

# PREDATORY PRICING AND THE SOUTH AFRICAN COMPETITION ACT: A FALSE-POSITIVE?

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*“From an antitrust perspective, predatory pricing is a particularly difficult problem with which to deal. If we are to prevent anticompetitive monopolization, it is a strategy that must not be permitted. The paradox, however, is that such a pricing strategy is virtually indistinguishable from the very sort of aggressive competitive pricing we wish to encourage.”*<sup>2</sup>

## Introduction

In September 2015, the Competition Tribunal (“**Tribunal**”), for the first time in South Africa’s sixteen year history of competition law enforcement found, in the *Media 24*,<sup>3</sup> case that a respondent had engaged in predatory pricing in contravention of the South African Competition Act, 89 of 1998 (“**Act**”).

The *Media 24* case, despite being dragged out for nearly six years, was set to be the leading jurisprudence on the laws pertain to predatory pricing, and in particular, how Section 8(d)(iv) of the Act would be interpreted and applied by the Tribunal. The finding by the Tribunal was, however, based on Section 8(c) of the Act, which is a broader ‘catch-all’ provision, and left some important questions as to the interpretation of Section 8(d)(iv) unanswered. Most notably, whether or not Section 8(d)(iv) permits complainants to utilise cost measurement standards other than Average Variable Costs (“**AVC**”) or Marginal Costs (“**MC**”) to prove that a dominant firm has engaged in predatory pricing in contravention of the provision.<sup>4</sup>

Having said that, however, the *Media 24* case provides some insight as to the precise relationship between Sections 8(d)(iv) and 8(c) of the Act as they relate to predatory pricing, and may have offered, by way of certain obiter remarks, an indication as to how the Tribunal may interpret and apply Section 8(d)(iv) of the Act in future.

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<sup>2</sup> D L Kaserman and J W Mayo, ‘*Government and Business: The Economics of Antitrust and Regulation*’ (1995) Fort Worth, TX: Dryden Press at 128.

<sup>3</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 (hereafter the “*Media 24*” case)

<sup>4</sup> Section 8(d)(iv) expressly refers to AVC and AMC as the benchmarks below which a firm must price, before such pricing will be considered predatory.

Accordingly, this paper examines the interpretation and application of Section 8(c) and 8(d)(iv) of the Act respectively, and specifically, whether the Tribunal, in *Media 24*, has interpreted the two provisions in a manner which best balances the legal, practical and policy considerations which arise from the prohibition against predatory pricing in South Africa.

### **Predatory Pricing and the Competition Act**

The notion behind predatory pricing is conceptually quite straightforward. Essentially, it entails a firm who sets its prices below a certain cost level for a short period of time seeking to drive out any other competitors in the market<sup>5</sup>. Once the victim(s) have been driven out of the market, the firm exercising predatory pricing may raise their costs and therefore recoup losses sustained in the interim period during which it engaged in predatory pricing.

In other words, a firm will forego short term losses to take advantage of long term price increases as a result of an increased market share.

As indicated above, predatory pricing is traditionally regulated by Section 8(d)(iv) of the Act, which reads as follows:

*Section 8 – It is prohibited for a dominant firm to -*

*(d) engage in any of the following exclusionary acts , unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act -*

...

*(iv) selling goods or services below their marginal or average variable cost;*

While Section 8(d) of the Act sets out specific types of conduct which are generally considered anticompetitive, if engaged in by a dominant firm, Section 8(c) of the Act is general ‘catch-all’ provision which reads as follows:

*Section 8 – It is prohibited for a dominant firm to -*

*(c) engage in an exclusionary act , other than that listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or*

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<sup>5</sup> <http://www.oecd.org/competition/abuse/2375661.pdf> (hereafter the “OECD Report”) (accessed on 18-10-2015) at 7.

A crucial distinction between Section 8(d)(iv) and Section 8(c) of the Act is that a first time contravention of Section 8(c) does not attract an administrative penalty.<sup>6</sup> Accordingly, the Competition Commission (“**Commission**”) will no doubt seek to prosecute a firm engaged in alleged predation in terms of Section 8(d)(iv) rather than Section 8(c). Another important distinction relates to the onus of proving that the act of predation was indeed exclusionary and anticompetitive. This is dealt with in more detail below.

As discussed below, the *Media 24* case sets out clearly the interplay between the two provisions and the factual circumstances of a case will to a large degree determine which would be the most appropriate provision for a complainant to rely on.

It should be pointed out that, like most anti-predation provisions in other jurisdiction, before a firm can be found to have engaged in any exclusionary conduct in terms of Section 8 of the Act, the firm must be ‘dominant’.<sup>7</sup> The significance of this pre-requisite becomes particularly relevant when considering the policy behind predatory pricing in South Africa.

### **Policy and Predation**

Regulating predatory pricing does appear, at first blush, to be at odds with a primary objectives of increased competition, namely, lower prices for consumers. This ‘anomaly’ has led a number of critics to suggest that the underlying premise, upon which the laws against predation are based, seems to be in conflict with general competition law policy.

The premise upon which predation is based, however, is low costs in the short run, followed by higher costs in the long run, and that the economic rent derived from long run monopolistic prices will ultimately outweigh the short term benefit to consumers.

What is important, however, is that laws governing predation should not de-incentivise firms from lowering their prices for fear of being held liable for predation. Mistaking competitive pricing as predatory would defeat the very purpose of aggressive competition in the market, while mistaking predation as competition may lead to higher prices as a result of increased concentration in the long term.<sup>8</sup>

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<sup>6</sup> I terms of Section 59 of the Competition Act, a first time contravention of Section 8(d)(iv) of the Competition Act may lead to an administrative penalty of up to 10% of a firm’s annual turnover.

<sup>7</sup> In terms of Section 7 of the Competition Act, a firm will be dominant if it has a market share of 45% of the relevant market and will be presumed to be dominant if it has a market share of above 35%. A firm could notionally also be considered dominant if it has market share of less than 35% but has market power.

<sup>8</sup> OECD Report at 5.

Likewise, the law needs to adequately ensure that smaller, efficient firms, are not prevented from entering into a market, or forced to exit the market, simply because of a dominant firm's resources to exploit their dominance and preclude such a smaller firm from competing in the market.

Whether predatory pricing should, as a matter of policy, be regulated in the first place is far from undisputed. A number of prominent writers have argued that predatory pricing does not require regulation because predation is that from a pure economic perspective, so the argument goes, more detrimental to the predator than to the victim.<sup>9</sup>

Some of the key economic arguments raised in support of the contention that the risk of predation is not credible can be summarised as follows:

- victims may enter into long term contracts with their customers, especially if their customers are aware that the victims exit from the market would create a monopoly;<sup>10</sup>
- dominant firms would rather merge with a smaller player than engage in predatory pricing;<sup>11</sup> and
- costs of predation would invariably not make it financially worthwhile to engage in predatory pricing<sup>12</sup>.

Ultimately, McGee and Easterbrook (the “**Chicago School of Thought**”) argue that predatory pricing is so rare that it should not be a matter of concern for competition law agencies.<sup>13</sup> The risk of regulating predation, as far as the Writers are concerned, is that rules against predatory pricing run the risk of generating false positives, by being over-inclusive. The crux of the Writer's contention is that the risk of predation is, from an economic perspective, self-detering and therefore does not require government intervention.

The policy behind prohibiting predatory pricing, however, must be evaluated from a contextual perspective. The larger a dominant firm's market position is, the higher the barrier

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<sup>9</sup> See the arguments of well-respected writers John McGee and Frank Easterbrook.

<sup>10</sup> JS McGee, *Predatory Pricing Revisited*, 23 *Journal of Law and Economics* 338 (1989) at 310-311 (hereafter “McGee”); FH Easterbrook, *Predatory Strategies and Counterstrategies*, 48 *University of Chicago Law Review* 127 (1981) at 292-293 (hereafter “Easterbrook”).

<sup>11</sup> OECD Report at 10.

<sup>12</sup> OECD Report at 10.

<sup>13</sup> OECD Report at 19.

to entry in a particular market is and the inability of the market to regulate itself efficiently, are all factors which would increase the potential for a dominant firm to engage in predatory pricing. It should be noted, that these factors are all common to the South African economy.

While the merits of the arguments raised by those from the Chicago School of Thought is certainly not universally accepted<sup>14</sup> (especially in Europe)<sup>15</sup>, the points raised by writers such as McGee and Easterbrook confirm that economic risks and considerations will at least to some degree, serve as a deterrent from engaging in predatory pricing.

In South Africa's context, the economic deterrents put forward by the Chicago School of Thought writers should be considered in conjunction with any legislative deterrents (i.e. administrative penalties and/or civil damages), when evaluating whether our legislative provisions are under or over inclusive.

Whether predatory pricing should or shouldn't be regulated under competition law is rather academic insofar as the South African competition regulatory environment is concerned, as the Competition Act clearly prohibits predatory pricing.

The more relevant question to be asked is whether the Competition Act, or rather the interpretation and application of the relevant provisions of the Competition Act by the competition authorities, adequately balances the harm that predatory pricing may cause, while ensuring that the provisions are not over-inclusive.

Accordingly, the rest of this paper is dedicated to considering the *Media 24* case, and in particular, whether an adequate balance between the interpretation and reconciliation of Sections 8(d)(iv) and Section 8(c) of the Act has been achieved, in light of the policy considerations identified above.

## **The Media 24 Case**

### *The Facts*

The facts can briefly be summarised as follows:

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<sup>14</sup> See Schwatz's criticism at page 10 of the OECD Report.

<sup>15</sup> Such as administrative penalties being imposed in terms of Section 59 of the Competition Act.

Media 24 owned two weekly community newspapers, namely; Vista and Forum. Forum subsequently exited the market soon after another independently owned paper, namely, GNN Gold Net News (“GNN”), had exited the market<sup>16,17</sup>.

The Commission alleged that Media 24 used Forum as ‘fighting brand’ during 2004 and 2009 to force GNN out of the market,<sup>18</sup> while Media 24 contended that GNN’s demise was as a result of other external factors such as the 2008 economic recession, and that Forum had always generated revenue at prices which “*exceeded any legally acceptable measure of cost*”<sup>19</sup>.

The Commission relied on Section 8(d)(iv) and, in the alternative, Section 8(c) of the Act to show that against Media 24 had engaged in predatory pricing.<sup>20</sup>

In particular, the Commission alleged that Forum had priced below their AVC, alternatively, below its average total cost (“ATC”). In this regard, the Commission contended that on the facts, Media 24’s average avoidable costs (“AAC”) equalled their AVC and therefore produced evidence before the Tribunal in order to establish Forum’s AAC only.

Lastly, the Commission argued that Forum’s conduct was both exclusionary and anticompetitive.<sup>21</sup>

#### *The interplay between Section 8(c) and Section 8(d)(iv) of the Competition Act*

In the *Nationwide*<sup>22</sup> case, the Tribunal set out the distinction between the two provisions quite succinctly. In essence, the Tribunal held that to bring a complaint of predatory pricing in terms of Section 8(c), the onus is on the complainant to prove that the conduct was exclusionary and anti-competitive, whereas conduct is deemed exclusionary in terms of Section 8(d)(iv) of the Act<sup>23</sup>.

<sup>16</sup> GNN was independently owned by Berkina Twintig (Pty) Ltd.

<sup>17</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at para 2.

<sup>18</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 4.

<sup>19</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 5.

<sup>20</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 7.

<sup>21</sup> It is beyond the scope of this paper to set out fully the factual matrix and evidence before the Tribunal which led to a substantial part of the decision dedicated to various cost considerations. Suffice to say that the conduct was exclusionary as it excluded GNN from the market and that Forum, who had never been profitable throughout the relevant period was closed down after GNN had exited and the conduct had an anticompetitive effect as consumers were forced to pay higher prices for advertising and were deprived of choices.

<sup>22</sup> *Nationwide Airlines (Pty) Ltd v SAA (Pty) Ltd and others* [1999-2000] CPLR 230 [CT].

<sup>23</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at para 224.

In terms of Section 8(c), however, complainant is not limited to showing that the predator priced its product below AVC or MC and may use any appropriate cost measurement, provided additional evidence supporting an act of predation is provided<sup>24</sup>.

#### Economic Cost Models and the Relevant Provisions

As mentioned above, a key issue regarding predatory pricing in terms of Section 8(d)(iv) of the Act, is whether complainants are entitled to rely on other suitable cost measurements such as AAC in order to prove that a firm has contravened Section 8(d)(iv).

In *Media 24*, the Tribunal did not make an express finding on whether AAC is an appropriate alternative cost measurement for purposes of Section 8(d)(iv) of the Act. The Tribunal did, however, note that there does not appear to be any legal proposition which would bar the use of AAC as a cost measurement to be used under Section 8(d)(iv), provided it shows that the predatory price was still below the AVC. This would of course necessitate drawing a reasonable inference as to the relationship between the AAC and the AVC, which would be largely dependent on the facts of the case.

Accordingly, it is arguable that if the evidence ultimately shows that the AAC would, by reasonable inference, show that the price would necessarily be below either the AVC or MC, then potentially, a party could succeed with a complaint in terms of Section 8(d)(iv) of the Act.<sup>25</sup>

Ultimately, the Tribunal found that, on the evidence, the Commission had not succeeded in producing sufficient evidence to prove what the AAC was and held that it was therefore unnecessary to decide the issue of whether a firm can be found to have contravened Section 8(d)(iv) of the Act, without the complainant specifically showing what either the AVC or MC was.<sup>26</sup>

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<sup>24</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 10.

<sup>25</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 104.

<sup>26</sup> In particular, the 'opportunity costs' and 'redeployment costs' could not accurately be calculated in the AAC calculation

Accordingly, because the Commission contended that in this case, the AAC equalled the AVC, the Commission had failed to discharge their onus of proving a case under Section 8(d)(iv) of the Act.<sup>27</sup>

The rest of the decision then turned on the interpretation and application of Section 8(c) of the Act.

For purposes of Section 8(c), the Commission alleged that Forum had charged below its Average Total Cost (“ATC”) with the intention to predate.<sup>28</sup>

While there was no dispute on the facts that Forum had priced below their ATC, a key issue in the decision was whether ATC is an appropriate standard to use for purposes of establishing a contravention in terms of Section 8(c) of the Act.

The Tribunal recognised that by using ATC, there is a risk of over-enforcement, while at the same time, taking into account the arguments of those who are in favour of utilising ATC (i.e. ensuring predators don’t escape too easily).<sup>29</sup>

The Tribunal ultimately held that given that South Africa’s economy is characterised by high barriers to entry in many markets and there is a lack of capital available to new market entrants, ATC is an appropriate standard.

Furthermore, the Tribunal supported the use of ATC, as any potential false-positives could be overcome by considering ‘additional evidence’.

The additional evidence relates to proving that the conduct was exclusionary. The Tribunal noted that there is no single test to be utilised and that the additional evidence which must be taken into account, may differ on a case by case basis. Based on the facts of the *Media 24* case, the Tribunal evaluated four different tests, namely: direct intention; indirect intention, recoupment and the ‘equally efficient’ competitor test.

Accordingly, the Tribunal has largely followed the European Court of Justice’s approach in the well-known *AZKO*<sup>30</sup> case, namely; that where prices are above the ATC, such a pricing

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<sup>27</sup> The Commission had always contended that on the facts, the AAC equalled the AVC and produced no further evidence than that to prove AAC. Accordingly, neither the AVC nor AMC was established by the Commission.

<sup>28</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 213.

<sup>29</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 218-220.

<sup>30</sup> Judgment of the Court of Justice of 3 July 1991 in case C-62/86, *AKZO Chemie BV v Commission*, European Court reports 1991, page I-03359.

strategy must be accompanied with the requisite intention to predate before such conduct could amount to an abuse of dominance.<sup>31</sup>

In summary, the Tribunal concluded that the evidence, on a balance of probabilities, supported the Commission's contention that there was both a direct and indirect intention to predate,<sup>32</sup> and furthermore, that Forum had, based on the evidence before the Tribunal, recouped their losses arising from their predation.<sup>33</sup>

Finally, the Tribunal held that GNN was an equally efficient competitor in the market and that their exit was not due to inefficiencies, but that there was a causal nexus between Forum's pricing strategy and GNN's demise.<sup>34</sup> The Tribunal therefore held that Media 24's conduct was exclusionary.

In the final stage of the inquiry as to whether Section 8(c) of the Act had been contravened, the Tribunal had to determine whether Forum's conduct was anticompetitive.

The Tribunal held that Forum's conduct was anticompetitive because, *inter alia*:

- it lead to the foreclosure of a rival in the market;
- consumer welfare had been affected;
- advertisers had less choice and were subjected to price increases; and
- readers had been deprived of choice.

Furthermore, the Tribunal concluded that there were no pro-competitive gains which could save Media 24.

### Conclusion in Media 24

The Tribunal held that Media 24 had contravened Section 8(c) of the Act because Forum had priced below its ATC, the conduct was both exclusionary and had an anticompetitive effect.<sup>35</sup>

As to the remedy, the Tribunal was asked to first decide the matter on the merits before determining a remedy. Accordingly, at the time of writing this paper, the Tribunal is still to make such a determination.

<sup>31</sup> [http://ec.europa.eu/competition/speeches/text/sp2003\\_066\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2003_066_en.pdf) at 2 (accessed 20-10-2015).

<sup>32</sup> With regards to indirect intention, the Tribunal took Forum's closure and cannibalisation into account.

<sup>33</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 560

<sup>34</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 598.

<sup>35</sup> *The Competition Commission vs Media 24 Limited* CR154Oct11/013938 at 621.

Importantly, however, the Tribunal may not impose an administrative penalty on Media 24. As mentioned above, a first time offence for contravening Section 8(c) of the Act does not attract an administrative penalty.<sup>36</sup>

It should be noted, however, that the Tribunal would be entitled to issue what is commonly referred to as a ‘Section 65 Certificate’, which would allow a civil litigant who has suffered damages as a result of Media 24’s conduct, to bring a damages claim before a civil court.<sup>37</sup>

Such a claimant would need only to prove his quantum and causation, but would not have to prove the wrongfulness of the conduct.

The prospect of facing civil liability for contravening either of the two provisions prohibiting predatory pricing should be considered a significant deterrent.<sup>38</sup>

### **Has the correct balance between struck?**

As discussed in the *Media 24* case and is widely acknowledged, South Africa’s economic environment is very different to that of our American and European counter parts. High barriers to entry and cost of capital, combined with certain industry players who have an entrenched dominance with deep pockets, may all point to the necessity to ensure that smaller market players or potential market entrants are protected from predation.

The lack of information available to the market and the challenges facing consumers in appreciating market dynamics in the long run, further support the notion that the pure economic risks attached to predatory pricing may not in itself serve as a sufficient deterrent to predate. This much is evidenced by the *Media 24* case.

Section 8(d)(iv) of the Act, if contravened, may result in a firm being subjected to an administrative penalty for a first time offence, places a lower evidentiary burden on a complainant. Due to the fact, however, that a complainant must prove that pricing is below either AVC or AMC, Section 8(d)(iv) of the Act may be considered to be under-inclusive, especially when considering:

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<sup>36</sup> See Section 59 of the Competition Act.

<sup>37</sup> See Section 65 of the Competition Act.

<sup>38</sup> It should be noted, however, that quantifying damages arising from anti-competitive conduct is particularly challenging. Whether quantifying damages as a result of being victim to predation will be easier to quantify than for instance cartel conduct, remains to be seen.

- marginal costs are particularly difficult to calculate<sup>39</sup>; and
- the two cost measurements expressed in Section 8(d)(iv) of the Act may lead to certain anomalous results if one considers the practical realities of various industries. For instance, certain industries such as telecommunications and pharmaceuticals are generally characterised by very high fixed costs, and very low marginal or variable costs<sup>40</sup>. Making it even more difficult to prove a case of predation. Furthermore, the mere fact that these industries are characterised by very high fixed costs, serves as a significant barrier to entry in the first place.

Accordingly, a number of alternatives have been proposed as being more appropriate cost measurements, such as AAC or Long Run Average Incremental Costs.<sup>41</sup>

In *Media 24*, the Tribunal alluded to the notion that it may be possible to prove a contravention of Section 8(d)(iv) of the Act without specifically establishing either the AVC or AMC. Whether this contention could be sustained based on the wording of the provision remains to be seen. Although, as mentioned above, the Tribunal in *Media 24* seemed to suggest that such an interpretation may be justifiable.

From a policy perspective, however, such an interpretation would ensure that the Commission is not bound by cost measurements which do not take specific industries into account, while still ensuring that dominant firms have an objective basis upon which to gauge whether their pricing strategies may fall foul of the predatory pricing provisions in terms of the Competition Act.

It is beyond the scope of this paper to discuss the merits of the most suitable alternative cost measurement, however, it would be favourable if a complainant is entitled to utilise various cost measurements for purposes of proving a contravention of Section 8(d)(iv), provided that whichever measurement is utilised, a reasonable inference can be drawn that the predatory price is ultimately, either below the AVC or MC. In other words, the complainant would not have to specifically show what the AVC or MC is, only that the price charged, was below it.

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<sup>39</sup> Areeda and Turner, 'Predatory Pricing under Section 2 of the Sherman Act' 88 Harvard Law Review 697 (1975) at 716.

<sup>40</sup> See Whish and Baily, 'Competition Law', 7ed (2012), Oxford University Press at 747.

<sup>41</sup> See M Kilby and A Piotrowski "Abuse of Dominance" in S Elliot, 'Competition Act & Commentary' (2015) Lexis Nexis at 116-117 - Canada's 2012 Abuse of Dominance Guidelines indicate that AAV is the most appropriate cost measurement to be utilised to establish predatory pricing;

Interpreting Section 8(d)(iv) of the Act in the manner suggested above, should not result in over-inclusion, and any risk of over-inclusion, may be allayed by an alleged predator being entitled to adduce additional evidence showing that the conduct is not anticompetitive or that there is some other pro-competitive gain which would absolve the predator from liability in terms of Section 8(d)(iv) of the Act.<sup>42</sup>

As discussed above, should a complainant fail to prove a case under Section 8(d)(iv) of the Act, the complainant may still rely on Section 8(c) of the Act to prove a case of predation and consequently contravention of a “*prohibited conduct*”.<sup>43</sup>

While Section 8(c) of the Act does not attract an administrative penalty for a first time offence, it does open up the door for a potential civil damages claim which would, in itself, be a significant deterrent.

The Tribunal, in *Media 24*, by accepting that ATC is an appropriate measurement tool to be utilised under Section 8(c) of the Act, has interpreted the provision broadly (in so far as ATC is an acceptable cost measure to prove a case of predation).

Given that in terms of Section 8(c) of the Act the onus is on the complainant to prove that the conduct was both exclusionary and anticompetitive, coupled with the fact that a first time contravention of Section 8(c) does not attract an administrative penalty, the Tribunal has achieved an appropriate balance between the potential ‘over-inclusion’ which may arise from using ATC, with the harm sought to be deterred.

## **Conclusion**

From a policy perspective predatory pricing by dominant firms certainly has to be regulated, particularly when having regard to the contextual landscape of South Africa’s economy.

While economic considerations may serve as deterrent to potential predators, the risk of smaller efficient industry players being forced out of the market due to the substantial resources of a few dominant firms is a real risk. The *Media 24* case illustrates as much.

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<sup>42</sup> What did emerge from the *Media 24* case is that the Tribunal explicitly stated that exclusionary effects and anticompetitive effects may overlap, they are two distinct enquiries. It has furthermore been stated that the conduct listed in Section 8(d) of the Act is deemed to be exclusionary. Whether there is potentially an argument available to a dominant firm who has priced below AVC or AMC to contend that the conduct was not exclusionary would seem limited. Having said that, however, it is hard to imagine a situation where any such potential argument would not be equally suitably raised to demonstrate that there was no anti-competitive effect.

<sup>43</sup> As defined in Section 1 of the Act.

The law regulating predation must not be so over-inclusive and uncertain so as to deter firms from competing aggressively and lowering prices for fear of falling foul of the anti-predatory pricing provisions. In the same breath, however, the laws against predation must not be so rigid that they do not take industry peculiarities into account thereby being under-inclusive and overly burdensome on a complainant to prove a case of predation.

The *Media 24* case has provided much clarity as to the relationship between and Sections 8(d)(iv) and Section 8(c) of the Act in so far as they relate to predatory pricing and confirmed that the onus falls on the complainant to prove that conduct was both exclusionary and anticompetitive in terms of Section 8(c), while conduct will be deemed to be exclusionary and anti-competitive under Section 8(d)(iv) of the Act.

Accordingly, the Tribunal confirmed that for purposes of Section 8(c) of the Act, ATC is an appropriate measurement tool on which to gauge whether predatory pricing has occurred, and has appropriately guarded against potential over-inclusion by requiring additional evidence to be adduced by the complainant, proving on a balance of probabilities, that the conduct was both exclusionary and anti-competitive. To determine whether the conduct was exclusionary, the Tribunal has followed the European approach in *AZKO* which requires the predatory pricing strategy to be accompanied with the intent to predate, before a contravention of Section 8(c) can be established.

What the *Media 24* case did not confirm, is whether for purposes of establishing a contravention under Section 8(d)(iv) of the Act, a complainant is entitled to utilise another suitable cost measurement tool, other than AVC or MC, to show that the provision has been contravened. While the Tribunal appeared open to such a contention, it remains to be seen whether the Tribunal (or any other court for that matter) may, based on the express wording of Section 8(d)(iv), accept the argument that it is not essential to establish the AVC or MC specifically, provided an inference can be drawn from which ever cost measurement is used, that the price charged was below either the AVC or MC.

If Section 8(d)(iv) of the Act is interpreted in more pragmatic manner than the express wording suggests, any risks of over-inclusion may be offset by the fact that the ‘predator’ could show that the conduct did not amount to anticompetitive conduct, or resulted in pro-competitive gains.

Although, unlike Section 8(c) of the Act, the onus would be on the alleged predator to prove that the conduct was not anticompetitive in terms of Section 8(d)(iv), it is nonetheless an appropriate safe guard, ensuring that an adequate balance has been achieved between law and policy.