

Competition Commission's appeal against SAB dismissed

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The Competition Commission's appeal against South African Breweries Limited (SAB) was dismissed with costs in a judgment handed down on Monday, 2 February 2015 by the Competition Appeal Court (CAC).



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In March 2014, the Competition Tribunal dismissed a case against South African Breweries Limited (SAB) in respect of its distribution systems. The Competition Commission alleged that SAB's conduct amounted to:

1. unlawful price discrimination in contravention of s9 of the Competition Act, No 89 of 1998 (Act) to the extent that SAB charged a different price to its authorised distributors (being the retail price minus a discount) than to other distributors (being the retail price) (referred to as the price discrimination case);
2. market division in contravention of s4(1)(b) of the Act as SAB agreed not to compete with its authorised distributors for the distribution of SAB products in the exclusive territories (referred to as the horizontal case); and, alternatively,
3. a vertical restrictive practice in contravention of s5(1) by virtue of the territorial carve-outs being anti-competitive and not capable of justification (referred to as the vertical s5(1) case); and
4. minimum resale price maintenance in contravention of s5(2) of the Act (referred to as the minimum resale price maintenance case).

The Tribunal found that:

1. SAB's conduct did not amount to price discrimination as the transactions between SAB and authorised distributors on the one hand and independent distributors were not functionally equivalent;
2. the relationship between SAB and its distributors cannot be characterised as the type of horizontal relationship the legislature intended to scrutinise in terms of those provisions of the Act that prohibit market allocation as the authorised distributors were not autonomous economic actors;
3. the conduct did not lead to a substantial lessening or prevention of competition that would be prohibited in terms of s5(1) or s4(1) of the Act;
4. there was no evidence to suggest that SAB intentionally imposed a computer system on its authorised distributors (that limited authorised distributors from setting their own price) in order to enforce a system of resale price maintenance or that SAB penalised its authorised distributors for granting discounts.

The Commission unsuccessfully appealed the decision of the Tribunal to the CAC. The CAC found that:

- Horizontal case of market allocation: the CAC criticised the Tribunal for considering the independence of the authorised distributors as the only relevant factor in its enquiry, but confirmed that it is a relevant consideration. The CAC considered the central consideration to be whether the relationship between SAB and its authorised distributors could be characterised as a horizontal relationship (as between competitors) or a vertical relationship (as between supplier and customer).

The CAC concluded that (in line with international precedents) the relationship between SAB and its authorised distributors is more accurately characterised as a vertical relationship and that the horizontal component of the relationship was incidental to and flows from the vertical supply arrangement. Accordingly, the conduct of SAB cannot be appropriately considered under s4 of the Act.

- Vertical s5(1) case: the CAC agreed with the finding of the Tribunal that the Commission could not, on the evidence, show that the conduct, in fact, led to a substantial lessening or prevention of competition. On the contrary the distribution system achieved lower warehousing, primary distribution and secondary distribution costs and ensured that the demand of all purchasers of more than ten cases of beer were met at the lowest cost and, overall, benefited consumer welfare.
- Price discrimination case: the CAC did not deem it necessary to consider whether the transactions between SAB and its authorised distributors, on the one hand, and its independent distributors, on the other hand, were equivalent transactions (and, hence, subject to scrutiny in terms of s9(1) of the Act). The CAC concluded that any such inquiry is unnecessary as the Commission did not establish that the alleged price discrimination was likely to have the effect of substantially lessening or prevention of competition, of the kind which would undermine the competitive process and ultimately harm consumers.
- Minimum resale price maintenance case: the CAC supported the conclusion reached by the Tribunal and found that there was no evidence to suggest that SAB enforced a practice on its distributors to prevent the distributors from charging less than the listed prices.

Accordingly, the CAC dismissed the Commission's appeal with costs. It has been reported that the Commission is considering its options to appeal the decision of the CAC to the Constitutional Court.

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