

# Competition law and corporate social responsibility: a review of the special responsibility of dominant firms in competition law

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## SUMMARY

*“with great power, comes great responsibility”*<sup>1</sup>

Few concepts aptly captures competition law’s expectations on firms with substantial market share or market power than ‘*with great power, comes great responsibility*’, made popular in American movie *Spider Man*.<sup>2</sup> Although *Spider Man* helped made the concept popular, its true origin may be religious teachings and ancient cultural wisdoms. The Bible, *King James Version*, warns that “*For unto whomsoever much is given, of him shall be much required*”.<sup>3</sup> In African culture, the value or principle of *Ubuntu*, with its emphasis on common humanity and good, counsels that one person should not thrive at the expense, or to the exclusion, of others.

The relevance and application of these principles or values to commercial relationships and rules of trade regulation, in particular competition law, is the object of this paper. In some competition law jurisdictions, abuse of dominance rules recognise, explicitly or impliedly, that firms with substantial market share or market power have a special ‘duty’ or ‘responsibility’ to the market.<sup>4</sup> The purpose of this paper is to investigate the link between certain elements of this special duty or responsibility and Corporate Social Responsibility (“CSR”).<sup>5</sup> It is the argument of this paper that the principle of special responsibility, as applied in competition and abuse of dominance law, has elements of CSR.

1 Lee & Ditko *Amazing Fantasy No. 15: Spider Man* (1962) 13.

2 Adapted from Lee & Ditko 13.

3 *The Holy Bible*, Luke 12:48.

4 *Michelin v Commission* Case No. C-322/81. Wood “EU Competition Law and the Internet: Present and Past Cases” 2011 *Competition Law International* 44; Szyszczak “Controlling Dominance in European Markets” 2010 *Fordham International Law Journal* 1755.

5 It is the assumption of this paper that the reader has some basic knowledge of what CSR entails as CSR is already a popular concept in business and legal culture. However, for the sake of completeness, a brief explanation of CSR will be provided in discussion that will follow. Because it is not the main object of this paper to provide a full exposition of what CSR entails, it is recommended that appropriate sources on what CSR entails be consulted, see Agudelo, Jóhannsdóttir & Davídsdóttir “A literature review of the history and evolution of corporate social responsibility” 2019 *International Journal of Corporate Social Responsibility* 1.

## 1 Introduction

It is generally accepted that the main or primary goal of competition law is to promote competition.<sup>6</sup> Competition entails the existence of commercial rivalry among different sellers of the same or similar services or products striving to win custom. Competition, and the pursuit thereof, is the ultimate antithesis of monopoly.<sup>7</sup> One of the likely outcomes of competition is that one seller may gain more custom than others, while others may have to make do with little or no custom. In worst case scenario, those with little or no custom may be forced to exit the market.

In this context, the difficult question for competition law, and indeed its main paradox, is what must the law do to ensure that competition in the market is maintained? Put differently, when one seller emerges victorious from the competitive struggle, what is the role of competition law and its enforcement agencies in the market and towards the emergent dominant firm specifically? To maintain a healthy competitive balance in the market, can competition law and its enforcement agencies require or expect the successful and thus dominant firm, once victorious, to start “pulling its competitive punches”<sup>8</sup> in order to “leave a certain amount of money on the table”<sup>9</sup> for other competitors in the market so as to avoid destroying competition?

Competition policy and law makers recognise that while the free market system is still a reliable mechanism for the allocation of resources, they also accept that in appropriate circumstances there may be justification for intervention in markets, particularly where such markets have failed or where they do not allocate resources more efficiently. Markets characterised by monopoly or firms with substantial market share are a good example of markets with poor and undesirable resource allocation. Competition law provides a mechanism to control the actions of monopolies and firms with substantial market share. The

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6 Brassey *et al Competition Law* (2002) 2.

7 This is consistent with the view that the origin and development of competition law had its roots in the widespread hostility that existed towards monopoly. *Standard Oil Co of New Jersey v United States* 221 US 1 1911 77-82; *United States v Aluminium Company of America* 148 F2d 416 2d Cir 1945 427-429; *United States v Columbia Steel Co* 334 US 495 1948 536. Orbach “How Antitrust Lost its Goal” 2013 *Fordham Law Review* 2254; Bradley, Jr. “On the Origins of the Sherman Act” 1990 *Cato Journal* 737-738; Fox “Monopolization and Dominance in the United States and the European Community: Efficiency Opportunity and Fairness” 1986 *Notre Dame Law Review* 983; Letwin *Law and Economic Policy in America* (1967)15, 54 and 59; Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1954) 1–5.

8 *Goldwasser v Ameritech Corp* 222 F.3d 390 7th Cir. 2000 397-398. US Department of Justice *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* (2008) 8.

9 *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* Case No 13/CR/FEB04 para 131.

law against the abuse or misuse of dominance or market power are a case in point.

However, abuse of dominance law is strange. Unlike criminal law, for example, which proscribes defined criminal conduct and penalises it regardless of who the offender is, abuse of dominance law, by contrast, is selective.<sup>10</sup> Under the law of abuse of dominance, certain conduct is prohibited only if performed by firms meeting the legal definition of dominance. When the same conduct is performed by a firm that does not meet the legal definition of dominance, it is treated as lawful and therefore not actionable.<sup>11</sup> While the logical defensibility of the law of abuse of dominance is not the subject of this paper, it is sufficient to be observed here that monopolies and firms with substantial market power are treated differently in competition law. This begs the questions, are there special rules for dominant firms and do dominant firms have any special duty or responsibility under the law?

As Bakan observes, some corporations, particularly those with substantial market share, “are dangerous possessors of great power which they wield over people and societies”.<sup>12</sup> It may be appropriate, therefore, that the manner in which firms with substantial market power exercise their power is regulated. In some jurisdictions, especially in European Competition law, abuse of dominance rules include the principle that dominant firms have a “special responsibility” to the market.<sup>13</sup> Although the exact meaning of this concept is not the subject of broad consensus, its operation – as this paper will show – may have the effect of fostering a kind of Corporate Social Responsibility (“CSR”) on firms with substantial market share.

Although a thorough investigation of the meaning and scope of the concept of CSR is not within the remit of this paper, it may be helpful to provide an explanation of what CSR entails and how it may be relevant for competition law. It is appropriate to note from the onset that the definition of CSR is context dependant and may as a result differ from one industry or country to another.<sup>14</sup> However, there is no doubt as to what its core principle is: businesses have a responsibility towards the industries and communities in which they operate.<sup>15</sup> This means that corporate strategies, decisions and day to day practices cannot be driven

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10 Munyai *A Critical Review of the Treatment of Dominant Firms In Competition Law: A South African Perspective* (2016) ch 5.

11 Munyai ch 5.

12 Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2005) 1 – 2.

13 *Michelin v Commission supra*. Wood 2011 *Competition Law International* 44; Szyszczak 2010 *Fordham International Law Journal* 1755.

14 Blowfield & Frynas “Setting new agendas: critical perspectives on Corporate Social Responsibility in the developing world” 2005 *International Affairs* 502.

15 Kloppers “Driving corporate social responsibility through Black economic empowerment Law, Democracy and Development” 2014 *Law, Democracy and Development* 63.

by profit and profit alone.<sup>16</sup> Profit maximisation should be balanced with other goals. As the United Nations Industrial Development Organisation observes, other key issues which companies must consider include, responsible sourcing, employee and community interest, social equity, gender balance, human rights, good governance and anti-corruption measures.<sup>17</sup> CSR principles requires corporations to have a much broader view of their goals and an awareness of the impact of their operations on a broader set of stakeholders. Indeed business must have a social conscience.<sup>18</sup>

From a South African perspective, CSR acquires an additional meaning. A number of government policies and legislation promoting socio-economic transformation, notably those relating to BEE,<sup>19</sup> have been described as espousing a CSR element.<sup>20</sup> South African competition policy, while based fundamentally on traditional competition policy principles, also embraces a host of equity and distribution goals.<sup>21</sup> Among its stated goals, the Competition Act<sup>22</sup> provides that the purpose of the Act is to promote employment; ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.<sup>23</sup> The substantive provisions of the Act,<sup>24</sup> strengthened by recent amendments,<sup>25</sup> ensures that equity and distributive goals are an important part of merger review as well as determinations as to whether a prohibited practice, such as an abuse of dominance, has occurred.<sup>26</sup> This means that when designing their policies and strategies and when embarking on their day to day practices, South African firms must judge the impact of their actions on a broader set of interests and stakeholders, which includes employees and small businesses, particularly those owned by historically disadvantaged persons. In this context, the actions

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16 As Esser observes, corporate actions purely focused on short gain and profit maximisation tend to have a negative impact, even on the relevant firm's own long term profit, Esser "Corporate Social Responsibility: A Company Law Perspective" 2011 *SA Merc LJ* 317 – 18.

17 United Nations Industrial Development Organisation "What is CSR" available at <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr> (accessed 2020-03-032).

18 Esser 2011 *SA Merc LJ* 317 – 19.

19 Broad-Based Black Economic Empowerment Act 53 of 2003.

20 Kloppers 2014 *Law, Democracy and Development* 60.

21 OECD *Competition Law and Policy in South Africa, An OECD Peer Review* 2003 17 – 20.

22 89 of 1998.

23 See preamble & s 2 of the Act.

24 Contained in chs 2 & 3 of the Act.

25 Competition Amendment Act 18 of 2018.

26 Ss 12A(1)(b) & 12A(3) of the Act, as amended by s 9 of the 2018 Amendment Act; s 9(1)(a)(ii) of the Act, as amended by s 6 of the 2018 Amendment Act.

of South African firms are to be judged, not only from a purely legal and economic standard, but also a social one.

Corporate social responsibility, it is submitted, is particularly relevant in the context of firms with substantial market share, as they may easily be able to abuse their market power.<sup>27</sup> So, by prohibiting the abuse of market power by dominant firms, it is argued, competition law seeks to foster not only legal but also socially responsible corporate conduct.<sup>28</sup> The idea that firms with substantial market share have social responsibilities beyond the maximisation of shareholder value is premised on the view that dominant firms have too much political, social and economic power and for that reason they have social responsibilities to a broader range of stakeholders.<sup>29</sup>

As the gap between the wealthy and the poor widens, there is recognition in most societies that inequality will become a greater socio-economic problem. Societies are finding ways to respond to the challenge of inequality, especially in the economic sphere. In competition law, dominant firms are being required to think about the impact of their actions on the livelihoods of their rivals, especially small and medium sized enterprises. For example, the South African Competition Act provides that certain actions or practices by dominant firms, such as price discrimination, will be unlawful, particularly if they are likely to impede small and medium sized enterprises, or firms owned or controlled by historically disadvantaged persons, from participating effectively in the relevant market.<sup>30</sup>

For purposes of this paper, the jurisdictions that have been selected for purposes of illustrating the application of the principle of special responsibility in competition law are the European Economic Community and South Africa. In different ways, these jurisdictions have developed rules that, expressly or implicitly, recognise or suggest that dominant firms have a “special responsibility” to the market or society in general, based on the need to protect competition and the public interest.

In the discussion that follows, I start with a discussion of the European Economic Community, as the jurisdiction in which the special responsibility of dominant firms is most central to their abuse of dominance law enforcement. I then provide a discussion of the special responsibility of dominant firms under South African competition law. This will then be followed by a broad analysis of the special responsibility of dominant firms from a legal and CSR perspective. In the end I provide a summary of my observations and conclusions.

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27 Quo “The role of competition law in promoting corporate social responsibility: an Australian perspective” 2010 *Company Lawyer* 1.

28 Quo 2010 *Company Lawyer* 1.

29 Quo 2010 *Company Lawyer* 9.

30 S 9(1)(a)(ii) of the Act, as amended by s 6 of the 2018 Amendment Act.

## 2 European competition law

The cornerstone of European competition law is Article 102 of the Treaty on the Functioning of the European Union.<sup>31</sup> 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.”<sup>32</sup> It is important to note that Article 102 does not make any explicit reference to “special responsibility” or “CSR”. Article 102 does not even define the meaning of ‘dominant position’, an important concept in the application and enforcement of the provision. However, the practice established by case law is that a firm is considered dominant when it enjoys a position of economic strength in a market enabling it “to act anticompetitively to an appreciable extent independent of its competitors, customers and consumers”.<sup>33</sup> A firm with a market share of at least 50 per cent is, in the absence of exceptional circumstances pointing to the contrary, presumed to be in such position of economic strength and therefore dominant.<sup>34</sup> Connected to the concept of dominance is the idea that some dominant firms can be “super-dominant”.<sup>35</sup> This refers to a state where a dominant firm’s market share and level of dominance in the market is substantially higher than the average it normally takes to be considered dominant.

One of the most important principles that have emerged in the application and enforcement of Article 102 is that a dominant undertaking has a special responsibility to the market.<sup>36</sup> And when a firm’s level of dominance is substantially higher than the average

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31 Official Journal of the European Union, C 202, 7 June 2016. See also Vickers “Abuse of Market Power” 2005 *Economic Journal* F245.

32 Such abuse may, the Article provides further, consist in: 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; 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.

33 *United Brands Company and United Brands Continentaal BV v Commission* Case No. 27/76 para 65; *Hoffmann-La Roche & Co AG v Commission* Case No. 85/76 para 39.

34 *AKZO Chemie BV v Commission* Case No. 62/86 para 60; *Solvay SA v Commission* Case No. T-57/01 para 279; *France Télécom SA v Commission* Case No. T-340/03 para 100; *AstraZeneca AB v Commission* Case No. T-321/05 para 243.

35 Amato *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997) 70-71; Schweitzer “The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC” (2007) paper deliver at the 12th Annual Competition Law and Policy Workshop, Florence; Szyszczak 2010 *Fordham International Law Journal* 1756.

36 Wood 2011 *Competition Law International* 44; Szyszczak 2010 *Fordham International Law Journal* 1755.

required for dominance, more special responsibilities are imposed on it, in recognition of its status as a super-dominant firm. To illustrate how the special responsibility of dominant firms work, in *Europemballage Corporation and Continental Can Company Inc v Commission*<sup>37</sup> the Court observed that a dominant firm may be found to have abused its position in the market by ‘strengthening its position in the market to such an extent that the degree of dominance achieved makes it impossible for other firms in the market to survive without relying on, or cooperating with, it’.<sup>38</sup> Because Article 102 does not provide a closed list of practices or conduct that may fall foul of the provision (on the contrary the provision is open ended), the implication therefore is that nearly every action or practice by a firm considered to be dominant which strengthens its position or market share will fall foul of the provision. The maintenance and improvement of market share lies at the heart of the competitive process. It is the goal and ambition of every business to improve their market share. However, firms which are subject to the special responsibility, as dominant firms are, may find themselves denied or restricted from exercising this basic economic right.

Dominant firms may as a result find that their ability to compete freely and effectively in the market is limited. This may be in spite of the fact that same conduct would be unobjectionable when adopted by other firms that are not dominant.<sup>39</sup> It would seem that in European competition law, dominant firms, once they achieve a certain degree of commercial success, are expected to “pull their competitive punches so as to avoid the degree of marketplace success that gives them monopoly power” or “lie down and play dead and watch the quality of their products deteriorate and their customers base eroded”.<sup>40</sup> This they must do to avoid the unwanted attention of competition authorities. As Marvel observes, in European competition law large firms are expected to “hunker down to avoid attracting the attention of competition authorities by building on their successes”.<sup>41</sup>

A salient feature of the operation of the principle of special responsibility, particularly having regard to the restrictions imposed by it on dominant firms, is consideration for other market players. Dominant firms are required to act in a socially responsible way, by leaving the market open for entry and or growth by others, instead of monopolising it. In this context, it can be said that the special responsibility of

37 Case No. C-6/72.

38 *Europemballage Corporation and Continental Can Company Inc v Commission* supra para 26. This view was also endorsed in *Atlantic Container Line AB and Others v Commission* Joined Cases No. T-191/98, T-212/98 to T-214/98 para 1262.

39 Ahlborn, Evans & Padilla “Competition Policy in the New Economy: Is European Competition Law up to the Challenge?” 2001 *European Competition Law Review* 162.

40 *Goldwasser v Ameritech Corp* supra; US Department of Justice (2008) 8.

41 Marvel “The New (Or Is It Old?) Approach to Antitrust Regulation” 2009 *Global Competition Policy* 2.

dominant firms, as applied in European competition law, has elements of CSR. While the special responsibility of dominant firms and its accompanying CSR elements may be seen by some as unnecessary, there are some who are of the firm view that the principle plays an important role of ensuring that markets are accessible.<sup>42</sup>

Following to the introductory discussion of European competition law and CSR provided above, I will now provide a brief discussion of the development of the principle of special responsibility with a view to highlight its CSR elements.

## 2 1 The principle of special responsibility

As stated earlier, Article 102 does not refer to or mention the issue of 'special responsibility' that may attach to dominant undertakings. The principle was developed by case law. One of the earliest moments in which the principle of special responsibility of dominant firms was recognised in European competition law was in the case of *Michelin v Commission*.<sup>43</sup> In this case, the Court found that "a dominant undertaking has a 'special responsibility' not to allow its conduct to impair genuine undistorted competition on the market".<sup>44</sup> The *Michelin* decision has been followed by numerous other subsequent decisions, to such an extent that it can confidently be said that the special responsibility of dominant firms has become an important principle of European abuse of dominance law.<sup>45</sup>

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42 The special responsibility of dominant firms, Vatiero observes, can be justified in terms of its role in preventing a distortion of competition in the market, see Vatiero [https://www.academia.edu/3038173/Power\\_in\\_the\\_Market\\_on\\_the\\_Dominant\\_Position](https://www.academia.edu/3038173/Power_in_the_Market_on_the_Dominant_Position) (accessed 2020-03-02). Bavasso also argues that the notion of a dominant undertaking having a special responsibility is not inconsistent with the principle that efficient behavior ought to be promoted and only prevented when it gives rise to exclusion of a competitor which is likely to produce consumer harm, see Bavasso "The Role of Intent Under Article 82 EC: From "Flushing the Turkeys" to "Spotting Lionesses" in Regent's Park" 2005 *European Competition Law Review* 620.

43 *Michelin v Commission supra*.

44 *Michelin v Commission supra* para 57.

45 *BPB Industries Plc and British Gypsum Ltd v Commission* Case No. T-65/89 para 67; *Compagnie Maritime Belge Transports SA and Others v Commission* Joined Cases No. T-24/93, T-25/93, T-26/93 & T-28/93 paras 19 & 106; *Tetra Pak International SA v Commission* Case No. C-333/94 P para 24; *Compagnie Maritime Belge Transports SA & Dafra-Lines A/S v Commission* Joined Cases No. C-395/96 P & C-396/96 P paras 37 & 85; *Irish Sugar plc v. European Commission* Case No. T-228/97 paras 5 & 112 ; *Duetsche Telekom AG v Commission* Case No. C-280/08 P para 176 ; *Konkurrensverket v TeliaSonera Sverige* Case No. C-52/09 para 24.



Judging by the decision in *Continental Can*,<sup>46</sup> there can be little doubt that this principle may make it difficult for dominant firms to engage in a wide range of ordinary business conduct which other firms that are not dominant may freely engage in.<sup>47</sup> The principle effectively means that dominant firms may not be allowed to act in the same manner as other firms that are not dominant. This seems to suggest that there is effectively one law for dominant firms and another for firms that are not dominant.<sup>48</sup> Some observers argue that there is no rational explanation for this unequal treatment of firms, where sound commercial practices that are common in the marketplace may become illegal only when adopted by dominant firms.<sup>49</sup> But in societies where inequality is growing, and with no signs of it abating, it may be understandable why some competition authorities may look for ways to prevent the capitalisation of markets by one or a few entities in order to preserve opportunities for others. After all competition, the main object of the law, may not exist if there are no competitors.

## 2.2 The concept of super-dominance: with more dominance, comes more responsibilities

Article 102 does not formally distinguish between the behaviors of ordinarily dominant and super-dominant undertakings. The provision does not even refer to degrees of dominance or different responsibilities for different dominant undertakings.<sup>50</sup> In European community competition law, the concept of super-dominance was first entertained in the written opinion of the Advocate General in *Compagnie Maritime Belge Transports SA v Commission*.<sup>51</sup> It is important to note, however, that in this case the Court did not itself use the term. In *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading*,<sup>52</sup> the UK Competition Appeal Tribunal referred with approval to the concept of super-dominance as proposed in the Advocate General's opinion in *Compagnie Maritime Belge*, when it found that "super-dominant firms may have particularly more onerous responsibilities than

46 That an action by a dominant firm to strengthen its dominant position in the market to such an extent that the degree of dominance achieved makes it impossible for other firms in the market to survive without relying on, or cooperating with, Case No. C-6/72 para 26. This view was also endorsed in *Atlantic Container Line AB and Others v Commission* Joined Cases No. T-191/98, T-212/98 to T-214/98 para 1262.

47 Marsden & Lovdahl "Guidance on abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure" 2010 *The Antitrust Bulletin* 892; Bloch *et al* "A Comparative Analysis of Article 82 and Section 2 the Sherman Act" 2006 *Business Law International* 142.

48 Vickers 2005 *Economic Journal* F246.

49 Lianos [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235875](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875) (accessed 2020-03-03).

50 Szyszczak 2010 *Fordham International Law Journal* 1758.

51 Opinion of Advocate General Fennelly, *Compagnie Maritime Belge Transports SA and Dafra-Lines A/S v Commission* Joined Cases No. C-395/96 P & C-396/96 P para 137; Szyszczak 2010 *Fordham International Law Journal* 1757.

52 Case No 1001/1/1/01 2002 CAT 1.

other dominant undertakings”.<sup>53</sup> In *Konkurrensverket v TeliaSonera Sverige*,<sup>54</sup> the European Court of Justice acknowledged that the concept of super-dominance has become part of European abuse of dominance law, adding that “an undertaking’s degree of dominance in the market is relevant to the assessment of the lawfulness of its conduct”.<sup>55</sup>

The concept of super-dominance clearly suggests that there may be varying degrees of dominance, and possibly different legal obligations accompanying different levels or categories of dominance. Whish and Bailey allude to this potential distinction in legal responsibilities and obligations between super-dominant and ordinarily dominant firms when they observe that “if an ordinarily dominant undertaking has a special responsibility, a super-dominant firm should have an even greater responsibility”.<sup>56</sup> The rationale behind super-dominance is that if a firm with a 50 per cent market share is dominant, as is standard practice in European competition law,<sup>57</sup> then a firm with a 90 per cent market share is likely to be even more dominant.<sup>58</sup> More responsibilities and constraints on market conduct will accordingly follow a firm considered to be super-dominant.

### 2 3 Summary of observations

Constraints on the market conduct of firms with substantial market share occasioned by the principle of special responsibility are in line with the European view that the presence in markets of firms with substantial market shares is inimical to the ideal of free and effective competition. The existence or presence of such firms in markets is seen as an indication that “the degree of competition in that market has been weakened”.<sup>59</sup> 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”.<sup>60</sup>

Successful firms, the ones whose dominant status is achieved on the merit of their performance and innovation, may thus find their success

53 *Napp Pharmaceutical Holdings supra* para 219.

54 Case No. C-52/09.

55 *Konkurrensverket v TeliaSonera Sverige supra* para 81.

56 Whish & Bailey *Competition Law* (2012) 189; Skilbeck “Carter Holt Harvey Building Products Group Ltd v Commerce Commission [2004] UKPC 37; [2005] 2 LRC 320” 2005 *Commonwealth Law Bulletin* 191.

57 *AKZO Chemie BV v Commission supra*; *Solvay SA v Commission supra*; *France Télécom SA v Commission supra*; *AstraZeneca AB v Commission supra*.

58 Geradin <http://ssrn.com/abstract=770144> (accessed 2020-03-02).

59 *Hoffmann-La Roche & Co AG v Commission supra* para 91; *Michelin v Commission supra* para 70; *General Electric v Commission* Case No. T-210/01 para 549; *British Airways v Commission* Case No. C-95/04P para 66; *Tomra Systems ASA and Others v Commission* Case No. T-155/06 paras 38 & 206. See also Sinclair “Abuse of Dominance at a Crossroads - Potential Effect, Object and Appreciability Under Article 82 EC” 2004 *European Competition Law Review* 495.

60 Niels & Jenkins “Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down” 2005 *European Competition Law Review* 605.

unenjoyable,<sup>61</sup> especially if they find the CSR elements embodied in the special responsibility principle to be of no relevance to their organisations. As Arowolo observes, “there are serious disincentives to the acquisition and maintenance of dominance”, in view of the manner in which Article 102 has been applied by European competition authorities.<sup>62</sup> European courts have made a number of decisions the effect of which has been to prevent dominant firms from pursuing commercial practices that are perfectly standard in the market.<sup>63</sup> For example, some dominant firms have even been precluded from aligning their prices to meet competition from their rivals.<sup>64</sup> As Gal contends, because the rights of dominant firms to protect their commercial interests when threatened are not properly recognised, dominant firms have to compete “with their hands tied to their back”.<sup>65</sup>

There are different perspectives from which observers can view the principle of special responsibility as applied in European competition law. In this paper, the application of the principle of special responsibility in European competition law is seen as fostering a kind of corporate social responsibility on dominant firms. With dominant firms not allowed or being restricted from doing what other non-dominant firms may do freely, dominant firms are effectively being required to think not only about the maximisation of their profits and market share. They are also being forced to consider the impact of their actions on the sustainability of competition in the market and the welfare of their rivals, particularly small and medium sized enterprises. It is important to note that business is not just business. By and large it is the livelihoods of individuals and their families. Depending on one’s level of moral and social awareness, there may be a case for the preservation of the livelihoods of others when under threat by aggressive profit and market share maximisation driven practices, which have no regard for the sustainability of the livelihoods of others. Responsible corporations may caution themselves against this form of corporate aggression, even when exercising it is not strictly unlawful. Irresponsible ones may need a nudge

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61 Subiotto “The Special Responsibility of Dominant Undertakings Not to Impair Genuine Undistorted Competition” 1994 *World Competition* 6.

62 Arowolo “Application of the Concept of Barriers to Entry Under Article 82 of the EC Treaty: Is There a Case for Review?” 2005 *European Competition Law Review* 251.

63 See *Atlantic Container Line AB and Others v Commission supra* paras 1105-1127. Other standard market practices that may be prohibited if adopted by a dominant firm include loyalty discounts and rebates, see generally *Hoffmann-La Roche & Co AG v Commission supra*; *Michelin v Commission supra*; *BPB Industries Plc and British Gypsum Ltd v Commission supra*.

64 *AKZO Chemie BV v Commission supra* paras 70-71 & 133-134; *France Télécom SA v Commission supra* paras 171, 179, 182 and 187; *Tetra Pak International SA v Commission supra* para 41. See also European Commission DG Competition <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (accessed 2020-03-03).

65 Gal “Below-cost Price Alignment: Meeting or Beating Competition? The France Télécom Case” 2007 *European Competition Law Review* 382-383.

in that direction. In different ways, the principle of special responsibility does that.

### 3 South African competition law

It is important to note that section 8 of the Competition Act,<sup>66</sup> which prohibits dominant firms from engaging in various practices deemed to constitute an abuse of dominance,<sup>67</sup> does not mention any special responsibility that may attach to a dominant firm. As far as the question of dominance is concerned, the Competition Act outlines various instances in which dominance may be deemed to exist in a market.<sup>68</sup> However, the Competition Act does not say anything about the concept of super-dominance. Section 7 of the Competition Act provides that a firm is dominant in the market if “it has at least 45 % market share”.<sup>69</sup> It states further that a firm can also be dominant if “it has between 35 % – 45 % market share, unless the firm concerned can show that it does not have market power”.<sup>70</sup> Lastly, section 7 provides that a firm can be deemed to be dominant if “it has less than 35 % market share, but has market power”.<sup>71</sup> Market power is defined in section 1 of the Act 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.<sup>72</sup> It can be seen that the definition of market power under the South African Competition Act is similar to or echoes the definition of dominance followed in European competition law.<sup>73</sup> Therefore market power can be taken to mean the same thing as dominance.<sup>74</sup>

Despite the absence of any reference to the concepts of special responsibility and super-dominance in the Competition Act, South African competition authorities have invoked them. By so doing, they followed the lead of European competition law. It is perhaps relevant to note here that of all foreign competition jurisdictions, European competition law has had the most pervasive influence in the development of South African competition law. Indeed South African competition case law is replete with generous quotations of principles and rules from European competition law. As our Competition Appeal

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66 89 of 1998.

67 Such practices include excessive pricing; refusal to give a competitor access to an essential facility when doing so is feasible; engaging in various exclusionary acts that includes 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 feasible; bundling/tying; predatory pricing; buying-up scarce goods or resources required by a competitor.

68 S 7 of the Competition Act.

69 S 7(a) of the Competition Act.

70 S 7(b) of the Competition Act.

71 S 7(c) of the Competition Act.

72 S 1 of the Competition Act.

73 *United Brands Company and United Brands Continentaal BV v Commission supra* para 65; *Hoffmann-La Roche & Co AG v Commission supra* para 39.

74 *Munyai* 244.

Court also found in *Senwes Limited v Competition Commission*,<sup>75</sup> the theoretical foundations of European competition law “are more congruent with those of our own Competition Act”.<sup>76</sup> This also makes European competition law a suitable jurisdiction to study for purposes of understanding the development of the principle of the special responsibility of dominant firms in South African law.

### 3 1 The principle of special responsibility

It is appropriate to note that the principle of special responsibility has not been recognised explicitly in the majority of decisions by South African competition authorities. But this is neither surprising nor unusual, given that competition authorities in South Africa have thus far had a limited number of abuse of dominance cases to deal with.<sup>77</sup> The first South African competition law decision to explicitly refer to the special responsibility of dominant firms is that of the Competition Tribunal in *Competition Commission v South African Airways (Pty) Ltd*.<sup>78</sup>

In *South African Airways* the Tribunal cited with approval a passage from the European decision in *Michelin*,<sup>79</sup> in which it was found that “a dominant firm had a special responsibility not to allow its conduct to impair genuine undistorted competition in the market”.<sup>80</sup> Following *Michelin*, the Tribunal found that South African Airways bore this ‘special responsibility’ towards the market.<sup>81</sup> It is interesting to note that in this particular case, South African Airways, as the Tribunal observed,<sup>82</sup> lacked an appreciation of what this ‘special responsibility’ it was found

75 Case No 87/CAC/Feb09.

76 *Senwes Limited v Competition Commission supra* para 54. See Munyai “The Interface Between Competition and Constitutional Law: Intergrating Constitutional Norms in South African Competition Law Proceedings” 2013 *South African Mercantile Law Journal* 326-327.

77 For example, at the time of the preparation of this paper the list of complaints involving prohibited practices under ch 2 of the Competition Act decided by the Competition Tribunal (as the primary adjudicative body in competition law) is fewer than 40. And of these decided complaints, many of them did not concern the abuse of dominance but restrictive horizontal and vertical practices, see Competition Tribunal of South Africa date unknown <http://www.comptrib.co.za/cases/complaint/?start=0> (accessed 2020-03-02).

78 *Competition Commission v South African Airways (Pty) Ltd* Case No 18/CR/Mar01.

79 *Michelin v Commission supra*.

80 *Michelin v Commission supra* para 57; *Competition Commission v South African Airways supra* para 302.

81 *Competition Commission v South African Airways supra* para 303. Hawthorne “Has the Conduct-based Approach to Competition Law in South Africa Led to Consistent Interpretations of Harm to Competition?” 2008 *South African Journal of Economic Management and Science* 292.

82 *Competition Commission v South African Airways supra* para 303. Part of this confusion had to do with the approach the Competition Commission adopted in defining the relevant market which South African Airways disputed, see *Competition Commission v South African Airways supra* paras 50; 51 & 57.

to have entailed.<sup>83</sup> However, the Tribunal insisted that South African Airways ought nevertheless to have been alert to any possible dangers to the market inherent in its conduct as a dominant firm having this special responsibility.<sup>84</sup>

Another South African competition decision, and perhaps the most prominent, which has explicitly recognised the special responsibility of dominant undertakings towards the market is *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*.<sup>85</sup> In this case the Tribunal observed that the principle of special responsibility, which applies to the ‘privileged status’ of dominance, is well recognised in scholarly work and in the decisions of foreign competition adjudicators.<sup>86</sup>

There is limited academic commentary in South Africa on the usefulness or otherwise of the principle of special responsibility of dominant firms. What does exist appears overwhelmingly sympathetic to its use in our law.<sup>87</sup> As one commentator remarked, ‘the imposition of a special responsibility on dominant firms in South African competition law is justified, as it is consistent with the idea that in the presence of dominant firms competition in the market is already weakened and that any interference by the dominant firm with the market structure may eliminate all competition’.<sup>88</sup>

Kampel has gone so far as to suggest that “the South African Competition Act may need to be amended in order to ensure that it explicitly imposes a special responsibility on dominant firms to maintain genuine undistorted competition in the market”.<sup>89</sup> The special responsibility of dominant firms, Kampel further submits, will be particularly necessary in South African competition law when regard is had to the historical economic context and prevailing concentrated market structures that are not conducive to free and effective participation in the economy by small and medium-sized enterprises.<sup>90</sup>

### 3 2 The concept of super-dominance

Most South African abuse of dominance cases in which substantial market shares have been involved have generally adopted the concept of

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83 *Competition Commission v South African Airways supra* para 303.

84 *Competition Commission v South African Airways supra* para 303.

85 Case No 13/CR/FEB04.

86 *Harmony Gold Mining v Mittal Steel supra* para 96.

87 Hawthorne 2008 *South African Journal of Economic Management and Science* 303.

88 Njoroge *Regulation of dominant firms in South Africa* (2011) 3.

89 Kampel <https://ideas.repec.org/p/ags/idpmcr/30655.html> (accessed 2019-08-15).

90 Kampel <https://ideas.repec.org/p/ags/idpmcr/30655.html> (accessed 2019-08-15).

“overwhelming dominance”,<sup>91</sup> which may have the same connotation as super-dominance. The concept of ‘super-dominance’ entered the annals of South African competition law jurisprudence through the decision of the Competition Tribunal in *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*.<sup>92</sup> The Tribunal found Mittal Steel South Africa to be not only dominant, but also ‘super-dominant’.<sup>93</sup> In this case, the Tribunal cited with approval the UK competition decision in *Napp Pharmaceutical Holdings Limited*,<sup>94</sup> which emphasised the principle that “the more dominant the firm the more onerous responsibilities it attracts”.<sup>95</sup> Referring to the obligation imposed on Mittal Steel South Africa, as a super-dominant firm, not to charge excessive prices to its customers, the Tribunal found that when devising its pricing policies, Mittal Steel South Africa was expected to “leave a certain amount of money on the table”.<sup>96</sup> This means that dominant firms are required by law to refrain from taking the utmost advantage of their positions in the market, even when doing so may not completely be illegal.

To demonstrate the extent to which the Tribunal embraced the concept of super-dominance, it used the term more than 40 times in this decision.<sup>97</sup> When this is taken into account, it is clear that the use of the concept of super-dominance in this case was not some casual remarks of the Tribunal made in passing. It was based on a genuine belief on the part of the Tribunal that the concept is of fundamental relevance and importance to South African abuse of dominance law enforcement. Unhappy with the decision of the Tribunal, Mittal Steel South Africa appealed to the Competition Appeal Court.

On appeal, in *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*,<sup>98</sup> the Competition Appeal Court observed that section 8 of the Competition Act makes no reference to the term “super-dominance”.<sup>99</sup> However, the Court was clearly sympathetic to why the Tribunal had used the term. The Competition Appeal Court found that “in holding that a firm is ‘super-dominant’, the Tribunal was indicating that the firm concerned was able to exercise its

91 *Harmony Gold Mining v Mittal Steel supra* paras 96 & 109; *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* Case No 05/CR/Feb05 paras 4 & 38; *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* Case No 70/CAC/Apr07 para 77; *Competition Commission v South African Breweries Limited and Others* 2015 (3) SA 329 (CAC) paras 1, 52 & 53.

92 *Harmony Gold Mining v Mittal Steel supra*.

93 *Harmony Gold Mining v Mittal Steel supra* paras 121 & 164.

94 *Napp Pharmaceutical Holdings supra*.

95 *Napp Pharmaceutical Holdings supra* para 219.

96 *Harmony Gold Mining v Mittal Steel supra* para 131.

97 *Harmony Gold Mining v Mittal Steel supra* paras 37; 47; 61; 84; 106; 108; 112; 117; 121; 126; 129; 131; 132; 133; 143; 152; 154; 163; 164; 175; 189; 194; 195 & 196.

98 *Mittal Steel South Africa v Harmony Gold Mining Company supra*.

99 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 30.

market power as if it were a monopolist”.<sup>100</sup> For its part, the Competition Appeal Court also found that Mittal Steel South Africa had done little to show that it was not “super-dominant” or “overwhelmingly dominant”.<sup>101</sup>

Crucially, the central point on which the Competition Appeal Court eventually overturned the Tribunal’s *Mittal* decision was not the use of the concept of ‘super-dominance’ by the Tribunal, but the Tribunal’s own failure to evaluate Mittal Steel South Africa’s pricing in order to determine whether there had been excessive pricing.<sup>102</sup> Having regard to the above, it can be said that the concept of ‘super-dominance’ has not been expunged from South African competition law. This argument is also fortified by the fact that the concept of super-dominance does not stand alone but is an extension of, and gives effect to, the principle of ‘special responsibility’, which has never been questioned and enjoys respectable support in our competition law.

### 3 3 Summary of observations

What this means is that firms with substantial market shares in South Africa must, as their European counterparts, be more cautious of the impact of their actions on the accessibility of markets and the survival of rivals. Considering that inequality remains high in South Africa and that many markets in the economy remain highly concentrated and dominated by a few large firms, it can hardly be surprising that dominant firms, as responsible corporate citizens, are expected *to leave a certain amount of money on the table*, to borrow from the language of the Tribunal in *Mittal*. This will be in line, not only with their legal obligations, but also their corporate social responsibilities.

## 4 An analysis of the special responsibility of dominant firms from a legal and CSR perspective

It is appropriate to acknowledge that the principle of special responsibility may play an important role of ensuring that markets are accessible and competitive. However, it is also clear that the principle may also raise significant legal concerns. One of the key issues that emerges in the evaluation of the principle of special responsibility is that once a firm is found to enjoy substantial market share, it may find its market conduct constrained by virtue of its status as a dominant firm. And these constraints will apply regardless of whether the firm acquired its market share lawfully or fairly. The overall effect may be that the ability of such a firm to compete freely and effectively in the market may

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100 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 19.

101 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 77.

102 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 28 & 75.



be limited.<sup>103</sup> As a commentator remarked, dominant firms may have to compete “with their hands tied to their back”.<sup>104</sup> In some instances a dominant firm may even find itself restricted from engaging in market conduct that is common among other firms that may not be dominant in the market. Although it may be a stretch to argue on this basis alone that the principle of special responsibility would violate some legal principle, the fact that the operation of the principle may impact unfavourably on the ability of dominant firms to compete freely is beyond doubt.

From a South African constitutional point of view, dominant firms, like all other enterprises, are entitled to certain rights in the Bill of Rights.<sup>105</sup> Indeed, the Bill of Rights applies to all laws, including competition law.<sup>106</sup> In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*<sup>107</sup> the Supreme Court of Appeal emphasised that the Competition Act must be applied in a manner that least impinges on the fundamental rights of affected firms.<sup>108</sup> The fundamental rights relevant to the field of competition law may include, but are not limited to, the right to fairness, freedom of trade, equality and non-discrimination.<sup>109</sup> In *AK Entertainment CC v Minister of Safety and Security*<sup>110</sup> the Court held that “it is difficult to appreciate why a corporation should not be entitled to enforce the Bill of Rights, in particular the equality clause, where an executive or administrative functionary blatantly treats it unequally from all other persons”.<sup>111</sup>

However, a counter argument can also be made to the effect that, when historic and prevailing economic inequalities are taken into consideration, restrictions on the market conduct of dominant firms occasioned by the operation of the principle of special responsibility are a justifiable and necessary limitation of rights designed to achieve the transformative objectives of the Constitution. From a South African CSR perspective, this argument may have some persuasive force.

Some, in fact many, private corporate behemoths currently dominating the economy in South Africa traces their history back to the times of apartheid. There is no doubt that they may have been enabled, directly or indirectly, in their monopolisation of the economy by favorable state policies. Other entities were also designed as state

103 Arowolo 2005 *European Competition Law Review* 251.

104 Gal 2007 *European Competition Law Review* 382-383.

105 S 8(4) of the Constitution. *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.

106 S 8(1) of the Constitution.

107 2010 6 SA 108 (SCA).

108 *Woodlands Dairy v Competition Commission supra* para 10.

109 Neethling & Rutherford “The Law of Competition and the Bill of Rights” in JA Faris (ed) *Law of South Africa*, Annual Cumulative Supplement, 2nd vol 2(2) (Lexis Nexis Online) para 233; Van Heerden and Neethling *Unlawful Competition* 2nd ed (2008)12-13.

110 1994 4 BCLR 31 (E); 1995 1 SA 783 (E).

111 *AK Entertainment CC v Minister of Safety and Security supra* 38; 39

monopolies operating in various strategic sectors of the economy and continues to operate to this day with substantial degrees of market power and control over their respective sectors. In this context, it would seem reasonable for competition authorities to insist that firms in this privileged position must, in line with their special responsibilities to the market, act more carefully when taking advantage of their positions in the market, even when doing so may not be illegal. It may be fair and reasonable to expect firms in this privileged position to be sympathetic to the plight and challenges of small and medium sized enterprises, particularly those owned by historically disadvantaged individuals.

## 5 Conclusion

From the perspective of the principle of the special responsibility of dominant firms, the purpose of this contribution was to assess the relevance of corporate social responsibility in competition and abuse of dominance law enforcement in Europe and South Africa. The contribution observes that competition and abuse of dominance rules in the two jurisdictions place significant pressure on firms with substantial market shares to consider and be sensitive to the impact of their actions on competition in the market and the sustainability of rivals, especially small and medium sized enterprises. In South Africa, evidence of this can be seen in the 2018 Competition Amendment Act, which makes certain practices, like price discrimination by a dominant firm, particularly unlawful when they have an adverse effect on small and medium sized enterprises and firms owned or controlled by historically disadvantaged persons.<sup>112</sup> Although this policy falls within the broader competition policy objective of ensuring the promotion and maintenance of competition, as competition can only exist when there are competitors, it also fosters responsible corporate conduct among dominant firms.

Indeed, the enforcement of the special responsibility doctrine may in some instances seem unfairly to inhibit the ability of firms with substantial market share to engage in trade freely and unhindered. However, when regard is had to economic history and existing market structures in a country like South Africa, such interference with the right of dominant firms to trade freely may be seen as a justifiable and necessary limitation of rights necessary to achieve fairness and equity in commerce and society. Although the free market system remains a preferred means of doing business in most societies, few societies are content with remaining silent or passive in the face of market failures, monopolies, poverty and inequality. In different ways, societies have always found ways, taxation being a fine example, to ensure that those more fortunate must shoulder some responsibility of contributing to the welfare of those less fortunate.

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112 S 9(1)(a)(ii) of the Act as amended by s 6 of the 2018 Amendment Act.

The special responsibility imposed on dominant firms ensures that dominant firms are sensitive, as the American Supreme Court found,<sup>113</sup> to the plight of many small dealers and other worthy men who could face extinction from the market as a result of fierce competition waged against them by their well-established rivals.<sup>114</sup> The Court, per Justice Peckham, remarked that it would be unfortunate for society and the economy to lose the services of a large number of small and independent dealers who had spent their lifetimes developing their own businesses, becoming experts in their trade and supported themselves and their families from the small profits realised from their business.<sup>115</sup>

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113 *United States v Trans-Missouri Freight Association* 166 US 290 (1897).

114 323. See also Hazlett "The Legislative History of the Sherman Act Re-Examined" (1992) *Economic Inquiry* 264.

115 *United States v Trans-Missouri Freight Association* *supra* 324.