

What constitutes “inducement” in terms of section 8(d)(i)?

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INTRODUCTION

Section 8(d)(i) of the South African Competition Act (“Act”) prohibits dominant firms from “requiring or inducing” a supplier or customer to not deal with a competitor unless the efficiency gains can be shown to outweigh any anti-competitive effect of this action. However, there is substantial ambiguity as to what conduct can be characterised as “inducement” – yet it is this very activity of “inducement” that section 8(d)(i) is meant to target. The treatment of 8(d)(i) complaints by the Competition Tribunal (“Tribunal”) thus far has not clarified matters. In the Senwes decision the Tribunal offered a broad dictionary definition for inducement which is unhelpful as it leaves identification of this conduct wide open. Such a general and all-encompassing treatment of “inducement” would seem to defeat the very objective of section 8(d) which is intended, by its design, to only capture specifically prescribed exclusionary behaviour vis-à-vis the more general provision of section 8(c).

The implications of this very general treatment of “inducement” are also non-trivial as section 8(d) carries administrative penalties for a first time contravention while section 8(c) does not. Furthermore, conduct falling under 8(d) is assumed to be exclusionary whilst this is not the case for section 8(c) complaints. In addition, respondents to a section 8(d) complaint also carry the onus in weighing-up efficiency benefits against any anti-competitive effect, whilst this onus remains with the complainant under a section 8(c) case. As such, how the conduct of “inducement” is defined can have serious implications for firms, not only in terms of the application of administrative penalties but also the path and possibly the outcome of their case.

This paper considers the concept of “inducement” from an economic perspective and assesses how it is currently treated in South African competition law. This paper finds that there is a real need to clarify the specific conduct, or types of conduct, which may constitute “inducement”.

¹ The authors of this paper are economists at Genesis Analytics. The views expressed herein are those of the authors and do not necessarily represent the views of Genesis Analytics. The authors would also like to express gratitude to Michael Nicolaou for assistance in researching this topic.

THE INDUCEMENT PUZZLE

Section 8(d)(i) of the Act states that it is prohibited for a dominant firm to require or induce a supplier or customer to not deal with a competitor, unless the dominant firm can show that the anti-competitive effects are outweighed by its countervailing efficiency or pro-competitive benefits. The provision therefore has three requirements:²

- First, the firm in question must be dominant.
- Second, the dominant firm must have engaged in a practice which either “required” or “induced” a customer not to deal with a competitor.
- Third, the effects of the conduct must be analysed and the conduct will only be impugned if it is demonstrated that the anti-competitive effects outweigh the pro-competitive effects.

It is the second element – that is the actual classification of what behaviour may be termed as inducement in terms of section 8(d)(i) – which is clouded with uncertainty. The inducement provision is worded broadly and a wide range of acts could potentially be classified as “inducement” depending on how this term is to be understood. As an indication of the various types of conduct that could potentially be caught under the inducement provision, Sutherland and Kemp³ refer to the following acts:

- Exclusive purchasing or supply agreements which require a customer to purchase all or a portion of its requirements from the dominant firm in the case of a purchasing agreement or requires a supplier to sell all or a portion of its output to the dominant firm in the case of a supply agreement.
- A clause in an agreement with a customer that states if a competitor offers a better price, the customer must disclose this and allow the dominant firm an opportunity to match or better the price.
- Express inducement whereby a dominant firm may be able to wield its bargaining power to coerce suppliers or customers not to deal with competitors.
- Pricing inducements which is a broad category and can take on a number of forms, including, for example, loyalty rebates which are conditional upon obtaining a certain proportion of requirements from the dominant firm; or rebates which are linked to purchasing a certain product range from the dominant firm.

² Sutherland, P. and S. Kemp (2010) Competition Law of South Africa (Service Issue 13), 7-76

³ Sutherland, P. and S. Kemp (2010) Competition Law of South Africa (Service Issue 13), 7-77 to 7-79

- Practical inducements not to deal, including the provision of display or storage facilities which can only be used for the products or services of the dominant firm and leaves no space for competitors.

Indeed the wording of section 8(d)(i) has often facilitated very broad and almost opened-ended interpretations of what types of conduct might be classified as “inducement” under this provision.

The question of what actions should constitute inducement is relevant from a conceptual point of view as it would seem that the very essence of competition is to ‘induce’ customers or suppliers to deal with itself and by implication, not with competitors. This has practical implications for dominant firms who are subject to the abuse of dominance provisions and require legal certainty regarding what is and is not permitted in terms of the Act.

The positioning of the “inducement” provision within section 8

To fully understand why the classification of “inducement” conduct matters, it is necessary to consider the schema of the abuse of dominance provisions in the Act and where therein this inducement provision resides. In particular, the inducement-type of conduct described above would fall under the ‘rule of reason’ category of exclusionary abuses, which is subdivided into two main sections, 8(c) and 8(d):

- Section 8(c) is a general prohibition against exclusionary practices. It prohibits a dominant firm from engaging in an exclusionary act, which is defined as a practice that impedes or prevents a firm “entering into, or expanding within, a market” (section 1(x)). However, the practice is only prohibited if it can be shown that the anti-competitive effect of that act outweighs its countervailing efficiency or pro-competitive benefits.
- The general exclusionary clause of section 8(c) is followed by five sub-sections of section 8(d) which describe specific exclusionary acts that are prohibited, unless the dominant firm can show that the anti-competitive effects are outweighed by the pro-competitive gains arising from the conduct. The specific acts listed under section 8(d) are:
 - I. *requiring or inducing a supplier or customer to not deal with a competitor;*
 - II. *refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
 - III. *selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;*

- IV. *selling goods or services below their marginal or average variable cost; or*
- V. *buying-up a scarce supply of intermediate goods or resources required by a competitor.*

Whilst both sections 8(c) and 8(d) deal with exclusionary acts which are assessed using a rule of reason analysis, there are some important differences between the two sections, as canvassed by the Tribunal in SAA.⁴

- First, to determine whether the conduct in question is exclusionary in nature, section 8(c) requires a consideration of whether the conduct fits the definition of what constitutes an exclusionary act, whilst section 8(d) involves determining whether the conduct meets the definitions set out in the section 8(d) sub-clauses.⁵ As such, section 8(d) conduct is presumed to be exclusionary, whereas with section 8(c) the complainant is required to establish that the act is exclusionary.⁶ However, for both sections 8(c) and 8(d), the anti-competitive effects of the conduct must be established. The Tribunal has determined that for both sections, this requires:

“(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.”⁷

- Second, the onus of proof regarding the weighing-up of pro-competitive gains against the anti-competitive effects differs for the two sections. For section 8(c), the onus is on the complainant who is required to show that the anti-competitive effect outweighs the efficiency gains. The burden of proof shifts to the respondent in section 8(d) cases, who is required to demonstrate that the gains from the conduct outweigh the anti-competitive effects of the conduct.⁸
- Third, an administrative penalty applies to a first time contravention of the named section 8(d) acts, whilst a section 8(c) contravention will attract a fine only if it is a repeat of conduct previously found by the Tribunal to be a prohibited practice.⁹

What constitutes ‘inducement’ matters as it determines whether the act is assessed under the specific inducement provision of section 8d(i) or whether it would fall under the general 8(c) provisions. The categorisation of the conduct may have serious implications for firms, not only

⁴ Competition Tribunal, Competition Commission v South African Airways (Pty.) Ltd, Case no: 18/CR/Mar01(“SAA”)

⁵ SAA, par 132

⁶ SAA, par 101

⁷ SAA, par 132

⁸ SAA, par 134 - 135

⁹ SAA, par 99

in terms of the application of administrative penalties but also the path and perhaps even the outcome of the case as there is a shift in the burden of proof.

Inducement within the logic of 8(d)

The ability to distinguish between competition-on-the-merits and anti-competitive behaviour is one of the more difficult aspects of competition policy. The example that is commonly cited is the case of a reduction of the dominant firm's selling price following entry – should this conduct be characterised as anti-competitive behaviour aimed at inducing the exit of the entrant, or should the lower prices be seen as healthy price competition, which is beneficial to consumers?¹⁰ Exclusionary conduct has the potential to be anti-competitive in instances where it leads to the creation or enhancement of a dominant firm's ability to exercise market power. On the other hand, almost all lawful, competitive behaviour has the potential to exclude competitors. The difficulty often with exclusionary conduct is that, at face value and at least in the short run, it closely resembles that of competitive behaviour. There is a danger that an overly-aggressive approach to enforcement of exclusionary conduct may also discourage and penalise true competitive behaviour – the very objective of antitrust law. In this regard the Tribunal has previously recognised the fine line that often exists between certain prohibited exclusionary acts and robust competition.¹¹

It is within this context that the logic underpinning the differential treatment between sections 8(c) and 8(d) is explained by the Tribunal in SAA:

“The reason for these differences in treatment is that the exclusionary acts in 8(d) are listed, presumably evidencing the legislature’s view that these are the more egregious of the exclusionary acts and so firms who are dominant are on notice that they must behave with due caution in relation to this conduct, whereas in 8(c) no acts are listed and hence the complainant would have to prove that the conduct sought to be impugned is indeed exclusionary. Here the dominant firm has no advance notice that the conduct is deemed exclusionary in nature, and hence may be in some danger zone. This explains the policy choice to shift the onus in (c) to the complainant in respect of negating efficiencies, and secondly, not exposing firms to a fine for first time offences.”¹² (own emphasis)

In other words, by naming specific acts that are recognised means of excluding competitors from a market with potentially anti-competitive effects, it is suggested that the legislature intended to warn dominant firms of certain conduct which should be avoided.¹³ Corresponding with the more ‘egregious’ nature of the listed exclusionary acts and the fact that dominant firms have been forewarned against such conduct, these are subject to an administrative penalty for

¹⁰ Motta, M. (2004) Competition Policy, Theory and Practice. Cambridge University Press, p. 411

¹¹ Competition Tribunal of South Africa, Nationwide v SAA, Case no: 92/IR/Oct00

¹² SAA, par 102

¹³ Sutherland, P. and S. Kemp (2010) Competition Law of South Africa (Service Issue 13), 7-77 to 7-79

a first-time contravention. Part of the purpose of section 8(d) would also seem to be to identify specific conduct which is more likely to be problematic and of an egregious nature. It is presumably for this reason, at least in part, that section 8(d) carries the presumption that the acts listed are exclusionary and that the onus of demonstrating offsetting efficiencies shifts to the defendant.

The manner in which the South African competition authorities have dealt with the inducement provision has not clarified matters. This is considered further in the following section.

South African case precedent

While few section 8 cases have been brought before the Tribunal, many of the abuse of dominance cases have in fact dealt with the inducement provision. However, the Tribunal's treatment of section 8(d)(i) complaints thus far has not always been helpful in identifying what conduct could be impugned under section 8(d)(i) and at times appears to be at odds with the conceptual underpinning of section 8(d). This section sets out the relevant findings of the authorities in the key South African inducement cases, followed by an assessment of where the case precedent takes us in determining what constitutes inducement.

Patensie and SA Raisins

The earliest inducement cases considered by the Tribunal found certain supply provisions in agreements constituted an inducement not to deal:

- Patensie:¹⁴ This case concerns provisions contained in the shareholders' agreement which required farmers who are members or shareholders of Patensie to sell their output to it. The abuse complaint was brought under section 8d(i) only.¹⁵ The Tribunal found that the provision which provided Patensie with the first right and option to pack and market the members' output constituted an inducement not to deal.¹⁶ The Competition Appeal Court ("CAC") agreed with the Tribunal, finding that the provisions deprived farmers from choosing the source of supply for packing and marketing services and that this abuse was reinforced by provisions which imposed sanctions on members and because the termination of membership was costly.¹⁷ Furthermore, the CAC found that by tying in more than 70% of the farmers to the exclusivity agreement, potential competitors wishing to compete with Patensie were effectively excluded.¹⁸
- SA Raisins:¹⁹ Similarly, SA Raisins involves a shareholder's agreement which required producers who are shareholders of SAD to supply all of their produce to SAD, a

¹⁴ Competition Tribunal, Competition Commission v Patensie Sitrus Beherend Beperk, Case no: 37/CR/Jun01 ("Patensie")

¹⁵ Patensie, par 20

¹⁶ Patensie, par 89

¹⁷ Competition Appeal Court, Patensie Sitrus Beherend Beperk v Competition Commission, Case no: 16/CAC/Arp02, p. 28

¹⁸ CAC, Case no: 16/CAC/Arp02, p. 30

¹⁹ Competition Tribunal, South African Raisins (Pty) Ltd v SAD Holdings Ltd, Case no: 04/IR/Oct/1999 ("SA Raisins")

dominant firm in the market for the purchasing and processing of grapes into raisins. Furthermore, it was argued that the producers were effectively locked into being shareholders as SAD's dominant position enabled it to provide a blanket undertaking to purchase all of the members' produce (which competitors were unable to do) and because loans would have to be repaid immediately upon the sale of shares.²⁰ The Tribunal found that cumulatively the provisions were a contravention of section 8(d)(i) as it served as a disincentive to producers to supply produce to any processor other than SAD. It was noted further that individually, the practices were not objectionable, but collectively they became a concern when applied by a dominant firm seeking to reinforce its dominance.²¹

SAA

The SAA case concerns two incentive schemes that SAA had with travel agents. The first scheme involved commission payments made to agents whereby an agent received a commission if it met the target determined by SAA and which was payable on the total of all sales achieved. The target was based on the previous annual sales figure achieved by the agent with a percentage increase.²² The second incentive scheme was targeted at the employees of the agencies, who were rewarded with free international air tickets based on the attainment of set sales targets.²³ The Competition Commission ("Commission") alleged that these loyalty rebates were exclusionary, in contravention of section 8(d)(i) and alternatively, section 8(c).²⁴

The Tribunal found that the rebates constituted anti-competitive inducement in contravention of section 8(d)(i). In coming to this conclusion, the Tribunal noted the following:

- It is not the existence of the scheme, but the nature of the scheme that is problematic.²⁵ The schemes were found to be anti-competitive in nature as the increase in sales required to meet the targets was high relative to the growth in the market and the schemes themselves were unlikely to lead to increased growth in the market²⁶. In light of these elements, the payments were effectively aimed at achieving higher market shares for SAA, which would naturally come at the expense of rivals absent substantial market growth.
- Even if the scheme was designed to direct sales towards SAA at the expense of its rivals, it was still necessary to demonstrate that its effect was to induce agents to sell SAA tickets and not those of rivals. This was achieved by showing that (i) the agents

²⁰ SA Raisins, p. 9

²¹ SA Raisins, p. 10

²² SAA, par 15 -18

²³ SAA, par 21

²⁴ SAA, par 96

²⁵ SAA, par 141

²⁶ Sutherland, P. and S. Kemp (2010) Competition Law of South Africa (Service Issue 13), 7-78

had an incentive to move customers towards SAA and (ii) the agents had the ability to do so.²⁷

Senwes

Senwes²⁸ is the first case where the Tribunal explicitly considered the distinction between conduct which constituted exclusionary behaviour that amounted to inducement and conduct which falls short of inducement and should therefore fall under the general exclusionary provision of 8(c). The Tribunal noted that in theory all acts of exclusion against a competitor can be regarded as inducing customers or suppliers not to deal with the competitor. However, if this was the case then the distinction between distinct 8(c) and 8(d)(i) cases would be lost. As such, the Tribunal found that there must be a qualitative difference between abuse that can be regarded as inducement and general exclusionary conduct.²⁹

In its assessment of whether conduct could be considered to be inducement, the Tribunal used a dictionary definition of inducement: *“the act or process of enticing or persuading another person to take a certain course of action...”*³⁰. In applying this definition to understand what is meant by inducement, the Tribunal noted that *“(i)t would seem that s(8)(d)(i) requires that the exclusionary act complained of constitutes a process of enticing or persuading a customer or supplier not to deal with a competitor.”*³¹ If the features of “persuasion or enticement” do not exist the conduct would not constitute inducement.

The claims made against Senwes included two forms of abuse: inducement and margin squeeze. The inducement allegation involved representations made by Senwes’ traders which made farmers and other traders believe that farmers would have an advantage by selling to Senwes because it could offer them a better price as it did not apply its storage policy to its own trading division as it did to third parties.³² The Commission referred the inducement abuse under the following sections of the Act: 8(c), 8(d)(i), 8(d)(iii) and 9. During the course of the case, the Commission also alleged that by applying a differential tariff, Senwes had engaged in a margin squeeze, in contravention of 8(d) or 8(c).³³

Applying the Tribunal’s test for inducement to the facts of the case, the Tribunal found that the conduct complained of did constitute inducement in terms of s8(d)(i). It concluded that:

“They attempted to say to customers – deal with us, if you deal with our competitors they will pay you less for your grain because we can offer a better deal on storage costs. This is clear cut inducement to deal with Senwes and not with a rival. For this

²⁷ SAA, par 146 - 147

²⁸ Competition Tribunal, Competition Commission v Senwes Ltd, Case no: 110/CR/Dec06 (“Senwes”)

²⁹ Senwes, par 157 - 158

³⁰ Senwes, par 160

³¹ Senwes, par 162

³² Senwes, par 115

³³ Senwes, par 44 - 46

reason we find that the exclusionary act complained of in respect of the inducement abuse, does constitute inducement for the purpose of 8(d)(i).³⁴

In contrast, the Tribunal determined that the margin squeeze complaint should not be characterised as inducement, and should instead be assessed under the general exclusionary provision of 8(c) for the following reason:

“(T)here is nothing in this conduct to suggest that it persuades or entices customers not to deal with Senwes’ rivals. Indeed customers may not even be aware of what traders’ terms with Senwes are. The mere fact that rivals costs are raised and that consequently they may have to make less competitive offerings to customers, does not constitute inducement for the purpose of 8(d)(i)³⁵

Ultimately, the Tribunal concluded that although the representations conduct did amount to inducement, there was insufficient evidence regarding the anti-competitive effect of the conduct and therefore Senwes had not contravened section 8(d)(i). Instead, it was found that Senwes contravened section 8(c) for engaging in a margin squeeze against rival traders.³⁶ When the case was appealed, the Commission cross-appealed the Tribunal’s decision, contending that margin squeeze raised rivals costs and constituted an inducement for the purposes of section 8(d)(i), which was dismissed by the Competition Appeal Court³⁷.

BATSA

The more recent BATSA³⁸ case involves payments made by BATSA, a cigarette manufacturer to retailers in exchange for preferential promotional opportunities at the point-of-sale. More specifically, BATSA entered into agreements with retailers and vending machine owners, providing cash payments and free shelving units in exchange for preferential space and positioning at the point of sale. BATSA also had agreements with some restaurants and cafes, providing for exclusive access to the venues.³⁹ The conduct was referred under sections 8(c) and 8d(i).⁴⁰ The Tribunal found that BATSA’s promotional activities did not contravene the Act as promotional opportunities had not been significantly foreclosed and consequently did not have an anti-competitive effect.⁴¹

The Tribunal notes that there exists “*an extremely thin line between anti-competitive inducement, on the one hand, and the very essence of competition, on the other*”⁴² and that BATSA’s conduct did not amount to an inducement not to deal. The following points made by the Tribunal form the basis for why BATSA’s conduct did not constitute inducement:

³⁴ Senwes, par 164

³⁵ Senwes, par 165

³⁶ Senwes, par 264 - 265

³⁷ Competition Appeal Court, *Senwes Ltd v Competition Commission*, Case no: 87/CAC/FEB09, par 78

³⁸ Competition Tribunal, *Competition Commission v British American Tobacco (South Africa)*, Case no: 05/CR/Feb05 (“BATSA”)

³⁹ Sutherland, P. and S. Kemp (2010) *Competition Law of South Africa (Service Issue 13)*, 7-65

⁴⁰ BATSA, par 5

⁴¹ BATSA, par 298

⁴² BATSA, par 302

- BATSA's conduct amounted to the paying of a fee for preferential promotional opportunities at the retail point-of-sale and selected restaurants and cafes. These facilities were available on the market to rival bidders, who themselves were successful in acquiring these facilities on many occasions.⁴³
- A payment for not selling the product of a rival is likely to constitute anti-competitive inducement. On the other hand, offering a higher price for an input or a lower price for an output, does not constitute illegal inducement.⁴⁴

The point around offering better prices was also made previously by the Tribunal:

- In Natal Wholesalers, the Tribunal agreed with the respondents who argued that inducement cannot be interpreted broadly to include all types of discounts, noting that "*(m)ore is required in terms of [section 8(d)(i)]. It is the very essence of competition for competitors to compete for custom on the basis of superior offerings*".⁴⁵
- In Mittal, an inducement allegation was made against Mittal based on an incident whereby Mittal offered a discounted price to a manufacturer in response to imports. Dismissing the allegation, the Tribunal indicated that inducement allegations should be treated cautiously:

*"(T)he practice of competition consists precisely in inducement. While we can envisage – as clearly does the Act – a species of anti-competitive inducement, the facts of this case are insufficiently clear to arrive at so far-reaching a conclusion."*⁴⁶

Observations drawn from case precedent

The following observations are drawn from the review of South African case precedent:

- Dismissing summarily the inducement cases which related to pure pricing incentives, the Tribunal has established that the offering of a cheaper price would not fall under the inducement provision and that something more is required in order for it to be characterised as inducement. For example, a payment for not selling a rival's product is likely to fall foul of the inducement provision.
- However, the test proposed in the Senwes matter is broad and therefore opens up the interpretation of inducement. Arguably, most competitive acts, like lowering prices, could constitute a 'process of enticing or persuading' a customer to deal with the dominant firm (and consequently not with competitors). While the Tribunal has been

⁴³ BATSA, par 304

⁴⁴ BATSA, par 309-311

⁴⁵ Competition Tribunal, National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Limited, Case no: 68/IR/JUN 00, par 137

⁴⁶ Competition Tribunal, Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd v Mittal Steel South Africa Ltd and Macsteel International Holdings BV, Case no: 13/CR/Feb04, par. 204

clear that pricing incentives would generally not be of concern and that something more is required for section 8(d)(i), the test used in *Senwes* does little to identify the 'something more'.

- Reflecting the broad wording and interpretation of the inducement provision, the case law reveals that very different acts are assessed under the inducement clause: *SAA* concerned the use of loyalty rebates; *Senwes* dealt with representations made by employees regarding its ability to offer better prices; *BATSA* involved payments made by a dominant firm in exchange for preferential promotional opportunities; and *Patensie* and *SA Raisins* involved contractual provisions requiring producers to supply to the dominant firm. Therefore, in contrast to the other section 8(d) provisions which deal with very specific acts, section 8(d)(i) captures a range of conduct, much like the section 8(c) provision which is intended to be the 'catch all' provision.
- Looking at the various acts which have been considered under inducement, it is not obvious which conduct could constitute inducement and therefore should be avoided by dominant firms. For example, *Senwes* involved representations made by employees regarding *Senwes*' ability to offer a better price based on a differential tariff. In this case, and notwithstanding the disputed evidence regarding the representations made to farmers, the Tribunal found that the conduct constituted an inducement not to deal. However, such conduct could conceivably be characterised as an offer by *Senwes* of a higher price for an input,⁴⁷ much like *BATSA*'s conduct was characterised and where the Tribunal found that this did not amount to an inducement not to deal.
- It is not obvious what type of conduct would constitute inducement as it is not the existence of the conduct that determines its legality, but the nature of conduct and its likely effect. This concept was canvassed in detail in the *SAA* case, where the Tribunal considered whether the loyalty payments had the effect of inducing agents. Such an analysis would occur before the assessment of the anti-competitive effects. This approach is consistent with economic theory as not all rebates would have the effect of inducement and each form of rebate would have to be assessed to determine whether its nature amounts to anti-competitive inducement.

In light of these observations, we find that the Act and the case precedent which interprets the provisions of the Act do not take us far in identifying what constitutes inducement. The proposed test for inducement is broad and captures a range of conduct, including conduct that is not obviously harmful. Furthermore, a detailed analysis is required to determine whether conduct should be impugned under section 8(d)(i). Before moving on to the implications of these findings, it should be noted that the focus has been on South African case precedent, as limited guidance can be gleaned from the international treatment of inducement as section 8 of

⁴⁷ This point is made by Sutherland and Kemp (2010), 7-80

the Act does not conform to the legislature in other well-known jurisdictions. This was noted by the Tribunal in *Senwes*:

“Comparative case law is not helpful to us because the schema of section 8, insofar it has provided for the separate classification, is not a feature of legislation in other jurisdictions that we know of. Section 2 of the Sherman Act which creates the monopolisation offence in US law does not specify particular conduct as constituting monopolistic conduct. Although Article 82 of the Treaty of the European Union, provides a list of conduct that might constitute an abuse, the list is neither exhaustive nor does it purport, unlike our law, to distinguish between the juristic consequences of specified and unspecified conduct. Nor for that matter is the language of section 8(d) (i) referring to inducement, replicated in Article 82.”⁴⁸

IMPLICATIONS FOR THE ANALYSIS OF INDUCEMENT

Section 8(d) is intended, by its design, to only capture specifically prescribed exclusionary behaviour vis-à-vis the more general provision of section 8(c). While the Tribunal has generally been clear that something more than pure pricing incentives (either in the form of lower prices for an output or higher prices for an input) is required to constitute inducement, limited guidance has been offered as to how to identify the ‘something more’. Furthermore, in a few specific cases, the Tribunal appears to have opened up the ambit of the inducement provision by proposing a broad test which could capture a wide range of conduct.

A clear symptom of the vagueness surrounding the inducement clause is the fact that a large proportion of the abuse cases are referred under section 8(d)(i) (typically amongst other complaints), regardless of their context or the conduct. To a large extent section 8(d)(i) is often treated as a general catch-all provision, much like 8(c), but with more draconian implications for a dominant firm.

The ambiguous and typically broad treatment of inducement would not seem to be consistent with the underlying logic of section 8(d). In particular two major issues arise from this treatment of “inducement”:

- First, the inducement provision is not effective in signalling a danger zone. A general and somewhat ambiguous treatment of “inducement” defeats a key stated objective of section 8(d) which is to name specific acts which are presumed to be exclusionary and thereby warn dominant firms to steer away from such behaviour (unless they have an objective justification for doing so). The implication of this is that a dominant firm is exposed to the risks associated with section 8(d) without the benefit of being forewarned.

⁴⁸ *Senwes*, par 164

- Second, the analytical justification for listing a standalone inducement abuse is uncertain. By naming acts which are presumed to be exclusionary, it would seem the legislature intended to capture a belief about the type of harm that is likely to flow from the specific conduct. The current broad treatment of inducement does not offer any benefit in identifying specific acts which may be considered to be more egregious and therefore justify a shift of onus to the defendant and a penalty for first time offences. In contrast, a broad treatment of “inducement” as suggested in *Senwes* could capture a range of conduct which does not necessarily have an underlying presumption of exclusion. This would seem to be at odds with the logic and apparent intention of section 8(d)(i). Furthermore, in the case of inducement, it is typically not the form of the conduct that is problematic, but rather the nature and the effect that this has on the market. Thus, in order to be brought under the ambit of section 8(d)(i) it must be shown that the conduct is likely to have the practical effect of an inducement not to deal. Listing inducement as a presumed exclusionary act does not seem an appropriate heuristic as a detailed analysis is required to determine whether the conduct has the effect of inducement. In this regard, the analytical distinction between sections 8(c) and 8(d)(i) is murky as the analysis conducted would be largely the same. This too would seem to defeat the object of section 8(d).

A broad interpretation of “inducement” stands in contrast to the other section 8(d) clauses which outline very specific acts, with relatively clear exclusionary underpinnings. For example, the predation provision of section 8(d)(iv) is worded very specifically and although there will be much debate around the calculation methodology and around the assessment of effects, it is clear that a dominant firm should avoid pricing below their marginal or average variable cost and there would also seem to be reasonable grounds for singling out such pricing as being potentially problematic.

The need for further clarity

Given that the current treatment of inducement largely defeats the purpose of the section 8(d) provisions, further clarity is required to identify what type of conduct constitutes inducement and to bring the provision in line with the underlying rationale and logic of section 8(d). In developing a framework to assess inducement, the following considerations would seem to be relevant:

- There should be a link between the dominance of the firm and the conduct that is being assessed in order for the conduct to be considered an *abuse of dominance*. As Hovenkamp discusses in the context of US case precedent, illegal monopolisation requires a demonstration that the firm has substantial market power and that it *has*

exercised that power. The market power requirement is precisely there because it helps courts to characterise a firm's conduct and predict its consequence.⁴⁹

- Conduct that is punitive towards competitors as opposed to improving the dominant firm's offering is more likely to constitute inducement. Such conduct would do nothing to expand the market to the benefit of consumers. In contrast, offering superior or cheaper products or services should not be found to amount to anti-competitive inducement, even if it does make life harder for rivals.⁵⁰ This principle captures the point made by the Tribunal that a payment by a dominant firm that is linked to not selling a rival's product would be considered problematic, but the offering of a higher price for an input or a lower price for an output will generally be pro-competitive.

It is for these reasons that economists would typically consider certain forms of loyalty rebates as well as exclusive dealing arrangements to fit more neatly into the inducement-type provisions:

- While there are many pro-competitive reasons for applying loyalty rebates, economic theory does suggest that loyalty rebates can be harmful if a customer would face a significant penalty by dealing with a competitor and not the dominant firm. This creates a strong disincentive for customers to deal with the dominant firm's competitors as competitors are unable to compensate the customer for the loss from not dealing with the dominant firm.⁵¹ Thus, loyalty rebates would incorporate the points discussed above, as it is the result of the dominant firm's sales base that is able to structure rebates in a manner that simply cannot be matched by its smaller rivals.
- Similarly, exclusive dealing will only have an anti-competitive effect if it ties up a significant share of the market. The degree of foreclosure will correspond to the dominant firm's market share in which case there can be a presumption of foreclosure if the firm is dominant.⁵²

In contrast, the other types of conduct which is not linked to dominance and which improves the dominant firm's offering instead of making a rival's product less attractive is unlikely to have an underlying presumption of exclusion.

CONCLUSION

The Act and the interpretation of the Act by South African competition authorities provides limited guidance regarding what conduct can be characterised as 'inducement' in terms of section 8(d)(i) of the Act. Given the broad and often ambiguous treatment of inducement

⁴⁹ Hovenkamp, H. (2005) "Federal Antitrust Policy: The Law of Competition and its Practice", Third Edition, Hornbook Series, Thompson West, pp. 272 – 273.

⁵⁰ O'Donoghue, R. and A.J. Padilla (2006) "The Law and Economics of Article 82 EC", Hart Publishing, p. 199

⁵¹ O'Donoghue, R. and A.J. Padilla (2006) "The Law and Economics of Article 82 EC", Hart Publishing, p. 379

⁵² O'Donoghue, R. and A.J. Padilla (2006) "The Law and Economics of Article 82 EC", Hart Publishing, p. 361

currently adopted in South Africa, a range of very different conduct could potentially be captured under the inducement provision. Accordingly, it is not always possible for dominant firms to determine whether their conduct could be characterised as inducement and therefore whether they are exposed to the risks associated with a section 8(d) contravention. This runs contrary to the conceptual underpinning of the section 8(d), which is intended to list acts that are presumed to be exclusionary and provide a clear signal to dominant firms that they are entering a danger zone if they engage in the particular act. A broad treatment of the inducement provision also does little to clearly identify specific conduct more likely to be egregious in nature and therefore justify the more draconian treatment associated with section 8(d)(i). As such further clarity is required to assist in identifying what type of conduct constitutes inducement and to bring the provision in line with the underlying rationale of section 8(d).