

The effects-based approach to abuse of dominance competition enquiries: a South African perspective

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BATSA – recent abuse of dominance complaint

Literature;
 Application to abuse of dominance cases;
 EU – ‘Modernisation of Article 82’;
 Form based to effects-based;
 What has happened in SA over 10 years of competition law?
 Category management

Application to BATSA

1. Has the effects-based approach been applied in this case?;
2. What are the challenges of applying such an approach;
3. Adds to empirical antitrust literature on category management.

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Literature

Padilla: “Existing form-based rules are likely to cause too many type I errors (false positives) since they are not properly grounded on economic theory and experience and largely neglect the potential efficiencies generated by conduct which under purely formalistic criteria looks anti-competitive” (2007:3).

Examples?

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Features of effects-based approach

1. Theory of harm that causally links the conduct with ultimate impact on competition;
2. Assessment of market power – more sensitive to structural market features;
3. Theory of harm must be consistent with literature;
4. Theory of harm must be consistent with the evidence;
5. Efficiency must be analysed in depth.

What was the abuse?

1. Dominance
2. Foreclosure of the retail market through its distribution agreements: 8(d)(i) and 8(c);

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Dominance



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Economic framework

Vertical restraints – large economic literature;
 Presumed pro-competitive with strong efficiency aspects;
 BATSA – vertical aspects of category management;
 Exclusive dealing – useful framework;
 BUT this is not exclusive dealing;
 Exclusive dealing (limited exclusives)/ foreclosure (partial foreclosure).

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Effects-based

Consider extant theory and empirical literature and relevant evidence;
 Theory – entry deterrent strategies of incumbent;
 Models of exclusive dealing – foreclosure is complete- miscoordination or exclusion equilibrium;
 Wright – limited exclusives – ‘grant a manufacturer shelf space but do not exclude all rivals’;
 ‘The primary contribution of our economic analysis to the antitrust treatment of category management contracts is that these arrangements are properly thought of as limited exclusives’- Klein & Wright (2006);
 But rivals are present?
 Cannot use normal economic paradigm of exclusive dealing.
 E.g. Conwood (USA).
 Limited exclusive recognised by the SA Tribunal.

Effects?

Important questions:

1. How much of the market is foreclosed, for how long and what other options are left to competitors?
2. What would be the effect on consumers?

How to measure foreclosure (partial foreclosure)

Indicators of foreclosure – applicable to exclusive dealing;
 Useful indicators:
 Total coverage of the market (foreclosure benchmarks) – cases such as RJR, Microsoft, Heineken.
 Space to sales ratio's (economics of distribution).
 But in which market to be measured?
 Market definition – important for theory of harm;
 Downstream retail and upstream manufacturing markets;
 Market power;
 RJR: ‘Complainant must show ‘an actual adverse effect on competition as a whole in the relevant market’

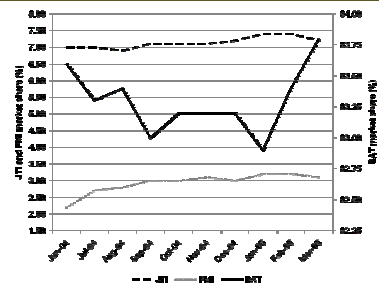
Space-to-sales ratio's

Wright (2006): space to sales... ‘concludes that a dominant firm has achieved substantial foreclosure when it enters promotion contracts that require retailers to supply a percentage of category shelf space exceeding manufacturer’s market share’
 Not enough to infer harm to consumer
 Tribunal: ‘such harm may be inferred from significant foreclosure’;
 Which welfare standard?
Space-to-sales provides information about the extent of choice in the market.

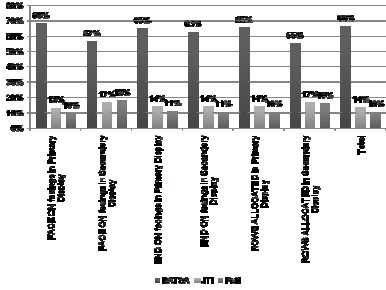
Space to sales (internal company data)

Store	Average visibility	Average market share
Groceries chain stores (total)	84.46%	89.53%
Chain A	86.39%	87.73%
Chain B	85.56%	89.42%
Chain C	82.65%	87.72%
Chain D	84.74%	93.04%
Chain E	85.79%	90.34%
Chain F	92.80%	93.11%
Branded convenience chain stores (total)	82.25%	86.29%
Chain G	83.09%	N.A.
Chain H	82.23%	N.A.
Chain I	82.52%	N.A.
Chain J	79.41%	86.23%
Chain K	83.10%	84.94%
Branded fuel station forecourt stores (total)	87.15%	86.40%
Chain L	87.42%	85.23%
Chain M	83.26%	N.A.
Chain N	86.29%	N.A.
Chain O	88.39%	N.A.
Chain P	90.46%	84.71%
Chain Q	90.21%	N.A.

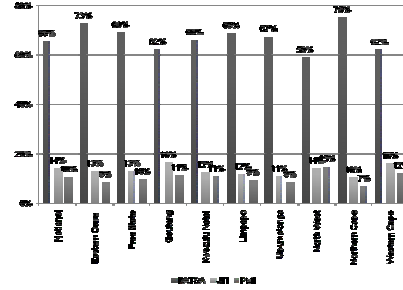
Internal company data (Jun 04- Mar 05) Number of facings by manufacturer.



Independent data



Independent data – number of rows in primary display



Independent data – by channel

Company	Space-to-sales	All channels	Groceries chain stores	Branded convenience stores	Branded fuel station stores
BATSA	Market share	58.2%	63.0%	62.3%	60.6%
	Visibility share	65.4%	68.8%	63.1%	64.8%
JTI	Market share	5.9%	9.8%	9.5%	12.3%
	Visibility share	14.1%	12.0%	13.3%	16.6%
PMI	Market share	2.2%	3.5%	5.1%	5.2%
	Visibility share	10.5%	9.9%	11.2%	10.3%

Conclusion

“The applicants have, for the overwhelming part, sought to rely on proof of significant foreclosure in order to infer anti-trust harm. As elaborated at length we do not believe that significant foreclosure has been established”.