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The Assessment of Exclusive Contracts: The Competition Case Against Computicket in South Africa

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Abstract
This article reviews an abuse of dominance decision against the main outsourced ticketing firm in South Africa. The decision of the Competition Tribunal in January 2019 was upheld by the Competition Appeal Court in October 2019. The case clearly illustrates an economics approach to evaluating exclusionary conduct. As this article sets out, the market and contractual environment in which Computicket operated corresponded closely to the assumptions of the economic theory of anti-competitive exclusive dealing. These conditions, taken together, imply that Computicket's exclusive contracts are likely to have led to significant anti-competitive effects in the relevant market.

Keywords Antitrust · Abuse of dominance · Exclusive contracts

JEL Classifications K21 · L41 · L42 · L82

1 Introduction

On 21 January 2019, the Competition Tribunal ("Tribunal") found that Computicket (PTY) LTD ("Computicket"), South Africa's well known ticketing firm, had—through the imposition of exclusive contracts—abused its dominant position in the South African outsourced ticketing distribution market, and imposed a fine of ZAR

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20 million (about USD 1.3 million) to Computicket.[1] The exclusive contracts were multi-year contracts between Computicket and each buyer of ticketing services (venues and promoters) in which each buyer committed not to make any purchase from a competing seller of ticketing services. The contracts, as we discuss below, contained implicit and explicit penalties for breach of exclusivity by the buyer. Nine months later, on appeal, the Competition Appeal Court ("CAC") upheld the Tribunal's decision in its entirety, confirming the effects-based assessment of exclusive contracts that had been the base for the Tribunal's original decision.[2]

The genesis of the case follows several complaints by rivals of Computicket that dated to February 2008. The Competition Commission ("Commission"), as the prosecuting agency, asked the Tribunal, in April 2010, to determine (1) whether Computicket was dominant in the market for the supply of outsourced ticketing services for entertainment events; and (2) whether Computicket had abused its dominance by securing exclusive contracts with its clients. The Tribunal hearing in the matter took place more than seven years later: in October 2017. The long delay is attributed to a lengthy and litigious history between the parties over the discovery of documents in which Computicket tried every possible way to delay the proceedings, followed by Computicket's unsuccessful administrative law challenge to the Commission's decision to refer the complaint to the Tribunal.

In many respects, this case is exemplary of the economic approach that has been followed in abuse-of-dominance cases by the competition authorities in South Africa in several prominent cases..[3] South Africa's competition law prohibits a firm from abusing its dominant position through an exclusionary act. An exclusionary practice is defined as one in which a dominant firm impedes or prevents a rival from entering into or expanding within a market**.** Exclusionary practices are prohibited only when committed by a dominant firm and when they result in an anti-competitive effect that cannot be justified on efficiency or pro-competitive grounds.

In *Commission vs. South African Airways* ("SAA"),[4] the Tribunal provided guidance as tohow to identify such anti-competitive effects. According to the Tribunal, an anti-competitive effect requires (1) evidence of actual harm to consumer welfare or (2) factual evidence or reasonable inferences that are drawn from proven facts that

[1] Case number CR008Apr10, Competition Commission vs. Computicket (Pty) (Ltd) ("Computicket") published on 21 January 2019 https://www.comptrib.co.za/case-detail/5455 [hereinafter CT Computicket (2019)].

[2] Case Number 170/CAC/Feb19, Computicket vs. Competition Commission published on 23 October 2019 http://www.saflii.org/za/cases/ZACAC/2019/4.html [hereinafter CAC Computicket (2019)].

[3] Another clear example of this approach is provided by the two landmark cases of anticompetitive exclusionary contracts that were successfully brought by the competition authorities against South African Airways (see: Competition Tribunal of South Africa, *Competition Commission v. South African Airways*, Case No. 18/CR/Mar01; Competition Tribunal of South Africa, *Nationwide/Comair v. South African Airways*, Case No. 80/CR/SEPT06; Competition Appeal Court of South Africa, *South African Airways v. Comair/Nationwide*, Case No. 92/CAC/MAR10, 11 April 2011). For an economic assessment of the second case against South African Airways, and an explanation of the extensive economic analysis that was carried out by the South African competition authorities, see Federico (2013).

[4] Confirmed in paragraph 112, *South African Airways (Pty) Limited vs. Comair Limited and Another* (92/CAC/Mar10)).

the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.[5] On foreclosure, the Tribunal's guidance is that it is not necessary to show that the conduct completely foreclosed rivals from entering or accessing a market, it is sufficient to show that the conduct prevents or impedes a firm from expanding in the market. In other words, condition 1 relates to actual effects and condition 2 relates to likely effects.

This paper is organised as follows: In Sect. 2 we will briefly describe the markets at hand, and summarise the exclusive contracts that were implemented by Computicket. Section 3 contains our assessment of the case: We start with the formulation of a coherent theory of foreclosure, followed by an assessment of the evidence of likely and actual effects – based on the evidence that was available in the case – and then a consideration of possible pro-competitive effects. In Sect. 4 we provide a brief comparison of the Computicket case with ticketing cases from Singapore and Ireland. Section 5 concludes.

2 A Short Description of the Case

In this section, we first briefly provide some background on the industry (at the time of the investigation) and of the relevant conduct (e.g., mid 2005–2010), then describe the relevant markets; and we finally summarise the nature of the contracts that were the subject of the investigation.

2.1 Background to the Industry

Outsourced ticketing services ("OTS") companies are firms that sell tickets on behalf of venues and promoters (which we generally define as Inventory Providers ("IPs") throughout this paper). The essential function of OTS companies is to provide IPs with an efficient way of distributing tickets, in order to increase the overall volume of tickets that sold and also to reduce the cost of distribution. IPs might outsource the ticketing service completely to OTS companies, or the IPs might outsource only part of the services and handle part of the ticketing themselves.

[5] On appeal, this approach was also endorsed by the CAC. See *South African Airways (Pty) Limited vs. Comair Limited and Another* (92/CAC/Mar10)). In that case, the respondent contended that the Tribunal's approach of establishing a substantial prevention or lessening of competition on the basis of "*likely*", as opposed to "*actual*", effects amounted to a "*form-based*", as opposed to an "*effects-based*", approach to anti-competitive effects that was not mandated by the Act. The Tribunal reaffirmed that for an exclusionary abuse of dominance, the Competition Act "*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.*" at paragraph 105–106. For further details see Federico (2013).

OTS companies provide a service that is also designed to enhance convenience to the end-consumers, and as such increase the volume of ticket sales. OTS providers allow consumers to buy tickets at local outlets, via the internet and over the telephone. This allows end-consumers to avoid having to wait in queues at a venue's box office on the day of the event. Given that OTS providers typically have a wide network of retail outlets, consumers can save time and transportation costs by buying or collecting the ticket at the closest retail outlet, rather than at the venue itself. Internet usage in South Africa at the time of the investigated conduct was very limited, and hence most of the sales took place offline through different types of outlets.

The IP (i.e. the venue and/or promoter) is responsible for contracting with artists to appear at a certain time, date and venue in return for a payment. The IP will also typically advertise the event. In most cases, contracts are signed, and an advance payment is made to the artist before the performance. The IP decides on the face value of the ticket to take into account also all of the other expenses such as hiring a venue (if necessary) and promoting the event. The IP will also decide on the optimal ticketing distribution method, and on whether to outsource the service or not.

Contracts between OTS providers and IPs are based on individual bilateral negotiation. Two main price elements are typically contained in these contracts, based on evidence from other jurisdictions in this market and from South Africa:

i. A booking fee (also known as service charge or fee), expressed as an absolute amount per ticket, to be added on to the promoter's ticket price. This fee is paid directly by the end-consumer. The level of the booking fee can increase with the price of the ticket, typically according to a sliding scale. If a consumer buys the ticket through the OTS provider, the final price that is paid for the ticket therefore equals the promoter's price plus the booking fee; and
ii. A commission (also known as "inside commission"), which is set as a percentage of the promoter's price (excluding the booking fee). This is paid directly by the IP to the OTS provider.

Both the booking fee and the commission charged by a given OTS supplier can vary across different IPs.

At the time of the investigation Computicket (which had entered the market in 1971) was the main provider in the South African market for outsourced ticketing services. The South African market for outsourced ticketing services had undergone a process of consolidation during the period prior to the investigation, most notably in 2002 and in 2005. In 2002, Computicket had acquired its main competitor, TicketWeb (which had entered the market in 1999). Prior to TicketWeb´s entry into the market, Computicket had not operated through exclusive contracts with IPs. This however changed in 1999 (one year after TicketWeb's entry), when Computicket started to rely on exclusive contracts. In its case against Computicket, the Commission alleged that the introduction of exclusive contracts was in response to the entry of TicketWeb.

Evidence from the case suggests that the Computicket and TicketWeb were competing with each other on price in 1999–2000, and that TicketWeb acted as a competitive constraint on Computicket. Notably, TicketWeb's commission, on average, was set at 4%. By contrast, Computicket's commission, on average, was 5%.[6] Figure 1 plots the standard booking fee schedule for TicketWeb, which was applicable between September 1999 and November 2000. As Fig. 1 shows, the TicketWeb online fee schedule was significantly lower than the Computicket schedule during the same period. The TicketWeb schedule for bookings via the call centre/outlets was closer to the Computicket schedule, but also lower than it. Witness testimony during the trial also indicated that Computicket had lost market share to TicketWeb after the latter's entry into the market.[7]

In its decision, the Tribunal observed that TicketWeb was not always cheaper during this period, given that it increased its fee in November 2000, which resulted in Computicket becoming more competitive than TicketWeb for some tickets (see Fig. 2).[8] This evidence is consistent with the fact that Computicket and TicketWeb competed in price—notwithstanding the increase in TicketWeb's booking fees in late 2000.

In 2002, after acquiring TicketWeb, Computicket extended its offer of exclusive contracts to IPs that had been previously customers of TicketWeb. Witness testimony suggested that Computicket acquired TicketWeb to increase its dominant position in the market and to deter future potential competition.[9] The Tribunal also noted Computicket's own internal documents which stated that: *"CKT removes its main competitor whose presence has resulted in a reduction of commissions and service charges over the past two years"* and further in the same document Computicket made the following observation: *"CKT can return to the position as the one stop shop for all consumers ticketing needs, removing confusion in the minds of consumers regarding where to acquire pre-event tickets"*.[10]

In 2005, Shoprite purchased Computicket. This led to the disappearance of Shoprite's own ticketing service (Ticket Shop), as an independent competitor, which had been active in the market since 2004. Ticket Shop too had acted as competitive constraint on Computicket during its brief presence in the market.[11] Ticket Shop was active in the market between late 2004 and mid-2006. The Tribunal also noted internal documents from Computicket in December 2005 in which Computicket attributed a net margin decrease from 33 to 28% as a result of increased competition from the Shoprite ticketing system.[12] After the acquisition of TicketWeb and the transaction with Shoprite, Computicket obtained effectively a monopoly position in the market for outsourced ticketing services.

[6] CT Computicket, paragraph 43.
[7] CT Computicket, paragraph 41.
[8] CT Computicket, paragraph 44.
[9] CT Computicket, paragraph 46.
[10] CT Computicket, paragraph 47.
[11] CT Computicket, paragraph 55.
[12] CT Computicket, footnote 28.

As a condition of the merger, Shoprite required a profit guarantee from the sellers of Computicket.[13] To ensure that they could meet the condition, the sellers of Computicket extended the duration of Computicket's exclusive contracts from short duration contracts: from short-duration contracts, which were four months or less, to long-duration contracts, which were typically three years.

2.2 The Markets

The discussion of the product and geographic markets will be kept short here because it was not particularly controversial. The Commission defined the market as the supply of OTS for entertainment events. Computicket accepted the Commission's market definition and that it was dominant during the relevant period.[14]

The relevant product market excludes the self-supply of ticketing activities by IPs. The reason for excluding self-supply is that the outsourcing of ticketing activities to an external company such as Computicket offers significant advantages to an inventory provider. These include most notably: access to a wide network of retail outlets; the ability to rely on qualified staff with specific expertise in ticketing; access to a firm with a brand that is well-known by final consumers and therefore makes it more likely that consumers will know where to purchase tickets; and cost advantages due to scale economies. Moreover, the ability of outsourced ticketing companies to price-discriminate across inventory providers can isolate the potential competitive pressure that arises from those providers that may find the option of self-supply more attractive, thus supporting a definition of the market that excludes self-supply.

These factors make it likely that a small but significant price rise above competitive levels would be profitable for a hypothetical monopolist of outsourced ticketing: The "hypothetical monopolist test" would be satisfied. Moreover, in this case there is direct evidence concerning market definition, since Computicket became an actual monopolist in the market for outsourced ticketing services in 2002. Following its merger with TicketWeb in that year, Computicket increased its booking fees twice—first in mid-2002, and then in mid-2003—and also raised its standard commissions in late 2002.[15] These price rises were significant—above the standard 5–10% thresholds that are used for the purposes of market definition—and profitable (as Computicket's financial performance since 2002 indicated).[16] This evidence therefore provides direct support for a definition of the market that excludes self-supply by inventory providers.

[13] CT Computicket, paragraph 57.

[14] CT Computicket, paragraph 51.

[15] The Commission and the Tribunal were set up in 1999. The Competition Act prohibits mergers that are likely to substantially prevent or lessen competition unless outweighed by efficiency gains or justified on certain public interest grounds. The fact that de-facto mergers-to-monopoly were approved by the competition authorities illustrates a weakness in the merger control regime at the time. The substantive legal and economic analysis in merger review has gradually increased overtime.

[16] CT Computicket, paragraph 48.

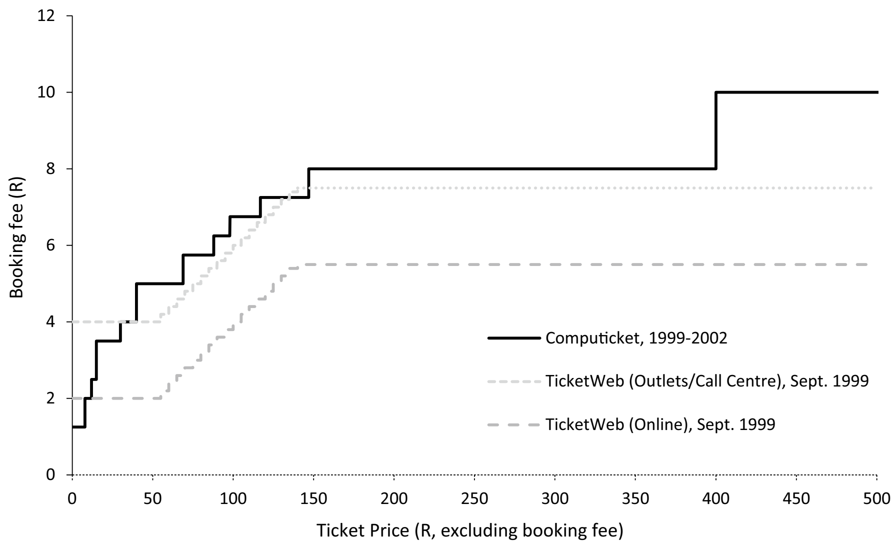

Fig. 1 Computicket and TicketWeb standard booking fee schedules, 1999–2000. Source: Own calculations using information submitted to the Commission

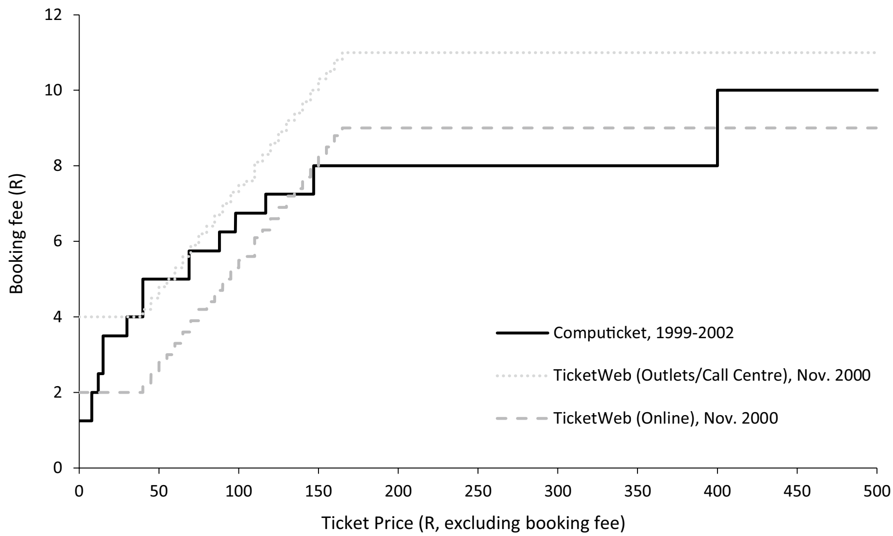

Fig. 2 Computicket and TicketWeb standard booking fee schedules, Nov. 2000–2001. Source: Own calculations using information submitted to the Commission

The merger between Computicket and Ticket Shop in 2005 also provides evidence that the relevant market includes only outsourced ticketing services: Internal Computicket documents indicate that, at the time of that merger, Computicket had experienced a decline in margins due to competition from Ticket Shop, and it expected margins to 'normalise' after the elimination of this competition. This evidence is again supportive of the conclusion that prices in the relevant market were constrained by competition between suppliers of outsourced services, rather than by the threat of self-supply by inventory providers.

The relevant market in this matter can be appropriately defined to comprise only inventory that is related to entertainment events and, excludes non-entertainment inventory such as bus tickets. From a demand-side perspective, there is clearly no substitution possible between entertainment and non-entertainment inventory, and in most instances there is also very limited substitution across different entertainment genres: e.g., between theatre and sports. However, supply-side substitution by ticketing agents can to some extent imply that different categories of inventory form part of the same market. In the case of transport services, however, it is likely that substitution on the supply-side would not be sufficiently rapid and effective to imply that they should be included in the same market as entertainment events. Not much, however, turns on this aspect of the definition of the market. In particular, Computicket also remained dominant in a wider market that includes both entertainment and non-entertainment inventory.

In South Africa the Competition Act states that a firm is dominant in market if it has a market share of 45% or more. Computicket consistently held an annual share of over 95% in the outsourced ticketing services market, in relation to entertainment events, between 2005 and 2009. Computicket's share of the relevant market therefore significantly exceeded the statutory thresholds for dominance that are established in the Competition Act. The Tribunal and the CAC noted that the issues of dominance—as well as the definition of the market—were conceded by Computicket.[17]

2.3 Analysis of Computicket's Contracts and Conduct

After 2005, some new ticketing services firms entered the market, but none garnered a significant share of the market. The Commission argued that the main reason that new firms were not able to challenge Computicket's dominant position was because of the exclusionary effect of the exclusive contracts. By contrast, Computicket argued that some of these new firms have been unsuccessful entrants and others failed for other reasons that were not related to the exclusive contracts. In this sub-section, we focus on the design and implementation of Computicket's exclusive contracts, which are at the heart of the competition case that was brought by the Commission.

The Tribunal and the CAC found that the exclusive contracts have evolved both in form and duration since their introduction.[18] The Commission's experts carried out an extensive empirical analysis of over 1800 of Computicket's contracts that were discovered during the proceedings. This analysis revealed that exclusivity applied to 99% of the more than 1,600 contracts for which the relevant information was

[17] CAC Computicket, paragraph 15 and CT Computicket, paragraph 85 and 86.
[18] CT Computicket, paragraph 62 and CAC Computicket, paragraph 7 and 8.

available (see Table 1).[19] Moreover, as the CAC found, exclusivity was based on a specific clause in Computicket's standard Services Agreement, which indicated that such exclusivity was the result of a deliberate contractual policy by Computicket.[20]

The Tribunal and the CAC observed that the Commission´s analysis of Computicket's contracts from 1999 up to April 2010 demonstrated the fact that the duration of the exclusive contracts increased drastically over the relevant period.[21] Contracts that were signed between 1999 and 2003 were typically of a short duration: four months or less. In 2004, roughly 40% of contracts were of a short duration, and the remaining 60% had an average duration of just over one year. Contract duration then increased significantly from June 2005: From that month onwards, 95% of discovered contracts were signed for three years, and average contract duration increased to about 3 years (Fig. 3).[22]

The Tribunal and the CAC also accepted the evidence that was brought by the Commission that indicated that Computicket increased its standard booking fees twice during that period: first in late April 2002; and then again in approximately May 2003.[23] In addition, the Tribunal and the CAC accepted the evidence that indicated that Computicket was able to price discriminate across inventory providers, with respect to both booking fees and commissions.[24] This flows from the fact that the contracts were individually negotiated.

Figure 4 summarises the distribution of booking fee modalities by year, distinguishing between three categories: the standard booking fee schedule; special booking fees; and no booking fee.[25] Computicket's departures from the standard booking fee schedule showed that it was able to price discriminate extensively across IPs (if necessary), and that it negotiated each contract individually. The ability to apply different booking fees was also explicitly recognised in the contract forms that were used internally by Computicket to record the key terms that were agreed to in each contract. In addition, Computicket was able to price discriminate across IPs with respect to the commission that was agreed to in the contract.[26] The CAC accepted the testimony of a Computicket executive who stated that larger customers were able to negotiate substantially better rates.[27]

[19] Computicket provided a total of 1,841 unique contracts over the period 1999–2010 for analysis by the Commission.

[20] CAC Computicket, paragraph 56.

[21] CT Computicket, paragraph 111 and CAC Computicket, paragraph 57.

[22] CAC Computicket, paragraph 57.

[23] CAC Computicket, paragraph 58.

[24] Discriminatory terms across clients enhances the profitability (and hence the likelihood) of exclusion.

[25] Under this type of booking fee arrangement, no booking fee was used, and instead a higher commission was typically put in place.

[26] The evidence from the discovered contracts showed that overall, roughly 70% of the contracts included the standard commission. This share ranged from more than 90% of contracts between 1999 and 2004, to 40–60% in 2008–2009.

[27] CT Computicket, paragraph 58.

Table 1 Exclusivity clauses in Computicket's discovered contracts[a]. *Source* CT Computicket, page 26

Period	Discovered	With Information on Exclusivity	Exclusive	Non-Exclusive	% Exclusive
1999–2001	77	72	71	1	99%
2002	141	139	138	1	99%
2003	129	129	128	1	99%
2004	106	81	80	1	99%
2005	109	58	58	0	100%
2006	321	305	303	2	99%
2007	325	324	323	1	100%
2008	494	433	431	2	100%
2009	103	64	64	0	100%
2010	36	34	34	0	100%
Total 1999–2010	1841	1639	1630	9	99%

[a]Discovered contracts are contracts that Computicket provided to the Commission during the proceedings before the Tribunal

The evidence also indicated that Computicket's contracts were typically signed on different dates throughout a given year, with the result that the contract expiry dates were also staggered (Fig. 5); this is a point to which we shall return below.

Finally, both the Tribunal and the CAC accepted the overwhelming evidence that Computicket enforced its exclusivity strictly in relation to inventory providers that attempted to use the services of competing firms: in most cases, those of Strictly Tickets, which entered the market in 2004.[28] Failure by the inventory providers to remedy the breach of the exclusivity clause typically resulted in: (a) cancellation of the contract, and removal of the client's events from the Computicket booking system; (b) the removal of Computicket's equipment (e.g. printers, computers and ticket stock) from the venue; and (c) Computicket's exercising its contractual rights in relation to a breach of the agreement, which included the ability to claim for damages in respect of such breach. The Tribunal and the CAC relied on documentary evidence[29] and the testimony of a Computicket executive who confirmed that Computicket enforced its exclusive contracts strictly.[30] Moreover, the evidence indicated that Computicket rejected requests for non-exclusive contracts by inventory providers; Computicket insisted that its contracts must be exclusive. Effectively, Computicket implemented a policy of "all-or-nothing" in relation to it's services.[31]

[28] CT Computicket, paragraph 152 to 158 and CAC Computicket, paragraph 53 and 54.

[29] The documentary evidence indicated six instances in which Computicket enforced the exclusivity clause and two instances in which it threatened to do so. See, for example, CAC Computicket, paragraph 53.

[30] See for example CAC Computicket, paragraph 53.

[31] CT Computicket, paragraph 71.

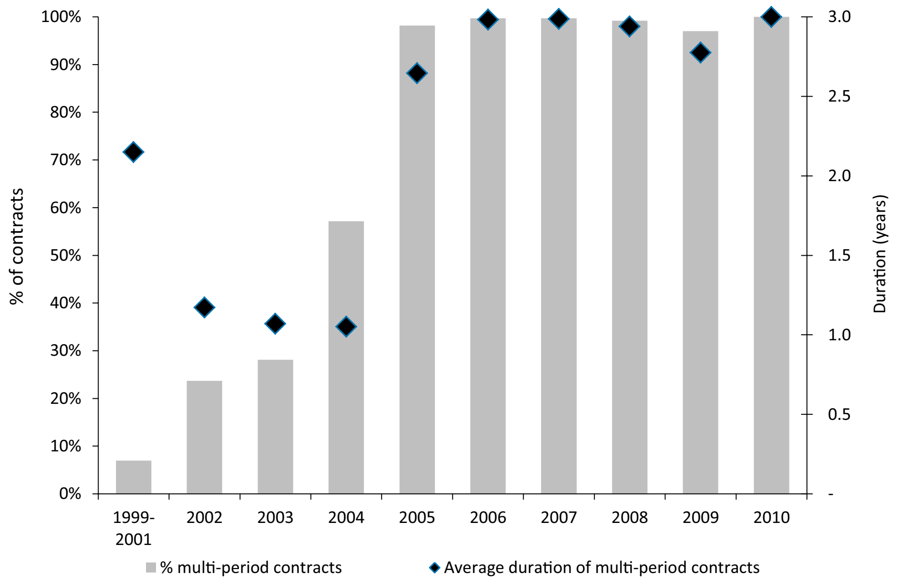

Fig. 3 Analysis of duration of Computicket's contracts, 1999–2010. Source: Own calculations using information submitted to the Commission

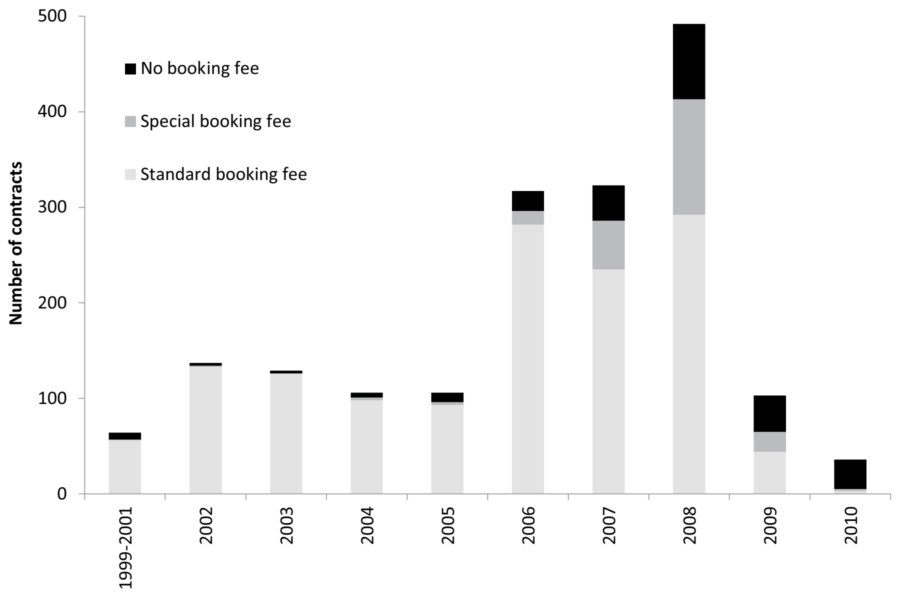

Fig. 4 Prevalence of each type of booking fee, 1999–2010 (number of contracts). Source: Own calculations using information submitted to the Commission

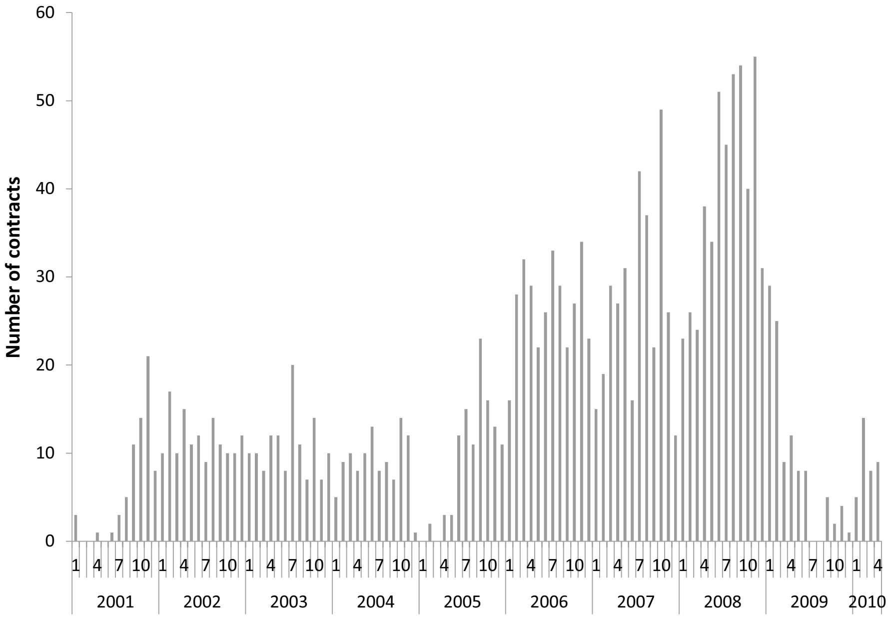

Fig. 5 Number of contracts signed in each month, 2001–2010. Source: Own calculations using information submitted to the Commission

3 Effects of Computicket's Exclusive Contracts

In this section, we evaluate the effects on competitors and on consumers of Computicket's exclusive contracts. Our evaluation is based on the standard economic theory of exclusive dealing, coupled with the main features of Computicket's conduct and of the South African market. We also discuss potential efficiency justifications for Computicket's exclusive contracts, based on guidance from economic literature and evidence on the South African OTS market.

3.1 Foreclosure Effects

Modern economic theory shows that exclusive dealing by a dominant firm can lead to foreclosure of competitors and harm to consumers under certain conditions.[32] The main conditions for this to be possible in the standard models of anticompetitive exclusive dealing are: (a) the presence of a strong incumbency advantage in favour of the dominant firm (which implies that its rivals are not in a position to compete head-to-head with the incumbent firm when offering contracts to clients); and (b) scale economies in the market (which implies that entrants need to incur fixed costs

[32] See Rasmussen et al (1991); and Segal and Whinston (2000). Fumagalli et al. (2018) offer an extensive review of the modern literature on exclusive dealing and its policy implications. Non-technical treatment of the theory is also found in Whinston (2006) and Motta (2004).

before being able to compete effectively in the market, and thereby require a critical mass of consumers in order to recover their initial investment).

If these conditions hold, buyers might find it in their individual interest to accept an exclusive offer from the incumbent seller, and thereby potentially deny an (equally or more) efficient competitor the required scale to enter the market. However, as a group, buyers would be better off by not signing the exclusive contract and instead enabling entry to take place, and are therefore harmed by exclusive dealing. In other words, in a set-up with multiple buyers and fixed cost of entry, exclusive dealing *may* result in anti-competitive foreclosure and consumer harm. This for example can happen if buyers—when simultaneously offered the exclusive contracts under the same terms—fail to coordinate their contracting decision and accept the offer of an exclusive deal from the seller, even if this offer does not compensate them sufficiently for accepting the loss of competition. This is one of the possible outcomes in this scenario, but not the only one.

Once the stylised model that was sketched out above is made richer—by allowing, in particular, for discrimination across buyers, and sequential contracting decisions—then exclusion is more likely to occur as a result of exclusive dealing. If the incumbent can price discriminate between consumers, exclusive dealing is more likely to lead to inefficient or harmful foreclosure – provided that the other conditions hold, in particular the existence of scale economies and a sufficient level of buyer fragmentation. As Whinston (2006, p. 145) puts it, "*once [the seller] can discriminate across buyers […] the anticompetitive use of exclusive contracts becomes a much more robust phenomenon.*"

When the dominant firm is able to offer exclusive contracts to consumers in a sequential manner, then not only does exclusion take place, but it is also the case that no compensation needs to be offered to any of the affected buyers in order to achieve this outcome. In essence, anti-competitive exclusion is an even stronger prediction—and more profitable for the seller—if buyers can be approached sequentially (one by one). In addition, the staggering of contract expiry dates that occurs if contracting is sequential can ensure that the number of free buyers is comparatively small at any point in time (if the that contracts are of limited duration). This too can help the incumbent achieve exclusion over time.[33]

In the stylised examples that are discussed above, we considered the case of equally-sized buyers, where no buyer was sufficiently large to be able to 'sponsor' entry. Exclusive dealing can also lead to anti-competitive exclusion in the presence of a few large buyers that are pivotal – that are in principle sufficient on their own to enable profitable entry. However, in this case the pivotal buyers need to receive sufficient compensation for accepting the exclusivity clause (see Fumagalli et al., 2018).[34]

[33] As noted by Whinston (2006, p. 148) "With staggered expirations, the number of free customers at any one point in time is inversely related to the contracts' duration: the longer the duration, the fewer contracts are up for renewal at any time.".

[34] However, the size of the large pivotal buyers needs to be small relative to the overall market: otherwise exclusion would not be profitable for the seller. This is because the payment that needs to be offered to pivotal buyers to accept the exclusive deal needs to be small enough as a percentage of the total monopoly profits that can be extracted from the rest of the market. For example, if there are 100

To summarise the implications of economic theory: Exclusive contracts by a dominant supplier are more likely to lead to anti-competitive foreclosure if the following conditions hold:

i. The dominant firm benefits from strong incumbency advantages: Rival firms are not in a position to act as an effective constraint when buyers decide whether to accept an exclusive contract with the incumbent.
ii. The market is characterised by significant fixed costs of operation, and economies of scale.
iii. The dominant firm can price discriminate across buyers, and contracts are staggered.
iv. The buyer side of the market is not heavily concentrated: A significant sub-set of buyers may suffer from coordination failures.
v. Consumers are unwilling to switch their entire demand to a new rival—e.g., when the exclusive contract expires—due to potential concerns about the reliability and effectiveness of competing firms, but would consider using competitors for some of their requirements. If this is the case, even exclusive contracts of short duration can be problematic.

The essential characteristics of the South African market for OTS—and of Computicket's conduct within this market—fit the benchmark model of exclusive dealing described above very well, and support a finding that Computicket's exclusive contracts are likely to have led to significant anti-competitive effects.[35] The five features are present in the South Africa market for OTS.

The Tribunal and the CAC found that, during the relevant period, Computicket engaged in an extensive practice of signing exclusive contracts with its clients, in a context where it held an overwhelming incumbency advantage relative to its actual or potential rivals, and in a market that was characterised by scale economies and fixed costs of entry.[36]

In what follows, we briefly deal with how the five conditions that were indicated above are consistent with the facts of the case at hand:

Footnote 34 (continued)
buyers, and only 1 of them is large enough to sponsor entry, then the seller can offer little or no compensation to 99 of the buyers (especially with sequential contracting, as was shown above), and compensate only the large buyer. In this case, the net profit from exclusion is the sum of the monopoly profits on the 100 buyers, minus the compensation that is paid to the large buyer.

[35] We review the potential efficiencies that could be associated with Computicket's conduct below. The lack of material efficiencies that were associated with Computicket's exclusive contracts reinforces the conclusion that the conduct leads to anti-competitive effects.

[36] CAC Computicket, paragraph 52. The CAC acknowledged Computicket's incumbency advantages and economies of scale.

3.1.1 Incumbency Advantages

In terms of incumbency advantages, Computicket's dominance in the market for OTS shows clearly that Computicket benefited from a near-monopoly position in the market during the relevant period, and that it faced no effective large-scale competitors in the market. This means that, when IPs were faced with a choice of accepting or rejecting an exclusive offer from Computicket, they often did not have a credible alternative. Some IPs might have been able to rely on internet-based competitors for their needs—e.g., as is the case of theatres that opted to stop using Computicket and turned to Strictly Tickets instead. This, however, would not have been an option for customers that needed the distribution network that was offered by Computicket.

The fact that the South African OTS market might have been growing over the course of the relevant period, and that new inventory became available over time, did not diminish Computicket's incumbency advantage during that period. A new entrant still needed to incur the cost of entry in order to compete for new inventory, which was not the case for Computicket. This put the incumbent in a favourable position to secure new inventory on an exclusive basis.

3.1.2 Barriers to Entry

As regards the costs of entry, the OTS market was characterised by important economies of scale—on both the supply and the demand side. From a supply-side perspective, a firm that might seek to enter the market on the basis of a similar business model to that of Computicket would have needed to incur significant upfront costs. These included the cost of setting up a network of retail outlets, of developing suitable booking software, and of establishing a brand name in the market (through marketing expenditures). On the demand-side, an entrant would have needed to overcome the advantages that were enjoyed by Computicket—given its standing with inventory providers and customers (which give rise to network effects).

These barriers were particularly large for an entrant that might seek to replicate Computicket's business model and compete for a wide range of inventory. In order for this type of entry to be viable, the competitor would have needed to attract a sufficiently large number of buyers. This created the coordination problem that plays an important role in the basic theory of anti-competitive exclusive contracts.[37]

3.1.3 Sequential and Individualised Contracts

The Tribunal and the CAC found that Computicket was able to offer different contractual conditions to its buyers (to price discriminate across IPs, if necessary), and that its contracts were staggered (which indicated the presence of sequential contracting) and of long-duration (after mid-2005, with almost all contracts having been

[37] Note also that scale economies need not be in the form of entry costs in order for exclusive dealing to lead to exclusion. The same effects can arise if there are demand-side economies that are due to network effects.

signed on a 3-year exclusive basis). These features—the ability to price discriminate, and the sequencing—significantly reduced the cost of exclusion for Computicket, which made it more likely that Computicket would find profitable its insistence on exclusive contracts in order to foreclose potential entrants.

3.1.4 Buyer Fragmentation

On the issue of buyer fragmentation, there was evidence that a significant part of the South African marker for OTS was not concentrated, and therefore potentially subject to coordination failures when contracting with Computicket. The CAC found that the five largest clients accounted for about 50% of the total entertainment sector.[38]

3.1.5 Customers Desire to Multi-Source

Finally, the Tribunal and CAC found evidence that Computicket adopted an all-or-nothing policy with respect to exclusivity clauses.[39] The policy stated that unless a buyer accepted the exclusivity, there would be no agreement with that buyer. The CAC concluded that this policy harmed customers that may have preferred to use multiple ticket agents in order to maximise their sales and it also hurt customers over time, by making it harder for entrants to build scale gradually and acquire a reputation for reliable service in the marketplace.[40] As was found in the US *Dentsply* case,[41] a policy of this type by the incumbent firm can hurt consumers even if exclusive contracts are of short duration, or can be terminated at short notice.

As it happens, Computicket's contracts after mid 2005 were not of short duration, which exacerbated their anti-competitive effects: by making entry even harder during the period covered by the contracts. The CAC concluded that Computicket's all-or-nothing policy had the effect of making small-scale entry harder when the contracts came up for renewal—thus reinforcing the overall exclusionary effects of its exclusive deals.[42]

These conditions, taken together, imply that Computicket's exclusive contracts are likely to have significant anti-competitive effects in the market. From a legal perspective, Computicket's conduct was substantial or significant in terms of its foreclosure effects by virtue of the following factors:

i. The extensive coverage of Computicket's exclusive contracts which applied to the vast majority of IPs with which Computicket had its contracts;
ii. The duration of Computicket's exclusivity, which in the overwhelming majority of cases was of three years;

[38] CAC Computicket, paragraph 60.
[39] CT Computicket, paragraph 71 and CAC Computicket, paragraph 55.
[40] CAC Computicket, paragraph 55.
[41] *U.S. v. Dentsply International, Inc.*, 399 F.3d 181 (2005).
[42] CAC Computicket, paragraph 55.

iii. The nature of the contractual relationship between Computicket and IPs, which allowed Computicket to discriminate across its buyers, and to engage in sequential contracting (which, for the reasons that were explained above, is more likely to lead to foreclosure); and
iv. Some of the other empirical features of the market that were reviewed above, such as Computicket's strong incumbency advantages, and the presence of economies of scale in the market.

Moreover, there was complementary evidence on the evolution of the South African market for OTS which supported a conclusion that Computicket's conduct was likely to have led to substantial anti-competitive effects.

The Commission argued that the simple observation that there has been no effective and sustained entry in the South African ticketing market since TicketWeb's exit in 2001 was evidence of the foreclosure effects of Computicket's exclusive contracts. This was so in spite of the attractive—and increasing—profit margins that were enjoyed by Computicket during the relevant period.

The Tribunal and the CAC accepted that the absence of entry since 2001 could not be entirely ascribed to Computicket's conduct: E.g., other reasons include further consolidation in the industry following the acquisition of Computicket by Shoprite; and seemingly unrelated difficulties that were encountered by competitors such as Ticket Connection. However, both the Tribunal and the CAC found that the extensive presence of exclusive contracts of a long duration since 2005 was likely to have been an important factor that underlay the lack of recent entry into the market, which was consistent with the Commission's theory of harm.[43]

3.2 Anticompetitive Effects

The second significant piece of evidence that supported the conclusion that Computicket's conduct was anti-competitive was that the reduction in competition in this market appears to have increased the prices that were paid by consumers: There was evidence of actual harm to consumers that resulted from Computicket's market power.

In many competition cases, evidence of actual harm to consumers is not available—either because such harm is likely to occur only in the future, or because it is difficult to build a counterfactual without the conduct and compare outcomes for consumers with such counterfactual. This means that typically indirect proxies are used to infer final harm to consumers—including for example evidence on foreclosure of efficient competitors, or evidence on the overall incidence and nature of the conduct at stake.

In this case however, the available empirical evidence from the large number of contracts that were discovered during the investigation allowed the competition authorities to make a finding also on an actual anti-competitive harm.

[43] CT Computicket, paragraph 163 and 164.

The main challenge for this analysis was the formulation of hypotheses about the counterfactual: What would have happened if the practice at issue had not been in place—something that by definition cannot be observed.

As noted by the Tribunal, the Commission and Computicket agreed that the counterfactual analysis in this case required asking the question: "What would have happened in the market if the exclusive contracts had not been in place?"[44] The Commission and Computicket differed on how to apply this question to the facts of the case: The Commission contended that the correct counterfactual is what would have happened between 1999 and 2010 if the exclusive contracts had not been in place.[45] In contrast, Computicket argued that the period after the complaint period in this case—after 2012—should be considered as the counterfactual as this was the period in which there was new entry despite the fact that exclusive contracts were still in place.[46]

The Tribunal and the CAC rejected Computickets' proposed counterfactual: They found it to be procedurally irregular and insufficiently robust.[47] The Tribunal and the CAC also found that the appropriate counterfactual should not be based on what happened after the complaint period, given that observed outcomes during this period may be influenced by a range of other factors e.g., technological improvements and demand changes which may mean that market conditions are not sufficiently similar to those that prevailed at the time of the conduct: among other things, in this period the internet started to have wider diffusion in South Africa. Furthermore, there was little evidence about what happened after 2012 and this period had not fully been investigated by the Commission.

The Tribunal and the CAC considered the period 1999 to 2002 as the more appropriate counterfactual and hence accepted the Commission's counterfactual analysis. Recall that the period 1999 to 2002 was the period when TicketWeb was competing in the market, and only a relatively limited number of short duration exclusive contracts—less than four months—were introduced during this period.

As was already stated above, following its merger with TicketWeb, Computicket implemented two separate increases in its standard booking fee schedule: one was implemented from approximately late April 2002, and was applicable until roughly May 2003; and a second one that was effected around mid-2003. The standard booking fee schedule that was introduced in mid-2003 remained the same until 2010 (according to discovered contracts). The Commission presented the evidence in Table 2, which shows the nominal percentage increases that were implemented by the second half of 2003 of between 33 and 100% (again, depending on the ticket price) relative to 1999–2002.[48]

The Commission also presented evidence—which is in Fig. 6—that shows the real percentage increases in booking fees that were implemented during the overall

[44] CT Computicket, paragraph 95.
[45] CT Computicket, paragraph 97.
[46] CT Computicket, paragraph 98.
[47] CT Computicket, paragraph 108.
[48] CAC Computicket, paragraph 92.

2003–2010 period relative to 1999–2002. The average real annual increase in booking fees ranged between 11% (for a ticket price of R60 in 2002), to 52% (for a ticket price of R300 in 2002).[49] Given that Computicket had not increased its standard booking fee since mid-2003, the annual real increase in booking fees generally declines through time, due to the impact of inflation. However, due to the large increases that were implemented in mid-2002 and in mid-2003, even at the end of the period (in 2010), booking fees were higher than the 2002 level in real terms—especially at the higher ticket prices: E.g., at a ticket price of R300 in 2002 prices, the booking fee in 2010 remained 29% higher than in 2002, in real terms.

The CAC concluded that these increases were profitable.[50] The analysis of the contracts also showed that Computicket was able to increase the level of commissions after the merger with TicketWeb.

The Tribunal and the CAC accepted the Commission's pricing analysis in its entirety: They stated that on the balance of probabilities this pricing evidence was consistent with the Commission's theory of harm.[51] In particular, this evidence showed that Computicket's dominant position was associated with adverse outcomes for consumers, following the merger with TicketWeb and the transaction with Shoprite (which had eliminated the two main possible challengers to Computicket). By erecting strong barriers to entry—and thus protecting Computicket's dominance—the exclusive contracts contributed to the consumer harm that resulted from Computicket's market power. Moreover, the evidence on the evolution of Computicket's prices and profit margins showed that Computicket did not compensate its customers for the introduction of long exclusivity clauses, but quite the contrary.

The Tribunal went further and found that the pricing evidence was also relevant to the issue of entry by rivals. It stated that in contestable markets one would expect that if the incumbent firm enjoys high prices and superior profits this would be conducive to attracting effective entry by rivals. The Tribunal concluded by stating that it did not find any evidence that showed that any entry had threatened Computicket's pricing power—particularly when compared to the period of competition with TicketWeb.

3.3 Possible Efficiency Justifications for Exclusive Contracts

On the evidence presented above, the Tribunal and the CAC found that the Commission had established a case of anti-competitive effects on a balance of probabilities. The next question was then to determine whether there was any efficiency or other pro-competitive justification for Computicket's anti-competitive conduct. The Tribunal stated that 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 anticompetitive effect*

[49] CAC Computicket, paragraph 92.

[50] CAC Computicket, paragraph 92.

[51] CAC Computicket, paragraph 215 and CAC Computicket, paragraph 92.

Table 2 Nominal percentage increase in Computicket booking fees, at different ticket price levels. *Source*: Own calculations using information that was submitted to the Commission

Ticket price (excluding booking fees, R)	% increase in 2003–2010 schedule relative to 1999–2002 schedule
100	33%
200	50%
300	88%
400	60%
500	80%
750	100%

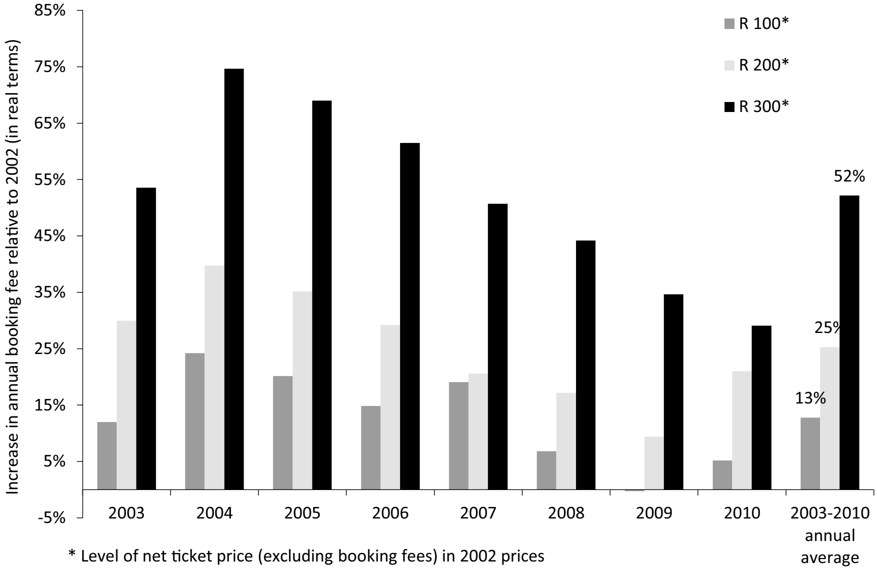

Fig. 6 Real annual increases in Computicket's booking fees as of January 1 of each year, relative to January 1, 2002, at three different ticket price levels. Source: Own calculations using information submitted to the Commission

on consumers".[52] The onus to demonstrate an efficiency defence rested with Computicket.

Modern economic analysis indicates that exclusive dealing is more likely to promote efficient investment by a supplier if the following three (cumulative) conditions hold[53]: First, the investment is non-contractible, which implies that it cannot be specified ex-ante in a contract, and paid for by the buyer. Tirole (1988) stresses that investment hold-up takes place if customer-specific investments are observable

52 CT Computicket, paragraph 97.

53 We only consider investment by the seller (i.e. Computicket) and not by buyers (i.e. IPs) as this is the more empirically relevant situation in this case.

but not verifiable (meaning that investment is not measurable by a court, so that the contract cannot be contingent on its realised level). As Tirole (1988) puts it, "*if the investments were verifiable, they could be specified ex-ante, and enforced ex-post, so that the issue of asset-specificity would not arise.*"

Second, the investment is customer- (or relationship-) specific: Once the investment has been incurred by the seller, it cannot be used for another customer. The importance of asset-specificity is also explicitly noted in the relevant economic literature and in competition guidelines on exclusive dealing. Tirole (1988, p. 25) shows explicitly that with no asset specificity, investment by a seller is socially optimal and not subject to *ex post* opportunism. Similarly, the European guidelines on vertical restraints[54] discuss the fact that one of the conditions that is required for the risk of under-investment to be significant is that the investment must be relationship-specific: "*after the termination of the contract, it cannot be used by the supplier to supply other customers, and can only be sold at a significant loss.*"[55] As an example of relationship-specific investment, the guidelines mention "*the installation or adaptation of equipment by the supplier when this equipment can be used afterwards only to produce components for a particular buyer*"; the guidelinesstate also that "*General or market-specific investment in (extra) capacity are not normally-relationship specific.*"[56]

Third, the investment has "external" effects on competitors to the seller, which increase the value of trading between such competitors and the buyer. Modern economic theory—most notably work by Segal and Whinston—shows that the investment needs to have external effects—to be subject to free-riding—for exclusive dealing to be efficiency -enhancing (by promoting investment). If the investment is purely internal, meaning that it affects only the value of the trade between the seller and a buyer (with no effects on the outside options of the buyer), then exclusive dealing is irrelevant for both investment and efficiency, under reasonable assumptions on contracting between the parties Segal and Whinston (2000) refer to this as the "irrelevance result".[57]

Whinston (2006) has relied on the irrelevance result to comment on efficiencies from exclusive dealing precisely in the industry that is the subject matter of this article (ticketing services), stating: *"[…] in a DOJ investigation into contracting practices in the computerized ticketing industry, the leading ticketer, Ticketmaster, has exclusive contracts with concert venues having 80–95% of the available seating capacity in many cities. Ticketmaster argued that those exclusives were not designed to exclude rivals, but rather to protect Ticketmaster's relationship-specific investments both in training a venue's personnel in the use of its systems and in tailoring*

54 European Commission, Commission Notice: Guidelines on Vertical Restraints, 2010.

55 European Commission, Commission Notice: Guidelines on Vertical Restraints, 2010, page 34, paragraph 107(4).

56 European Commission, Commission Notice: Guidelines on Vertical Restraints, 2010, page 43, paragraph 146.

57 Fumagalli et al. (2012) show that in some particular circumstances exclusive dealing may promote specific investment even if there is no external effect, but that investment may be socially wasteful. See also Fumagalli et al., (2018: 302–306).

its software to the specific needs of a venue. However, because of the proprietary nature of Ticketmaster's system, the investment could not be used by a venue in conjunction with other systems, so they were internal in our terminology. The irrelevance result therefore casts doubt on the claimed efficiency motivation for Ticketmaster's exclusive contracts."[58]

In his article on the *Dentsply* case,[59] Katz (2009) discusses the traditional argument that relates to the protection of manufacturer investments, in situations where the investment has no value outside of the specific manufacturer-retailer relationship, as advanced by Klein (1998).

If conditions that were summarised above hold, exclusive dealing may promote efficient investment by the seller. In the absence of exclusive dealing, the level of investment would be too low, since the seller will know that once the investment has been made, competitors will be able to rely also on it in their commercial relationship with the buyer, obtaining more value from such a relationship: "Free-riding" could take place. This will make it harder for the incumbent seller to obtain a high share of the value of trading with the buyer, since the option for the buyer of trading with a competitor—either exclusively, or in conjunction with the incumbent seller—will be more attractive. This will in turn reduce the investment incentives faced by incumbent seller, which leads to a less efficient outcome.

Exclusive dealing can restore efficiency in this case by preventing the buyer from trading with a competitor, after the buyer has received the positive benefits of the seller's investment. This means that competitors will not be able to free-ride on the initial investment. If this is the case, exclusive dealing protects the investment of the seller, and thus provides it with greater incentives to undertake the investment in the first place.

Note that all three of the conditions listed above need to hold for exclusive dealing to lead to significant efficiency effects. Examples of concrete investments that may satisfy the three conditions that were given above include the following (for the case where the buyer is a retailer that then sells the good to final buyers, which is the standard case that is examined in the economic literature):

i. Non-contractible training of the retailer's staff by the seller. If that training is generalised and it makes the retailer more effective in selling any brands of the product in question, then the training may be subject to free riding by competitors and/or buyers.
ii. Advertising by the seller that is primarily product-specific, rather than brand-specific: The seller's competitors can also take advantage of such promotional activity when selling their products via a given retailer.

[58] See Whinston(2006, p.187).

[59] Dentsply had relied on arguments that were based on free-riding effects in its defence of its exclusivity policy. Both the District Court and the Appeals Court dismissed Dentsply's efficiency arguments as "pretextual".

iii. The provision of infrastructure e.g. hardware and software—that is customer-specific (e.g., tailored to the needs of a particular retailer), and that can also be used by competing sellers.

The Tribunal and the CAC accepted the above economic framework for evaluating efficiencies and found that Computicket's efficiency claims did not meet the test.[60] Computicket had applied the exclusivity provision in each contract regardless of the types of IPs or the needs of the IPs. Further, the Tribunal found that standard terms were applied for the duration of time to all IPs and that Computicket had not provided any documentary evidence to support the claim that the contracts were motivated by efficiency justifications.[61]

The Tribunal and the CAC accepted the testimony of a Computicket executive who stated that the purpose of the exclusive contracts was to respond to TicketWeb's entry into the market and that in June 2005 Computicket had received an instruction from its parent company at the time to secure stock for a long period of time. The CAC concluded that the purpose of the exclusive contracts was to protect Computicket from competition.[62]

The Tribunal stated that the only potential case for an efficiency defence that was put forward by Computicket was that the exclusivity was required to avoid problems of splitting inventory that arise when two ticketing firms sell tickets for the same event. However, the Tribunal and the CAC found that even if the exclusivity could be justified for a single event, this did not justify the exclusivity applying to all of an IP's events and the three year exclusive contracts.[63] Therefore, the Tribunal and the CAC found that Computicket had failed to justify the exclusive contracts on efficiency claims.[64]

4 Comparing the Computicket Case to Examples of Other Ticketing Cases from Around the World

The closest case to the South African situation is the one that was considered by the Competition Commission of Singapore in *SISTIC,*[65] given the similarities between the essential features of the affected markets and of the incumbent's position in the market.

In its decision, the Singapore competition authority established that the incumbent ticketing service firm had a very high share of the market (roughly 90%), which was protected by high barriers to entry. Moreover, the buyer side of the market was found to be relatively fragmented, with no single event promoter accounting

60 CAC Computicket, paragraph 102 and 103.
61 CT Computicket, paragraph 238.
62 CAC Computicket, paragraph 98.
63 CAC Computicket, paragraph 108 and CT Computicket, paragraph 241.
64 CT Computicket, paragraph 243 and CAC Computicket, paragraph 111.
65 Competition Commission of Singapore (2010).

for more than 5–15% of SISTIC's ticket sales. The authority found that the incumbent (SISTIC) "*unilaterally imposed the exclusivity provisions upon its customer partners, thereby artificially dictating an 'all-or-noting' model of competition.*"[66] According to the authority: *"…this mode of competition discourages customers from experimenting with new entrants by switching a minor portion of their needs. Consequently, new entrants are denied of the opportunity to pick up residual demand in the market, build capability and credibility progressively, and eventually attain critical mass to become an effective competitive constraint upon the incumbent*."[67]

As a result, SISTIC's exclusive agreements were found to be anti-competitive. In reaching its conclusion, the authority rejected the existence of short contractual duration[68] and termination notice as mitigating factors,[69] which is in line with the position that was adopted in *Dentsply* and in the European guidance on exclusionary abuse that were reviewed above.

The other case that concerned an abuse of dominance investigation is the *Ticketmaster* case in Ireland.[70] In that case, the Irish authority found that Ticketmaster's alleged exclusive contracts with event promoters were not anti-competitive.[71] The key reason for this finding (which distinguishes the Irish market from both the South African and the Singaporean markets) is that the two major promoters in Ireland were found to have "*strong countervailing power vis-à-vis their ticketing provider Ticketmaster*", so that they could "*credibly threaten to either switch to another ticket provider or set up their own ticketing facilities*"[72] (in the event of an increase in booking fees).

According to the decision of the Irish authority, the two largest customers accounted for 50–100% of the tickets that were sold by Ticketmaster between 1998 and 2004 (with the next largest buyer in 2004 accounting for less than 10% of sales). The decision also established that it was the promoters—rather than Ticketmaster—that drove the terms of the contracts[73]; and that internal documentation indicated that the promoters considered both alternative providers and self-supply when renegotiating the terms of their contracts with the incumbent.

Given these features of the Irish market, the basic theory of anti-competitive exclusive dealing does not apply, since, in that scenario, it is unlikely to be profitable for the seller to compensate key buyers for anti-competitive exclusion at the same time as extracting monopoly rents from the rest of the market. Moreover, any potential harm to consumers is mitigated in that scenario by the fact that the two largest consumers can protect themselves from anti-competitive effects.

[66] Competition Commission of Singapore (2010).

[67] Competition Commission of Singapore (2010); page 114, paragraph 7.5.2.

[68] Information on the duration of SISTIC's contracts is confidential, and not reported in the non-confidential version of the Commission's decision.

[69] Competition Commission of Singapore (2010); page 142, paragraph 7.13.6.

[70] Irish Competition Authority (2005).

[71] In this case, the contracts did not envisage total exclusivity, and were based instead on a high share of the requirements of the promoters (75–85%).

[72] Irish Competition Authority (2005), page 12. page 2.

[73] Irish Competition Authority (2005), page 12. page 25, paragraph 2.58.

Given that the South African inventory-provider market appears to be significantly less concentrated than the corresponding Irish market,[74] the findings of the Irish Competition Authority in *Ticketmaster* are of limited applicability to Computicket's conduct insofar as the anti-competitive effects of its exclusive contracts are concerned.

5 Conclusion

For the reasons that we set out in this article, the decisions of the Tribunal and the CAC against Computicket are a clear example of the use of a rigorous economic approach to evaluate whether the conduct of a dominant firm is exclusionary, in line with previous cases by the competition authorities in South Africa (such as the two cases against South African Airways). The two decisions in Computicket apply an 'effects-based approach' to anticompetitive conduct. Under this approach, the conduct of dominant firm is assessed not only on the basis of the form of the contractual provisions—e.g., are the contracts that were used by the dominant firm exclusive?—but also by taking into account the likely (and, where possible, actual) effects on market outcomes and, ultimately, on consumers.

Under this approach, conduct that leads (or is likely to lead) to the foreclosure of competitors is anti-competitive if it is likely ultimately to harm consumers. In many competition cases, evidence of actual harm to consumers is not available, either because such harm is only likely to occur in the future, or because it is difficult to build a counterfactual without the conduct and compare outcomes for consumers with such a counterfactual. This means that, indirect proxies are typically used to assess the likelihood of harm to consumers, including the consideration of (among others): evidence on the foreclosure of efficient competitors; evidence on the overall incidence and nature of the conduct at stake; an understanding what economic theory and experience identify as the likely effects of the conduct; and checking whether the theory of harm is consistent with the facts of the case (which is a particularly important step in the assessment); and checking whether there exist likely efficiencies (and of what magnitude) that flow from the conduct at issue.

The analysis conducted by the South African competition authorities demonstrated that the essential characteristics of the South African Outsourced Ticketing Services market, and of Computicket's conduct within it, were entirely consistent with those that have been identified in established economic theory as being conducive to anti-competitive effects, and were thus strongly supportive of the conclusion that Computicket's exclusivity contracts had a substantial anti-competitive effect. This analysis was underpinned by an extensive and original analysis of over 1800 unique Computicket contracts during the relevant period.

This case was also characterised by the availability of comprehensive evidence as to the actual harm to consumers that was associated with Computicket's market power and conduct (as shown by the evolution of prices and of profit margins). The

[74] In South Africa, the five largest buyers accounted for about 50% of the total entertainment sector.

Tribunal and the CAC followed the standard economic framework of the identification of ’actual’ effects relative to the formulation of hypotheses about the counterfactual. The reduction in competition that was experienced in the market after the merger between Computicket and TicketWeb resulted in a substantial average increase in both booking fees and commissions. The evidence—data, internal documents and testimony evidence directly supported the conclusion that Computicket’s exclusive contracts—by protecting its market power and foreclosing rivals—harmed consumers by leading to higher fees and commission, relative to a counterfactual with more competition.

The approach and empirical analysis that were followed by the South African competition authorities in this case are a notable illustration that an economic analysis of anti-competitive exclusionary conduct can be administrable under competition law. As such, this case is directly relevant to the current debate as to how to best assess exclusionary conduct under European competition law, in the wake of the Court of Justice’s judgement on *Intel* in September 2017.[75] It is also a good illustration of the rule-of-reason approach to exclusive dealing that is followed under modern US jurisprudence.

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