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COMPETITION **ALERT**

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Competition Appeal Court confirms fine for use of exclusive contracts – what key features should I be aware of?

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The Competition Appeal Court (CAC) has upheld the decision of the Competition Tribunal (Tribunal), finding that Computicket had, as a consequence of the exclusivity provisions in its contracts, abused its dominant position and imposing a penalty of R20 million.

(For more information on the Tribunal's decision, please see our previous Alert on this topic).

Computicket was found to have contravened section 8(d)(i) of the Competition Act 89 of 1998 which provides that *"it is prohibited for a dominant firm to 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: (i) requiring or inducing a supplier or customer to not deal with a competitor..."*

In its appeal to the CAC, Computicket argued that the Tribunal erred in its factual conclusions in respect of its interpretation of the terms *"exclusionary act"* and *"anti-competitive effects"*. It contended that competitors had not in fact been excluded from the market as a result of Computicket's exclusive contracts, and those who had exited had done so because they were inefficient, not because Computicket's practices excluded them.

Exclusionary Act

The CAC confirmed that if conduct falls within the scope of one of the enumerated types of conduct contained in section 8(d) (such as inducement, tying, predatory pricing etc), the conduct is automatically exclusionary. In the case of Computicket, the fact that its contracts were exclusive and thus prohibited inventory providers from utilising the services of Computicket's competitors for the duration of the contracts, was sufficient to tick the "exclusionary act" box.

Anti-competitive Effect

The more difficult question put before the CAC was whether the exclusionary act could be considered to have an "anti-competitive effect". The CAC highlighted two pertinent questions in this regard: (1) Is there evidence of actual harm to consumer welfare; or (2) Is the exclusionary act substantial or significant in foreclosing the market to competition? Thus, if consumer harm (such as increased prices) cannot be demonstrated, it will be sufficient to show that the exclusionary practice leads to substantial foreclosure. Here too the CAC confirmed that such foreclosure can be actual (ie evidence of exit from the market) or likely. The CAC here quoted a previous case against SAA, which stated that once it has been established that the exclusionary act is substantial or significant in nature, an inference can be drawn that it creates, enhances or preserves the market power of the dominant firm and this in turn will lead to a presumption that the exclusionary act has an anti-competitive effect. The onus then shifts to the respondent to rebut this presumption by justifying the anti-competitive effect on efficiency grounds.

In relation to what constitutes foreclosure, the CAC stated that: *"Ultimately, the question is whether the market and the dominant firm's rivals are rendered less effective competitors by reason of the exclusionary conduct of the dominant firm. This enquiry may engage an aggregative enquiry of the market: how dominant is*

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the firm in the market, to what extent are the sales in the market affected by the exclusionary conduct, and what conditions exist in the market as to entry and the possibility of expansion."

The CAC referenced the following considerations (established in the International Competition Network literature) which will be relevant in determining whether the effect of exclusive dealing is anti-competitive:

(a) market coverage: the larger the proportion of the relevant market that is the subject of exclusive dealings, the more likely to result in anti-competitive effects;

(b) duration of the exclusive dealings: the longer the duration, the stronger its potential for foreclosure (considering also whether contracts are renewed simultaneously, automatically renewed, or subject to conditions of renewal);

(c) alternative sources of supply;

(d) whether the customer requested the exclusivity;

(e) ease of entry and market dynamics; and

(f) scale of economies: where the conduct prevents or hinders a competitor from obtaining the economies of scale necessary to allow it to grow into an effective competitor. Also relevant here is an assessment of network effects and/or incumbency advantages as these factors have an effect on scale economies since a dominant firm can use exclusive deals to exploit such market dynamics in order to deprive a competitor of the means of gaining the required critical mass of sales or credibility of customers.

This case has reaffirmed the legal test applicable under section 8(d)(i) of the Act and offers dominant firms an opportunity to review and assess the competition law risks of their exclusive arrangements.

Notably, this Computicket decision was made in terms of the Act prior to the 2019 amendment. Under the amended Act, a new section 8(4) has been introduced which prohibits dominant firms from imposing on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair prices or other trading terms. The principles in this case may potentially be applied now also in relation to assessing the terms of purchase by a dominant firm, if those terms impose requirements of exclusive supply from black owned or small and medium enterprises.

Lara Granville, Preanka Gounden and Zahrah Ebrahim

OUR TEAM

For more information about our Competition practice and services, please contact:

Chris Charter
National Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com

Albert Aukema
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com

Lara Granville
Director
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com

Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com

Susan Meyer
Director
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com

Veronica Cadman
Executive Consultant
Competition
T +27 (0)11 562 1131
E veronica.cadman@cdhlegal.com

Naasha Loopoo
Senior Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com

Nazeera Mia
Senior Associate
T +27 (0)21 481 6337
E nazeera.mia@cdhlegal.com

Kitso Tlhabanelo
Senior Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@cdhlegal.com

Preanka Gounden
Associate
T +27 (0)21 481 6389
E preanka.gounden@cdhlegal.com

Duduetsang Mogapi
Associate
T +27 (0)11 562 1068
E duduetsang.mogapi@cdhlegal.com

Craig Thomas
Associate
T +27 (0)11 562 1055
E craig.thomas@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR