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Abuse of Dominant Position Under Federal Competition and Consumer Protection Act: Part 3

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INTRODUCTION

The trigger for the application of Section 72 of the Federal Competition and Consumer Protection Act No. 1 2018 ("the Act") is a finding that the undertaking under examination is dominant firm. Thus, the investigation whether the practice of an undertaking is abusive is preceded by an affirmative finding that the said undertaking is dominant in the relevant market[1]. We have discussed in Part 2 of our Competition Law Series on Abuse of Dominance the concept of dominance. In this Part 3 of the series, we shall be discussing the concept of abuse of dominance.

1. What are the Various Classifications of Abuse of Dominance?

Conducts that constitute an abuse of dominance can be categorized as:

- Exploitative abuse which includes the conducts of dominant companies whereby the company takes advantage of its market power to exploit customers and/or consumers;
- Exclusionary abuse which includes the conducts of a dominant companies which prevents or hinders competition in the relevant market by foreclosing actual or potential competitors to the detriment of customers and consumers;

2. In Characterising a Conduct as Abusive, does the Commission Apply an Objective or Subjective Test?

The Federal Competition and Consumer Protection Commission (Commission) examines whether the conduct of a dominant undertaking is abusive by assessing objective factors[2]. Abuse of dominance is an objective concept relating to the conduct of a dominant undertaking on a market characterised by already weakened due to the presence of the dominant undertakings which resorts to methods different from those governing normal competition[3]. In other words, lack of intent to harm competition is no defence to an allegation of abuse of dominance.

3. Are Subjective Tests Totally Neglected in Assessing Abuse of Dominance?

No. The Commission may consider the evidence of subjective intent on the part of the dominant undertaking to restrict competition, although this factor is not necessary[4]. That is, the presence of an anti-competitive motive may reinforce a conclusion that there is an abuse of dominance even though it is not a necessary condition.

4. Are the List of Abusive Conducts in Section 72(2) of the Act Exhaustive?

No. The Commission may consider the evidence of subjective intent on the part of the dominant undertaking to restrict competition, although this factor is not necessary[4]. That is, the presence of an anti-competitive motive may reinforce a conclusion that there is an abuse of dominance even though it is not a necessary condition.

[1] Reg. 9(1)(2) Abuse of Dominance Regulations 2022 ("Regulations")
[2] Reg. 9(3)(a) of the Regulations
[3] Case C-549/10 P, Tomra Systems ASA v European Commission EU
[4] Reg. 9(3)(b) of the Regulations

SECTION 1: EXCESSIVE PRICING

Excessive pricing by dominant firms is the form of abuse that in most cases solely and directly exploits consumers. If one of the objectives of Nigerian competition policy, if not the overarching objective, is consumer interest, excessive pricing is one of the most important instances of prohibited abuse of dominance, particularly, where the practice leads to a transfer of wealth from consumers to dominant companies[5]. Thus, Section 72(2)(a) of the Act prohibits excessive pricing to the detriment of consumers by one or more dominant firms.

1. Is the FCCPC a Price Regulator?

No. There are several anti-competitive consequences when a competition authority directly or indirectly decides to act as a price regulator. There are instances where it is the lure of short-term supra-normal returns that attracts men with business acumen to enter a market in the first place. In such circumstances, it is the possibilities of high returns that incentivises them to take risks that ultimately results in economic growth and innovation[6]. Where supra-normal returns attract new entrants and the new entry puts a down-ward pressure on price, the introduction of more innovative products and processes may be the effect, and this ultimately promotes long-term competition in the market. While consumers may suffer short-term increase in price, since the time horizon for competition policy is long-term and not transitory[7], competition law authorities typically do not prefer transitory and immediate consumer gratification at the expense of the market evolving into a durable, self-sufficient and efficiently competitive market which benefits consumers in the long run. Hence, it is only in cases where the markets are characterised by high barriers to entry should the competition law authorities interfere to determine whether prices are excessive. The concept of "barriers to entry" has been discussed in Part 2 of our Competition Law Series on Abuse of Dominance.

It is however important to note that pursuant to Part XI of the Act, the Commission may submit to the President of the Federal Republic of Nigeria ("**President**"), a report assessing the state of competition in a relevant market and provide recommendations on the desirability and likely effects of implementing price regulations or other remedies in such market. Upon the report of the Commission, the President may by order published in the federal gazette declare that for the purpose of regulating and facilitating competition only, the prices for goods or services stipulated in the order shall be controlled in accordance with the Act. For the President to make such order, the President must be satisfied that (a) the product to which the order relates are/or will be supplied or acquired is in a market in which competition is limited or is likely to lessen; (b) it is necessary or desirable for the prices of those goods or services to be controlled in accordance with the Act in the interest of users, consumers, or, as the case may be, suppliers; and (c) the declaration of price regulation is narrowly designed, both in terms of duration and the list of goods and services affected, as is necessary to remedy the effects of the absence of competition in the relevant market.

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[5] Eugene Buttigieg "Competition Law: Safeguarding the Consumer Interest-A Comparative Analysis of US Antitrust Law and EC Competition Law"
[6] Verizon Communications Inc. v Law Offices of Curtiz Trinko 540 U.S. 398 (2004)
[7] Joseph F Brodley (n.14) p. 1024

> The Federal Competition and Consumer Protection Commission (FCCPC) has said it is engaging pay television company, MultiChoice Nigeria, for clarity over the increase in subscription rates. Mr Babatunde Irukera, the Executive Vice Chairman of FCCPC, said this while speaking with the News Agency of Nigeria (NAN) in Abuja on Wednesday. Irukera said the engagement was to check whether the company implemented a change in terms and conditions in line with the Commission's mandated steps. According to him, our orders were broad and it will be important that compliance is prioritised. "Although we cannot, and did not regulate price except in limited circumstances requiring presidential approval and gazetting. As such, our order to MultiChoice did not prevent them from pricing their services in a manner acceptable between them and their subscribers. We regulate price gouging. The nature of gouging is post-fact, meaning that when a price movement occurs, we can investigate to determine if it is excessive, exploitative, unrestored or manifestly unjust. Such is a very intricate investigation and the fact of the existence of any increase is not the entire evidence. There is a method to analyse the increase and other circumstances leading to it. As in the case of pharmacies, we are prosecuting for inordinate increases of certain products during early stages of the COVID-19 pandemic. For now, the first check with MultiChoice is whether they implement, or intend to, a material change in terms and conditions (of which price is one) without the steps the Commission has mandated as conditions precedent," he said. Recall that MultiChoice on Tuesday, announced the increase in DStv and GOtv subscription rates, blaming it on the rising cost of inflation and business operations. The rates are Xtraview +PVR access fee formerly N2,300, now N2,900, Business will now go for N2,669, Padi formerly N1,850 will now be N2,150, Yanga formerly N2,565 will now be N2,950, Confam formally N4,615 will now be N5,300. Also, Compact formerly N7,900 will now be N9,000, Compact Plus formerly N12,400 will now be N14,250, while Premium which was N18,400 will now go for N21,000.
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> **FCCPC Takes Action As MultiChoice Increases DSTV/GOTV Subscription. FCCPC takes action as MultiChoice increases DStv/GOtv subscription** - Daily Post Nigeria accessed on 7th June 2022

2. When is a Price Excessive?

Pursuant to Regulation 10(1) of the Abuse of Dominance Regulations 2022 ("Regulations"), the Commission will regard a price as excessive where a dominant undertaking takes undue advantage of consumers by using its market position to charge an excessive price either in itself or when compared to competing products.

3. What are the Market Conditions that Enable Excessive Pricing?

For a positive finding of excessive pricing, the following factors must characterise the relevant market[8]:

- High barriers to entry: as discussed above, high prices serve as signal to potential market entrants of the business opportunities and the possibilities for sura-normal profits obtainable in the relevant market. Thus, when new entrants gravitate towards markets where incumbents charge excessive prices, there is a downward pressure on price because the new entrants introduce new capacity, products and innovation to the market. Hence, the critical question for the Commission is whether in face of excessive pricing, new competitors are likely to enter the market within a reasonable time frame.

[8] Reg. 10(2) of the Regulations

In 2002, the UK Office of Fair Trade (OFT) opened an abuse of dominance investigation into excessive pricing by the makers of Durex condoms. Prior to then, the condoms market had been subject of various monopoly inquiries and price regulations during the 1970s and 1980s. The last of such inquiry by the UK Monopolies and Mergers Commission (MMC) in 1994 had resulted in price liberalization in light of new entry and the reduction in the market share of durex condoms from 95% to about 75% during the 1980s. The OFT closed the new case in 2003 without finding an abuse, noting that like the MMC previously found, evidence of emerging competition, Durex's market share had fallen further to around 60% by 2002 and new brands of condoms had entered the UK market including Trojan the market leader for condoms in the US. Thus, the OFT decided to exercise caution to the effect that any imposition of a price cap in the market will stifle and deter any market entry in which case a finding of abuse will hinder rather than promote competition.

See, **Jenkins, Niels and Kavanaugh "Economics for Competition Law Lawyers". For more discussions on high barrier to entry please see the 2nd Edition of our Competition Law Series on Abuse of Dominance. See also Chapter 9 of Seye Ayinla "Nigerian Merger Control: Principles and Practice"**

- <u>Lack of credible alternatives:</u> The consumers/customers must lack a credible alternative product to switch to in response to excessive pricing by the dominant company. To this end, it is important consider the presence of switching costs which make it difficult or impossible for consumers to switch to competitors. It may also be important ask whether consumers are "locked-in" to the products of the dominant company and/or exhibit inertia to other available products of services;

- <u>Mature Markets</u>: If the companies operate in a mature markets where investment and innovation play a limited role, innovation, technological growth and market expansion is very limited;

- <u>Lack of external factors</u>: The Commission will examine whether the price increase is the attendant consequence of an exogenous factor over which companies in the relevant market have no control. For example, increase in the price of raw materials, foreign exchange volatilities, hyper-inflation in the economy, increased taxation etc.

If at least one of the market conditions discussed above is present in the relevant market, the Commission will consider it unlikely that high prices is an abuse of dominance because such high prices will be regulated by new entrants or innovation[9].

4. What will the Commission Assess in Investigating Excessive Pricing?

When investigating an allegation of excessive pricing by a dominant company, the Commission will assess the following:

a. Price-Cost Differences

The Commission will assess whether the price charged by the dominant company exceeds the costs actually incurred in producing the products ("Price/Cost Difference"). The price shall only be excessive if the cost/prise benchmarks within the relevant market and that of competing products is substantial. The increase in price will be regarded as "substantial" if the price bears no reasonable correlation to the economic value of the product under analysis[10].

[9] Reg. 10(3) of the Regulations
[10] Reg 10(4)(a)(5)&(6) of the Regulations

(i). How is Price/Cost Difference Calculated?

The primary question will be to determine whether the difference between the costs actually incurred and the price actually charged to consumer/customers is excessive. Where it is possible to objectively calculate the costs of productions, such costs are compared with the selling price of the products which will help ascertain the profit margin of the company in respect of the product under analysis.

(ii). Is it always Easy to Ascertain Costs?

No. Ascertaining costs incurred in making the products is not always an easy task due to several factors such as dearth of reliable data, discretionary apportionment of indirect costs and general expenditure which may vary considerably according to the size of the undertakings. Similarly, it is more difficult to ascertain the costs of productions when it relates to intangibles such as intellectual property rights, in respect of which monopoly rights are granted to right holders as reward and incentive for their creation. In any of these scenarios, enforcing excessive pricing may be seen as a cap or limitation on statutory monopoly rights granted by intellectual property law which may be adverse to the long-term interests of consumers.

Furthermore, it may also important to consider the obligations of the company to its capital providers who demand high returns on their investment as consideration for risks associated with their investments in the company. Hence, it may be advisable to take cognizance of investments and risks incurred by capital providers to the company under investigation, especially losses sustained in the start-up phase of the undertaking's lifecycle[11].

(iii). When is the Price Excessive using the Cost/Price Difference Model?

Excessive price will be found where:

- the price charged is excessive either in itself; or
- the price charged is excessive when compared to competing products in the relevant geographical market[12]. Hence, the Commission will inquire about the price that would have been expected to be charged by an efficient company in a competitive market[13]; or

In the NAPP case, the UK Office of Fair Trade ("OFT") inquired whether a pharmaceutical company had charged an excessive price for its sustained release morphine product, MST. The UK Competition Appeal Tribunal upheld the decision of the OFT in view of the fact that NAPP's gross profit margin on MST sales of 80% was 10% points higher that the profit earned by NAPP's next most profitable rival (after adjusting for cost differences). Furthermore, NAPP's MST price was 40% higher than that of the highest price rivals. The OFT also established that there had been a stability in the high price charged by NAPP in view that the high prices did not decline despite the expiration of NAPP's patent and the fact that there had been no effective competition from new entrants. **NAPP Pharmaceuticals Holdings Limited and Subsidiaries v Director General of Fair Trading [2002] CAT 15 January 2002**

[11] Jenkins, Niels & Kavanaugh "Competition Law for Lawyers"
[12] Regulation 10(4)(c) of the Regulations
[13] Regulation 10(4)(b) of the Regulations

- the price charged is excessing when compared with prices in comparable geographic markets. Thus, where a dominant undertaking charge prices that are appreciably higher than those charged in another geographic market and comparison of the prices have been made on a consistent basis, the difference in prices may be indicative of excessive pricing. In such a case, the dominant firm may be required to justify the price differences by reference to objective dissimilarities between the geographic markets[14]. In such scenario the Commission will take cognizance of cost structures in the other comparable geographic markets such as taxes, wages, transportation, cost of raw materials and other local features peculiar to the comparable geographic markets[15];

> Dangote Cement Plc, Africa's leading cement manufacturer, has clarified that the price of a bag of cement from its factories and plants across Nigeria is in consonance with or even lower than prices in other Africa countries. The clarification is coming on the heels of recent insinuations that the company sells cement in Nigeria at significantly higher prices relative to other countries, particularly Ghana and Zambia. According to Dangote Cement, the price of a bag of cement in Nigeria, inclusive of Value Added Tax (VAT), ranges from N2,450 being sold at Obajana and Gboko factory to N2,510 in Ibese factory. While a bag of cement sells for an equivalent of $5.1, including VAT, in Nigeria, it sells for $7.2 in Ghana and $5.95 in Zambia ex-factory, inclusive of all taxes, Devakumar Edwin, Dangote Group's executive director, strategy, portfolio development & capital projects, told journalists in Lagos on Monday. He said it was important to distinguish Dangote's ex-factory prices from prices at which retailers sell cement in the market, adding that though the company has direct control over its ex-factory prices, it cannot control the ultimate price of cement when it gets to the market. He frowned at intentional misinformation, allegedly sponsored by some individuals, who claimed Dangote sells its cement at higher prices in Nigeria relative to other African countries at the expense of Nigerians. He described the allegation as false and misleading while also urging the media to conduct independent investigations and compare the price of cement from Nigeria and other African countries (Cameroun, Ghana, Sierra Leone, Zambia). **Dangote Cement Says Nigeria Price in Line with Other African Countries- Business Day Newspaper, April 12, 2021**

- the difference with the cost/price benchmarks within the relevant market and competing products must be substantial[16].

(iv). When is the difference between the Putative Excessive Price and the Cost/Price Benchmarks in the Market Regarded as Substantial?

The difference in pricing will be regarded as substantial if the price bears no reasonable correlation to the economic value of the products being considered. Neither the Act nor the Regulations provides us with the definition of the term "economic value" and the import of the term has been the cause of several debates such that there is no consensus among competition lawyers on the precise meaning and import of the expression. As such, what competition authorities typically do is to first establish the production costs to the extent possible in order to compare these with the selling price so as to extract the profit margin. Thereafter, the competition law authority considers if the difference is unreasonably high either because the profit margin is excessive in itself or when compared with the price of competing products[17].

[14] Jones, Sufrin & Dunne "Competition Law: Text, Cases and Materials"
[15] Eugene Buttigieg
[16] Regulation 10(5) of the Regulations
[17] Eugene Buttigieg

SECTION 2: PREDATORY PRICING

Introduction

With respect to price related abuse of dominance, while excessive pricing discussed above is at one end of the spectrum, at the other end is where the dominant company prices too low in relation to its costs. The dominant undertaking would have been making profits, but where it feels that its market power is being threatened by an existing competitor or a potential new entrant, the dominant company temporarily reduces its prices to a level that its actual or potential competitors would be unable to match the below cost pricing and are compelled to either exit the market or new entrants dissuaded from entering the market. After disciplining its actual or potential competitors, the dominant undertaking increases the price to the previous level to recoup the losses made[18]. Unlike excessive pricing policies, the target is not the exploitation of the consumer but the elimination of competition from the market. While the consumer might feel that the sudden very low bargain price offered by the dominant company is a bonanza, in the long-term even the consumer stands to suffer as the dominant company through this spate of price-cutting will consolidate its dominance in the market. Where the price cuts results in disciplining or exit of equally if not more efficient competitors which lack its financial strength there is a loss in consumer choice and return to supra-normal prices[19].

In the seminal US antitrust case of, ***Standard Oil Company of New Jersey v United States***[20], it was found that the Standard Oil Company frequently cut its prices to a point which leaves the company with negligible or no profit, and which more often leaves no profit to competitors, whose costs are ordinarily higher. Thus, the Regulations, proscribes predatory pricing which involves a dominant company deliberately setting price of a product(s) below an appropriate measure of its own cost to, incur short term losses on the sale of product(s) in the market(s) for a period of time sufficient to eliminate, discipline or deter entry or expansion of a competitor, in the expectation that the dominant company will thereafter recoup its losses by charging prices that would have prevailed in the absence of the impugned conduct[21]. By engaging in predatory pricing, the dominant company deliberately reduces prices to a loss-making level when faced with competition from an existing competitor or new entrant to the market. The existing competitor having been disciplined or the new entrant having been foreclosed, the dominant undertaking then raises its prices again so as to accumulate further profits and causing harm to consumers[22].

Predatory pricing defined in Regulation 13(1) of the Regulations can conceptually be described as a 3 stage process aptly represented in the Diagram1 below[23].

Monopoly Price	Profits Before Entry		Profits After Exit
		Losses	
Predatory Price	Stage 1	Stage 2	Stage 3
		T entry	T exit Time

[18] Ibid
[19] Eugene Buttigieg
[20] 221 US 1 (1911)
[21] Reg. 13(1) of the Regulations
[22] Richard Whish and David Bailey "Competition Law"
[23] Niels, Jenkins and Kavanagh

In Stage 1 there is a dominant company with fringe smaller competitors unable to wield significant competition strictures on the dominant Company. At Stage 2, the dominant undertaking engages a below-cost pricing strategy against any new entrant or against existing competitors and incurs losses in the process. At Stage 3, the rivals are either forced out of the market or disciplined and the dominant undertaking can continue to enjoy supra-normal profits.

1. What is the Anticompetitive Effect of Predatory Pricing?

Where the predatory pricing results in exit of competitors or deters new entry, the dominant firm has foreclosed new entrants and existing competitors. This way, predatory pricing makes the relevant market less competitive and reduces the autonomy of consumers to have a variety of quality products from which to choose from at competitive prices which is contrary to Section 1(c) of the Act.

2. Below, What Price is a Dominant Company's Pricing Model Regarded as Predatory?

The Commission will consider a dominant company to be engaged in a predatory conduct if the dominant company sets a price below the average avoidable cost ("AAC") as a short-term strategy subject however to market conditions[24].

3. How is AAC Calculated?

The average avoidable cost of a company is calculated by dividing all the company's avoidable costs by its output. Hence, if a company is being accused of predatory pricing over a period of for example 12 months, the first step is to ask what costs the company would have avoided if it had not produced the units that were the subject of predation over the said 12 months. Once the avoidable cost is discerned, the next step is to divide all the avoidable costs by the outputs for the said period[25].

4. What are Avoidable Costs?

Avoidable costs are the costs that could have been avoided by a company if the company had not produced the identified amount of products in question[26]. The dominant company would be better off producing nothing and avoiding these costs altogether. Hence, in order to assess whether a dominant company is engaged in predatory pricing, the Commission shall examine whether the dominant company incurs losses that it would have avoided when compared to economically rational and practical alternatives that may realistically be expected to be more profitable, but for the elimination of actual or potential competitors[27]. That is, the Commission will assume predation by the very fact that the price is so low that on the basis of rationality the only explanation for such low price is the exclusion of actual or potential competitors. Putting it succinctly, there is no other conceivable economic purpose for such below the cost pricing otherwise than the elimination or restriction of competition[28].

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[24] Reg. 13(4)(a) of the Regulations
[25] Richard Whish & David Bailey "Competition Law"
[26] Reg 13(7)(a) of the Regulations
[27] Reg. 13(3) of the Regulations
[28] Tetra Pak International v Commission [1996] ECR I-5951

5. For How Long Must the Dominant Company Price Below AAC for a Finding of Predation?

From the perspective of the dominant company, the Stage 2 in Diagram 1 (Losses) must be short and stage 3 (Profits After Exit) must be long. That is, the predation in Stage 2 must be quick and dirty because if Stage 2 is protracted the dominant company will keep building losses and the prospect of ever recouping these losses diminishes. Hence, the Regulations expressly provided that whether a cost is avoidable depends in part on the duration of the alleged predation as, in general, more costs become avoidable over time[29]. If a dominant company maintains a low price over a significant period of time, such price could be a sustainable low price rather than a predatory price and it is unlikely that the conduct constitutes predatory pricing[30].

6. Is Every Pricing Below AAC by a Dominant Company Prohibited?

No. One of the most important parameters of competition is price. Hence, Every company, including dominant companies have the right to compete on price even though such price competition may lead to the exit of less efficient competitors. It is for the Commission to make a distinction between legitimated price competition on the one hand and exclusionary/predatory pricing model on the other hand. Otherwise, it will be antithetical to the objective of competition law if dominant companies are reluctant to compete on price for fear of prosecution of an infraction under the Act.[31] Furthermore, consumers would suffer because a competition policy that is too harsh will discourage established firms from reducing prices if such conduct will enable such firms pass on the effects of economies of scale to consumers. Hence, the Regulations expressly stipulates that where a dominant company's pricing does not cover its own AAC, the Commission will consider the pricing to be predatory in the absence of evidence that the overriding purpose of the conduct was in furtherance of a credible efficiency or pro-competitive rational[32]. Examples of instances where pricing below AAC will not be considered as predatory pricing include:

(i). where it is reasonable for the company to sell excess, obsolete or perishable products at below-cost prices[33];

(ii). when the company uses below-cost promotional pricing for the purpose of inducing customers to try new products[34]. Especially if the dominant company is in the process of entering a new market or launching a new product, the company may offer the products at rebates, discounts or even free as a means of gaining market shares;

(iii). network effect products whereby it is efficient to engage in below cost pricing. For example, a new network product will need to achieve a critical mass (as discussed in Part 2) and one of the ways of doing this involves low pricing, providing free products or even paying early subscribers and the prices are raised once the critical mass is achieved. In the long-term, this strategy favors the consumers who will be worse off if such network product is not introduced into the market in the first place. This will only make sense however, where the undertaking in question faces no competition[35].

[29] Reg. 13(7)(b) of the Regulations
[30] Reg. 13(6)(b) of the Regulations
[31] Richard Whish and David Bailey
[32] Reg. 13(8) of the Regulations
[33] Reg. 13(8)(i) of the Regulations
[34] Reg. 13(8)(ii) of the Regulations
[35] Niels, Jenkins & Kavanagh

7. Is Pricing Below AAC the only Prohibited Below-Cost Pricing Under the Act?

No. Section 72(2)(d)(iv) of the Act proscribes a dominant undertaking from selling its products below the marginal costs and average costs. Marginal costs are costs incurred by a company when the company produces an additional unit of outputs. Average cost on the other hand is the division of the total cost by the number of units of goods produced. Total cost being a summation of total fixed cost and total variable cost. Fixed cost being costs that do not vary with the amount of products produced by the company while variable costs are costs that vary with the amount of products produced by the company. Examples of fixed costs include the rent of the property for where production activities occur which cost does not vary with the change in the quantity of goods produced. Examples of variable costs include cost of raw materials and fuel consumption which varies with the quantity of products manufactured.

8. Must the Predatory Pricing Strategy always be an Explicit Reduction of Price?

No. Predatory pricing can also be implied such as where the dominant company offers the products at a discount or rebates[36].

9. How is Predatory Pricing Established as Distinguished from Permissible Below-Cost Pricing Discussed in Paragraph (6) Above?

The Commission will take account of factors such as:

(i). direct evidence of a strategy aimed at excluding competitors[37]. For example, minutes of board meetings, internal written memorandum and electronic mails that reveal intentions to foreclose competitors otherwise referred to as "smoking guns". The reality is that unearthing smoking guns will be difficult as the companies concerned will do well to delete or destroy such documents before they are discovered by the regulators. According to Richard Posner

> *"the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality. A firm with executives sensitized to antitrust problems will not leave any documentary trail of improper intent; one whose executives lack this sensitivity will often create a rich evidence of such intent simply by clumsy choice of words to describe an innocent behaviour";*

the likelihood for equally efficient competitors to have entered the market in the absence of the below-cost pricing or for the period where the below-cost is sustained[38]. This is also known as the "as -efficient competitor test" which inquires whether the conduct of the dominant company will exclude a competitor that is as efficient as the dominant company under investigation. The test seeks to distinguish between a conduct that is competition on the merits on the one hand and exclusionary conduct that ultimately harm consumers on the other. Generally, conducts of a dominant undertaking company cutting its price down to, but not below, its own costs is beneficial to consumers and will tend to exclude only competitors that are less efficient- that is competitors that have higher costs[39]. Hence, if prices are at or above the benchmark costs, equally efficient companies with similar cost structures as that of

[36] Reg. 13(2) of the Regulations
[37] Reg. 13(5)(a) of the Regulations
[38] Reg. 13(5)(b) of the Regulations
[39] Niels, Jenkins & Kavanagh

the dominant company may still be able to compete in the market[40]. Hence, the Commission will consider it important to assess if an equally efficient competitor would survive in the particular market scenario[41].

10. Is it Necessary to Prove Exit of Competitors?

No. It is not necessary to show that competitors actually exited the market as a result of the predation though it is vital to demonstrate consumer harm resulted from the predatory conduct of the dominant company[42]. It will suffice if the dominant undertaking was able to discipline the competitor from competing effectively. The consumer harm that warrants the interference of the Commission is the reasonably expectation that the post-predation market power of the dominant company will be greater than it would otherwise have been but for the predation. For example, where the dominant company is able to increase price or moderate any fall in prices[43].

11. Is Recoupment a Necessary Ingredient for a Finding of Predation?

No. It is not necessary for the Commission to demonstrate that the dominant undertaking was able recoup losses occasioned by engaging in a below-cost pricing or that initially losses were recouped before the Commission makes a finding of predatory pricing[44].

[40] Ibid
[41] Reg. 13(6)(c) of the Regulations
[42] Reg. 13(6)(a) of the Regulations
[43] Deutsche Post Case OJ [2001] L 125/27, Par. 69-71
[44] Reg. 13(4)(b) of the Regulations

SECTION 3: TYING AND BUNDLING

Introduction

Tying refers to a situation where customers that purchase one product ("tying product") are required to also purchase another product ("tied product") from the dominant company[45]. The primary competitive vice of tying arrangements is the restriction on customer/consumer autonomy. The tying arrangement compels the consumer/customer to purchase both the tying product and the tied products from the dominant firm irrespective of whether (i) the consumer/customer would have preferred to purchase the tied product from a different firm other than the dominant firm or (ii) the consumer/customer may not even want to purchase the tied product in the first place. Additionally, tying practices by the dominant firm may foreclose an efficient competitor in the market for tied product because consumers are compelled to purchase both the tying and tied product from the dominant firm. By leveraging its market power in the market for the tying product, the dominant firm is able to unduly increase its sales in the market for the tied product.

1. What are the Forms of Tying Arrangements?

The forms of tying recognized by the Regulations include:

- Contractual Tying which is the result of:
  - an express contractual stipulation to the effect that the sale of the tying product be predicated on the sale of the tied product;
  - unilateral refusal to supply the tying product until the tied product is also purchased.
  - withdrawing or withholding the benefit of a guarantee unless a customer uses the dominant company's tied products as opposed to that of a 3rd party.
- Technical tying which occurs where:
  - the tied product is integrated into the tying product so that it is impossible to purchase only one of them; or
  - if the tying product is so designed that it only works with the tied products.

See the ***U.S. v. Microsoft*** where Microsoft by virtue of contractual provisions and technical integration tied it Microsoft Office operating systems with the web browser, Internet Explorer to foreclose competitors such as Netscape owned by Netscape Corporation.

2. What is Bundling and What are the Forms of Bundling?

Bundling refers to the way products are offered and priced by the dominant firm as a single package. Bundling could take the form of:

- Pure Bundling- where the products are only sold jointly in fixed proportion;

[45] Reg. 12(1) Abuse of Dominance Regulations

- Multi-Product Rebate or Mixed Bundling- where the products are made separately, but the sum of the prices of the individual elements of the bundle when sold separately is higher than the bundled price[46].

3. What is the Difference between Pure Bundling and Mixed Bundling?

The difference between pure bundling and mixed bundling can be illustrated as follows. Where Firm C the manufacturer of **Product A** and **Product B** engages in a pure bundling, the consumer is constrained to purchase both **Product A** and **Product B** or he is compelled to forego both **Product A** and **Product B** altogether for alternative products which may be poor substitutes for the **Product A** or **Product B** desired by the consumer. Whereas, if Firm C engaged in a mixed bundling, because Product A and Product B are offered separately, the consumer has the choice to buy **Product A** or **Product B**, albeit at a discount should he purchase **Product A** and **Product B** from Firm C.

4. When is a Multi-Product Rebate Regarded as an Anticompetitive Bundling or Tying?

A multi-product rebate will only be regarded as anti-competitive in the tied or bundling market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle[47].

5. What are the Elements of an Anticompetitive Tying and Bundling?

The Commission will characterize a bundling or tying as prohibited by Section 72(d)(iii) of the Act where there is a cumulative finding of the following conditions[48]:

- The firm is dominant in the primary product which is the product on which other products are bundled or tied ("**Dominance**");
- The products are distinct products from the consumer's point of view and the Commission will assess whether in the absence of such conduct, a substantial number of customers would have bought the primary products from the dominant firm without the tied or bundled product ("**Distinct Product**");
- The conduct or practices are likely to lead to foreclosure of competitors on the tied or bundling market, especially where the dominant firm's strategy is a lasting one (**Foreclosure**).

Since Dominance has been discussed in Part 2 of our Competition Law Series on Abuse of Dominance, our discussion in this section will be restricted to Distinct Products and Foreclosure.

6. When will the Bundled Products or the Tied and Tying Products be regarded as Distinct?

The test for whether the products are distinct from the perspective of consumers is whether there is a consumer demand. The two or more products will be treated as distinct if, in the absence of tying or bundling a substantial number of consumers would purchase or would have purchased the primary product stand-alone without also buying the tied or bundled product from the company under investigation[49]. Distinctiveness of the products can be established by:

[46] Reg. 12(2)&(3) of the Regulations
[47] Reg. 12(6) of the Regulations
[48] Reg. 12(4) of the Regulations
[49] Reg. 12(4)(b) of the Regulations

- Direct evidence that when customers are given a choice, they purchase the primary product and the tied/bundled product separately from different sources of supply; or
- Indirect evidence such as the presence on the market of companies specialized in the manufacture or sale of the tied/bundled products without the primary product or each of the products bundled[50].

7. How Does Tying and Bundling Result in a Foreclosure?

The dominant firm uses its market power in the market for the primary product to foreclose competitors in the market for the tied or bundled products. Since the company is dominant in the market for the primary product the customer has difficulty going elsewhere. Tying takes away a customer's freedom of choice in respect of the tied product because the customer cannot buy the tied or bundled product from other competitors who are deprived from accessing the customer. Essentially, the dominant company leverages its position in respect of the primary product to achieve increased sales in the market for the tied or bundled product. A mixed bundling can have a foreclosure effect because it offers a price that an "as efficient competitor" cannot match. An "as efficient competitor" being a competitor with the same cost structure as the dominant firm such that the conduct of the dominant company is unlawful only if it is capable of excluding such competitor because only some kind of anti-competitive conduct can exclude such a competitor.

8. What Happens Where any of Dominance, Distinctiveness of Products or Foreclosure is Absent?

Where the Commission deems that one of the conditions of Dominance, Distinct Product and Foreclosure is not met, the Commission may allow the firm to demonstrate objective pro-competitive justification for the tying/bundling conduct[51]. The firm under investigation will be allowed to establish for example that:

a. where the tying involves integration and assembling of components into one product, the conduct will result in significant economic efficiencies such as reduction in production and distribution costs and may also culminate in quality improvement provided that consumers get a fair share of the benefits accruing to the tying/bundling;

b. due to the firm's expertise, knowledge and skill in the assembly and combination of production activities, the cost of assembly may be lower for the firm than the customers and will result in efficiency rather than putting the obligation of assembling compatible components of the relevant product on the customer;

c. it might be time consuming and expensive for consumers/customers to shop around for complementary products which most appropriately and efficiently connects to the desired product. Therefore, it might be more sensible to leave the selection to the supplier of the tying product who has the expertise and finance to discover other products such as the tied product that function most effectively with the tying product and then link both sales as a single package;

[50] Ibid
[51] Reg. 12(5) of the Regulations

d. the tying helps with product evaluation when the product is bought as a single integrated product with various components working in combination. In the event of a malfunction the supplier of the product will be clearly liable to the customer/consumer for the defect in the product and the consumer will not be required to establish which component of the integrated product contributed to the malfunction.

[50] Ibid

[51] Reg. 12(5) of the Regulations

SECTION 4: EXCLUSIVE DEALING

Introduction

Generally, exclusive dealing is a practice whereby a firm:

- conditions the supply of a product to a customer(s) on such customer(s) accepting to deal only or primarily in the products supplied or designed by the firm or a nominee of the firm, or requires that the customer refrains from dealing in a specified class or kind of products except those by the firm or its nominee. For example, where upstream Firm A conditions the sale of **Product P** to **Dealer D** on condition that **Dealer D** will only sell Product P and not sell the product of any firm competing with **Firm A** or sell products that are substitutes for **Product P**. This is also known as "Exclusive Purchasing Obligations" whereby a dominant firm forecloses its competitors by hindering them from dealing with/selling to customers (dealers) with which the dominant firm has an agreement[52];

- induces a customer to meet certain conditions by offering to supply products to the customer on more favourable terms and conditions if the conditions are met. For example, Firm A may not expressly require that **Dealer D** purchases only **Product P**, but may provide **Dealer D** with loyalty rebates and other discounts which encourages or induces Dealer D to deal exclusively or largely in **Product P** of **Firm A**;

- as a condition for the purchase of a specified class or kind of products from a supplier, requires the supplier refrain from supplying the same class or kind of products to other undertaking. For example, where a **Dealer D** conditions the purchase of **Product P** from **Firm A** on the condition that **Firm A** refrains from supplying **Product P** or similar products to any other dealer in **Dealer D**'s geographic market. This is also known as "Exclusive Supply Obligations" which accommodates situations where a dominant company obliges a supplier of a product to exclusively or to a large extent supply products only to the dominant company[53].

1. What are the Anticompetitive Effects of Exclusive Dealing?

Exclusive dealing agreements are contrary to Section 59(2)(c) of the Act because they limit or restrict the distribution of the product by either (i) compelling customers/dealers in the downstream market to source all or most of their market demand from dominant firm; or (ii) refraining manufacturers/suppliers in the upstream market from supplying the products to competing customers/dealers in the downstream market.

Furthermore, exclusive dealing by requiring customers to secure all or almost all of its customers' requirements from the dominant company has a foreclosure effect because the dominant company is able to foreclose rivals not by competition on the merits but instead by strategically depriving competitors from access to a sufficiently large base of possible customers/consumers.

2. What are the Forms of Exclusive Dealing?

Exclusive dealing arrangements could take several forms, such as:

[52] Section 167 of the Act and Reg. 14(7) of the Regulations
[53] Ibid

- Express provisions of contracts;
- Indirectly such as where the dominant company provides loyalty rebates and other discounts to customers which encourage them to go into exclusive arrangements with the dominant company; or
- De facto whereby there is no express contractual provision or grant of rebates but the nature of arrangement has the substantial effect of an exclusivity.

- In **Van Den Bergh OJ [1998] L 246/1** the EU Commission concluded that it was an abuse of dominant position for Van den Bergh to provide freezer cabinets free of charge to retail outlets on the condition that they were to be used exclusively for the storage of its ice cream products. The consequence of the practice was that, de facto, Van den Bergh achieved outlet exclusivity, since retailers were unlikely to, and in practice did not, maintain a second freezer in their shops, therefore, the retailers would purchase ice cream exclusively from Van den Bergh.
- Similarly in **Coca-Cola Undertaking (2005) OJ L253/21**, the Coca-Cola had to give an undertaking to the EU Commission by amending its Cooler Policy whereby dealers are authorized to allow 20% of cooler space for the products of competitors.

3. Must the Purchase or Supply Obligation be 100%?

Exclusivity does not mean that the dealer must source 100% of their requirements from the dominant company. The Commission will consider an arrangement as exclusive if the dominant company places an obligation on the customer to purchase at least 50% of the customer's requirement from the dominant company[54].

4. Is Every Exclusive Arrangement by Dominant Firms Prohibited?

No. An exclusive purchasing obligation does not constitute a violation of the Act if only a small portion of the relevant market is affected so that there remain sufficient demand on the market to allow equally efficient competitors or potential competitors to compete viably on almost equal terms for individual customer's entire demand[55]. The analysis will examine whether the exclusivity can potentially drive out efficient sources of supply from the market because, regardless of how effectively those firms might compete, there is simply an insufficient number of remaining customers available to allow rivals of the dominant company to obtain a sustainable market share. Thus, in determining whether the exclusivity forecloses more than a small portion of the relevant market, the competition analyst may consider: (i) the competitive constraints exercised by both actual and potential competitors (ii) stability of market share (iii) likelihood of new entry; and (iv) the portion of the market affected by such conduct and the duration of the exclusive purchasing obligations[56].

[54] Reg. 14(2) of the Regulations
[55] Reg. 14(6) of the Regulations
[56] Reg. 14(4) of the Regulations

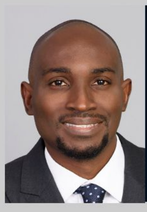
5. What Duration of Exclusivity is More Likely to Have a Foreclosure Effect?

Exclusivity obligations of longer duration are more likely to have a foreclosure effect on the market than obligations of short duration. Generally, the longer the duration of the exclusivity obligation, the greater the likelihood of foreclosure of rivals. Exclusivity obligations with duration of two or more years is considered long although the length of duration will be assessed on a case-by-case basis. Whether or not the exclusivity obligation is for a short or long durations, the dominant firm must be an unavoidable trading partner for most customers. In some cases, purchasing obligation of short duration may lead to anti-competitive foreclosure if the dominant firm is an unavoidable trading partner of all or most customers.[57]

6. When Will a Dominant Firm Be Treated as an Unavoidable Trading Partner?

The dominant company will be treated as an unavoidable trading partner where for example the products of the dominant company is a "must-stock" item for customers. A dominant company can also be characterized as an unavoidable partner where the rivals of the dominant firm are by reason of capacity constraints unable to satisfy the entire demand of each individual customer.

[57] Reg 14(5)(a)-(d) of the Regulations



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