



DUALE, OVIA &  
ALEX-ADEDIPE



# **Abuse of Dominant Position Under Federal Competition and Consumer Protection Act**

## INTRODUCTION

Investigating an alleged abuse of dominant position under the Federal Competition and Consumer Protection Act No. 1 2018 ("**the Act**") is a 3-step process as follows:

- Firstly, an assessment whether an undertaking is in a dominant position within the meaning of Section 70 (1)&(2) of the Act ("**Dominance**");
- Secondly, where the undertaking under investigation is found to be in a dominant position, assessment whether the market conduct of the undertaking under the investigation amounts to an abuse of its dominant position ("**Abuse of Dominance**"). The second step of the process is only relevant if the Federal Competition and Consumer Protection Commission ("**Commission**") finds the undertaking under investigation to be in a dominant position in the first step of the process;
- Thirdly, determination whether the alleged conduct of the dominant undertaking will result or results in any technological efficiency and other pro-competitive benefits and whether those technological efficiencies and pro-competitive efficiencies outweigh the anti-competitive effect of the undertaking's Abuse of Dominance. Similarly, Step three only becomes relevant if the alleged conduct of the dominant undertaking is found by the Commission to be an Abuse of Dominance ("**Efficiency Exception**").

It is imperative to note that Dominance and investigation of an Abuse of Dominance does not exist in abstract but against the background of a market. As such an investigation of abuse of dominant position under Section 70 of the Act presupposes that the Commission had defined the relevant market pursuant to Section 71 of the Act. The concept of market definition and an analysis of the Commission's Notice on Market Definition will be discussed and analysed in our subsequent Competition Law Series on Market Definition.

This Part A of our Series is an introduction to the concept of Dominance, Part B examines the factors that the Commission will consider in determining an undertaking is dominant. While Part C will discuss the examples of market practices that are characterised as an Abuse of Dominance, Part D discusses Efficiency Exception.

## SECTION A: DOMINANCE

### 1. Does the Act prohibit market dominance?

No, it is not an infraction of the Act if an undertaking is dominant, rather, what the law prohibits is an abuse of that dominant position. According to the U.S. jurist, Justice Learned Hand, a successful competitor having been urged to compete, must not be turned upon when he wins<sup>1</sup>.

While the law does not proscribe a position of market dominance, the law however places an obligation on the dominant undertakings not to engage in anti-competitive conduct that violates the Act. That is, a dominant undertaking must ensure that its market conduct is not inimical to the competitive process of the relevant market by avoiding abusive practices discussed in Part B of this Competition Law Series.

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<sup>1</sup> United States v Aluminium Company of America, et. al., 148 F.



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Once an undertaking satisfies the criteria for dominance (discussed in Part B of our Competition Law Series), its market conduct comes under increased scrutiny such that conducts which are permissible for non-dominant undertaking will be characterised as an illegal abuse of dominant position if the same conduct is by a dominant undertaking.

## 2. Is the Law Designed to Protect Smaller Undertakings from Dominant Undertakings?

No. One of the primary purpose of the Act in Section 1 thereof, is primarily to protect the competitiveness of the market and not necessarily to protect less efficient undertakings that are in the same market as an efficient dominant undertaking. The conduct of a dominant undertaking is not automatically proscribed merely because it makes life difficult for other competitors since the aim of the law is to protect the competitive process and not specific categories of competitors provided that the dominant undertaking plays according to the rule. The rule of the market is, Darwinism, where the strongest survive. Thus, the accent of the analysis on the abuse of dominant position is the impact of the dominant undertaking's conduct on customers, consumers and the competitive process of the market. Provided that the dominant firm competes on the merit, its conduct is not an infraction if it leads to the exit of competitors that are less efficient and less attractive to consumers in terms of price, choice, quality and innovation. As succinctly put by leading authors Richard Whish and David Bailey "...some competitor win and become dominant in their fields. The more powerful of two boxers wins: as long as the boxer does so within the rules of the sport (not punching below the belt or, in the case of Mike Tyson, biting his opponent's ear) the result must be respected. The fact that the opponent may be left lying in a pool of blood on the canvas with several teeth missing can be the consequence of competition within the rules. Put simply, competition can be ruthless: the most efficient succeed and the weak disappear"<sup>2</sup>.

For more discussions on competition law and the interest of micro, small and medium enterprises, see Seye Ayinla "Nigerian Merger Control: Principles and Practice" Chapter.

## 3. When is an Undertaking Dominant?

Pursuant to Section 70 of the Act, an undertaking will be held to be dominant when:

- a. The undertaking has market power which connotes the ability of an undertaking to increase price, decrease output or capacity, reduce quality, limit the choice available to customers/consumers and/or suppress innovation ("**Market Power**") and
- b. The undertaking either:
  - i. can exercise the Market Power independently of and insulated from the competitive strictures imposed by actual or potential competitors, consumers and customers ("independent conduct"); or
  - ii. possesses sufficient economic strength to charge prices above the competitive levels or offer subnormal product quality for a non-transient period without losing much of its business to its actual or potential competitors ("economic strength"). That is, the undertaking in question possesses economic strength in the relevant market which

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<sup>2</sup> Richard Whish and David Bailey "Competition Law" 10th Edition

enables the undertaking in question to prevent the maintenance of effective competition in the relevant market. Effective competition being the state of a market whereby all the firms in the market are subject to a degree of constraints from competitors (actual or potential) and from their customers/consumers. Thus, a dominant undertaking is one that can prevent effective position in a market owing to its ability to behave independently of the usual competitive constraints from market stakeholders such as competitors, customers and ultimately consumer.

#### 4. Does Dominance mean that the Undertaking is Insulated from every Competition?

No. According to Michael Porter, there are 5 forces that shape industry competition, namely: rivalry among existing competitors; threat of substitute products or services, bargaining power of buyers, bargaining power of suppliers and threat of new entrants<sup>3</sup>. Except an undertaking is a monopolist trading in a market characterized by insurmountable barriers to entry and completely inelastic demand, no undertaking is completely immune from the competitors, customers or consumers. Thus, dominance does not mean the absence of competitive pressure, rather, dominance means the undertaking under investigation can to an appreciable extent charge price above competitive level or offer goods and services below competitive level for a non-trivial period without losing its market share or reducing its profitability. Putting it differently, dominance is not mean ability to set price independently of demand, rather, it is the fact that the undertaking under investigation is not susceptible to the competitive constraints from competitors, customers and consumers, because the competitive strictures they wield are insufficient to constrain the undertaking in question from charging prices above competitive level, providing quality and quantity below competitive level or stifling innovation in the market.

#### 5. What are the Competitive Parameters of Market Power?

The Commission's Abuse of Dominance Regulations 2022 ("**Regulations**") provides an indicative and inexhaustive list of competitive parameters that determine whether an undertaking possesses market power, namely:

##### a. Price

The decision of a consumer to purchase a particular product<sup>4</sup> is influenced by three factors. First, the price of the product; second, the price of other products; and third, the consumer's income or the customer's revenue. Where there is an increase in price, the demand of the products reduces for two reasons: (i) where the price of the product is in excess of the price which the consumer is willing to pay, the consumer may be compelled to reduce his purchase of the relevant product and service; and (ii) flowing from (i) the consumer may decide not to buy the product and switch to a substitutable product which has become more attractive due to the increase in the price of the first products. The importance of price as a competitive parameter is aptly captured in a survey by the Centre for International Private Enterprises on the possible impact of the AfCFTA on Nigerian MSMEs which quoted Olanrewaju Onyitan the Founder & CEO of W-Holistic Business Solution as saying "*Nigerians are not loyal to brand but loyal to products best suitable for their 'pocket' and hence favour cheaper goods*".

<sup>3</sup> Michael Porter "On Competition"

<sup>4</sup> Section 167 of the Act, defines the word "product" to include goods and services

Thus, an undertaking is dominant where it can influence price independently of the customers or consumers. Where the customers and consumers are compelled to purchase the products or services at a price above the competitive level, the consumer or customer will derive less value from the products because they are paying a higher price than the value they place on the product/service which is a transfer of wealth from consumers to producers. Furthermore, where the customers or consumer diverts to a substitutable good or service, such products and services may be inferior to that of the undertaking under investigation.

b. **Output**

It is the aggregate output of a market that determines the price of products through the law of demand and supply. Hence, where an undertaking has a decisive influence on the aggregate output of products in a market, the undertaking can ultimately influence the price of products sold in that market independently of their customers and consumers.

c. **Variety**

One of the primary objectives of the Act as contained in the Long Title and Section 1 of the Act is the protection of consumer's right of private autonomy free from the exercise of market power by producers and sellers. That is, consumers should have access to a range of quality products/services at competitive prices, especially because tastes and preference differs from consumer to consumer. Consumer welfare is enhanced where consumers can choose from a range of product/services. Hence, an undertaking's ability to control or influence the variety of products available in a market is an indication of the undertaking's market power.

d. **Quality**

Quality is of equal importance as price since, consumers and customers want "value for money". The price of a product or service is only sensible where the price is examined as the sum payable for the product or service of a particular quality<sup>5</sup>.

e. **Innovation**

As undertakings compete to gain strategic advantage over each other, they are compelled to innovate. In a broad sense, innovation will include the introduction of new technologies and new process of doing things. Competition incentivizes undertaking to perceive a new basis for competing or find better means for competing in new ways. Innovation can be manifested in a new production process, a new marketing approach. Innovation as a parameter for competition is most evident in platform markets. The Commission's Notice on Market Definition 2022 ("Market Definition Notice") defines a "platform" as an undertaking that brings together economic agents and actively manages external effects between them.

Platforms create value by bringing two or more different types of economic agents together and facilitating interaction between them in such a way that make all economic agents better-off<sup>6</sup>. Platforms thus acts as connectors between two different sets of customers that

<sup>5</sup> Alistair Lindsay and Alison Berridge "The EU Merger Regulation: Substantive Issue" Fourth Edition"

<sup>6</sup> David S. Evans and Richard Schmalensee "The Antitrust Analysis of Multisided Platform Businesses" "The Oxford Handbook of International Antitrust Economics" Edited by Roger D Blair and D Daniel Sokol p. 404

obtain value from interacting with each other. Platforms adopt a “zero price” model, where the price of products to customers are set at N0. However, the word “0 price” does not necessarily mean “free”. In consideration for free use and access to digital platforms, subscribers pay with the attention they give to advertisers on the platform, privacy and personal data<sup>7</sup>. For example, Google and Yahoo! do not charge people that use their search engines; nor do Facebook or LinkedIn impose fees on users of those social media. Users of these services pay for these services by making themselves available to see the adverts on the platform and/or by making their personal data about themselves available to the digital platforms, whose algorithms enables highly personalized and targeted advertisement tailored to each user’s tastes and preferences. It is from these advertisements that the digital platforms generate huge revenue and profits<sup>8</sup>. Thus, as far as platforms are concerned, the relevant competitive parameter is innovation/quality and not price in monetary terms. In the **Google Search (Shopping) Case**, where the relevant product was online search services and the practice of self-preferencing by Google was under investigation. Google was accused of leveraging its dominant position in the market for general online searches into an adjacent market for comparison of shopping services. Since the services were provided free of charge to individual users, the EU Commission held the view, since the Google was trading in 0 price market, the ability to raise price above the marginal cost will not adequately capture the market power of Google. Hence, the EU Commission resorted to innovation and quality as the appropriate competitive parameters, specifically the relevance of search results, speed at which the results are provided, attractiveness of the user interface and the depth of indexing the web. Thus, the EU Commission held that Google could diminish quality of services without running any substantial risk that users will switch to alternative search engines.

f. **Data**

With increased digitization of daily lives a lot of undertakings compete in what is known as the “digital economy”. Data is the currency as well as the raw material for the digital economy, hence, the quip that the world’s most valuable resource is no longer oil but data. Digital firms and other internet businesses such as google and metaverse collect huge troves of data on their users which are analysed by algorithm designed by increasingly analytical tools including machine learning and AI technologies. The data analysed are used to improve services to users and to attract advertisers and other businesses desirous of targeting consumers. The more consumers are active on the digital platform, the more data they generate and the more useful the platform is to consumers and customers. Since data is the currency and raw material for the digital economy, incumbent tech firms grow more useful to customers when they attract more users and they gather even more data about those users. There are 2 overlapping issues when it comes to the users of data. First, data binds the users to a platform. Secondly, and concomitantly, where data binds users to a platform, a platform with a critical mass of users have an anticompetitive advantage. An undertaking is said to have achieved critical mass where the undertaking has attained a significant number of users such that the market is treated to have tipped in favor of the undertaking. For example, Facebook has billions subscribers which makes it the custodian one of the largest troves of data.

<sup>7</sup> Draft Notice on Market Definition, Pars. 53

<sup>8</sup> Richard Whish and David Bailey (n.11) p. 35

Thus, a large trove of data collected and stored by dominant incumbents may be needed by competing undertaking and new entrants if the competing undertakings and new entrants are to compete with the incumbent and/or develop innovative products and services.

## SECTION B: COLLECTIVE DOMINANCE

### 1. Can more than 1 Undertaking be Dominant?

Yes. The fact that Section 72(1) of the Act states that “one or more undertakings” means that the dominant position can be held by more than 1 undertaking. This is known as the concept of collective dominance.

### 2. Can Collective Dominance be held by Undertakings that are not Members of the same Group?

Yes. While collective dominance can be held by affiliated companies that are members of the same group of companies, collective dominance can be held by undertakings that are legally independent of each other.

### 3. When does Collective Dominance Arise?

Undertakings will be held to be collectively dominant where the undertakings are able due to certain factors that give rise to a connection between or among them, to adopt a common policy on the relevant market and to act independently of the remaining competitors in the market, their customers and ultimately their consumers. Two or more legally independent economic undertakings operating in a specific market may be united by certain economic links such that by virtue of the economic links they hold a dominant position vis a vis other competitors in the market. For example, by virtue of the agreements, licenses or technology the relevant undertakings are able to behave independently of other competitors in the market, their customers and consumers. From an economic perspective the undertakings under analysis must present themselves or act together on a particular market as a collective entity.

### 3. How is Collective Dominance Established?

The undertakings under investigation must be part of a collective entity vis a vis their competitors which require that the Commission examine the economic links or factors which give rise to a connection between or among the undertakings concerned. The economic links may be contractual (such as agreements, licenses, shared infrastructure or assets), structural (such as cross-shareholding or common directorship). The economic links could also be attributed to the structure of the market which ensures that operators in the market behave in a parallel way and sustain a tacit coordination between and among the undertakings which is the common characteristic of an oligopoly.

The assessment of connectors among the undertakings depend on an economic assessment of the circumstances, particularly, an assessment of the structure of the market where the undertakings under investigation operate. The economic assessment will also include the position on the relevant market of the undertakings concerned. Particularly, the Commission shall examine:





a. **Ability to Monitor**

Each member of the collective entity must be able to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. This is characteristic of oligopolies where undertakings are able to monitor the conduct of other operators due to factors such as fewness of operators, homogeneity of products with limited product differentiation, homogeneity of undertakings due to factors such as similarity of cost structures, transparency of the market, stability of the market especially where the markets are technologically mature and not subject to new innovations etc.

b. **Internally Sustainable**

That is, the undertakings involved must be able to internally sustain tacit coordination of their market conduct because there is a strong incentive not to depart from the common policy. Also, the participating undertakings must be in the position to punish any undertaking that deviates from the common policy.

c. **Externally Sustainable**

The common policy of the undertakings under investigation cannot be jeopardised by the competitive reactions of the actual competitors (inclusive of fringe competitors) and future competitors such as new market entrants.

For more discussions on the ability to monitor, internal sustainability and external sustainability, see Seye Ayinla "Nigerian Merger Control: Principles and Practice" Chapter 6.



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