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# COMPETITION ALERT

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### The price is right – a confusing end to a costly saga

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## The price is right – a confusing end to a costly saga

The Commission investigated the matter and in 2011, referred the complaint to the Tribunal, alleging predatory pricing.

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The matter related to community newspapers in Welkom in the Free State. One community newspaper, GNN complained to the Commission that Media24 (which ran two community newspapers at the time - Forum and Vista) had abused its dominance through offering advertising rates in Forum that were "below cost". The Commission investigated the matter and in 2011, referred the complaint to the Tribunal, alleging predatory pricing.

While s8(d)(iv) of the Competition Act prohibits pricing below marginal cost or "average variable cost", there was insufficient evidence that Media24's pricing was below that standard, and accordingly the matter dealt with what pricing level may be considered sufficiently "predatory" to contravene s8(c) of the Competition Act (the "catch all" provision prohibiting all exclusionary conduct which has an anti-competitive effect overall).

**The following cost standards are considered in cases of this kind:**

- "Average variable cost" or "AVC", being the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product.

- "Average avoidable cost" or "AAC", being the costs that could have been avoided if the firm ceased producing an identified amount of additional output, which is typically calculated as the sum of variable costs and product-specific fixed costs, divided by the quantity of the additional output.
- "Average total cost" or "ATC", being the sum of AVC, product specific fixed costs as well as a portion of common costs divided by the total units produced.
- "Long-run average incremental cost" or "LRAIC" refers to the total value of costs that are needed to enter and start supplying a specific product, represented as an average over output.

The decisions in the Tribunal, Competition Appeal Court (CAC) and the ConCourt dealt with the question of whether pricing below ATC could be predatory and if so, when? The Tribunal found that the Commission had proven that Media24 priced below ATC, and this coupled with "predatory intent", was a contravention of s8(c).

The CAC overturned the Tribunal's decision on the basis that the test in the Competition Act under s8(c) was an objective test and the Tribunal had inappropriately grafted a subjective element into that test. The CAC found that predation should focus on likely economic effect rather than intention and therefore dismissed the complaint.

## The price is right – a confusing end to a costly saga...*continued*

Given that the appeal was ultimately dismissed by the ConCourt, the CAC decision stands.

### The ConCourt's decision:

The Commission appealed to the ConCourt. Confusingly, there is no majority decision arising from the ConCourt decision – only an order which is stitched together from four conflicting judgments. Out of the 10 judges that decided the matter:

- Judgment 1 (three judges): Would grant leave to appeal, uphold the appeal, and remit the matter to the CAC on the basis that the CAC's disregard of the evidence of predatory intent incorrectly limited the powers of the Commission to prosecute matters.
- Judgment 2 (four judges): Would dismiss the application for leave to appeal as the assessment of these specialist economic matters is not appropriate to be determined by the ConCourt and gives rise to no constitutional question or a point of law in the public interest.
- Judgment 3 (two judges): Would grant leave to appeal (for different reasons to Judgment 1) but would dismiss the appeal as prohibiting pricing below ATC would undermine the Competition Act's objectives.
- Judgment 4 (one judge). Concurs with Judgment 3 on leave to appeal and Judgment 1 on the merits.

Seeing as six judges granted leave to appeal, albeit for different reasons (Judgments 1, 3 and 4), leave to appeal was granted. However, since six judges did not uphold the appeal, again for differing reasons (Judgments 2 and 3), the appeal was dismissed.

### Conclusion:

Given that the appeal was ultimately dismissed by the ConCourt, the CAC decision stands. Accordingly, in evaluating s8(c), one cannot look to predatory intent as a factor indicating a contravention, when a firm prices below ATC.

A few final points to note: the Competition Amendment Act has amended s8(d)(iv) by prohibiting pricing below AAC and AVC. The CAC and ConCourt decisions therefore stand on the question of pricing below ATC. Secondly, Media24, in this case was not liable for a fine because s8(c) was at the time still subject to the so called "yellow card provision" in terms of which a firm could not be fined for a first-time offence. This yellow card has been removed with effect from 12 July 2019, when certain provisions of the [Competition Amendment Act](#) came into force. Thus, whilst the standard has now been clarified for these abuses of dominance, the threat of an administrative penalty now looms.

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