THE INTENTION TO EXCLUDE COMPETITORS: DOES ANYBODY CARE AND IF SO, HOW MUCH?

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The Tribunal’s approach towards the exclusion of competitors by a dominant firm

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Prohibitions against excluding competitors

The abuse of a dominant position is addressed in s 8 of the Competition Act, 89 of 1998 (“the Act”). Section 8 sets out various practices which, if engaged in by a dominant firm, constitute an infringement. Section 8(c) of the Act sets out a general prohibition against exclusionary acts, while s 8(d) sets out certain specific exclusionary acts. For the purposes of the Act, an exclusionary act is “[a]n act that impedes or prevents a firm from entering into, or expanding within, a market”. Thus, as an abuse of dominance, an exclusionary act by a dominant firm concerns unilateral conduct. The equivalent prohibition in EU law is Article 82 of the EC Treaty, which also applies to the unilateral conduct of a dominant firm.1

The Tribunal’s approach towards the exclusion of competitors by a dominant firm

In terms of s 8(d)(i) of the Act, a dominant firm is prohibited from engaging in the exclusionary act of “requiring or inducing a supplier or customer to not deal with a competitor”, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act.

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1 In EU competition law and in South African competition law, the dominance itself is not prohibited, only certain practices regarded as an anti-competitive when engaged in by firms enjoying a dominant market position. In terms of Article 82 EC Treaty, ‘[A]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.’
In the *SAA* case,\(^2\) the Competition Tribunal (the “Tribunal”) fined South African Airways (“SAA”) R 45 million\(^3\) for abusing its dominant position in the domestic airline market. The Tribunal ruled that two incentive schemes which SAA operated with travel agents were in breach of the Act. SAA’s incentive schemes, used to compensate travel agents for their services, were found to give travel agencies a compelling commercial incentive to sell SAA tickets in preference to those of its rivals. The Tribunal also found that the Explorer scheme, a system of rewarding travel agency staff with SAA tickets on the basis of the number of SAA tickets they sold, reinforced the exclusionary effects of the incentive schemes. The Tribunal ruled that the Commission had established, on a balance of probabilities, that the *practical effect* of the incentive schemes was to induce suppliers not to deal with competitors of SAA and therefore constituted an infringement of s 8(d)(i) of the Act.\(^4\)

It is noteworthy that SAA’s intentions did not form part of the finding of a contravention of s 8(d)(i). Considering the evidence presented, the Tribunal found that the Commission had established, on a balance of probabilities, that the practical effect of SAA’s incentive schemes was that they induced suppliers not to deal with SAA’s competitors and, as such, constituted an exclusionary act for purposes of s 8(d)(i) of the Act. Having drawn this conclusion, the Tribunal’s next enquiry was whether the exclusionary act has an anti-competitive effect. In this regard, the Tribunal noted that for such a finding, it is necessary that “*either there is direct evidence of an adverse effect on consumer welfare or evidence that the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.*”\(^5\)

Seemingly, on the Tribunal’s approach, which we consider to be correct, the conduct in question could only constitute a contravention of s 8(d)(i) if there were evidence of an anti-competitive effect.

\(^2\) *The Competition Commission / South African Airways*, Case No. 18/CR/Mar01.
\(^3\) Approximately € 5,619,100 on the day of the Tribunal’s decision (29 July 2005).
\(^4\) Section 8 of the Act deals with the abuse of a dominant position. Section 8(d)(i) provides that it is prohibited for a dominant firm to engage in the exclusionary act of requiring or inducing a supplier or customer to not deal with a competitor, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act.
\(^5\) See *The Competition Commission / South African Airways*, Case No. 18/CR/Mar01, p. 49, paragraphs 218 to 219.
competitive effect on either of the bases mentioned above, regardless of SAA’s intentions to exclude rivals. Conversely, the conduct in question could not have constituted a contravention of s 8(d)(i) if evidence of an anti-competitive effect had not been established, even if it were shown that SAA had actively sought to exclude rivals. On the Tribunal’s approach to s 8(d)(i) of the Act, the enquiry as to a contravention is a factual enquiry as to the effect of an act on competition in the relevant market.

**Intention to exclude competitors or the effect of exclusion?**

By comparison, the approach towards the abuse of dominance in the EU is reflected in the European Commission’s decision in the *AstraZeneca* case.6 In this case, following a six-year investigation, the European Commission (“EC”) found that AstraZeneca had abused its dominant position on a number of national markets in the European Economic Area (“EEA”) for oral prescription proton pump inhibitors (“PPIs”). AstraZeneca owns the successful drug, Losec, used to treat stomach ulcers.7 Article 82 of the EC Treaty prohibits any abuse of a dominant position by one or more undertakings, where the abuse has an effect on trade between EC member states.8

The EC found two abuses of dominance by AstraZeneca, relating to misrepresentations made from 1993 - 2000:

- AstraZeneca had provided misleading information to several national patent offices in the EEA resulting in the company gaining extended patent protection for Losec through so-called supplementary protection certificates (SPCs). The patent offices were not obliged, as in usual patent assessments, to consider whether the products were innovative, and had essentially relied on the information supplied by the company; and

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6 The EC’s decision is on appeal.
7 Losec pioneered a new generation of medicines to treat stomach ulcers and other acid-related diseases – so-called PPIs. Losec initially received patent protection in Europe in 1979. During part of this period, Losec was the world’s best-selling prescription medicine. See the EC’s press release on [www.europa.eu.int](http://www.europa.eu.int), reference: IP/05/737, date 15/06/2005.
• AstraZeneca had misused regulatory procedures applied by the national medicines agencies by selectively withdrawing marketing authorizations for the capsule form of Losec with the intent of blocking or delaying entry by generic firms and parallel traders: this inhibited generic entry as the withdrawal of a marketing authorization prevents applications from generic manufacturers from being assessed under the abridged procedure. Patent protection for the tablet form of Losec, for which AstraZeneca maintained a marketing authorization, was only due to expire some time after the end of patent protection for the capsule form.

The EC stated that, at the time, generic products could only be marketed and parallel importers only obtain import licenses if there was an existing reference market authorization for the original corresponding product (Losec). The purpose of a market authorization is the right to sell a medicine, and not to exclude competitors. Unlike patents, SPCs and data exclusivity, market authorizations are not intended to reward innovation, and the finding of an abuse should not, therefore, affect incentives to innovate. The relevant EU rules on marketing authorizations have since changed so that such an abuse cannot be repeated.

Unlike the Tribunal’s approach in the SAA case and in others, the intention of the dominant firm appeared to play a key role in the EC’s finding. The EC noted in its official press releases dealing with its decision, that there was a pattern of intentional misleading representations by AstraZeneca as part of a centralized and coordinated strategy with the aim of acquiring or preserving SPCs to prevent or delay generic market entry. As such, the firm was found to amount to an infringement of Article 82 of the EC Treaty which prohibits the abuse of a dominant position. The EC imposed a penalty of € 60 million for AstraZeneca’s infringement.

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8 See footnote 1 above.
9 See, for example, Nationwide Poles CC and Sasol Oil (Pty) Ltd, Competition Tribunal Case Number 72/CR/Dec03.
10 The EC’s decision was not published at the time of writing and it may be the case that evidence of foreclosure of the market to rivals was considered more closely in reaching the conclusion but not stated in detail in the EC’s press release.
The decision appears to differ from the approach followed in the *Hoffman La Roche* case,\(^\text{11}\) where an abuse of dominance was defined with reference to the effect on the market of hindering the maintenance of competition still existing in the market or the growth of competition. Similarly, in the decision by the Court of First Instance (CFI) in *BPB Industries v Commission*, the CFI held in relation to exclusive purchasing agreements that exclusive purchasing cannot, as a matter of principle, be considered to infringe Article 81 EC Treaty: it is necessary to examine the effects of such an agreement in its specific context.\(^\text{12}\)

A similar approach to that applied in *Hoffman La Roche* and in *BPB Industries* has been followed in South Africa, with regard to the relevance of the effect of a firm’s conduct on the market. In the *SAA* case, the Tribunal adopted a less subjective approach than that which appears to have been followed in the *AstraZeneca* case. The Tribunal stated that even if the conduct meets the definition in terms of s 8(d) of the Act, prior to the respondent being required to prove any efficiency justifications, the complainant is required to show that the exclusionary act has an *anti-competitive effect*.\(^\text{13}\) According to the Tribunal, this burden is met if the complainant can show (i) evidence of actual harm to consumer welfare, or (ii) evidence that the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. The latter conclusion, the Tribunal stated, is partly factual and partly based on reasonable inferences drawn from proven facts. “If the answer to that question is yes, we conclude that the conduct will have an anti-competitive effect. Whichever species of anti-competitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scales with a concept capable of being measured against the alleged

\(^{11}\) *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, 3 CMLR 211.


\(^{13}\) The Tribunal considered in detail the different possible approaches towards the application of this section of the Act, including a discussion of approaches to equivalent legislation in other jurisdictions. The Tribunal regarded the approach in terms of which once an act is exclusionary, it is deemed to have an anti-competitive effect as problematic, on the basis that this can lead to the outlawing of conduct that has no anti-competitive effect. The approach the Tribunal preferred was that of the complainant being required to show that the exclusionary act has an anti-competitive effect. See *The Competition Commission / South African Airways* (Case No. 18/CR/Mar01), p.25, at paragraph 104, *et seq.*
efficiency gain."14

On the evidence presented, the Tribunal found that the Commission had, on a balance of probabilities, established that the practical effect of the schemes was to induce suppliers not to deal with competitors of SAA. The Tribunal found that the override and incremental commission schemes gave travel agents a financial incentive to move customers to purchase tickets from them away from rivals and towards SAA, and that agents are, to a significant extent, able to influence customer preferences so as to give effect to these incentives, and on this basis, constituted an exclusionary act.

In relation to the anti-competitive effect of the exclusionary act, the Tribunal found that the effect of the anti-competitive conduct on the structure of the market was to inhibit rivals from expanding and, at the same time, reinforce SAA’s dominant position. The Tribunal regarded the exclusionary act as substantial or significant in terms of its effect in foreclosing the market to rivals. The Tribunal also found it highly likely that the foreclosure would have had adverse effects on consumers. The effects-based approach of the Tribunal is reflected in its determination of the duration of SAA’s infringement. The Tribunal considered that although SAA’s incentive schemes had existed for a significant period of time, it was not the existence of the schemes that was pertinent but rather the nature of the schemes which had changed over time. On this basis, the Tribunal considered that evidence of the exclusionary effect of the incentive schemes was shown for the period October 1999 to May 2001. This period was considered the relevant period of SAA’s abuse of its dominant position.15

The Tribunal found that SAA’s incentive schemes caused two competitive harms. The first was harm to consumers, since the effect of the incentive schemes was that in the short run consumers fly on more expensive tickets and at less preferable times than if ticket offerings by travel agents were unbiased. The second competitive harm was that SAA was able to perpetuate

14 The Competition Commission / South African Airways (Case No. 18/CR/Mar01), p.31, at paragraph 132.
15 The Tribunal noted that the two incentive schemes may have had effects for long after the relevant period but that its findings were confined to the period for which evidence on market shares, sales of tickets through travel agents and effects on rivals’ sales of tickets could reasonably be correlated. See the Tribunal’s ruling in The Competition Commission / South African Airways (Case No. 18/CR/Mar01), p.4, at paragraph 9.
its existing dominance, restrict new entry into the market and inhibit its existing rivals from expanding in the market.

As far as a subjective enquiry into the conduct of a dominant firm is concerned, this plays a part in the Tribunal’s approach but only after a finding of a contravention, when a determination is made as to the penalty to be applied. In terms of the Act, a firm that has infringed s 8(d) of the Act may be liable for an administrative penalty of up to 10% of the firm’s annual turnover in South Africa and its exports from South Africa during the firm’s preceding financial year. When determining an appropriate penalty, the Tribunal is required to have regard to the following factors:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has cooperated with the Commission and the Tribunal; and
- whether the respondent has previously been found in contravention of the Act.

It is only at this stage of the enquiry that subjective considerations may be taken into account. In the SAA case, the Tribunal’s penalty of R 45 million was the largest imposed by the South African authorities to date although it was not the maximum penalty that could have been imposed. When considering the first criterion mentioned above, the Tribunal noted SAA’s

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16 A contravention of s 8(d) of the Act constitutes a per se offence and the Tribunal may impose an administrative penalty for a first infringement. The Tribunal is empowered to impose an administrative penalty for contraventions of certain other sections of the Act that require a rule-of-reason analysis and are not per se offences only if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice.
intention with regard to the incentive schemes, stating that:

“…[T]he nature of the override scheme during the relevant period was of such a nature that the real intention must have been to make use of it in an anti-competitive, exclusionary manner, rather than to introduce efficiencies into the ticket distribution system, evidence which we have already found to be wholly unconvincing. Its use in conjunction with the Explorer scheme at the same time aggravates its effect. The combined conduct whilst brief in duration, in terms of the evidence, was nevertheless of a seriously anti-competitive nature.”  

In considering the behaviour of the respondent, the Tribunal noted the Commission’s submissions that it was well known, or should have been to SAA, that override schemes had fallen foul of competition law elsewhere, but SAA continued to implement them. The Tribunal considered the relevant facts relating to this criterion and concluded that “It appears that SAA was not prepared to abandon the override scheme at any time soon despite serious questions over its legality nor did it show any caution in this regard. We therefore find that the behaviour of SAA in the market place since the complaint does not warrant any mitigation of the fine but on the contrary, aggravation.” 

Based on the various factors considered, and the weighting applied to those factors, the Tribunal imposed a penalty of 2.25% to the base figure of R 2 billion, giving rise to a penalty of R 45 million.

While the Tribunal’s approach (of limiting the enquiry of a contravention to the effect of conduct) carries the advantage of permitting conduct which does not have an anti-competitive effect – in contrast to the EC’s approach which seemingly supports a finding of abuse of dominance on the basis of intention, regardless of effect – the Tribunal’s approach makes it incumbent on dominant firms to assess the effect of their conduct on the market. This creates uncertainty for dominant firms, who are tasked with assessing a likely effect of proposed conduct. Both approaches carry uncertainty for firms holding a dominant position and aggressive marketing strategies by dominant firms carry the risk of infringements of competition.

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17 Section 59(3) of the Act.
18 The Competition Commission / South African Airways, Case No. 18/CR/Mar01, p.65, paragraph 285.
19 See The Competition Commission / South African Airways, Case No. 18/CR/Mar01, p. 70, paragraphs 309 to 310.
legislation. Ironically, the South African legislation is a hybrid of the EU and the US system and, when drafted, the rules against the abuse of dominance were regarded as following the EU system rather than the US.20 When interpreting and applying the Act, the South African authorities are empowered to consider appropriate foreign and international law. The outcome of the appeal against the EC’s decision in the AstraZeneca case will, therefore, also be of interest to the application of the abuse against dominance under South African competition law.

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20 See, for example, Brassey et al Competition Law (Juta, 2002, at p180).