

Recent experience of market power investigations in SA

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10 years of abuse of market power

- Approach of the competition authorities – has anything changed?
- Early cases – e.g. SAA/Nationwide (early 2000s);
- More recent cases:
 - Senwes – 8(c) – general exclusionary acts & margin squeeze;
 - BATSA – 8 (c) – general exclusionary acts;
 - MITTAL – 8(a) – excessive pricing;
 - EU – move to effects-based approach in abuse of dominance cases;
- Economic analysis crucial.

Criteria for dominance and market power

- SA Competition Act – no need to analyse market power if market share > 45%
- Economic theory on this point?
- Literature: OFT - Role of Market definition in monopoly and dominance enquiries (2001):
 - Too much emphasis on definition of relevant market;
 - Too little on question of dominance;
 - Market definition should play a screening role;
 - Can infer dominance directly – any value in defining a market?
 - Too much emphasis on market definition, too little on actual economic effects.
 - Propose framework for abuse of dominance investigations.

Structural approach

- Modern theory – not simple relationship between structure and market outcomes;
- Causation not uni-directional;
- Structure is useful 1st step;
- High market share not enough to determine SMP;
- High market shares – more detailed analysis is required

Abuse of dominance – which approach?

- Abandon market definition altogether?
- Relevant market definition should be retained – used to focus the analysis;
- Analysis of dominance MUST go beyond market shares;
- Emphasis on economic effects;
- Rationale for EU discussion paper on the modernisation of art 82 (2005);
- ‘Modernisation of art. 82’: *‘This expression has become shorthand for abandoning a legalistic, form-based approach to enforcement in favour of an approach based on the economic impact of the conduct at issue’*. (Freshfields, Bruckhaus Deringer (2005));

OFT paper: *'I know abuse when I see it'*

- *“There is often a sense in which Article 82 inquiries appear to have been conducted in a backwards fashion. This approach can be caricatured as:*
 - *identify a business practice to which objections have been made (usually by competitors rather than customers)*
 - *....find the business practice objectionable based on a priori beliefs about the workings of the market in question*
 - *define a relevant market in such a way that the undertaking concerned has a high market share*
 - *conclude that because the undertaking has a high market share it enjoys a dominant position; and*
 - *Infer from its dominant position that its behaviour is an abuse.”*

Importance of economic effects

1. Anti-competitive agreements;
 2. Anti-competitive mergers;
 3. Abuse of market power.
- More economics based approach for 1 & 2.
 - Same should happen to 3.
 - Importance of economics-based development of the law. Has shifted from legal form to economic effects.

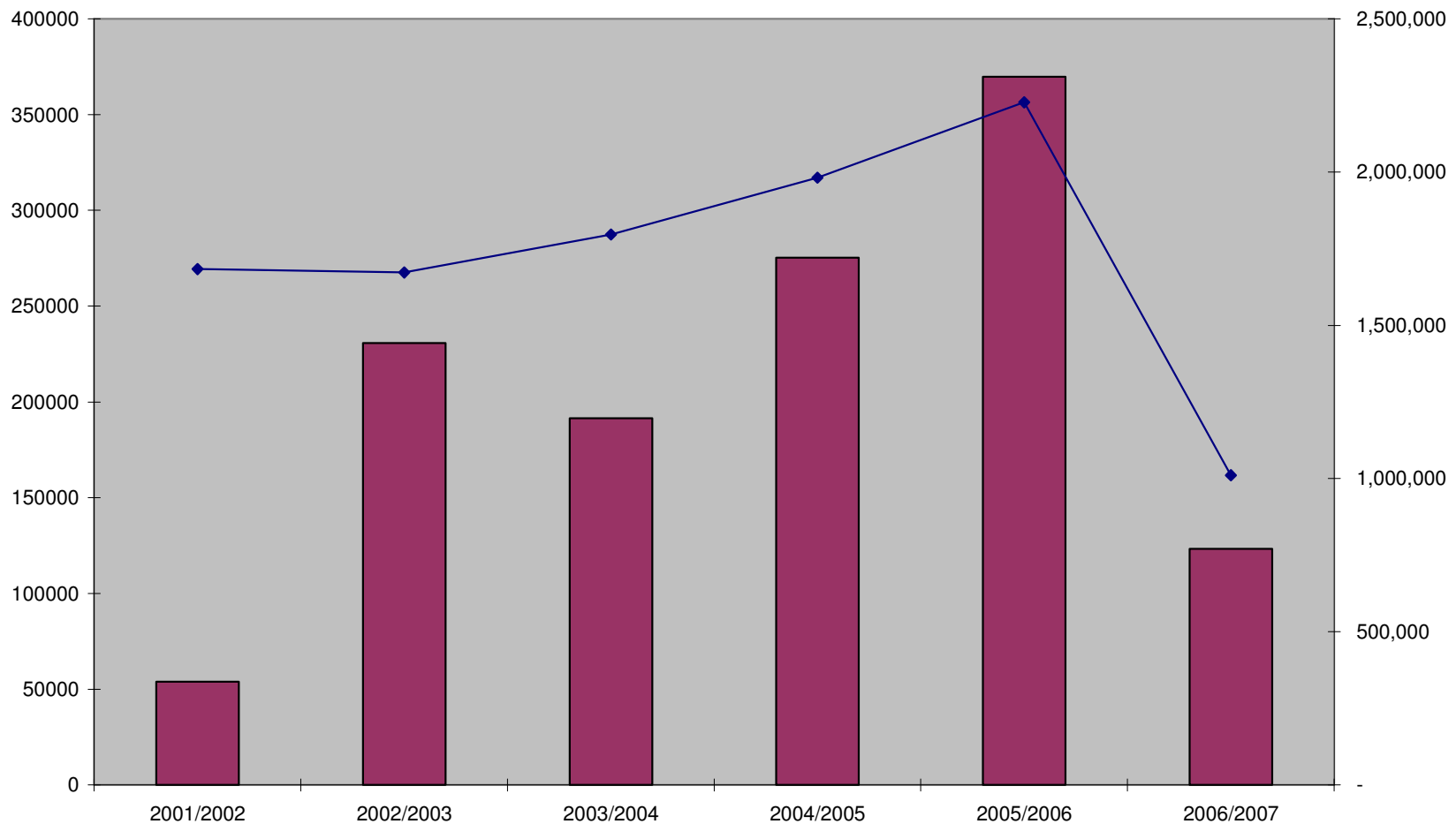
SA - Older cases

- SAA – 18/CR/Mar01
- Incentive schemes of SAA;
- Abuse of dominance – exclusionary acts;
- Market definition?
- Market shares in relevant markets;
 1. Travel agency services;
 2. Market for domestic airline travel
- Abuse is experienced in travel agent market.
- Effect in which market? Necessary to test? Foreclosing market to rivals?
- P. 54/55 – anti-competitive effects are likely.

Recent decision - Senwes

- 1st margin squeeze case;
- Not telecoms, but agricultural markets;
- Vertical integration;
- Market definition;
- Market power – upstream and downstream?
- Silo's – local/ regional monopoly;
- Decision – abuse under section 8(c);
- Tribunal did consider effects;
- Ability of other traders to trade in the Senwes area.

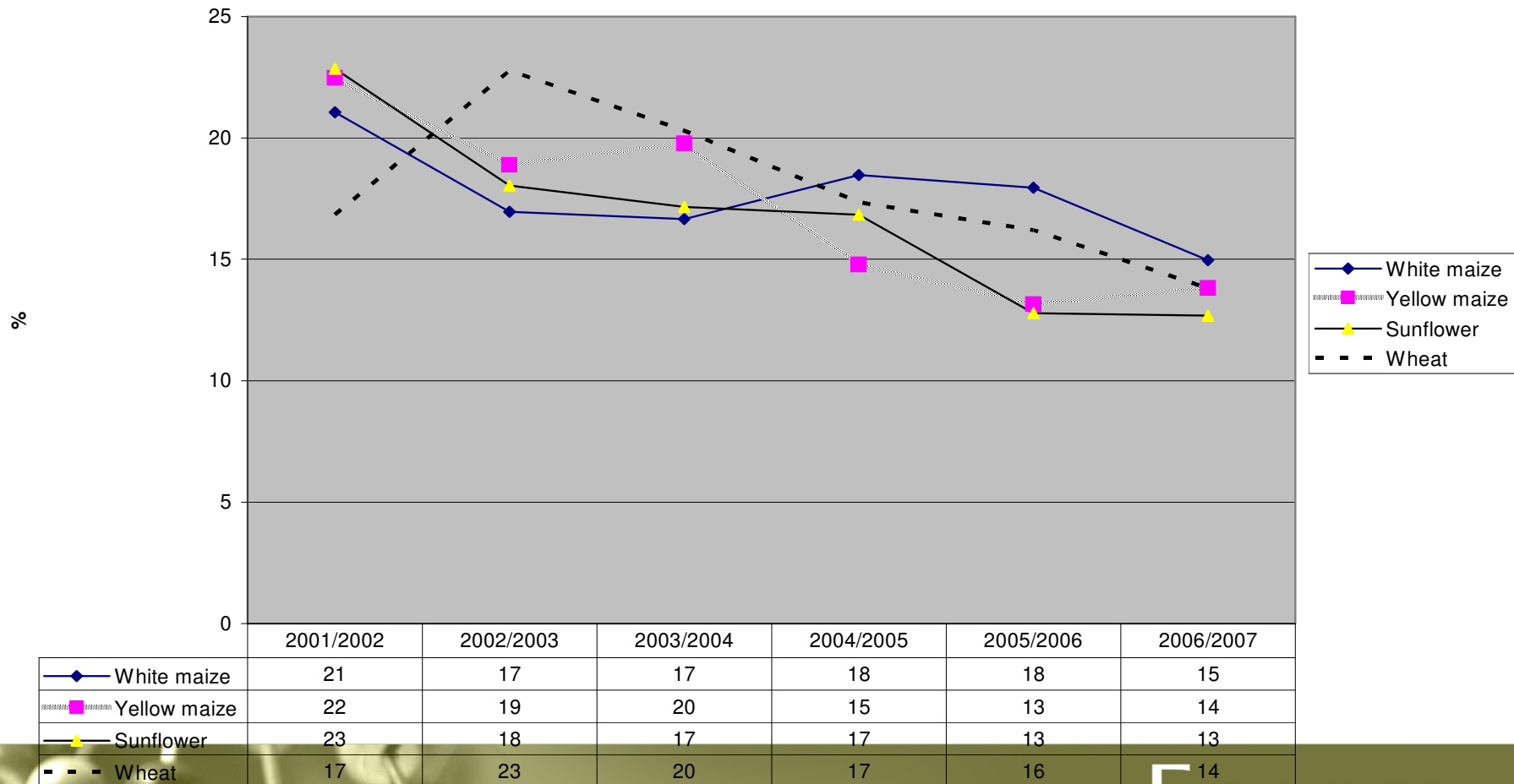
Increase in capped storage volumes



Farmer storage to capped storage tariff - white maize Crop estimate for the Senwes region - white maize

Volumes for which a silo certificate is issued as % of total tonnage received by Senwes

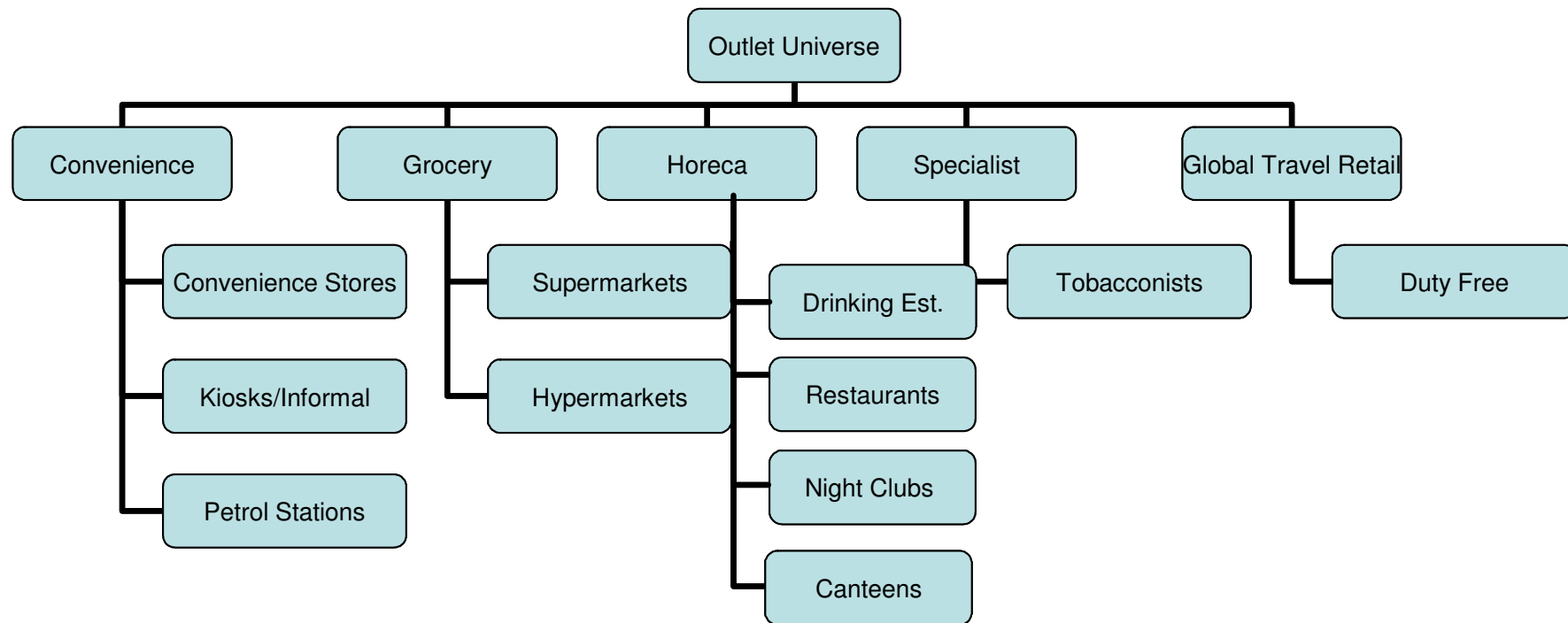
Senwes - Total silo certificates to farmers as % of total tonnage received by Senwes



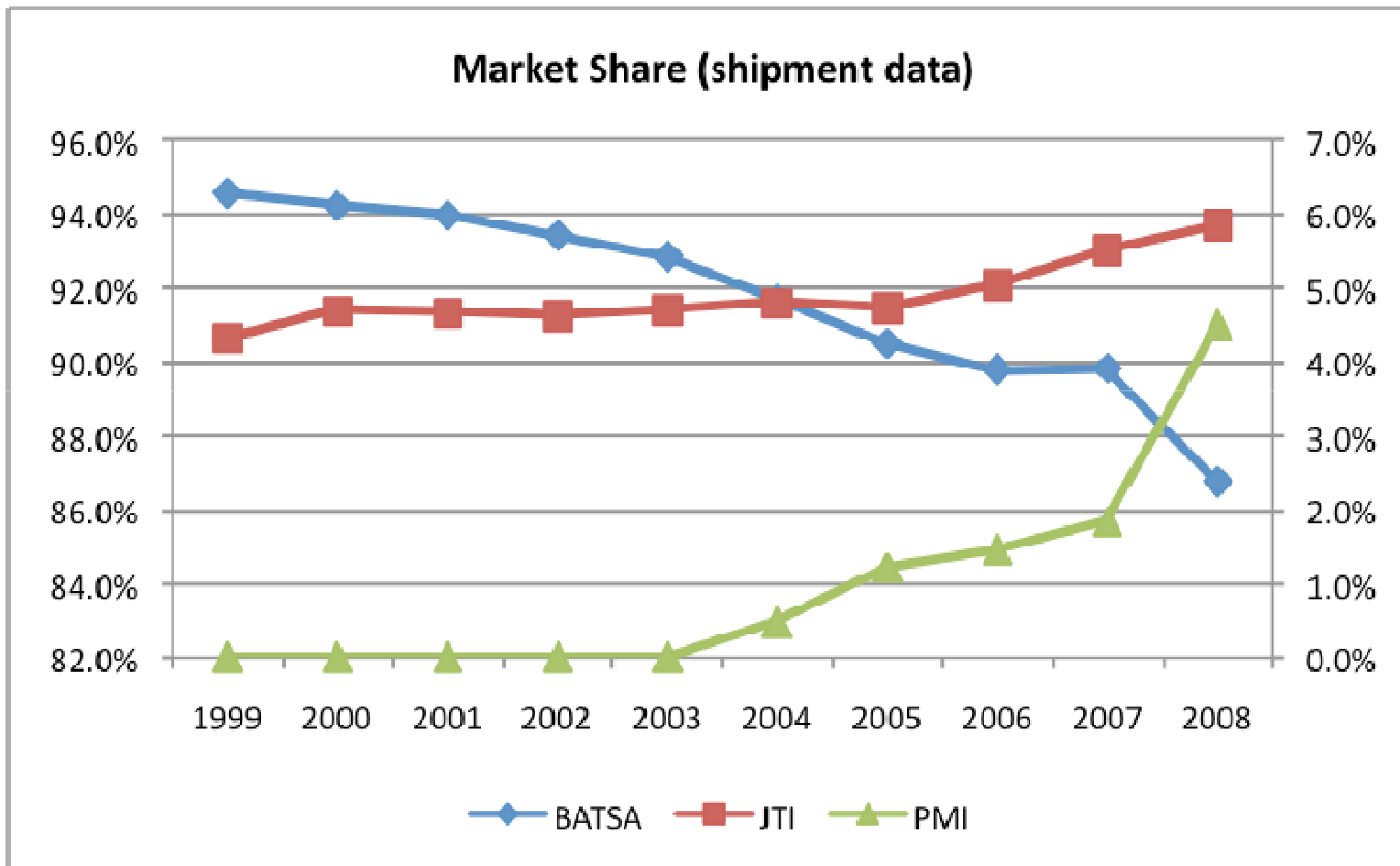
Recent case - BATSA

- BATSA's dominant position;
- Which market?
- Vertical restraints – manufacturer, distributor and retailer;
- Theory of harm;
- General exclusionary acts;
- Foreclosure and monopolising the market;
- Effects?

BATSA supply chain



BATSA market share



New entry (number of sku's)?

	2000	2001	2002	2003	2004	2005	2006	2007	2008
BATSA	124	86	77	74	71	91	86	83	73
CTC SA	0	0	0	0	0	0	0	0	2
GLTC	0	1	3	3	3	8	9	9	9
ITC	3	4	4	4	4	4	0	0	0
JTI	12	12	12	11	11	28	36	45	46
McCroft	0	0	0	0	0	0	0	4	6
MSM	5	6	6	6	9	9	9	10	10
Non Compliant	0	0	3	5	8	9	8	10	7
Other Opposition	0	9	15	19	22	32	39	34	37
PMI	0	0	0	0	5	8	8	9	18
TOTAL	144	118	120	122	133	189	195	204	208

Conclusions

- Move to economics effects based approach;
- Focus should also shift locally;
- Market definition only first step in abuse of dominance enquiries;
- Guard against 'I know abuse when I see it' approach;
- Proper theory of harm and quantification of harm important;
- Not clear from SA cases that economic effects are always properly analysed.