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Competition Commission appeals against Tribunal's finding

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On 24 March 2014, the Competition Tribunal issued its reasons in respect of a matter concerning the distribution systems of South African Breweries Limited (SAB). SAB contracts with distributors for the distribution of its products on terms that grant these distributors exclusive territories for the distribution of SAB products at a distribution fee (in the form of a discount on the retail price).

The Competition Commission's case was that SAB's conduct amounted to unlawful price discrimination in contravention of s9 of the Competition Act, No. 89 of 1998 to the extent that it charged a different price to its authorised distributors (being retail price minus a discount) than to other distributors (being the retail price), market division in contravention of s4(1)(b) of the Act as it agreed not to compete with its authorised distributors for the distribution of SAB products in the exclusive territories and, alternatively, a vertical restrictive practice in contravention of s5(1) by virtue of the territorial carve-outs being anti-competitive and not capable of justification.

In respect of the market allocation charge the Tribunal noted that SAB, through enforcing exclusivity in respect of its authorised distributors, may have engaged in conduct that amounted to market allocation. No (formal or informal) agreement existed between the authorised distributors in respect of the exclusive territories, but SAB, allegedly, acted as the hub in a hub-and-spoke arrangement in respect of this market allocation arrangement.

In addition, SAB, in performing certain of its distribution functions itself, was a competitor of its authorised distributors and stood in a horizontal relationship with them. The Tribunal, however, considered a characterisation argument in respect of the ostensible transgression of s4(1)(b) of the Act.

Distributors are not competitors

The Tribunal considered whether SAB and its authorised distributors are basic economic units independent of SAB. In the absence of guiding case law and precedent on how to identify the boundary between a single and basic economic unit, the Tribunal concluded that the authorised distributors are not sufficiently independent of SAB in the manner that would make them competitors of SAB in respect of the distribution of products. This reasoning was not based on a single economic entity theory, but rather on the characterisation of the relationship between SAB and its authorised distributors and a conclusion that this type of independent, yet highly interrelated (and controlled), conduct is not the type of conduct the Legislature intended to prohibit as per se collusive.

In respect of the vertical and horizontal restrictive practices complaint against SAB, which are analysed based on the rule

of reason, the Tribunal concluded that the Commission could not successfully show that there was a substantial lessening or prevention of price competition, as it was shown that the current distribution system employed by SAB in fact leads to the cheapest possible prices to customers and that there was insufficient evidence to prove a lessening of non-price competition.

The Commission, further, brought a case that the differentiation by SAB between its authorised distributors and other distributors in granting discounts on the retail price as remuneration for distribution services amounted to prohibited price discrimination in terms of s9(1) of the Act.
SAB's approach, in other words, is that most customers except its authorised distributors are treated as retail customers and are charged retail prices for its products. The Tribunal found that the transactions between SAB and authorised distributors, on the one hand, and independent distributors, on the other hand, were not functionally equivalent, to render these transactions equivalent and capable of scrutiny under s9 of the Act.

Resale price maintenance

The Commission further brought a charge of resale price maintenance against SAB in respect of the obligatory use of a computer system that limited authorised distributors from setting their own price.

The Tribunal found that there was no evidence to suggest that SAB intentionally imposed the computer system on its authorised distributors in order to enforce a system of resale price maintenance or penalised its authorised distributors for granting discounts and, hence, s5(2) of the Act was not transgressed.

On 14 April 2014 the Commission appealed this decision by the Tribunal to the Competition Appeal Court on, amongst other, the following grounds:

- The Tribunal erred in its conclusion that SAB and its authorised distributors could not be understood to be competitors as contemplated in s4(1)(b) of the Act relating to per se prohibited horizontal restrictive practices;
- S4(1) of the Act does not envisage or require an analysis of whether the firms are sufficiently independent to stand in a horizontal relationship and the only defence in this regard is a single economic entity defence in terms of s4(5), which the Tribunal acknowledged was not raised by the respondents and the respondents, in any event, do not satisfy;
- That SAB and its authorised representatives, in fact, are competitors (or at least potential competitors) and the conduct engaged in constitutes market allocation in contravention of s4(1)(b)(ii) of the Act;
- There was sufficient evidence to prove a substantial lessening or prevention of competition in respect of the complaint of vertical restrictive practices in terms of s5(1) of the Act, as the arrangements between SAB and its authorised distributors, amongst other reasons, are harmful to consumer welfare, limit competition between authorised distributors, and the exclusive territories granted in terms of the arrangement between SAB and its authorised distributors provide these authorised distributors with a captive consumer base and an opportunity to charge monopoly prices and to operate inefficiently;
- The transactions between SAB its authorised distributors and independent distributors are equivalent transactions and the Tribunal erred further considering the charge of prohibited price discrimination in contravention of s9(1) of the Act and should have concluded that SAB engaged in price discrimination with reference to its relationship with its authorised distributors and independent distributors;
- For resale price maintenance to be proven, the presence of intention is irrelevant and the Tribunal should have concluded that SAB transgressed s5(2) of the Act by engaging in resale price maintenance, which the Commission argues it did intentionally.

The Commission seeks an administrative penalty against SAB in the total amount of R1,856,320,000 including certain behavioural remedies should its appeal in respect of all the charges against SAB succeed.

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