



COMPETITION ALERT

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COMPETITION ÜBER ALLES

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COMMISSION IMPOSSIBLE? – DOES THE COMMISSION HAVE THE STATUTORY POWERS TO REFER A COMPLAINT TO THE TRIBUNAL?

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The Commission issued a media release on 20 October 2016 notifying the public that it has decided not to prosecute this complaint.



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It's no wonder that the Metered Taxi Industry has been up in arms against Uber and as a result turned to the competition regulator to address this threat to its entrenched market position. In its complaint lodged with the Competition Commission (Commission), the Metered Taxi Industry raised the following concerns:

- Uber operates unfairly in that it secures partnerships with multinational companies and this gives it unparalleled access to the market;
- Uber misleads the public by its notion of job creation for drivers and does not comply with South African public rules and regulations;
- Uber floods the market with vehicles because it does not have to comply with licensing and other public transport regulations; and
- Uber charges prices that are below costs.

Following an investigation into these allegations, the Commission issued a media release on 20 October 2016 notifying the public that it has decided not to prosecute this complaint. The Commission concluded

that the alleged conduct does not contravene the Competition Act, 1998. This is no doubt good news not only for Uber but also for consumers who have found the Uber system to be refreshingly transparent from a pricing perspective; technologically driven; and ultimately an efficient, effective, reliable and safe means to travel.

In terms of the Competition Act, the Metered Taxi Industry has 20 business days to refer the complaint directly to the Competition Tribunal if it disagrees with the Commission's decision. It will be interesting to see whether the Metered Taxi Industry does decide to pursue its complaint which appears at its essence to be a complaint about improved service offering and the introduction of aggressive competition in a market that has been stagnant for too long.

It seems clear that while market competition may harm some participants like the Meter Taxi Industry, our policy makers and regulators should aspire to create market structures where competition can be rife, as these circumstances really do seem to yield the best consumer welfare results and isn't that what competition is really all about ... #competitionuberalles!

Natalie von Ey

COMMISSION IMPOSSIBLE? – DOES THE COMMISSION HAVE THE STATUTORY POWERS TO REFER A COMPLAINT TO THE TRIBUNAL?

Computicket challenged the referral on the basis that the Commission as an institution has no statutory powers to make such a referral.

The application was accordingly dismissed and thus either the Commission as an institution or the Commissioner as an office of the institution is granted the statutory powers to refer a complaint to the Tribunal.

The Competition Appeal Court (CAC) has recently dismissed an application brought by Computicket (Pty) Limited (Computicket), for the setting aside of the Competition Commission's (Commission) application for the production of certain documents, pursuant to a referral to the Competition Tribunal (Tribunal).

The leading ticket dealer has defended allegations of anti-competitive practices, which allegations have been levelled against it as far back as 2008 by some of its competitors, and which became the subject matter of Commission's investigations in 2010. The Commission subsequently referred the complaint to the Tribunal. Computicket challenged the referral on the basis that the Commission as an institution has no statutory powers to make such a referral, relying on s50(2)(a) of the Competition Act, 1998 (Act) which reads that "within one year after a complaint was submitted to it, the Commissioner must subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established". The Commission dismissed this argument, saying that a literal interpretation of this provision could not have been the intention of the Legislature, and that the reference to a Commissioner was clearly a drafting error considering that subsections (1) and (3) refer to the Commission's referral.

The CAC was thus tasked with interpreting this particular section, so as to determine whether in fact the Commission was in breach of the statutory provisions, thus

rendering the referral invalid and of no force or effect. In doing so, it considered the process of a complaint, and by whom such a complaint is made in terms of the Act.

Pursuant to an initiation of a complaint, either the Commissioner or the complainant may submit a referral. The CAC's interpretation of subsection (1) is that "where the Commissioner has initiated the complaint, the complaint can only be referred by the Commission". The CAC also highlighted the fact that the Commissioner is by definition a part of the Commission as an institution.

Computicket's arguments were received as unconvincing, and the Tribunal favoured the Commission's interpretation of this section of the Act. The application was accordingly dismissed and thus either the Commission as an institution or the Commissioner as an office of the institution is granted the statutory powers to refer a complaint to the Tribunal.

This interpretative approach favours the intention of the Legislature and gives a practical and holistic effect to the provisions of the Act.

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