CCPC

COMPETITION & CONSUMER PROTECTION COMMISSION

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FAQ

FREQUENTLY ASKED QUESTIONS

ABOUT DOMINANCE AND ABUSE OF DOMINANCE

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Introduction

The Competition and Consumer Protection Commission (the "Commission") is a statutory body established with a unique dual mandate to protect the competition process in the Zambian Economy and also to protect consumers. Therefore, the Commission is mandated to enforce the Competition and Consumer Protection Act No. 24 of 2010 ("the Act").

What is a dominant position and how is it defined in the Act?

According to Section 2 of the Act, a dominant position means a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors.

It is important to take note that abuse of dominance cases like any other competition cases, are defined in a given market called the Relevant Market (comprising of relevant product market and relevant geographical market).The product market considers the good or service in question in relation to actual or potential competition it faces whereas geographic market on the other hand describes the area within which demand and supply of the product takes place. The main goal of defining the relevant market (market definition) is to assess the existence, creation or strengthening of market power.

What are the thresholds of dominance?

According to Section 15 of the Act, a dominant position exists in relation to the supply of goods or services in Zambia, if

- Thirty percent or more of those goods or services are supplied or acquired by one enterprise (individual dominance) or

- Sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises (collective dominance).

How is dominance threshold determined?

Dominance threshold is determined based on market shares. For purposes of estimating an enterprise's market share, the Commission relies on sales (turnover) of an enterprise or a company's expenditure. However, in instances where sales or spend figures are not readily available, the Commission may use alternative approaches such as asset value or production capacity or any other relevant approach.

Is being dominant a violation of the Act?

A firm being dominant is not prohibited by Law. This is because businesses may become dominant through innovation, efficiency, mergers and acquisitions or any other objective means. However, it is the abuse of a dominant position of market power by the dominant firm or business which is prohibited by law.

Section 16(1) provides that; An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general."

Types of Abuse of Dominance in accordance to the Act

Abuse of dominance can either be exclusionary, exploitative or both. Exclusionary conduct is a type abuse that businesses engage in, in order to eliminate competitors from the market. On the other hand, exploitative conduct is the type of abuse that takes advantage of the consumers of the product or service being provided by the dominant firm.

According to Section 16(2) of the Act, the following are the listed conducts or acts that amount to abuse of dominance:

a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions; Exploitative/ Exclusionary

b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition; Exclusionary

c) applying dissimilar conditions to equivalent transactions with other trading parties; Exploitative/ Exclusionary

d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; Exploitative/ Exclusionary

e) denying any person access to an essential facility; Exclusionary

f) charging an excessive price to the detriment of consumers; Exploitative/ Exclusionary.

g) Selling goods below their marginal or variable cost; Exclusionary.

It is important to note that the list above is not exhaustive and as such the Commission will generally take into account any conduct or act as long as it unduly restrains competition, limits access to markets or has or is likely to have an adverse effect on trade or the economy in general. Other abusive conducts include fidelity and loyalty discounts.

a) *Imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;*

A trading condition is unfair if different conditions are applied to similar situations or the imposition of situations which are absolutely unnecessary.

For instance, suppose there is a company A which supplies the same(homogenous) product to two regions, that is Region A and Region B) but ends up charging a higher price to customers in Region A as compared to Region B taking into account all factors that could differentiate the two regions. If such a company does not raise any acceptable justifications as stipulated in Section 19 of the Act, the conduct will be regarded as unfair for customers in Region A.

This provision of the law could be exclusionary if the unfair trading conditions or prices are applied to a competitor and could be exploitative if such conditions are applied to consumers.

b) ***Limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition***

Limiting or restricting production

The Commission will consider "limiting or restricting production" as an act aimed at exploiting consumers. For instance suppose there is a dominant firm that has capacity to produce 1000 litres of milk in a year for the country, and this dominant firm purposely reduces production to 250 litres of milk per year to be sold at a higher price without reasonable justifications for the purpose of creating an artificial shortage and make abnormal profits, such a conduct is abusive.

Limiting or restricting market access or market outlets

The Commission will consider "limiting or restricting market outlet or market access" as an act aimed at unjustifiably denying potential entrants to access the market. The erection or advocating for the erection of barriers in whatever form and with the resultant or potential results of strengthening or maintaining one's position in a market will be considered abusive.

For example, suppose there is a dominant manufacturer of biscuits who enters into an exclusive agreement with its distributors whereby its distributors are prohibited from distributing competing brands of biscuits or competitors biscuits, such a conduct limits and/or restricts market access or outlets as it potentially restricts the ability of competitors of the dominant manufacturer to have access to certain markets.

Limiting or restricting investment, technical development or technological progress in a manner that affects competition

The Commission will consider "limiting or restricting investment, technical development or technological progress " if such an act is aimed at unjustifiably denying potential entrants to access the market or competitors to progress. For instance, suppose there is a pharmaceutical company A that produces a patented drug and sells to consumers at a relatively high price, then there is company B which wants to enter the market and produce the same drug at a lower cost after the expiration of the patent or produce a generic drug, but A does not want B to do this. If A engages in conduct that frustrates B such as wanting to extend the patent beyond the acceptable period, such a conduct is abusive as it restricts or limits technical progress and affects competition in that consumers will still be subjected to the same medicines (i.e without possible improvement) at the same high cost as the entry of B would have provided competition and possible reduction in the prices of the medicines.

c) **Applying dissimilar conditions to equivalent transactions with other trading parties;**

The Commission will consider whether an enterprise in a dominant position of market power has imposed conditions that are different to different customers for a business transaction that is equivalent. The Commission will also consider whether the enterprise has imposed similar conditions to different customers for transactions that are not equivalent. This is exclusionary if dissimilar conditions are applied to competitors and exploitative if applied to customers

For Instance, suppose there is a dominant Firm A which supplies cotton to two distributors B and C, and A charges B K5 but charges C K9 for the same quantity of cotton without reasonable justifications, such a conduct by A against C is abusive as it puts C at a competitive disadvantage as it risks losing business or customers to competitors because of being given a high price and cannot compete fairly with B.

d) **Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts;**

This type of abuse of dominance is known as exclusionary, and applies to dominant firms that want to impose conditions that are not necessary for customers to access their goods or services. This is usually meant to exploit customers and in some cases lead to exclusion of competitors for the dominant firm.

The conduct in some cases is referred to as tying. Tying occurs when a firm makes the purchase of product A on condition that the customer also purchases product B even though the two products are unrelated and the consumer does not need B in order to use A.

For instance, a dominant firm may say that for you to buy a suit, you will also need to buy shoes from them. The dominant firm may have dominance in the suits market and not be dominant in the shoes market. Therefore by tying shoes to suits it can leverage and also become dominant in the market for shoes to the disadvantage of its competitors, hence excluding its competitors.

The other form is bundling which involves the selling of a collection of goods as a package at a lower price than they would if they were to be sold individually. Here, the two products are sold by the seller as a package at one price. i.e they are not available independently. For instance, if Product A costs K5 and B costs K10, by bundling the products, the seller may sell both products at a cost of K12. The customer is compelled to buy the entire package as a whole which restricts consumer choice in terms of the type and the number of products to be purchased.

The other scenario is the making of contracts subject to acceptance by other parties of supplementary conditions which by their nature or usage have no connection with the subject matter of the contract. For instance, suppose there is a boarding school that requires its pupils to only buy a particular brand of mattresses (supplier) despite the fact that there are other suppliers or brands of mattresses some of which may be cheaper than the chosen brand. Such a conduct by the school restricts competition as pupils are not given a choice to buy whatever brand they want and competitors of the chosen brand by the school will be disadvantaged, hence may be driven out of the market.

e) Denying any person access to an essential facility;

According to Section 2 of the Act, an essential facility" means an infrastructure or resource that cannot reasonably be duplicated, without access to which competitors cannot reasonably provide goods or services to their customers.

For instance, suppose there are two railway companies A and B, and that A which is a dominant firm owns railway lines which B (not dominant) need to access for its operations in order to provide a rail service to its customers. If A refuses to grant B access to its railway line even with plenty of railway space without a justifiable reason, such an act by A amounts to abuse of dominance and a breach of Section 16 (2)(e). This is an exclusionary type of abuse of dominance.

f) Charging an excessive price to the detriment of consumers

This is an abusive conduct which exploits consumers. While the Act has not defined what an excessive price is, other jurisdictions have defined excessive pricing as a price without a reasonable relation to the economic value of the good in question. How it is excessive depends on the circumstances of each case and can only be determined on a case by case basis. Here you compare the costs incurred in the production of the good and the price charged and thereafter determine whether the price is unfair in itself or when compared with other competitors' prices. This can either be exploitative to end user customers or exclusionary if applied to competitors.

g) Selling goods below their marginal or variable cost.

This is also referred to as predatory pricing. Predatory pricing is prohibited under the Act, as firms reduce prices below their average variable costs in the short run to exclude competitors and later increase prices to exploit consumers once competitors are eliminated from the market. This is an exclusionary type of abuse of dominance.

What does the Commission do when an enterprise has abused its dominance?

Abuse of dominance is based on the rule of reason and is not a per se violation meaning that before sanctions are imposed on a seemingly erring company, justifications if any from the enterprises are considered by the Commission in line with Section 59(2) of the Act. However, such justifications must be legitimate and in line with Section 19 of the Act.

What are some of the remedies that the Commission may give in relation to abuse of dominance cases?

According to Section 59 (3) of the Act, the Commission may give the following directions or remedies:

(a) terminate or amend an agreement;

(b) cease or amend a practice or course of conduct, including conduct in relation to prices;

(c) supply goods or services, or grant access to facilities;

(d) separate or divest itself of any enterprise or assets; or

(e) provide the Commission with specified information on a continuing basis.

Furthermore, Section 16 (3) of the Act states that *"an enterprise that abuses its dominance contravenes this section and is liable to pay the Commission a fine not exceeding ten percent of its annual turnover."*

HOW TO OBTAIN FURTHER INFORMATION ABOUT CCPC?

Further information about CCPC can be obtained by visiting the Commission offices.
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