

Bullying Tactics: The Introduction Of Margin Squeeze Into South African Competition Law

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The recent decision of the Competition Appeal Court ("CAC") in *Senwes Limited v the Competition Commission* (Case no. 87/CAC/ FEB09) imported into South African competition law the concept of a margin squeeze, affirming in principle the adoption of foreign jurisprudence when interpreting or applying the provisions of the Competition Act no. 89 of 1998 ("Competition Act"). While the order of the CAC was subsequently overturned by the Supreme Court of Appeal on jurisdictional grounds, the decision of the CAC insofar as it relates to introduction of a margin squeeze under section 8(c) of the Competition Act remains in effect.

In terms of section 8(c), it is prohibited for a dominant firm to engage in an 'exclusionary act' if the anti-competitive effect of such conduct outweighs any technological, efficiency or pro-competitive gain. An 'exclusionary act' is defined in section 1 as conduct that impedes or prevents a firm from entering into, or expanding within, a particular market. This section is regarded by the competition authorities as a 'catch-all' provision, thereby enabling a complainant to file a complaint against a dominant firm as a result of any conduct that could be regarded as exclusionary. However, in contrast to the conduct specifically listed under section 8(d), which are assumed by their nature to be exclusionary in effect, any conduct falling within the parameters of section 8(c) must be proved to be exclusionary before the competitive effect thereof will be considered. In other words, section 8(c) places an onus on the complainant to prove that the conduct complained of has had the effect of excluding a firm from a market. It will not suffice for a complaint to merely allege the existence of bullying tactics on the part of a dominant firm.

In considering whether the conduct complained of in *Senwes* fell foul of section 8(c), the CAC and the Competition tribunal ("tribunal") had regard to the laws regulating competition in the European Union. In particular, the writings of O'Donoghue and Padilla relevant to Article 82 of the EC Treaty were used at length to describe the nature of a margin squeeze and to identify instances in which a dominant firm may be regarded as engaging in such conduct. In particular, it was concluded that a margin squeeze will occur when –

"...a vertically integrated firm with a dominant position in an upstream market prevents its non-vertically integrated downstream rivals from achieving an economically viable price-cost margin".

Otherwise stated, the term 'margin squeeze' may be used to describe instances in which a vertically integrated firm, dominant in the upstream market, supplies its own downstream operations at a preferable rate to its downstream competitors, to the exclusion of competition in that market.

To this end, the tribunal found that in order to amount to a contravention of section 8(c), the goods or services provided by the dominant firm must be essential to enable downstream rivals to compete. Furthermore such input must form a substantial part of the downstream rival's fixed expenditure. Once these requirements are met, the exclusionary nature of the conduct complained of will only be established if – the downstream operation of the dominant firm could not profitably trade on the basis of the upstream price charged to its

competitors or, the price charged by the dominant firm in the downstream market would not allow a reasonably efficient firm operating in the downstream market to obtain a normal profit. this assessment in terms of section 8(c) of the Competition Act was endorsed by the CAC which found that the widely couched provision did include the concept of a margin squeeze, and if properly evidenced, would amount to a prohibited practice under the Competition Act.

With this in mind, vertically integrated firms would be well advised to exercise caution when offering goods or services to its downstream rivals. in instances in which it can be established that the terms of supply render the downstream activities of a dominant firm's competitors unprofitable, assuming that the dominant firm supplies its own operations at a preferential rate, such conduct may be found to amount to a margin squeeze in contravention of section 8(c) of the Competition Act.