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COMPETITION ALERT

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TRIBUNAL FINES COMPUTICKET FOR EXCLUSIVE CONTRACTS – WHERE DOES THAT LEAVE ME?

Exclusive contracts are a common feature of the business landscape. The Competition Tribunal (Tribunal) recently pronounced that Computicket (Pty) Ltd (Computicket) abused its dominant position and engaged in anti-competitive behaviour due to the exclusionary terms in its contracts. Before shredding all exclusive agreements, it is worth reflecting on whether there were particular features of Computicket's exclusive contracts which caused the Tribunal to find Computicket to be in contravention of the Competition Act, No 89 of 1998 (Competition Act).

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The Tribunal fined Computicket R20 million and found it to have contravened s8(d)(i) of the Competition Act, No 89 of 1998 (Competition Act) which section prohibits a dominant firm from requiring or inducing a supplier or customer to not deal with a competitor, unless the dominant firm can prove efficiency gains that outweigh the anticompetitive effects.

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Computicket has confirmed its intention to appeal this decision to the Competition Appeal Court.

The contracts in question were between Computicket, the provider of outsourced ticket distribution services, and entertainment providers such as theatre owners, concert promoters and sports stadia (inventory providers).

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Shoprite's exclusivity 'upgrade':

Computicket's first exclusive agreements with inventory providers saw Computicket being the sole provider of ticketing services for a short duration, typically four months or less. According to the Tribunal, certain of the exclusionary features of these contracts were enhanced in 2005 when Shoprite acquired Computicket:

- Duration:
  - Under Shoprite's helm, the exclusivity agreements were for a minimum of three years and contained a default annual renewal clause, the effect of which was if neither party *expressly* cancelled three months prior to the expiry of the existing agreement, it would be automatically renewed for another year.
  - Even during the renewal period, the contract, if not cancelled, would automatically be extended for an additional year.

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- Form:
  - Shoprite is alleged to have extended the ambit of the exclusivity, such that it pertained to *all* events held by the inventory provider client including events of any third party, in a venue owned or leased by the client.
  - Management allegedly adopted a more active role in the enforcement of exclusivity contracts. For example, there were allegations of threats to inventory providers, such as delisting on the Computicket website, removal of equipment on site, damages claims and refusal to renew agreements unless there was future compliance.
- The use of exclusive contracts was also found to have drastically increased over time (from 58 in 2005 to some 431 in 2008).

The Tribunal's analysis:

The first requirement for liability in terms of s8(d)(i) is that the firm concerned is dominant. A firm is generally assumed to be dominant when it holds a 35% share of a relevant market (a firm with less than a 35% share can also be dominant but then the Commission or a complainant would need to prove that it has market power). It was common cause that Computicket is dominant. Whilst exclusive contracts imposed by firms that are not dominant may still attract liability under a different section of the Competition Act, it is indeed dominant firms who are the most at risk, and should heed the warning signs signalled by the Tribunal in this case.

The second requirement for liability is an 'exclusionary act'. Here too it was common cause that the relevant agreements prohibited inventory providers from utilising the services of a competitor for the duration of the contract without the written consent of Computicket. The Tribunal found this to be sufficient in meeting the legal hurdle.

The more contested liability requirement was whether there was evidence of any anticompetitive effects. The Commission's primary argument was that Computicket's agreements had a foreclosing effect on its competitors because they were not able to compete for sufficient tickets to reach the scale needed to become effective competitors.

Computicket opposed this by arguing, among other things, that its exclusive contracts served to mitigate reputational risks, clients preferred its services based on the superiority of its brand and entry of competitors into the market had increased.

The Tribunal accepted that Computicket may have a reputational interest in insisting on exclusivity, but found that the greatest bearer of the reputational risk for events was inventory providers, as opposed to the outsourced ticket distributors. The Tribunal then presumed that if there was indeed a reputational risk, the inventory providers could voluntarily elect to be bound by

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exclusivity. In the same vein, the Tribunal held that insofar as the inventory providers preferred the Computicket brand, they would voluntarily decide on exclusivity without having this contractually imposed on them.

Computicket also argued, among other things, that absent the exclusivity, event and seating chaos would ensue. Computicket's rivals, however, countered that it was logistically possible to block off tickets to more than one provider without causing double bookings or other catastrophes.

In competition law circles, considering only duration as a factor, a three-year period for exclusivity is generally considered acceptable (although other significant factors could alter advice as to whether the arrangement is ultimately likely to harm competition or not). It is thus interesting that the Tribunal focused on the automatic renewal clauses (as described above), as something which companies can exploit as clients often do not pay attention to this detail. The Tribunal cautioned that *"automatic renewal clauses or defaults therefore act as powerful tools to attracting and maintaining a firm's market share"*.

Ultimately the Tribunal found the cumulative effect of various factors sufficient to discharge the Commission's onus of proving an anticompetitive effect. The strongest evidence was said to be that of foreclosure of the market to effective competition. Others included allegations of a decrease in the supply by inventory providers, a reluctance by Computicket to timeously make use of available advances in technology and innovation, and a lack of choice for consumers.

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Lastly, the question was whether there were sufficient redeeming features in the form of an efficiency defence. Computicket bore the onus of proving this. Examples of efficiency justifications for exclusive agreements include client specific investments (for example, marketing contributions and hardware); free rider risk (other ticketing service providers benefitting from Computicket's investment for the client); and lower transaction costs for the consumer. The Commission accepted that in certain instances an exclusive agreement may be justified on efficiency grounds, but argued that they were not justified in this case, and the Tribunal concurred.

Central to the Tribunal's finding of Computicket's inability to prove an efficiency defence was that Computicket generally applied the exclusive provisions in each contract it has with inventory providers, regardless of individual event types and client needs. Computicket did have a bespoke arrangement with one particular client which suggested to the Tribunal that Computicket could tailor exclusive arrangements to those clients where there was a genuine need to recoup an investment or there was some other efficiency enhancing justification for exclusivity. It thus appears that the Tribunal took issue with Computicket routinely applying exclusivity to all its clients and all their events, as opposed to the existence of exclusivity per se.

Conclusion:

It is evident that the Tribunal has not drawn a line through all exclusive contracts and the unique context in which Computicket's exclusive agreements existed, such as Computicket's market position, was central to the Tribunal's analysis. Since exclusive contracts may well serve a legitimate purpose in some cases, be sure not to throw the baby out with the bath water. However, it is also clear that every exclusive agreement must be analysed on its own merits to assess whether it poses competition law risks.

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