IN THIS ISSUE

SUPPLIER CHARGED WITH FIXING THE PRICE OF YOUR COFFEE FIX

The Competition Tribunal has confirmed a consent agreement between the Competition Commission and Secret Trading CC, trading as Caffeluxe, in terms of which Caffeluxe admitted to fixing the price of coffee capsules sold to retail customers.

THE PRICE IS ALWAYS (OBJECTIVELY) RIGHT: THE COMPETITION APPEAL COURT ATTEMPTS TO CLARIFY THE PREDATORY PRICING BLUR

On 19 March 2018, the Competition Appeal Court (CAC) handed down its judgment in the hotly contested predatory pricing case involving Media 24 (Pty) Ltd.

CDH
CLIFFE DEKKER HOFMEYR

SUPPLIER CHARGED WITH FIXING THE PRICE OF YOUR COFFEE FIX

Price fixing as a per se prohibition is presumed to have negative market effects and is prohibited outright without an examination of the actual effects on competition, attracting a penalty of up to 10% of a firm's annual turnover.

The Competition Tribunal has confirmed a consent agreement between the Competition Commission and Secret Trading CC, trading as Caffeluxe, in terms of which Caffeluxe admitted to fixing the price of coffee capsules sold to retail customers.

This consent agreement comes after a string of recent consent agreements confirmed by the Competition Tribunal involving price fixing claims against various companies across different industries.

The Commission initiated a complaint in July 2015 against Caffeluxe and Global Coffee Exports Limited for their alleged conduct during 2013 and 2014 where they agreed not to undercut each other when selling coffee capsules to retailers. The Commission found this conduct to be in contravention of s4(1)(b)(i) of the Competition Act, No 89 of 1998.

Price fixing as a per se prohibition is presumed to have negative market effects and is prohibited outright without an examination of the actual effects on competition, attracting a penalty of up to 10% of a firm's annual turnover. In settling with the Commission, Caffeluxe agreed to pay a fine of R750,000, which is less than 10% of its annual turnover and payable in instalments. Caffeluxe has also agreed not to engage in any other anti-competitive conduct and has agreed to implement a competition law compliance programme for its employees, management, directors and agents. Although unclear from the consent order, it seems likely that Global Coffee was a successful leniency applicant.

This consent agreement comes after a string of recent consent agreements confirmed by the Competition Tribunal involving price fixing claims against various companies across different industries. In as much as this highlights the importance of consent agreements in expeditiously resolving matters between respondents and the Commission, it also highlights the alarming number of price fixing incidents that continue to be uncovered.

Duduetsang Mogapi and Chris Charter

Best Lawyers 2018 South Africa Edition

Included 53 of CDH's Directors across Cape Town and Johannesburg.

Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.

THE PRICE IS ALWAYS (OBJECTIVELY) RIGHT: THE COMPETITION APPEAL COURT ATTEMPTS TO CLARIFY THE PREDATORY PRICING BLUR

The Competition Commission had referred the complaint to the Competition Tribunal where it alleged that Forum had engaged in predatory pricing in contravention of s8(d)(iv), alternatively s8(c), of the Competition Act.

The wording of the Act does not support a requirement of intention, with the effect that competitive firms resorting to "fighting talk" will in itself not be a basis to impugn the competitive conduct it underpins.

On 19 March 2018, the Competition Appeal Court (CAC) handed down its judgment in the hotly contested predatory pricing case involving Media 24 (Pty) Ltd.

The case concerned three relatively small community newspapers which served readers and more importantly, (since the publications were distributed free to readers), advertisers in the Welkom area. Two of these newspapers (Forum and Vista) were owned by Media 24 and the other newspaper (Gold Net News) was independently owned.

The Competition Commission (Commission) had referred the complaint to the Competition Tribunal (Tribunal) where it alleged that Forum had engaged in predatory pricing in contravention of s8(d)(iv), alternatively s8(c), of the Competition Act, No 89 of 1998 (Act). On the Commission's version, Forum allegedly did so by selling its newspaper advertising space at discounted rates, unrelated to Forum's production and overhead costs, which ultimately resulted in Gold Net News exiting the market.

Section 8(d)(iv) of the Act prohibits a dominant firm from selling goods or services below its marginal or average variable cost unless a technological, efficiency or pre-competitive gain outweighs the anti-competitive effect. Should the alleged predatory conduct not fall within the ambit of s8(d)(iv), s8(c) provides a "catchall" provision whereby dominant firms are prohibited from engaging in "any other exclusionary act" (other than those provided for in s8(d) of the Act) if the anticompetitive effect outweighs its technological, efficiency or pro-competitive gain.

The Tribunal found that the standard in s8(d)(iv) was not breached, but found a contravention of s8(c) by applying a cost standard based on average total cost. What appeared to drive the Tribunal's decision, however, was evidence of predatory intent (which the CAC referred to as a finding based on "Average Total Cost plus intent").

The CAC confirmed the strictures of the objective thresholds set out in s8(d)(iv) of the Act, being marginal and average variable cost. However, the CAC, in considering the appropriate test for s8(c), found that the wording of the Act does not support a requirement of intention, with the effect that competitive firms resorting to "fighting talk" will in itself not be a basis to impugn the competitive conduct it underpins. Furthermore, imposing a standard of average total cost would result in a firm that is recovering its variable costs for production but not its initial fixed costs, falling within the ambit of predation. The CAC found this to be too strict a standard which might encourage higher prices if it were to be implemented.

The CAC found the standard of average avoidable costs (AAC) to be a more appropriate benchmark when assessing a s8(c) predation case. The AAC standard is better suited to determining whether a dominant firm is capable of excluding an equally efficient competitor. This is because pricing below AAC means that more profit would have been made by forgoing sales altogether by not producing the product. In other words, if these costs aren't covered,

CDH
CLIFFE DEKKER HOFMEYR

THE PRICE IS ALWAYS (OBJECTIVELY) RIGHT: THE COMPETITION APPEAL COURT ATTEMPTS TO CLARIFY THE PREDATORY PRICING BLUR

CONTINUED

The provisions of predatory pricing should never have the effect of making competitors afraid to compete on price.

an equally efficient competitor – ie with the same costs – would need to operate at a loss to match the price, which is thus *prima facie* predatory.

The CAC refused to consider opportunity costs (that is, forgone revenue) as forming part of AAC as this does not go to the costs of producing the goods. Moreover, if dominant firms had to add the cost of a discount to AAC, this would make the test more difficult to pass and thus result in higher pricing, for fear of a contravention.

The CAC ultimately found that there was not sufficient compelling evidence before it to suggest that the AAC threshold was breached. The CAC dismissed the complaint and ordered the Commission to pay costs.

Predatory pricing remains a complex battleground. The CAC judgment attempts to deal with some of the complex economic tests involved, but as always, context is key and the decision expressly stopped short of engaging with a residual question of when pricing below AAC might be justified.

The judgment notably makes specific reference to the dangers associated with too readily prosecuting firms for apparently low pricing. The provisions of predatory pricing should never have the effect of making competitors afraid to compete on price. This would undermine the vital objectives of competition law itself, being lower prices and increased consumer welfare. This warning should perhaps be heeded in light of the proposed Competition Amendment Bill whereby the Legislature proposes removing s8(c) and amending s8(d)(iv) to make predatory pricing dependant on "a relevant cost benchmark", as well as introducing rules aimed at prosecuting attempts to lower input pricing upstream ("predatory buying" for lack of a better term). This will run a serious risk of resulting in increased prices at all levels of the value chain – exactly the mischief the CAC warns against in enforcement.

Chris Charter and Reece May

CDH
CLIFFE DEKKER HOFMEYR

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

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

©2018 2275/MAR

CLIFFE DEKKER HOFMEYR