



## **MONOPOLISATION AND ABUSE OF DOMINANCE GUIDELINES**

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## 1. FOREWORD

- 1.1 The Competition & Consumer Authority (CCA) is a statutory body corporate established under section 4 of the Competition Act (Cap 46:09). These Guidelines deal with section 30 of the Competition Act ('the Act'), which covers abuse of dominance. The Guidelines have been developed in line with international best practice, such as the International Competition Network (ICN) guidelines, the Southern African Development Community (SADC) guidelines and other countries experiences. The Guidelines outline the general principles underpinning the Competition and Consumer Authority's approach to the analysis of abuse of dominance cases under section 30 (1) of the Act.
- 1.2 The investigation and analysis of abuse of dominance follows a thorough, fact based and intensive rule of reason approach, which assesses both market structure and business conduct, applying the substantiality and competitive effects tests.
- 1.3 The Guidelines provide a framework that assists the Competition & Consumer Authority to determine whether a dominant position that exists increases or decreases the risk of market power and is of substantial harm to competition and consumers, once a dominant position has been established.
- 1.4 The procedures presented in this document serve as a mechanism for administrative transparency, constituting a description of the analytical thought process followed by the CCA during the analysis of abuse of dominance cases.
- 1.5 The Act does not identify specific activities which may be deemed to be abusive and, therefore, the document, though not exhaustive, attempts to provide guidance on activities that are typically regarded to constitute abuse of dominance behaviour. Dominant enterprises need to be aware of these commercial activities in order to proactively avoid a contravention of the prohibitions of the Act.
- 1.6 The Guidelines are not a substitute for the Act and regulations. They must, therefore, be read in conjunction with the Act and regulations. The examples in these Guidelines are for illustrative purposes. They are not exhaustive and do not set a limit on the investigation and enforcement activities of the Competition and Consumer Authority. In applying the Guidelines, the facts and circumstances of each case will be considered.
- 1.7 These Guidelines reflect the views of the Competition & Consumer Authority at the time of publication. Markets, economic theory, legal thinking and best practice evolve; and, as such, the CCA may revise the Guidelines from time to time to reflect developments.

## 2. INTRODUCTION

2.1 As dominant enterprises are most often as close as we get in reality to a monopoly, competition authorities are interested not only in their conduct, but also in how they acquire and keep their market position. A number of factors may contribute to the rise of a dominant firm, such as for reasons of economies of scale. However, an enterprise may sometimes obtain a dominant position because it engages in strategic behaviour that is designed to exclude competitors and prevent competition on merits. Competition law specifically aims to regulate anti-competitive strategic behaviour of dominant enterprises, where market forces cannot. Accordingly, the Act does not condemn dominance that is achieved as a result of normal industrial development and competition. It simply aims to level the playing field in cases where dominant enterprises abuse their dominant market position.

2.2 The test for dominance is the ability to profitably adjust prices or output, acting to some degree independently of competitive constraints. It is not simply an exercise of assessing market shares.

2.3 As already stated, the Act does not prohibit dominance. It is not in itself a breach of the law for an enterprise to be dominant, but such enterprises have a responsibility to ensure that they are not abusing or exploiting any market power this position confers upon them. A dominant position in the context of section 2 of the Act refers to a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors. Regulation 4 of the Competition Regulations states that:

*“The CA may consider an enterprise or enterprises to be in a dominant position if it is satisfied that:*

- (a) The enterprise supplies or acquires at least 25 percent of the goods or services in the market; or*
- (b) Three or fewer enterprises supply or acquire at least 50 percent of the goods or services in the market”*

2.4 Regulation 5 proceeds to state that:

*“Notwithstanding the threshold under regulations 3 and 4, the CA may initiate an investigation into the conduct of any enterprise where the CA has reasonable grounds to suspect that:*

- (a) *The conduct or practice of one or more enterprises has caused or is likely to cause serious or irreparable harm to the market or consumer; or*
- (b) *One or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors.*

2.5 These Guidelines are premised on the underlying principle that enterprises with high market shares in a relevant market should not necessarily be investigated and penalised merely on the basis of the existence of a monopoly or dominant position, but rather on the basis that the enterprise is abusing its market power in a manner that has adverse effects on competition and consumers, substantially lessens existing and prospective competition and/or is likely to have no benefits to consumers.

2.6 In other words, a high market share does not necessarily indicate dominance and a dominant position does not necessarily translate into market power and the motivation and ability to abuse a dominant position. Under certain circumstances, a supplier with a smaller market share can be the enterprise with the market power to control prices and restrict entry through anti-competitive exclusionary and foreclosure practices. Conversely, a major supplier may have market power, but may decide not to abuse it for various reasons. Accordingly, dominance is not necessarily a sin and can often be a virtue when based on superior performance.

2.7 The question that the CA would seek to establish is whether dominant enterprises are engaged in a conduct which restricts, prevents or distorts competition, such as using their market position to exclude rival enterprises. The Act treats abuse of dominance as a conduct to be addressed through remedies. Section 44 (1) states,

*“If, upon the conclusion of an investigation and a hearing, the Commission determines that:*

*(a) an abuse of dominant position has occurred or is occurring and the provisions of section 30 do not apply to the matter or do not apply sufficiently to offset the adverse effects on, or absence of, competition, the Commission shall give the enterprise or enterprises concerned such directions as the Commission considers necessary, reasonable or practicable.*

*(2) The Commission may, acting under subsection (1), direct the enterprise concerned to remedy, mitigate or prevent:*

- (a) the adverse effects on competition that the Commission has identified; or*
- (b) any detrimental effects on users and consumers to the extent that they have resulted from, or may be expected to result from, the adverse effects on, or absence of, competition.*

- 2.8 Abuse of dominance can only be identified and dealt with following a formal investigation by the CCA, which might then seek to remedy the situation, but cannot impose fines and other penalties. As a result, the CCA's investigation will focus on the specific effects of any abuse of dominance and try to discover how a conduct can be modified and/or removed altogether. The guidelines should thus be read with this understanding in mind, which distinguishes the Act from treating abuse of dominance as a breach to be deterred through penalties, as is the case in some jurisdictions. In this area of enforcing the Act, the CCA will intervene to try and improve the workings of markets in Botswana as opposed to enforcing a prohibition.
- 2.9 The risk of abuse is typically higher when dominance is achieved through highly aggressive foreclosure, exclusionary and related practices, which can become anti-competitive conduct and abuse of dominance after the enterprise becomes dominant within the relevant market.
- 2.10 The risk is typically lower when dominance is achieved through superior competitive performance and the relevant market continues to be contestable because of comparatively low entry barriers, a competitive fringe and a maverick producer among the remaining competitors.

## **RELEVANT LAW**

- 2.11 A dominant position in the context of section 2 of the Act refers to:
- “a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors”.*
- 2.12 Regulation 4 of the Competition Regulations states that an enterprise acquires a dominant position if it supplies or acquires at least 25 percent of the goods or services in the market; or three or fewer enterprises supply or acquire at least 50 percent of the goods or services in the market.
- 2.13 Under section 30 of the Act, it states that -*“any conduct on the part of one or more enterprises is subject to prohibition by the Authority, if, following an investigation by the Authority, such conduct is determined to amount to an abuse of a dominant position in any market”.*

- 2.14 An 'enterprise' is defined in the Act to mean - "*any person or group of persons whether or not incorporated, that carries on a business for gain or reward in the production, supply or distribution of goods or the provision of any service*".

### **3. EXISTENCE OF A DOMINANT POSITION AND ACTION TAKEN BY THE COMPETITION & CONSUMER AUTHORITY**

- 3.1 This section sets out some considerations that the CCA will take into account when deciding whether to investigate and whether to take action regarding a dominant market player<sup>1</sup>.

- a) There must be an enterprise, as defined within the Act.
- b) There must be a conduct by the enterprise(s) that under international best practice is classified as 'abusive' in effect, i.e., prevents or distorts competition or otherwise exploits the dominant position – which conduct is referred to as abuse of dominant position. Where the CCA has reasonable grounds to believe that abuse of dominance is occurring or will occur, an investigation may be launched.
- c) There must be a position of dominance, as defined within the Act and the regulations by reference to market shares within the relevant market<sup>2</sup>. Dominance generally means the enterprise(s) have substantial market power, that by virtue of their position in the market they can act to some extent free of the constraints that competition would normally be expected to provide. This is referred to as the structural test for dominance. Dominance will also be viewed within the context of regulation 4, with respect to market shares in excess of 25% for an individual enterprise and at least 50% for three or fewer enterprises.
- d) There must be actual or potential for abuse of dominance. Abuse of a dominant market position is understood to be an anti-competitive business practice (including improper exploitation of customers or exclusion of competitors), which a dominant firm may use in order to maintain its position in the market<sup>3</sup>. This conduct test for dominance will be examined within the realm of section 30 of the Act.

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<sup>1</sup> See also the Competition Commission of Mauritius 2009, Monopoly Situations and Non-Collusive Agreements 2009

<sup>2</sup> However, if the nature of the conduct is through collusive agreements – price fixing and agreeing not to compete, the enterprises will be investigated and fined, no matter how small the market shares

<sup>3</sup> A Practical Guide to the South African Competition Act, Minette Neuhoff et al., 2006

3.2 In addition, the CCA may not take action if it believes that there are public interest benefits that arise from the conduct. Accordingly, section 30 (2), states that in determining whether an abuse of dominant position has occurred, the CCA may have regard to whether the agreement or conduct in question:

- a) *Maintains or promotes exports from Botswana or employment in Botswana;*
- b) *Advances the strategic or national interest of Botswana in relation to a particular economic activity;*
- c) *Provides social benefits which outweigh the effects on competition;*
- d) *Occurs within the context of a citizen empowerment initiative of Government, or otherwise enhances the competitiveness of small and medium sized enterprises; or*
- e) *In any other way enhances the effectiveness of the Government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation.*

3.3 It should be pointed out that the fact that there are plausible public interest grounds to an abuse does not necessarily mean that the CCA cannot impose certain remedies and/or in addition require certain undertakings from an enterprise.

#### **4. MARKET SHARE THRESHOLDS FOR THE EXISTENCE OF A DOMINANT POSITION**

4.1 As regulation 4 of the Competition Regulations of 2011 states, an enterprise acquires a dominant position if it supplies or acquires at least 25 percent of the goods or services in the market; or three or fewer enterprises supply or acquire at least 50 percent of the goods or services in the market. The emphasis at this point is on market shares.

4.2 When dealing with a case of abuse, the market shares must be based on a definition of the relevant market(s) as discussed in greater detail in the *Market Definition Guidelines* developed by the CA. The process of market definition requires careful analysis of available data and qualitative evidence, not all of which will be available prior to, or in the early stages of an investigation. It should be noted that the assessment of market shares and related indices of concentration is not determinative. In some instances an enterprise, with a high market share, might not be dominant; and in others, enterprises, even with relatively low market shares of a broadly defined market, might be dominant, at least in part of the market.

4.3 Take for example, an industry in which customers can very easily switch to essentially identical products from alternative suppliers and where the suppliers can easily meet the increased demand.

- 4.4 In such an instance, even a small number of competitors might be enough to prevent an enterprise from being dominant and/or from holding a large market share in such an industry. At the other extreme, when products are quite differentiated (e.g., branded goods), the possessor of such products may be dominant, even if there are other similar goods.
- 4.5 The power of large buyers might also prevent an enterprise enjoying a dominant position, even if its market share is high and the industry concentrated.
- 4.6 Before launching a full investigation, the CCA must have reasonable grounds to believe that the dominance thresholds are indeed met in the market(s) under investigation. Similarly, the CA at this stage must have a preliminary sense of which provisions of the Act the conduct under investigation is alleged to have infringed.
- 4.7 If, in the course of the investigation, the CCA becomes satisfied that no abuse of dominance exists, because the market shares are such that the thresholds are not exceeded, coupled with the conduct in question having not been established to contravene the provisions of the Act, the CCA would issue a “Notice of Non-referral”<sup>4</sup> to discontinue investigations to the parties involved and terminate further investigations.
- 4.8 If at the end of the investigations, the CCA is of the view that there has been an abuse of dominance in the relevant market; the matter is then referred to the Competition & Consumer Tribunal for adjudication on a “Notice of Referral”, as contained in Form I of the Competition Regulations (2011).

## **5. ABUSE OF DOMINANCE**

- 5.1 As mentioned earlier, the existence of a dominant position is not in any way a breach of the Act. The CCA is not required to investigate a dominant firm simply on the fact that it is dominant. There has to be a conduct that is anti-competitive in nature for the case to be earmarked for investigation.
- 5.2 The identification of a specific conduct engaged in by the dominant firm is inevitably why section 30 of the Act states that:

*“any conduct on the part of one or more enterprises is subject to prohibition by the CA, if, following an investigation by the CA, such conduct is determined to amount to an abuse of a dominant position in any market.”*

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<sup>4</sup> Form H of the Competition Regulations 2011

- 5.3 Arising from the foregoing, the CCA shall review and investigate abuse of dominance cases where it has reasonable grounds to believe that an enterprise in a dominant position<sup>5</sup> is engaging in conduct that amounts to an abuse of dominant position.<sup>6</sup>
- 5.4 The CCA will, following international best practice, approach the analysis according to the principles of exclusionary and exploitative conduct. Exploitative abuses are those where the firm with market power sets prices and conditions that take advantage of the strong position of the seller (and correspondingly weak position of the buyer) to ensure that an undue share of the gains from the trade accrue to the seller. Exclusionary abuses are those where a firm seeks to engage in conduct to evict a rival from its market (or deter a rival from entering its market), by engaging in pricing and/or non-price strategies that induce the rival to cease competing.<sup>7</sup>
- 5.5 The CCA takes the view that, in most markets, free competition is an effective guarantor of the interests of consumers and is likely to promote the efficiency, adaptability and competitiveness of the economy of Botswana. Significant weakening of competition will, therefore, have adverse effects. Consequently, if the CA finds evidence of behaviour that is preventing, restricting or distorting competition on the part of an enterprise with a dominant position, it will normally expect that such behaviour will have adverse effects on competition in the economy.
- 5.6 The CCA will focus on both exploitative and exclusionary conduct so that its interventions promote competition. Where there is abuse, but lack of effective competition to counter the abuse, then the CCA would consider the remedies that may be radical, such as divestiture. Otherwise, each case will be determined on its own merits.

## **6. ANALYTICAL METHODS FOR AN ABUSE OF DOMINANCE CASE<sup>8</sup>**

- 6.1 There are many similarities between merger reviews and the analytical methods for an abuse of dominance case. The major difference is that, in an abuse of dominance case, most (but not all) of the analysis is on past and current market structure, conduct, competitive and anti-competitive strategies, rather than on predictions of market structure, conduct, business entry and the achievement of efficiencies in the future. The CCA has adopted certain key steps in analysing an abuse of dominance case, which include but may not necessarily be limited to the following:

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<sup>5</sup> This extends to monopoly situations.

<sup>6</sup> This would typically be conduct that has the object and effect of preventing, restricting or distorting competition or in any way has an exploitative or exclusionary effect.

<sup>7</sup> Predation and Excessive Pricing, Dr. Mark Williams, Director NERA Economic Consulting 2012-13, Informa Professional Academy

<sup>8</sup> SADC Secretariat Trade Com Facility, December 2011

- (a) Definition of the relevant market with emphasis on identifying other suppliers that produce close product substitutes; or produce the same or a similar product in a neighbouring geographic market.
- (b) Investigation of past and current conduct of the dominant and other suppliers within the relevant market to identify conduct, business practices and strategies that could meet the abuse of dominance test of substantially lessening competition and substantially preventing entry and competition in the future.
- (c) Assessment of current and future entry conditions in the relevant market to determine whether entry is likely to be timely and sufficient to discipline the pricing, product quality and other business decisions of the dominant supplier.
- (d) Determine whether a maverick producer or the emergence of a competitive fringe will discipline the dominant firm's conduct in the years ahead.
- (e) Analyse whether dominance was achieved through superior competitive performance, which is anticipated to continue now that the firm is a dominant producer<sup>9</sup>.
- (f) Determine whether feasible and implementable structural and behavioural remedies are available<sup>10</sup>.

### **ABUSE OF DOMINANCE REMEDIES**

6.2 An important part of any abuse of dominance case is the identification of remedies that are implementable, will reduce and eliminate the anti-competitive conduct and adverse competitive effects of the dominant position and will prevent the anti-competitive conduct from recurring in the future. In order to put in place an effective remedy, it is necessary first to identify the competitive detriments that would result from the merger. Any decision on remedies must, therefore, follow a decision on competitive detriments. As noted by ICN Recommended Remedies Practice A, "A remedy should address the identified competitive harm arising from the proposed transaction".

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<sup>9</sup> It is worth noting, from the *USA v Microsoft* case, that, although dominance may have been achieved through superior competitive advantage, a firm may later on, as equally efficient competitors enter various market segments, engage in foreclosure conduct that is totally separate from its past superior performance history.

<sup>10</sup> Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally on-going remedies that are designed to modify or constrain the behaviour of merging firms (in some jurisdictions, behavioural remedies are normally referred to as "conduct remedies"). ICN Merger Working Group: Analytical Framework Subgroup, June 2005.

- 6.3 Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally preferred over behavioural remedies for abuse of dominance, mergers and other rule of reason cases, but can also involve major risks.
- 6.4 The Structural Remedies<sup>11</sup> that the CCA may consider include the following:
- (a) Divestiture
  - (b) Termination or amending of agreement
  - (c) Ceasing a particular practice
  - (d) Observe specified conditions
- 6.5 The behavioural remedies that the CCA may use include the following:
- (a) Prohibition of tying or bundling
  - (b) Restraints on predatory pricing
  - (c) Preventing the use of exclusive contracts
  - (d) Mandating access to key inputs and facilities
  - (e) Undertakings and/or commitments by entities involved
- 6.6 Where the CCA considers forced divestment of strategic assets, it will ensure that such does not undermine the long-term competitiveness of the enterprise and should be proportionate to the violation or the harm being fixed.
- 6.7 As a general principle<sup>12</sup>, the abuse of dominance remedies should satisfy the following conditions:
- (a) The remedies should be feasible, implementable, effective and proportional to the violation;
  - (b) Monetary penalties (where they apply) should be sufficient to eliminate anti-competitive conduct and effects;
  - (c) Behavioural remedies should involve oversight and monitoring costs and risks that are manageable and affordable for the Competition and Consumer Authority; and
  - (d) Overall, the remedies must be self-regulatory, i.e., be transparent, checked and accounted for by all the market participants.

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<sup>11</sup>Competition Act, 2009

<sup>12</sup>Best Practices for the Abuse of Dominance Cases, Technical Assistance to the SADC Secretariat, December 2011

## **7. CONDUCT TO BE CONSIDERED AS ABUSE OR OF A MONOPOLISATION NATURE**

- 7.1 Section 30(1) of the Act holds that the CCA can prohibit 'any conduct' it deems to amount to an abuse of a dominant position of market power. The Act does not, therefore, specify any particular forms of conduct by an enterprise in a dominant position that will be considered as abusive. There is no checklist of practices that enterprises can simply avoid. There is, however, an established body of economic analysis and examples from authorities in other jurisdictions on which the CCA can draw from in making its assessment, as outlined below.
- 7.2 When assessing whether conduct by an enterprise in a dominant position constitutes an exclusive restrictive practice, the CCA will consider the state of competition, were the practice not to occur. If, even in the absence of the conduct, the CCA would not expect the market to be any more competitive or result in better outcomes, the conduct will not be considered a restrictive practice. As noted earlier, abuse of market power is categorised into two, i.e., exclusionary and exploitative conduct.

### **EXCLUSIONARY ABUSIVE CONDUCT**

- 7.3 The CCA is mindful of the fact that, in some cases, it can be very difficult to distinguish anti-competitive exclusionary conduct from the normal process of competition, in which competing enterprises seek to gain sales from one another. Excessive concern to prevent exclusionary abuse can run the risk of penalising competitive behaviour or worse, discouraging that competitive behaviour in the first place. Enterprises, which are successful because their prices reflect low costs or because their products and services are valued by consumers, should not be concerned about possible competition investigations.
- 7.4 In assessing conduct, the CCA will be mindful not to penalise vigorous competition, as to do so would harm the economy. Exclusionary abusive conduct (which are elaborated below) include:
- (a) foreclosure;
  - (b) exclusive dealing;
  - (c) incentive/discount schemes;
  - (d) refusal to deal/supply and/or buy;
  - (e) tying and bundling;
  - (f) predatory pricing and conduct.

### ***Foreclosure/Barriers to Entry***

- 7.5 Anti-competitive foreclosure (or creation of barriers to entry) is said to occur when the conduct of a dominant enterprise restricts or eliminates effective access of actual or potential competitors to customers or to suppliers, to the detriment of consumers or the economy in general<sup>13</sup>. Foreclosure may be of supplies: for example, when an upstream supplier refuses to sell or increases prices to a specific downstream enterprise. It may be of customers: for example, when a downstream enterprise refuses to buy from an upstream supplier. It need not involve exclusive dealing, as in these examples, but could include conduct which has the effect of foreclosure – such as incentives for customers not to buy from rivals. Foreclosure should be understood to mean exclusion of competitors in a manner that damages consumers or the economy in general and not simply exclusion of competitors.
- 7.6 Complete foreclosure, which drives competitors out of the market, may result in a less competitive market in the future and thereby lead to higher prices to consumers and/or to less efficient production. Partial foreclosure may result in similar harm, if as a result of the foreclosure the competitor faces higher unit costs (perhaps because it cannot achieve economies of scale) or is otherwise less efficient and thereby less effective as a competitor. Foreclosure may also occur as a form of entry deterrence, preventing new competitors from coming into the market (perhaps by denying them the possibility of achieving sales sufficient to reach minimum efficient scale).
- 7.7 The stronger the market power of the foreclosing enterprise and the stronger the effect on foreclosed rivals, the more likely it is that foreclosure will be found to be anti-competitive. In assessing foreclosure, the CCA will normally consider whether the conduct is likely to result in increased profits for the dominant enterprise, as a result of the reduced competition. Conduct, which is not expected to result in higher profits, is less likely to be considered to be anti-competitive foreclosure. Conduct that would only be profitable if it results in a reduction in competition is particularly likely to be considered to be anti-competitive<sup>14</sup>.

### ***Exclusive Dealing***

- 7.8 Anti-competitive foreclosure may arise through *exclusive dealing* – preventing competitors from selling to customers through the use of exclusive purchasing obligations and rebates.

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<sup>13</sup>Competition Commission of Mauritius, Monopoly Situations and Non-Collusive Agreements 2009

<sup>14</sup>Ibid

- 7.9 In general, customers signing an exclusive contract with a supplier will have done so in the knowledge that they are thereby limiting their choice in the future. This is not in itself an abuse, but might be if it is expected to result in anti-competitive foreclosure.
- 7.10 The Act recognises that a manufacturer or importer of a product has the right to determine its optimal route to market. Accordingly, should a manufacturer decide to distribute its total supply through a single distributor, this arrangement may not necessarily be problematic. It is only when this exclusive arrangement has an anti-competitive effect that it would be in contravention of the Act.
- 7.11 Thus, the CCA will consider the effects of any exclusive dealing requirements on competitors.

### ***Incentive, Loyalty and Discount Schemes***

- 7.12 Some forms of sales and incentives can have similar effects to exclusive dealing requirements. Discounts and rebates which reward loyalty, for example, can induce customers to behave as if they had signed an exclusive dealing agreement.
- 7.13 Most forms of discounting and rebates are pro-competitive, as they represent healthy price competition. The key test for the CA in assessing any discount scheme is whether it is profitable for the supplier, even without any effects on competitors. If a discount scheme depends for its profitability on reducing or eliminating competitors' market shares, it is more likely to be found to be anti-competitive<sup>15</sup>.

### ***Refusals to Deal, Supply and/or Buy<sup>16</sup>***

- 7.14 Vertically integrated enterprises are those which bring together buyers and sellers in a supply chain under common ownership. Vertical integration can be a considerable form of efficiency. In some industries, a high degree of vertical integration may be essential. A vertically integrated business, which is in a dominant position at one level of its business, but faces (or might potentially face) competition at another, might use its market power to foreclose rivals in the competitive market and, in some circumstances, this could lead to consumers or the economy as a whole being worse off as a result of a loss of competition. This could take the form of a refusal to buy or to supply.
- 7.15 The CCA would work from the premise that any enterprise should have the right to freely choose its trading partners, especially when deciding from which source to buy. Similarly, the Competition Policy does not interfere with a supplier's choice of customer or route to market.

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<sup>15</sup>See the *Virgin Atlantic v British Airways* case

<sup>16</sup>See the CA Guide on Refusal to Deal for more details

- 7.16 The CCA will, therefore, pay particular attention to refusals to supply where it has reasonable grounds to believe that a significant dominant position is protected in an upstream market that would otherwise be competitive, yielding better value for consumers downstream.
- 7.17 In certain cases, a dominant firm may be in a position to abuse its market power by refusing to supply another firm and, in this way, impede effective competition in a market. Refusals to supply are more likely to be anti-competitive, but the CCA will proceed with caution. In general, it is perfectly legitimate for businesses to freely decide whether to supply a potential customer or not and on what terms. A refusal to supply is most likely to be anti-competitive only where it concerns an essential upstream input, over which a supplier exerts significant market power, without which competitors to that supplier's downstream business are at a serious disadvantage. For example, if the only local source of an input was monopolised and imports were significantly more expensive, a refusal to deal could significantly reduce competition in various downstream markets.
- 7.18 A refusal to supply is likely to be more detrimental when an existing supply agreement has been terminated than when a potential customer is refused for the first time. If an existing customer has made specific investments effectively committing to that source of supply, then a refusal to deal is likely to have particularly adverse effects on that customer and might, therefore, be more likely to have adverse effects on competition overall<sup>17</sup>.
- 7.19 Refusal to buy or the offer of unfair discriminatory buying terms by a dominant buyer (i.e., a monopsony) also follows the same process as for refusal to supply. The CCA would be concerned about this kind of conduct.

### ***Tying and Bundling***

- 7.20 Tying or bundling refers to a situation where the sale of one product is conditional on the sale of another product. Tying and bundling are in some instances normal business practices that are not by any means necessarily anti-competitive<sup>18</sup>. Many products are sold jointly, or in varying combinations. It would be inefficient and unworkable to try to prohibit cars being sold as bundles of engine, body, wheels and tyres. Similarly, where tying is used to maintain the quality of complementary inputs and to protect the goodwill of the firm imposing the tie, it may be justified.
- 7.21 However, in some cases bundling might be used anti-competitively. If an enterprise has market power in the sale of one product (for example a 100% market share), but sells another in a more competitive market, then it might leverage market power to reduce competition in the second market.

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<sup>17</sup>See the Australian case *Queensland Wire Industries v. BHP* (1989) 167 CLR 177

<sup>18</sup>Competition Commission of Mauritius, *Monopoly Situations and Non-Collusive Agreements* 2009

- 7.22 To the extent customers have to buy the product where the enterprise is dominant, they are forced in effect to buy the other (tied) product, reducing the sales of competitors for that second product. If this irreparably damages those competitors or forces them out of the market, this might damage competition and therefore be regarded as anti-competitive foreclosure. If tying is employed strategically, it raises the barriers to entry and so worsens the performance of the market for the tying product. Whatever its purpose, anti-competitive tying means that performance in the market for the tied product is not determined by competition on its merits and the enterprise imposing the tie is able to force a purchaser to do something that he would not do in a competitive market<sup>19</sup>.
- 7.23 The CCA is more likely to find that such bundling and tying as described above is anti-competitive, if the market power of the tying product is stronger. In all cases, the CCA would examine the effects of any tying and bundling arrangements on the basis of the specific facts of the case. Again a key test will be whether the tying and bundling seems to have a purpose, other than anti-competitive foreclosure<sup>20</sup>

### ***Predatory Pricing***

- 7.24 In contrast to situations where prices are regarded as too high, there may also be situations where a dominant firm charges prices that are too low, and may be in contravention of the Act. Predatory pricing is the term used for a form of exclusive abuse in which an enterprise with market power prices low with a specific strategy of forcing competitors out of the market, in order to exploit customers in the subsequent period in which competition is weakened or eliminated.
- 7.25 Low prices are normally evidence of effective, vigorous competition as enterprises seek to undercut one another's prices. Very vigorous competition on price can be in the customers' interests. If the CCA were to intervene too readily in response to accusations of predatory pricing, it might have the effect of preventing or softening, rather than promoting competition. In a worst case scenario, it might result in enterprises being reluctant to cut prices in future, for fear of being investigated. Because of these concerns and the awareness that businesses will often bring complaints of predatory pricing, with the aim of softening competition, competition authorities typically adopt a strict set of rules concerning the behaviour they might consider to be predatory. The intention is that competition law should protect competition, not competitors.
- 7.26 Many firms price below cost from time to time. In the retail market, firms often cut prices on some products for a limited period in order to attract customers.

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<sup>19</sup>Ibid

<sup>20</sup>If, for example, the seller realises substantial cost savings as a result of selling two products together, or customers value the convenience associated with buying the products together, the conduct is less likely to be found to be anti-competitive.

These products are sometimes referred to as loss-leaders. This strategy is obviously not feasible if it is applied on all products or if it is consistently applied for a long period of time. It would not be rational for any firm to continue to sell its products below cost for a sustained period of time, unless there are long-term benefits from employing such a strategy. When a firm engages in sustained below-cost pricing in order to drive competitors from the market, pricing too low is problematic. Logic dictates that only dominant firms would be able to sustain below-cost pricing sufficiently long enough to harm competitors in the short-term and customers in the long-term. While competing firms sometimes have similar cost structures which should allow them to match prices, the dominant firm's economies of scale may allow it to price far below the price of the competing fringe.

7.27 The CCA will, therefore, consider pricing to be predatory only if the pricing strategy would be unprofitable or if it results in the elimination or significant weakening of competition. This will only be the case if three conditions are met:

- (a) The pricing strategy must be clearly unprofitable for the alleged predator in the short-term. Prices must be below marginal<sup>21</sup> or average variable cost<sup>22</sup> (which broadly refers to the firm's average cost of manufacturing and selling its products), so that the supplier is losing money on every additional item sold;
- (b) The pricing strategy has resulted (or is expected to result) in the exit of significant competitors or increased marginal costs for competitors as a result of reduced scale, such that the market is less competitive than previously; and
- (c) It can be expected that any such losses can be recouped as a result of eliminated or weakened competition in the future. This requires proof that damage to competition is for a significant period and irreversible. It would not be a successful predatory strategy to price low to eliminate a rival, if the resulting dominant player cannot sustain high prices because rivals simply enter again.

### ***Predatory conduct***

7.28 Sometimes, predation can be non-price related. A dominant enterprise may conduct itself as a real proverbial predator where a competitor is anti-competitively prevented from succeeding in the market, or a potential competitor is stopped in its tracks, e.g., by influencing new regulatory or licensing requirements that prevent or frustrate entry and growth.

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<sup>21</sup> Marginal cost refers to the increment to total cost that results from producing an additional unit of output. Marginal cost is a function of variable costs alone, since fixed costs do not vary with increases in output.

<sup>22</sup> Variable costs are costs that vary with the amount produced, e.g. materials, fuel, labour and maintenance.

7.29 Other forms of predation might include predatory advertising<sup>23</sup> or predatory product variety<sup>24</sup>. To illustrate a non-price predatory act, we consider the Darlington Bus case<sup>25</sup>. In this matter, the UK Monopolies and Mergers Commission found that the bus operator had engaged in predatory staff poaching. In this case, Busways was found to have poached almost all of the staff of its rival, leaving the rival unable to provide a service<sup>26</sup>. The CCA would be concerned about such acts which are influenced and/or perpetrated by a dominant firm.

### ***Denial of Access to Essential Facility***

7.30 An essential facility can be any infrastructure or resource to which access is required in order to compete in a market and without access to which competitors cannot reasonably participate in the market<sup>27</sup>.

7.31 Most of the structures found to be essential facilities have fallen into one of the following three categories:-

- (a) Natural monopolies or joint venture arrangements subject to significant economies of scale, such as postal delivery networks;
- (b) Structures, plants or other valuable productive assets that were created as part of a regulatory regime, whether or not they are proper natural monopolies. An example would include a port facility or airport; and
- (c) Structures that are owned by the Government and whose creation or maintenance is subsidised<sup>28</sup>.

7.32 What all these structures have in common is that those who have control over or access to them may have a significant cost advantage over those who do not, as these structures cannot be readily duplicated without incurring significant costs.

7.33 In addition, no alternatives, including alternatives that face cost disadvantages, are usually available that would allow competitors of the owner of the essential facility to compete with it. In other words, competitors are unable to reasonably provide goods and services to their customers without access to the infrastructure or resource.

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<sup>23</sup>Increasing advertising spend above the profit maximizing level

<sup>24</sup>Introducing so many brands that a new entrant would find it very difficult to find a profitable niche

<sup>25</sup>The supply of bus services in the North-east of England, 1995.

<sup>26</sup>Predation and Excessive Pricing, Dr. Mark Williams, Director NERA Economic Consulting 2012-13, Informa Professional Academy

<sup>27</sup>For instance, the Botswana Meat Commission, export processing abattoirs; Botswana Railways railway line, Botswana Telecommunications back-bone infrastructure

<sup>28</sup>A Practical Guide to the South African Competition Act, Minette Neuhoff et al., 2006

7.34 Therefore, a refusal to provide access to an essential facility might have the effect of anti-competitive exclusion downstream and thereby constitute abuse of dominance. The CCA would examine such cautiously because courts in other jurisdictions have held the view that, even if there may be anti-competitive effects, the controller of an essential facility need not compromise or impair its own business in order to accommodate others. If the owner of an essential facility is using it to full capacity to supply a product for which it has a ready market, it has no duty to provide access to a competitor<sup>29</sup>.

### ***Price Discrimination***

7.35 Price discrimination<sup>30</sup> is the practice of charging different prices to different customers for reasons unrelated to cost differentials. Price discrimination is not in itself anti-competitive and the CCA will not regard it as outright abuse. Price discrimination can be an efficient way of recovering fixed costs: charging the more price sensitive customers the lowest profitable price at or close to variable cost, while charging higher prices to less price sensitive customers to make a margin to cover fixed costs. Price discrimination is a normal business practice in a range of industries, including highly competitive ones.

7.36 Price discrimination may, however, be part of a strategy that is an abuse. If some customers are charged low prices and others high prices, the low prices might be predatory, or the high prices might be part of a margin squeeze<sup>31</sup> strategy against downstream competitors, or might indicate excessive pricing by an exploitative dominant enterprise. Therefore, such pricing behaviour would be investigated by the CCA.

### ***Non-Price Discrimination***

7.37 Discrimination in competition can also be non-price related. This relates to both dominant suppliers and buyers. The CCA would be concerned in the same manner as that based on price where a dominant or monopoly enterprise discriminates in relation to, but not limited to the following:

- (a) Terms and conditions of supply, e.g., discriminatory credit periods, requirements for cash and credit payments;
- (b) Quality aspects or standards;
- (c) Warranties and guarantees;
- (d) Quantities supplied or purchased; and
- (e) Any other discriminatory conduct that affects market performance and competition in the relevant market.

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<sup>29</sup> Ibid

<sup>30</sup> See further details, under the Guidelines for Price Discrimination developed by the Competition and Consumer Authority.

<sup>31</sup> A margin squeeze occurs when there is such a narrow margin between an integrated provider's price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete.

## 8. EXPLOITATIVE ABUSIVE CONDUCT

- 8.1 This part explains the approach and general principles the CCA takes in assessing the exploitative abuse of a dominant player. Exploitative abuse is where an enterprise with a dominant position benefits from the absence of effective competition, whether or not that enterprise's own conduct created it<sup>32</sup>. In many cases, the CA will be investigating cases in which both forms of abuse are alleged – exclusive conduct restricting, preventing or distorting competition and exploitation of the resulting lack of competition. There are two broad categories of exploitative abuse: excessive pricing and tacit collusion (coordinated effects).

### *Excessive Pricing*

- 8.2 Enterprises in a dominant position may face an economic incentive to exploit their customers. This will normally manifest itself in excessive prices, although it may also appear as reduced quality, choice or service. It may be very difficult for competition agencies to distinguish between normal and excessive pricing. Attempts to simply relate prices to costs can be misleading, if they fail to take account of different categories of cost, risk, the need for seasonal or other variations in prices. Furthermore, where entry costs are relatively low, in those related to growth and expansion of new or existing businesses, high prices can themselves stimulate competition to remove the monopolist's advantage. This scenario may not necessarily be true for small markets, such as Botswana, where demand is highly inelastic and business growth dependent largely on Government and the fragile diamond industry.
- 8.3 While the CCA is not a price regulator, it would be concerned with excessive prices by a dominant firm and, in some cases, may conduct market studies to determine whether prices in any sector are cost-related or, more broadly, fair<sup>33</sup>. However, in a small economy, dominant market players can persist without any specifically exclusionary behaviour to create or preserve that position on the part of the enterprise. In situations of substantial market power which are not expected to be eroded by entry or expansion by rivals, persistent pricing substantially in excess of cost may be considered exploitative.

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<sup>32</sup>Competition Commission of Mauritius, Monopoly Situations and Non-Collusive Agreements 2009

<sup>33</sup>See section 49 of the Competition Act, 2009

- 8.4 Excessive pricing refers to a situation where the price of goods and services bears no reasonable relation to the economic value of that good or service and is, in fact, higher than that<sup>34</sup>. Accordingly, in determining whether the price of a particular product is excessive, the CCA would have to consider:
- (a) What the economic value of the product in question is;
  - (b) What price would be regarded as reasonable in relation to the economic value of the products in question; and
  - (c) Whether the price of the product in question is higher than a price that bears a reasonable relation to the economic value of the product.
- 8.5 Where appropriate, the CCA will also conduct price comparisons<sup>35</sup>. If prices are persistently and significantly lower in other markets, where costs should be similar, that might indicate that, in the market under investigation, they are excessive. If prices have risen from a stable level to a higher level, without any equivalent movement in costs, that might also indicate excessive pricing. Even such a price spike, however, can indicate an effective competitive response to sudden changes in demand or supply conditions.
- 8.6 Identification of excessive pricing would also be expected in utilities or regulated sectors where licensing and/or access fees may be unilaterally set without recourse to the capacity of the targets, and where the intention is clearly or implicitly to frustrate competition and/or market growth.

### ***Tacit Collusion***

- 8.7 In some markets, a small number of enterprises might collectively be dominant, in that they could keep prices high if they do not compete against one another. Any understanding not to compete would be a breach of the prohibition on collusive agreements. However, even in the absence of such an understanding, enterprises might become aware of their mutual dependence and soften competition against one another, to maintain profits. This situation is sometimes termed `tacit collusion` (to distinguish it from active collusion)<sup>36</sup>.
- 8.8 In normal competitive markets, such behaviour would rapidly result in lost sales and lost profits, as the rivals to an enterprise maintaining high prices undercut those prices. Either the existing parties to the informal understanding would act on the incentive to take business from one another, or existing small suppliers or new entrants would rapidly expand sales.

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<sup>34</sup>Predation and Excessive Pricing. Dr. Mark Williams, Director NERA Economic Consulting 2012-13, Informa Professional Academy

<sup>35</sup>OFT undertook a number of price and profitability comparisons into the pricing of sustained release morphine capsules and tablets sold by NAPP into both the community segment (patients under the care of their GP) and the hospital segment. The OFT found that these comparisons supported the conclusion that NAPP's prices to the community segment were excessive.

<sup>36</sup>Competition Commission of Mauritius, Monopoly Situations and Non-Collusive Agreements 2009

- 8.9 In order to sustain tacit collusion, therefore, it is necessary that the participating enterprises have the ability and incentive to persist with their uncompetitive behaviour, rather than undercut one another and the new entrants or smaller fringe players have only limited scope to take market share. For tacit collusion to be sustained, therefore, the following three conditions must be present in the market:
- (a) It must be possible for enterprises engaged in tacit collusion to reach an implicit agreement about the price level, and to monitor compliance, becoming aware if any among them undercut it;
  - (b) It must be in each of the participating enterprises' interests to maintain the tacit collusion, for example, through credible threats to launch a price war if one of the enterprises undercuts the collusive price; and
  - (c) Constraints from rivals outside the coordinating group (e.g., fringe players or new entrants) must be weak.
- 8.10 In considering possible tacit collusion, the CCA will assess whether these three conditions are present in the market. If they are, it will consider whether market outcomes show that enterprises are not competing effectively, particularly by foregoing apparently profitable opportunities to undercut one another's prices and take one another's market share. Evidence, such as price-cost comparisons, the stability of market shares or stable or parallel price levels over time, may be helpful in this regard, although none of these indicators is decisive, as all can occur in competitive markets. The Act provides for penalties in the instance of tacit collusion.

## **9. SUMMARY**

- 9.1 In summary, it is not an offence for an enterprise to be a monopoly or a dominant firm. The Act is concerned about monopolization and/or abuse of monopoly or dominant market power.
- 9.2 Several conducts will be considered as instances of abuse, which include, but not limited to the following:
- (a) excessive pricing;
  - (b) foreclosure;
  - (c) exclusive dealing;
  - (d) incentive/discount schemes;
  - (e) refusal to deal/supply and/or buy;
  - (f) tying and bundling;
  - (g) predatory pricing and conduct.

## **ANNEX I:**

### **PRACTICAL CONSIDERATIONS**

To minimise the risk of contravening the dominance provisions of the Act, dominant enterprises may wish to consider the following practical steps:

- Determine the relevant market(s) within which the enterprises operate. This may require the services of expert economists in this regard. Although this may be a costly exercise, it is worth doing to avoid unnecessarily restricting business activities and strategies.
- Having defined the relevant market, determine whether the enterprise holds a dominant position in the market(s), as defined by the Act. Remember that market share alone is not a sufficient indicator of dominance.
- If dominant, the enterprise should carefully review its contracts with suppliers and customers to ensure that it is not in contravention of the Act. If in doubt, contact a legal advisor.
- Review the market position of the enterprise's suppliers and customers. If any of these market participants are dominant firms and possibly abusing their dominant position, the enterprise may initiate a complaint by contacting the Competition & Consumer Authority.