A comparative study of the development of competition/antitrust laws with regard to the treatment of dominant firms*

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Abstract
The majority of the decisions by competition authorities and by the courts, as well as academic commentary in modern competition law have embraced an interpretation and enforcement approach to competition rules that appears generally tolerant and welcoming towards firms that are dominant in markets. This is encapsulated by the oft-quoted mantras in modern competition-law enforcement that the mere acquisition of dominance is not unlawful and that no firm should be punished for the mere reason of its dominance, as it is only the abuse of a dominant market status that is prohibited. However, historically, antitrust enforcers and commentators have not exactly rolled out the red carpet for dominant firms. A study of the historical development of competition law overwhelmingly shows that the origin and development of competition law has its roots in the widespread hostility that existed towards dominant firms. This hostility towards dominant firms can, in some cases, still be seen in modern competition law.

INTRODUCTION

The primary aim of this article is to conduct a comparative survey of the historical development of competition laws with regard to their treatment of dominant firms in the United States of America, Europe and South Africa. I argue that the origin and development of competition laws in these jurisdictions have their roots in the widespread philosophy of hostility towards

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monopolies, the equivalent of dominant firms in modern competition law.[1] In some instances, this hostility towards dominant undertakings has had the potential to cause significant economic problems, as dominant firms have traditionally played an important role in economic development through innovation, efficiency and employment creation.[2] Serious legal questions relating to dominant firms' rights to fairness, freedom of trade, equality and non-discrimination could also arise from this philosophy.[3]

I point out that there are indeed instances where dominant firms have been treated fairly and even favourably, particularly in modern competition law, in line with the principle that it is the abuse of a dominant status, and not the mere acquisition of dominance that is prohibited.[4] However, this aspect falls outside the scope of this article, which is approached primarily from a historical perspective—space precludes a comprehensive discussion of the most recent developments on the treatment of dominant firms under the competition laws in the jurisdictions under review. Therefore,

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1 *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) 77–82; *United States v Aluminium Company of America* 148 F 2d, 416 2d Cir (1945) hereinafter '*ALCOA*' 427–429; and *United States v Columbia Steel Co* 334 US 495 (1948) 536. See also Barak Orbach, 'How Antitrust Lost its Goal' (2013) 81 Fordham LR 2254; Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (12th Annual Competition Law and Policy Workshop, Robert Schuman Centre, European University Institute, Florence, 8–9 June 2007) 2; Simon Roberts, 'The Role for Competition Policy in Economic Development: The South African Experience' (2004) Trade and Industrial Policy Strategies Working Paper No 8 at 7; Robert Bradley Jr, 'On the Origins of the Sherman Act' (1990) 9 Cato Journal 737–738; Eleanor M Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness' (1986) 61 Notre Dame LR 983; William Letwin, *Law and Economic Policy in America* (Edinburgh University Press 1967) 15, 54 and 59; Hans B Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Hopkins 1954) 1–5.

2 Because most monopolies and dominant firms are able to produce a greater quantity of goods at reasonably lower average cost, the benefits of lower production costs can be passed on to consumers in the form of lower prices. As Djolov observed, if a firm increases in size, it may be able to benefit from economies of scale, which is a cost advantage based on size. This is because when a firm grows in size, it will have a lower cost per unit of output than a smaller firm, which should translate into lower product prices. See G Djolov, 'Competition in the South African Manufacturing Sector: An Empirical Probe' (2015) 46 SAJ of Business Management 24.

3 The majority of basic rights and freedoms to which juristic persons are entitled under the Constitution of the Republic of South Africa, 1996, (hereinafter the 'Constitution') and the law may be invoked by firms affected adversely by the application of competition law. See s 8(4) of the Constitution and s 1(2)(a) of the Competition Act 89 of 1998; *AK Entertainment CC v Minister of Safety and Security* [1994] 4 BCLR 31 (E) 38; 1995 (1) SA 783 (E) 790; and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 57. See also J Neethling and BR Rutherford, 'The Law of Competition and The Bill of Rights' in JA Faris (ed), 'Law of South Africa' *Annual Cumulative Supplement* (2 edn 2(2) Lexis Nexis Online 2014) para 233; J Neethling, *Van Heerden—Neethling Unlawful Competition* (2 edn LexisNexis 2008) 12–13.

4 *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) 407; and Martin Brassey et al, *Competition Law* (Juta 2002) 197.

only where necessary I will highlight the current state of affairs in order to show changes (if any) in the laws' developmental trajectory. Because American antitrust law is the oldest of the three jurisdictions, a review of the development of American antitrust law is presented first, followed by that of European competition law as the second oldest, and South African competition law as the most recent of the three.

WHY IS THE HISTORY OF COMPETITION LAW IMPORTANT?

The philosophy underpinning competition law is rooted predominantly in economic theory. An understanding of economic history has always played an important role in shaping the functioning of modern societies and economies. Given the interplay between economics and law in competition law, it is essential to understand the historical economic theory that has driven the formulation and enforcement of competition law since its inception.[5] A study of the historical development of competition law provides a helpful platform in identifying formative influences in the evolution of the law, which may also bear upon future developments.[6] Indeed, in seeking to speculate about the future, it is always desirable to look at the past as the seeds of future development can often be found in past practices.[7]

As Kovacic observes, 'significant developments in doctrine hinge on interpretations of distant episodes in antitrust experience, which is why recent shifts in enforcement activity have been motivated substantially by commentary on historical records to identify perceived and longstanding flaws in antitrust policy.'[8] According to Bork, not only does a historical study of the development of competition law allow us to know how the law's grand ideas actually took root and grew, it also helps to free us from a falsely imagined past.[9] Kovacic further observes, that without its appeal to history, Bork's seminal work, *The Antitrust Paradox,* would probably not have played such an extraordinary role in moulding competition-law doctrine and in determining the agenda for modern debate.[10]

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5 Nicola Giocoli, 'Competition versus Property Rights Advance: American Antitrust Law, the Freiburg School and the Early Years of European Competition Policy' (2009) 5 Journal of Competition Law and Economics 748.

6 William E Kovacic, 'Modern US Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act' <www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf> accessed 29 September 2016 at 2

7 Roman Tomasic, 'The Challenge of Corporate Law Enforcement: Corporate Law Reform in Australia and Beyond' (2006) 10 University of Western Sydney LR 1.

8 William E Kovacic, 'The Sherman Act: The First Century—Comments and Observations' (1990) 59 Antitrust LJ 119.

9 Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books Inc 1978) 15.

10 Kovacic (n 8).

THE DEVELOPMENT OF AMERICAN ANTITRUST LAW

What we today know as 'competition law', originated in the United States of America more than 125 years ago through the Sherman Act.[11] Although other supplementary antitrust legislation have been enacted in America from time to time, Thorelli observes that 'the Sherman Act has prevailed as a seemingly timeless expression of public policy in relation to economic life and remains by far the most important legislation in the field.'[12] The US Supreme Court, too, has termed the Sherman Act 'the Magna Carta of our free enterprise economy.'[13] As the most significant federal antitrust statute,[14] it goes without saying that a study of the origin of American antitrust law should focus on the history of the Sherman Act.[15]

The cornerstone of American antitrust law is based on section 2 of the Sherman Act. This provision makes it unlawful for any person to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.'[16] Section 2 establishes three offences, namely 'monopolization'; 'attempted monopolization'; and 'conspiracy to monopolize'.[17] However, despite the centrality and potentially wide implications of the term 'monopolization' in this section, the term is not defined in the Act. For over a century, antitrust enforcement agencies and the courts have grappled with the meaning and scope of the offence of monopolization.

From a basic reading of section 2 of the Sherman Act, one is inclined to deduce that the purpose and effect of the provision is the straightforward prohibition of monopoly or the acquisition of a dominant status in a market. However, it is appropriate to observe that this view is not generally supported, particularly not in modern competition law.[18] The majority of recent court decisions and academic works have adopted an interpretation of section 2 of the Sherman Act, which appears tolerant and welcoming

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11 The Sherman Antitrust Act of 1890, 26 Stat 209, 15 USC ch 1.

12 Thorelli (n 1) 1.

13 *United States v Topco Associates Inc* 405 US 596 (1972) 610.

14 Washington State—Office of the Attorney-General, 'Guide to Antitrust Laws' <www.atg.wa.gov/guide-antitrust-laws> accessed 29 September 2016.

15 Thorelli (n 1) 164.

16 S 2 of the Sherman Act provides that: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.'

17 US Department of Justice, 'Competition and Monopoly: Single-firm Conduct Under Section 2 of the Sherman Act' (2008) 5 <www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act> accessed 29 September 2016; Antitrust Modernization Commission, 'Exclusionary Conduct Discussion Memorandum' (2006) 4 <http://govinfo.library.unt.edu/amc/pdf/meetings/ExclCond%20DiscMemo060711fin.pdfv> accessed 29 September 2016.

18 *Verizon Communications v Trinko* (n 4).

towards dominant firms.[19] This is encapsulated by the often-stated mantra in competition-law enforcement that 'mere acquisition of dominance is not unlawful'.[20]

However, as I shall show, historically, antitrust enforcers and commentators have been distinctly hostile towards dominant undertakings. Although the assessment of the current state of affairs under section 2 of the Sherman Act falls outside the strict confines of this paper, I am inclined to add that the philosophy of hostility towards dominant undertakings has not completely, or even significantly, disappeared in modern American antitrust law. There is overwhelming evidence in case law and academic commentary to support the view that the philosophy behind the formulation and enforcement of American antitrust laws—and the Sherman Act in particular—was, and to some extent remains, rooted in the philosophy of hostility towards dominant undertakings.[21]

Antitrust Law and the Sherman Act as Instruments to Attack Market Dominance

When the US Congress passed the Sherman Act, the American economy was experiencing a period of turbulent industrial change. As observers have noted, new mass production technology for various goods and a rapidly expanding distribution network associated with the railroad industry boom, gave birth to some of the country's earliest big businesses, called 'trusts'.[22] Technological developments also made the emergence of big business possible and, indeed, inevitable.[23] As Thorelli further observes, 'the heavy investments needed to secure the efficient use of the technical means of production in growing enterprises were beginning to create demand for capital that could not be met by a single or even a minor group of investors'.[24]

While these industrial developments brought greater economic efficiency than had been seen in the past, they also created a situation where industries

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19 ibid; William E Kovacic and Marc Winerman, 'Competition Policy and the Application of Section 5 of the Federal Trade Commission Act' (2009) 76 Antitrust LJ 929; and George B Shepherd, Joanna M Shepherd and William G Shepherd, 'Antitrust and Market Dominance' (2001) Winter Antitrust Bulletin 835.

20 *Goldwasser v Ameritech Corp* 222 F 3d 390 7th Cir (2000) 397; *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d, 263 2d Cir (1979) 275; *United States v New York Great Atlantic Pacific Tea Co* 173 F 2d, 79 7th Cir (1949) 87; *ALCOA* (n 1) 429.

21 See the next discussions under the headings: 'Antitrust Law and the Sherman Act as Instruments to Attack Market Dominance' and 'Evidence of Hostility towards Dominant Firms in Early Monopolisation Cases' below.

22 Thorelli (n 1) 63–64; Letwin (n 1) 74; Rudolph JR Peritz, 'The Sherman Anti-trust Act of 1890—A More Dynamic and Open American Economic System' <http://iipdigital.usembassy.gov/st/english/publication/2008/04/20080423212813eaifas0.42149.html#axzz3gX5vJ1HA> accessed 29 September 2016.

23 Thorelli (n 1) 64.

24 ibid.

were increasingly becoming concentrated.[25] In the decades preceding the enactment of the Sherman Act, industrial combinations or trusts proved an almost indispensable vehicle for the smooth rearrangement of capital.[26] However, American public opinion and feeling about trusts or monopoly has always been clear: 'the American public hated trusts or monopolies fervently.'[27] This hatred of monopoly was considered to be deeply ingrained in the American social fabric.[28]

The Sherman Act was passed in response to public protests against the trusts.[29] As Thorelli observes, 'that the Sherman Act was actually, if not formally, intended as a weapon against monopoly cannot be doubted.'[30] According to Orbach, 'American competition laws are aptly described "anti"-trust laws primarily because they were chiefly intended to counter the emergence of big businesses called trusts in the nineteenth century.'[31] As also noted by other observers, 'the term "antitrust" generally refers to a fluid set of American national competition policies designed in response to the threat posed by the emergence of monopolies',[32] and in response to 'the excessive concentrations of economic power in the hands of a few.'[33]

Evidence of Hostility towards Dominant Firms in Early Monopolisation Cases

The majority of early and historically significant decisions in American antitrust law exhibited considerable hostility towards dominant firms. This is because historically, antitrust laws in America were in the main viewed as instruments designed to curb the market power of larger corporations and to protect small businesses.[34] In one of the earliest decisions under section 2 of the Sherman Act, *United States v Trans-Missouri Freight Association,*[35] Peckham J expressed concern about the plight of 'small dealers', whom he feared could face extinction from the market as a result of fierce

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25 Peritz (n 22).

26 ibid; Thorelli (n 1) 65; Letwin (n 1) 70.

27 Letwin (n 1) 15 and 54.

28 ibid 59; Thorelli (n 1) 1.

29 Letwin (n 1) 15 and 54.

30 Thorelli (n 1) 5.

31 Orbach (n 1).

32 Jeffrey L Cotter, 'Extraterritorial Jurisdiction: The Application of US Antitrust Laws to Acts Outside the United States—*Hart Ford Fire Insurance Co v California* 113 S Ct 2891 (1993)' (1994) 20 William Mitchell LR 1114.

33 Eleanor M Fox, 'US and EU Competition Law: A Comparison' in Edward M Graham and J David Richardson (eds), *Global Competition Policy* (Peterson Institute 1997) 340.

34 Robert H Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings LJ 65; Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4 edn Wolters Kluwer Law and Business 2013) 100b; Douglas H Ginsberg, 'Judge Bork, Consumer Welfare and Antitrust Law' (2008) 31 Harvard J of Law and Public Policy 453.

35 166 US 290 (1897).

competition waged against them by their dominant rivals.[36] He believed that bigger corporations were against American national interests, because they increased the likelihood that some essential commodities could fall within the exclusive control of a single corporation.[37]

The use of section 2 of the Sherman Act to protect smaller corporations and to discourage the domination of markets by a few enterprises, was notable in *Standard Oil Co of New Jersey v United States*.[38] In *Standard Oil* the Supreme Court broke a large corporation into more than thirty separate units, consistent with the notion that the Sherman Act was founded on the philosophy of hostility towards big corporations.[39] In *United States v Aluminium Company of America*[40] (hereinafter '*Alcoa*') Hand J observed that 'throughout the history of the Sherman Act the purpose of the law was to discourage monopoly at all costs and to encourage the existence and preservation of several small independent operators'.[41] He found that 'possession of unchallenged economic power invariably killed initiative and discouraged thrift and for that reason the Sherman Act outlawed monopoly in all its manifestations in favour of an industrial structure in which small enterprises could effectively operate'.[42]

The principle that emerged from *Alcoa*[43]—that high levels of market domination are a violation of section 2—became central to the Supreme Court's understanding of the Sherman Act.[44] For several decades afterwards, the US Supreme Court applied antitrust laws, in particular section 2 of the Sherman Act, to protect the viability of small and middle-sized businesses.[45] In *United States v Columbia Steel Co*[46] the court noted that 'the philosophy of the Sherman Act was that monopoly should not be allowed to exist because the Act was founded on a theory of hostility to the concentration of economic power in the private hands of a few.'[47] In this case, a bigger firm size was seen as a curse that had the potential to turn into both an industrial

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36 ibid 323. See also Thomas W Hazlett, 'The Legislative History of the Sherman Act Re-examined' (1992) Vol XXX Economic Inquiry 264.

37 *United States v Trans-Missouri Freight Association* (n 35) 323.

38 (n 1).

39 ibid 77–82. See also William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' (2000) 14 J of Economic Perspectives 45.

40 (n 1).

41 ibid 429.

42 ibid 427. See also Bork (n 9) 51–2; Spencer Weber Waller, 'The Story of Alcoa: Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases' in Eleanor M Fox and Daniel A Crane (eds), *Antitrust Stories* (Foundation Press 2007) 132–133.

43 (n 40).

44 Harold Demsetz, 'How Many Cheers for Antitrust's 100 Years?' (1992) Vol XXX Economic Inquiry 210.

45 Fox (n 1).

46 (n 1).

47 ibid 536. Eleanor M Fox, 'The Sherman Antitrust Act and the World—Let Freedom Ring' (1990–1991) 59 Antitrust LJ 116–117.

menace (because of the firm's ability to create inequalities in relation to its competitors) and a social menace (because of the firm's ability to control prices).[48]

In *United States v Von's Grocery Co*[49] the Supreme Court observed, per Black J, that 'from the birth of the United States there has been an abiding and widespread fear of the evils which flow from monopoly and that it was in response to this fear that the US Congress passed the Sherman Act'.[50] Black J further observed that, when enacting antitrust laws: 'Congress sought to arrest a trend toward concentration by preserving competition among small independent businesses.'[51] In his dissent in *Von's Grocery*, Stewart J could not have been more apt when he observed that in Supreme Court antitrust cases where market domination concerns were an issue, the sole consistency he could find was that 'the government always won'.[52] This demonstrated the extent to which hostility against dominant firms was entrenched in Supreme Court antitrust decisions, as the majority of the decisions favored the state.

Perhaps the most hostile views of a judge against large corporations were those held and expressed by Louis D Brandeis, associate justice of the Supreme Court of the US between 1916 and 1939. In his writings, he argued that 'a big firm size is indicative of past transgressions by the firm against the economy, the political process, and consumers.'[53] He argued that 'no monopoly could be attained by efficiency alone as no business could be superior to its competitors in the process of manufacture and distribution in a manner that enabled it to control the market.'[54] As McGraw has observed, Brandeis decided early in his career, that business could become big only through illegitimate means and that by his frequent references to the 'curse of bigness', he meant that a big firm size was 'a sign of prior sinning'.[55]

From the 1930s the mistrust of big business, influenced by the Brandeis philosophy, grew in relevance to such an extent that it became the dominant viewpoint and would remain at the centre of American antitrust policy for many decades.[56] Despite an increase in the level of tolerance to dominant undertakings in recent times (classically demonstrated in Robert

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48 *United States v Columbia Steel* (n 46) 535–536.

49 384 US 270 (1966).

50 ibid 274.

51 ibid 277.

52 ibid 301. Kovacic and Shapiro (n 39) 51.

53 Louis Dembitz Brandeis, *The Curse of Bigness: Miscellaneous Papers of Louis D Brandeis* Osmond K Fraenkel (ed, Viking Press 1934) 114–115; Darren Bush, 'Too Big to Bail: The Role of Antitrust in Distressed Industries' (2010) 77 Antitrust LJ 281.

54 Brandeis (n 53). Cited also in *United States v Columbia Steel* (n 1) 540.

55 Thomas K McGraw, *Prophets of Regulation: Charles Francis Adam, Louis D Brandeis, James M Landis, Alfred E Kahn* (Harvard University Press 1986) 108.

56 David P Ramsey, *The Role of the Supreme Court in Antitrust Enforcement* (LLD thesis, Baylor University 2010) 108; Bork (n 9) 17; and Hazlett (n 36).

Bork's *Antitrust Paradox*[57] and Supreme Court cases, such as *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*),[58] the reality is that, when regard is had to the actions of antitrust enforcement agencies, some recent court decisions, and the remarks of prominent commentators, a deep mistrust—perhaps resentment—of dominant undertakings is still alive and well in modern American antitrust law.[59]

THE DEVELOPMENT OF EUROPEAN COMPETITION LAW

The commonly accepted view is that the development of European competition law can be traced back to the history of integration.[60] The 1951 Treaty of Paris (entered into by France, Germany, Italy, Belgium, Luxembourg and the Netherlands) established the European Coal and Steel Community, which is credited by some with creating the first competition rules in Europe.[61] At a meeting of Foreign Ministers of the member states of the European Coal and Steel Community held in Brussels in 1956, it is said that former Belgian Foreign Minister, Paul-Henri Spaak, introduced a report, commonly known as the *Spaak Report*, which laid the foundation for European competition law.[62] As Akman has observed, 'the *Spaak Report* suggested measures to preclude the creation of monopolies and the domination of markets by single enterprises.'[63] The policy of the *Spaak Report*, Akman observes further, 'was actually the prohibition of monopoly and market domination per se.'[64] The *Spaak Report* therefore proposed the prohibition of monopoly and market domination in terms that were

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57 (n 9).

58 (n 4).

59 *McWane Inc v Star Pipe Products Ltd* Docket no 9351 FTC (6 February 2014)*; McWane Inc v Federal Trade Commission* Case no 14–11363 11th Cir (15 April 2015); *LePage's Inc v Minnesota Mining and Manufacturing Company (3M)* 324 F 3d, 141 3d Cir (2003) 148–149; Spencer Weber Waller, 'Microsoft and Trinko: A Tale of Two Courts' (2006) 901 Utah LR 748–749; Peter C Carstensen, 'Remedies for Monopolization from Standard Oil to Microsoft and Intel: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use' (2012) 85 Southern California LR 817–818 and 841; Carl T Bogus, 'The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust' (2015) 49 University of Michigan J of Law Reform 2–3 and 115; Elyse Dorsey and Jonathan M Jacobson, 'Exclusionary Conduct in Antitrust' (2015) 89 St John's LR 105.

60 Pinar Akman, 'Searching for the Long-lost Soul of Article 82 EC' (2009) 29 Oxford J of Legal Studies 269, 283 and 286; Tuna Baskoy, 'The Political Economy of European Union Competition Policy: A Case Study of the Telecommunications Industry' (DPhil thesis, York University 2006) IV and 3; Laurent Warlouzet, 'The Rise of European Competition Policy 1950–1991: A Cross-disciplinary Survey of Contested Policy' (2010) Robert Schuman Centre for Advanced Studies, European University Institute, Working Paper No RSCAS 2010/80, 8–9.

61 Warlouzet (n 60) 7; Akman (n 60) 277.

62 Akman (n 60) 277.

63 ibid 281.

64 ibid.

substantially similar to those of section 2 of the Sherman Act in American antitrust law.

The European Coal and Steel Community is regarded by some to have substantially influenced the competition-law provisions contained in the Treaty of Rome (now the Treaty on the Functioning of the European Union).[65] Some concepts and institutions that appeared first in the European Coal and Steel Community are deemed to have served as a model for the European competition system contained in the Treaty on the Functioning of the European Union.[66] Today, the cornerstone of European competition law is Article 102 of the Treaty on the Functioning of the European Union.[67] Article 102 provides that: 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.' In short, Article 102 prohibits various acts by dominant firms deemed to constitute an abuse of their dominant position in the market.[68]

The Philosophy behind Article 102

It is generally accepted that the preparation of European competition rules contained in the Treaty on the Functioning of the European Union, and Article 102 in particular, was largely dominated by Germans, who had the most experience in competition law.[69] Many of the key German

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[65] Andrew Schupanitz, 'Creating Europe: The History of European Integration and the Changing Role of EU Competition Law' European Union Law Working Paper no 11 (a joint initiative of Stanford Law School and the University of Vienna School of Law 2013) 5.

[66] Organisation for Economic Co-operation and Development (OECD), 'Competition Law and Policy in the European Union' (2005) 9–10 < www.oecd.org/eu/35908641.pdf> accessed 29 September 2016.

[67] John Vickers, 'Abuse of Market Power' (2005) 115 The Economic Journal F245.

[68] Art 102 further provides that such abuse may consist of: directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[69] Germany is widely regarded as the first country in Europe to have had a system of competition law. Given their experience and knowledge in the area, Germans are also credited with playing an active role in the establishment of European competition law. Donald I Baker, 'An Enduring Antitrust Divide Across the Atlantic over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists' (2009) 5 European Competition Journal 149–50; Ian Rose and Cynthia Ngwe, 'The Ordoliberal Tradition in the European Union, Its Influence on Article 82 EC and the IBA's Comments on Article 82 EC' (2007) 3 Competition Law International 8; David J Gerber, 'Law and the Abuse of Economic Power in Europe' (1987) 62 Tulane LR 85 and 107; Massimiliano Vatiero, 'The Ordoliberal Notion of Market Power: An Institutionalist Reassessment' (2010) 6 European Competition Journal 689; David J Gerber, 'Europe and the Globalization of Antitrust Law' (1999) 14 Connecticut J of International Law 26.

figures involved in the establishment of the European Union, including Walter Hallstein—who became the first President of the Commission of the European Economic Community—were closely associated with the philosophy of ordoliberalism.[70]

Developed in the 1930s by a school of thought at the University of Freiburg, Germany, the philosophy of ordoliberalism emphasised the protection of the structure of the market to prevent a situation where one or a few undertakings dominated the market, something that was considered incompatible with a competitive market system.[71] One of the leading proponents of ordoliberalism, Walter Eucken, proposed that 'avoidable monopolies were to be broken up and unavoidable ones were to be regulated'.[72]

Evidence of Hostility Towards Dominant Firms in Article 102 Cases

The majority of European competition-law decisions under Article 102 have embraced the ordoliberal principle that 'the mere existence of a dominant firm in a market triggers the presumption that there is harm to the structure of competition in that market.'[73] In *Hoffmann-La Roche and Co AG v Commission*,[74] one of the most widely followed decisions under Article 102, the court found that the 'mere presence of a dominant undertaking in a market automatically means that the degree of competition in that market has been weakened.'[75] This principle was followed in another seminal decision, *Michelin v Commission*.[76]

The principle has been repeated almost verbatim in the majority of subsequent cases, including the most recent ones, to the extent that it is now a settled principle of European competition law.[77] While European competition authorities have, in recent years, declared their interest in

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70 Rose and Ngwe (n 69); Giocoli (n 5) 767 and 776.

71 David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001) 251–252; Alberto Pera, 'Changing Views of Competition, Economic Analysis and EC Antitrust Law' (2008) 4 European Competition Journal 145–146.

72 Walter Eucken, 'The Competitive Order and Its Implementation' (Ahlborn and Grave trs, 2006) 2 Competition Policy International 241; and Giocoli (n 5) 774.

73 Liza Lovdahl Gormsen, 'The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 European Competition Journal 339; Philip Marsden and Liza Lovdahl Gormsen, 'Guidance on Abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure' (2010) 55 The Antitrust Bulletin 876 and 881; Duncan Sinclair, 'Abuse of Dominance at a Crossroads—Potential Effect, Object and Appreciability Under Article 82 EC' (2004) 25 European Competition LR 493; Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' University College London, Centre for Law, Economics and Society, Working Paper Series 3/2013, (2013) 27.

74 Case C-85/76.

75 ibid para 91.

76 Case 322/81 para 70.

77 *General Electric v Commission* T-210/01 para 549; *British Airways v Commission* C-95/04P para 66; *Tomra Systems ASA v Commission* T-155/06 paras 38 and 206.

modernising their approach to the enforcement of Article 102, in particular by being tolerant of competitive dominant-firm conduct,[78] there is consensus among commentators that not much has changed in practice.[79] As Niels and Jenkins observe, 'the notion that the mere existence of dominant firms is dangerous for competition is still deeply embedded in European competition law.'[80]

THE DEVELOPMENT OF SOUTH AFRICAN COMPETITION LAW

Competition legislation in South Africa arose primarily as part of government's efforts to fight the excessive concentration of economic power.[81] There is a longstanding belief in South African society that the concentration of economic power in the hands of dominant conglomerates controlled by a few individuals and their families—is against the common interest of the majority of citizens.[82] This concentration of economic power in the hands of a few corporations and individuals has been singled out as a major source of the prevailing inequality in wealth and income distribution in South Africa.

Since the start of the twentieth century, successive governments have attempted to control, and even eliminate, monopolies in piecemeal fashion through various pieces of legislation.[83] From the middle of the twentieth

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78 European Commission, 'Report on Competition Policy' (2010) para 17 <http://ec.europa.eu/competition/publications/annual_report/2010/part1_en.pdf> accessed 29 September 2016; European Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (2009/C 45/02) para 1 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224(01)> accessed 29 September 2016; European Commission—DG Competition, 'Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (2005) para 4 <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed 29 September 2016.

79 Laura Parret, 'Shouldn't We Know What We are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy' (2010) 6 European Competition LJ 348 and 358–359; Marsden and Gormsen (n 73) 886.

80 Gunnar Niels and Helen Jenkins, 'Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down' (2005) 26 European Competition LR 605.

81 Roberts (n 1); Australian Competition and Consumer Commission, 'Better Regulation of Economic Infrastructure: Country-based Review' Working Paper No 8, (2013) 10.

82 Bork (n 9) 5 also observed a similar trend in American society.

83 Such legislation includes the Cape Meat Trade Act 15 of 1907; the Post Office Administration and Shipping Combinations Discouragement Act 10 of 1911; the Patents, Designs, Trade Mark and Copyright Act 9 of 1916; The Profiteering Act 27 of 1920; the Board of Trade and Industries Act 28 of 1923; the Board of Trade and Industries Act 33 of 1924; the Customs Tariff and Excise Duties Act 36 of 1925; the Unlawful Determination of Prices Act 24 of 1931; the Board of Trade and Industries Act 19 of 1944; the Customs Act 35 of 1944; and the Undue Restraint of Trade Act 59 of 1949. See also DV Cowen, 'A Survey of the Law Relating to the Control of Monopoly in South Africa' (1950) 8 SAJ of Economics 125; EE Bekker, *Monopolies: Review of the Role of the Competition Board* (Rand Afrikaans University 1992) 8–13; EE Bekker, 'Monopolies and the Role of the Competition Board' (1992) Journal of South African Law 622–626; Brassey (n 4) 63.

century onwards, a string of notable pieces of competition legislation have also been adopted with the aim of controlling and eliminating monopolies: these included the Undue Restraint of Trade Act;[84] the Regulation of Monopolistic Conditions Act;[85] and the Maintenance and Promotion of Competition Act.[86] It is generally accepted that none of these Acts were able to decisively deal with the social and economic problems posed by monopolies.[87] At the dawn of democracy, it had long been clear that existing competition legislation could no longer effectively serve the needs of a modern economy characterised by complex business practices and transactions. A new Competition Act[88] was adopted by the ANC-led government to effectively deal with the multifarious economic challenges facing the new democratic state. The main provisions of the Competition Act specifically dealing with dominant-firm conduct, are sections 8 (which prohibits dominant firms from engaging in various practices deemed to constitute an abuse of dominance)[89] and 9 (which prohibits dominant firms from engaging in price discrimination).[90]

The Competition Act as an Anti-monopoly Measure

Before the adoption of the Competition Act, several key industries in the South African economy were characterised by monopolies and industrial concentration.[91] Corporate ownership and control were concentrated in the conglomerate groups that dominated economic activity in strategic sectors of the economy, such as mining, manufacturing and financial services.

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84 59 of 1949.

85 24 of 1955. Bekker (Rand Afrikaans University 1992) (n 83) 13; Brassey (n 4) 63; JV Tregenna-Piggott, 'An Assessment of Competition Policy in South Africa' Occasional Paper no 8 Economic Research Unit Department of Economics, University of Natal, (1980) 24; Organisation for Economic Co-operation and Development (OECD), 'Competition Law and Policy in South Africa' *An OECD Peer Review* (2003) 12–13 <www.oecd.org/southafrica/34823812.pdf> accessed 29 September 2016; Neo Chabane, 'An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa' (*TIPS*, CSID Research Project 2003) 4 <www.tips.org.za/files/732.pdf> accessed 29 September 2016.

86 96 of 1979. Brassey (n 4) 71; Bekker (Rand Afrikaans University 1992) (n 83) 20; Bekker (JSAL 1992) (n 83) 630.

87 Brassey (n 4) 63–64; Cowen (n 83); Bekker (Rand Afrikaans University 1992) (n 83) 20; Bekker (JSAL 1992) (n 83); EE Bekker, 'Monopolies. Review of the Role of the Competition Board' (1993) Journal of South African Law 88–89; Tregenna-Piggott (n 85) 26–27; Louise Jordaan and Phumudzo S Munyai, 'The Constitutional Implication of the New Section 73A of the Competition Act 89 of 1998' (2011) 23 {SA Merc LJ} 198.

88 89 of 1998. OECD (n 85) 17.

89 Such practices include excessive pricing; refusal to give a competitor access to an essential facility when doing so is economically feasible; engaging in various exclusionary acts that include requiring or inducing a supplier or customer not to deal with a competitor; refusing to supply a competitor with scarce goods or resources when doing so is economically feasible; bundling/tying; predatory pricing; and buying-up scarce goods or resources required by a competitor.

90 See s 9 of the Act.

91 Tregenna-Piggott (n 85) 6; Roberts (n 1).

For example, in 1994, five investment conglomerates (Anglo-American, Sanlam, Liberty Life, Rembrandt/Remgro and Old Mutual) accounted for 84 per cent of the capitalisation of the stock exchange, and one of them, Anglo-American, on its own accounted for 43 per cent.[92] Anglo-American's domination of the South African economy for over a century ensured that it was a consistently top-ranked company in terms of JSE market capitalisation.[93] The South African banking sector has historically also been marked by a high degree of concentration, which has long been a source of political concern.[94] Even the entire production chain of staple food, such as bread (from wheat production, storage, milling, baking and retail) was also characterised by levels of concentration of ownership and control.[95]

The extent of control over economic activity enjoyed by a small group of companies in South Africa was one of the main reasons for the prominence of competition policy in the ANC's Reconstruction and Development Programme.[96] The new ANC government wanted to use competition policy as a means to correct the faults of the old systemand in particular, to address issues of equity and wealth distribution.[97] As Chabane has observed, 'the Competition Act seeks to address the problem of excessive concentration of ownership and control in the economy'.[98] To this end, the Act declares that the establishment of an environment in which small and medium-sized enterprises can flourish, is one of its main priorities.[99] The achievement of the small-business agenda of the Competition Act requires carefully designed policy and enforcement actions, in which small-business interests are prioritised over those of their more established counterparts. Indeed, as I later show, competition authorities have, in some cases, applied the Act in

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92 OECD (n 85) 10; Roberts (n 1).

93 Competition Commission, 'Review of Changes in Industrial Structure and Competition: Input Paper for 15 Year Review' (2008) 20 <www.thepresidency.gov.za/docs/reports/15year.../industrial_structure.pdf> accessed 29 September 2016; Neo Chabane et al, '10 Year Review: Industrial Structure and Competition Policy' (Corporate Strategy and Industrial Development Research Project, School of Economic and Business Sciences, University of the Witwatersrand, 2003) 6 and 18.

94 Grietjie Verhoef, 'Concentration and Competition: The Changing Landscape of the Banking Sector in South Africa 1970–2007' (2009) 24 SAJ of Economic History 159, 163 and 168. See also generally Charles C Okeahalam, 'Structure and Conduct in the Commercial Banking Sector of South Africa' (TIPS Annual Forum, 2001) <www.tips.org.za/files/499.pdf> accessed 29 September 2016.

95 Jacklyn Cock, 'Declining Food Security in South Africa: Monopolies on the Bread Market' (2009) *Rosa Luxemburg Stiftung Conference: The Global Crisis and Africa: Struggles for Alternatives* 1–4 <www.rosalux.co.za/wp-content/files_mf/monopoliesbreadmarketjcock.pdf> accessed 29 September 2016.

96 Chabane (n 93) 6.

97 Brassey (n 4) 82–83; Kasturi Moodaliyar and Simon Roberts, *The Development of Competition Law and Economics in South Africa* (HSRC Press 2012) ix; OECD (n 85) 7 and 18.

98 Chabane (n 85) 1.

99 S 2(e) and (f) of the Competition Act.

a manner, that appears to have favoured small businesses to the exclusion or disadvantage of dominant firms.

Evidence of Hostility Towards Dominant Firms in South African Competition Decisions

It is fair to state that no formal system of competition law jurisprudence developed in South Africa under the previous competition legislation.[100] Given that the current Competition Act is relatively new, it is not possible to provide an historical account of the development of our competition-law jurisprudence on the treatment of dominant firms—all our abuse of — dominance decisions are recent. It is, however, possible to consider established patterns in the enforcement of the Act thus far in some cases involving dominant firms.

Since the coming into force of the Competition Act, South African competition authorities have made a number of decisions that appear to favour small enterprises in a manner that disadvantaged dominant firms. For example, in *Nationwide Poles v Sasol Oil (Pty) Ltd*[101] the Tribunal found that 'the purpose of the Competition Act is to maintain accessible, competitively structured markets which accommodate smaller businesses, and enable them to compete effectively against larger and well-established incumbents.'[102] The Tribunal further pointed out, when enacting the Competition Act, the legislature was concerned about problems confronting small and medium-sized enterprises, which, in the absence of a 'level playing field', may find it difficult to enter new markets and compete effectively against incumbents.[103] While this may seem to be the protection of competitors at the expense of competition (one of the worst mistakes that can be made in competition-law enforcement), the Tribunal pre-empted any potential criticism in this regard by arguing that 'if there are no competitors there is no competition.'[104]

The Tribunal's ruling in *Nationwide Poles* is considered a landmark decision in the competition authorities' history as regards how the conflicting interests of small and big business are generally dealt with.[105] Although this decision was overturned on appeal by the Competition Appeal Court due to lack of evidence of a substantial prevention and lessening of competition in the market,[106] the Appeal Court did not interfere with the Tribunal's reasoning and finding on the importance attached to the protection of small

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100 The processes prescribed by previous legislation were largely political. See Brassey (n 4) 58.

101 Case no 72/CR/Dec03.

102 ibid paras 81 and 89.

103 ibid para 81.

104 ibid para 86.

105 Kim Kampel, 'Competition Law and SMEs: Exploring the Competitor/Competition Debate in a Developing Democracy' (Centre on Regulation and Competition Working Paper Series, Paper no 109, Institute for Development Policy and Management, University of Manchester 2004) para 3.

106 *Sasol Oil (Pty) Ltd v Nationwide Poles CC* Case no 49/CAC/APRIL05 38–41.

business interests under the Act. Indeed, the Competition Appeal Court emphasised that its decision did not seek to minimise the weight that the legislature has given to the need to ensure that small and medium-sized businesses are protected under the Act.[107]

What is odd about the Tribunal's decision in *Nationwide Poles,* is the readiness to make a finding of abuse of dominance against a dominant firm, even in circumstances where there was no evidence that the firm's conduct resulted in competition harm. In this case, the Tribunal even admitted that it was unable to determine whether the alleged price discrimination by Sasol resulted in the competition harm complained of.[108] However, despite its inability to determine this, the Tribunal still found against Sasol.[109]

In *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd,*[110] an excessive, pricing complaint against a dominant firm, the Tribunal observed that, at the core of competition-law enforcement, is the recognition that the benefits of competitively structured markets may be wiped out by the conduct of dominant firms.[111] While the Tribunal cautioned that competition law is not necessarily directed at eliminating dominant firms from the market, it surprisingly went on to state in the same paragraph that dominant firms are 'beasts'—against whom competition regulators must remain vigilant in enforcing competition rules to prevent them from inflicting further damage to already fragile markets.[112]

It is possible that the Tribunal may have jokingly referred to dominant firms as 'beasts' and that its finding that Mittal had abused its dominance by excessively pricing flat steel products was correct. But it is the manner in which the Tribunal arrived at its conclusion in this case that could raise questions about its impartiality when dominant firms are concerned. In its analysis of the excessive-pricing complaint, the Tribunal asked itself 'how a competition authority should approach the question of excessive pricing against a dominant firm' and in reply stated that 'by asking ourselves whether the structure of the market in question enables those who participate in it to charge excessive prices.'[113] The Tribunal found that the structure of the market was such that Mittal was 'super-dominant' or 'overwhelmingly dominant'.[114] The approach of the Tribunal relied unduly on Mittal's dominance as its primary basis for understanding and for explaining Mittal's infringement of the Competition Act. It appears as though the Tribunal believed that Mittal's dominance alone was unlawful.

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107 ibid 41.
108 *Nationwide Poles v Sasol* (n 101) para 117.
109 ibid.
110 Case no 13/CR/FEB04.
111 ibid para 75.
112 ibid paras 124 and 127.
113 ibid paras 83 and 84.
114 ibid paras 96, 109, 121 and 164.

As the Competition Appeal Court found on appeal, the approach of the Tribunal in *Mittal Steel* was fundamentally flawed.[115] The correct and fair approach, the Competition Appeal Court found, would have been for the Tribunal to engage in an assessment of the prices charged by Mittal in order to determine whether there had been excessive pricing to the detriment of customers.[116]

In *Competition Commission v South African Airways*,[117] despite its own admission that it simply could not be sure whether the conduct complained of was (among a host of competing factors) the most probable cause of the decline in the state of competition in the market,[118] the Tribunal nevertheless felt confident in finding against a dominant firm.[119] Justifying its finding against a dominant firm in the absence of sufficient evidence of competition harm, the Tribunal stated, quoting Areeda and Hovenkamp, that 'no antitrust authority which is seriously concerned about the evil of monopoly would condition its intervention strategy solely on a clear and genuine chain of causation.'[120] What this means is that findings of competition harm against dominant firms will be possible even in circumstances where the evidence to support them is weak. In defence of its finding, the Tribunal argued that it would be a disservice to the enforcement of the Act for it to abstain from making a finding of the nature it did against South African Airways, merely because it had not been conclusively proven that the firm's conduct was the dominant cause of the competition harm complained of.[121]

The Tribunal's propensity to find against dominant firms in the absence of sufficient evidence of competition harm, particularly harm to consumers who are the ultimate beneficiaries of competition law, can be seen in other cases as well.[122] Some commentators have criticised the Tribunal's approach, arguing that blaming and punishing dominant firms for a decline in competition in the market where there is little or no evidence of consumer harm, is too formalistic and unfair towards dominant firms.[123]

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115 *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* Case no 70/CAC/Apr07 para 75.

116 ibid para 28.

117 Case no 18/CR/Mar01.

118 ibid para 238.

119 ibid para 237.

120 ibid para 115. Also see Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (2 edn Aspen Law and Business 2001) para 651c; Ankur Kapoor, 'What is the Standard of Causation of Monopoly?' (2009) 23 Antitrust 40–41.

121 *Competition Commission v South African Airways* (n 117) para 289.

122 See for example *Nationwide Airlines Pty Ltd and Comair Limited v South African Airways Pty Ltd* Case no 80/CR/Sept06 para 248; *Competition Commission v Telkom SA Ltd* Case no 11/CR/Feb04 para 99.

123 Simon Roberts, Jonathan Klaaren and Kasturi Moodaliyar, 'Introduction to Special Section of Competition Law and Economics' (2008) 11 SAJ of Economic Management and Science 248.

GENERAL OBSERVATIONS AND CONCLUSION

Clearly, the development of competition laws in the jurisdictions under review has been subjected to different economic, political and social influences leading, over time, to varied enforcement patterns. In a limited article such as this, I have not been able to comprehensively cover all the relevant aspects of the evolution of competition rules applicable to dominant firms in the jurisdictions under review. The primary focus of this article has been to compare the historical development of competition laws with regard to their treatment of dominant firms in the US, Europe and South Africa. I have observed that the origin and development of competition laws in these jurisdictions had their roots in the widespread philosophy of hostility towards dominant firms. While noting that, in some instances, dominant firms have been treated fairly and even favourably, I have further observed that the philosophy of hostility towards dominant undertakings has not completely, or even significantly disappeared in modern competition-law enforcement. In some instances this philosophy of hostility towards dominant undertakings has had, and in appropriate cases still has, the potential to give rise to significant economic and legal problems.