



ABUSE OF DOMINANT POSITION

What is abuse of dominant position?

Section 16 of the Fair Competition Act 2002-19 prohibits the abuse of a dominant position. It is important to recognise that the Act does not prohibit a dominant position, only its abuse.

A firm will generally be considered to be dominant if it is able to act without taking account of the reactions of its customers or competitors. Abuse of a dominant position occurs where a firm holds a position of such economic strength that allows it to operate in a market without being significantly affected by competition and it engages in conduct that is likely to impede the development or maintenance of effective competition. The Act is not breached when a firm's vigorous competition takes business from less efficient competitors as this is part of the competitive process.

Some of the more common types of abuse by dominant firms include tied selling, predatory pricing, exclusive dealing, market restriction and price squeezing.

Tied selling

Tied selling occurs where a supplier, as a condition of supplying a good or service requires a customer to acquire another good from the supplier or his nominee. Tied selling also occurs where a supplier requires that a dealer refrain from using or distributing in conjunction with the supplied good any other good that is not of the particular brand. An example of tied selling would be the case of a manufacturer not supplying a small shop unless that shop agrees to purchase other goods or services from the manufacturer.

Predatory pricing

Predatory pricing occurs when a large firm sets its prices very low often below the costs of production, with the intention of forcing competitors out of

the market so that it can establish a monopoly type position and charge higher prices in the future to gain super normal profits.

Exclusive dealing

This is where a supplier requires that as a condition for supplying goods or services to an independent dealer, that dealer must sell or deal only in goods supplied by the supplier or a nominee of the supplier. An example of this would be where a dominant supplier as a condition of supplying raw material (flour) to a bakery, demands that the bakery only source additional inputs (sugar) from an affiliated firm identified by the supplier.

Market restriction

This occurs where a supplier, as a condition for supplying the goods, requires an independent dealer to supply the goods only in a specified market. A firm supplying agricultural products may demand as a condition of supply, that a retailer only retails those products in a limited prescribed area.

Price squeezing

This is the situation where unreasonable or inflated purchase prices are imposed by a dominant manufacturer upon independent dealers with whom the manufacturer may be competing through an affiliate company. Such price squeezing will result in a restriction of competition in the retail or derived product market. This occurs where a supplier inflates the price of the raw material it supplies to a manufacturer forcing that manufacturer to retail the derived product at higher than competitive prices. This may be done because the raw material supplier is itself a competing retailer of the derived product.

Are there any exemptions?

An enterprise will not be considered to have abused its dominant position if the Commission is satisfied that;

- ❖ Its behaviour is exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers are allowed a share of the resulting benefit.
- ❖ The effect or likely effect of its behaviour in the market is the result of its superior competitive performance.
- ❖ The enterprise is enforcing a right under an existing copyright, patent, registered design or trademark.

What are the penalties for the breach of the Act?

A person who contravenes these provisions of the Act is guilty of an offence and is liable on conviction on indictment;

- (i) where the person is an individual, to a fine of \$150,000 or to imprisonment for a term of 6 months or both;
- (ii) where the person is a corporate entity, to a fine of \$500,000 or to imprisonment for a term of 6 months or to both.

What can you do?

If you suspect that there is anti-competitive behaviour contact the Fair Trading Commission who will investigate the matter. The Commission has been granted various investigative powers including the power to summon witnesses and search premises and seize documents.

Persons can also take action in court if they believe that they have been affected by anti-competitive conduct.