A REVIEW OF THE ABUSE OF DOMINANCE REGULATIONS, 2022

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Introduction

The Abuse of Dominance Regulations 2022 was made by the Federal Competition and Consumer Protection Commission (FCCPC) in exercise of its powers under sections 17, 18 and 163 of the Federal Competition and Consumer Protection Act, 2019 (the "Act"). The Regulations provide a regulatory framework for the implementation of the provisions of the Act as regards the abuse of dominant position.

What is Dominance?

A firm is considered dominant where it enjoys a position of economic strength enabling it to prevent effective competition in the relevant market and having the power to behave to an appreciable extent independently of its competitors and consumers.

A dominant position may be held by a single firm or two or more firms referred to as Collective Dominance. A Collective dominance position exist where two or more firms together are able to adopt a common policy on the relevant market and act to a considerable extent independently of their competitors and customers.

Holding a dominant position without more is not illegal. However, a firm in a dominant position is prohibited from abusing such position.

Abuse of Dominance

An abuse of dominance exists where one or more firm in a dominant position engages in any of the following practices:

(a) Charges an excessive price to the detriment of customers.

An abuse of dominance exists where a dominant firm charges price significantly higher than the cost of production in any of the following market conditions:

(i) The market is characterised by high barriers to entry;

(ii) Customers have no credible alternatives to the products of the dominant firm;

(iii) Firms compete in a mature environment where investment and innovation play little or no role; and

(iv) The price increase is not due to external factors (factors not within the control of the firm).

One of the objectives of the Act is to protect the interest of the consumers and charging excessive price directly exploits consumers.

(b) Refusal to supply essential goods or services or provide access to facilities.

Here, an abuse of dominance will exist under the following circumstance:

(i) Where the dominant firm's refusal relates to products or essential facilities that is necessary for the downstream market such that the input of the product or facility is indispensable since there are no alternatives which will enable competition;

(ii) Where the refusal is likely to lead to consumer harm such as preventing innovation or the emergence of a new product that is not merely a duplicate of the dominant firms' product;

(iii) Where the refusal will lead to an elimination of effective competition or the prevention of its emergence in the downstream market;

(iv) Where the dominant firm refuses to supply another undertaking with, or grant access to essential data or infrastructural facilities which are not easily accessible for an appropriate consideration.

Scenario – PC Industry
The upstream end of the Personal Computers (PC) industry includes production of all basic parts used in building PCs while the downstream end includes the assembly of the basic parts and the manufacture of the PC.

Company X is a market giant in the upstream and downstream end of the Personal Computer (PC) Industry. Company X refuses to supply or supplies the basic parts at an exorbitant price to companies in the downstream end of the PC industry.

The conduct by Company X forces companies involved in the assembly and manufacturing of PC to exit the downstream market due to unavailability of the basic parts or high cost of production. New entrants are also discouraged from exploring the PC Industry and Company X becomes the only company actively involved in the downstream market.

(c) Ties and bundles products.

Tying occurs when a dominant firm requires purchasers to purchase a product (tying product) in order to be able to purchase another product (tied product) while bundling refers to the way products are offered and priced by a dominant firm as a single package. Tying may be expressly provided for in a contract or on technical basis where the tied product will be required to be integrated into the tying product so that it is impossible to purchase only one of them or where the tying product is so designed that it only works properly with the tied product. Tying and bundling will be considered abuse of dominance by a dominant firm where there is a cumulative finding by the FCCPC of the following conditions:

(i) The products are distinct products from the customer's point of view and in the absence of the tying or bundling a substantial number of customers would have bought the products from the dominant firm without the tied product; and

(ii) The conduct leads to a foreclosure of competitors on the tied or bundling market especially where the strategy of the dominant firm is a lasting one.

This conduct takes away the customer's freedom of choice and forecloses competitors in relation to the tied product.

Scenario

The Federal Trade Commission challenged a drug producer that required patients to purchase its blood-monitoring services along with its medicine to treat schizophrenia. The drug producer was the only producer of the drug, but there were many other companies providing blood-monitoring service. The conduct prevented patients from patronising other blood-monitoring service providers.

The conduct was challenged on the ground that it lead to the foreclosure of other blood-monitoring service providers.

(d) Prices its products too low in relation to its cost.

A dominant firm engaging in predatory pricing is an abuse of dominance. This exist where the firm deliberately sets the price of its product below an appropriate measure of its own cost to incur short term losses in the market for a period of time sufficient to eliminate or deter the entry of a competitor in the expectation that the dominant firm will recoup its losses by charging a higher price than it would have prevailed in the absence of the abuse.

The predatory pricing may also be implied where products are offered at a discount or rebate. It is immaterial that competitors actually exited the market as a result of the predatory pricing or that the dominant firm was able to recoup its losses.

Scenario

A market comprising of a dominant firm (Firm A) and smaller competitors (Firms S, M and L) involved in the production of sanitary pads.

Firm A regularly engages in below-cost price strategy which leaves Firms S, M and L with little or no profit when compared to the cost of production.

Consequently, Firms S, M and L are forced to exit the market due to the continuous losses incurred. After a while, Firm A increases its price and continues to enjoy profit being the only firm producing sanitary pads.

(e) Obligates the consumers to purchase exclusively or to a large extent only from the dominant firm.

Exclusive dealing by a dominant firm exists under the following conditions:

(i) Where the firm conditions the supply of its products to customers on such customer accepting to deal only or primarily with the dominant firm or nominee of the firm.

(ii) Exclusive dealing compels customers to source all or at least 50 % of their market demand from the dominant firm or refrains other firms from supplying to customers.

(iii) Exclusive dealing effectively forecloses other firms by depriving them access to a sufficiently large base of possible customers.

(iv) Exclusive Dealing could also take the following forms: express provisions of a contract or indirectly such as where the dominant firm provides loyalty rebates and other discounts to customers which encourage them to go into an exclusive arrangements

In considering whether a dominant firm has abused its position by exclusively dealing with customers, the FCCPC will examine whether the exclusivity can potentially drive out other efficient sources of supply. There will be an insufficient amount of customers available for the competitors to deal with.

Consequence of Abuse of Dominance

Where the FCCPC finds that an undertaking has abused or is abusing its dominant position, the FCCPC shall prepare a report notifying the firm that it has abused its dominant position. The report shall also direct the firm to immediately cease the abusive practices. Failure to comply with the notice is an offence, and the firm is liable on conviction to a fine not exceeding 10% of its turnover in the preceding business year or to such higher percentage as the Court may determine given the circumstance of the case.

Third parties such as competitors, consumers and accredited consumer protection groups, may file a complaint with the FCCPC in order to bring a potential abuse of dominance to the FCCPC's attention.

Defence to Abuse of Dominance

Where a firm has been assessed as a dominant firm and is found to have abused the position of dominance by engaging in any of the above conducts, the firm may invoke the benefits of section 72(3) of the FCCPC Act by proving that the pro-competitive effects of its conduct outweighs its anti-competitive effects and is objectively justifiable on unquestionable commercial grounds. In other words, that its conduct contributes to the improvement of production or distribution of goods and services or that the conduct of the firm contributes to the promotion of technological or economic progress while allowing consumers a fair share of the resulting benefit

The application of the defence is subject to four cumulative conditions:

a. That efficiencies have been, or are likely to be realised as a result of the conduct which may, for example include technical improvements in the quality of goods, or reduction in the cost of production;

b. The conduct is indispensable to the realisation of technical improvement or reduction in the cost of production;

c. The likely efficiencies brought about by the conduct outweighs any negative effects on competition and consumer welfare in the relevant market; and

d. The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

The existence of these conditions are exhaustive and where they are cumulatively present then the firm will not be considered as abusing its dominant position.

Appeals

Any person or firm aggrieved with the decision of the commission may appeal to the Competition and Consumer Protection Tribunal within 30 business days of being notified of FCCPC's decision. Appeals from the Tribunal lie to the Court of Appeal.