firms.[[88]](#footnote-89) Therefore, competition is the regulating mechanism ensuring that the socially efficient quantity is produced at the socially efficient price and hence it is argued that the competition process is the reason why the market system achieves the optimal allocation of resources.[[89]](#footnote-90) It goes without saying that competition is one of the most important factors influencing the efficiency of the market system.

To recapitulate, the market brings together buyers and sellers in order to exchange information.[[90]](#footnote-91) This exchange of information regarding supply and demand determines the market price and the market price then coordinates and directs the economic activity within the relevant market.[[91]](#footnote-92) Competition on the other hand, is what ensures that the market system guides the use of the economic resources in such a way that the socially efficient quantity is produced at the socially efficient price i.e. market equilibrium is obtained.[[92]](#footnote-93)

2.2.5 The perfectly competitive market model

The market system itself consists of different models with the so called “perfectly competitive model” being the most efficient model for the market system.[[93]](#footnote-94) In the perfectly competitive model, all firms are price takers and accordingly none of them can individually influence the market price.[[94]](#footnote-95) The firms are labelled price takers because the market price, which is the maximum price that these firms can sell their products for, is determined by the market and not by themselves.[[95]](#footnote-96)

As mentioned earlier the market price is derived from where the market demand is equal to the market supply i.e. where the market is in equilibrium.[[96]](#footnote-97) Accordingly, no individual firm is in a position to coordinate and direct the economic activity within that market. Stated differently, in a perfectly competitive market no individual firm can influence the market price and accordingly no individual firm has control over the quantity demanded and supplied within the relevant market.[[97]](#footnote-98) Consequently, in a perfectly competitive market all the firms are in a position of perfect competition with each other.[[98]](#footnote-99)

Since the perfectly competitive market is the most efficient form of the market system it is used as the benchmark for reviewing all other markets.[[99]](#footnote-100) In real life however, no market actually achieves the position of being perfectly competitive.[[100]](#footnote-101) Nonetheless, the perfectly competitive market does provide a very useful benchmark to estimate and increase the efficiency of markets.[[101]](#footnote-102)

Considering that the perfectly competitive market is depended on the level of competition within that market i.e. a market requires “perfect competition” for that market to be classified as perfectly competitive, the most important concept in the perfectly competitive market is the concept of market power.[[102]](#footnote-103) Market power can be described as the power of a firm to:

 a) “Control prices.

 b) Exclude competition.

 c) Behave to an appreciable extent independently from competitors, suppliers and customers.”[[103]](#footnote-104)

In other words market power can be described as a firm’s ability to influence the level of competition in a given market.[[104]](#footnote-105) This in turn implies that a firm can potentially change the market model from a perfectly competitive market to a model in which that firm can obtain more profit because of the absence or lower level of competition in that market.

Consequently, the abuse of market power has the outcome of lessening competition in a specific market and hence also lessens the efficiency of the market system and thus causes the market to move away from its equilibrium position to a position where the most efficient allocation of economic resources are not obtained. Stated differently, the market is no longer using its scarce economic resources optimally and thus is wasting some of society’s scarce economic resources.

The different models of the market system and the concept of market power will be discussed in detail later on in this chapter. What is of importance at this moment is the definition of competition since competition forms the foundation of the perfectly competitive market model which is the most efficient model for the market system.[[105]](#footnote-106) As mentioned earlier, competition is also extremely important for the market system in general.[[106]](#footnote-107)

2.2.6 The meaning of competition

The general definition of competition in South Africa is as follows: “In general terms competition involves the idea of a struggle between rivals endeavouring to obtain the same end. It may be said to exist whenever there is potential diversion of trade from one to another. For competition to exist the articles or services of the competitors should be related to the same purpose or must satisfy the same need.”[[107]](#footnote-108)

Although this definition may seem accurate and appropriate closer inspection reveals that this definition is in truth, within the context of regulating the market system, fundamentally flawed.[[108]](#footnote-109) The general definition does not provide for different types of competition and also not for the degree of competition in a given market.[[109]](#footnote-110) The general definition is also ineffective when determining whether specific conduct will lessen competition in a market.[[110]](#footnote-111) Accordingly, the general definition is problematic for competition authorities when regulating competition.[[111]](#footnote-112) Of course, the term competitors and the competitive relationship between competitors can be described using the general definition.

Remember however, that competition in the context of the market system refers to the scenario where all the firms in a market are price takers. This means that the firms are unable to set the market price and thus determine the market supply and demand i.e. the firms are unable to coordinate and direct the economic activity within that market. Hence, it is obvious that competition in this context does not refer to the individual relationship between the individual competitors but rather to the degree of market power which the firms within a given market possess. Hence, competition in the context of the market system is defined as the “absence of market power”[[112]](#footnote-113) and also as the “opposite of monopoly.”[[113]](#footnote-114) Also, remember that Competition Law draws upon the economist’s concept of competition.[[114]](#footnote-115)

It is worth noting at this point that the Competition Act[[115]](#footnote-116) which aims to maintain and promote competition does not define the term “competition.”[[116]](#footnote-117) At first, this may seem odd given that term “competition” is the purpose and hence also the relevance of the Competition Act[[117]](#footnote-118) in South Africa’s legal system.[[118]](#footnote-119) The reason why the term “competition” is not defined in the Competition Act[[119]](#footnote-120) is because the term “competition” is dependent on the market structure (model).[[120]](#footnote-121) The necessity for defining competition as the “absence of market power”[[121]](#footnote-122) or as the “opposite of monopoly”[[122]](#footnote-123) will become clear in section 3.3.4.2.2 where the structure element of the Structure-Conduct-Performance paradigm is discussed as will the relationship between the market structure and the meaning of competition. Furthermore, the meaning of competition will be revisited by section 3.3.4.3 after the SCP paradigm has been discussed.

2.2.7 The failure of market systems

Sometimes the market system fail to achieve the socially efficient quantity at the socially efficient price i.e. markets may fail to achieve allocative efficiency.[[123]](#footnote-124) In general, markets fail because of imperfect competition, externalities influencing the functioning of the markets, the desire for public goods that can only be provided by government and lastly due to asymmetrical (irregular) information.[[124]](#footnote-125) Market failure refers to a situation where the market forces are not functioning properly.

It can also be said that competition can exclude (destroy) competition because it awards efficient firms with profits and inefficient firms with losses.[[125]](#footnote-126) This implies that as insufficient firms leave a particular market because of their losses, the more efficient firms gain market power because there are fever firms to compete with and accordingly the efficient firms can influence the price and output in that market to a greater extent.[[126]](#footnote-127) Through competition the efficient firms have in reality destroyed competition.[[127]](#footnote-128) Notice however, that the lack of competition in this market will not cause the firms and hence the market to become more inefficient. The reason for this is that these firms and hence the market have already achieved efficiency. It is only when these firms then abuse their market power that they themselves and hence also the market will become less efficient. This is also the point where the market system fails.

For the reason that the market system fail from time to time, governments have been intervening in the market system for years.[[128]](#footnote-129) The government intervention is however not aimed at coordinating and directing the economic activity within the markets but rather to ensure the proper functioning thereof.[[129]](#footnote-130) Stated differently, governments intervene in the market system but they are not the dominant force within that market.[[130]](#footnote-131) Accordingly, the plan of government is to ensure that the market equilibrium is determined and obtained through the market forces where the market forces denote demand and supply within that market.[[131]](#footnote-132)

Governments make use of what is called “competition policy” to intervene within markets in order to enhance the efficiency of those markets.[[132]](#footnote-133) Competition policy can be defined as “a regulatory tool which seeks to address market failures by maintaining or creating the foundations for effective functioning markets.”[[133]](#footnote-134) Furthermore, competition policy itself can be divided into 2 parts namely economic policy and competition law.[[134]](#footnote-135)

Economic policies are aimed at increasing competition within the national and international markets and consist of trade policies[[135]](#footnote-136), deregulation[[136]](#footnote-137) and privatisation.[[137]](#footnote-138) Economic policies, in the context of capitalism, are thus aimed at creating a favourable environment for the implementation and functioning of the market system.

Competition law on the other hand is aimed at enhancing the efficiency of the market system through the maintenance and promotion of competition within the different markets.[[138]](#footnote-139) As mentioned earlier, competition can be defined as the “absence of market power”[[139]](#footnote-140) and also as the “opposite of monopoly.”[[140]](#footnote-141) Accordingly, competition law is aimed at prohibiting firms from obtaining so much market power so as to allow them to abuse this power in order to lower the level of competition in the specific market.[[141]](#footnote-142)

Bear in mind that competition is regarded as the regularity force of the market system because it prohibits firms from asking more than the market price for any specific good or service.[[142]](#footnote-143) Accordingly, competition ensures that firms need to maximise their efficiency if they desire to provide their products at the competitive market price otherwise they face exit from the market.[[143]](#footnote-144)

2.2.8 The South African economic system

Currently South Africa has a mixed economic system which contains elements of both the planned and the market economy.[[144]](#footnote-145) The reason for this is the composition of South Africa's government.[[145]](#footnote-146) The South African government consist out of 3 parties namely the African National Congress (ANC), the South African Communist Party (SACP) and the Congress

Of South African Trade Unions (Cosatu).[[146]](#footnote-147) These 3 parties have a history of supporting the planned socialist economic system.[[147]](#footnote-148)

Nevertheless, South Africa's current economic system is nearer to that of the market system even though it contains several elements of the planned economic system.[[148]](#footnote-149) Accordingly, it is held that the correct delineation for South Africa's economic system is that of the market system albeit imperfectly competitive.[[149]](#footnote-150)

Given that South Africa follows the market system, competition and thus also competition policy is essential for the efficient functioning of South Africa's markets. The focus of this paper is on the competition law part of competition policy and hence the economic policy part of competition policy is largely ignored for the purposes of this paper.

In South Africa the competition law part of competition policy is satisfied by the Competition Act 89/1998 which aspires to maintain and promote competition within the republic of South Africa.[[150]](#footnote-151) In other words the Competition Act[[151]](#footnote-152) regulates the abuse of market power.[[152]](#footnote-153) This is the same as saying that the Competition Act[[153]](#footnote-154) regulates monopoly conduct.

**2.3 The Historical development of Monopoly regulation in South Africa.**[[154]](#footnote-155)

2.3.1 The South African Common law

2.3.1.1 Monopoly regulation under Roman criminal law

The first attempt to regulate monopoly was made by the Roman Empire some 2000 years ago.[[155]](#footnote-156) The Romans sought to regulate monopoly through the use of criminal sanctions.[[156]](#footnote-157)

The first of these laws prohibiting monopolies was the so called *Lex Julia de annona*.[[157]](#footnote-158) The *Lex Julia de annona* was applicable to individuals or a group of individuals acting collectively to raise the price of corn in an artificial manner.[[158]](#footnote-159) The catalyst for the writing and implementation of this legislation was traders who bought very large quantities of corn and who then kept from selling their corn until a time when they could essentially sell it free from competition and hence increase the price of their corn dramatically.[[159]](#footnote-160) This indicates that the Roman traders were fully aware that they could use scarcity to gain monopoly power (market power) to dramatically increase prices.[[160]](#footnote-161)

Despite the *Lex Julia de annona* monopoly spread throughout the Roman Empire and also became practiced with regard to most food types and other goods used on a daily basis.[[161]](#footnote-162) In response to the spread of monopoly conduct, several decrees were promulgated which increased the sanctions imposed by the *Lex Julia de annona* in order to try and stop monopoly conduct.[[162]](#footnote-163) Despite the numerous attempts to bring monopoly conduct under control it had little or no effect on the spread of monopoly.[[163]](#footnote-164)

Despite the oppressive nature of monopolies the states themselves became supporters thereof during the economic crises which threatened the Western part of the Roman Empire.[[164]](#footnote-165) The economic crisis convinced the state to sell monopoly rights to traders as the state sought to replenish its treasuries and for all practical reasons the Roman Empire became organised by state protected monopolies.[[165]](#footnote-166) Accordingly, the *Lex Julia de annona* for all practical reasons fell into disuse.[[166]](#footnote-167)

By the beginning of the fourth century, monopoly had impoverished the public to such an extent that the Roman emperor, Diocletian, in 301 A.D. was forced to promulgate an edict on price control.[[167]](#footnote-168) This edict placed ceiling (maximum) prices on various goods and made contravening this Edict punishable by death.[[168]](#footnote-169) Alas, Diocletian abdicated in 305 A.D. and this Edict on price control was repealed immediately.[[169]](#footnote-170) For the next 178 years monopoly conduct were to be unrestricted in the Roman Empire.[[170]](#footnote-171)

Then in 483 A.D. Emperor Zeno promulgated an edict which prohibited monopoly conduct.[[171]](#footnote-172) This Edict which came to be known as the Edict of Zeno went much further than all previous measures aimed at curtailing monopoly conduct.[[172]](#footnote-173) The Edict of Zeno went as far as to annul all monopoly rights obtained from previous Emperors and it also prohibited the future grant of Imperial privileges regarding monopoly rights.[[173]](#footnote-174) The Edict of Zeno even contained a provision which prohibited minimum resale price maintenance.[[174]](#footnote-175)

The Edict of Zeno was the pinnacle of anti-monopoly legislation in the Roman Empire and even when Justinian codified the Roman law he did nothing more other than to include the Lex Julia de annona and the Edict of Zeno as the collective legislation regarding the regulation monopoly conduct.[[175]](#footnote-176) Nevertheless, it was only a matter of a few short years before the Edict of Zeno also became victim of imperial circumvention and consequently the Edict of Zeno became largely abandoned.[[176]](#footnote-177) Accordingly, it is fair to say that the regulation of monopoly conduct under Roman criminal law was decisively ineffective.[[177]](#footnote-178)

2.3.1.2 Monopoly regulation under Roman-Dutch criminal law

To study the resurgence of Roman criminal law against monopoly conduct we must study the European Legal systems in the Middle Ages since these systems were to implement the relevant Roman law.[[178]](#footnote-179) Of primary importance to this study is Holland’s[[179]](#footnote-180) implementation of the Roman Laws prohibiting monopolies given that the Roman-Dutch Law forms by far the largest part of South Africa’s common law.[[180]](#footnote-181)

By the middle of the 16th century the effects of monopoly conduct weighed so heavily on the citizens of Holland that Charles V, despite being a tyrant and against his own interest, promulgated an Edict which for all practical reasons and after a thousand years, re-enacted the Roman laws governing monopoly conduct.[[181]](#footnote-182) This Edict is also known as the “Placaat of 1540.”[[182]](#footnote-183)

The section prohibiting monopoly conduct is contained in paragraph 7 of the Placaat of 1540.[[183]](#footnote-184) Paragraph 7 states that *“to prevent from henceforth on the damage proceeding from monopolies and improper contracts which many merchants and traders make and use in our land to the detriment of other good and righteous merchants and traders and against the common welfare: so we have ordered and decreed, and do order and decree, that no merchant, trader, or anyone else do promote the making of contracts, pacts or agreements smacking of monopoly or prejudicial to the common welfare, such as to buy all the commodities of any sort to keep them amongst themselves and afterwards to sell at excessive prices, or other similar practice, under pain of confiscation of the goods and commodities so bought, and in addition of arbitrary punishment*.”[[184]](#footnote-185)

It is clear from the preceding paragraph that the Placaat 1540 prohibited conduct which was also prohibited under the *Lex Julia de annona*,forestalling in the trade of goods, and under the Edict of Zeno, minimum resale price maintenance.[[185]](#footnote-186) Just as their counterparts in the Roman law, the prohibitions regarding monopoly conduct contained in the Placaat of 1540 was dealt with under the criminal law branch of Holland’s legal system.[[186]](#footnote-187)

Despite these prohibiting provisions contained within the Placaat of 1540 it is commonly acknowledged that these provisions too fell into disuse and monopoly conduct became a crime in name only.[[187]](#footnote-188)

2.3.1.3. The South African context

The provisions contained within the Placaat of 1540 which prohibits monopoly conduct has never been implemented in South Africa’s legal system.[[188]](#footnote-189) The only reference in South African law to these provisions was in the case of Tothill v Gordon but this case revolved around a civil lawsuit and accordingly the court did not consider whether monopoly conduct is a crime in South Africa.[[189]](#footnote-190) Consequently, it is accepted that monopoly conduct is not a crime in South Africa.[[190]](#footnote-191)

This complete failure of the criminal branch of South Africa’s legal system to deal with monopoly conduct placed the whole burden upon the civil branch of South Africa’s legal system.[[191]](#footnote-192) The civil branch pertaining to monopoly regulation will now be discussed.

2.3.2.1 Monopoly regulation under South African Civil Law

One of the most important monopoly practices regulated by the civil law is that of trade agreements[[192]](#footnote-193) to maintain prices.[[193]](#footnote-194) These trade agreements can be divided into 2 categories namely coöperative price maintenance agreements and resale price maintenance agreements.[[194]](#footnote-195)

A coöperative price maintenance agreement is an agreement between suppliers in the same industry in terms of which they fix the price at which they sell their products to retailers and in terms of which they regulate the distribution channels for their produce.[[195]](#footnote-196) A price maintenance agreement on the other hand is an agreement between an individual supplier and an individual retailer in terms of which the supplier determines the price at which the retailer has to sell the suppliers goods to the consumers.[[196]](#footnote-197) In general coöperative price maintenance agreements and resale price maintenance agreements are regulated by the same legal principles and accordingly this paper will only consider the regulation of price maintenance agreements.[[197]](#footnote-198) This paper will now discuss the functioning of price maintenance agreements and then it will consider its regulation under the law of contracts and the law of delict.

2.3.2.2 Functioning of price maintenance agreements

From the preceding paragraph it is clear that the purpose of a resale price maintenance agreement is to set the price that consumers pay for a specific product.[[198]](#footnote-199) In terms of a price maintenance agreement the supplier agrees to supply the retailer with products and the retailer in turn agrees not to sell the suppliers products at a price lower than that prescribed by the supplier.[[199]](#footnote-200) If a retailer were to break this agreement the suppliers can choose between 2 types of remedies.[[200]](#footnote-201)

Firstly, the supplier can sue the retailer for breach of contract and secondly the supplier can stop supplying the retailer with his products.[[201]](#footnote-202) Sometimes with regard to the second remedy, suppliers act collectively in terms of which a defaulting retailer is placed on what is called a stop-list in terms of which the supply to that retailer is stopped.[[202]](#footnote-203) The stop list is then distributed between the various suppliers acting collectively and accordingly all the participating suppliers discontinue the supply of their products to the specific retailer.[[203]](#footnote-204) The first remedy relates to the Law of Contracts and the second remedy relates to the Law of Delict.[[204]](#footnote-205)

2.3.2.3 Law of Contract

In South African law the general principle with regard to concluding agreements is the principle that persons are free to contract on any terms provided that they do not violate any principle of public policy or any other legal principle.[[205]](#footnote-206) This freedom to contract in turn is limited by another principle which states that any agreement that places an unreasonable restraint of trade on a person is contrary to public policy.[[206]](#footnote-207) Accordingly, coöperative price maintenance agreements and resale price maintenance agreements are dealt with under the principle of restraint of trade.[[207]](#footnote-208)

In the case of Tothill v Gordon[[208]](#footnote-209) it was decided that those agreements which are concluded in order to fix prices and the conditions under which goods are bought and sold i.e. coöperative price maintenance agreements and resale price maintenance agreements are not in itself contrary to South African law.[[209]](#footnote-210) Accordingly, these contracts are enforceable in South African law i.e. when a retailer breaches a coöperative price maintenance agreement or a resale price maintenance agreement the supplier has legal recourse against him.[[210]](#footnote-211)

From the preceding paragraph it is quite clear that the South African Law of Contracts is not only inadequate in dealing with monopoly conduct but in certain instances it even contributes to the use of monopoly conduct.[[211]](#footnote-212)

2.3.2.4 Law of Delict

We now come to the use of stop-lists as previously described. In the case of Tothill v Gordon[[212]](#footnote-213) the court concluded that the use of stop-lists is not contrary to South African law and hence these stop-lists are legally enforceable in South Africa.[[213]](#footnote-214) This means that suppliers can legally boycott any retailer from selling the suppliers goods if the retailer acted contrary to any coöperative price maintenance agreement or any resale price maintenance agreement.[[214]](#footnote-215)

From the preceding paragraph it is pretty clear that the South African Law of Delict is inadequate in dealing with monopoly conduct.[[215]](#footnote-216) Taking into consideration the Law of Contract and the Law of Delict it is clear that the net effect of the South African Civil Law is to enhance the use of monopoly conduct and not to prohibit it.[[216]](#footnote-217)

2.3.2.5 The South African context

The preceding paragraphs indicate that the complete inadequacy and ignorance of the South African common law regarding the regulation of monopoly conduct contributed to the unskillfulness of the South African courts in effectively dealing with monopoly conduct.[[217]](#footnote-218) Accordingly it has been suggested that the courts should be replaced by an administrative tribunal regarding the regulation of monopoly conduct.[[218]](#footnote-219)

This administrative tribunal should however be subjected to certain requirements which include that “the public is entitled to expect that the ancient and honoured tradition of judicial impartiality and detachment in receiving and weighing evidence, and in interpreting and applying rules, will in no way be diminished. These qualities the Courts have never lacked. On the other hand, the Courts, on their own admission, are not suitable tribunals to adjudicate between conflicting theories of political economy. One thing, therefore, is clear: if an administrative tribunal is to do better than the Courts, it must be both judicially and technically competent in the economic sphere.”[[219]](#footnote-220)

The inadequacy of the South African common law and courts regarding the regulation of monopoly conduct left the South African government with no choice but to write statutory legislation and to create an administrative tribunal to regulate the growing problem of monopolies in South Africa.[[220]](#footnote-221) These statutory legislations will now be discussed.

2.3.2 Statutory law

2.3.2.1 Undue restraint of trade Act[[221]](#footnote-222)

The first legislation to be passed in South Africa with the purpose of controlling monopoly conduct was the Undue restraint of trade Act[[222]](#footnote-223) which became law in 1949. This Act[[223]](#footnote-224) prohibited various activities which hindered the trade process in South Africa.[[224]](#footnote-225) Of particular importance for this paper is that this Act[[225]](#footnote-226) prohibited the evil practice of resale price maintenance which up to this point was largely legalized by South African law.[[226]](#footnote-227) This Act[[227]](#footnote-228) even went as far as to allow for criminal prosecution in the event that an act of resale price maintenance was committed. This Act[[228]](#footnote-229) also provided for the investigation and exposure of any monopoly conduct.[[229]](#footnote-230)

Nevertheless this Act[[230]](#footnote-231) was always intended to be an interim measure for the regulation of monopoly conduct.[[231]](#footnote-232) Accordingly, this Act[[232]](#footnote-233) was promptly replaced by the Regulation of Monopolistic Conditions Act.[[233]](#footnote-234)

2.3.2.2 Regulation of Monopolistic Conditions Act[[234]](#footnote-235)

The Regulation of Monopolistic Conditions Act[[235]](#footnote-236) was South Africa’s first suitable attempt to control monopoly conduct.[[236]](#footnote-237) The purpose of this Act[[237]](#footnote-238) was to maintain and prevent monopoly conduct which are harmful to consumers and hence in conflict with the public interest.[[238]](#footnote-239) This Act[[239]](#footnote-240) was largely based upon a report by the Board of Trade and Industry[[240]](#footnote-241) which set out the principles which would form the foundation of this Act.[[241]](#footnote-242)

These principles are as follows:

a) The condemnation of all monopoly conduct is unrealistic and unjustified.[[242]](#footnote-243) For this reason an *ad hoc* approach should be followed to determine, in each case, whether the specific monopoly conduct should be prohibited.[[243]](#footnote-244) Accordingly an approach of *per se[[244]](#footnote-245)* prohibitions on monopoly conduct should not be undertaken.[[245]](#footnote-246)

b) The market structure is not the deciding factor to determine the economic impact of monopoly conduct.[[246]](#footnote-247)

c) The regulation of monopoly conduct should be administered by a specialist body and not by the South African courts.[[247]](#footnote-248)

d) Amalgamations such as trade unions should not be prohibited by monopoly legislation.[[248]](#footnote-249) It was contend that only the agreements among the members of such an amalgamation which could potentially restrict competition should be regulated i.e. restricted agreements were to be regulated and not prohibited.[[249]](#footnote-250)

e) Large firms and groups of large firms should not be subjected to compulsory dissolution.[[250]](#footnote-251)

f) State owned firms should be subjected the same monopoly legislation as private firms.[[251]](#footnote-252)

This Act[[252]](#footnote-253) was an enabling Act since it appointed the Board of Trade and Industry as the specialist body to administer monopoly legislation in South Africa.[[253]](#footnote-254) However, the Board of Trade and Industry had no jurisdiction with regard to the initiation of investigations and the awarding of relief for monopoly conduct.[[254]](#footnote-255) The power to initiate investigations into monopoly conduct and to determine the relief awarded for such conduct vested in the Minister of Trade and Industry.[[255]](#footnote-256) Furthermore, the standard of analysis when determining whether specific conduct should be prohibited under this Act[[256]](#footnote-257) was simply the “public interest” with the term “public interest” not being defined in this Act.[[257]](#footnote-258) This caused several headaches regarding the application and functioning of this Act.[[258]](#footnote-259)

The Board of Trade and Industry had to be authorised by the Minister of Trade and Industry with the investigation of conduct, the recommendation of remedies and lastly to negotiate and ensure compliance with this Act.[[259]](#footnote-260) The Minister of Trade and Industry then had the authority to either accept or reject the findings and recommendations of the Board of Trade and Industry.[[260]](#footnote-261) These investigations by the Board of Trade and Industry eventually lead to a general prohibition of resale price maintenance in 1968.[[261]](#footnote-262)

In 1975 a commission of enquiry was established to investigate the effectiveness of the Regulation of Monopolistic Conditions Act.[[262]](#footnote-263) This commission is known as the Mouton Commission.[[263]](#footnote-264) The enquiry undertaken by the Mouton Commission concluded that the Regulation of Monopolistic Conditions Act[[264]](#footnote-265) failed miserably in “preventing a dramatic increase in oligopolies.”[[265]](#footnote-266) The Mouton Commission blamed the implementation of the Regulation of Monopolistic Conditions Act[[266]](#footnote-267) for its failure.[[267]](#footnote-268) Stating that the reason for this unsuccessful implementation of this Act[[268]](#footnote-269) was due to the Minister of Trade and Industry being driven by political influence and citing that the Board of Trade and Industry had a conflict of interest regarding the application of the Regulation of Monopolistic Conditions Act.[[269]](#footnote-270)

The Regulation of Monopolistic Conditions Act[[270]](#footnote-271) also had other shortcomings such as that it did not allow for preventative action against monopoly conduct, the penalties of this Act[[271]](#footnote-272) was no longer satisfactory and lastly this Act[[272]](#footnote-273) also failed to deal with mergers and acquisitions.[[273]](#footnote-274)

As a result of the enquiry by the Mouton Commission the Regulation of Monopolistic Conditions Act[[274]](#footnote-275) was repealed by the Maintenance and Promotion of Competition Act[[275]](#footnote-276) which came into force on the 1st of January 1980.[[276]](#footnote-277)

2.3.2.3 Maintenance and Promotion of Competition Act[[277]](#footnote-278)

2.3.2.3.1 Underlying principles

The Mouton Commission suggested that the new competition Act[[278]](#footnote-279) should provide for a new administrative authority with more resources, heavier penalties for any violation of the competition legislation and also for the inclusion of provisions for merger control.[[279]](#footnote-280) The Mouton Commission also made recommendations on the objectives and principles of competition policy in South Africa.[[280]](#footnote-281)

These recommendations include the following:

a) “A competition policy based on free enterprise, embracing the total economy, is essential for achieving the country's overall economic objectives, such as the optimum utilization of economic resources, the creation of employment, improving the balance of payments and stimulating economic growth.”[[281]](#footnote-282)

b) Competition policy should also provide for coöperation between the public and private establishments.[[282]](#footnote-283)

c) Competition policy should be aimed at protecting the public interest from the abuse of market power and should contain appropriate penalties.[[283]](#footnote-284) To achieve this competition policy should promote effective competition so as to obtain the optimum allocation of the economic resources.[[284]](#footnote-285)

d) The Mouton Commission also noticed that South Africa generally has high levels of concentration[[285]](#footnote-286) of economic power within the economy but the Mouton Commission was of the opinion that these high levels of concentrations are not against public interest.[[286]](#footnote-287)

Accordingly, the Mouton Commission was of the opinion that competition legislation should not contain any *per se* prohibitions regarding monopoly conduct and restrictive trade practises.[[287]](#footnote-288) Hence, the Mouton Commission endorsed the approach followed in the Regulation of Monopolistic Conditions Act[[288]](#footnote-289) in terms of which monopolistic conditions and restrictive trade practises should only be prohibited if it is found, after thorough investigation that it is contrary to public interest.[[289]](#footnote-290)

Following these recommendations the Maintenance and Promotion of Competition Act[[290]](#footnote-291) was drafted, accepted and became law.[[291]](#footnote-292)

2.3.2.3.2 Purpose

The purpose of the Maintenance and Promotion of Competition Act[[292]](#footnote-293) is to provide for the maintenance and promotion of competition in the economy, the prevention or control of restrictive practices, acquisitions and monopoly situations and for any other related matters.[[293]](#footnote-294) The end purpose of the Maintenance and Promotion of Competition Act[[294]](#footnote-295) is thus to facilitate and promote the optimum allocation of South Africa’s economic resources.[[295]](#footnote-296)

2.3.2.3.2 Functioning and evaluation

The Maintenance and Promotion of Competition Act[[296]](#footnote-297) provided for the “review of mergers and acquisitions, restrictive practices and monopoly situations.”[[297]](#footnote-298) A restrictive practice was defined as “any agreement, understanding, act or omission, and situation which restricts competition and having or likely to have the effect of inter alia, restricting the production or distribution of any commodity, enhancing or maintaining prices, preventing or retarding the introduction of new technology, and preventing or restricting new entrants into any market.”[[298]](#footnote-299)

A monopoly situation on the other hand is defined as “a situation where any person, or two or more persons with a substantial economic connection, control in the Republic or any part thereof, wholly or to a large extent, the class of business in which he or they are engaged in respect of any commodity.”[[299]](#footnote-300) Mergers and acquisitions were confined to horizontal[[300]](#footnote-301) mergers and acquisitions.[[301]](#footnote-302) This Act[[302]](#footnote-303) thus provided for the regulation of the market structure and market conduct.[[303]](#footnote-304) Initially however, the market structure and accordingly market concentration was downplayed in their importance for competition policy.[[304]](#footnote-305)

When reviewing mergers and acquisitions, restrictive practices and monopoly situations the deciding factor whether or not the specific conduct was illegal was the public interest.[[305]](#footnote-306) Public interest however was not defined by the Maintenance and Promotion of Competition Act[[306]](#footnote-307) and accordingly it gave rise to inconsistency regarding the legality of certain conduct.[[307]](#footnote-308)

Furthermore, this Act[[308]](#footnote-309) established the Competition Board and assigned it to administer this Act.[[309]](#footnote-310) Consequently, the Competition Board replaced the Board of Trade and Industry as the administrative authority regarding competition matters.[[310]](#footnote-311) The Competition Board had extensive authority to undertake investigations regarding mergers and acquisitions, restrictive practices and monopoly situations.[[311]](#footnote-312) The mergers and acquisitions which the Board could investigate were however limited to horizontal mergers and acquisitions.[[312]](#footnote-313) Furthermore, this Act[[313]](#footnote-314) did not require pre-merger (pre-acquisition) notification and hence the Competition Board relied exclusively on complaints and voluntary notification in order to investigate a merger and/or acquisition.[[314]](#footnote-315) This severely limited the efficiency of the Competition Board regarding the administration of mergers and acquisitions.[[315]](#footnote-316)

The main limitation regarding the efficiency of the Competition Board was however the fact that the Competition Board was merely an administrative body without executive authority within the Department of Trade and Industry.[[316]](#footnote-317) The Competition Board could only make recommendations to the Minister of Trade and Industry who could then either uphold or reject the Competition Boards recommendation.[[317]](#footnote-318) This opened up the possibility for the Competition Board to be limited and manipulated by political forces.[[318]](#footnote-319)

Another limitation to the efficient functioning of this Act[[319]](#footnote-320) was the fact that this Act[[320]](#footnote-321) only provided for the review of mergers and acquisitions, restrictive practices and monopoly situations.[[321]](#footnote-322) Accordingly, none of these practices were prohibited *per se* i.e. restrictive and anti-competitive practices was only illegal if it was investigated by the Competition Board and found to be contrary to public interest and then only if the Competition Board’s recommendation was uphold by the Minister of Trade and Industry.[[322]](#footnote-323) In 1986 however, the Maintenance and Promotion of Competition Act[[323]](#footnote-324) was amended so as to make resale price maintenance agreements, horizontal price fixing, horizontal collusion in order to divide markets and horizontal collusive tendering[[324]](#footnote-325) *per se* illegal activities.[[325]](#footnote-326)

These amendments also authorised the Competition Board to act against existing monopolies and oligopolies.[[326]](#footnote-327) Prior to this amendment the Competition Board could only act against new concentrations of economic power i.e. new monopolies and new oligopolies.[[327]](#footnote-328)

Despite these amendments the Maintenance and Promotion of Competition Act[[328]](#footnote-329) continued to be plagued by its various limitations and eventually it would be repealed by the Competition Act.[[329]](#footnote-330)

2.3.2.4 Towards a new competition policy

 *“Recent developments in the global economy, including mega mergers and the increased potential for cross-border anti-competitive practices, are of direct relevance to developing countries’ growth and development and also have implications for their integration into the world economy. Evidence from the experience of developing countries over the past decade suggests that insufficient attention to competition issues has, in some cases, negated whatever positive effects may have been gained from liberalization and privatization*...”[[330]](#footnote-331)

Prior to the 1994 elections the South African economy was in ruins and South Africa’s economy was, as is today, characterised by an elevated level of concentration of economic power with only five conglomerates controlling the majority of economic activity.[[331]](#footnote-332) As recently as 1998 these five conglomerates made up 54.7 percent of the capitalisation of the Johannesburg Stock Exchange.[[332]](#footnote-333) As a result, the majority of markets were classified as being monopolistic in nature.[[333]](#footnote-334) The high degree of concentration and the monopolistic nature of markets were brought about by years of international isolation when the economic focus was on self-sufficiency.[[334]](#footnote-335)

The 1994 elections paved the way for South Africa’s integration into the world economy.[[335]](#footnote-336) In fact, South Africa did eventually become a fully fledged member of the international community and economy.[[336]](#footnote-337) South Africa achieved this by among other things becoming a member of the World Trade Organization (WTO) and by renegotiating its trade relations in international markets such as the European Union, The United States of America and Japan.[[337]](#footnote-338) South Africa also increased its integration into regional areas for example by joining the Southern African Development Community (SADC).[[338]](#footnote-339)

South Africa’s integration into the world markets unfortunately had a very harmful effect associated with it.[[339]](#footnote-340) This harmful effect was that the increased integration caused the South African economy to become even more concentrated than ever before.[[340]](#footnote-341) The reason for this was that the increased liberalisation caused smaller firms to be taken over by larger firms and it also caused firms to focus only on their primary activities and as a result they exited from their secondary markets.[[341]](#footnote-342) One question however remained and that was whether South Africa could survive in the international markets.[[342]](#footnote-343)

This increased integration of South Africa into world markets also lead to competition legislation taking centre stage.[[343]](#footnote-344) The reason for this is that the world markets (international trade) require proficient competition policies which include competition legislation.[[344]](#footnote-345) Accordingly, the South African government went about to formulate an ambitious competition policy reform.[[345]](#footnote-346) This task was to be delegated to the Department of Trade and Industry.[[346]](#footnote-347)

The government however indicated that competition policy should embrace the following.[[347]](#footnote-348)

a) Competition policy should advance free and active competition in all markets, private property rights, economic efficiency, the optimum allocation of resources, transparency, international competitiveness and the entry into markets.[[348]](#footnote-349)

b) Competition policy should include the interest of consumers, employees, entrepreneurs and corporate competitors. Competition policy should also protect the ability of national firms to enter international markets.[[349]](#footnote-350)

c) Competition policy should ensure that competition matters are dealt with in a speedy, consistent and procedurally fair manner.[[350]](#footnote-351)

d) Competition policy should be “sufficiently flexible to incorporate existing policies and future modes of market regulation that extend in a coherent manner across the full spectrum of industrial and trade policy, foreign exchange policy, the attraction of foreign direct investment, the restructuring of state assets, tax reform, labour market policy, financial market regulation, consumer protection, research and development incentives, small business and affirmative action programmes, corporate governance instruments, and revised company law.”[[351]](#footnote-352)

The Department of Trade and Industry then went about to formulate a new competition policy for South Africa. It was decided that the purpose of competition legislation should be to promote and maintain competition to ensure economic efficiency and adaptability, international competitiveness, facilitate market entry by Small Micro and Medium Enterprises (SMME’s), facilitate the attainment of ownership for previously disadvantaged persons and to create new jobs.[[352]](#footnote-353)

The Department of Trade and Industry aspired to improve the efficiency of the South African economy through increased competition and also to enhance the public interest which was to be more clearly defined in the context of the market structure and firm behaviour.[[353]](#footnote-354) Additionally, The Department of Trade and Industry believed that competition and development would be mutually supportive and hence the increase in competitiveness and efficiency could be achieved together with an increase in economic access for previously disadvantaged groups.[[354]](#footnote-355) The Department of Trade and Industry thus had 2 policy considerations namely the promotion of competition and the restructuring of South Africa’s industrial organization to the benefit of previously disadvantaged groups.[[355]](#footnote-356) This would eventually lead to the Competition Act[[356]](#footnote-357) having to balance economic efficiency with socio-economic equity and development.[[357]](#footnote-358)

Nonetheless, the Department of Trade and Industry was of the opinion that in the broadest sense the main objective of competition legislation should be to promote active competition so as to improve allocative efficiency without impairing productive efficiency to such an extent that no gains are achieved for the consumer welfare.[[358]](#footnote-359) The essence of competition legislation is thus to use competition as a means to enhance the economic efficiency of firms and consequently the efficiency of the economy as a whole.[[359]](#footnote-360) The end result of competition legislation should thus be the maximisation of consumer welfare and this it is argued can only be achieved through the increase in efficiency resulting from competition legislation.[[360]](#footnote-361)

The Department of Trade and Industry would eventually draft a document named the “A Framework for Competition, Competitiveness and Development,” this document was to form the framework of the Competition Act.[[361]](#footnote-362) In January 2008 the Department of Trade and Industry would use this document to approach the National Economic Development and Labour Council (NEDLEC) to negotiate the policies that were to form the foundation of the Competition Act.[[362]](#footnote-363) This gave firms and labour parties the opportunity to influence the formulation of the Competition Act[[363]](#footnote-364) to better balance economic efficiency with socio-economic equity and development.[[364]](#footnote-365)

 In September 1998 the Competition Act[[365]](#footnote-366) were approved by government with the sections[[366]](#footnote-367) establishing the institutional framework[[367]](#footnote-368) set to commence on the 1st of November 1998 and the remaining sections on the 1st of September 1999.[[368]](#footnote-369)

To conclude, the Competition Act[[369]](#footnote-370) has significant improvements over the Maintenance and Promotion of Competition Act[[370]](#footnote-371) and is South Africa’s first proper attempt at effective market governance.[[371]](#footnote-372) In terms of the Competition Act[[372]](#footnote-373) the Competition Board[[373]](#footnote-374) was replaced with an independent competition authority tasked with administering the Competition Act.[[374]](#footnote-375) The new competition authority is also awarded with far-reaching authority to combat anti-competitive practices.[[375]](#footnote-376) Additionally, the Competition Act[[376]](#footnote-377) prohibits various practices which include the abuse of dominance.[[377]](#footnote-378) Lastly, the Competition Act[[378]](#footnote-379) also contains a mechanism designed to supervise mergers and acquisitions.[[379]](#footnote-380)

**2.4 The Competition Act**[[380]](#footnote-381)

2.4.1 Purpose and objectives

The purpose of the Competition Act,[[381]](#footnote-382) as described in section 2, 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 to 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;

 (f) To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The purpose of this Act[[382]](#footnote-383), which is to promote and maintain competition, is in line with the competition laws found in several developed market economies.[[383]](#footnote-384) What makes this Act[[384]](#footnote-385) unique however, is the broad scope of the objectives which is to be achieved by promoting and maintaining competition.[[385]](#footnote-386) Only 2 of the 6 objectives directly relate to competition policy namely objective (a), to promote the efficiency, adaptability and development of the economy, and objective (b), to provide consumers with competitive prices and product choices.[[386]](#footnote-387)

Objective (c), to promote employment and advance the social and economic welfare of South Africans, is a macroeconomic[[387]](#footnote-388) consideration and should not be an objective of competition policy.[[388]](#footnote-389) Furthermore, if too much focus is placed on the promotion of employment through the use of competition legislation it could be detrimental to the realization of objectives (a) and (b).[[389]](#footnote-390) The inclusion of the words “social welfare” could also lead to uncertainty in view of the fact that these words are not defined in the Competition Act.[[390]](#footnote-391)

Objective (d), to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic, is also a macroeconomic consideration and again if it is emphasised too much it could also be detrimental to objectives (a) and (b).[[391]](#footnote-392)

Objective (e), to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy, directly relates to competition policy.[[392]](#footnote-393) However, objective (e) will only relate to the promotion and maintenance of competition if the following conditions hold namely:[[393]](#footnote-394)

1. If these small and medium sized enterprises produce what consumers want[[394]](#footnote-395) and if it does so efficiently[[395]](#footnote-396) and

2. If there are no artificial barriers to entry preventing them or other firms from achievement this.[[396]](#footnote-397) The term “equitable” used in objective (e) could however be interpreted in such a manner as to create artificial barriers to entry.[[397]](#footnote-398)

Objective (f), to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons, is clearly not a consideration for competition legislation.[[398]](#footnote-399) This should be achieved through either fiscal policy or capital reallocation using state asset restructuring.[[399]](#footnote-400)

It is argued that these contradictory objectives could potentially lead to inconsistent policy decisions and also lower the efficiency of the Competition Act[[400]](#footnote-401) in achieving its purpose namely to promote and maintain competition.[[401]](#footnote-402)

The heterogenous nature of these objectives reveals the contradictory demands of the various groups[[402]](#footnote-403) that influenced the formulation of the Competition Act.[[403]](#footnote-404) In view of the contradictory demands the heterogenous nature of these objectives, which received countless discussions and criticisms, was considered necessary for obtaining the required political support for the formulation and acceptance of the Competition Act[[404]](#footnote-405) which were to be 1 of the most important factors to point South Africa in the direction of becoming a truly modern market economy.[[405]](#footnote-406)

Whether the inclusion of the wider macro-economic or public interest objectives will deter the attainment of promoting and maintaining competition is yet to be observed.[[406]](#footnote-407) What is certain however, is that economic efficiency and therefore consumer welfare is the overruling principle for the application of the competition Act.[[407]](#footnote-408) This opinion is supported by the following comment made by the Competition Tribunal “The role played by the competition authorities in defending even those aspects of the public interest listed in the Act[[408]](#footnote-409) is, at most, secondary to other statutory and regulatory instruments... The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect.”[[409]](#footnote-410)

In August 2009 the president signed the Competition Amendment Act.[[410]](#footnote-411) This Act[[411]](#footnote-412) made numerous amendments to the Competition Act[[412]](#footnote-413) but it is yet to come into force. One of the amendments made to the Competition Act[[413]](#footnote-414) by the Competition Amendment Act[[414]](#footnote-415) is the inclusion of the following 2 objections to section 2 of the Competition Act:[[415]](#footnote-416)

 “(g) ) to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to prevent, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic; and

 (h) To provide for consistent application of common standards and policies affecting competition within all markets and sectors of the economy.”

This amendment seems to support the opinion that economic efficiency and thus consumer welfare is the overruling principles for the application of the Competition Act.[[416]](#footnote-417) To conclude, the Competition Act[[417]](#footnote-418) does not aspire to protect the individual competitors in a given market instead it aspires to protect the competition process to ensure that the individual markets and thus the economy as a whole performs efficiently.[[418]](#footnote-419)

2.4.2 Restrictive practises

The Competition Act[[419]](#footnote-420) prohibits 2 kinds of practises namely restrictive agreements and the abuse of dominance.[[420]](#footnote-421) The restrictive agreements are further divided into 2 categories namely restrictive horizontal agreements[[421]](#footnote-422) and restrictive vertical agreements.[[422]](#footnote-423) Horizontal agreements can be defined as agreements between competitors whereas vertical agreements can be defined as agreements between parties who are in a supplier and customer relationship.[[423]](#footnote-424) Furthermore, a restrictive agreement is presumed to exist between firms if one of them owns a significant interest in the other or if they have at least one director or substantial shareholder in common and if those firms engage in that restrictive horizontal practice.[[424]](#footnote-425)

These prohibited practices namely restrictive agreements and the abuse of dominance too are divided into 2 categories namely *per se* and *rule of reason* prohibitions.[[425]](#footnote-426) *Per se* prohibitions are prohibitions for which there are no defences i.e. when a firm has committed a *per se* prohibited practice that firm is not allowed to raise any defences.[[426]](#footnote-427) The p*er se* prohibitions relate to conduct which is perceived as to always lead to anti-competitive effects and hence is always harmful for consumers.[[427]](#footnote-428)

*Rule of reason* prohibitions are prohibitions for which there are defences i.e. when a firm has committed a *rule of reason* prohibited practise that firm will be allowed to raise a defence.[[428]](#footnote-429) The primary test regarding *rule of reason* prohibitions is whether the specific conduct substantially prevents or lessens competition in that market.[[429]](#footnote-430) If proven, the contravening party will then have to proof that any technological, efficiency or other pro-competitive gains resulting from the prohibited practice outweigh any anticompetitive effects thereof and also that the prohibited conduct is reasonably necessary to achieve these pro-competitive gains.[[430]](#footnote-431)

2.4.2.1 Restrictive agreements

The restrictive horizontal practices prohibited are contained in section 4 of the Competition Act[[431]](#footnote-432) with the *rule of reason* prohibition contained in section 4(1)(a) and the *per se* prohibitions contained in section 4(1)(b).

**Section 4 Restrictive horizontal practices prohibited**

“(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect. or

(b) it involves any of the following restrictive horizontal practices:

 (i) directly or indirectly fixing a purchase or selling price or any other trading condition;

 (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

 (iii) collusive tendering.”

The restrictive vertical practices prohibited are contained in section 5 of the Competition Act[[432]](#footnote-433) with the *rule of reason* prohibition contained in section 5(1) and the *per se* prohibitions contained in section 5(2) and 5(3).

**Section 5: Restrictive vertical practices prohibited**

“(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

(2) The practice of minimum resale price maintenance is prohibited.

(3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –

 (a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and

 (b) if the product has its price stated on it, the words “recommended price” appear next to the stated price.”

2.4.2.2 Abuse of dominance

In terms of section 7 of the Competition Act[[433]](#footnote-434) a firm is regarded as being dominant in a specific market if that firm:

 (a) has 45 percent of that market or

 (b) if it has 35 percent, but less than 45 percent, of that market unless the firm can show that it does not possess market power in that market or

 (c) if it has less than 35 percent of that market but are in possession of market power within that market.

The Competition Act[[434]](#footnote-435) defines market power as “the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.”[[435]](#footnote-436)

The prohibited practises involving the abuse of dominance are contained in section 8 and 9 of the Competition Act[[436]](#footnote-437) with section 8 (a), 8(b) and 9(1)(a) containing the *rule of reason* prohibitions and section 8 (c), 8(d), 9(b), 9(c) and 9(d) containing the *per se* prohibitions.

**Section 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.”

**Section 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.”

2.4.3 Merger Control

Chapter 3, sections 11 to 17, of the Competition Act[[437]](#footnote-438) contains the merger control mechanism.[[438]](#footnote-439) Chapter 3 places a compulsory pre-merger notification obligation on firms who are contemplating a merger.[[439]](#footnote-440) According to the compulsory pre-merger notification, firms are obligated to obtain pre-merger approval from the Competition Commission or the Competition Tribunal with the Competition Commission considering small and intermediate mergers and the Competition Tribunal considering large mergers.[[440]](#footnote-441) Firms are however only obligated to obtain pre-merger approval if the value of the merger falls within the value of the merger thresholds.[[441]](#footnote-442) Currently the merger thresholds are as follow:

Merger thresholds as at 1 April 2009

|  |  |  |
| --- | --- | --- |
| Thresholds | Combined turnover / Asset value | Target turnover / Asset value |
| Lower threshold | R 560m | R 80m |
| Higher threshold | R 6 600m | R 190m |

Furthermore, mergers are divided into 3 size categories namely small, intermediate and large mergers.[[442]](#footnote-443) A small merger is defined as a merger or a contemplated merger with a value equal to or below that of the value of the lower threshold.[[443]](#footnote-444) An intermediate merger is defined as a merger or a contemplated merger with a value between the value of the lower and the higher thresholds.[[444]](#footnote-445) A large merger is defined as a merger or contemplated merger with a value equal to or exceeding the higher threshold.[[445]](#footnote-446)

Accordingly, the merger thresholds should be interpreted as follows. Small mergers do not require pre-merger approval.[[446]](#footnote-447) There are however an exception to this namely that the Competition Commission may within 6 months of the implementation of a small merger require the parties to the merger to inform the Competition Commission in the prescribed manner and form of all the relevant details of the merger if the Competition Commission is of the opinion that the small merger may substantially prevent or lessen competition in the relevant market and if that small merger cannot be justified on public interest grounds.[[447]](#footnote-448)

Intermediate and large mergers do however require pre-merger approval.[[448]](#footnote-449) Furthermore, a merger will constitute an intermediate merger if the value of that merger, in terms of the combined annual turnover of all the participating firms or their combined asset value, equals or exceeds R 560 million and the annual turnover or asset value of the targeted firm exceeds or is equal to R 80 million.[[449]](#footnote-450)

A large merger on the other hand will be a merger where the value of that merger, in terms of the combined annual turnover of all the participating firms or their combined asset value, equals or exceeds R 6.6 trillion and the turnover or asset value of the targeted firm exceeds or is equal to R 190 million.[[450]](#footnote-451)

In terms of the Competition Act[[451]](#footnote-452) a merger is defined as “when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.”[[452]](#footnote-453) Control on the other hand may be obtained in any manner including the purchase or lease of shares, by obtaining an interest or assets in the other firm or by an amalgamation or another form of grouping with the other firm.[[453]](#footnote-454)

To conclude, the Competition Act[[454]](#footnote-455) administers 3 types of mergers namely horizontal, vertical and conglomerate mergers.[[455]](#footnote-456) Horizontal mergers are defined as mergers between firms doing business in the same level of the supply chain and who sell substitutable goods or services in the same geographical area.[[456]](#footnote-457) Vertical mergers on the other hand are mergers between parties in a vertical relationship i.e. parties in a supplier and customer relationship.[[457]](#footnote-458) Conglomerate mergers are mergers that are neither horizontal nor vertical mergers i.e. it is mergers where there are no economic relationship between the parties.[[458]](#footnote-459)

2.4.4 Complex monopoly conduct

The Competition Amendment Act[[459]](#footnote-460) inserted what is termed “complex monopoly conduct” as section 10A into chapter 2 of the Competition Act[[460]](#footnote-461) which contains the prohibited practices.[[461]](#footnote-462) Sections 10A(1) and 10A(2) [[462]](#footnote-463) reads as follow:

“(1) Complex monopoly conduct subsists within the market for any particular goods or services if—

(a) at least 75% of the goods or services in that market are supplied to, or by ﬁve or fewer ﬁrms;

(b) any two or more of the ﬁrms contemplated in paragraph (a) conduct their respective business affairs in a conscious parallel manner or coordinated manner, without agreement between or among themselves; and

(c) the conduct contemplated in paragraph (b) has the effect of substantially preventing or lessening competition in that market, unless a ﬁrm engaging in the conduct can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

(2) For the purposes of subsection (1)(b) “conscious parallel conduct” occurs when two or more ﬁrms in a concentrated market, being aware of each other’s action, conduct their business affairs in a cooperative manner without discussion or agreement.”

Section 10A also provides for the Competition Commission to initiate its own investigation into complex monopoly conduct if it believes complex monopoly conduct is being practised within a given market.[[463]](#footnote-464) Upon its investigation the Competition Commission can apply to the Competition Tribunal and if the Competition Tribunal is satisfied with the Competition Commission’s investigation the Competition Tribunal may make any order it sees as reasonably necessary to mitigate the harmful effects of the complex monopoly conduct.[[464]](#footnote-465)

2.4.5 The Competition Authorities

The Competition Act[[465]](#footnote-466) is administered by what is termed a “three-pillar model” or a “tripartite model.”[[466]](#footnote-467) Owing to this model the Competition Act[[467]](#footnote-468) is administered by 3 separate authorities namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court.[[468]](#footnote-469)

The reason this model was chosen is because it is believed that since this model provides for authorities that are independent from politics, for the separation of investigative and adjudicative functions and for a convenient way to consider appeals that this model ensures the optimum in competition competence and legal accountability.[[469]](#footnote-470) It is also believed that such a model is a necessity and the only way for the effective functioning of competition legislation.[[470]](#footnote-471)

2.4.5.1 The Competition Commission

According to section 20(1)(a) the Competition Commission is an independent authority and subject only to the Constitution[[471]](#footnote-472) and the law. Furthermore, the Competition Commission is a juristic person with jurisdiction throughout South Africa and it must perform its functions without fear, favour and prejudice and in accordance to this Act.[[472]](#footnote-473) The Competition Commission comprise of the Commissioner and one or more Deputy Commissioners appointed by the Minister of Trade and Industry in terms the Competition Act.[[473]](#footnote-474) The Commissioner and the Deputy Commissioners must be suitably qualified and experienced in economics, law, commerce, industry or public affairs.[[474]](#footnote-475)

2.4.5.1.1 The functions of the Competition Commission

The functions of the Competition Commission include among others the following.[[475]](#footnote-476)

The Competition Commission is obliged to implement measures to increase market transparency and public awareness regarding the Competition Act.[[476]](#footnote-477) Furthermore, the Competition Commission is also obliged to investigate and evaluate alleged contraventions of the prohibited practises contained in chapter 2 and also to grant or refuse exemptions regarding the prohibited practices contained in chapter 2.[[477]](#footnote-478)

The Competition Commission is also authorised to conditionally or unconditionally accept, reject of refer any mergers which is referred to it in terms of chapter 3.[[478]](#footnote-479) The Competition Commission is the principle authority for evaluating small and intermediate mergers.[[479]](#footnote-480) Nonetheless, its decision can be taken on appeal to the Competition Tribunal who will then have the final verdict.[[480]](#footnote-481) Large mergers on the other hand are evaluated by the Competition Tribunal although the Competition Commission is allowed to make recommendations to the Competition Tribunal concerning a large merger.[[481]](#footnote-482)

To conclude, the Competition Commission is allowed to investigate alleged complex monopoly conduct.[[482]](#footnote-483) It is however only authorised to investigate such matters and to make recommendations based upon its investigations to the Competition Tribunal who is the adjudication authority regarding complex monopoly conduct.[[483]](#footnote-484)

2.4.5.2 The Competition Tribunal

The Competition Tribunal is a juristic person with jurisdiction throughout South Africa.[[484]](#footnote-485) The Competition Tribunal is also a tribunal of record and it is obligated to perform its functions in accordance with the Competition Act.[[485]](#footnote-486) Furthermore, the Competition Tribunal comprise of a Chairperson and no less than 3 but no more than 10 other employees appointed on a full or part-time basis by the President on recommendation from the Minister of Trade and Industry.[[486]](#footnote-487)

3.4.5.2.1 The functions of the Competition Tribunal

In terms of section 27(1) of the Competition Act[[487]](#footnote-488) the Competition Tribunal has the following functions:

 “(a) To adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act;

 (b) To adjudicate on any other matter that may, in terms of this Act, be considered by it and make any order provided for in this Act;

 (c) hear appeals from or review any decision of the Competition Commission that may, in terms of this Act, be referred to it; and

 (d) To make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.”

2.4.5.3 The Competition Appeal Court

The Competition Appeal Court is a court contemplated in section 166(e) of the Constitution[[488]](#footnote-489) with the same status as a High Court.[[489]](#footnote-490) Furthermore, the Competition Appeal Court is a court of record and it has jurisdiction throughout South Africa.[[490]](#footnote-491)

2.4.5.3.1 The functions of the Competition Appeal Court

In terms of section 37 of the Competition Act[[491]](#footnote-492) the Competition Appeal Court has the following functions:

 “(1) The Competition Appeal Court may –

 (a) Review any decision of the Competition Tribunal; or

 (b) Consider an appeal arising from the Competition Tribunal in respect of –

 (i) Any of its final decisions, other than a consent order made in terms of section 63; or

 (ii) Any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.

 (2) The Competition Appeal Court may give any judgement or make any order, including an order to –

 (a) confirm, amend or set aside a decision or order of the Competition Tribunal; or

 (b) Remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.”

2.4.6 Jurisdiction

2.4.6.1 Jurisdiction of the Competition Authorities

The Competition Act[[492]](#footnote-493) applies to all economic activity within or having an effect within South Africa despite any contrary stipulations in any other legislation.[[493]](#footnote-494) Nonetheless, the Competition Act[[494]](#footnote-495) does not apply to collective bargaining[[495]](#footnote-496), collective agreements[[496]](#footnote-497) and concerted practises designed to achieve a non-commercial socio-economic objective or similar purpose.[[497]](#footnote-498)

The Competition Act[[498]](#footnote-499) is also not applicable to any conduct within an industry or sector to the extent that the specific conduct in that industry or sector is regulated by another authority in terms of any other legislation.[[499]](#footnote-500) The Competition Act[[500]](#footnote-501) and the legislation regulating the specific industry of sector must be interpreted in such a manner as to give the Competition Act[[501]](#footnote-502) and the other legislation concurrent jurisdiction[[502]](#footnote-503) regarding any conduct that is regulated by the Competition Act[[503]](#footnote-504) and the other legislation in that industry or sector.[[504]](#footnote-505) The manner in which the concurrent jurisdiction is to be exercised should be determined by the Competition Commission and that other regulatory authority as provided for in sections 21(1)(h) and 82(1) of the Competition Act.[[505]](#footnote-506)

Furthermore, the concurrent jurisdiction should be determined in such a manner so that the other regulatory authority has primary authority to establish conditions within the industry or sector that it regulates to give effect to the relevant legislation under which that authority functions and also to give effect to the Competition Act.[[506]](#footnote-507) The Competition Commission on the other hand should have primary authority to detect and investigate alleged prohibited conduct and to review mergers so as to give effect to its obligations under the Competition Act.[[507]](#footnote-508)

Agreements constituting concurrent jurisdiction between the Competition Commission and another regulatory authority have been concluded in a number of industries and sectors including sectors in the banking and agricultural industry and for the electricity, telecommunications and postal industries as a whole.[[508]](#footnote-509)

2.4.6.2 The Jurisdictional interaction between the Competition Authorities and the Civil Courts

In terms of section 65(2) of the Competition Act[[509]](#footnote-510) a civil court is not authorized to consider any issue concerning any conduct which is prohibited in terms of the Competition Act. If it is an issue on which the Competition Tribunal and/or the Competition Tribunal have made an order the civil court is obligated to give effect to that order and if it is an issue on which the Competition Tribunal and/or Competition Appeal Court have not made an order that issue should be referred to the Competition Tribunal to be considered on its merits.[[510]](#footnote-511)

Furthermore, if a person suffered damages or losses because of any conduct that is prohibited in terms of the Competition Act[[511]](#footnote-512) that person is prohibited from instituting any action in a civil court for the quantification of the damages or losses or for the awarding of damages if that person has already been awarded damages by way of a consent order in terms of section 49D(1) of the Competition Act.[[512]](#footnote-513) To conclude, if a person is at liberty to institute an action in a civil court for damages or losses suffered as a result of any conduct which is prohibited in terms of the Competition Act.[[513]](#footnote-514) That person may only do so if he/she when instituting the proceedings also file with the Register or Clerk of the Court a certificate from the Chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court stating that the conduct which forms the basis for the proceedings has been found to be a prohibited practice in terms of the Competition Act.[[514]](#footnote-515)

**Chapter 3: The underlying principles of the South Africa Competition Act**[[515]](#footnote-516)

 “*Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce*.”

 1776 by Adam Smith.[[516]](#footnote-517)

3.1 The essence of the Competition Act[[517]](#footnote-518)

As mentioned earlier the purpose of the Competition Act[[518]](#footnote-519) is to promote and maintain competition in the Republic of South Africa with economic efficiency and therefore consumer welfare being the overruling principles for the application of the competition Act.[[519]](#footnote-520)

Competition is important because it is the regulatory force ensuring the efficient functioning of the market system.[[520]](#footnote-521) The reason for this is that competition prohibits firms from asking more than the market price for any specific good or service.[[521]](#footnote-522) Accordingly, the competition process ensures that firms need to maximise their efficiency if they want to supply their products at the market price.[[522]](#footnote-523) If not, they face losing sales (profits) to other more efficient firms and hence exit from the market.[[523]](#footnote-524) The Competition process thus ensures that the market system guides the use of the economic resources in such a way that the socially efficient quantity is produced at the socially efficient price i.e. that market the equilibrium is achieved.[[524]](#footnote-525)

Competition requires the freedom of enterprise, which entails that firms are free to obtain and use economic resources to produce that combination of goods and/or services that they wish and lastly to sell their products in any market they choose.[[525]](#footnote-526)

Competition also requires the freedom of choice which entails that the owners of property are free to obtain, use and dispose of their property and money as they choose.[[526]](#footnote-527) It also entails that consumers are free to buy, within their budget constraints, that combination of goods and services from which they derive the most satisfaction (utility).[[527]](#footnote-528) Lastly, competition requires that firms (sellers) and individuals (consumers of buyers) exercise these aforementioned freedoms in the realization of their self interests.[[528]](#footnote-529)

Broadly speaking, competition thus requires that sellers and buyers are free to enter and exit any market they wish in their effort to satisfy their self interest.[[529]](#footnote-530) The result hereof is the creation of competition between the various sellers and buyers and as a result the market power of the individual buyers and sellers in a given market is diminished.[[530]](#footnote-531)

Competition therefore reduces market power and market power is defined by the Competition Act[[531]](#footnote-532) as the ability of firms to

 a) “Control prices.

 b) Exclude competition.

 c) Behave to an appreciable extent independently from competitors, suppliers and customers.”[[532]](#footnote-533)

From this definition, it is clear that market power is the ability of firms to influence the market price and thus also the market forces i.e. market power is the ability to direct the economic activity within a market.[[533]](#footnote-534) Consequently, the abuse of market power, in any given market, is held to decrease the competition in that market and subsequently the abuse of market power has the effect of decreasing the efficient functioning of that market.[[534]](#footnote-535) In light of the importance of competition and given that market power reduces competition, competition legislation aim to regulate market power so as to enhance competition and as a result increase the efficiency of markets and hence, also the efficiency of the economy as a whole.[[535]](#footnote-536)

In practice however, all firms have some degree of market power with some having a significant degree of market power[[536]](#footnote-537) and others having an insignificant degree of market power.[[537]](#footnote-538) Since all firms possess market power the Competition Act[[538]](#footnote-539) which aspires to promote and maintain competition does not regulate the possession of market power *per se* but rather regulates the situation where a single firm or a group of firms acting together possess so much market power so as to allow it/them to abuse this market power and hence decrease the level of competition in that market.[[539]](#footnote-540)

From the preceding paragraphs, it is clear that the most important concept in competition regulation is that of market power.[[540]](#footnote-541) Accordingly, the following sections will examine the measurement of market power by the South African competition authorities.

3.2 The competition analysis undertaken by the competition authorities

The function of the South African competition authorities is to promote and maintain competition within the Republic of South Africa.[[541]](#footnote-542) As indicated previously, this goal is achieved by regulating the abuse of market power seeing that the abuse of market power discourages competition in any given market.

Competition however, can only occur within a market and accordingly the possession and abuse of market power too can only exist within a market.[[542]](#footnote-543) This market is called the relevant market and the relevant market can be defined as the area within which the conduct under consideration should be evaluated.[[543]](#footnote-544)

As a result, the competition analyses[[544]](#footnote-545) undertaken by the competition authorities to determine whether certain conduct is anti-competitive[[545]](#footnote-546) consist of two phases namely the delineation of the relevant market and secondly the assessment of the nature and degree of competition in the relevant market.[[546]](#footnote-547)

The delineation of the relevant market is essential because it positions the boundaries of the area of competition within which it is to be determined whether the conduct under consideration substantially prevents or lessens competition i.e. whether it is anti-competitive or not.[[547]](#footnote-548) The assessment of the nature and degree of competition in the relevant market in turn is important given that the nature and degree of competition in a market determines whether it is possible for firms in that market to abuse their market power and consequently reduce competition in that market.[[548]](#footnote-549) In other words, the nature and degree of competition in any given market is used to asses the unilateral and/or collective market power of the firms in that market. Accordingly, the process of determining the nature and degree of competition is also referred to as the measurement of market power.

In view of the preceding paragraphs the following sections will examine the delineation of the relevant market and the measurement of market power.

3.3 The delineation of the relevant market

3.3.1 Components of the relevant market

The relevant market can be divided into four categories namely the product market, the geographical market; the functional market and the temporal market.[[549]](#footnote-550)

The product market

The product market is defined as a particular collection of products (goods or services) that are considered by consumers as being substitutable products with regard to the price and function of those products.[[550]](#footnote-551) Stated differently, the product market is a set of products that is viewed by consumers as having a similar price and function and hence are easily substitutable.[[551]](#footnote-552) Substitutability is the essence of delineating the relevant market.[[552]](#footnote-553)

The Geographical market

The geographical market is defined as the geographical area within which the product market is located.[[553]](#footnote-554) In other words, the geographical market is the geographical area within which various firms supply products that are considered substitutable with regard to their price and function.[[554]](#footnote-555) Geographical markets can be divided into four subcategories namely local, regional, national and international geographical markets.[[555]](#footnote-556)

The functional market

The functional market is defined by the position on the supply chain[[556]](#footnote-557) occupied by the relevant firms.[[557]](#footnote-558) This position on the supply chain in turn is determined by the stage of production of their products and their respective customers.[[558]](#footnote-559)

The functional market can be divided into two categories namely the upstream and the downstream markets.[[559]](#footnote-560) The upstream market mainly includes products in the early stages of production, which are typically sold to other manufactures for re-processing or to wholesalers and distributors.[[560]](#footnote-561) The downstream market mainly includes products at the latter stages of production, which are generally sold to consumers in the retail sector.[[561]](#footnote-562)

The temporal market

Occasionally time is a factor that needs to be taken into account when delineating the relevant market.[[562]](#footnote-563) This generally arise when the substitution of products by consumers cannot occur instantaneously i.e. consumers need time to switch from one product to another.[[563]](#footnote-564) Time characteristics include among others seasonality, peak and off-peak services and work that can only be performed at a specific time of day.[[564]](#footnote-565)

The product-, geographical- and functional markets are used most often in the process of delineating the relevant market with the temporal market rarely used.[[565]](#footnote-566)

3.3.2. The importance of market delineation

The South African Competition Act[[566]](#footnote-567) does not define the term “relevant market” nor does it prescribe any processes or methods to be applied in delineating the relevant market.[[567]](#footnote-568) As a result, the South African competition authorities use contemporary economic and econometric techniques to delineate the relevant market.

As discussed previously, market power is the essence of competition regulation since it is this market power that allows firms to harm competition in any given market.[[568]](#footnote-569) Also discussed previously is the fact that market power can only exist within a market hence the term “market power”.[[569]](#footnote-570) Accordingly, the delineation of the relevant market is vital to the measurement of market power since the delineation of the relevant market determines the area within which market power is to be measured.[[570]](#footnote-571) Therefore, extreme conscientiousness ought to be applied when delineating the relevant market.[[571]](#footnote-572) An erroneous delineation of the relevant market could potentially lead to an overestimate or an underestimate of market power.[[572]](#footnote-573) In view of this, an erroneous delineation of the relevant market could have severe consequences for competition in the relevant (actual) market.[[573]](#footnote-574)

An example of this would be, when a merger is prohibited on the grounds that the merger will increase the market power of the merging firms to such an extent so as to allow the merging firms to abuse their market power and when it is then later revealed that the relevant market was delineated to narrowly and that the merger should have been approved.[[574]](#footnote-575) In this example, competition was effectively hampered because the competition authorities prohibited a more competitive firm from entering into the relevant (actual) market.[[575]](#footnote-576) Equally, when the relevant market is delineated to broadly the competition authorities could potentially approve a merger where the merger has the consequence of providing the merging firms with sufficient market power to allow them to abuse their market power to the detriment of competition in the that market.[[576]](#footnote-577) Accordingly, the erroneous delineation of the relevant market could potentially decrease the efficacy of competition legislation and as a result reduce the social welfare of society.[[577]](#footnote-578)

3.3.3 Methods of market delineation.

 *“My lament is that this battle on market definitions, which is fought thousands of times what with all the private antitrust suits, has received virtually no attention from us economists. Except for a casual flirtation with cross elasticities of demand and supply, the determination of markets has remained an undeveloped area of economic research at either the theoretical or empirical level.”*

 *1982 by* George J. Stigler.[[578]](#footnote-579)

Traditionally, economists have delineated the relevant market, from a consumption standpoint,[[579]](#footnote-580) using cross-price elasticity of demand.[[580]](#footnote-581) The cross-price elasticity of demand measures how sensitive the demand for a specific product (for example product X) is to changes in the price of another product (for example product Y).[[581]](#footnote-582) In other words, what will be the change in the quantity demanded for product X if the price of product Y decreases or increases?

The cross-price elasticity of demand is thus defined as:[[582]](#footnote-583)

 Exy = $\frac{percentage change in the quantity demanded of product X}{percentage change in the price of product Y}$

Where Exy denotes the cross-price elasticity of demand.

The market delineated using the cross-price elasticity of demand method is generally referred to as the economic market.[[583]](#footnote-584) In the past, the cross-price elasticity of demand and other techniques have been used to delineate the relevant market, used in competition matters, since many economists assumed that the relevant market is analogous to the concept of the economic market.[[584]](#footnote-585) However, these techniques were always plagued by inadequacies when applied to competition matters.[[585]](#footnote-586) The reason for these inadequacies being that the relevant market used in competition matters are not analogous to the concept of the economic market.[[586]](#footnote-587)

The economic market consists of that combination of products and geographical areas in which the prices of the various products are linked through arbitrage.[[587]](#footnote-588) On the other hand the relevant market, as used in competition matters, refer to “any product or group of products and any geographic area in which collective action by all firms (as through collusion or merger) would result in a profit maximizing price that significantly exceeds the competitive price.”[[588]](#footnote-589) Stated differently, the relevant market consists of that combination of products and that specific geographical area that can potentially be monopolised by the relevant firms.[[589]](#footnote-590) In other words, the relevant market refers to that market where a specific firm or a group of firms acting collectively could exhibit sufficient market power to allow them to abuse that market power to the detriment of the competition in that market.

The inadequacies that plagued the above mentioned techniques eventually lead to the development of a technique specifically designed to delineate the relevant market with reference to market power.[[590]](#footnote-591) This technique, which is called the Small but Significant and Non-Transitory Increase in Price (SSNIP) Test was first implemented by the US Department of Justice in 1982 and would eventually become the standard test for market delineation in competition matters.[[591]](#footnote-592) The SSNIP Test, also called the Hypothetical Monopoly Test (HMT),[[592]](#footnote-593) is also used in South African competition matters[[593]](#footnote-594) and accordingly this test will discussed in the next section.

3.3.3.1 The Small but Significant and Non-Transitory Increase in Price (SSNIP) test

Up to this point, this paper has defined market power using the Competition Act’s[[594]](#footnote-595) definition of market power without considering the rationale for the Competition Act’s[[595]](#footnote-596) definition of market power. The Competition Act[[596]](#footnote-597) defines market power as “the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.”[[597]](#footnote-598)

In industrial economics however, market power is commonly defined as the ability of a firm or a group of firms acting together to increase the price of any specific product or a group of products, by restricting output, from what the price would have been in a perfectly competitive market and as a result increase their respective profits from what it would have been under conditions of perfect competition.[[598]](#footnote-599) From this definition, the rational for the Competition Act’s[[599]](#footnote-600) definition of market power becomes clear.

The Competition Act’s[[600]](#footnote-601) definition of market power includes three powers namely:

1. The power to control prices.

2. The power to exclude competition.

3. The power to act independently from your competitors, customers and suppliers.

It is clear that the first power falls within the industrial economics definition of market power. The second power also falls within the industrial economics definition of market power. The reason being, if a firm has successfully excluded competition in a market, then the concentration level within that market should increase i.e. there is less competitors to compete with, which in turn will provide the abusive firm with more control over price and output and enable it to sustain higher profits. The third power also falls within the industrial economics definition of market power because the power to act independently means that the market forces do not bind the specific firm and accordingly that firm can determine a price without considering the reaction of his competitors, suppliers and customers to that price.

Accordingly, the rational for the Competition Act’s[[601]](#footnote-602) definition of market power lies in the definition of market power in industrial economics.[[602]](#footnote-603) Hence, market power in terms of the Competition Act[[603]](#footnote-604) can broadly be defined as the ability of a firm or a group of firms acting together to increase the price of any specific product or a group of products, by restricting output, from what the price would have been in a perfectly competitive market and as a result increase their respective profits from what it would have been under conditions of perfect competition.[[604]](#footnote-605)

As discussed previously, the regulation of market power lies at the heart of competition regulation. Also discussed earlier, is the importance and influence of market delineation in measuring market power because market delineation determines the market within which market power is to be assessed. With the preceding paragraphs in mind, the SSNIP Test will now be discussed.

The SSNIP Test, also called the Hypothetical Monopolist Test (HMT), is described in the Horizontal Merger Guidelines of the US Department of Justice and the Federal Trade Commission as:

 “*a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximising firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a ‘small but significant non- transitory’ increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test*.”[[605]](#footnote-606)

For the SSNIP test to be of any use it is important to note that this test considers the market from the demand side i.e. what will happen to the demand for a product if the price of that product increase?[[606]](#footnote-607) If a price increase cause the demand for that product to decrease it implies, in terms of the SSNIP test, that consumers are now substituting that product for other products.[[607]](#footnote-608) The SSNIP test is thus based upon the cross price-elasticity of demand as discussed earlier.[[608]](#footnote-609)

A “small but significant non-transitory increase in price” is generally taken to be between 5 and 10 percent.[[609]](#footnote-610) This “small but significant non-transitory increase in price” is referred to as a SSNIP hence the SSNIP test.[[610]](#footnote-611)

The purpose of the SSNIP Test is to determine the narrowest possible market within which a hypothetical monopolist or cartel could increase the price of their product(s) by imposing a small but significant non-transitory increase in the price of their product(s).[[611]](#footnote-612) Accordingly, the first step in applying this test is to determine the characteristics, price and function of the product under investigation so as to ascertain other substitutable products.[[612]](#footnote-613)

More specifically, this test considers whether the relevant firm or the relevant group of firms acting together can maintain a small increase in the price (i.e. a SSNIP between 5-10 percent) for at least a 12 month period (hence the term non-transitory) without diminishing their profits.[[613]](#footnote-614) If this SSNIP leads to lower profits for the firm(s) under investigation it is argued that the relevant market is delineated to narrowly.[[614]](#footnote-615)

The reason for this decrease in profits is that the SSNIP test considers the market from the demand side.[[615]](#footnote-616) Accordingly, this decrease in the profits of the firm(s) under investigation is held to be caused by consumers substituting the investigated firm(s) product(s) with other sufficiently close substitutable products in that and other geographical areas.[[616]](#footnote-617) In such a case, the relevant market needs to be delineated more broadly so as to include these other sufficiently close substitutable products and other geographical areas i.e. the next closest substitutable product(s) in this and other geographical markets need to be added to the relevant market.[[617]](#footnote-618)

This process is repeated until the narrowest market is delineated within which the SSNIP is profitable.[[618]](#footnote-619) This narrowest market is referred to as the relevant market and it includes all products and/or geographical areas for which the SSNIP is profitable.[[619]](#footnote-620) Stated differently, the relevant market is the smallest market within which there are no other substitutable products and as a result, the hypothetical monopolist can profitably and sustainably increase the price of its products.[[620]](#footnote-621)

The purpose of this SSNIP test is to include all the competitive constraints that are applicable to the firm(s) under investigation.[[621]](#footnote-622) Competitive constraints can be defined as any constraint that prohibits firms from abusing their market power, their importance will become clear in the following sections.

If significant constraints on the investigated firms are left out then the relevant market is defined to narrowly.[[622]](#footnote-623) On the contrary, if products and geographical areas are included that do not pose a competitive constraint on the firm(s) under investigation, then the relevant market is delineated to broadly.[[623]](#footnote-624) Accordingly, the SSNIP test is not exclusively based upon the cross price-elasticity demand and other economic evidence should be considered with the purpose of evaluating the reliability of the price-elasticities.[[624]](#footnote-625)

The competition authorities should thus consider a broad array of factors when delineating the relevant market, which include all possible competitive constraints.[[625]](#footnote-626) These factors however, fall beyond the scope of this paper and accordingly they are ignored. Also, note that the SSNIP test comprises several other considerations that are beyond the scope of this paper and consequently they are also ignored.

In practice however, the data necessary for correctly applying the SSNIP test is rarely available.[[626]](#footnote-627) As a result, competition authorities in practice use a combination of the following techniques to delineate the relevant market:[[627]](#footnote-628)

1. Consider the internal documentation of the suppliers of the product(s) under investigation.[[628]](#footnote-629)

2. Apply the SSNIP Test insofar it is possible.[[629]](#footnote-630)

3. Use other statistical techniques, which include other statistical techniques to calculate price elasticities.[[630]](#footnote-631)

4. Consider information from industry and economic experts on what constitute the relevant market.[[631]](#footnote-632)

5. Consider information from consumers and suppliers on what constitutes the relevant market.[[632]](#footnote-633)

Nonetheless, in instances where the data required for the effective application of the SSNIP test is not available, the SSNIP test is still applied in the analyses of delineating the relevant market.[[633]](#footnote-634) In such circumstances however, the application of the SSNIP test becomes and intuitive process where the SSNIP test only provides a framework within which the relevant market is delineated.[[634]](#footnote-635)

3.3.4 The measurement of market power

Note: The measurement of market power is only relevant in cases where rule of reason prohibitions were contravened or in cases where proposed mergers are evaluated.[[635]](#footnote-636) The reason being that in cases where *per se* prohibitions were contravened, the competition authorities have only to determine whether the firm under investigation has indeed committed an *per se* prohibitions.[[636]](#footnote-637) On the other, if a rule of reason prohibition was contravened, the competition authorities must in addition to proofing that the firm breached a rule of reason prohibition, also proof that the infringement substantially prevented of lessened competition in the relevant market.[[637]](#footnote-638)

3.3.4.1 Direct measurement of market power

Economic theory stipulates that in a perfectly competitive market no firm possess sufficient market power[[638]](#footnote-639) to allow it to individually influence the market price and hence also the market quantity.[[639]](#footnote-640) Consequently, in a perfectly competitive market, all firms are price takers since all firms within that perfectly competitive market are constraint to ask the market price (Pm) for their products.[[640]](#footnote-641)

Furthermore, economic theory dictates that at the market price the perfectly competitive firm can sell as many of its products as it likes.[[641]](#footnote-642) On the other hand, the perfectly competitive firm will have zero sales if it asks any price (Pf) higher than the market price.[[642]](#footnote-643) Moreover, the perfectly competitive firm has no incentive to ask any price lower than the market price since this, ceteris paribus, will decrease its profits and it could potentially decrease the relevant market price.[[643]](#footnote-644)

Given that a perfectly competitive firm is constraint to ask the market price for its products, it is argued that the marginal revenue[[644]](#footnote-645) (MR) of a perfectly competitive firm is equal to the market price of that firm’s product.[[645]](#footnote-646) Furthermore, economic theory dictates that a perfectly competitive firm will maximise its profits by producing that quantity of output where the firm’s marginal revenue is equal to the firm’s marginal cost (MC).[[646]](#footnote-647)

Accordingly, a profit maximising firm in a perfectly competitive market will produce that quantity of output where the firm’s marginal revenue is equal to the firm’s marginal cost[[647]](#footnote-648) which is equal the price of the firm’s products which is equal to the market price.[[648]](#footnote-649) Stated differently, in a perfectly competitive market the following statement is true for a profit maximising firm: Pf=Pm=MR=MC.

Note: as discussed previously in this paper, the purpose of all economic agents are to satisfy their self interest and in the case of the firm its self interest is money.[[649]](#footnote-650) Accordingly, the objective of all firms, for the purpose of competition legislation, is to maximise their profits.[[650]](#footnote-651)

Previously in this paper, market power was defined as the ability of a firm or a group of firms acting together to increase the price of any specific product or a group of products from what the price would have been in a perfectly competitive market and as a result increase their respective profits from what it would have been under conditions of perfect competition.[[651]](#footnote-652)

In light of the preceding paragraphs, the previous definition of market power can be written more correctly by augmenting it slightly to read as follows. Market power is the ability of a firm or a group of firms acting together to raise the price of their products above their marginal costs at the profit maximising level of output.[[652]](#footnote-653) In this case the price of their products and hence their marginal revenue will be higher than their marginal cost.[[653]](#footnote-654) Accordingly, the firms will increase their profit from what it would have been under conditions of perfect competition namely where Pf=Pm=MR=MC.[[654]](#footnote-655) Simplifying this definition, market power can be defined as the ability of a firm to maintain prices that are higher than that firm’s marginal cost at the profit maximising level of output.[[655]](#footnote-656)

To conclude the meaning of market power, take note that market power can be divided into two type’s namely unilateral market power and collective market power.[[656]](#footnote-657) Unilateral market power is the market power possessed by an individual firm whereas collective market power refers to the situation where a group of firms are able to profitably co-ordinate their behaviour by way of their accommodating reactions to the conduct of the other firms in the group i.e. collective market power refers to the market power held collectively by a group of firms acting together.[[657]](#footnote-658)

3.3.4.1.1 The Lerner Index (also called the Price Cost Margin, PCM)[[658]](#footnote-659)

The Lerner Index was developed by A.P. Lerner in 1934 as an instrument to directly quantify the market power of a firm.[[659]](#footnote-660) According to Lerner, the difference between a firms marginal cost and the price that it asks for its products, called the price mark-up,[[660]](#footnote-661) can be used to quantify the degree of market power for that firm.[[661]](#footnote-662) Hence, the degree of a firm’s market power can be quantified by the following equation:

LI = $\frac{P-MC}{P}$

Where:

LI = Lerner Index.

P = the price asked by the firm for its product.

MC = the firm’s marginal cost.

As mentioned earlier, in a perfectly competitive market the price asked by the perfectly competitive firm for its products are equal to the market price, which is equal to their marginal revenue, which is equal to its marginal cost. Accordingly, in a perfectly competitive market firms are constraint from asking a price that is higher than the market price. Hence, the Lerner Index for a perfectly competitive firm will be zero.[[662]](#footnote-663) In opposition to the perfectly competitive firm, the monopolist is unconstraint from asking the market price and consequently the monopolist will ask a higher price than that of the market price i.e. the monopolist has a great degree of market power.[[663]](#footnote-664) Accordingly, for the pure monopolist the Lerner Index will be equal to one.[[664]](#footnote-665)

The usefulness of the Lerner Index is that it provides a direct measure of market power to easily determine the degree of market power of a particular firm or a group of firms acting together.[[665]](#footnote-666) Accordingly, it should be straightforward to decide whether certain conduct should be approved by the competition authorities.[[666]](#footnote-667) The Lerner Index also indicates whether a specific market deviates from the perfectly competitive market and to what extent it deviates.[[667]](#footnote-668)

Despite these advantages gained from using the Lerner Index, the Lerner Index has several weaknesses.[[668]](#footnote-669) These weaknesses include among others the following.[[669]](#footnote-670) The Lerner Index does not provide for a benchmark to test the degree of market power against.[[670]](#footnote-671) Accordingly, it is difficult to interpret any result other than zero, which indicates perfect conditions of competition.[[671]](#footnote-672) If for example the Lerner Index provides a value of 0.4, how should this value be interpreter with regard to the approval of prohibition of firm conduct by the competition authorities? Another potential weakness of the Lerner Index is that it could lead to the prohibition of conduct by firms who offer superior or cheaper products.[[672]](#footnote-673) Furthermore, the Lerner Index is a single market metric, accordingly, it is subject to significant error when applied to firms competing in multiple markets.[[673]](#footnote-674)

Regardless of these weaknesses, the Lerner Index is widely used in competition matters and is commonly discussed in undergraduate and postgraduate textbooks on industrial organisation.[[674]](#footnote-675)

3.3.4.1.2 Price elasticity of demand

Another method used to quantify the degree of market power is through the use of the price elasticity of demand.[[675]](#footnote-676) The price elasticity of demand indicates how sensitive consumer demand for a specific product (for example product X) is to changes in the price of that product.[[676]](#footnote-677) In other words, by how much will the demand for product X change if the price of product X increases or decreases? Accordingly, the price elasticity of demand is defined as follow:[[677]](#footnote-678)

Ed = $\frac{percentage change in the quantity demanded of product X}{percentage change in the price of product X}$

Where:

Ed = price elasticity of demand.

Note: Demand is inversely related to price therefore, Ed will always have a negative sign.[[678]](#footnote-679) Nonetheless, this negative sign is ignored and consequently Ed is always expressed in absolute (positive) terms.[[679]](#footnote-680)

If the percentage change in the quantity demanded of a product is larger than the percentage change in the price of that product, the demand is said to be elastic.[[680]](#footnote-681) If the percentage change in the quantity demanded of a product is smaller than the percentage change in the price of that product, the demand is said to be inelastic.[[681]](#footnote-682)

For example, if the demand for a product is elastic, a 5 percent decrease in the price of that product will result in an increase in the demand of that product that is larger than the 5 percent decrease in the price.[[682]](#footnote-683) Furthermore, elastic demand is indicated by a value of Ed larger than one i.e. Ed > 1 and inelastic demand is indicated by a value of Ed smaller than one i.e. Ed < 1.[[683]](#footnote-684)

Additionally, it is held that a firm possess market power if the demand for his product is inelastic.[[684]](#footnote-685) The reason for this lies in the fact that the percentage change in the price of the firm’s product is larger than the percentage change in the demand for that product.[[685]](#footnote-686) This implies that for example, if a firm decide to increase the price of its product by 20 percent, the demand for that product will decrease by less than 20 percent i.e. by increasing the price, the firm increased its profits.[[686]](#footnote-687) The opposite holds for elastic demand.[[687]](#footnote-688) In other words, a firm is regarded as having market power if Ed < 1 and is regarded as not having market power if Ed > 1.[[688]](#footnote-689)

Note: The price elasticity of demand and the Lerner Index are inversely related since elastic demand will make it extremely difficult for firms to apply a price mark-up.[[689]](#footnote-690) Inelastic demand however, will make it much easier for firms to apply a price mark-up. In other words, the larger Ed,the smaller the potential price mark-up and Lerner Index value will be, and the smaller Ed,the larger the potential price mark-up and the larger the Lerner Index value.[[690]](#footnote-691)

To conclude, in practice the application of the Lerner Index and the price elasticity of demand is severely limited by the scarcity of the data required to calculate these direct measures of market power.[[691]](#footnote-692) Accordingly, various methods have been developed to measure market power indirectly to indicate whether a firm or a group of firms acting together have sufficient market power to enable them to abuse that market power and accordingly destroy competition in that market.[[692]](#footnote-693) In South Africa, market power is measured indirectly using the so-called Structure-Conduct- Performance paradigm (SCP). The SCP paradigm will be discussed in the following section.[[693]](#footnote-694)

3.3.4.2 Indirect measure of market power

Note: this paper focuses on the determinants and measurement of supply side market power i.e. the market power of producers and sellers and not those of consumers and buyers (demand side market power).

3.3.4.2.1 The Structure-Conduct-Performance paradigm

As discussed earlier[[694]](#footnote-695) the market system itself consists of different models with the so called “perfectly competitive model” being the most efficient model for the market system.[[695]](#footnote-696) Furthermore, economic theory stipulates that in a perfectly competitive market no firm possess sufficient market power to allow it to individually influence the market price and hence also the market quantity.[[696]](#footnote-697) Consequently, in a perfectly competitive market, all firms are price takers since all firms within that perfectly competitive market are constraint to ask the market price (Pm) for their products.[[697]](#footnote-698)

Accordingly, no individual firm is in a position to coordinate and direct the economic activity within a perfectly competitive market. Stated differently, in a perfectly competitive market no individual firm can influence the market price and accordingly no individual firm has control over the quantity demanded and supplied within that market.[[698]](#footnote-699) Consequently, in a perfectly competitive market all the firms are in a position of perfect competition with each other.[[699]](#footnote-700) The result of the perfectly competitive market is thus that the scarce economic resources of society are used in such a way that the socially efficient quantity is produced at the socially efficient price i.e. market equilibrium is obtained.[[700]](#footnote-701)

In view of the fact that the perfectly competitive market is the most efficient form of the market system, it is used as the benchmark for reviewing all other markets.[[701]](#footnote-702) In real life however, no market actually achieves the position of being perfectly competitive.[[702]](#footnote-703) The perfectly competitive market does however provide a very useful benchmark that can be used to estimate and increase the efficiency in markets.[[703]](#footnote-704)

Also mentioned earlier, the monopoly market is positioned in stark contrast to the perfectly competitive market.[[704]](#footnote-705) The monopolist is unconstraint from asking the market price and consequently the monopolist will ask a higher price than that of the market price i.e. the monopolist has a great degree of market power which implies that the monopolist is in a position to influence the market forces and consequently also the efficiency of the market.[[705]](#footnote-706)

With these two extremes namely the perfectly competitive market and the monopoly market in mind, Edward S. Mason developed the Structure-Conduct-Performance paradigm.[[706]](#footnote-707) The SCP paradigm functions between the perfectly competitive market and the monopoly market and is used to determine the nature and degree of competition in the relevant market.[[707]](#footnote-708) Furthermore, it is held that the nature and degree of competition in a market determines whether it is possible for firms to abuse their unilateral and/or collective market power.[[708]](#footnote-709)\*

The SCP paradigm states that “exogenous basic conditions determine market structure and that there is a unidirectional flow of causality from market structure, through conduct, to performance.”[[709]](#footnote-710) Stated differently, the SCP paradigm suggests that there is a causal link, which runs from the market structure, to the conduct of the firms in that market to the performance of the firms in that market.[[710]](#footnote-711) Furthermore, it is suggested that this causal link only moves in one direction namely from the market structure, to the firm behaviour to the performance of the firms.[[711]](#footnote-712) Accordingly, the most important concept in the SCP paradigm is that of market structure because market structure is regarded as the primary variable that influences market performance i.e. the efficiency of the market.[[712]](#footnote-713) Therefore, competition authorities should assess competition matters by evaluating where the structure of the relevant market lies between the continuum of a perfectly competitive market and a monopoly market.[[713]](#footnote-714)

The SCP paradigm can be illustrated as follow:[[714]](#footnote-715)

|  |  |  |
| --- | --- | --- |
| **Structure** | **Conduct** | **Performance** |
| Perfect Competition | marginal cost pricing | Allocative efficiency and equity between firms |
| Imperfect Competition | pricing deviates from marginal cost | Inefficiency and potential monopoly profits |

According to the SCP paradigm the closer the market structure resembles that of a perfectly competitive market, the lower the market price is and accordingly the higher the quantity of products produced are.[[715]](#footnote-716) Such a market is said to provide the highest benefit to society.[[716]](#footnote-717) On the other hand, markets structures that more closely resembles a monopoly market are associated with higher market prices and thus lower quantities of products produced.[[717]](#footnote-718) Such markets are also said to provide less benefit to society.[[718]](#footnote-719) In other words, according to the SCP paradigm the further the market structure of a market departs from that of a perfectly competitive market the further that market departs from the social ideal or equilibrium.[[719]](#footnote-720)

The structure of a market refers to the number and relative size of the firms in that market i.e. the level of concentration.[[720]](#footnote-721) Conduct refers to the conduct of the firms in a market for example do they collude, what prices do they ask for their products and any other anticompetitive conduct by the firms in the market.[[721]](#footnote-722) Performance include among other things, the profitability the firms in a market, their efficiency and any economies of scale they obtain.[[722]](#footnote-723)

Also, note that a perfectly competitive market is said to be less concentrated[[723]](#footnote-724) (the number and relative size of the firms in a market) whereas a monopoly market is said to be more concentrated.[[724]](#footnote-725) Furthermore, according to the SCP paradigm it is held that higher concentration levels are positively correlated with the ability of firms to act together (collude) and so to obtain collective market power in addition to their unilateral market power i.e. high concentration levels are held to lead to abnormal profits for firms, lower social welfare and potentially lower economic growth.[[725]](#footnote-726) For this reason, the SCP paradigm argues that industrial structure (concentration) ought to be regulated to prevent firms from obtaining and abusing market power.[[726]](#footnote-727)

Thus, in practical terms, the SCP paradigm assumes that all firms within a market endeavour to obtain and to abuse a large market share in order to maximise their profits.[[727]](#footnote-728) This endeavour by all firms is said to lead to a struggle between the various firms in the market to obtain a larger market share.[[728]](#footnote-729) This struggle in turn, constraints the firms in the market, keeps costs and prices under control and ensures that the market structure remains one that resembles a perfectly competitive market.[[729]](#footnote-730) If however, a firm were to obtain a large market share, monopoly power, it is held that that firm can increase prices and so obtain monopoly profits and consequently also pave the way for inefficiency, reduced innovation and an inequitable distribution of income and wealth in that market.[[730]](#footnote-731) As a result, the number of firms in a market and their relative sizes i.e. the concentration in the market, is an important element in determining market structure.[[731]](#footnote-732)

Nonetheless, it is argued by some that these inefficiencies and reduced innovations, associated with monopoly structures, could in fact be counterbalanced by an actual increase in efficiency and innovations under certain conditions of monopoly structure.[[732]](#footnote-733) This is relevant for the weighing of anti-competitive effects against technological, efficiency and other pro-competitive gains, which forms an essential part of the efficiency defence, which is the object of this paper. These potential increases in efficiency and innovation and the subsequent weighing process will be discussed in later chapters.

3.3.4.2.1. The validity of the SCP paradigm in South Africa

The development of the SCP paradigm was based upon empirical research, which indicated that the profits of firms in relatively more concentrated markets are significantly higher than those of firms in relatively less concentrated markets.[[733]](#footnote-734) Accordingly, it was held that concentrated markets make it easier for firms to obtain abnormal profits by way of collusive behaviour and increased prices (collective and unilateral market power).[[734]](#footnote-735) As a result, it was promulgated that the structure of a market influences the conduct of firms, which in turn influence their performance i.e. high levels of concentration (structure) leads to collusive behaviour and higher prices (conduct) which leads to abnormal profits (performance) and its associated disadvantages.[[735]](#footnote-736) Hence, market structure ought to be regulated.[[736]](#footnote-737)

This was the standard position of the SCP paradigm and it is termed the “monopoly hypothesis” or the “collusion hypothesis”.[[737]](#footnote-738) The monopoly hypothesis states that a positive correlation between market concentration and the profitability levels in the market is an indication of collusive behaviour and/or other abuses of market power designed to increase profits i.e. there is a unidirectional causality from structure, to conduct to performance.[[738]](#footnote-739) Stated differently, a concentrated market structure makes it possible for firms to abuse their unilateral market power or to collude with other firms to abuse their collective market power.[[739]](#footnote-740) It is this abuse of market power (conduct) that is said to cause increased levels of profit (performance).[[740]](#footnote-741) Accordingly, market structure causes firms to abuse their market power (conduct) which increases their performance (profits).[[741]](#footnote-742)

Several schools of thought however, have rejected the monopoly hypothesis and stated that a positive correlation between market concentration and the profitability level within that market reflects the natural tendency of efficient firms to obtain larger market shares and higher profits and thus contribute to the concentration of that market i.e. market conduct (being efficient) influences market structure and not the other way around as proclaimed by the supporters of the SCP paradigm.[[742]](#footnote-743)

This point of view is known as the “efficiency hypothesis” and it states that high levels of market concentration and the associated high levels of market power is the result of the competition process in which efficient firms have outperformed less efficient firms.[[743]](#footnote-744) Accordingly, firms with large market shares do not necessarily implement collusive and/or other anticompetitive conduct.[[744]](#footnote-745) The efficiency hypothesis thus rejects the hypothesis that there is a unidirectional flow of causality from market structure, through conduct, to performance.[[745]](#footnote-746) In other words, the efficiency hypothesis proclaims that there is a multi-directional flow of causality between market structure, conduct and performance i.e. structure, conduct and performance can all influence each other in no apparent hierarchy.[[746]](#footnote-747) The supporters of the monopoly hypothesis can be referred to as the non-Chicago school of thought while the supporters of the efficiency hypothesis can be referred to as the Chicago School of thought.[[747]](#footnote-748) The importance of this debate between the Chicago and non-Chicago schools of thought lies in its influence on competition policy.[[748]](#footnote-749) Competition policy based upon the non-Chicago school will primarily focus on industry structure whereas competition policy based upon the Chicago school will mainly focus on market conduct.[[749]](#footnote-750)

As discussed earlier, South Africa’s economy is highly concentrated.[[750]](#footnote-751) Furthermore, it is argued that prices within South Africa are extremely high because of the concentrated nature of South Africa’s markets.[[751]](#footnote-752) As a result, several authors have tested the validity of the SCP paradigm in South Africa in light of the debate between the non-Chicago and the Chicago schools of thought.[[752]](#footnote-753)

The first author to test the validity of the SCP paradigm in South Africa was Reekie in 1984.[[753]](#footnote-754) His results however, provided for an ambiguous interpretation supporting both the collusion hypothesis and the efficiency hypothesis.[[754]](#footnote-755) Accordingly, Reekie disputed the correctness of the SCP paradigm within the context of the South African economy.[[755]](#footnote-756) The next author to test the validity of the SCP paradigm in South Africa was Leach in 1991.[[756]](#footnote-757) Leach concluded that the efficiency hypothesis rather than the collusion hypothesis holds for South Africa and hence he argued that market conduct influences market structure and not the other way around.[[757]](#footnote-758) However, in a later paper in 1997, Leach found that the correlation between concentration and industry profitability is consistent with both the collusion hypothesis and the efficiency hypothesis i.e. his results were ambiguous.[[758]](#footnote-759) Although, Reekie and Leach could not dismiss the SCP paradigm they did cast significant doubt on its accuracy.

Nonetheless, there are authors in South Africa who unequivocally support the monopoly hypothesis most notably the authors Fourie and Smith.[[759]](#footnote-760) In 1998, Fourie and Smith published a paper in which they declared a stalemate between the validity of the monopoly hypothesis and the validity of the efficiency hypothesis in South Africa.[[760]](#footnote-761) In their paper they emphasised that it is inappropriate, to search for universal laws that are applicable to all situations i.e. to follow an either/or approach.[[761]](#footnote-762) Furthermore, they cited deep ideological and methodological differences as contributing to the stalemate between the Chicago and non-Chicago school of thought in addition to the technical difficulties of testing causality.[[762]](#footnote-763)

In spite of more recent empirical research, the stalemate between the Chicago and non-Chicago schools of thought seems to remain in South Africa.[[763]](#footnote-764) Accordingly, in South Africa the validity of the SCP paradigm is in doubt i.e. it is uncertain whether there is a unidirectional flow of causality from market structure, through conduct, to performance.[[764]](#footnote-765)

Despite these uncertainties surrounding the validity of the SCP paradigm in South Africa, it has nonetheless been incorporated into the Competition Act.[[765]](#footnote-766) The competition authorities are however hesitant to assume a unidirectional causality from structure, to conduct to performance.[[766]](#footnote-767) Accordingly, the South African competition authorities follow a holistic approach, considering all relevant factors when assessing market power.[[767]](#footnote-768) In this regard, the delineation of the relevant market is very important since it includes all the potential competitive constraints that prohibit firms from abusing their unilateral and collective market power.[[768]](#footnote-769)

Nonetheless, the SCP paradigm, and thus market structure, remains an important element in the assessment of market power and it provides a very useful framework within which to assess the market power and the ability to abuse it of the firms in the relevant market.[[769]](#footnote-770)

Note: the debate between the Chicago and non-Chicago schools of thought entails a great deal more than what is discussed in this paper. A lengthy discussion on this debate is however beyond the scope of this paper. Furthermore, the following sections will briefly discuss the structure, conduct and performance elements of the SCP paradigm. Once more, a comprehensive discussion on these elements is beyond the scope of this paper.

3.3.4.2.2 Structure

Market structure can be defined as the characteristics of a market that determines the conduct and the performance of the firms within that market.[[770]](#footnote-771) Accordingly, the market structure itself consists out of various characteristics, which include among others the following:

 1. The number of firms within the market.[[771]](#footnote-772)

 2. The size of the firms in the market relative to the size of the other firms in the market.[[772]](#footnote-773)

 3. Barriers (obstacles) to entry and exit.[[773]](#footnote-774)

 4. Product differentiation.[[774]](#footnote-775)

 5. Diversification between the various firms in the market.[[775]](#footnote-776)

 4. The cost conditions within the market and economies of scale.[[776]](#footnote-777)

 5. The technological environment within the market.[[777]](#footnote-778)

These characteristics of market structure, among others, are used to determine the structure of a market and to classify markets into various types of market models.[[778]](#footnote-779) The market model in turn is an indication of the nature and degree of competition within that market model.[[779]](#footnote-780) As mentioned, there is a variety of different market models, this paper however only considers two namely the perfectly competitive model and the monopoly model.

3.3.4.2.2.1 Market models

The perfectly competitive model[[780]](#footnote-781)

The perfectly competitive model has the following characteristics:

 1. Large number of buyers and sellers.[[781]](#footnote-782)

 2. Consumers and producers have perfect knowledge.[[782]](#footnote-783)

 3. A homogenous product.[[783]](#footnote-784)

 4. No barriers of entry and exit i.e. easy entry into and exit from the market.[[784]](#footnote-785)

 5. Firms act independently from one another and endeavour to maximise profits.[[785]](#footnote-786)

 6. All firms are price takers and accordingly there is no price competition between the firms in a perfectly competitive market.[[786]](#footnote-787)

 7. At the market price, a firm can sell as much output as it wishes i.e. the demand curve of an individual firm is perfectly elastic.[[787]](#footnote-788)

As mentioned earlier, this is the most efficient model of the market system and accordingly the perfectly competitive model serves as a benchmark to asses all markets by.[[788]](#footnote-789) Furthermore, in a perfectly competitive market, firms do not possess unilateral nor collective market power as defined in the Competition Act.[[789]](#footnote-790) From the characteristics of the perfectly competitive market it is clear that no individual firm is in a position to “control prices, exclude competition and to behave to an appreciable extent independently of its competitors, customers or suppliers,” i.e. no firm is in a position to abuse its unilateral market power.[[790]](#footnote-791)

Additionally, because the perfectly competitive market consists of a large number of buyers and sellers, it is very difficult for firms in the market to coordinate their behaviour to obtain collective market power i.e. in a perfectly competitive market, firms do not possess collective market power.[[791]](#footnote-792) Accordingly, the perfectly competitive market has the greatest degree of competition and as a result, the competition authorities rarely regulate it.[[792]](#footnote-793)

In real life however, no market actually achieves the position of being perfectly competitive.[[793]](#footnote-794) Nonetheless, the perfectly competitive model provides a very useful benchmark to asses all markets by.[[794]](#footnote-795)

Monopoly model

The monopoly model has the following characteristics:

1. There is only one seller of the product.[[795]](#footnote-796)

2. There are a large number of buyers.[[796]](#footnote-797)

3. The product of the monopolist is unique and there are no close substitutes for it.[[797]](#footnote-798)

4. Very large barriers to entry.[[798]](#footnote-799)

The monopoly model is positioned in contrast to the perfectly competitive market.[[799]](#footnote-800) Furthermore, because that the monopolist is the only supplier in the market, it is in control of the total output of that market.[[800]](#footnote-801) Accordingly, the monopolist has a great degree of control over the price of the product.[[801]](#footnote-802) As a result, the monopolist will charge a price higher than that of the equilibrium price namely where price is equal to the monopolist’s marginal cost.[[802]](#footnote-803)

Additionally, the monopoly model is associated with certain efficiency and welfare losses for society.[[803]](#footnote-804) These losses are caused by the lack of competition in the monopoly market, which in turn makes it possible for the monopolist to decrease output so as to increase prices.[[804]](#footnote-805) Furthermore, the lack of competition also makes it possible for the monopolist to survive in the market despite of being inefficient and asking higher prices.[[805]](#footnote-806) The monopolist is also in a position to contribute to the barriers of entry into the monopoly market, thereby strengthen the monopolist’s grip on the market.[[806]](#footnote-807)

From the preceding paragraphs it is clear that the monopolist is in a position to “control prices, exclude competition and to behave to an appreciable extent independently of its competitors, customers or suppliers.”[[807]](#footnote-808) Accordingly, the monopolist has the greatest degree of market power and consequently the monopolist has a Lerner Index value of one.[[808]](#footnote-809) Furthermore, the monopoly market has the lowest degree of competition and as a result, the competition authorities vigorously regulate it.[[809]](#footnote-810) Lastly, the monopoly market is contrasted with the perfectly competitive market and accordingly competition regulation functions between these two extremes.[[810]](#footnote-811)

As mentioned earlier, markets have various characteristics that are used to classify the structure of a market. All these characteristics are important do assess the degree of market power. However, this paper will only discuss two characteristics namely concentration and barriers to entry.

Note: Market characteristics are used to classify the structure of a market.[[811]](#footnote-812) The market structure in turn, is an indication of the nature and degree of competition in a market.[[812]](#footnote-813) The nature and degree of competition in turn, is used to assess the degree of unilateral or collective market power of the firms in a market.[[813]](#footnote-814)

3.3.4.2.2.2 Market characteristics

3.3.4.2.2.2.1 Market Concentration

As discussed earlier, the SCP paradigm asserts that there is a positive correlation between the level of concentration and the profitability in a market and that this correlation is an indication of collusive behaviour and/or other abuses of market power designed to increase profits i.e. there is a unidirectional causality from structure, to conduct to performance.[[814]](#footnote-815) Stated differently, a concentrated market structure makes it possible for firms to abuse their unilateral market power or to collude with other firms to obtain and abuse their collective market power.[[815]](#footnote-816) Accordingly, it is held that relatively more concentrated markets results in higher prices and lower levels of social welfare i.e. the closer the structure of a market resembles that of a monopoly market, the higher the prices and the lower the social welfare should be.[[816]](#footnote-817)

Market concentration refers to the number of firms in the relevant market and their size in the market relative to each other.[[817]](#footnote-818) Stated differently, concentration refers to the extent to which a small number of firms are responsible for a large proportion of the economic activity within a market.[[818]](#footnote-819) Numerous indices are used to measure industry concentration. Several of these indices have been used in South Africa and they include among others the following: market share; the Concentration Ratio, the Herfindahl-Hirschman Index; the Rosenbluth Index, the Gini Coefficient; Lorenz Curve; the Occupancy Count; C5% index.[[819]](#footnote-820)

Nonetheless, the two most widely used concentration measures are the Concentration Ratio (CR) and the Herfindahl-Hirschman Index (HHI).[[820]](#footnote-821) Accordingly, this paper will only focus on these two indices along with market share (which is necessary to calculate the CR and HHI).

Note: No single index is superior to all the other indices.[[821]](#footnote-822) The appropriateness of an index depends on the study being done and on the availability of the necessary data required to calculate a specific concentration index.[[822]](#footnote-823)

Market share

Market share measures the percentage of the total sales within the relevant market that can be attributed to a particular firm and the distribution of the remaining percentage market share among its competitors.[[823]](#footnote-824) Total sales can be substituted with other metrics such as total revenues, total output, total production capacity, total value and total inputs.[[824]](#footnote-825) A market will be regarded as concentrated if for example one or two firms in that market possess large market shares.[[825]](#footnote-826) In South Africa, a firm will be regarded as having sufficient market power to allow it to abuse that market power if it has at least 45 percent market share.[[826]](#footnote-827)

As mentioned previously, the delineation of the relevant market determines the area within which the market shares are to be calculated.[[827]](#footnote-828) Accordingly, an erroneous delineation of the relevant market could potentially lead to an overestimate or an underestimate of the market shares.[[828]](#footnote-829) Furthermore, using market shares as an indication of market power has several shortcomings.[[829]](#footnote-830) These shortcomings are however beyond the scope of this paper.

The Concentration Ratio (CR)

The concentration ratio is a straightforward summary statistics[[830]](#footnote-831) and is defined as “the percentage of total industry sales (or capacity, or employment, or value added, or physical output)”[[831]](#footnote-832) contributed by an N number of leading firms within the relevant market.[[832]](#footnote-833) Accordingly, the CR is written as follows:

n

CRn =∑Si

i=1

Where:

n = the number of firms being measured.

Si = the market share[[833]](#footnote-834) of a specific firm.

Concentration ratios come in a variety of different categories for example CR4, CR8 and CR10.[[834]](#footnote-835) Where the letters indicate how much of the market is controlled by the 4, 8 or 10 leading firms in the market.[[835]](#footnote-836) Stated differently, the CR is calculated by the summation of the market shares of the N leading firms in the relevant market.[[836]](#footnote-837) For example, the CR2 is calculated by adding the market shares of the two leading firms in the relevant market together.[[837]](#footnote-838)

The CR to, is plagued with inadequacies.[[838]](#footnote-839) The largest of these inadequacies being that the CR do not consider all the firms in a market nor does it account for the differences in the size (size distribution) of the various leading firms.[[839]](#footnote-840) Again, these inadequacies fall beyond the scope of this paper.

Herfindahl-Hirschman Index (HHI)

The HHI accounts for the total number of firms in the relevant market as well as their size distrubutions.[[840]](#footnote-841) The HHI is calculated by the summation of the squares of the market shares of all the firms in the relevant market.[[841]](#footnote-842) Accordingly, the HHI is written as follows:[[842]](#footnote-843)

 n

CRn =∑Si2

i=1

Where:

n = the total number of firms in the market.

Si = the market share[[843]](#footnote-844) of a particular firm.

The HHI can have an index value between zero and 10000.[[844]](#footnote-845) An index value of zero indicates that each of the firms in the market have an immeasurable small market share.[[845]](#footnote-846) This indicates that the market is perfectly competitive.[[846]](#footnote-847) An index value of 10000 indicates that one firm has a 100 percent market share (1002 = 10000).[[847]](#footnote-848) This indicates that the market is a monopoly market.[[848]](#footnote-849)

The US Merger Guidelines of 1992 divides the HHI into three regions.[[849]](#footnote-850) Region one encompasses all values between zero and 1000, region two encompasses all values between 1000 and 1800 and region three encompasses all values higher than 1800.[[850]](#footnote-851) Additionally, the regions are characterised respectively as unconcentrated, moderately concentrated and highly concentrated.[[851]](#footnote-852)

Furthermore, the HHI has various mathematical and economic theory characteristics which makes it an attractive concentration index.[[852]](#footnote-853) One of these characteristics is that it recognises the important influence of large firms have on the degree of competition in a market while also recognising the influence of smaller firms.[[853]](#footnote-854) Despite of the advantage of using the HHI to measure market concentration there is no consensus in South Africa on which measure is best seeing that concentration is a highly complex concept and extremely difficult to measure.[[854]](#footnote-855)

However, in most cases, the South African Competition Authorities use the HHI and the CR as an indication of market concentration.[[855]](#footnote-856) Some of these cases include the proposed mergers between Santam Limited and Guardian National Insurance Company Limited;[[856]](#footnote-857) JD Group Ltd and Ellerine Holdings Ltd;[[857]](#footnote-858) Tongaat-Hulett Group Ltd and Transvaal Suiker Bpk.[[858]](#footnote-859)

Lastly, empirical research in South Africa indicate that South Africa’s industry concentration was very high and increasing up to 1996.[[859]](#footnote-860) However, concentration levels seems to have decreased after 1996.[[860]](#footnote-861) Nonetheless, empirical research indicate that price mark-ups in South Africa are significantly higher than those of comparable industries and that these mark-ups are increasing.[[861]](#footnote-862)

3.3.4.2.2.2.2 Barriers to entry

There are several definitions for barriers to entry which include the following definitions: “Barriers to entry are anything that allow existing firms to earn pure (abnormal) profits without threat of entry by other firms;”[[862]](#footnote-863) “a Cost of production which must be borne by a firm which seeks to enter an industry but is no borne by firms already in the industry;”[[863]](#footnote-864) “any competitive advantage that established firms have over potential entrants.”[[864]](#footnote-865) A more formal definition of barriers to entry is that “barriers to entry reflect the extent to which established firms, in the long run, can elevate their selling price above minimum average cost of production and distribution without inducing potential entrants to enter the industry.”[[865]](#footnote-866)

It is clear from the preceding paragraph that barriers of entry is anything that prevents new firms from entering into a market or anything that makes it possible for existing firms to ask high prices for their products without the worry that new competitors will enter into the market.

What is important for barriers of entry as a consideration in the assessment of market power is the relative ease or difficulty with which new firms can enter into a market.[[866]](#footnote-867) Furthermore, high barriers to entry will make it possible for firms to sustain prices in excess of its marginal costs in the long run whereas low barriers to entry will prevent firms from asking prices that are higher than its marginal cost.[[867]](#footnote-868) Accordingly, a firm with a large market share in an industry with low barriers to entry is unlikely to have market power whereas a firm with a large market share in an industry with high barriers of entry is likely to have market power.[[868]](#footnote-869)

Broadly speaking, barriers to entry can be divided into two categories namely natural barriers to entry and artificial barriers to entry.[[869]](#footnote-870) Natural barriers to entry are those barriers of entry that are inherently part of functioning in a market.[[870]](#footnote-871) Examples of natural barriers to entry include economies of scale for existing firms,[[871]](#footnote-872) absolute cost advantages by existing firms,[[872]](#footnote-873) product differentiation,[[873]](#footnote-874) switching costs,[[874]](#footnote-875) network externalities,[[875]](#footnote-876) geographical barriers[[876]](#footnote-877) and legal barriers to entry.[[877]](#footnote-878)

On the other hand, artificial barriers to entry are barriers to entry that are established by the existing firms through entry-deterring strategies.[[878]](#footnote-879) Artificial barriers to entry include among others pricing strategies such as providing large rebates to customers, lowering the price to such an extent that the new entrant or an existing entrant is forced to leave the market (called predatory pricing).[[879]](#footnote-880) Artificial barriers to entry also include agreements by which an existing firm secures exclusive ownership, control or supply over essential resources required to function in that market.[[880]](#footnote-881)

Furthermore, barriers to exit may also be considered when assessing market power.[[881]](#footnote-882) These barriers generally refer to sunk costs.[[882]](#footnote-883) Sunk costs are cost that cannot be recuperated when a firm leaves a market.[[883]](#footnote-884) Accordingly, a new entrant will be hesitant to enter a market if the sunk cost are high since that firm is unsure whether it will survive in that market.[[884]](#footnote-885) This application of sunk costs to barriers of entry and exit is also referred to as the Contestable Market theory, which was developed in 1982.[[885]](#footnote-886)

From the preceding paragraphs, it is clear that there are numerous barriers to entry that can exist in a specific market and that these barriers can vary from market to market. Accordingly, the competition authorities consider all the factors that influence a firm in its decision to enter a market.[[886]](#footnote-887) A more detailed discussion on barriers to entry and the different types of barriers to entry is beyond the scope of this paper.

Furthermore, as mentioned earlier, the SCP paradigm assumes a unidirectional causality from structure, to conduct to performance.[[887]](#footnote-888) Accordingly, market structure is the most important element when assessing market power using the SCP paradigm.[[888]](#footnote-889) Indeed, this is also the case in South Africa where the market structure remains a very important element in the assessment of market power and the ability of firms to abuse it.[[889]](#footnote-890)

Nevertheless, the Competition Act[[890]](#footnote-891) does not prohibit the possession of market power but rather the abuse thereof.[[891]](#footnote-892) Accordingly, structural characteristics, which are an indication of the degree of market power in an industry, do not provide sufficient evidence to conclude whether or not a firm is in a position to abuse its market power.[[892]](#footnote-893) One example would be a market where buyers choose suppliers by way of a bidding process.[[893]](#footnote-894) Even if these markets where to be characterised by high concentration levels and large barriers to entry, structural indicators could potentially provide a wrong assessment of market power.[[894]](#footnote-895) The reason for this is that the bidding process could prohibit firms with large market shares from abusing their market power.[[895]](#footnote-896)

Given that structural characteristics are insufficient to conclude that firms are in a position to abuse their market power, the South African competition authorities follow a holistic approach when assessing the ability of firms to abuse their market power.[[896]](#footnote-897) Furthermore, it has been said the “market power is not an absolute term but a matter of degree, and the degree of market power will depend on the circumstances of each case. In assessing whether an undertaking has substantial market power, it is helpful to consider whether and the extent to which an undertaking faces competitive constraints*.”[[897]](#footnote-898)* With this statement in mind, the holistic approach followed by the South African competition authorities is one that This holistic approach includes all factors (conditions) that could potentially constraint firms from abusing their market power.[[898]](#footnote-899)

One means in which to assess the existence of these competitive constraints is by analysing the conduct and the performance of the firms within a market.[[899]](#footnote-900) Accordingly, the conduct and the performance of firms that could indicate an absence of competitive constraints within a market will be discussed in the following sections. These discussions however, will be brief and only focus on the essence of the conduct and the performance that is relevant for the assessment of the ability of firms to abuse their market power.

3.3.4.2.3 Conduct

Conduct refers to the behaviour of firms.[[900]](#footnote-901) More specifically, conduct refers to the numerous business decisions that need to be taken on a daily bases by the firms within a market.[[901]](#footnote-902) In the context of the SCP paradigm however, the relevant behavioural patterns (conduct) of firms relate to the market structure.[[902]](#footnote-903) Furthermore, it is argued that market structure and market conduct is always correlated with each other.[[903]](#footnote-904) Be it whether market structure determines market conduct or whether market conduct determines market structure.[[904]](#footnote-905)

However, as discussed previously, the SCP paradigm assumes that market conduct is determined by the market structure i.e. there is a unidirectional causality from structure, to conduct to performance.[[905]](#footnote-906) As a result, it is assumed that a firm’s market conduct is an indication of whether that firm is able to abuse its market power within the relevant market structure i.e. it is an indication of the competitive constraints that exist within that specific market’s structure, prohibiting firms from abusing their market power.[[906]](#footnote-907)

Furthermore, the abuse of market power is also referred to as anti-competitive conduct.[[907]](#footnote-908) As discussed earlier, the abuse of market power i.e. anticompetitive conduct, is taken to be detrimental to competition.[[908]](#footnote-909) In other words, anti-competitive conduct is any conduct that lessens or prevents competition within a market.[[909]](#footnote-910)

When considering the conduct element of the SCP paradigm the competition authorities consider all conduct that could potentially prevent or lessen competition in the relevant market.[[910]](#footnote-911) Conduct that is viewed as anti-competitive depends on the circumstances of each case and market and as a result it will vary from case to case and from market to market.[[911]](#footnote-912) Furthermore, there are copious quantities of different types of conduct that can be regarded as being anti-competitive.[[912]](#footnote-913) Accordingly, it is impossible to provide an exhaustive list of all the different types of conduct that can be considered as anti-competitive.[[913]](#footnote-914) Anti-competitive conduct could include among others the following:

1. The pricing behaviour of the firms in the market:[[914]](#footnote-915) Here the key question is whether the firms in the market are able to sustain prices in excess of their marginal costs.[[915]](#footnote-916) Remember, it is argued that only highly concentrated markets with high barriers to entry will allow firms to determine prices in excess of their marginal cost.[[916]](#footnote-917) In other words, if firms are able to sustain prices above their marginal cost it indicates that the firms have market power and that the market structure more closely resembles that of the monopoly model.[[917]](#footnote-918) Lastly, pricing behaviour seems to be the most important measure of conduct.[[918]](#footnote-919)

2. Barriers to entry:[[919]](#footnote-920) This measure of conduct refers to any conduct of a firm that contributes to any barriers to entry.[[920]](#footnote-921) These include among others, product design, branding, advertising and marketing which contribute to the product differentiation barrier to entry.[[921]](#footnote-922)

3. Research and development:[[922]](#footnote-923) The investment in research and development together with advertising and marketing is an important measure to indicate the degree of non-price competition between the various firms in the market.[[923]](#footnote-924)

4. Collusion:[[924]](#footnote-925) This measure of conduct includes all agreements between firms in the same market by which they agree not to directly compete with each other.[[925]](#footnote-926) This includes collective decision on prices; output; advertising and marketing and research and development.[[926]](#footnote-927) Lastly, collusion can be explicit or tacit.[[927]](#footnote-928)

5. Mergers:[[928]](#footnote-929) This includes horizontal, vertical and conglomerate mergers.[[929]](#footnote-930) Each one of these mergers could alter the market structure of the relevant market and provide the merging parties with sufficient market power to abuse it.[[930]](#footnote-931)

3.3.4.2.4 Performance

As discussed earlier, the perfectly competitive market model is the most efficient market model.[[931]](#footnote-932) The reason being that the perfectly competitive market is regulated by the competition process, which ensures that the market forces functions properly.[[932]](#footnote-933) The consequence of this being that the market equilibrium is achieved i.e. the socially efficient quantity is produced at the socially efficient price.[[933]](#footnote-934)

Furthermore, the competition process, which regulates the perfectly competitive market, ensures that all firms are efficient given that they face exit from the market if they are not.[[934]](#footnote-935) Competition thus ensures economic efficiency and consumer welfare. Accordingly, the purpose of the South African Competition Act[[935]](#footnote-936) is to promote and maintain competition within the Republic of South Africa with economic efficiency and consumer welfare being the overruling principles for the application of the Competition Act.[[936]](#footnote-937)

Additionally, it has been discussed that in equilibrium the follow equation holds for the profit maximising firm: Pf=Pm=MR=MC.[[937]](#footnote-938) Furthermore, market power has been said to be the ability of a firm or a group of firms acting together to raise the price of their products above their marginal costs at the profit maximising level of output.[[938]](#footnote-939) This will result in increasing their profits from what it would have been under conditions of perfect competition namely where Pf=Pm=MR=MC.[[939]](#footnote-940)

Moreover, it has been discussed that the essence of the Competition Act[[940]](#footnote-941) lies in the regulation of market power.[[941]](#footnote-942) More specifically, the essence of the Competition Act[[942]](#footnote-943) is to regulate the situation where a single firm or a group of firms acting together possess so much market power so as to allow it/them to abuse this market power and hence decrease the level of competition in that market.[[943]](#footnote-944)

As a result, the performance element of the SCP paradigm is nothing more than an evaluation of the performance of the firms in the relevant market in light of the performance outcomes of the perfectly competitive market, where the competition process functions properly, and where no unilateral or collective market power exists. The evaluation of market performance is thus an indication of the degree market power that exists in the structure of the relevant market.

The relevant performance outcomes of the perfectly competitive market, in the context of the SCP paradigm, is lower prices, higher quality goods, more choices of goods and/or services for consumers and for producers it is higher efficiency.[[944]](#footnote-945) These performance outcomes also results in the highest possible consumer welfare.[[945]](#footnote-946)

Accordingly, market performance in context of the SCP paradigm is assessed by, among others, the following metrics:

1. Profitability:[[946]](#footnote-947) As discussed in the preceding paragraphs, market power is the ability to raise prices above marginal cost to obtain higher profits. High profits are thus an indication of market power. However, there is a debate on whether high profits are a result of market power or a result of efficiency.[[947]](#footnote-948) This debate is beyond the scope of this paper.

2. Growth:[[948]](#footnote-949) The profitability measure is less appropriate to firms that pursue other objectives as profit maximisation for example firms that pursue growth, sales, number of clients etc.[[949]](#footnote-950) Market power can thus be indicated, for example, by a firm that had exceptional growth. The debate between the Chicago and non-Chicago is also relevant for the growth measure but beyond the scope of this paper.[[950]](#footnote-951)

3. Efficiency:[[951]](#footnote-952) As discussed in the previous paragraphs the perfectly competitive market results in firms that are more efficient. Accordingly, efficiency can provide an indication on the degree of market power within a market.[[952]](#footnote-953)

3. Quality and variety of products:[[953]](#footnote-954) As mentioned in the preceding paragraphs, perfect competition should result in higher quality products and a larger variety of products. Therefore, the quality of products and the choices for consumers can be an indication of market power.[[954]](#footnote-955)

4. Technological advancement:[[955]](#footnote-956) This measure is the result of research and development, which is a conduct measure.[[956]](#footnote-957) Accordingly, the technological advancement of firms can indicate the degree of non-price competition between firms and as a result, it could indicate the existence of market power.[[957]](#footnote-958)

3.3.4.3 The meaning of competition revisited[[958]](#footnote-959)

The meaning of competition is important since the purpose of the Competition Act[[959]](#footnote-960) is to promote and maintain competition.[[960]](#footnote-961) Accordingly, the Competition Act[[961]](#footnote-962) prohibits all conduct that it perceives as being anti-competitive. As a result, for the Competition Act[[962]](#footnote-963) to be of any use, the term “competition” needs to be defined. Nevertheless, the Competition Act[[963]](#footnote-964) does not provide a definition for the term “competition.”[[964]](#footnote-965)

For economists the term “competition” refers to the market structure where no firm is in a position to abuse its unilateral or collective market power.[[965]](#footnote-966) Accordingly, the term “competition” refers to all competitive constraints that prohibit firms from abusing their unilateral or collective market power i.e. competition refers to the absence of the ability to abuse market power.[[966]](#footnote-967) Therefore, the general definition of competition, which defines competition as a process of rivalry between competitors,[[967]](#footnote-968) is fundamentally flawed when applied in competition matters since it does not provide for all the competitive constraints that could prohibit firms from abusing their market power and hence decrease competition in their market.[[968]](#footnote-969) On the other hand, the general definition also seems unable to provide for collusive behaviour by firms.

In light of the Competition Act’s[[969]](#footnote-970) omission to define the term “competition,”[[970]](#footnote-971) there is an opportunity to debate the proper meaning of the term “competition.” However, a more detailed discussion on the proper meaning of the term “competition” is beyond the scope of this paper.

**Sien fourie bl 335. Deadweight loss ens Kyk na Reekie waar hy die *per se* en rule of reason prohibitions uitbring by die perforamance deel!!! Sien Rutherford ook waar hy *per se* en rule of reason prohibitions definieer.** **Die relationship between competition competitiveness and development gee lekker inligting oor hoekom mergers en acquisitions verbied word.**

Measuring economic efficiency Wetzstein bl 301.

Williamson trade-off and deadweight loss moet by die weighing van efficiencies teen die anti-competitive effects geweeg word.

**2.6 Distinguish between unlawful competition and competition law**

What is competition law? Economist idée etc Market system fail because imperfect competition which makes the abuse of market power possible. And the abuse of market power is what competition law regulates. Marekt power can be defined as..

Neethling speak about adam smith’s failing in performance competition but the definition of competition is different and this also indicates confusion between unlawful competition and competition.

In ons reg mededingings reg bestaan uit privaatregtelik (onregmatige mededinging) en publiekregtelik (competition act).Verskil tussen unlawful competition and Competition Act see neethling begin van boek. Competition definisie verskil asook doel van die wetgewing. Een soek doeltreffendheid en die ander een regverdige mededinging en beskerming van die produsente se regte. Kan nie se beidie vorm deel van mededingingsreg nie want die 2 verskil te veel en het nie dieselfde doel nie. Verder kan daar ook nie gese word dat unlawful competition die vryemark bevoordeel nie want dit neem nie die struktuut van dei mark in ag nie en ook nie of ‘n bepaalde handeling enigsins ‘n invloed op mededinging in die mark het nie. Dit moet sleg die handeling verhoed as dit wel mededinging in die mark (substantially benadeel), dalk bevoordeel die handeling alhoewel dit onregmatig is wel mededinging in die mark. Rigtings het wel invloed op mekaar maar is voldoende verskillend sodat dat beide deelvorm van die selfde deel van die reg nie regverdig kan word nie. Buite besek van die paper en daarom sal dit nie verder bespreek word nie en is ‘n onderwerp vir verdure navorsing wat onstaan uit hierdie paper. Kan ook na verskillende artikels veral by die doel van die Competition Act wat verwys na publieke mededingingsreg as competition law en unlawful competition ignoreer. Kan ook nie se dat unlawful competition privaatregtelike mededingingsreg is nie omdat baie wetgewing wat nie met die deliktereg te doen het nie ook ‘n invloed op mededinging kan he soos bv insider trading. Gevolglik moet men sander naam kry soos soos competition law en net wetgewing wat ‘n invloed het op handelinge van besighede en nie noodwendig mededinging beinvloed nie. Verder is mededinging in ekonomie nie dieselfde as in die reg nie. In ekonomie is mededinging die totale mededinging in ‘n mark en gaan dit oor die aantal mededingingers in die mark waar medediging tussen die partye gedefinieer kan word volgens die regsouens se definisie maar nie volgens die ekonomie ouens nie omdat die ekonomie ouens mededinging as die hoeveelheid firma swat in ‘n bepaalde mark funksioneer beheer. Daar moet onderskei word tussen competition law en wetgewing wat moontlik ‘n invloed op mededinging kan he soos bv. die afbrand van jou mededinger se besigheid vorm deel van die deliktereg en beskerm die mededinger se regte. Dit kan ‘n invloed het op die mededinging in die mark maar daar kan nie van mededingings reg gepraat word nie omdat dit nie mededinging as sulks reguleer nie. Dit neem nie die structure van die mark in ag nie ook nie die aard en vlak van mededinging in die mark nie en of die betrokke handeling ‘n anti-competitive consequence in die mark het nie. unlawful competition het te doen met onwettighede wat mededinginger beperk maar competition law het te doen met restrictive business practises wat nie dieselfde is as onwettighede nie sien UN conference on trade development bl 3.

Verskillende terme. Die een praat van unlawful maw maak inbreuk op die ander ou se regte mar die Competition Act praat van anti-competitive wat beteken die ou kan sy market power misbruik en dit beteken nie noodwendig dat die ander ou se regte beperk word nie. “Onregmatige mededinging het ‘n beperkte betekenis en aanwending[[971]](#footnote-972)”

Competition in unlawful is stryd tussen 2 of meer mededingers maar in ekonomie is dit nie net stryd tussen 2 mededingers nie maar of die ouens hulle market power kan misbruik of gebruik. As hulle nie kan nie dan is daar baie mededinging tussen hulle en as hulle wel kan is data min mededinging tussen hulle.

**To define competition, we follow Stigler’s (Palgrave 1987) preference for the classical**

**Usage of the term: competition in the product market is identified as a rivalry that arises when two or more firms strive for something that not all can obtain. He defines the central elements of competition: the freedom of traders to use their resources where they will, and exchange them at any price they will. (sine importance of competition in developing countries bl 2)**

Say that competition law[[972]](#footnote-973) and unlawful competition are not both part of competition law. Unlawful competition is part of law of delict and should be called trade law since it protects firm’s rights to trade and not its right to compete or competition. It also does not enhance the free market.

**2.7 Summary**

**Bibliography**

**Textbooks**

Agnew JH

1985. Competition Law. 1st ed. London: Allen & Unwin.

Broder DF

2005. *A Guide to US Antitrust Law*. 1st ed. London: Sweet & Maxwell.

Fourie FCvN

2006. *How to think and reason in macroeconomics*. 2nd ed. Lansdowne: Juta.

Kleyn D and Viljoen F

2002. *Beginners Guide for Legal Students*. 3rd ed. Lansdowne: Juta.

Klopper H.B and Van der Spuy P

2002. *Law of Intellectual Property*. Pretoria: University of Pretoria.

Korah V

2004. *An Introductory Guide to EC Competition Law and Practice*. 8th ed. Oxford: Hart Publishing.

Lipczynski J and Wilson JOS and Goddard J

2009. *Industrial Organization: Competition, strategy and policy*. 3rd ed. Essex: Pearson Education.

McConnel CR and Brue SL

2008. *Economics: Principles, Problems and Policies*. 17th ed. New York: McGraw-Hill/Irwine.

Neuhoff M and Govender M and Versfeld M and Dingley D

2006. *A Practical Guide to the South African Competition Act*. 1st ed. Durban: LexisNexis.

Reekie WD

1989. *Industrial Economics: A critical introduction to corpotrate enterprise in Europe and America*. 1st ed. Aldershot: Edward Elgar.

Reid G

1987. *Theories of Industrial Organization*. 1st ed. Oxford: Basil Blackwell.

Reisman G

1996. *Capitalism: A Treatise on Economics*. 1st ed. Illinois: Jameson Books.

Spulber DF

2003. Entry Barriers and Entry Strategies. *Journal of Strategic Management Education* 1(2003):55-80.

Stigler GJ

1968. *The Organization of Industry*. 1st ed. Holmwood: Irwin.

Van Heerden HJO and Neethling J

1995. *Unlawful Competition*. 1st ed. Durban: Butterworths.

Wetzstein ME

2005. *Microeconomic Theory: Concepts and Connections*. 1st ed. Ohio: South Western.

Whish R

1993. *Competition Law*. 3rd ed. London: Butterworths.

**Journal articles**

 Audretsch DB and Baumol WJ and Burke AE

 2001. *International Journal of Industrial Organization* 19(2001): 613-634.

 Cowen DV

1950. A Survey of the Law Relating to the Control of Monopoly in South Africa. *South African Journal of Economics* 18(2):124-147.

 Fourie FCvN

 1996. Industrial Concentration Levels and Trends in South Africa: Completing the Picture. *The South African Journal of Economics* 64(1):97-121.

 Fourie FCvN and Smit MR

 1989. Trends in Economic Concentration in South Africa. *The South African Journal of Economics* 57(3): 241-256.

 Fourie FCvN and Smith A

 1998. The Concentration - Profits Stalemate I: Causality and Interpretation Problems. *South African Journal of Economics* 66(4):559-585.

 Fourie FCvN and Smith A

 1999. The Concentration-Profits Stale Mate II: Ideological Rifts and Methodological Stress. *South African Journal of Economics* 67(1):66-96.

 Hartzenberg T

 2006. Competition Policy and Practice in South Africa: Promoting Competition for Development. *Northwestern Journal of International Law & Business* 26(3):667-685.

 Karim WJ

 2010. The Economic Crisis, Capitalism and Islam: The Making of a New Economic Order? *Globalization* 7(1&2):105-125.

 Klein S

 1998. Competition Policy and Global Competitiveness in South Africa. *Thunderbird International Business Review* 40(5):505-523.

 Leach DF

 1992. Concentration and Profits in South Africa: Monopoly or Efficiency? *South African Journal of Economics* 60(2):143-157.

 Leach DF

 1997. Concentration-Profits Monopoly vs. Efficiency Debate: South African Evidence. *Contemporary Economic Policy* 15(1997):12-23.

 Land J and Owens J and Cejnar L

 The meaning of “Competition.” *New Zealand Universities Law Review* 24(June 2010):98-112.

 Lavergne P and Réquillart V and Simioni M

 2001. Welfare Losses Due to Market Power: Hicksian versus Marshallian Measurement. *American Journal of Agricultural Economics* 83(1):157-165.

 Lerner AP

 1934. The Concept of Monopoly and the Measurement of Monopoly Power. *The Review of Economic Studies* 1(3):157-175.

 Liebenberg AP and Kamerschen DR

 2008. Structure, Conduct And Performance Analysis Of The South African Auto Insurance Market: 1980-2000. South African Journal of Economics 76(2):228-238.

 López EJ

 2001. *New Anti-Merger Theories: Critique*. Cato Journal 20(3):359-378.

 Massey P

 2000. Market Definition and Market Power in Competition Analysis: Some Practical Issues. *The Economic and Social Review* 31(4):309-328.

 McNulty PJ

 1968. Economic Theory and the Meaning of Competition. *The Quarterly Journal of Economics* 82(4):639-656.

 Mousseau M

 2010. Coming to Terms with the Capitalist Peace.

 *International Interactions* 36:185– 213.

 Oppenheimer F

 1942. Capitalism and the Free Economy. *American Journal of Economics and Sociology* 1(3):307-310.

 Pleatsikas C and Teece D

 2001. The analysis of market definition and market power in the context of rapid innovation. *International Journal of Industrial Organization* 19(2001):665-693.

 Reekie WD

 1984. The Structure-Conduct-Performance Paradigm in a South African Setting. *South African Journal of Economics* 52(2):146-155.

 Reekie WD

 1999. The Competition Act, 1998: An Economic Perspective. *South African Journal of Economics* 67(2):258-289.

 Rojas C

 2011. Market Power and the Lerner Index: A Classroom Experiment. *Journal of Industrial Organization Education* 5(1):Article2.

 Romar EJ

 2008. Noble Markets: The Noble/Slave Ethic in Hayek’s Free Market Capitalism. *Journal of Business Ethics* 2009(85):57–66.

 Rutherford BR

 1999. An Overview of the New Competition Act. *South African Mercantile Law Journal* 1999(11):300-310.

 Stigler GJ

 1982. The Economists and the Problem of Monopoly. *The American Economic Review* 72(2):1-11.

 Tardif TJ and Weisman DL

 2009. *THE DOMINANT FIRM REVISITED*. *Journal of Competition Law & Economics* 5(3):517-536.

 Theron N

 2001. The Economics Of Competition Policy: Merger Analysis In South Africa. *The South African Journal of Economics* 69(4):614-658.

 Truu ML

 1996. Wanted: An Economic System for South Africa. *South African Journal of Economic and Management Sciences* 47(21):30-60.

 Vallejo H

 2006. *A generalized index of market power*. Revista de Economía Del Rosario 10(2):95-108.

 Venkatasubramanian V

 2010. Fairness Is an Emergent Self-Organized Property of the Free Market for Labor. *Entropy* 2010(12):1514-1531.

 Weis LW

 1979. The Structure-Conduct-Performance Paradigm and Antitrust. *University of Pennsylvania Law Review* 127(4):1104-1140

 Werden GJ and Froeb LM

 1993. Correlation, Causality, and All that Jazz: The Inherent Shortcomings of Price Tests for Antitrust Market Delineation. *Review of Industrial Organization* 8(1993):329-353.

 Werden GJ

 1992. *Four Suggestions on Market Delineation*. *Antitrust Bulletin* 37(1)107- 121.

 Witztum A

 2010. Interdependence, the Invisible Hand, and Equilibrium in Adam Smith. *History of Political Economy* 42(1):155-192.

**Working Papers[[973]](#footnote-974)**

 Boshoff WH

 2006. *Quantitative Competition Analysis: Stationary Tests In*

 *Geographic Market Definition*. Department of Economics: University of Stellenbosch. Working Paper 17(2006).

 Boshoff WH

 2011. *Advances in price time series tests for antitrust market definition*. Department of Economics: University of Stellenbosch Economic Working Paper: 1(2011).

 Competition Commission Annual Report

 2001. *The Annual Report of the South African Competition Commission*. Competition Commission: South Africa.

 Chabane N and Machaka J and Molaba N and Roberts S and Taka M

 2003. *10 Year Review: Industrial Structure and Competition Policy*. School of Economic and Business Sciences: University of the Witwatersrand.

 Cook P

 2001. *Competition and Its Regulation: Key Issues*. Centre on Regulation and Competition: University of Manchester. Working paper 2(2001).

 Dobbs IM

 2002. *Demand, Cost Elasticities and Pricing Benchmarks in the Hypothetical Monopoly Test: The Consequences of a Simple SSNIP*. School of Business: University of Newcastle.

 Fedderke J and Simbanegavi W

 2008. *South African Manufacturing Industry Structure and its Implications for Competition Policy*. School of Economics: University of Cape Town. Working paper 11(2008).

 Filistrucchi L

 2008. *A SSNIP Test for Two-sided Markets: The Case of Media*. Tilburg University & University of Siena Working Paper: 08-34.

 Littlechild S

 2006. *Beyond Regulation*. Cambridge Working Papers in Economics: 06/16.

 Martin S

 2005. *U.S. Antitrust and EU Competition Policy: Where has the Former Been, Where is the Latter Going?* Department of Economics: Purdue University.

 Moresi SX and Salop SC and Woodbury JR

 2008. Implementing the Hypothetical Monopolist SSNIP Test With Multi- Product Firms. The AntitrustSource.

 Office of Fair Trading

 2004. *Assessment of market power: Understanding Competition Law*. The Office of Fair Trading.

 Kellman M and Roxo T and Shachmurove Y

 2003. *South Africa’s International Competitiveness: A Product Level Analysis*. Penn Institute for Economic Research Working Paper 20(2003).

 Ridyard and Bishop and Baker

 2003. *Goldilocks and the three bears - the story of market definition and the cruise mergers*. RBB Economics: RBB Publications.

 Roberts S

 2004. *The Role for Competition Policy in Economic Development: The South African Experience*. Trade and Industrial Policy Strategies Working Paper 8(2004).

 Stenborg M

 2004. *Biases in the Market Definition Procedure*. The Research Institute of the Finnish Economy and Berkeley Roundtable on the International Economy

 Török A

 2005. *Competition policy reform in South Africa Towards the mainstream CP model for ‘transition’ economies in the Third World?* Research Group on Micro-integration and Regional Development Studies: University of Veszprém and Hungarian Academy of Sciences.

 Walker M

 2006. *Competition Law, Anti-Competitive Behaviour, and Merger Analysis: Economic Foundations.*

 Office of the General Counsel: Asian Development Bank.

**Conference Papers**

 Du Plessis SA and Gilbert ES

 2008. *The Structure–Conduct–Performance (SCP) paradigm and its application in South Africa: a review of the empirical evidence and the implications for competition policy*. Annual Competition Conference on Competition Law, Economics and Policy in South Africa. Johannesburg: 2008.

 Holland M

 2007. *Two-Sided Markets: A Challenge to Competition Policy?* Annual Competition Conference on Competition Law, Economics and Policy in South Africa. Johannesburg: 2007.

 Jafta RCC

 1998. *Is South African Competition Policy keeping up with world developments?* The Annual Legislation & Policy Review Conference. Randburg: 1998.

 Kahn AE

 1981. The Relevance of Industrial Organization. Middlebury College Conference on Economic Issues. Vermont: 1981.

 Lewis D

 1998. Recent Developments in Competition Policy in South Africa. Conference on the Economics of Competition Policy in South Africa. Johannesburg: 1998.

 Neven D

 1998. HORIZONTAL MERGER ANALYSIS. Conference on the Economics of Competition Policy in South Africa. Johannesburg: 1998.

 Smith C

 2005. *The Rationale for Competition Policy*: *A South African Perspective*. The Biennial Economic Society of South Africa Conference. Durban: 2005.

 United Nations Conference on Trade and Development

 1998. *Issues related to competition law of particular relevance to development*. Geneva: 1998.

 United Nations Conference on Trade and Development

 2002. *The Relationship between Competition, Competitiveness and Development*. Geneva: 2002.

**Peer reviews**

 Competition Commission

 2002. *Market Investigation References: Competition Commission Guidelines*. Competition Commission: London.

 Organisation for Economic Co-operation and Development

 2003. *Competition Law and Policy in South Africa*. OECD: Paris.

 United Nations Conference on Trade and Development

 1998. *Issues related to competition law of particular relevance to development*. United Nations: Geneva.

**Monographs**

Cseres KJ

2005. *Competition Law and Consumer Protection*. 1st ed. The Hague: Kluwer Law International.

 Reekie WD

 2000. *Monopoly and competition policy*. 2nd ed. Sandton: The Free Market Foundation.

**Internet sources**

 Competition Commission

 2011. *The Evolution of Competition Policy in South Africa*. http://www.compcom.co.za/about-us/ (accessed 11 March 2011)

 Economy Watch

 2011. *Types of Economic Systems*. http://www.economywatch.com/world\_economy/world-economic- indicators/type-of- economic-system.html (accessed 18 April 2011)

 Mount Holyoke College

 2011. *Excerpts from Milton Friedman, Capitalism and Freedom*. http://www.mtholyoke.edu/acad/intrel/ipe/friedman.htm

 (accessed 18 March 2011)

 McTeer

 2002. *Free Enterprise: The Economics of Cooperation*. http://www.dallasfed.org/educate/free/index.html#intro

 (accessed 17 March 2011)

 Organisation for Economic Co-operation and Development

 OECD. *Glossary of Industrial Organisation Economics and Competition Law*. www.oecd.org/dataoecd/8/61/2376087.pdf (accessed on 31 Mei 2011)

 US Federal Trade Commission

 1992. Horizontal Merger Guidelines. http://www.ftc.gov/bc/docs/horizmer.shtm (accessed 19 Mei 2011)

 US Federal Trade Commission

 2007. How Do Courts and Agencies Evaluate Market Power?

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed 13 Mei 2011)

 US Department of Justice

 1992. Horizontal Merger Guidelines. http://www.justice.gov/atr/public/guidelines/horiz\_book/11.html

 (accessed 19 Mei 2011)

**Legislation**

Competition Act 89 of 1998.

 Maintenance and Promotion of Competition Act 96/1979.

 Regulation of Monopolistic Conditions Act 25/1955.

 Undue restraint of trade Act 59 of 1949.

**Case law**

 JD Group Limited and Ellerine Holdings Limited Case 78/LM/Jul00.

 Lorimar v Sterling Clothing Manufacturers 1981 3 SA 1129 (T) 1141.

 National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome (Pty) Ltd and Others case 45/CR/Jul01.

 Santam Limited and Guardian National Insurance Company Limited case 14/LM/Feb00

 Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd case 66/LM/Oct01.

 Tongaat-Hulett Group Limited and Transvaal Suiker Bpk Case 83/LM/Jul00

 Tothill v Gordon 1930 WLD 99 112.

.

1. Cseres 2005: 12. [↑](#footnote-ref-2)
2. Rowley 1989: 125 as cited in Cseres 2005: 12. [↑](#footnote-ref-3)
3. Cseres 2005: 11. [↑](#footnote-ref-4)
4. Cseres 2005: 11-12. [↑](#footnote-ref-5)
5. Cseres 2005: 11-12. [↑](#footnote-ref-6)
6. Cseres 2005: 11-12. [↑](#footnote-ref-7)
7. Cseres 2005: 11. [↑](#footnote-ref-8)
8. Neuhoff *et al* 2006: 26. [↑](#footnote-ref-9)
9. Neuhoff *et al* 2006: 26. [↑](#footnote-ref-10)
10. Wish 1993: 1. [↑](#footnote-ref-11)
11. In economics there are 4 types of economic resources. They are as follow: “Land, which include all natural resources used in the production of goods and services; Labour, which include the physical and mental talents of individuals used in producing goods and services; Capital, which is defined as all manufacturing aids used in the production of goods and services and lastly entrepreneurial ability.” For more information see McConnel & Brue 2008: 4. [↑](#footnote-ref-12)
12. McConnell & Brue 2008: 4; Wetzstein 2005: 2-3. [↑](#footnote-ref-13)
13. McConnell & Brue 2008: 4; Wetzstein 2005: 2-3. [↑](#footnote-ref-14)
14. McConnell & Brue 2008: 4; Wetzstein 2005: 2-3. [↑](#footnote-ref-15)
15. McConnell & Brue 2008: 10. [↑](#footnote-ref-16)
16. McConnell & Brue 2008: 4; Wetzstein 2005: 2-3. [↑](#footnote-ref-17)
17. Wetzstein 2005: 3. [↑](#footnote-ref-18)
18. Wetzstein 2005: 3. [↑](#footnote-ref-19)
19. Wetzstein 2005: 3. [↑](#footnote-ref-20)
20. McConnell & Brue 2008: 29. [↑](#footnote-ref-21)
21. McConnell & Brue 2008: 29. [↑](#footnote-ref-22)
22. Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html (accessed 18 April 2011) [↑](#footnote-ref-23)
23. Since all four types of economic resources are used in the production of goods and services, they can also be called the factors of production. For more information see McConnell & Brue 2008: 11. [↑](#footnote-ref-24)
24. McConnell & Brue 2008: 29; Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html (accessed 18 April 2011) [↑](#footnote-ref-25)
25. McConnell & Brue 2008: 29; Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html (accessed 18 April 2011) [↑](#footnote-ref-26)
26. Property resources consist of capital and land resources with the land resources including all natural resources. For more information see McConnell & Brue 2008: 29. [↑](#footnote-ref-27)
27. Wetzstein 2005: 367; McConnell & Brue 2008: 29; Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html (accessed 18 April 2011) [↑](#footnote-ref-28)
28. A market can be defined as a mechanism that brings buyers and sellers together. Therefore the market forces are the supply and demand within a given market. For more information see McConnell & Brue 2008: 31. [↑](#footnote-ref-29)
29. Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html (accessed 18 April 2011); Wetzstein 2005: 367; McConnell & Brue 2008: 29. [↑](#footnote-ref-30)
30. Wetzstein 2005: 367; McConnell & Brue 2008: 29. [↑](#footnote-ref-31)
31. Wetzstein 2005: 367; McConnell & Brue 2008: 29. [↑](#footnote-ref-32)
32. The efficient allocation of resources means that the scarce economic resources are allocated so as to maximise the social welfare of the citizens within a given economy. For more information see Wetzstein 2005: 367. [↑](#footnote-ref-33)
33. Wetzstein 2005: 366. [↑](#footnote-ref-34)
34. Wetzstein 2005: 367; McConnell & Brue 2008: 29; Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html (accessed 18 April 2011) [↑](#footnote-ref-35)
35. McConnell & Brue 2008: 29. [↑](#footnote-ref-36)
36. McConnell & Brue 2008: 29. See fn 28 for a definition of the term “market.” [↑](#footnote-ref-37)
37. McConnell & Brue 2008: 29. [↑](#footnote-ref-38)
38. Oppenheimer: 1942: 307. [↑](#footnote-ref-39)
39. This term means “let it be” i.e. the state should not interfere within the economy. [↑](#footnote-ref-40)
40. Romar: 2008: 57; Wetzstein 2005: 19; McConnell & Brue 2008: 29; Venkatasubramanian: 2010: 1515. [↑](#footnote-ref-41)
41. In other words demand and supply. See fn 28. [↑](#footnote-ref-42)
42. Fourie 2006: 335; Wetzstein 2005: 19; McConnell & Brue 2008: 29; Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html (accessed 18 April 2011) [↑](#footnote-ref-43)
43. McConnell & Brue 2008: 29. [↑](#footnote-ref-44)
44. Mousseau: 2010: 186. [↑](#footnote-ref-45)
45. Oppenheimer: 1942: 307. [↑](#footnote-ref-46)
46. Reisman 1996: 19; Mousseau: 2010: 186. [↑](#footnote-ref-47)
47. Mount Holyoke College on http://www.mtholyoke.edu/acad/intrel/ipe/friedman.htm (accessed on 18 March 2011) [↑](#footnote-ref-48)
48. Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html [↑](#footnote-ref-49)
49. Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html [↑](#footnote-ref-50)
50. Economy Watch on http://www.economywatch.com/world\_economy/world-economic-indicators/type-of-economic-system.html [↑](#footnote-ref-51)
51. McConnell & Brue 2008: 29. [↑](#footnote-ref-52)
52. McConnell & Brue 2008: 29. [↑](#footnote-ref-53)
53. McConnell & Brue 2008: 29. [↑](#footnote-ref-54)
54. McConnell & Brue 2008: 29-33. [↑](#footnote-ref-55)
55. McConnell & Brue 2008: 29. [↑](#footnote-ref-56)
56. McConnell & Brue 2008: 29. [↑](#footnote-ref-57)
57. McConnell & Brue 2008: 29. [↑](#footnote-ref-58)
58. McConnell & Brue 2008: 30. [↑](#footnote-ref-59)
59. McConnell & Brue 2008: 30. [↑](#footnote-ref-60)
60. McConnell & Brue 2008: 30. [↑](#footnote-ref-61)
61. McConnell & Brue 2008: 30. [↑](#footnote-ref-62)
62. Romar 2008: 57. [↑](#footnote-ref-63)
63. Fourie 2006: 335. [↑](#footnote-ref-64)
64. Fourie 2006: 335. [↑](#footnote-ref-65)
65. McConnell & Brue 2008: 30. [↑](#footnote-ref-66)
66. Fourie 2006: 335; McConnell & Brue 2008: 31. [↑](#footnote-ref-67)
67. The most efficient allocation of resources is also called the market equilibrium i.e. where market demand and market supply are equal to each other. For more information see Wetzstein 2005: 258. [↑](#footnote-ref-68)
68. McConnell & Brue 2008: 31. [↑](#footnote-ref-69)
69. Market forces refer to the supply and demand in the relevant market. For more information see Wetzstein 2005: 264; Fourie 2006: 335; McConnell & Brue 2008: 31. [↑](#footnote-ref-70)
70. Fourie 2006: 335, McConnell & Brue 2008: 29; Wetzstein 2005: 19; Romar 2008: 63. [↑](#footnote-ref-71)
71. Fourie 2006: 335. [↑](#footnote-ref-72)
72. Wetzstein 2005: 258-259; McTeer 2002: Chapter 2; McConnell & Brue 2008: 29. [↑](#footnote-ref-73)
73. McConnell & Brue 2008: 31. [↑](#footnote-ref-74)
74. McConnell & Brue 2008: 31. [↑](#footnote-ref-75)
75. McConnell & Brue 2008: 31; Neuhoff *et al* 2006: 11. [↑](#footnote-ref-76)
76. McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-77)
77. Wetzstein 2005: 368; McConnell & Brue 2008: 31. [↑](#footnote-ref-78)
78. McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-79)
79. Wetzstein 2005: 368; McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-80)
80. Wetzstein 2005: 368; McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-81)
81. This is known as “consumer sovereignty.” For more information see Wetzstein 2005: 19. [↑](#footnote-ref-82)
82. Wetzstein 2005: 19. [↑](#footnote-ref-83)
83. Wetzstein 2005: 19. [↑](#footnote-ref-84)
84. McConnell & Brue 2008: 31. [↑](#footnote-ref-85)
85. McConnell & Brue 2008: 31. [↑](#footnote-ref-86)
86. McConnell & Brue 2008: 31. [↑](#footnote-ref-87)
87. McConnell & Brue 2008: 31. [↑](#footnote-ref-88)
88. McConnell & Brue 2008: 31. [↑](#footnote-ref-89)
89. Neuhoff *et al* 2006: 11; McConnell & Brue 2008: 31. [↑](#footnote-ref-90)
90. Wetzstein 2005: 368; McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-91)
91. Wetzstein 2005: 368; McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-92)
92. Wetzstein 2005: 368; McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-93)
93. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2004: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259. [↑](#footnote-ref-94)
94. Neuhoff *et al* 2006: 36; Wetzstein 2005: 258; McConnel & Brue 2008: 400; [↑](#footnote-ref-95)
95. Wetzstein 2005: 258 [↑](#footnote-ref-96)
96. Wetzstein 2005: 258; McConnel & Brue 2008: 411. [↑](#footnote-ref-97)
97. McConnel & Brue 2008: 400-401. [↑](#footnote-ref-98)
98. McConnel & Brue 2008: 400-401. [↑](#footnote-ref-99)
99. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2008: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259. [↑](#footnote-ref-100)
100. Neuhoff *et al* 35-36; McConnel & Brue 400; Wetzstein 259. [↑](#footnote-ref-101)
101. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2008: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259. [↑](#footnote-ref-102)
102. Holland: 2007: 1; Chabane *et al* 2003: 1; Roberts 2004: 1; Neuhoff *et al* 2006: 26; McConnell & Brue 2008: 31. [↑](#footnote-ref-103)
103. The Competition Act 89/1998: section 1. [↑](#footnote-ref-104)
104. Neuhoff *et al* 2006: 27. [↑](#footnote-ref-105)
105. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2004: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259. [↑](#footnote-ref-106)
106. See page 8 and 9 of this chapter. [↑](#footnote-ref-107)
107. Lorimar v Sterling Clothing Manufacturers 1981 3 SA 1129 (T) 1141. Also see Neethling & Van Heerden 1995: 2-3 and Klopper & Van Der Spuy 2008: 65. [↑](#footnote-ref-108)
108. Neuhoff *et al* 2006: 26; Land *et al* 2010: 98; McNulty 1968: 639-640. [↑](#footnote-ref-109)
109. Neuhoff *et al* 2006: 26 read with page 35. [↑](#footnote-ref-110)
110. Neuhoff *et al* 2006: 26. [↑](#footnote-ref-111)
111. Neuhoff *et al* 2006: 26. [↑](#footnote-ref-112)
112. Land *et al* 2010: 98. [↑](#footnote-ref-113)
113. McNulty 1968: 639-640. In this context monopoly can be described as a situation where an individual firm or a collection of firms are in a position to control prices and accordingly they are also in a position to coordinate and direct economic activity. [↑](#footnote-ref-114)
114. See page 1 of this chapter. [↑](#footnote-ref-115)
115. 89/1998. [↑](#footnote-ref-116)
116. The Competition Act 89/1998: section 1; Neuhoff *et al* 2006: 25-26. [↑](#footnote-ref-117)
117. 89/1998. [↑](#footnote-ref-118)
118. The Competition Act 89/1998: section 2. [↑](#footnote-ref-119)
119. 89/1998. [↑](#footnote-ref-120)
120. Neuhoff *et al* 2006: 26. [↑](#footnote-ref-121)
121. Land *et al* 2010: 98. [↑](#footnote-ref-122)
122. McNulty 1968: 639-640. [↑](#footnote-ref-123)
123. Neuhoff *et al* 2006: 11; Wetzstein 2005: 367; Van Heerden & Neethling 1995: 12-13; Klopper & Van Der Spuy 2002: 67; McConnel & Brue 2008: 33. [↑](#footnote-ref-124)
124. Wetzstein 2005: 367; Neuhoff *et al* 2006: 11. [↑](#footnote-ref-125)
125. United Nations Conference on Trade and Development 2002: 4. [↑](#footnote-ref-126)
126. United Nations Conference on Trade and Development 2002: 4. [↑](#footnote-ref-127)
127. United Nations Conference on Trade and Development 2002: 4. [↑](#footnote-ref-128)
128. Neuhoff *et al* 2006: 11; Broder 2005: 28; Cseres 2005: 1 & 17; Wetzstein 2005: 367; Van Heerden & Neethling 1995: 12-13; Klopper & Van Der Spuy 2002: 67; McConnel & Brue 2008: 33. [↑](#footnote-ref-129)
129. Neuhoff *et al* 2006: 11; Broder 2005: 28; Cseres 2005: 1 & 17; Wetzstein 2005: 367; Van Heerden & Neethling 1995: 12-13; Klopper & Van Der Spuy 2002: 67; McConnel & Brue 2008: 33. [↑](#footnote-ref-130)
130. McConnel & Brue 2008: 29. [↑](#footnote-ref-131)
131. See fn 15. [↑](#footnote-ref-132)
132. Neuhoff *et al* 2006: 11; Broder 2005: 28. [↑](#footnote-ref-133)
133. Neuhoff *et al* 2006: 11. [↑](#footnote-ref-134)
134. Neuhoff *et al* 2006: 11. [↑](#footnote-ref-135)
135. Trade policies determine how trade between national firms and foreign firms are to be conducted. For more information see Neuhoff *et al* 2006: 11. [↑](#footnote-ref-136)
136. Deregulation can be described as the removal of unnecessary restrictions on firms. For more information see Neuhoff *et al* 2006: 11. [↑](#footnote-ref-137)
137. Privatisation can be described as the “transfer in ownership of an asset from the public sector to the private sector.” See Neuhoff *et al* 2006: 11. [↑](#footnote-ref-138)
138. Neuhoff *et al* 2006: 12. The difference between the “maintaining and promoting of competition” and “unlawful competition” will be discussed in section 2.6. [↑](#footnote-ref-139)
139. Land *et al* 2010: 98. [↑](#footnote-ref-140)
140. McNulty 1968: 639-640. [↑](#footnote-ref-141)
141. Neuhoff *et al* 2006: 27; Roberts 2004: 1-17. [↑](#footnote-ref-142)
142. McConnell & Brue 2008: 31. [↑](#footnote-ref-143)
143. McConnell & Brue 2008: 31. [↑](#footnote-ref-144)
144. Truu 1996: 2. [↑](#footnote-ref-145)
145. Truu 1996: 2. [↑](#footnote-ref-146)
146. Truu 1996: 2. [↑](#footnote-ref-147)
147. Truu 1996: 2. [↑](#footnote-ref-148)
148. Truu 1996: 2. [↑](#footnote-ref-149)
149. Klopper & Van Der Spuy 2002: 65; Van Heerden & Neethling 1995: 1; Truu 1996: 2; Neuhoff et al 2006: 11; Chabane *et al* 2003: 6. [↑](#footnote-ref-150)
150. Competition Act 89/1998: section 2. [↑](#footnote-ref-151)
151. 89/1998. [↑](#footnote-ref-152)
152. Neuhoff *et al* 2006: 27. [↑](#footnote-ref-153)
153. Neuhoff *et al* 2006: 27. [↑](#footnote-ref-154)
154. 89/1998. [↑](#footnote-ref-155)
155. Cowen 1950: 124-125. [↑](#footnote-ref-156)
156. Cowen 1950: 125-126. [↑](#footnote-ref-157)
157. Cowen 1950: 126. [↑](#footnote-ref-158)
158. Cowen 1950: 126. [↑](#footnote-ref-159)
159. Cowen 1950: 126. [↑](#footnote-ref-160)
160. Cowen 1950: 126. [↑](#footnote-ref-161)
161. Cowen 1950: 126. [↑](#footnote-ref-162)
162. Cowen 1950: 126. [↑](#footnote-ref-163)
163. Cowen 1950: 126. [↑](#footnote-ref-164)
164. Cowen 1950: 127. [↑](#footnote-ref-165)
165. Cowen 1950: 127; See also Van Heerden & Neethling 1995: 6 which mentions the existence of state monopolies. [↑](#footnote-ref-166)
166. Cowen 1950: 127. [↑](#footnote-ref-167)
167. Cowen 1950: 127. [↑](#footnote-ref-168)
168. De Roover 1951: 493; Cowen 1950: 127. [↑](#footnote-ref-169)
169. De Roover 1951: 493; Cowen 1950: 127. [↑](#footnote-ref-170)
170. Cowen 1950: 127. [↑](#footnote-ref-171)
171. Van Heerden & Neethling 1995: 6; Cowen 1950: 127. [↑](#footnote-ref-172)
172. Cowen 1950: 127. [↑](#footnote-ref-173)
173. Cowen 1950: 126. [↑](#footnote-ref-174)
174. Cowen 1950: 127-128. Minimum resale price maintenance will be discussed in chapter 3. [↑](#footnote-ref-175)
175. Cowen 1950: 128. [↑](#footnote-ref-176)
176. Van Heerden & Neethling 1995: 6; Cowen 1950: 128. [↑](#footnote-ref-177)
177. Van Heerden & Neethling 1995: 5-6; Klopper & Van Der Spuy 2002: 66; Cowen 1950: 128. [↑](#footnote-ref-178)
178. Cowen 1950: 128. [↑](#footnote-ref-179)
179. Also called Roman-Dutch Law. [↑](#footnote-ref-180)
180. Kleyn & Viljoen 2002: 35; Cowen 1950: 128. [↑](#footnote-ref-181)
181. Cowen 1950: 128-129; Van Heerden & Neethling 1995: 22-23; Klopper & Van Der Spuy 2002: 70. [↑](#footnote-ref-182)
182. Van Heerden & Neethling 1995: 22-23; Klopper & Van Der Spuy 2002: 70. [↑](#footnote-ref-183)
183. Cowen 1950: 129; Van Heerden & Neethling 1995: 22-23; Klopper & Van Der Spuy 2002: 70. [↑](#footnote-ref-184)
184. This paragraph was taken as is from Cowen 1950: 129. The original text can be found on page 315 of Volume 1 of the Groot Placaat Boek. [↑](#footnote-ref-185)
185. Cowen 1950: 131; Van Heerden & Neethling 1995: 23. [↑](#footnote-ref-186)
186. Cowen 1950: 131; Van Heerden & Neethling 1995: 23. [↑](#footnote-ref-187)
187. Cowen 1950: 131; Van Heerden & Neethling 1995: 23. [↑](#footnote-ref-188)
188. Cowen 1950: 132; Van Heerden & Neethling 1995: 23; Klopper & Van Der Spuy 2002: 70. [↑](#footnote-ref-189)
189. Cowen 1950: 132; Van Heerden & Neethling 1995: 23; Klopper & Van Der Spuy 2002: 70. [↑](#footnote-ref-190)
190. Cowen 1950: 132; Van Heerden & Neethling 1995: 23; Klopper & Van Der Spuy 2002: 70. [↑](#footnote-ref-191)
191. Cowen 1950: 132. [↑](#footnote-ref-192)
192. For the purposes of this paper the term “agreement” is synonymous with the term “contract.” [↑](#footnote-ref-193)
193. Cowen 1950: 132. [↑](#footnote-ref-194)
194. Cowen 1950: 132. [↑](#footnote-ref-195)
195. Cowen 1950: 132-133. [↑](#footnote-ref-196)
196. Neuhoff *et al* 2006: 88; Cowen 1950: 132. [↑](#footnote-ref-197)
197. Cowen 1950: 133. [↑](#footnote-ref-198)
198. Cowen 1950: 135. [↑](#footnote-ref-199)
199. Cowen 1950: 135. [↑](#footnote-ref-200)
200. Cowen 1950: 135. [↑](#footnote-ref-201)
201. Cowen 1950: 135. [↑](#footnote-ref-202)
202. Cowen 1950: 135. [↑](#footnote-ref-203)
203. Cowen 1950: 135. [↑](#footnote-ref-204)
204. Cowen 1950: 136. [↑](#footnote-ref-205)
205. Cowen 1950: 136. [↑](#footnote-ref-206)
206. Cowen 1950: 137. [↑](#footnote-ref-207)
207. Cowen 1950: 136. [↑](#footnote-ref-208)
208. 1930 WLD 99 112. [↑](#footnote-ref-209)
209. Van Heerden & Neethling 1995: 23; Cowen 1950: 142. [↑](#footnote-ref-210)
210. Van Heerden & Neethling 1995: 23; Cowen 1950: 142. [↑](#footnote-ref-211)
211. Cowen 1950: 132; Organisation for Economic Co-operation and Development 2003: 12. [↑](#footnote-ref-212)
212. 1930 WLD 99 112. [↑](#footnote-ref-213)
213. Van Heerden & Neethling 1995: 23; Cowen 1950: 142; Klopper & Van Der Spuy 2002: 71. [↑](#footnote-ref-214)
214. Van Heerden & Neethling 1995: 23; Cowen 1950: 144; Klopper & Van Der Spuy 2002: 71. [↑](#footnote-ref-215)
215. Cowen 1950: 132. [↑](#footnote-ref-216)
216. United Nations Conference on Trade and Development 1998: 23; Cowen 1950: 132. [↑](#footnote-ref-217)
217. United Nations Conference on Trade and Development 1998: 23; Cowen 1950: 146-147; Organisation for Economic Co-operation and Development (hereafter OECD) 2003: 12. [↑](#footnote-ref-218)
218. Cowen 1950: 146-147. [↑](#footnote-ref-219)
219. Cowen 1950: 147. [↑](#footnote-ref-220)
220. Cowen 1950: 124-125; United Nations Conference on Trade and Development 1998: 23; Organisation for Economic Co-Operation and Development 2003: 12. [↑](#footnote-ref-221)
221. 59/1949. [↑](#footnote-ref-222)
222. 59/1949. [↑](#footnote-ref-223)
223. Undue restraint of trade Act 59/1949. [↑](#footnote-ref-224)
224. United Nations Conference on Trade and Development 1998: 23; Cowen 1950: 124. [↑](#footnote-ref-225)
225. Undue restraint of trade Act 59/1949. [↑](#footnote-ref-226)
226. United Nations Conference on Trade and Development 1998: 23; Cowen 1950: 124. [↑](#footnote-ref-227)
227. Undue restraint of trade Act 59/1949. [↑](#footnote-ref-228)
228. Undue restraint of trade Act 59/1949. [↑](#footnote-ref-229)
229. Cowen 1950: 124. [↑](#footnote-ref-230)
230. Undue restraint of trade Act 59/1949. [↑](#footnote-ref-231)
231. Cowen 1950: 124. [↑](#footnote-ref-232)
232. Undue restraint of trade Act 59/1949. [↑](#footnote-ref-233)
233. 25/1955. United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-234)
234. 25/1955. [↑](#footnote-ref-235)
235. 25/1955. [↑](#footnote-ref-236)
236. OECD 2003: 12; Smith 2005: 2; United Nations Conference on Trade and Development 1998: 23; Jafta 1998: 2; The Competition Commission on http://www.compcom.co.za/about-us/ (accessed 11 March 2011) [↑](#footnote-ref-237)
237. Regulation of Monopolistic Conditions Act 25/1955. [↑](#footnote-ref-238)
238. Jafta 1998: 2; OECD 2003: 12; Van Heerden & Neethling 1995: 31. [↑](#footnote-ref-239)
239. Regulation of Monopolistic Conditions Act 25/1955. [↑](#footnote-ref-240)
240. Report on the Regulation of Monopolistic conditions (Report 327 of 1951). [↑](#footnote-ref-241)
241. Regulation of Monopolistic Conditions Act 25/1955. Van Heerden & Neethling 1995: 18; United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-242)
242. Van Heerden & Neethling 1995: 20; United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-243)
243. United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-244)
244. For the meaning of a *per se* prohibition refer to section 2.4. [↑](#footnote-ref-245)
245. United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-246)
246. Van Heerden & Neethling 1995: 20; United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-247)
247. Van Heerden & Neethling 1995: 20; United Nations Conference on Trade and Development 1998: 23. Refer to fn 196. [↑](#footnote-ref-248)
248. Van Heerden & Neethling 1995: 20; United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-249)
249. Van Heerden & Neethling 1995: 20. [↑](#footnote-ref-250)
250. Van Heerden & Neethling 1995: 21; United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-251)
251. Van Heerden & Neethling 1995: 21; United Nations Conference on Trade and Development 1998: 23. [↑](#footnote-ref-252)
252. Regulation of Monopolistic Conditions Act 25/1955. [↑](#footnote-ref-253)
253. OECD 2003: 12; United Nations Conference on Trade and Development 1998: 24. [↑](#footnote-ref-254)
254. OECD 2003: 12; United Nations Conference on Trade and Development 1998: 24. [↑](#footnote-ref-255)
255. OECD 2003: 12; United Nations Conference on Trade and Development 1998: 24. [↑](#footnote-ref-256)
256. Regulation of Monopolistic Conditions Act 25/1955. [↑](#footnote-ref-257)
257. Regulation of Monopolistic Conditions Act 25/1955. OECD 2003: 12 [↑](#footnote-ref-258)
258. Regulation of Monopolistic Conditions Act 25/1955. OECD 2003: 12 [↑](#footnote-ref-259)
259. OECD 2003: 12. [↑](#footnote-ref-260)
260. United Nations Conference on Trade and Development 1998: 24. [↑](#footnote-ref-261)
261. United Nations Conference on Trade and Development 1998: 24. [↑](#footnote-ref-262)
262. 25/1955. OECD 2003: 13; Van Heerden & Neethling 1995: 21; Smith 2005: 2; United Nations Conference on Trade and Development 1998: 24; the Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-263)
263. Smith 2005: 2; Van Heerden & Neethling 1995: 21. [↑](#footnote-ref-264)
264. 25/1955. [↑](#footnote-ref-265)
265. The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) The term “oligopolies” will be explained in section 2.5. [↑](#footnote-ref-266)
266. 25/1955. [↑](#footnote-ref-267)
267. OECD 2003: 13; Van Heerden & Neethling 1995: 21-22. [↑](#footnote-ref-268)
268. Regulation of Monopolistic Conditions Act 25/1955. [↑](#footnote-ref-269)
269. 25/1955. OECD 2003: 13; Van Heerden & Neethling 1995: 21-22. [↑](#footnote-ref-270)
270. 25/1955. [↑](#footnote-ref-271)
271. Regulation of Monopolistic Conditions Act 25/1955. [↑](#footnote-ref-272)
272. Regulation of Monopolistic Conditions Act 25/1955. [↑](#footnote-ref-273)
273. Van Heerden & Neethling 1995: 22. [↑](#footnote-ref-274)
274. 25/1955. [↑](#footnote-ref-275)
275. 96/1979. [↑](#footnote-ref-276)
276. United Nations Conference on Trade and Development 1998: 24; OECD 2003: 13; Smith 2005: 2; Van Heerden & Neethling 1995: 18; the Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-277)
277. 96/1979. [↑](#footnote-ref-278)
278. Maintenance and Promotion of Competition Act 96/1979. [↑](#footnote-ref-279)
279. OECD 2003: 13. [↑](#footnote-ref-280)
280. OECD 2003: 13. [↑](#footnote-ref-281)
281. OECD 2003: 13. [↑](#footnote-ref-282)
282. OECD 2003: 13. [↑](#footnote-ref-283)
283. OECD 2003: 13. [↑](#footnote-ref-284)
284. Van Heerden & Neethling 1995: 21. [↑](#footnote-ref-285)
285. The meaning of the term “concentration” will be discussed in section 2.5. [↑](#footnote-ref-286)
286. Van Heerden & Neethling 1995: 21. [↑](#footnote-ref-287)
287. Van Heerden & Neethling 1995: 21. [↑](#footnote-ref-288)
288. 25/1955. [↑](#footnote-ref-289)
289. Van Heerden & Neethling 1995: 21. [↑](#footnote-ref-290)
290. 96/1979. [↑](#footnote-ref-291)
291. Van Heerden & Neethling 1995:18; OECD 2003: 13; the Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-292)
292. 96/1979. [↑](#footnote-ref-293)
293. Maintenance and Promotion of Competition Act 96/1979. [↑](#footnote-ref-294)
294. 96/1979. [↑](#footnote-ref-295)
295. Jafta 1998: 2-3. [↑](#footnote-ref-296)
296. 96/1979. [↑](#footnote-ref-297)
297. Roberts 2004: 7. [↑](#footnote-ref-298)
298. Roberts 2004: 8. [↑](#footnote-ref-299)
299. Maintenance and Promotion of Competition Act 96/1979: section 1. [↑](#footnote-ref-300)
300. Horizontal practises will be explained in section 2.4. [↑](#footnote-ref-301)
301. Roberts 2004: 7-8. [↑](#footnote-ref-302)
302. 96/1979. [↑](#footnote-ref-303)
303. Roberts 2004: 8. The importance of this sentence will become clear in section 2.5. [↑](#footnote-ref-304)
304. Klein 1998: 509. [↑](#footnote-ref-305)
305. Jafta 1998: 2 [↑](#footnote-ref-306)
306. 96/1979. [↑](#footnote-ref-307)
307. Jafta 1998: 2. [↑](#footnote-ref-308)
308. Maintenance and Promotion of Competition Act 96/1979. [↑](#footnote-ref-309)
309. Maintenance and Promotion of Competition Act 96/1979: section 3. [↑](#footnote-ref-310)
310. OECD 2003: 13; United Nations Conference on Trade and Development 1998: 24; the Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-311)
311. Maintenance and Promotion of Competition Act 96/1979: section 6. [↑](#footnote-ref-312)
312. Roberts 2004: 7-8. [↑](#footnote-ref-313)
313. Maintenance and Promotion of Competition Act 96/1979. [↑](#footnote-ref-314)
314. Roberts 2004: 7-8. [↑](#footnote-ref-315)
315. Roberts 2004: 7-8. [↑](#footnote-ref-316)
316. Hartzenberg 2006: 671; Chabane *et al* 2003: 28; Roberts 2003: 7; Smith 2005: 11. [↑](#footnote-ref-317)
317. Maintenance and Promotion of Competition Act 96/1979: section 6; Hartzenberg 2006: 671; Chabane *et al* 2003: 28; Roberts 2003: 7; Smith 2005: 11. [↑](#footnote-ref-318)
318. Roberts 2003: 8. [↑](#footnote-ref-319)
319. Maintenance and Promotion of Competition Act 96/1979. [↑](#footnote-ref-320)
320. 96/1979. [↑](#footnote-ref-321)
321. Roberts 2004: 7. [↑](#footnote-ref-322)
322. Smith 2005: 11. [↑](#footnote-ref-323)
323. 96/1979. [↑](#footnote-ref-324)
324. Collusive tendering refers to a situation where a firm(s) agree to tender a higher price to ensure that one of that firms competitors are awarded that tender. The next time that competitor will tender a higher price to ensure that the other firm(s) are awarded the tender. See Neuhoff *et al* 2006: 69-70 for more information. [↑](#footnote-ref-325)
325. Roberts 2004: 8; OECD 2003: 13; Smith 2005: 11. [↑](#footnote-ref-326)
326. The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-327)
327. The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-328)
328. 96/1979. [↑](#footnote-ref-329)
329. 89/1998. Neuhoff *et al* 2006: 12; Jafta 1998: 3; Roberts 2004: 8; Smith 2005: 11; OECD 2003: 13; The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-330)
330. United Nations Conference on Trade and Development 2002: 3. [↑](#footnote-ref-331)
331. Klein 1998: 506. [↑](#footnote-ref-332)
332. Klein 1998: 506. [↑](#footnote-ref-333)
333. Klein 1998: 506. [↑](#footnote-ref-334)
334. Klein 1998: 506. [↑](#footnote-ref-335)
335. Hartzenberg 2006: 667; Klein 1998: 506. [↑](#footnote-ref-336)
336. Hartzenberg 2006: 667; Klein 1998: 506. [↑](#footnote-ref-337)
337. Kellman *et al* 2003: 3. [↑](#footnote-ref-338)
338. Kellman *et al* 2003: 3. [↑](#footnote-ref-339)
339. Roberts 2004: 2. [↑](#footnote-ref-340)
340. Roberts 2004: 2. [↑](#footnote-ref-341)
341. Roberts 2004: 2. [↑](#footnote-ref-342)
342. Kellman *et al* 2003: 3. [↑](#footnote-ref-343)
343. Roberts 2004: 4. [↑](#footnote-ref-344)
344. Roberts 2004: 4. [↑](#footnote-ref-345)
345. OECD 2003: 14. [↑](#footnote-ref-346)
346. The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-347)
347. OECD 2003: 14. [↑](#footnote-ref-348)
348. OECD 2003: 14. [↑](#footnote-ref-349)
349. OECD 2003: 14. [↑](#footnote-ref-350)
350. OECD 2003: 14-15. [↑](#footnote-ref-351)
351. OECD 2003: 15. [↑](#footnote-ref-352)
352. Competition Act 89/1998 as cited by Jafta 1998: 3. [↑](#footnote-ref-353)
353. OECD 2003: 16. [↑](#footnote-ref-354)
354. OECD 2003: 16. [↑](#footnote-ref-355)
355. Torok 2005: 4; Lewis 1998: 3. [↑](#footnote-ref-356)
356. 89/1998. [↑](#footnote-ref-357)
357. Lewis 1998: 3; The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-358)
358. Lewis 1998: 3; Reekie 1999: 15. [↑](#footnote-ref-359)
359. Chabane *et al* 2003: 1. [↑](#footnote-ref-360)
360. Reekie 2000: 20. [↑](#footnote-ref-361)
361. 89/1998. The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-362)
362. The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-363)
363. 89/1998. [↑](#footnote-ref-364)
364. The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-365)
365. 89/1998. [↑](#footnote-ref-366)
366. Sections 19-43; 78-79 and 84. [↑](#footnote-ref-367)
367. The institutional frameworks refer to the competition authorities who are tasked with the administration of the Competition Act 89/1998. [↑](#footnote-ref-368)
368. Competition Act 89/1998. [↑](#footnote-ref-369)
369. 89/1998. [↑](#footnote-ref-370)
370. 96/1979. [↑](#footnote-ref-371)
371. Hartzenberg 2006: 667. [↑](#footnote-ref-372)
372. 89/1998. [↑](#footnote-ref-373)
373. Which functioned under the Maintenance and Promotion of Competition Act 96/1979. [↑](#footnote-ref-374)
374. Rutherford 1999: 301. [↑](#footnote-ref-375)
375. Rutherford 1999: 301. [↑](#footnote-ref-376)
376. 89/1998. [↑](#footnote-ref-377)
377. Rutherford 1999: 301. [↑](#footnote-ref-378)
378. 89/1998. [↑](#footnote-ref-379)
379. Rutherford 1999: 301. [↑](#footnote-ref-380)
380. 89/1998. [↑](#footnote-ref-381)
381. 89/1998. [↑](#footnote-ref-382)
382. 89/1998. [↑](#footnote-ref-383)
383. Torok 2005: 26. [↑](#footnote-ref-384)
384. Competition Act 89/1998. [↑](#footnote-ref-385)
385. Reekie 2000: 43; Neuhoff *et al* 2006: 13; CUTS 2002: 12; Roberts 2004: 7; Torok 2005: 26. [↑](#footnote-ref-386)
386. Reekie 2000: 43; Torok 2005: 26. [↑](#footnote-ref-387)
387. Macroeconomics can be defined as that part of economics which studies the whole economy or its aggregates. Therefore little attention is given to the various units that make up the aggregates. For more information see McConnel & Brue 2008: 6. [↑](#footnote-ref-388)
388. Reekie 2000: 43. [↑](#footnote-ref-389)
389. Reekie 2000: 43. [↑](#footnote-ref-390)
390. 89/1998. Reekie 2000: 43. [↑](#footnote-ref-391)
391. Reekie 2000: 43; Torok 2005: 26. [↑](#footnote-ref-392)
392. Reekie 2000: 43; Torok 2005: 26. [↑](#footnote-ref-393)
393. Reekie 2000: 43. [↑](#footnote-ref-394)
394. In this case objective (b) will be achieved. [↑](#footnote-ref-395)
395. Reekie 2000: 43. In this case objective (a) will be achieved. [↑](#footnote-ref-396)
396. Reekie 2000: 43. [↑](#footnote-ref-397)
397. Reekie 2000: 43. [↑](#footnote-ref-398)
398. Reekie 2000: 43. [↑](#footnote-ref-399)
399. Reekie 2000: 43. [↑](#footnote-ref-400)
400. 89/1998. [↑](#footnote-ref-401)
401. Reekie 2000: 43. [↑](#footnote-ref-402)
402. These groups include political, business and labour groups. For more information refer to The Competition Commission on http://www.compcom.co.za/about-us/ (accessed on 11 March 2011) [↑](#footnote-ref-403)
403. 89/1998. Roberts 2004: 7; Torok 2005: 26. [↑](#footnote-ref-404)
404. 89/1998. [↑](#footnote-ref-405)
405. Torok 2005: 26. [↑](#footnote-ref-406)
406. See Reekie 2000: 43 and Neuhoff *et al* 2006: 13 for conflicting opinions. [↑](#footnote-ref-407)
407. CUTS 2002: 12; Neuhoff *et al* 2006: 14; Roberts 2004: 7. [↑](#footnote-ref-408)
408. Competition Act 89/1998. [↑](#footnote-ref-409)
409. Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd case 66/LM/Oct01. [↑](#footnote-ref-410)
410. 1/2009. [↑](#footnote-ref-411)
411. Competition Amendment Act 1/2009. [↑](#footnote-ref-412)
412. 89/1998. [↑](#footnote-ref-413)
413. 89/1998. [↑](#footnote-ref-414)
414. 1/2009. [↑](#footnote-ref-415)
415. 89/1998. [↑](#footnote-ref-416)
416. 89/1998. [↑](#footnote-ref-417)
417. 89/1998. [↑](#footnote-ref-418)
418. Neuhoff *et al* 2006: 44. [↑](#footnote-ref-419)
419. 89/1998. [↑](#footnote-ref-420)
420. Competition Act 89/1998: section 4 & 5; CUTS 2002: 12; Neuhoff *et al* 2006: 14-15; Reekie 2000: 44; Rutherford 1999: 302-303. [↑](#footnote-ref-421)
421. In sections 4 & 5 of the Competition Act 89/1998 the terms “restricted horizontal practices” and “restrictive vertical practises” are used. [↑](#footnote-ref-422)
422. Competition Act 89/1998: section 4(2); Reekie 2000: 44; Rutherford 1999: 302-303. [↑](#footnote-ref-423)
423. Neuhoff *et al* 2006: 14. [↑](#footnote-ref-424)
424. Competition Act 89/1998: section 4(2); [↑](#footnote-ref-425)
425. Competition Act 89/1998: section 4 & 5; CUTS 2002: 12; Neuhoff *et al* 2006: 14-15; Reekie 2000: 44. [↑](#footnote-ref-426)
426. Neuhoff *et al* 2006: 16. Competition Act 89/1998: sections 4(1)(b) & 5(2)&5(3). [↑](#footnote-ref-427)
427. Neuhoff *et al* 2006: 16. [↑](#footnote-ref-428)
428. Neuhoff *et al* 2006: 16-17. [↑](#footnote-ref-429)
429. Competition Act 89/1998: sections 4(1)(a), 5(1) and 8(c)&(d); CUTS 2002: 12; Neuhoff *et al* 2006: 16-17; Torok 2005: 30; Reekie 2000: 44-45. [↑](#footnote-ref-430)
430. Competition Act 89/1998: sections 4(1)(a), 5(1) and 8(c)&(d); CUTS 2002: 12; Neuhoff *et al* 2006: 16-17; Torok 2005: 30; Reekie 2000: 44-45. [↑](#footnote-ref-431)
431. 89/1998. [↑](#footnote-ref-432)
432. 89/1998. [↑](#footnote-ref-433)
433. 89/1998. [↑](#footnote-ref-434)
434. 89/1998. [↑](#footnote-ref-435)
435. Competition Act 89/1998: section 1. [↑](#footnote-ref-436)
436. 89/1998. [↑](#footnote-ref-437)
437. 89/1998. [↑](#footnote-ref-438)
438. Competition Act 89/1998: sections 11-17. [↑](#footnote-ref-439)
439. Competition Act 89/1998. [↑](#footnote-ref-440)
440. Competition Act 89/1998: chapter 3. [↑](#footnote-ref-441)
441. Competition Act 89/1998: section 11. [↑](#footnote-ref-442)
442. Competition Act 89/1998: section 11(5). [↑](#footnote-ref-443)
443. Competition Act 89/1998: section 11(5)(a). [↑](#footnote-ref-444)
444. Competition Act 89/1998: section 11(5)(b). [↑](#footnote-ref-445)
445. Competition Act 89/1998: section 11(5)(c). [↑](#footnote-ref-446)
446. Competition Act 89/1998: section 13(1). [↑](#footnote-ref-447)
447. Competition Act 89/1998: section 13(3). [↑](#footnote-ref-448)
448. The Competition Commission on http://www.compcom.co.za/merger-thresholds/ (accessed on 24 January 2011) [↑](#footnote-ref-449)
449. The Competition Commission on http://www.compcom.co.za/merger-thresholds/ (accessed on 24 January 2011) [↑](#footnote-ref-450)
450. The Competition Commission on http://www.compcom.co.za/merger-thresholds/ (accessed on 24 January 2011) [↑](#footnote-ref-451)
451. 89/1998. [↑](#footnote-ref-452)
452. Competition Act 89/1998: section 12(1)(a). [↑](#footnote-ref-453)
453. Competition Act 89/1998: section 12(1)(b). [↑](#footnote-ref-454)
454. 89/1998. [↑](#footnote-ref-455)
455. Neuhoff *et al* 2006: 177-178. [↑](#footnote-ref-456)
456. Neuhoff *et al* 2006: 177. [↑](#footnote-ref-457)
457. Neuhoff *et al* 2006: 178. [↑](#footnote-ref-458)
458. Neuhoff *et al* 2006: 178. [↑](#footnote-ref-459)
459. 1/2009. [↑](#footnote-ref-460)
460. 89/1998. [↑](#footnote-ref-461)
461. Competition Amendment Act 1/2009. [↑](#footnote-ref-462)
462. Competition Amendment Act 1/2009. [↑](#footnote-ref-463)
463. Competition Amendment Act 1/2009: section 10A(3). [↑](#footnote-ref-464)
464. Competition Amendment Act 1/2009: section 10A(4) & (5). [↑](#footnote-ref-465)
465. 89/1998. [↑](#footnote-ref-466)
466. Torok 2005: 28; OECD 2003: 13. [↑](#footnote-ref-467)
467. 89/1998. [↑](#footnote-ref-468)
468. Competition Act 89/1998: chapter 4. [↑](#footnote-ref-469)
469. Torok 2005: 28 [↑](#footnote-ref-470)
470. Cowen 1950: 147. [↑](#footnote-ref-471)
471. Act 108/1996. [↑](#footnote-ref-472)
472. Competition Act 89/1998: section 20(1)(b). [↑](#footnote-ref-473)
473. Competition Act 89/1998: 19(2). [↑](#footnote-ref-474)
474. Competition Act 89/1998: section 22(1) and 23(1). [↑](#footnote-ref-475)
475. It is beyond the scope of this paper to provide a full list of all the functions of the Competition Commission. The full list is contained in section 21 of the Competition Act 89/1998. [↑](#footnote-ref-476)
476. Competition Act 89/1998: sections 21(1)(a) & 21(1)(b). [↑](#footnote-ref-477)
477. Competition Act 89/1998: sections 21(1)(c) & 21(1)(d). [↑](#footnote-ref-478)
478. Competition Act 89/1998: section 21(1)(e). [↑](#footnote-ref-479)
479. Neuhoff *et al* 2006: 19. [↑](#footnote-ref-480)
480. Neuhoff *et al* 2006: 19. [↑](#footnote-ref-481)
481. Neuhoff *et al* 2006: 19. [↑](#footnote-ref-482)
482. Competition Amendment Act 1/2009: section 10A(3). [↑](#footnote-ref-483)
483. Competition Amendment Act 1/2009: section 10A(4) and 10A(5). [↑](#footnote-ref-484)
484. Competition Act 89/1998: section 26(1)(a) and 26(1)(b). [↑](#footnote-ref-485)
485. Competition Act 89/1998: section 26(1)(c) and 26(1)(d). [↑](#footnote-ref-486)
486. Competition Act 89/1998: section 26(2). [↑](#footnote-ref-487)
487. 89/1998. [↑](#footnote-ref-488)
488. Act 108/1996. [↑](#footnote-ref-489)
489. Competition Act 89/1998: section 36(1)(a). [↑](#footnote-ref-490)
490. Competition Act 89/1998: section 36(1)(b) and 36(1)(c). [↑](#footnote-ref-491)
491. 89/1998. [↑](#footnote-ref-492)
492. 89/1998. [↑](#footnote-ref-493)
493. Competition Amendment Act 1/2009: section 3(1). [↑](#footnote-ref-494)
494. 89/1998. [↑](#footnote-ref-495)
495. As defined in section 23 of the Constitution 108/1996 and section 23 of the Labour Relations Act 66/1995. [↑](#footnote-ref-496)
496. As defined in section 213 of the Labour Relations Act 66/1995. [↑](#footnote-ref-497)
497. Competition Amendment Act 1/2009: section 3(2). [↑](#footnote-ref-498)
498. 89/1998. [↑](#footnote-ref-499)
499. Competition Amendment Act 1/2009: section 3(3). [↑](#footnote-ref-500)
500. 89/1998. [↑](#footnote-ref-501)
501. 89/1998. [↑](#footnote-ref-502)
502. Concurrent jurisdiction means that more than 1 authority has jurisdiction over a specific matter. [↑](#footnote-ref-503)
503. 89/1998. [↑](#footnote-ref-504)
504. Competition Amendment Act 1/2009: section 3(3)(a). [↑](#footnote-ref-505)
505. Competition Amendment Act 1/2009: section 3(3)(b). [↑](#footnote-ref-506)
506. Competition Amendment Act 1/2009: section 3(3)(a)(i). [↑](#footnote-ref-507)
507. Competition Amendment Act 1/2009: section 3(3)(a)(ii). [↑](#footnote-ref-508)
508. OECD 2003: 54-59; Hartzenberg 2006:673. [↑](#footnote-ref-509)
509. 89/1998. [↑](#footnote-ref-510)
510. Competition Act 89/1998: section 65(2)(a) and 65(2)(b). [↑](#footnote-ref-511)
511. 89/1998. [↑](#footnote-ref-512)
512. Competition Act 89/1998: section 65(6)(a). [↑](#footnote-ref-513)
513. Competition Act 89/1998: section 65(6)(b). [↑](#footnote-ref-514)
514. Competition Act 89/1998: section 65(6)(b). [↑](#footnote-ref-515)
515. 89/1998. [↑](#footnote-ref-516)
516. As cited in Reekie 2000: 20. [↑](#footnote-ref-517)
517. 89/1998. [↑](#footnote-ref-518)
518. 89/1998. [↑](#footnote-ref-519)
519. CUTS 2002: 12; Neuhoff *et al* 2006: 14; Roberts 2004: 7. [↑](#footnote-ref-520)
520. McConnell & Brue 2008: 31. [↑](#footnote-ref-521)
521. McConnell & Brue 2008: 31. [↑](#footnote-ref-522)
522. McConnell & Brue 2008: 31. [↑](#footnote-ref-523)
523. McConnell & Brue 2008: 31. [↑](#footnote-ref-524)
524. Wetzstein 2005: 368; McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-525)
525. McConnell & Brue 2008: 30. [↑](#footnote-ref-526)
526. McConnell & Brue 2008: 30. [↑](#footnote-ref-527)
527. McConnell & Brue 2008: 30. [↑](#footnote-ref-528)
528. McConnell & Brue 2008: 31. [↑](#footnote-ref-529)
529. McConnell & Brue 2008: 31. [↑](#footnote-ref-530)
530. McConnell & Brue 2008: 31. [↑](#footnote-ref-531)
531. 89/1998: section 1. [↑](#footnote-ref-532)
532. The Competition Act 89/1998: section 1. [↑](#footnote-ref-533)
533. It is argued by the author of this paper that the ability to control prices, exclude competition and to behave to an appreciable extent independently from competitors, suppliers and customers provides such firms with the ability to influence the quantity supplied and the quantity demanded in that market. [↑](#footnote-ref-534)
534. Refer to section 2.4.5. [↑](#footnote-ref-535)
535. Neuhoff *et al* 2006: 27. [↑](#footnote-ref-536)
536. A significant degree of market power refers to the situation where a single firm or a group of firms acting collectively have sufficient market power so as to allow it/them to abuse that market power in a particular market in order to decrease competition and hence the effective functioning of that market’s forces. An insignificant degree of market power on the other hand refers to the situation where a single firm or a group of firms acting collectively does not have sufficient market power so as to allow it/them to abuse that market power. For more information see Neuhoff *et al* 2006: 27. [↑](#footnote-ref-537)
537. Neuhoff *et al* 2006: 27. [↑](#footnote-ref-538)
538. 89/1998. [↑](#footnote-ref-539)
539. Neuhoff *et al* 2006: 27. [↑](#footnote-ref-540)
540. Walker 2006: 10; Pleatsikas & Teece 2001: 668. [↑](#footnote-ref-541)
541. Competition Act 89/1998: section 2 read with chapter 4. [↑](#footnote-ref-542)
542. Neuhoff *et al* 2006: 29. [↑](#footnote-ref-543)
543. Neuhoff *et al* 2006: 29. [↑](#footnote-ref-544)
544. The competition analysis is the process followed by the Competition Authorities to determine whether certain conduct is anti-competitive. [↑](#footnote-ref-545)
545. Anti-competitive conduct is any conduct that substantially prevents or lessens competition in any given market. It is argued, except for the *per se* prohibitions which by its very nature reduce competition and hence is anti-competitive, that conduct will only substantially prevent or lessen competition in a given market if the firm(s) that perpetrate that conduct possess sufficient market power so as to allow them to abuse that market power. Accordingly, anti- competitive conduct can also be described as the abuse of market power. For more information see the Competition Act 89/1998: sections 4(1), 5(1) & 5(2), 7, 8, 9 and 12(A); Rudman & Ostrovsky 2010: 7; Neuhoff *et al* 2006: 16 and 44. [↑](#footnote-ref-546)
546. Competition Commission 2002: 6; Neuhoff *et al* 2006: 29 read with 30. [↑](#footnote-ref-547)
547. Boshoff 2006: 2; Neuhoff *et al* 2006: 29. [↑](#footnote-ref-548)
548. Neuhoff *et al* 2006: 35. [↑](#footnote-ref-549)
549. Competition Commission 2002: 9; Neuhoff *et al* 2006: 30-31. [↑](#footnote-ref-550)
550. Neuhoff *et al* 2006: 30; Competition Commission 10; Boshoff 2011: 2. [↑](#footnote-ref-551)
551. Neuhoff *et al* 2006: 30; Competition Commission 10; Boshoff 2011: 2. [↑](#footnote-ref-552)
552. Competition Commission 2002: 9. [↑](#footnote-ref-553)
553. Neuhoff *et al* 31; Massey 2000: 315; Competition Commission 2002: 16. [↑](#footnote-ref-554)
554. Neuhoff *et al* 2006: 31; Massey 2000: 315; Competition Commission 2002: 16. [↑](#footnote-ref-555)
555. Neuhoff *et al* 2006: 31. [↑](#footnote-ref-556)
556. The supply chain can be defined as the causal link between participants in the production cycle of goods and services. There are four participants in the production cycle namely the manufacturers, distributors, wholesalers and retailers. [↑](#footnote-ref-557)
557. Competition Commission 2002: 19; Neuhoff *et al* 2006*:* 31. [↑](#footnote-ref-558)
558. Competition Commission 2002: 19; Neuhoff *et al* 2006: 31. [↑](#footnote-ref-559)
559. Competition Commission 2002: 19; Neuhoff *et al* 2006: 97. Also see National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome (Pty) Ltd and Others case 45/CR/Jul01. [↑](#footnote-ref-560)
560. Competition Commission 2002: 19; Neuhoff *et al* 2006: 97. Also see National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome (Pty) Ltd and Others case 45/CR/Jul01. [↑](#footnote-ref-561)
561. Competition Commission 2002: 19; Neuhoff *et al 2006:* 97. Also see National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome (Pty) Ltd and Others case 45/CR/Jul01. [↑](#footnote-ref-562)
562. Competition Commission 2002: 18; Neuhoff *et al* 2006: 31. [↑](#footnote-ref-563)
563. Competition Commission 2002: 18; Neuhoff *et al* 2006: 31. [↑](#footnote-ref-564)
564. Competition Commission 2002: 18. [↑](#footnote-ref-565)
565. Neuhoff *et al* 2006: 31. [↑](#footnote-ref-566)
566. 89/1998. [↑](#footnote-ref-567)
567. Competition Act 89/1998: section 1. [↑](#footnote-ref-568)
568. Refer to section 2.5.1 of this paper. [↑](#footnote-ref-569)
569. Refer to section 2.5.2 of this paper. [↑](#footnote-ref-570)
570. Refer to section 2.5.2 of this paper. [↑](#footnote-ref-571)
571. Filistrucchi 2008: 2; Ridyard *et al* 2003: 1. [↑](#footnote-ref-572)
572. Filistrucchi 2008: 2; Ridyard *et al* 2003: 1. [↑](#footnote-ref-573)
573. Filistrucchi 2008: 2; Ridyard *et al* 2003: 1. [↑](#footnote-ref-574)
574. Filistrucchi 2008: 2; Ridyard *et al* 2003: 1. [↑](#footnote-ref-575)
575. Filistrucchi 2008: 2; Ridyard *et al* 2003: 1. [↑](#footnote-ref-576)
576. Filistrucchi 2008: 2; Ridyard *et al* 2003: 1. [↑](#footnote-ref-577)
577. Filistrucchi 2008: 2; Ridyard *et al* 2003: 1. [↑](#footnote-ref-578)
578. Stigler 1982: 9. [↑](#footnote-ref-579)
579. The relevant market can also be delineated from a technological standpoint. For more information see Reekie 2000: 48. [↑](#footnote-ref-580)
580. Massey 2000: 314. [↑](#footnote-ref-581)
581. Massey 2000: 314; McConnel & Brue 2008: 350. [↑](#footnote-ref-582)
582. Massey 2000: 314; McConnel & Brue 2008: 350. [↑](#footnote-ref-583)
583. Boshoff 2006: 2; Massey 2000: 317; Werden & Froeb 1993: 329. [↑](#footnote-ref-584)
584. Boshoff 2006: 2; Werden & Froeb 1993: 329; Massey 2000: 317. [↑](#footnote-ref-585)
585. Massey 2000: 318; Boshoff 2006: 2. [↑](#footnote-ref-586)
586. Boshoff 2006: 2; Werden & Froeb 1993: 329; Massey 2000: 317. [↑](#footnote-ref-587)
587. Massey 2000: 318. [↑](#footnote-ref-588)
588. Massey 2000: 318. [↑](#footnote-ref-589)
589. Boshoff 2006: 2. [↑](#footnote-ref-590)
590. Massey 2000: 318. [↑](#footnote-ref-591)
591. Dobbs 2002: 1; Serge *et al* 2008: 2; Boshoff 2006: 2; Filistrucchi 2008: 2; Massey 2000: 318; Stenborg 2004: 4. [↑](#footnote-ref-592)
592. Dobbs 2002: 1; Serge *et al* 2008: 2; Boshoff 2006: 2; Filistrucchi 2008: 2; Massey 2000: 318; Stenborg 2004: 4. [↑](#footnote-ref-593)
593. Boshoff 2006: 2; Neuhoff *et al* 2006: 34. [↑](#footnote-ref-594)
594. 89/1998. [↑](#footnote-ref-595)
595. 89/1998. [↑](#footnote-ref-596)
596. 89/1998. [↑](#footnote-ref-597)
597. Competition Act 89/1998: section 1. [↑](#footnote-ref-598)
598. Theron 2001: 615-616; Walker 2006: 10. [↑](#footnote-ref-599)
599. 89/1998. [↑](#footnote-ref-600)
600. 89/1998. [↑](#footnote-ref-601)
601. 89/1998. [↑](#footnote-ref-602)
602. Theron 2001: 615-616. [↑](#footnote-ref-603)
603. 89/1998. [↑](#footnote-ref-604)
604. Walker 2006: 10. [↑](#footnote-ref-605)
605. Boshoff 2006: 3; Dobbs 2002: 2; Walker 2006: 26; Theron 2001: 623; US Department of Justice on http://www.justice.gov/atr/public/guidelines/horiz\_book/11.html (accessed on 19 Mei 2011); US Federal Trade Commission 1992 on http://www.ftc.gov/bc/docs/horizmer.shtm (accessed 19 Mei 2011) [↑](#footnote-ref-606)
606. Theron 2001: 623; Stenborg 2004: 4. [↑](#footnote-ref-607)
607. Massey 2000: 318; Boshoff 2006: 3; Stenborg 2004: 4. [↑](#footnote-ref-608)
608. Theron 2001: 623. [↑](#footnote-ref-609)
609. Massey 2000: 319; Boshoff 2006: 3; Filistrucchi 2008: 6; Dobbs 2002: 2; Competition Commission 2002: 10; Stenborg 2004: 4; Walker 2006: 25. [↑](#footnote-ref-610)
610. Walker 2006: 26; Competition Commission 2002: 10; Dobbs 2002: 2. [↑](#footnote-ref-611)
611. Massey 2000: 318. [↑](#footnote-ref-612)
612. Competition Commission 2002: 10. [↑](#footnote-ref-613)
613. Boshoff 2006: 3; Massey 2000: 318. [↑](#footnote-ref-614)
614. Stenborg 2004: 4; Competition Commission 2002: 10; Boshoff 2006: 3; Massey 2000: 318. [↑](#footnote-ref-615)
615. Theron 2001: 623; Stenborg 2004: 4. [↑](#footnote-ref-616)
616. Massey 2000: 318; Boshoff 2006: 3; Stenborg 2004: 4. [↑](#footnote-ref-617)
617. Massey 2000: 318; Boshoff 2006: 3; Stenborg 2004: 4; Competition Commission 2002: 10. [↑](#footnote-ref-618)
618. Massey 2000: 318; Boshoff 2006: 3; Stenborg 2004: 4; Competition Commission 2002: 10. [↑](#footnote-ref-619)
619. Massey 2000: 318; Boshoff 2006: 3; Stenborg 2004: 5; Competition Commission 2002: 10. [↑](#footnote-ref-620)
620. Theron 2001: 623; Boshoff 2006: 3. [↑](#footnote-ref-621)
621. Stenborg 2004: 5; Boshoff 2006: 3. [↑](#footnote-ref-622)
622. Stenborg 2004: 5. [↑](#footnote-ref-623)
623. Stenborg 2004: 5. [↑](#footnote-ref-624)
624. Boshoff 2006: 3. [↑](#footnote-ref-625)
625. Boshoff 2006: 3. [↑](#footnote-ref-626)
626. Theron 2001: 623; Neuhoff *et al* 2006: 34. [↑](#footnote-ref-627)
627. Neuhoff *et al* 2006: 33. [↑](#footnote-ref-628)
628. Neuhoff *et al* 2006: 33. [↑](#footnote-ref-629)
629. Neuhoff *et al* 2006: 33. [↑](#footnote-ref-630)
630. Neuhoff *et al* 2006: 33. [↑](#footnote-ref-631)
631. Neuhoff *et al* 2006: 33. [↑](#footnote-ref-632)
632. Neuhoff *et al* 2006: 33. [↑](#footnote-ref-633)
633. Theron 2001: 623; Neuhoff *et al* 2006: 34. [↑](#footnote-ref-634)
634. Theron 2001: 623; Neuhoff *et al* 2006: 34. [↑](#footnote-ref-635)
635. Competition Act 89/1998: sections 4, 5, 8, 9; 12A. [↑](#footnote-ref-636)
636. Competition Act 89/1998: sections 4, 5, 8, 9; 12A and section 10A of the Competition Amendment Act 1/2009. [↑](#footnote-ref-637)
637. Competition Act 89/1998: sections 4, 5, 8, 9; 12A [↑](#footnote-ref-638)
638. Market power is the power (ability) of an individual firm or a groups of firms acting together to ask a higher price than the market price for their products. Refer to section 3.3.3.1 for a discussion on the meaning of market power. [↑](#footnote-ref-639)
639. Wetzstein 2005: 259; McConnel & Brue 2008: 400-401. [↑](#footnote-ref-640)
640. Wetzstein 2005: 259; McConnel & Brue 2008: 400-401. [↑](#footnote-ref-641)
641. McConnel & Brue 2008: 401. [↑](#footnote-ref-642)
642. McConnel & Brue 2008: 401. [↑](#footnote-ref-643)
643. McConnel & Brue 2008: 401. [↑](#footnote-ref-644)
644. Marginal revenue can be defined as the extra revenue obtained by selling one more unit of output i.e. it is the change in total revenue due to selling one more unit of output. For more information see McConnel & Brue 2008: 401. [↑](#footnote-ref-645)
645. McConnel & Brue 2008: 401. [↑](#footnote-ref-646)
646. Wetzstein 2005: 263; McConnel & Brue 2008: 405. [↑](#footnote-ref-647)
647. Marginal cost can be described as the extra cost incurred from producing one additional unit of output. For more information see McConnel & Brue 2008: 5 & 50. [↑](#footnote-ref-648)
648. Wetzstein 2005: 259-263; McConnel & Brue 2008: 400-405. [↑](#footnote-ref-649)
649. Refer to section 2.2. [↑](#footnote-ref-650)
650. Wetzstein 2005: 261. Also, refer to section 2.2. [↑](#footnote-ref-651)
651. Refer o section 3.5.2.3. [↑](#footnote-ref-652)
652. Rojas 2010: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-653)
653. Rojas 2010: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-654)
654. Rojas 2010: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-655)
655. Rojas 2010: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-656)
656. Neuhoff *et al* 2006: 28-29. [↑](#footnote-ref-657)
657. Neuhoff *et al* 2006: 28-29. [↑](#footnote-ref-658)
658. Lavergne *et al* 2001: 159. [↑](#footnote-ref-659)
659. Lerner 1934: 169. [↑](#footnote-ref-660)
660. Vallejo 2006: 96. [↑](#footnote-ref-661)
661. Lerner 1934: 169; Vallejo 2006: 96; Littlechild 2006: 6; Massey 2000: 324; Tardiff & Weisman 2009: 521; Stenborg 2004: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-662)
662. Lerner 1934: 169; Rojas 2010: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-663)
663. McConnel 7 Brue 2008: 428; Neuhoff *et al* 2006: 37-38. [↑](#footnote-ref-664)
664. Lerner 1934: 169; Rojas 2010: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-665)
665. Rojas 2010: 1. [↑](#footnote-ref-666)
666. Rojas 2010: 1. [↑](#footnote-ref-667)
667. Rojas 2010: 1. [↑](#footnote-ref-668)
668. Rojas 2010: 1. [↑](#footnote-ref-669)
669. Rojas 2010: 1. [↑](#footnote-ref-670)
670. US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-671)
671. US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-672)
672. US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011) [↑](#footnote-ref-673)
673. Tardiff & Weisman 2009: 521. [↑](#footnote-ref-674)
674. Stenborg 2004: 1; Rojas 2010: 1. [↑](#footnote-ref-675)
675. Neuhoff *et al* 2006: 27. [↑](#footnote-ref-676)
676. Neuhoff *et al* 2006: 27; McConnel & Brue 2008: 340. [↑](#footnote-ref-677)
677. Neuhoff *et al* 2006: 28; McConnel & Brue 2008: 340. [↑](#footnote-ref-678)
678. Neuhoff *et al* 2006: 28; McConnel & Brue 2008: 341. [↑](#footnote-ref-679)
679. Neuhoff *et al* 2006: 28; McConnel & Brue 2008: 341. [↑](#footnote-ref-680)
680. Neuhoff *et al* 2006: 27; McConnel & Brue 2008: 341. [↑](#footnote-ref-681)
681. Neuhoff *et al* 2006: 27; McConnel & Brue 2008: 341. [↑](#footnote-ref-682)
682. The law of demand states that if the price of a product increases, the demand for that product decreases and vice versa. For more information, see McConnel & Brue 2008: 46. [↑](#footnote-ref-683)
683. Neuhoff *et al* 2006: 28; McConnel & Brue 2008: 341. [↑](#footnote-ref-684)
684. Neuhoff *et al* 2006: 27-28. [↑](#footnote-ref-685)
685. McConnel & Brue 2008: 340-341; Neuhoff *et al* 2006: 27-28. [↑](#footnote-ref-686)
686. McConnel & Brue 2008: 342-344. [↑](#footnote-ref-687)
687. McConnel & Brue 2008: 342-344. [↑](#footnote-ref-688)
688. Neuhoff *et al* 2006: 28. [↑](#footnote-ref-689)
689. Inferred from Rojas 2010: 1. [↑](#footnote-ref-690)
690. Inferred from Rojas 2010: 1. [↑](#footnote-ref-691)
691. Stenborg 2004: 1; Neuhoff *et al* 2006: 28. [↑](#footnote-ref-692)
692. Stenborg 2004: 1-2; Neuhoff *et al* 2006: 28. [↑](#footnote-ref-693)
693. Neuhoff *et al* 2006: 35. [↑](#footnote-ref-694)
694. Refer to section 2.4.5. [↑](#footnote-ref-695)
695. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2004: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259. [↑](#footnote-ref-696)
696. Wetzstein 2005: 259; McConnel & Brue 2008: 400-401. [↑](#footnote-ref-697)
697. Wetzstein 2005: 259; McConnel & Brue 2008: 400-401. [↑](#footnote-ref-698)
698. McConnel & Brue 2008: 400-401. [↑](#footnote-ref-699)
699. McConnel & Brue 2008: 400-401. [↑](#footnote-ref-700)
700. Wetzstein 2005: 368; McTeer 2002: Chapter 2; McConnell & Brue 2008: 31. [↑](#footnote-ref-701)
701. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2008: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259. [↑](#footnote-ref-702)
702. Neuhoff *et al* 35-36; McConnel & Brue 400; Wetzstein 259. [↑](#footnote-ref-703)
703. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2008: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259; Reekie 1989: 38. [↑](#footnote-ref-704)
704. Refer to section 2.5.3.1.1 [↑](#footnote-ref-705)
705. McConnel 7 Brue 2008: 428; Neuhoff *et al* 2006: 37-38. [↑](#footnote-ref-706)
706. Kahn 1981: 1; Cook 2001:12; Audretsch *et al* 2001: 615; López 2001: 360; Smith 1999: 6; Reid 1987: 11. [↑](#footnote-ref-707)
707. Kahn 1981: 1; Cook 2001: 12; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-708)
708. Neuhoff *et al* 2006: 35. [↑](#footnote-ref-709)
709. Reid 1987: 11. [↑](#footnote-ref-710)
710. Smith 2005: 8. [↑](#footnote-ref-711)
711. Smith 2005: 8. [↑](#footnote-ref-712)
712. Audretsch *et al* 2001: 615; Smith 2005: 8; Kahn 1981: 1. [↑](#footnote-ref-713)
713. Audretsch *et al* 2001: 615; Smith 2005: 8; Kahn 1981: 1; López 2001: 360. [↑](#footnote-ref-714)
714. Reekie 1989: 38. [↑](#footnote-ref-715)
715. López 2001: 360; Audretsch *et al* 2001: 615; Gilbert & Du Plessis 2008: 2; Reekie 2000: 12; Weis 1979: 1105; Smith 2005: 8. [↑](#footnote-ref-716)
716. López 2001: 360; Audretsch *et al* 2001: 615; Gilbert & Du Plessis 2008: 2; Reekie 2000: 12; Weis 1979: 1105; Smith 2005: 8. [↑](#footnote-ref-717)
717. López 2001: 360; Audretsch *et al* 2001: 615; Gilbert & Du Plessis 2008: 2; Reekie 2000: 12; Weis 1979: 1105; Smith 2005: 8. [↑](#footnote-ref-718)
718. López 2001: 360; Audretsch *et al* 2001: 615; Gilbert & Du Plessis 2008: 2; Reekie 2000: 12; Weis 1979: 1105; Smith 2005: 8. [↑](#footnote-ref-719)
719. López 2001: 360. [↑](#footnote-ref-720)
720. Liebenberg & kamerschen 2008: 228; Theron 2001: 620; Du Plessis & Gilbert 2008: 2. [↑](#footnote-ref-721)
721. Liebenberg & kamerschen 2008: 228; Theron 2001: 620; Du Plessis & Gilbert 2008: 2. [↑](#footnote-ref-722)
722. Liebenberg & kamerschen 2008: 228; Theron 2001: 620; Du Plessis & Gilbert 2008: 2. [↑](#footnote-ref-723)
723. Concentration will be discussed in the following section. [↑](#footnote-ref-724)
724. Du Plessis & Gilbert 2008: 2; Weis 1979: 1105; Smith 2005: 8; López 2001: 360. [↑](#footnote-ref-725)
725. Du Plessis & Gilbert 2008: 2; Weis 1979: 1105; Smith 2005: 8; López 2001: 360. [↑](#footnote-ref-726)
726. Reekie 2000: 12. [↑](#footnote-ref-727)
727. Reekie 2000: 11. [↑](#footnote-ref-728)
728. Reekie 2000: 11. [↑](#footnote-ref-729)
729. Reekie 2000: 11. [↑](#footnote-ref-730)
730. Reekie 2000: 11. [↑](#footnote-ref-731)
731. Neuhoff *et al* 2006: 40. [↑](#footnote-ref-732)
732. Reekie 2000: 12. [↑](#footnote-ref-733)
733. Du Plessis & Gilbert 2008: 4. [↑](#footnote-ref-734)
734. Du Plessis & Gilbert 2008: 2. [↑](#footnote-ref-735)
735. Du Plessis & Gilbert 2008: 2. [↑](#footnote-ref-736)
736. Du Plessis & Gilbert 2008: 2. [↑](#footnote-ref-737)
737. Du Plessis & Gilbert 2008: 2. [↑](#footnote-ref-738)
738. Lipczynski 2009: 17. [↑](#footnote-ref-739)
739. Inferred from Lipczynski 2009: 17; Du Plessis & Gilbert 2008: 2; Smith 2005: 8; Audretsch *et al* 2001: 615. [↑](#footnote-ref-740)
740. Inferred from Lipczynski 2009: 17; Du Plessis & Gilbert 2008: 2; Smith 2005: 8; Audretsch *et al* 2001: 615. [↑](#footnote-ref-741)
741. Inferred from Lipczynski 2009: 17; Du Plessis & Gilbert 2008: 2; Smith 2005: 8; Audretsch *et al* 2001: 615. [↑](#footnote-ref-742)
742. Reid 1987: 16; Lipczynski 2009: 17 [↑](#footnote-ref-743)
743. Black *et al* 1999: 42 as cited in Smith 2005: 8. [↑](#footnote-ref-744)
744. Smith 2005: 8. [↑](#footnote-ref-745)
745. Smith 2005: 9. [↑](#footnote-ref-746)
746. Smith 2005: 9. [↑](#footnote-ref-747)
747. Fourie & Smith 1999: 66. [↑](#footnote-ref-748)
748. Fourie & Smith 1999: 67. [↑](#footnote-ref-749)
749. Lipczynski 2009: 17; Kahn 1981: 3. [↑](#footnote-ref-750)
750. Refer to section 2.3.2.4. [↑](#footnote-ref-751)
751. Klein 1998: 510. [↑](#footnote-ref-752)
752. Theron 2001: 620; Klein 1998: 510; Du Plessis & Gilbert 2008: 5; Smith 2005: 8. [↑](#footnote-ref-753)
753. Du Plessis & Gilbert 2008: 5. [↑](#footnote-ref-754)
754. Reekie 1984: 154. [↑](#footnote-ref-755)
755. Reekie 1984: 154. [↑](#footnote-ref-756)
756. Du Plessis & Gilbert 2008: 5. [↑](#footnote-ref-757)
757. Du Plessis & Gilbert 2008: 6; Reekie 1999: 269. [↑](#footnote-ref-758)
758. Leach 1997: 12. [↑](#footnote-ref-759)
759. Reekie 1999: 269; Du Plessis & Gilbert 2008: 6. [↑](#footnote-ref-760)
760. Fourie & Smith 1998: 577. [↑](#footnote-ref-761)
761. Du Plessis & Gilbert 2008: 11. [↑](#footnote-ref-762)
762. Fourie & Smith 1999: 66-67. [↑](#footnote-ref-763)
763. Du Plessis & Gilbert 2008: 16. [↑](#footnote-ref-764)
764. Reekie 1999: 269; Du Plessis & Gilbert 2008: 6. [↑](#footnote-ref-765)
765. 89/1998. Neuhoff *et al* 2006: 43; Reekie 1999: 269; Du Plessis & Gilbert 2008: 16 [↑](#footnote-ref-766)
766. Theron 2001: 621. [↑](#footnote-ref-767)
767. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-768)
768. Stenborg 2004: 5; Boshoff 2006: 3. [↑](#footnote-ref-769)
769. Lipczynski 2009: 6; Neuhoff *et al* 2006: 35 & 43; Reekie 1999: 269; Du Plessis & Gilbert 2008: 16; Theron 2001: 622. [↑](#footnote-ref-770)
770. Neuhoff *et al* 2006: 35. [↑](#footnote-ref-771)
771. Reid 1987: 12; Lipczynski 2009: 8; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-772)
772. Reid 1987: 12; Lipczynski 2009: 8; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-773)
773. Reid 1987: 12; Lipczynski 2009: 8; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-774)
774. Reid 1987: 12; Lipczynski 2009: 8; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-775)
775. Reid 1987: 12; Lipczynski 2009: 8; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-776)
776. Reid 1987: 12; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-777)
777. Neuhoff *et al* 2006: 35. [↑](#footnote-ref-778)
778. McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 35. [↑](#footnote-ref-779)
779. Neuhoff *et al* 2006: 35. [↑](#footnote-ref-780)
780. Refer to section 2.5.3.1. [↑](#footnote-ref-781)
781. Wetzstein 2005: 259; Lipczynski 2009: 4; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-782)
782. Wetzstein 2005: 259; Lipczynski 2009: 4; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-783)
783. Wetzstein 2005: 259; Lipczynski 2009: 4; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-784)
784. Wetzstein 2005: 259; Lipczynski 2009: 4; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-785)
785. Lipczynski 2009: 4. [↑](#footnote-ref-786)
786. Wetzstein 2005: 259; Lipczynski 2009: 4; McConnel & Brue 2008: 400; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-787)
787. Lipczynski 2009: 4; McConnel & Brue 2008: 401. When demand is perfectly elastic, it implies that any increase in the price of the product, no matter how small, will cause the demand for that product to become zero i.e. a firm will not sell any output at any price higher than the market price. For more information, see McConnel & Brue 2008: 341. [↑](#footnote-ref-788)
788. Refer to sections 2.4.5 and 3.3.4.1. [↑](#footnote-ref-789)
789. 89/1998. Neuhoff *et al* 2006: 36. [↑](#footnote-ref-790)
790. Competition Act 89/1998: section 2. [↑](#footnote-ref-791)
791. Neuhoff *et al* 2006: 36. [↑](#footnote-ref-792)
792. Neuhoff *et al* 2006: 36. [↑](#footnote-ref-793)
793. Neuhoff *et al* 2006: 35-36; McConnel & Brue 400; Wetzstein 259. [↑](#footnote-ref-794)
794. Martin 2005: 15; Chabane *et al* 2003: 2; Witztum 2010: 157; Roberts 2008: 2; Reekie 2000: 11; Neuhoff *et al* 2006: 36; Fourie 2006: 335; McConnell & Brue 2008: 400; Wetzstein 2005: 258-259. [↑](#footnote-ref-795)
795. Reid 1987: 130; Wish 1993: 3; Wetzstein 2005: 273; McConnel & Brue 400; Lipczynski 2009: 60; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-796)
796. Wetzstein 2005: 273; McConnel & Brue 400; Lipczynski 2009: 60; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-797)
797. Wetzstein 2005: 273; McConnel & Brue 400; Lipczynski 2009: 60; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-798)
798. Wetzstein 2005: 273; McConnel & Brue 400; Lipczynski 2009: 60; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-799)
799. Walker 2006: 4; Wish 1993: 3; Neuhoff *et al* 2006: 37. [↑](#footnote-ref-800)
800. Wish 1993: 3; Lipczynski 2009: 61; Wetzstein 2005: 378; McConnel & Brue 2008: 446-448; Neuhoff *et al* 2006: 37. [↑](#footnote-ref-801)
801. Wish 1993: 3; Reekie 1989: 21; Lipczynski 2009: 61; Wetzstein 2005: 378; McConnel & Brue 2008: 446-448; Neuhoff *et al* 2006: 37. [↑](#footnote-ref-802)
802. Walker 2006: 4-5; Wish 1993: 3; Reekie 1989: 21; Lipczynski 2009: 61; Wetzstein 2005: 378; McConnel & Brue 2008: 446-448; Neuhoff *et al* 2006: 37. [↑](#footnote-ref-803)
803. Reid 1987: 131; Walker 20006: 4-6; Wish 1993: 3; Reekie 1989: 21; Wetzstein 2005: 387. [↑](#footnote-ref-804)
804. Inferred from Wish 1993: 3; Reekie 1989: 21; Lipczynski 2009: 61; Wetzstein 2005: 378; McConnel & Brue 2008: 449-450; Neuhoff *et al* 2006: 37. [↑](#footnote-ref-805)
805. Inferred from Wish 1993: 3; Reekie 1989: 21; Lipczynski 2009: 61; Wetzstein 2005: 378; McConnel & Brue 2008: 449-450; Neuhoff *et al* 2006: 37. [↑](#footnote-ref-806)
806. Lipczynski 2009: 251-252; Wetzstein 2005: 377; [↑](#footnote-ref-807)
807. Competition Act 89/1998: section 2; Neuhoff *et al* 2006: 37. [↑](#footnote-ref-808)
808. Lerner 1934: 169; Rojas 2010: 1; US Federal Trade Commission 2007 on

 http://www.ftc.gov/opp/jointvent/classic3.shtm (accessed on 13 Mei 2011); Wetzstein 2005: 384. [↑](#footnote-ref-809)
809. Wetzstein 2005: 392; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-810)
810. Inferred from Walker 2006: 4; Wish 1993: 3; Reekie 1989: 38; Neuhoff *et al* 2006: 36. [↑](#footnote-ref-811)
811. Refer to section 2.5.2. [↑](#footnote-ref-812)
812. Refer to section 2.5.2. [↑](#footnote-ref-813)
813. Refer to section 2.5.2. [↑](#footnote-ref-814)
814. Lipczynski 2009: 17. Refer to section 2.5.3.2.1. [↑](#footnote-ref-815)
815. Inferred from Lipczynski 2009: 17; Du Plessis & Gilbert 2008: 2; Smith 2005: 8; Audretsch *et al* 2001: 615. [↑](#footnote-ref-816)
816. Refer to section 2.5.3.2.1. [↑](#footnote-ref-817)
817. Cook 2001: 15; Theron 2001: 636; Neuhoff *et al* 2006: 40. [↑](#footnote-ref-818)
818. OECD on www.oecd.org/dataoecd/8/61/2376087.pdf (accessed on 31 Mei 2011) [↑](#footnote-ref-819)
819. Applied by various authors as cited in Fedderke & Simbanegavi 2008: 2. [↑](#footnote-ref-820)
820. Fourie 1996: 116; Fedderke & Simbanegavi 2008: 2; Walker 2006: 13; Liebenberg & kamerschen 2008: 230-231; Competition Commission 2002: 23; OECD on www.oecd.org/dataoecd/8/61/2376087.pdf (accessed on 31 Mei 2011) [↑](#footnote-ref-821)
821. Liebenberg & kamerschen 2008: 231. [↑](#footnote-ref-822)
822. Liebenberg & kamerschen 2008: 231; Theron 2001: 637. [↑](#footnote-ref-823)
823. Neuhoff *et al* 2006: 40. [↑](#footnote-ref-824)
824. Neven 1998: 11; Competition Commission 2002: 23; Office of Fair Trading 2004: 13. [↑](#footnote-ref-825)
825. Neuhoff *et al* 2006: 40. [↑](#footnote-ref-826)
826. Competition Act 89/1998: section 7(a). [↑](#footnote-ref-827)
827. Refer to section 2.5.2.1. [↑](#footnote-ref-828)
828. Refer to section 2.5.2.1. Also, see Theron 2001: 623. [↑](#footnote-ref-829)
829. Walker 2006: 12. [↑](#footnote-ref-830)
830. Walker 2006: 13. [↑](#footnote-ref-831)
831. Competition Commission Annual Report 2001: 49. [↑](#footnote-ref-832)
832. Smith 2005: 7. [↑](#footnote-ref-833)
833. Remember, market shares can be expressed in various metrics such as total sales, total revenues, total output, total production capacity, total value and total inputs. [↑](#footnote-ref-834)
834. López 2001: 360; Liebenberg & kamerschen 2008: 230-231; Theron 2001: 637; Walker 2006: 13; Competition Commission Annual Report 2001: 49; Competition Commission 2002: 23. [↑](#footnote-ref-835)
835. López 2001: 360; Liebenberg & kamerschen 2008: 230-231; Smith 2005: 7; Theron 2001: 637; Walker 2006: 13; Competition Commission Annual Report 2001: 49; Competition Commission 2002: 23. [↑](#footnote-ref-836)
836. López 2001: 360; Smith 2005: 7; Liebenberg *et al*  2008: 230-231; Competition Commission Annual Report 2001: 49; Walker 2006: 13. [↑](#footnote-ref-837)
837. López 2001: 360; Liebenberg & kamerschen 2008: 230-231; Walker 2006: 13. [↑](#footnote-ref-838)
838. Liebenberg & kamerschen 2008: 231; Walker 2006: 13. [↑](#footnote-ref-839)
839. Liebenberg & kamerschen 2008: 231; Walker 2006: 13; Neuhoff *et al* 2006: 41. [↑](#footnote-ref-840)
840. Fedderke & Simbanegavi 2008: 3; López 2001: 361; Liebenberg & kamerschen 2008: 231; OECD on www.oecd.org/dataoecd/8/61/2376087.pdf (accessed on 31 Mei 2011); US Federal Trade Commission 1992 on http://www.ftc.gov/bc/docs/horizmer.shtm (accessed 19 Mei 2011) [↑](#footnote-ref-841)
841. Fedderke & Simbanegavi 2008: 3; López 2001: 361; Liebenberg & kamerschen

 2008: 231; Competition Commission Annual Report2001: 49;

 OECD on www.oecd.org/dataoecd/8/61/2376087.pdf (accessed on 31 Mei 2011);

 US Federal Trade Commission 1992 on http://www.ftc.gov/bc/docs/horizmer.shtm (accessed 19 Mei 2011) [↑](#footnote-ref-842)
842. Leach 1992: 154; Fedderke & Simbanegavi 2008: 3;

 OECD on www.oecd.org/dataoecd/8/61/2376087.pdf (accessed on 31 Mei 2011) [↑](#footnote-ref-843)
843. Remember, market shares can be expressed in various metrics such as total sales, total revenues, total output, total production capacity, total value and total inputs. [↑](#footnote-ref-844)
844. López 2001: 361; Liebenberg & kamerschen2008: 231. [↑](#footnote-ref-845)
845. López 2001: 361; Liebenberg & kamerschen 2008: 231. [↑](#footnote-ref-846)
846. López 2001: 361; Liebenberg & kamerschen 2008: 231. [↑](#footnote-ref-847)
847. López 2001: 361; Liebenberg & kamerschen 2008: 231. [↑](#footnote-ref-848)
848. López 2001: 361; Liebenberg & kamerschen 2008: 231. [↑](#footnote-ref-849)
849. US Federal Trade Commission 1992 on http://www.ftc.gov/bc/docs/horizmer.shtm (accessed 19 Mei 2011); Fedderke & Simbanegavi 2008: 3. [↑](#footnote-ref-850)
850. US Federal Trade Commission 1992 on http://www.ftc.gov/bc/docs/horizmer.shtm (accessed 19 Mei 2011); Fedderke & Simbanegavi 2008: 3. [↑](#footnote-ref-851)
851. US Federal Trade Commission 1992 on http://www.ftc.gov/bc/docs/horizmer.shtm (accessed 19 Mei 2011); Fedderke & Simbanegavi 2008: 3; López 2001: 361; Theron 2001: 637. [↑](#footnote-ref-852)
852. OECD on www.oecd.org/dataoecd/8/61/2376087.pdf (accessed on 31 Mei 2011) [↑](#footnote-ref-853)
853. Fedderke & Simbanegavi 2008: 3. [↑](#footnote-ref-854)
854. Fourie 1996: 114; Theron 2001: 637. [↑](#footnote-ref-855)
855. Theron 2001: 637. [↑](#footnote-ref-856)
856. Case No: 14/LM/Feb00. [↑](#footnote-ref-857)
857. Case no. 78/LM/Jul00. [↑](#footnote-ref-858)
858. Case no: 83/LM/Jul00. [↑](#footnote-ref-859)
859. Fourie & Smit 1989; Fourie 1996. [↑](#footnote-ref-860)
860. Fedderke & Simbanegavi 2008: 1. [↑](#footnote-ref-861)
861. Fedderke & Simbanegavi 2008: 1. [↑](#footnote-ref-862)
862. Wetzstein 2005: 377; Office of Fair Trading 2004: 15. [↑](#footnote-ref-863)
863. Stigler 1968: 67. [↑](#footnote-ref-864)
864. Spulber 2003: 55. [↑](#footnote-ref-865)
865. Neuhoff *et al* 2006: 42. [↑](#footnote-ref-866)
866. Lipczynski 2009: 8. [↑](#footnote-ref-867)
867. Office of Fair Trading 2004: 15. [↑](#footnote-ref-868)
868. Office of Fair Trading 2004: 15. [↑](#footnote-ref-869)
869. Neuhoff *et al* 2006: 42. [↑](#footnote-ref-870)
870. Neuhoff *et al* 2006: 42. [↑](#footnote-ref-871)
871. Economies of scale refer to the situation where the average cost of a firm decreases as it produces more output. For more information, see Office of Fair Trading 2004: 17; Competition Commission 2002: 30; Reid 1987: 15; McConnel en Brue 2008: 425; Lipczynski 2009: 253. [↑](#footnote-ref-872)
872. Absolute cost advantage refers to any factor that contributes to decreasing the costs for a firm. For more information, see Reid 1987: 15; Lipczynski 2009: 254-255. [↑](#footnote-ref-873)
873. Product differentiation refers to the situation where a firm has differentiated its product from the products of his competitors and accordingly the firm’s customers are loyal to it. Therefore, a new entrant will have to, somehow entice the customers of the existing firm away from that firm. For more information, see Wish 1993: 266; Reid 1987: 15; Lipczynski 2009: 256. [↑](#footnote-ref-874)
874. Switching costs refer to the situation where consumers are faced with additional costs when switching from one supplier to the other. For more information, see Lipczynski 2009: 257. [↑](#footnote-ref-875)
875. Network externalities refer to the situation where consumers’ satisfaction from consuming a certain product or service increase as more consumers use that product or service. For more information see Office of Fair Trading 2004: 19; Korah 2004: 20; Competition Commission 2002: 31; Lipczynski 2009: 257. [↑](#footnote-ref-876)
876. Geographical barriers refer to barriers to entry that face foreign firms when they want to enter into the domestic market. For more information, see Lipczynski 2009: 259. [↑](#footnote-ref-877)
877. Legal barriers to entry is any barrier to entry that is placed on a new entrant by way of legislation and other government regulations such as intellectual property rights, monopoly rights, licenses. For more information see Office of Fair Trading 2004: 17; Competition Commission 2002: 31; Wish 1993: 264; Korah 2004: 21; Wetzstein 2005: 377; McConnel & Brue 425-426; Lipczynski 2009: 258- 259. [↑](#footnote-ref-878)
878. Wish 1993: 267; Lipczynski 2009: 252. [↑](#footnote-ref-879)
879. Broder 2005: 100; Office of Fair Trading 2004: 17; Lipczynski 2009: 262-265; McConnel & Brue 2008: 426. [↑](#footnote-ref-880)
880. Competition Commission 2002: 30; Office of Fair Trading 2004: 19; McConnel & Brue 2008: 426. [↑](#footnote-ref-881)
881. Office of Fair Trading 2004: 16; Competition Commission 2002: 29; Lipczynski 2009: 252. [↑](#footnote-ref-882)
882. Office of Fair Trading 2004: 16; Competition Commission 2002: 29; Lipczynski 2009: 252. [↑](#footnote-ref-883)
883. Cseres 2005:62; Office of Fair Trading 2004: 16; Competition Commission 2002: 29; Lipczynski 2009: 252. [↑](#footnote-ref-884)
884. Cseres 2005:62;Office of Fair Trading 2004: 16; Competition Commission 2002: 29; Lipczynski 2009: 252. [↑](#footnote-ref-885)
885. Cseres 2005:62. [↑](#footnote-ref-886)
886. Neuhoff *et al* 2006: 42. [↑](#footnote-ref-887)
887. Theron 2001: 621. [↑](#footnote-ref-888)
888. Audretsch *et al* 2001: 615; Smith 2005: 8; Kahn 1981: 1. [↑](#footnote-ref-889)
889. Neuhoff *et al* 2006: 35 & 43; Reekie 1999: 269; Du Plessis & Gilbert 2008: 16; Theron 2001: 622. [↑](#footnote-ref-890)
890. 89/19998. [↑](#footnote-ref-891)
891. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-892)
892. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-893)
893. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-894)
894. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-895)
895. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-896)
896. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-897)
897. Office of Fair Trading 2004: 6. [↑](#footnote-ref-898)
898. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-899)
899. Neuhoff *et al* 2006: 43. [↑](#footnote-ref-900)
900. Lipczynski 2009: 9; Neuhoff *et al* 2006: 44. [↑](#footnote-ref-901)
901. Neuhoff *et al* 2006: 44. [↑](#footnote-ref-902)
902. Lipczynski 2009: 9. [↑](#footnote-ref-903)
903. Reekie 2000: 16. [↑](#footnote-ref-904)
904. Reekie 2000: 16. [↑](#footnote-ref-905)
905. Theron 2001: 621. Refer to section 2.5.3.2.2 for a discussion on the SCP paradigms assumption of a unidirectional causality from structure, to conduct to performance. [↑](#footnote-ref-906)
906. Office of Fair Trading 2004: 25. [↑](#footnote-ref-907)
907. Neuhoff *et al* 2006: 44. [↑](#footnote-ref-908)
908. Refer to sections 2.2.5 & 2.5.1. [↑](#footnote-ref-909)
909. Agnew 1985: 67. [↑](#footnote-ref-910)
910. Competition Commission 2002: 40. [↑](#footnote-ref-911)
911. Competition Commission 2002: 40. [↑](#footnote-ref-912)
912. Competition Commission 2002: 40. [↑](#footnote-ref-913)
913. Competition Commission 2002: 40. [↑](#footnote-ref-914)
914. Reekie 1989: 54; Wish 1993; Liebenberg & kamerschen 2008: 233; Reid 1987: 12; Lipczynski 2009: 9; Competition Commission 2002: 40; Office of Fair Trading 2004: 25. [↑](#footnote-ref-915)
915. Liebenberg & kamerschen 2008: 233; Reekie 1989: 54; Lipczynski 2009: 9; Competition Commission 2002: 40; Office of Fair Trading 2004: 25. [↑](#footnote-ref-916)
916. Office of Fair Trading 2004: 15. [↑](#footnote-ref-917)
917. Office of Fair Trading 2004: 15. [↑](#footnote-ref-918)
918. Reekie 1989: 54; Wish 271: 1993; Liebenberg & kamerschen 2008: 233; Reid 1987: 12; Lipczynski 2009: 9; Competition Commission 2002: 40; Office of Fair Trading 2004: 25. [↑](#footnote-ref-919)
919. Reid 1987: 12; Wish 1993: 272; Reekie 1989: 56; Lipczynski 2009: 9. [↑](#footnote-ref-920)
920. Reid 1987: 12; Wish 1993: 272; Reekie 1989: 56; Lipczynski 2009: 9. [↑](#footnote-ref-921)
921. Reid 1987: 12; Wish 1993: 272; Reekie 1989: 56; Lipczynski 2009: 9. [↑](#footnote-ref-922)
922. Lipczynski 2009: 9; Reid 1987: 12. [↑](#footnote-ref-923)
923. Lipczynski 2009: 9; Reid 1987: 12. [↑](#footnote-ref-924)
924. Competition Commission 2002: 42-47; Reekie 1989: 56; Lipczynski 2009: 9. [↑](#footnote-ref-925)
925. Competition Commission 2002: 42-47; Reekie 1989: 56; Lipczynski 2009: 9. [↑](#footnote-ref-926)
926. Competition Commission 2002: 42-47; Reekie 1989: 56; Lipczynski 2009: 9. [↑](#footnote-ref-927)
927. Competition Commission 2002: 42-47; Reekie 1989: 56; Lipczynski 2009: 9. [↑](#footnote-ref-928)
928. Lipczynski 2009: 9. [↑](#footnote-ref-929)
929. Lipczynski 2009: 9. [↑](#footnote-ref-930)
930. Lipczynski 2009: 9. [↑](#footnote-ref-931)
931. Refer to section 2.2.5. [↑](#footnote-ref-932)
932. Refer to section 2.2.5. [↑](#footnote-ref-933)
933. Refer to section 2.2.5. [↑](#footnote-ref-934)
934. Refer to section 2.2.7. [↑](#footnote-ref-935)
935. 89/1999. [↑](#footnote-ref-936)
936. 89/1998. Refer to section 2.4.1. [↑](#footnote-ref-937)
937. Refer to section 3.3.4.1 [↑](#footnote-ref-938)
938. Refer to section 3.3.4.1. [↑](#footnote-ref-939)
939. Refer to section 3.3.4.1. [↑](#footnote-ref-940)
940. 89/1998. [↑](#footnote-ref-941)
941. Refer to section 3.1. [↑](#footnote-ref-942)
942. 89/1998. [↑](#footnote-ref-943)
943. Refer to section 3.1. [↑](#footnote-ref-944)
944. Neuhoff *et al* 2006: 44. [↑](#footnote-ref-945)
945. Neuhoff *et al* 2006: 44. [↑](#footnote-ref-946)
946. Lipczynski 2009: 11. [↑](#footnote-ref-947)
947. Refer to section 3.3.4.2.1 for a discussion on this debate. [↑](#footnote-ref-948)
948. Lipczynski 2009: 10. [↑](#footnote-ref-949)
949. Lipczynski 2009: 10. [↑](#footnote-ref-950)
950. Refer to section 3.3.4.2.1 for a discussion on this debate. [↑](#footnote-ref-951)
951. Reid 1987: 13; Lipczynski 2009: 10. [↑](#footnote-ref-952)
952. Inferred from Reid 1987: 13; Lipczynski 2009: 10. [↑](#footnote-ref-953)
953. Reid 1987: 13; Neuhoff *et al* 2006: 44; Lipczynski 2009: 10. [↑](#footnote-ref-954)
954. Inferred from Neuhoff *et al 2006*: 44. [↑](#footnote-ref-955)
955. Reid 1987: 13; Lipczynski 2009: 11. [↑](#footnote-ref-956)
956. Lipczynski 2009: 11. [↑](#footnote-ref-957)
957. Inferred from Lipczynski 2009: 10. [↑](#footnote-ref-958)
958. Refer to section 2.2.6. [↑](#footnote-ref-959)
959. 89/1998. [↑](#footnote-ref-960)
960. Competition Act 89/1998: section 2. [↑](#footnote-ref-961)
961. 89/1998. [↑](#footnote-ref-962)
962. 89/1998. [↑](#footnote-ref-963)
963. 89/1998. [↑](#footnote-ref-964)
964. Competition Act 89/1998: section 1. [↑](#footnote-ref-965)
965. Land *et al* 2010: 98. [↑](#footnote-ref-966)
966. Land *et al* 2010: 99. [↑](#footnote-ref-967)
967. Lorimar v Sterling Clothing Manufacturers 1981 3 SA 1129 (T) 1141. Also, see Neethling & Van Heerden 1995: 2-3 and Klopper & Van Der Spuy 2008: 65. [↑](#footnote-ref-968)
968. Neuhoff *et al* 2006: 26. [↑](#footnote-ref-969)
969. 89/1998. [↑](#footnote-ref-970)
970. Competition Act 89/1998: section 1. [↑](#footnote-ref-971)
971. Klopper bl 69. [↑](#footnote-ref-972)
972. Anti-trust and market law etc. [↑](#footnote-ref-973)
973. For the purpose of this paper, all articles not included in one of the other categories are included in the working papers category. [↑](#footnote-ref-974)