IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case Number: 170/CAC/Feb19

In the matter between:

COMPUTICKET (PTY) LTD Appellant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA Respondent

Delivered:

JUDGMENT

BOQWANA JA (DAVIS JP and UNTERHALTER AJA concurring)

Introduction

[1] The appellant ("Computicket") appeals against the decision of the Competition Tribunal ("the Tribunal") which found it to have breached the provisions of section 8 (d) (i) of the Competition Act 89 of 1998 ("the Competition Act"), by abusing its dominance in the market for the provision of outsourced ticket distribution services to inventory providers for entertainment events, from mid-2005 to 2010. The Tribunal consequently ordered Computicket to pay an administrative penalty of R20 000 000 (Twenty million Rand) within 60 days of that order.

[2] This followed from complaints submitted to the respondent ("the Commission") between 2008 and 2009 by various complainants, namely: Strictly Tickets CC ("Strictly Tickets"); Soundalite Artslink ("Soundalite"); KZN Entertainment News and others.

Background facts

[3] Computicket is a well-known brand in South Africa, having been established in 1971. It is engaged in the business of providing outsourced ticket distribution services, to inventory providers such as theatre owners, theatre producers, promoters, festival organisers in the entertainment industry and sports events. Computicket acts as a ticketing agent on behalf of the inventory providers: it holds the inventory for events, sells it to end-customers or patrons, and passes on the funds collected to the inventory providers after deduction of its fees for services provided. This is all regulated by contract. It has built a very strong and successful brand over the years.

[4] In late 1998 TicketWeb, owned by African Media Entertainment ("AME"), entered the market as Computicket's competitor, supported by one of Computicket's biggest clients, Big Concerts. TicketWeb gained a significant share of the ticketing market, and by January 2001 it was one of South Africa's most popular internet shopping sites. In late 2000, or early 2001, the Johnnic Group and South African Investments Limited ("SAIL") each acquired a 42.5% stake in TicketWeb from AME, the latter apparently not being in a position to provide additional capital for TicketWeb. In 2002 Computicket merged with TicketWeb under the banner of Computicket. At that stage, Computicket had been a member of the Naspers group, which owned it through M-Web.

[5] In 2004, the Shoprite group started Ticketshop, in competition with Computicket. It focused on sport stadia (rugby, soccer and cricket) and on smaller events, in respect of which its services could be offered. In 2005 Computicket was acquired by the Shoprite Group, operated as Shoprite Checkers (Pty) Ltd ("Shoprite"). The Ticketshop brand was removed. According to Computicket, the rationale for its acquisition was that the incorporation of Computicket into Shoprite would generate operational synergies, Computicket would be supported by Shoprite's financial muscle and offer tickets to a much broader consumer base. Using Shoprite's infrastructure, Computicket grew from 90 outlets in 2005, to 600 points of presence, situated in every Checkers and Shoprite supermarket and hyper store, selected U Save, House & Home Stores and several self-standing box-offices. Computicket supports Shoprite's retail business and brands by drawing customers to their stores. Computicket currently distributes tickets through call centres, via the internet and through physical retail outlets.

[6] Other entrants into the market were Strictly Tickets in 2004, which offered the first paperless ticketing solution. Webtickets, in 2007, which used Pick 'n Pay, Ticket Connection in 2008, sponsored by Mr Price, TicketSpace in 2009, and a few other small players. I return to the topic of entrants shortly.

[7] In 1999 Computicket introduced exclusivity provisions in their contracts with inventory providers. These were for relatively short periods, four months or less, and only applied to single events put on by the inventory providers. These clauses read:

> *"Client agrees that Computicket's appointment to sell tickets on its behalf for the Event is exclusive and, Computicket alone shall sell tickets to the event or performance to the exclusion of any person other than Client (and in that regard only to the extent agreed to in writing by Computicket)."* (Clause 15.1)

The Tribunal referred to these as *"first generation agreements"* to distinguish them from those that would later follow.

[8] By mid-2005 the scope, duration and coverage of the exclusivity provisions increased. These new exclusivity contracts, also referred to as "*second generation agreements*", were for a minimum period of three years, with a default indefinite annual renewal clause under "*Duration of Agreement*".[1] The scope of these new contracts extended to all events put on by the inventory providers during the relevant period, and also to all events put on by a third party in a venue owned or leased by the inventory provider. These expanded exclusivity provisions were included effectively in all Computicket's contracts with the inventory providers. The relevant clause of the contract, clause 2.3, determined:

> *"2.3 For the duration of this Agreement, Client appoints Company, which accepts the appointment, to be Client's exclusive ticketing agent for all Events, and Client agrees, for the duration of this Agreement, not to instruct or allow any other party to accept booking or sell or distribute tickets to any Event without the written consent of the Company."*

Whilst clause 2.7 provided:

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[1] *"This Agreement shall commence on the date of Client's signature hereof and shall continue for an initial period of three years, and unless terminated at the end of the initial period by either party giving the other three months' written notice of termination, the Agreement shall continue for successive periods of one year each, subject to the right of either party to terminate the Agreement at the end of each successive year by giving three months' written notice of termination prior thereto."*

> "*2.7 Client specifically agrees and acknowledges that in setting up the requisite organisational structure, and affording access by Client to hardware and software necessary for the provision of the Services, and in making available its facilities in respect of its personnel, intellectual property, expertise and ancillary thereto, Company is incurring expense and undertaking the commitment of resources; and accordingly, the exclusivity set forth in Clause 2.3 above is justified and reasonable.*"

[9] The exclusivity clauses were contained in Computicket's standard services agreement. It appears that, particularly after the take-over by Shoprite, Computicket strictly enforced these exclusivity provisions and especially in relation to inventory providers that attempted to utilise the services of competing firms. Failure by the inventory providers to remedy the alleged breach of the exclusivity clause would have consequences such as cancellation of the contract, removal of Computicket's equipment and/or damages claims. It appears that Computicket rejected any requests for non-exclusive contracts. These issues are expounded upon later in the judgment.

[10] As it was accepted by Computicket that it was a dominant firm for the purposes of section 7 of the Act, having had a market share in excess of 90% in the outsourced distribution market during the complaint period, the Tribunal went on to find that the agreements in question were at least "*facially exclusive*", as they prohibited the inventory providers who were Computicket's customers from utilising the services of a competitor without Computicket's written consent, for the duration of the contract. This, according to the Tribunal, met the definition set out in section 8 (d) (i) of the Act. Following the test it set out in *SAA (CT)*[2], it agreed with Dr Mncube's (the Commission's expert) chosen counterfactual which was based upon the period 1999-2001. In this regard, it found that a case of anti-competitive effect had been established on a balance of probabilities and that Computicket had not been able to discharge its onus of showing any efficiency justifications.

[11] The nub of the appeal by Computicket is that the Tribunal erred in its factual conclusions on exclusion and anti-competitive effects, primarily because excessive emphasis was placed on the experience of a "*single would-be competitor*" of Computicket [Strictly Tickets], that was (a) not an "*efficient competitor*"; (b) had focused its efforts on the sale of theatre tickets (which represented no more than 3% of the opportunities in the outsourced

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[2] *Competition Commission v South African Airways (Pty) Limited* (18/CR/Mar01) 2005] ZACT 50 (28 July 2005)

ticketing market in the relevant period); and (c) in fact had not been excluded from participation in the relevant market. The approach of the Tribunal as to how it accepted the Commission's evidence, was said to be untested and speculative. The expert analysis presented by the Commission, as opposed to that presented by Computicket, is challenged. Dr Mncube's independence is also placed in issue.

Dr Mncube's independence

[12] It is convenient to first deal with the issue of Dr Mncube's independence. To the extent that it is suggested that, by virtue of having been an economist in the employ of the Commission, Dr Mncube was disqualified from giving evidence as an expert for the Commission, that contention must be rejected. His evidence cannot be discredited on a plausible legal basis. The employment of Dr Mncube by the Commission has no greater entailments than the appointment of an expert by a litigant. What signifies is whether an expert discharges the duties that bind an expert. Those duties have been specified by this Court.[3] It remains the role of the Tribunal or the Court, on appeal, to assess the objectivity of any evidence he presented, on the basis of whether it is in line with the law as it relates to the giving of expert evidence. The manner in which such was obtained and assessed may also be evaluated, to the extent necessary. Any criticism regarding Dr Mncube's conduct as an expert should be based on particular facts and dealt with accordingly. The fact that he had an interest in the outcome of the case, owing to his employment with the Commission, is no sound legal basis to discard his evidence or accord it any less weight than it would otherwise have. No proper grounds were placed to challenge the independence of Dr Mncube's expert evidence nor to suggest that the evidence he gave fell within the realm of bias which would trigger a decision regarding its admissibility[4] and thus the Tribunal was correct in dismissing this assertion.

The relevant provisions of the Act

[13] Section 8 (d) (i) dealing with Abuse of Dominance provides that:

> "***Abuse of dominance prohibited.*** *–(1) It is prohibited for a dominant firm to –*
>
> ...

[3] *Sasol Chemical Industries Limited v The Competition Commission* 2015(5)SA 471(CAC) at paras 178-184
[4] See *Ways to curb expert bias,* De Rebus September 1 2017

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act-

(i) requiring or inducing a supplier or customer to not deal with a competitor;..."

[14] An exclusionary act is defined in section 1 of the Act as "*an act that impedes or prevents a firm from entering into, participating in or expanding within a market*".

Dominance and Market Definition

[15] The issues of dominance, as well as the definition of the market, were conceded by Computicket. Computicket consistently held an annual share of over 95% in the outsourced ticketing services market, in relation to entertainment events, between 2005 and 2009. The experts, Dr Mncube and Prof Theron for Computicket, agreed that the relevant market was the outsourced ticketing services in South Africa.

Exclusionary act

[16] As the Tribunal in *SAA (CT)*[5] has made plain, when approaching the relevant section, the first issue to determine is whether the conduct in question is exclusionary in nature. If prohibited conduct is alleged in terms of section 8 (c) of the Act, that conduct must assessed in line with the definition of exclusionary act. However, if section 8 (d) is relied upon, the impugned conduct would be that which meets the requirements of the conduct as categorised in sub-paragraphs (i) to (vi) of section 8(d). It is accordingly sufficient for the complainant, the Commission in this case, to prove that Computicket's conduct requires *or induces a customer not to deal with a competitor*, without having to show further that such conduct "*impedes or prevents a firm from entering into, participating in or expanding within a market*".

[17] To the extent that Computicket contended otherwise, I disagree. It seems to me, purely from a plain reading, that the exclusivity provision of the second generation agreements fits squarely within with conduct described in section 8 (d) (i) of the Act, as it *requires or induces a customer not to deal with a competitor*. The finding by the Tribunal that the exclusive agreements constituted an exclusionary act because they were "*facially*

[5] Id fn 2 at paras 103 to 105

exclusive", did not attach any "*per se prohibition*" to the agreements based purely on the existence of the contract, as argued by Computicket's. The act is exclusionary if it falls within the conduct described in section 8 (d) (i). That is, however, not the end of the enquiry. The Commission must still show that the conduct has an anti-competitive effect. If that has been established, the onus shifts to the respondent, Computicket in this case, to justify the anti-competitive effect on efficiency grounds.[6] The Tribunal was therefore correct in its finding, that the prohibition contained in the second generation exclusive agreements that inventory providers may not utilise the services of a competitor without Computicket's written consent for the duration of the contract fell within the definition set out in section 8 (d) (i). That finding entails no *per se* prohibition because the Commission must show the anti-competitive effects of the exclusionary conduct.

Anti – competitive effects

[18] The enquiry as to whether exclusionary conduct is anti-competitive yields a positive answer if "*there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion 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 efficiency gain.*"[7]

[19] This approach was endorsed by the Tribunal in *Nationwide*[8] and later by this Court in another *SAA (CAC)*[9] decision, where this Court reaffirmed that section 8 (d) (i) "*did not require showing of actual harm. It was sufficient if there was evidence that the exclusionary practice was substantial or significant or it had the potential to foreclose the market to competition. If it is substantial or significant, it may be inferred that it creates, enhances or preserves the market power of the dominant firm. If it creates, enhances or preserves the market power of the dominant firm it will be assumed to have an anti-competitive effect.*"

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[6] Id fn 2 at para 132
[7] Id fn 6
[8] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept 06) [2010] ZACT 13 (17 February 2010) at paras 143 and 183
[9] *South African Airways (Pty) Ltd v Comair Ltd and Another* 2012 (1) SA 20 (CAC) at paras 105-106

[20] The Tribunal found that there was sufficient evidence that the exclusive agreements employed by Computicket had resulted in substantial exclusion having anti-competitive effects, the strongest evidence being the foreclosure of the market to effective competition during the complaint period. It further held that "[*e*]*vidence concerning...competitive pricing effects, a decrease in supply by inventory providers, a reluctance by Computicket to timeously make use of available advances in technology and innovation and a lack of choices for end customers, was consistent with the Commission's theory of harm.*" It found the cumulative effect of these factors established on a balance of probabilities a case of substantial exclusionary conduct having anti-competitive effects.

[21] It is contended on behalf of Computicket that the Tribunal's finding is faulty because the Commission ought to have produced evidence of actual foreclosure effects. According to Computicket the use of the term "*likely*", as a descriptor of effects in the case law, does not mean that effects can be inferred where there is no evidence of any rival firms suffering any effects. Instead, it refers to the likely causal link between the effects and the alleged exclusionary act. This is because it may not be possible to prove that an act led to the observed effects on the market. Even then, it is argued, the alleged exclusionary act must be isolated as far as possible, following which there must be a causal link between the impugned act and the effects caused thereby. It is further contended that the only time the Tribunal found that actual evidence of foreclosure of rival firms may not be strictly necessary, was when the market was expanding and all firms experienced growth. Computicket submits that competition authorities cannot ignore actual evidence about the market circumstances and preferences of the market as a whole, in favour of limited anecdotal evidence from small segments of the market that suits its theory of harm; the Commission's theory of harm must take into account the unique and peculiar features of the relevant market. Computicket concludes that if there is a plausible explanation other than the alleged exclusionary act, the Commission would not have discharged its onus; foreclosure effects must be significant or substantial, therefore it is insufficient to demonstrate that one small segment of a market may experience foreclosure effects when there are other viable segments of the market open for entry.

[22] Computicket places reliance on an article by Paul Gorecki[10] who cautions against a form-based approach, which may lead to false positives, and in turn have a chilling effect on efficiency and consumer welfare-enhancing contracts.[11] By implication Computicket suggests that the Tribunal followed a form-based approach.

[23] This argument seems to be similar to that which was raised on behalf of SAA in the *SAA (CAC)*[12] matter and rejected by this Court. It had been contended by SAA in that case, that the Tribunal made a finding of anti-competitive effects in the market against it with no evidence of price or output effects justifying it. In this connection a submission was advanced that there had been no proof of economic effects and hence the requisite degree of foreclosure. In rejecting this contention, this Court held:

> "*These submissions need to be interrogated through the wording of the Act. Section 8 of the Act makes it clear what is necessary in order to establish an anti-competitive effect. It includes the consideration that if the exclusionary act is substantially significant in terms of its effect in foreclosing the market to rivals, the section applies. This approach can be established either by way of evidence of actual competitive harm or by evidence that the exclusionary practice is substantially significant, that is, the practice has the potential to foreclose the market to competition, in which case an anti-competitive effect can be inferred.*"[13] (My emphasis)

[24] At the Tribunal, Prof Theron, Computicket's expert, seemed to suggest that the test in *SAA (CT)* is not one to be followed as there is subsequent case law which points to a different approach, such as that which was employed in *BATSA*[14]. Counsel for Computicket however, on appeal, agreed with the *SAA (CT)* test, but continued to submit that actual evidence of anti-competitive effects must be shown. He however, during oral argument referred to the findings of this Court in *Netstar*[15], to advance a cause and effect argument. In *Nestar*, in the context of section 4 (1) (a) of the Act, Wallis AJA held that the agreement or concerted

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[10] Paul K Gorecki "*Form – versus effects based approach to the abuse of a dominant position: The case of Ticketmaster Ireland*" 2 J Comp L & Econ 533 (2006)
[11] Id fn 10 at page 547
[12] Id fn 9 at para 109 and 110
[13] Id fn 9 at para 112
[14] *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* (05/CR/Feb05) [2009] ZACT 46 (25 June 2009). It is perhaps is iro'nic, given the attack on Dr Mncube's evidence that Computicket's economist, Prof Theron, spent so much time divining on legal doctrine which is patently beyond the scope of an expert economist.
[15] *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another* 2011 (3) SA 171 (CAC). See also the EU approach in *Intell Corporation v European Commission* CaseC-413/14P

practice must be the primary or substantial cause of the prevention or lessening of competition. In other words, the lessening or prevention of competition must be sufficiently closely connected to the agreement or concerted practise that it can properly be said the former was the effect of the latter.[16] Apart from the fact that *Netstar* dealt with a differently framed section of the Act, that is, it was a case dealing with the problem of a cartel, the Court was confined to the case pleaded in those circumstances.[17] In any event, the authority directly on point *SAA (CAC)*[18] came after *Netstar* which firmly confirmed the effects doctrine as part of our law relating to abuse of dominance.

[25] These submissions warrant some clarification as to what is required to prove an abuse of dominance under section 8 (d). The provision specifies defined exclusionary acts. No prohibition arises unless it is proven, in the first place, that a dominant firm has engaged in one or more of the defined exclusionary acts. Prohibition however requires more. The introductory language of section 8(d) requires an evaluation of effects. The evaluation is predicated upon a weighing of harm and benefits (styled as gains in the language of the statute). Prohibition occurs when the harm outweighs the gains. The harm is measured by reference to the anti-competitive effect of the exclusionary act. The gains are measured by reference to technological, efficiency or other pro-competitive gains.

[26] This statutory formulation clearly entails a causal relationship. The exclusionary act must be shown to have effects of a kind that engage the evaluation required by section 8(d). If an exclusionary act gives rise to no anti-competitive effects, then the exclusionary act is not prohibited. So too, if an exclusionary act, though having anti-competitive effect, gives rise to no pro-competitive gains, then the exclusionary act is prohibited. As the text of section 8(d) makes plain, the effects that are relevant to the evaluation are the effects of "*its act*". In other words, the effects of the exclusionary act of the dominant firm. Every effect must have a cause. Section 8(d) stipulates that the relevant cause is the exclusionary act of the dominant firm. Accordingly, section 8(d) does require proof that there is a causal relationship between the exclusionary act of the dominant firm and the effects of that act that are relevant to the evaluation contemplated as to anti-competitive harm and pro-competitive gains.

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[16] Id fn 15 at para 33
[17] Id fn 15 at paras 29, 38 and 42
[18] Id fn 9

[27] The recognition of this causal relationship, however, does not answer a separate question: what is the anti-competitive effect that must be shown to have been caused by the exclusionary act? Computicket submits that the anti-competitive effect that must be proven by the Commission is actual foreclosure of a rival and the effect must meet a criterion of substantiality, that is to say, that the exclusionary conduct had a market wide effect. This submission is contrary to the text of the prohibition. It is also runs counter to precedent and economic principle.

[28] First, as to text, section 8(d) references the anti-competitive effect of an exclusionary act, whereas sections 4 and 5 reference the formulation: *"the effect of substantially preventing or lessening competition in a market"*. The legislature clearly marked out the requirement of substantiality judged against an appreciation of the effect in the market in formulating the prohibitions in sections 4 and 5, but repeated none of this language in section 8(d). This does not mean that section 8(d) resorts to form based prohibition. On the contrary, it requires the evaluation of effects. The question is rather: what effects?

[29] Second, in the *SAA* cases, cited above, what is required, absent evidence of actual harm to consumer welfare, is proof that the exclusionary act is substantial or significant in foreclosing the market to rivals. Such foreclosure may be actual or potential. The emphasis in these formulations is upon the substantiality of the exclusionary conduct. The more substantial the exclusionary conduct the more likely it is that the impact upon the market will also be substantial. But such an effect is not a requirement that must be met to establish an abuse of dominance.

[30] Third, the economic assessment of the anti-competitive effect of an exclusionary act will have regard to the market and the position of the dominant firm in that market. Ultimately, the question is whether the dominant firm's rivals are rendered less effective competitors by reason of the exclusionary conduct of the dominant firm. This is what we mean by foreclosure. This enquiry may engage an aggregative enquiry of the market: how dominant is the firm in the market, to what extent are the sales in the market affected by the exclusionary conduct, and what conditions exist in the market as to entry and the possibility of expansion? However, aggregative considerations need not be determining.

[31] Rivalry may be diminished because a small firm plays an important role in constraining the dominant firm in a part of the market, whether as to the product or territory.

An effect of this kind is not ousted from consideration. And this is so because under the discipline of section 8(d), the effects of the exclusionary conduct (harms and gains) must be weighed to determine ultimately whether there has been an abuse. The aggregative judgment is made in weighing the effects. It is not made by insisting that what can count as a gain or a harm must itself meet some criterion of sufficiency or can only be counted if it is an actual rather than a potential harm or must be a market-wide effect.

[32] Plainly, a small adverse effect will readily be outweighed by pro-competitive gains. So too, significant anti-competitive effects will be more difficult to justify by proving counter-veiling pro-competitive gains. There may be hard cases, where there are no gains, and a modest harm. But even in that case, the judgment required by section 8(d) will be responsive to the ultimate consideration as to whether the dominant firm has engaged in exclusionary conduct that has in some non-trivial way diminished the competitive constraints to which it would otherwise have been subject.

[33] It is widely accepted that determining whether the exclusionary act had anti-competitive effects is not an easy exercise, but as set out in the previous paragraphs, is the key requirement in determining cases of this nature. The substantiality of the exclusionary practice, however, can be inferred (not conjured or assumed). Clearly such an inference can be drawn from existing or proven facts; so much is clear from the economic principles which I have set out and which have been followed by this Court.

[34] In brief, the jurisprudence of this Court has been to the effect that the so long as the exclusionary conduct had the potential to foreclose the market to competition that would suffice for the purposes of section 8(d)[19]. In this, the Court followed an approach adopted by EU jurisprudence. In a relatively early decision of the European Court of Justice in *Continental Can v Commission*[20], the Court said , albeit within the context of whether an acquisition of a firm by a dominant firm could be an abuse of dominance: "*abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one ... it can ... be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously*

[19] See in particular *SAA (CAC)* fn 9 at para 112
[20] 1973[ECR] 215 at para 12

endangers the consumer's freedom of action in the market such a case necessarily exists if practically all competition is eliminated."

[35] See also *Hoffman La Roche v Commission*[21] where the Court held that: "*abuse is behavior which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*"

[36] This *dictum* is helpful in that it shows that the harm that must be shown to exist, whether in the form of actual or potential harm, strengthens the dominant firm's position to the extent that competitive rivalry is significantly impeded or is likely to be so impeded by the impugned conduct of the dominant firm.

[37] The assessment of the effect of exclusionary conduct is usually done "*by comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to the established business practices.*"[22]

[38] The experts of both parties agreed that applying a counter-factual is the correct approach which is canvassed this later in the judgment that is, absent Computicket's impugned conduct, competition would not have been significantly impeded in the relevant market or expressed differently whether Computicket's rivals were rendered less effective because of its impugned conduct.

[39] To return to the evidence, it is not disputed that exclusive dealings can lead to foreclosure of competitors and harm to consumers.[23] What is in dispute is whether the conduct of Computicket significantly effected competition in the market. In this regard, the

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[21] *Hoffman La Roche v Commission 1979*

[22] EC Guidelines on the Commission's enforcement of priorities in applying Article 102 at para 21

[23] See *ICN Unilateral Conduct Workbook*, Chapter 5: Exclusive Dealing, April 2013
"*The term 'exclusive dealing' is generally used to describe an arrangement through which an upstream seller's goods are sold to distributor or retailer under the condition that the distributor or retailer does not sell similar competing products. The term . . . may also describe an arrangement by which a downstream purchaser requires an upstream seller not to sell its products to any competing downstream purchasers.*" (At para 1).

Commission would, as a first step, "*need to identify a theory of harm whereby exclusive dealing arrangements have resulted in substantial foreclosure which has harmed or is likely to harm competition. A common way in which substantial foreclosure may be anticompetitive is if it denies to rivals sufficient share of distribution to achieve minimum efficient scale, thus raising the costs of those rivals. Alternatively it may raise rivals' costs by preventing them from accessing particular inputs or distribution channels. However, these are not the only ways in which substantial foreclosure may result in anticompetitive effects. What is important in general is for the agency to develop a robust theory of harm that connects the exclusive dealing conduct with anticompetitive effects and seeks appropriate evidence to support the theory.*"[24]

[40] The ICN Workbook further explains that:

> "*Harm can occur because the exclusive dealing leads to the exit of an existing competitor (or prevents entry by a new rival) or through increases in prices or decreases in innovation. Foreclosure may also harm competition by relaxing the competitive constraint imposed by rivals without fully eliminating them from the market. That is, it may weaken the ability of competitors to charge as low a price as they might otherwise do. Moreover, potential entrants, not just incumbent competitors, may be among the affected rivals.*" [25]

[41] The ICN Workbook refers to a number of factors to be taken into account when considering whether exclusive dealing has the capacity to foreclose competitors and, as a result, contribute to anti-competitive effects. Those include (a) market coverage, where exclusive dealings are more likely to result in anticompetitive effects the larger the proportion of the relevant market that is the subject of the conduct;[26] (b) duration of the exclusive dealings, where the longer the duration, the stronger its potential for foreclosure; whether contracts are all renewed simultaneously and whether they are automatically renewed or subject to conditions of renewal;[27] (c) alternative sources of supply;[28] (d) whether the customer requested the exclusivity;[29] (e) ease of entry and market dynamics;[30] and (f) scale of economies – "*denying a competitor access or partial access to the market may prevent or*

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[24] Id fn 23 at para 18
[25] Id fn 23 at para 13
[26] Id fn 23 at para 48
[27] Id fn 23 at paras 51 and 53
[28] Id fn 23 at para 56
[29] Id fn 23 at para 60
[30] Id fn 23 at para 61

hinder it from obtaining the economies of scale necessary to allow it to grow into an effective competitor"; two "*slightly different but related factors that may be taken into account are the network effects and/or incumbency advantages. These factors "have an effect similar to scale economies since a dominant firm can use exclusive deals to exploit such market dynamics in order to deprive a competitor of the means of gaining the required critical mass of sales or credibility of customers.*"[31]

[42] Prof Theron had no difficulty with the literature referred to by the Commission; her issue was that in the outsourced ticketing services market, one needed to look at the exclusive dealing literature in a two-sided market. According to her, Computicket is the two-sided platform that brings two sides of the market together, i.e. inventory providers and end consumers of tickets. In this market inventory providers may choose to by-pass the outsourced ticketing agent by selling its own tickets (self-supply). She observed that the two-sided ticketing platform creates a specific sort of dynamic in that: (a) Computicket needs to satisfy both, (b) these two groups rely on each other to sell and buy tickets, (c) they cannot capture the value from mutual attraction on their own, due to, for instance, high transaction costs, (d) they rely on Computicket's platform to facilitate value creation interactions between them, and (e) this restricts the potential market power of the platform (Computicket). It matters to both sides that there is a critical mass on the other side. In Computicket's case, the demand for Computicket's services by inventory providers will increase if there are more customers using it for bookings on the other side of the platform. The converse is also applicable. She criticised the Commission's analysis, as it did not include this feature, as well as the authorities upon which it relied as being too limited, as it leads to very strict assumptions. Consequently, Computicket submitted that ordinary theories of foreclosure are inappropriate in this case.

[43] There is no support for this conclusion apart for the argument that in the relevant period, at least, this market required large upfront infrastructure investments, including retail networks and that it made sense for the inventory to be grouped together in exclusive contacts, in order to make the investment worthwhile. This is the only basis put forward, which appears to be a standard defence. It reveals no foundation for a different theoretical approach to be employed in exclusive contracts in the context of two-sided markets. Prof

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[31] Id fn 23 at paras 64 and 65

Theron did not really deal with the question whether exclusivity was needed to operate at scale and, if required, the proportionality thereof.

[44] Furthermore, there was agreement between the experts that the market had two-sided features and that this had to be taken into account. Dr Mncube, however, explained that the two-sided market does not limit market power of the platform. On the contrary, it makes it more difficult for new entrants to break into the industry, "*which is dominated by an incumbent which has more than 90% market share, since they would need to attract enough scale on each side of the market.*" This position is strengthened by the approach set out in the ICN Workbook, namely that network effects have "*an effect similar to scale economies since a dominant firm can use exclusive deals to exploit such market dynamics in order to deprive a competitor of the means of gaining the required critical mass of sales or credibility with customers.*"[32]

[45] Prof Theron acknowledged that the two-sided market may create a barrier to entry, and that such markets are not impervious to abuse, although she argued that those cases may be few. I agree with the Tribunal that Prof Theron's argument of the special features, in relation to a two-sided market, stood at no more than a theoretical level and was not necessarily supported by any evidence. Nothing from what was presented by Computicket, specially changes the assessment applicable when examining the effect of exclusive contracts, even when two-sided markets are involved.

[46] As to market coverage, all Computicket post 2005 contracts with inventory providers covered the "entire" inventory of its inventory providers and not just a single or certain event(s). In addition, all the agreements contained exclusivity clauses. This means post-2005, the entire client base was subject to the exclusivity provisions. This represented over 95% of the total market, (as that constituted Computicket's market share).

[47] Prof Theron contended that market dominance cannot be the same as a share of the market which is foreclosed; only 1800 contracts were analysed by the Commission and in a market where there are no published figures reflecting the turnover of the whole market, it was very difficult to understand the relevant universe. According to her, about a third of contracts should expire on average every year. These contracts would then be open to be contestable by a new entrant.

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[32] Id fn 23 at para 65

[48] I fail to follow this argument. Firstly, the amount of contracts analysed would have represented a significant portion of the market, i.e. over 90%; the rest of the universe allegedly not known would have been insignificant in the bigger scheme of things.

[49] Secondly, the contention that some 25% of the contracts would expire each year opening an opportunity for a new entrant to do business with those inventory providers, does not assist, either, because of the constraints presented by the exclusivity contracts, as well as other barriers that a new entrant would have to face. This is not easily ascertainable as to what percentage of business remained "for the taking", as some inventory providers could have ceased doing business altogether after a particular event or show had come to an end. Certainly there was insufficient evidence to show that the figure of 25% could significantly sustain a rivalry. In addition, the inventory providers could also leave the outsourced ticketing services market or opt for self-supply. The suggested alternative of self-supply is, however, in this context, not an indication that the market was not foreclosed. Self-supply did not form part of the defined market of outsourced ticketing services.

[50] Thirdly, there is no evidence to support a view that an increase in contracts over the period 1999 to 2010 meant that many of those contracts were available to sign in previous years but not acquired by Computicket. The increase could be ascribed to a number of factors, including increase in business, or change in enforcement of contracts. Even if it signified new business, what prospects would a new entrant have in the face of the "*all or nothing approach*" adopted by Computicket, viewed together with the incumbency advantage Computicket had? Moreover, it is not clear how many of the expiring contracts were in fact terminated or were automatically renewed in terms of the default renewal provision. Even had the contracts expired, the figure of R364 million proposed by Computicket to represent business up for renewal, included gross ticket sales across all sectors, not just entertainment. In summary, it was uncertain whether the value of business that remained for contestation was sufficient to sustain a competitive rivalry with so dominant a firm as Computicket.

[51] As for the duration of the contracts, the exclusivity obligation was imposed for a period of three years in virtually all contracts from 2005. It is possible that inventory providers would fail to actively take any step, after expiry of the contract, which would result in its automatic renewal. Others may have no motivation to switch due to lack of suitable

replacements, or simply for reputational reasons, or because a Computicket product is a "*must stock*" product as explained in the ICN Workbook.[33]

[52] With regard to incumbency advantages and economies of scale, it is without a doubt that Computicket has over many years built a strong brand. As Dr Mncube submitted, a new supplier of outsourced ticketing services would need to overcome significant entry barriers on both supply and demand sides. An entrant would need to incur a significant amount of fixed costs in order to be an effective rival to Computicket. It would also need to overcome reputational barrier and other costs-price disadvantages.

[53] It was revealed at the Tribunal that in six out of eight instances, Computicket enforced the exclusivity clause strictly and in two instances it threatened to do so. If inventory providers attempted to use the services of a competing supplier they ran the risk of facing legal action for breach of the exclusivity clause and had to forgo use of Computicket's services at the same time. Mr Kurt Drennan, who testified for Computicket at the Tribunal, confirmed that Computicket enforced the exclusivity clause strictly. It also rejected requests to enter into non- exclusive agreements, even after the expiry of the exclusive agreement. Failure to accept the exclusivity clause resulted in no agreement being signed and therefore ticketing services not being provided by Computicket. As Mr Drennan put it "*if a party does not want to have exclusivity there is no agreement available for them.*"

[54] This was the case in respect of the Theatre on the Square in mid-2008. Computicket's insistence on exclusivity was also communicated to Theatres such as the Dockyard Theatre, Heritage and National Children's Theatre in early 2008 and 2009 respectively.

[55] Dr Mncube concluded that Computicket's 'all or nothing' policy also harmed consumers who may have preferred multiple ticket agents in order to maximise their sales. It also hurt them over time, by making it harder for entrants to build scale gradually, and acquire the reputation for reliable service in the marketplace. The harm to consumers could occur even if the policy was for a short duration. It also had the effect of making small-scale entry harder when the contracts came up for expiry, thus reinforcing the overall exclusionary effects of its exclusive deals.

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[33] Id fn 23 at para 55

[56] From the period 1999 to 2010, of the 1639 contracts for which information on exclusivity was made available, 1630 were exclusive, while only nine were non-exclusive. According to Dr Mncube, the appearance of the exclusivity clause in a standard service agreement indicated that it was a condition insisted upon by Computicket and not included at the behest of the inventory provider. This cannot be disputed.

[57] The change in duration of contract from 4 months or less coincided with Shoprite's acquisition of Computicket. Prior to 2005, less than 30% of contracts were on a multi-period basis, with fewer than 10% between 1999 and 2001. From June 2005, however, 95% of all contracts were signed for three years. Contracts did not all run out at the same time, they were staggered.

[58] Another significant issue concerns two significant increases in booking fees, in mid-2002 and mid-2003 respectively, after the merger with TicketWeb. I deal with this in more detail elsewhere in the judgment. According to Dr Mncube, variations in commissions and booking fees across different contracts confirmed the existence of price discrimination in relationships between Computicket and inventory providers. As Mr Drennan testified, larger customers were able to negotiate substantially better rates. There was less discrimination in terms of exclusivity and the contract scheme after mid-2005.

[59] The staggered nature of these contracts inhibited new entrants from discerning the expiry of the contracts and accessing the necessary stock of available business so as to enter and expand effectively in the market.

[60] Lack of buyer concentration is one of the features noted which could potentially have subjected them to coordination failures when contracting with Computicket. The largest five clients accounted for about 50% of the total entertainment sector. The *TicketMaster Ireland*[34] case upon which Computicket relies in this connection is distinguishable. In that case TicketMaster was constrained from exploiting its monopoly position, because of the countervailing buyer power of two promoters, MCD Promotions and Alken Promotions. There the promoter, in conjunction with the artist, set the price or face value of the ticket sold by TicketMaster. Promoters in Ireland competed with promoters in other countries to convince high profile artists to perform in Ireland. Artists had strong bargaining power,

[34] *TicketMaster Ireland*, Case COM/107/02, Competition Authority of Ireland, 26 September 2005. There it was found that: "*A single provider of ticketing services...reduces transaction costs of the promoter leaving the promoter in a better position to compete for artists.*" (at para 2.88)

could command substantial appearances fees, which was in turn reflected in the ticket price. If *TicketMaster* did not agree with the promoter's booking fee "*they can credibly threaten to either switch to another ticketing service provider or set up their own ticketing facilities.*"[35] This was not the case in the South African outsourced ticketing services market dominated by Computicket.

[61] In contrast to *TicketMaster*, in *SISTIC*[36] the Competition Commission of Singapore found explicit restrictions requiring all events held at certain venues to use SISTIC as a sole ticketing service provider to be abuse of dominance in contravention with section 47 of Singapore's Competition Act. It was found that "*when event promoters are required to sell tickets for all their events through SISTIC ticket buyers who wish to attend those events have no choice but to buy tickets through SISTIC as well.*"[37] In these circumstances there was no strong countervailing power from customers, unlike in *TicketMaster Ireland.*

Evidence supporting likely anti-competitive effects

[62] Computicket contends that there is no evidence to support any anti-competitive effects. Mr Drennan conceded under cross examination at the Tribunal that there was fierce competition between Computicket and TicketWeb at the time of their merger. Computicket's shareholders expressed the view in the Project Symphony deal document, dealing with the proposed transaction between Computicket and TicketWeb that the ticketing market in South Africa was too small and under too much pressure "*to sustain two competitors in the short to medium term.*" I take note of the fact that the merger was approved, and may have been intended to reduce costs by increasing joint scale of the business as contended by Computicket; its effect though, had an outcome of removing a formidable competitor from the market, at that time.

[63] Mr Bernard Jay, who was the Chief Executive Officer of Johannesburg Civic Theatre (Pty) Ltd ("Joburg Theatre"), in his witness statement stated that when TicketWeb entered the market, it was in direct competition with Computicket, it had a lower fee structure, and as a result became successful in attracting inventory providers. According to him, Computicket lost inventory to TicketWeb and it was around this time that it started to seek exclusive

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[35] Id fn 34 at page 2
[36] *Abuse of a Dominant Position by SISTIC.com Pte Ltd*, Case CCS 600/008/07, Singaporean Competition Commission 4 June 2010
[37] Id fn 36 at para 1.2

contracts with inventory providers. In certain instances it offered to undercut TicketWeb's fee structure if inventory providers agreed to sign these exclusive contracts with it. He did, however, testify that TicketWeb's financial viability declined, because the public still enjoyed going to retail outlets to buy tickets and TicketWeb could not compete with the facilities that Computicket had built. Before TicketWeb's entry, Computicket did not require inventory providers to sign exclusive contracts.

[64] The relevant issue here is that, at least between 1999 and 2001, successful entry by a competitor had been achieved, albeit both companies were making losses by the time of their merger. The Tribunal was therefore correct in accepting that period as the best available counter-factual for the purposes of assessing the anti-competitive effects of the exclusive contracts, since it was the least affected by the exclusivity policy.

[65] According to Computicket, Shoprite, through Ticketshop, successfully entered the market in 2004 and garnered significant business, reaching approximately R18 million of gross client turnover during the period July 2005 to June 2006. It entered the market offering low cost rates to some event promoters, or event organisers, in order to try and gain market share. It entered into exclusive arrangements with clients. Computicket therefore contends that from 1999 to 2005, there were two large entrants which were viable competitors to Computicket, and which survived because they were sponsored by large companies and had a retail footprint.

[66] The discord, in Computicket's view, is that during this period 99% of the contracts were said to be exclusive, but yet there was fierce competition, by large entrants; no small entrants were noted during this period. According to Computicket, if a counter-factual of prior to 2005 is preferred it ought to be the full period from 1999 to 2004. Prof Theron proposed an alternative counter-factual, from 2010 to 2016, on the basis that whilst the exclusive contracts were still in place, there were several firms that entered the market.

[67] Ticketshop only operated for a year before it merged with Computicket and had only achieved 3% of Computicket's revenue. In Computicktet's view, the contended success of Ticketshop could well demonstrate how entry could be achieved prior to the 2005 exclusivity provisions.

[68] Computicket also contends that from 2005 to 2010, there were two successful entries, by Webtickets and Ticket Connection in 2007 and 2008 respectively. It contends, however, that between these periods, the limited presence of firms was not due to the exclusive contracts, but was determined by the nature of the market and the fact that these firms were not as efficient as Computicket.

[69] In an email dated 28 August 2009, a Ms Lise Kuhle informed the Commission that Ticket Connection earned R3.5 million in fees and "*this was mostly due to the Celine Dion concert because the ticket prices were high and we also did a lot of work for this promoter so we charged our standard rates (not discounted)*". Ticket Connection was only in the market for a year. It appears that Ms Kuhle told the Commission in an interview that the primary reason for exiting the market was that they could not reimburse patrons who bought tickets for cancelled Josh Groban concerts. Ticket Connection subsequently went into liquidation. The other reason put forth by Ms Kuhle for Ticket Connection's demise was that it could not expand and get new inventory providers; most of the potential inventory providers were tied down to the exclusive contracts. Those that switched were very small and probably insignificant to Computicket. Ms Kuhle further advised that when they approached larger inventory providers, Computicket immediately sent those inventory providers' legal threatening letters which made the inventory providers stop any intended dealings with Ticket Connection. Hence it is clear that, whilst the Josh Groban concert was the cause for Ticket Connection's primary exit, the exclusivity contracts played a role in its struggle to survive.

[70] Computicket's counsel pointed out that Ms Kuhle should have been called to testify and that the utterances on correspondences remain untested and should not have been accorded much weight. The Tribunal has a discretion to decide whether or not to admit hearsay evidence. To the extent that it attached too much weight to the statements attributed to Ms Kuhle, such would have no material impact to the overall assessment of the case. Until 2010, Webtickets was a small player which had entered the market but had not sufficiently grown to pose any significant competitive threat to Computicket.

[71] As regards Strictly Tickets, Computicket submits that the Tribunal's findings were not supported by evidence. It argues that Strictly Tickets did not pose any competitive threat to Computicket during the relevant period. It was a small-scale up-start, not comparable to Computicket; it employed technology not generally desirable at the time and chose to focus its efforts on the theatre segment, which not only showed no growth but constituted only

2.7% of Computicket's total contracts. Furthermore, the exclusive contracts did not cause Strictly Tickets' exit from the market. It failed because it did not have the required attributes (scale, sponsorship and retail footprint) to successfully enter the market and expand.

[72] The evidence presented on behalf of the Commission stands in sharp contrast. Strictly Tickets introduced paperless ticketing as a first in the world, which provided convenience to customers to purchase tickets in the comfort of their homes and at any time of the day. It offered ticket distribution services to theatre owners/producers, festival organisers and promoters, who are inventory providers. The technology made it possible for a customer to purchase a ticket online and have it delivered to his or her cell phone through a 2D barcode. In contrast to Computicket's system, consumers did not have to travel to an outlet to collect their tickets. According to Mr Charne who testified about Strictly Tickets, the paperless system, in conjunction with the barcode system, also prevented any opportunity for fraudulent activities.

[73] Mr Charne stated that for about six months, approximately six theatres had given to and allocated Strictly Tickets inventory which they were selling for those who did not want to go to a physical outlet. This was a good supply for tourists who could not go to a physical outlet, for instance. The examples of those inventory providers were Victory Theatre, which hosted the Umoja show. Strictly Tickets was becoming very successful - in one month it sold over R120 000 worth of tickets. Other examples are the Heritage Theatre, the Dockyard Theatre where Strictly Tickets improved dramatically, as well as the Liberty Theatre. Within six months it had built up to R400 000 in ticket sales.

[74] Shortly thereafter, Strictly Tickets received notifications virtually from all the theatres it did business with, advising it of a letter they received from Computicket notifying them of the exclusive agreement they had with Computicket, and that they needed to stop selling tickets through Strictly Tickets, and threatening them with legal action. An email from Computicket to Heritage Theatre dated 19 February 2008, is a clear example of Computicket's conduct. It states, inter alia, as follows: "*I respectfully request that you correct the position within the next five days, of removing your event (s) from Strictly Tickets website and refrain from making use of their ticketing services until such time that our current agreement lapses od that we meet with you to discuss the path going forward. Should you not do so within the next five days as requested, we will suspend selling tickets for your event(s).*"

[75] The inventory providers were scared; they were frightened by the prospect of getting into a dispute with a well-respected brand, legal action and not being able to do business with Computicket. Whilst they would have wanted to continue using Strictly Tickets, they asked for their inventory to be removed. Various email exchanges and letters reflecting these notifications from Computicket are on record. One such exchange, from one of the theatres dated 17 June 2008, states: "*Joe asks that you please contact Strictly Tickets and tell them to stop whatever it is that they are doing in selling our tickets as we have a contract with Alfie/Computicket. We cannot afford for Computicket to pull the shows from their website and stop selling them. Please do this in writing and please confirm with Alfie that we have instructed Strictly Tickets to stop whatever they are doing.*"

[76] According to Mr Charne, the strict enforcement of the exclusivity contract by Computicket had a dramatic impact on Strictly Ticket's commercial viability. As the ticketing business is volume driven, theatres represent continuity in the business as they are open almost daily. They are a consistent source of business, unlike just doing once-off type of events.

[77] Mr Charne further testified that due to the enforcement of the exclusive contracts by Computicket, Strictly Tickets intended to downscale in 2011. It did not close down, however, due to some inventory providers who advised that they had left Computicket to support it. The business was left open for another five years and finally closed down towards the end of 2016. According to Mr Charne, the closure came when he gave up hope, ultimately realising that the "*ticketing industry was a blocked off industry and there wasn't very likely much chance of anything changing in the near future.*"

[78] It is abundantly clear that Strictly Tickets was a small-scale entrant, which was able to grow its business, without the extensive retail network. It had technology that no one else had in the market at the time, and offered customers a convenient paperless ticket option. Because of Computicket's enforcement of its exclusivity provisions and its incumbency advantages as a dominant firm, Strictly Tickets was prevented from growing in the market and was ultimately forced out.

[79] In cross examination, when it was put to Mr Charne that the business grew despite the presence of exclusivity agreements, as the hard financial facts showed, he suggested that it

would have become even more viable and a greater business without the presence of the exclusivity agreements.

[80] Counsel for Computicket criticised the Commission's reliance on Mr Charne's evidence, mainly for the reason that Strictly Tickets was small and not an efficient competitor. Size and efficiency of a competitor are not determinant factors in establishing likely competitive effects. It should not be forgotten that the exclusivity clauses, on the available evidence had a clear likelihood of impeding the rise of as efficient competitors to Computicket. Insistence on proof of actual effects could lead to firms escaping prohibition in terms of the Act in situations where conduct foreclosed the emergence of competition.

[81] I am in agreement with the Commission that the ultimate foreclosure of Strictly Tickets did not only affect it, but had an effect on inventory providers who would have wished to utilise more than one ticketing agent to increase their sales, and a loss to customers who enjoyed the convenience of a paperless technology which no one else offered at the time.

[82] Computicket argues that despite the remaining presence of exclusivity agreements after the relevant period of 2005 to 2010, many competitors entered the market, including Omni-Tickets, www.tunegum.co.za, Tixsa, SmartFan, Ticket Break, Micket, Entry Tickets, Viagogo and Groupon. It concludes that the limited presence of other entrants in the relevant period of 2005 to 2010 was not as a result of the exclusivity contracts, but was determined by the nature of the market as well as the fact that these firms were not as efficient as Computicket. Prof Theron had proposed the post 2010 period as an alternative counter-factual.

[83] In my view ,the Commission's contention that the entrants post 2010 were enabled by significant changes in the market, such as the development of the internet and possible changes in demand, is the more probable explanation. Firstly, the practicability of internet usage was fortified by the evidence of Mr Daryl Baruffol, the ticketing manager of Cricket South Africa (Pty) Ltd ("CSA") at the time, who, referring to a system implemented after termination of the Computicket contract as at the end of 2009/2010 season, said in his witness statement, "[*t*]*he new system that has been developed for CSA would not have been feasible in the past, and it is only the increased availability of open-source software and increased internet usage in South Africa in the recent past that had made it viable now. Previously,*

CSA was dependant on Computicket as a result of its ability to reach a wide range of customers via its retail network and call centre."

[84] As Dr Mncube put it, the question is what would have happened had the exclusive contracts not been in place, in the relevant period, and not what happened after 2012 in the context of Computicket continuing with exclusivity contracts. The time period for the analysis is accordingly flawed.

[85] What Dr Mncube explained made sense, because the period after 2012 was not under investigation. Even if that were to be the case, the correct counter-factual question in those circumstances, would be what would have happened between 2012 and the date the relevant period ends. A different investigation is apparently being undertaken by the Commission in respect of the said period. Entry in the post-period may have been made possible by a number of factors, which I have already mentioned. It equally cannot be argued that such post relevant period entry meant that exclusivity clauses did not constrain entry in the market during the relevant period.

[86] Besides not much interrogation had been done for the post 2012 period. The Tribunal was, therefore, correct in concluding that the proposed post relevant period counter-factual was procedurally irregular and insufficiently robust to constitute a reliable counter-factual.[38]

[87] There is no doubt that there were inventory providers who would have wished to split the inventory for various reasons including different technology, customer bases, customer relationships, quality of service and pricing of different ticketing providers, and they were denied that by the enforcement of the exclusivity clause. It was alleged by Mr Charne that Dockyard Theatre and Heritage Theatre closed down – ascribing this to not being allowed to benefit from split inventory. This may not be conclusive but that is not the requirement, such effect may be inferred from the substantive exclusionary conduct. It would be also recalled that the conduct need not completely drive the competitors out of business, or completely foreclose them from entering the market. It is enough to show that they were prevented or impeded from entering it.[39]

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[38] See also *Nationwide* fn 8 at para 213

[39] See *Competition Commission v Telkom SA Ltd* (11/CR/Feb04), at para 99, where the Tribunal held: "*In order to show harm for purposes of section 8 (d) (i) it is not necessary to show that competitors must first exit a market or even that they lost market share before harm. All that is required to be shown is that Telkom's*

[88] Prof Theron conceded that reduction of supply of inventory may be an anti-competitive effect. She would not comment on whether there would have been a reduction of inventory supply during the period of exclusivity. The exclusivity clause had a negative effect on innovation, choice and higher quality of service. There is sufficient evidence to provide an answer to this question.

Pricing effects

[89] As to the pricing effects, the Commission's theory of harm is that the exclusive contracts caused fees to be higher than they would otherwise have been. Following the merger with TicketWeb, Computicket implemented two separate increases in its standard booking fee, one in April 2002 and another in mid-2003. Dr Mncube found that a standard booking fee schedule was used frequently for the period 1999 to 2010. He testified that approximately 75% of contracts fell in this category. Arrangements with a special booking fee represented a limited exception. As with the booking fees, his assessment showed an increase in commissions paid by the inventory providers from late 2002. The standard commission between 1999 to 2001 was 5%, this was increased to 5.7% from about late 2002, up to and including 2010. Between October and December 2002, of 32 contracts about 17 had a commission of 5.7%. During 2003, about 93% of the contracts had the higher commission of 5.7%.

[90] Computicket on the other hand contends that prices charged for its services, between 2005 and 2010 and beyond, remained relatively steady or stable. It argues that there is no evidence to support a conclusion that fees associated with the tickets were higher than they would otherwise be, as a result of the exclusive contracts. It contends that such remained stable, or decreased, as shown by Prof Theron in her expert testimony.

[91] The experts differed on the periods as well as the assumptions used. Dr Mncube chose the period of 1999 to 2001, because during that period TicketWeb was an effective competitor. According to Dr Mncube, after the merger with TicketWeb, the reduction in competition appeared to have affected prices paid by customers; Computicket, who have moved into a *de facto* monopolist position in the market in 2001, was able to profitably increase both its booking fees and its commissions. He compared this period to that after the

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conduct was likely to result in preventing or lessening competition which would include the impeding of competition."

merger in 2002, which allowed Computicket to capture back all the clients it had lost to TicketWeb.

[92] The increases, according to Dr Mncube, brought about a nominal cumulative increase of between 33% and 100%, depending on the ticket price, between the first half of 2002 and the second half of 2003. Having been criticised by Prof Theron for relying on nominal pricing, Dr Mncube calculated booking fees in real terms, and concluded that the real booking fees had in reality increased: the analysis showed that during the period of 2003 to 2010, the average annual increases in booking fees ranged from 11% to 52%, being, 16% for a R60 ticket, 13% for R100 ticket, 25% for a R200 ticket and 52% for a R300 ticket. Given that the standard booking fee was not increased after mid-2003, the annual real increase in booking fees generally declined through time, due to the impact of inflation. However, due to large increases implemented mid-2002 and mid-2003, even at the end of the period in 2010, booking fees were higher than the 2002 level in real terms. For example, at a ticket price of R300 in 2002 prices, the booking fee in 2010 remained higher than in 2002 in real terms. The price increases were profitable, significantly so after the merger and consistently thereafter as in both 2004 and 2005 financial years. There was also an upward trend in the total fees and profitability of the entertainment business.

[93] Computicket's submission on the other hand is that its data showed that, whilst tickets had risen consistently from 2001 to 2016, its margins did not. From 2001 to 2006, they rose only by 1.5% and thereafter consistently declined until 2016. This was as a result of various technological improvements, resulting in a lower cost base and passing these efficiencies on to clients. Computicket disputes that it enjoyed "*supra-competitive*" prices as alleged by the Commission. In fact, it submits that there were no price increases. The flaw, in Computicket's view, is that Dr Mncube insisted on price comparisons between 2001 and 2010, as opposed to year on year price comparisons and recognition of what the comparative market price ought to have been in 2005, before the significant sign-up of exclusive contracts. Additionally, if there was any kind of increase, which is denied, as explained by the ICN Workbook, a price increase accompanied by a quantity increase is consistent with a pro-competitive effect, while a decrease suggests an anti-competitive effect.[40] In this case, it contends that the evidence showed there was an increase in quantity of supply over the relevant period.

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[40] Id fn 23 at para 73

[94] In her analysis Prof Theron included a period of analysis (after 2012), which constituted an error, as this is not a period under investigation. Another flaw identified by Dr Mncube is that the pricing method followed by Prof Theron is affected by composition of demand, so if for some reason demand for the lower price tickets increases, then the average price decreases. Even if the prices for each and every price category of tickets increased, the demand effect may bias their price index making it appear that the '*per transaction price*' has decreased.

[95] Prof Theron acknowledged the distortion caused by composition of demand, but stated that it was the best possible analysis as there was no way an index could be constructed that could show price increases over time, as this was not a "*homogenous*" product. Computicket's analysis also excluded its top five inventory providers, which had an effect on biasing its average booking fee downwards. The answer for this exclusion was less than satisfactory.

[96] In the final analysis I am satisfied that the Tribunal was correct in its finding that the Commission's theory of harm supports a conclusion that Computicket's exclusivity contracts were likely to have given rise to anti-competitive effects during mid-2005 to 2010 in that conduct by a dominant firm, being Computicket significantly impeded the establishment of a viable competitive rivalry and thereby consolidated Computickets' continued dominance through its impugned conduct.

The efficiency defence

[97] The next question is whether there was any technological, efficiency or other pro-competitive gain from Computicket's anti-competitive conduct. It is for Computicket to establish this defence. In analysing efficiencies, it must be considered "*whether they are relationship specific, whether the parties can achieve them through less restrictive means and whether the efficiencies outweigh any anti-competitive effects on consumers.*"[41]

[98] At the outset it is important to state that according to Mr Drennan the purpose of the exclusivity contracts was to respond to TicketWeb's entry into the market. In June 2005, Computicket received an instruction from Naspers, the parent company of the company that

[41] Id fn 23 at paras 30 to 32

owned Computicket at the time, to secure stock for a longer period of time. The purpose was clearly to protect Computicket's inventory from competition.

[99] When asked by the Chairperson of the Tribunal whether she had investigated efficiencies, Prof Theron testified that, in her report, they [Econex team] had found no anti-competitive effects, so they did not see a need for an in-depth analysis of the efficiencies, but "*included efficiencies from the literature and some that we got from the evidence to show that there could be specific efficiencies here yes.*"

[100] Computicket contended that exclusivity was necessary to protect general investments, as it did not charge its clients upfront for all of its investments. It also protected it from free riding by other ticketing agents, piggybacking on its advertising efforts. It has made considerable investments in advertising, which it would not have made had there been no exclusive agreements in place, despite being able to contract some of the investment with the individual clients.

[101] It submitted that it relied on clients remaining with it for the duration of the exclusive agreement in order to recoup its costs. It also contends that it was willing to make loans and investments in some way to protect inventory providers because it could reduce its risk through guaranteeing ticket sales for the duration of the exclusive agreement.

[102] Dr Mncube explained that guidance from economic theory indicated that exclusive dealing is more likely to promote efficient investment by a supplier if the following three cumulative conditions held: firstly, the investment must be non-contractible, which implies that it cannot be specified in a contract and paid for by the buyer; secondly, the investment is customer specific, meaning that once it has been incurred by the seller, it cannot be used by another customer; and thirdly, the investment has external effects on competitors to the seller, increasing the value of trading between such competitors.

[103] The Tribunal found that these requirements were not met as Computicket applied exclusivity provisions in each contract, regardless of what type or needs were. "*The standard terms were applied for the standard length to all providers. Nor was Computicket able to*

provide any documentary evidence to support that these contracts were motivated by any of the efficiency concerns set out above." [42]

[104] Computicket argued that there were general investments in every relationship that were not fully contracted and evidence showing that there were high operational costs associated with crafting new contracts for every specific client's needs which needed use of standard form contracts. Further, consumer convenience is enhanced through cross subsidisation of smaller events; this in turn builds consumer loyalty and brand reputation.

[105] According to Dr Mncube, if the investment was part of the contract, the seller and the buyer could simply agree on the efficient level of investment and make an upfront payment which would take into account the optimum level of the investment that would be required. This would ensure that efficient trading takes place with no need to rely on an exclusive contract as an instrument to indirectly achieve the outcome. This is a sensible method.

[106] There is no risk of free-riding that has been shown, requiring exclusivity, either. The exclusivity provisions spoken of were only introduced in 2005, if their purpose was to protect investment they would have been introduced long before that. When introduced in 2005, their reason was to meet certain contractual financial performance warranties. None of the contracts were suggested to have been tied into or calculated in relation to any specific investments.

[107] Support has not been shown for the justifications given by Computicket, as being in concert with general economic and competition principles in exclusive dealings in relation to general volume-based considerations. The generic submissions made do not illustrate why the Computicket situation had to be treated as unique. In addition, such submissions are not supported by evidence.

[108] The problems that may allegedly occur as a result of inventory splitting cannot in my view justify exclusive provisions for all events. Clearly this is an issue that can be overcome by contract, including making upfront arrangements per event(s), depending on the needs or as Baruffol stated, a possible blocking off of tickets that each agent has, to avoid any double booking, or confusion that may arise. Sharing of platforms is something that Computicket had at some occasions accommodated before, in circumstances where inventory was split

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[42] Tribunal's decision at page 238

with parties who were self-supplying. With all the concerns raised with inventory splitting including any reputational risks that may occur due to systems errors, I do not see a necessity of an exclusive contract of the nature employed, to avoid such from occurring. These are matters that can be resolved without a need for exclusivity. Again, another issue is that these difficulties would surely have arisen long before 2005. It has not been satisfactorily explained why inventory splitting would become a particular concern in 2005.

[109] Finally, on the efficiency point, it was argued on behalf of Computicket that exclusivity increases consumer choice and convenience by enabling Computicket to offer the best available seats and equal opportunity to tickets; this reduces search costs to consumers because they know where to buy tickets for a given event. With a large network of retail outlets, a website with large capacity and a call centre, it is very easy for most consumers to access tickets for a particular event as opposed to a non-exclusivity scenario where customers will have to move between retail outlets and websites. In addition, issues of fraud, management of ticket inventory, refunds to customers for cancelled concerts, and organising, negotiating and tendering for each event are efficiently managed.

[110] I agree with the Commission's argument that this presupposes that consumers would prefer to have one supplier than having to search for a best deal. In any event the network offered by Computicket would still be available as one of the choices available to the consumer; it would not be lost. To achieve all these efficiencies in order to offer value to customers does necessitate closing off of potential rivals by way of an exclusive contract.

Conclusion

[111] In summary, I am persuaded that not only was the exclusionary act substantial in terms of foreclosing the market to rivals, there is evidence pointing to actual harm on consumers (although the latter is not necessary to show). No pro-competitive efficiencies were established. Accordingly, the Tribunal did not err in its finding that Computicket had infringed the provisions of section 8 (d) (i) of the Act.

Penalty

[112] With regards to the penalty, Computicket submits that the Tribunal ought not to have imposed an administrative penalty which is almost equal to 10% of the firm's turnover. The reason put forward is that, regard being had to considerations of proportionality and

rationality, the only evidence advanced by the Commission in respect of foreclosure, was only in relation of a tiny (3%) of the total market, being the theatre market on which Mr Charne and Mr Jay focused their evidence.

[113] This submission cannot be sustained. The evidence presented in this case was across all inventory providers and not just the theatre section. Mr Drennan's contention was never that the enforcement of the exclusivity was intended to merely focus on theatres.

[114] The Tribunal thoroughly explained the methodology applicable and basis of its decision to impose the penalty of R20 million. There is no reason to repeat it. Having considered the submissions made on appeal, in relation to penalty, I find no basis to interfere with the Tribunal's discretion.

[115] In light of the above findings, the following order is made:

1. The appeal is dismissed with costs including costs of two counsel.

N P BOQWANA

Judge of Appeal

DM DAVIS and D UNTERHALTER

Judge President and Acting Judge of Appeal

(Concurred)

APPEARANCES

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