

competition tribunal dismisses complaint against tobacco giant

the competition commission, jt international south africa (proprietary) limited and british american tobacco south africa limited (proprietary) limited

The Competition Tribunal (*'Tribunal'*) today dismissed the complaint lodged by the Competition Commission (*'Commission'*) and JT International South Africa (Proprietary) Limited (*'JTI'*) against British American Tobacco South Africa Limited (*'BATSA'*).

BATSA was represented throughout the proceedings – which commenced in October 2003 – by the Competition Law Department of Edward Nathan Sonnenbergs Incorporated.

The Allegations

The allegations made by both the Commission and JTI were that (i) BATSA is dominant in the market for the supply of manufactured cigarettes in South Africa; (ii) BATSA abused its dominance by engaging in exclusionary conduct prohibited by sections 8(c) and (d)(i) of the Competition Act which redounds to the detriment of cigarette consumers whose choice is restricted and who, consequently, are obliged to pay higher prices than would otherwise be the case. In addition, JTI alleged a contravention of section 5(1) of the Competition Act, claiming that certain agreements concluded between BATSA and retailers – essentially the identical agreements that are the subject of the section 8 allegations – have the effect of substantially preventing or lessening competition without any countervailing pro-competitive gains emanating from the conduct in question.

The Tribunal's Approach

In examining the abovementioned allegations, the Tribunal focused its examination of the following factors, namely -

- the theory of harm advanced by the applicants (being JTI and the Commission); and
- the factual evidence of foreclosure produced by the applicants.

We will deal with each of these factors in greater detail below.

The theory of harm

The Commission and JTI sought to contrast the competitive conduct allegedly employed by BATSA with the pure category management principles advanced by the applicants and their marketing experts. In this regard, the applicants claimed that adherence to category management principles be treated as a proxy for pro-competitive conduct or, at least, that contravention of category management principles be regarded as evidence of anti-competitive conduct.

The applicants contended that the payment of incentives (monetary and in the form of dispensing units) to secure additional space and a preferential position on cigarette dispensing units, or, indeed on the retail shelves in general, is indeed anti-competitive.

The Tribunal did not agree with the approach adopted by the applicants and held that *"we do not accept the argument that holds out a set of abstract, idealised and thoroughly implausible marketing principles as the standard against which BATSA's conduct must be judged. Properly construed, the BATSA trade investment agreements, the hallmark of which is the constrained right that it has purchased over promotional opportunities at the [point of sale], is a species of exclusive agreement. Critically, this includes the right to determine, within limits, the amount of space allocated to competitor brands and the positioning of those brands within the [cigarette dispensing units]. The agreements also frequently include the right to determine the display of secondary promotional material at the [point of sale]. The right is granted against the payment of cash incentives, bolstered by the provision of free merchandising architecture at the retail [point of sale]."*

The factual evidence of foreclosure

The applicants alleged that BATSA's conduct (i.e. the agreements entered into between BATSA and the retailers supported by the incentive payments) gave rise to significant competitor foreclosure. In this regard, the Tribunal examined the factual evidence adduced by the applicants to determine the level of actual foreclosure and, in doing so, the Tribunal emphasised that not only must foreclosure be shown, the foreclosure must also be shown to have derived from the alleged anti-competitive conduct. In other words, where elements of the foreclosure may reasonably be inferred to have occurred in consequence of conduct beyond the reach of competition law, then "[the Tribunal] cannot necessarily conclude that the foreclosure amounts to anti-trust harm".

The Legal Tests employed by the Tribunal

The Tribunal's decision in this matter supports the axiomatic (but often understated) principle that a position of unrivalled dominance is not prohibited or even punishable under the provisions of the Competition Act. Rather it is the abuse of such a dominant position that attracts sanction.

In the Tribunal's words "[a]fter an exhaustive examination of the evidence, and contrary to the preconceptions with which many may approach an abuse of dominance allegation against a firm with a near monopoly market share, we do not believe that the applicants have discharged the obligation to show harm to competition". In this sense, the Tribunal placed much reliance on the promotional opportunities available to JTI, JTI's own resources, including international brands and experience, and alternative mechanisms and sites of marketing and promotion "studiously ignored" by JTI.

The Tribunal placed great store on the argument that allegations of exclusionary conduct (i.e. abusive conduct on the part of a dominant firm aimed at preventing a competitor from expanding within, or entering into, a particular market) premised on sections 8(c) and (d)(i) of the Competition Act must be supported by evidence of significant foreclosure - without which "the allegation of exclusionary conduct cannot be sustained". The "act of offering a higher price for an input (promotional resources or any other) or a lower price for an output as an illegal inducement of, respectively, a supplier or a customer is to penalise rather than promote competition".

In essence, the decision of the Tribunal reflects that JTI was outmarketed by BATSA and, rather than expending resources on competing with BATSA in the market place, JTI turned to the competition authorities for a solution. This is borne out by the Tribunal's words that "we must conclude either that JTI accorded little significance to the promotional opportunities afforded by this channel... or else it has chosen to fight its battles in the Competition Tribunal rather than on the more testing terrain of the market".