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The Fair Trading Commission

FTC 1

The Fair Trading Commission

of

Seychelles

Abuse of Dominance

These guidelines are not a substitute of the Act or any Regulations and should instead be read in conjunction with the relevant legal instruments. The examples used within these guidelines are for illustration and do not set a limit on the investigation and enforcement activities of the Commission. Persons in doubt with regards to how their commercial activities may be affected by the Act may wish to seek legal advice. The Commission may, from time to time, review and issue revised versions of its guidelines.

1. Introduction

1.1 The competition laws of many countries contain a concept of single firm exploitation of market power or use of improper means of attaining or retaining market power. These concepts are variously called "abuse of dominant position" or "monopolisation" or "misuse of market power," or some similar term.

1.2 Competition laws may also contain a related concept, called "joint dominance" or “collective dominance” in some jurisdictions, which involves multiple firms but which is a distinct concept from firms acting pursuant to an "agreement."

1.3 Holding a dominant position, jointly dominant position, a monopoly or a position of substantial market power is generally not abusive or illegal. However, some behaviour by such firms is.

1.4 The Fair Competition Act 2009, Section 7 (1) states “ *any conduct on the part of one or more enterprise or enterprises which amounts to an abuse of a dominant position in a market is prohibited, if it may adversely or unfairly affect trade within Seychelles*”

1.5 This guideline explains how the FTC will operate its powers under the Act in assessing the conduct of dominant enterprise(s). It indicates some of the factors which the FTC considers are relevant in determining whether an enterprise is dominant and whether its behaviour will or may be regarded as abusive. It is intended that this guideline should be of assistance not only to those enterprises which are dominant in their market or markets, but also to their customers and other businesses.

2. Scope of the Provision under FCA 2009, Section 7 (2) (3) (4)

2.1 “*An enterprise or, enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors*.”

2.2 Conduct may, in particular, constitute such an abuse if it consists in-

(a) *"restricting the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the goods or services supplied in that market;*

(b) *preventing or deterring any enterprise from engaging in competitive conduct in that or any other market;*

(c) *eliminating or removing any enterprise from that or any other market;*

(d) *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory;*

(e) *limiting production, markets or technical development to the prejudice of consumers;*

(f) *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

(g) *making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;*

(h) *exclusive dealing, market restriction or tied selling,"*

Exclusion

2.3 An enterprise is not to be treated as abusing a dominant position-

(a)*" if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit*;

(b) *if the effect or likely effect of its behaviour in a market is the result of its superior competitive performance; or*

(c) *by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights-*

(i) *has the effect of lessening competition substantially in a market; and*

(ii) *impedes the 'transfer 'and dissemination of technology*."

3. Concept of Dominance

3.1 Universally, there are two tests common to assess whether the restrictive business practice under FCA 2009, Section 7 applies:

- An enterprise is dominant
- If it is, whether it is abusing that dominant position

3.2 This raises two questions which are considered below: (i) the definition of the market in which the enterprise is alleged to be dominant (the relevant market); and (ii) whether it is dominant within that market.

Market Definition

3.3 Before assessing whether an enterprise is dominant, the relevant market must be determined. This relevant market will have two dimensions:

- The relevant goods or services (the product market), and
- The geographic extent of the market (the geographic market).

3.4 The FTC approach to market definition is provided in the *FTC 2 Guidelines (Market Definition and The Calculation of Market Shares)*.[1]

3.5 Market definition provides an appropriate frame of reference for competition analysis. In order to establish which products or geographic areas are included in the relevant market, a conceptual framework known as the hypothetical monopolist test is usually employed. [2]

Relevant Product Market

3.6 A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

3.7 Product market definition starts by considering the products which the parties to an agreement produce, or the products which are the subject to a complaint. The effects of a price increase above competitive levels are considered in order to determine the relevant market for these products.

3.8 If a significant number of buyers would switch to substitute products following the increase in price above competitive levels, these substitute products would be included in the definition of the-product market.

3.9 Products may be viewed as substitutes although they do not have similar physical or other characteristics. Their prices also need not be similar. For example, if two products serve the same function but one is of a higher price and quality than the other, they might be included in the same market. This is because even though one product is of a higher price and quality than the other, a price increase in the product of a higher quality could be such that buyers no longer feel that the quality difference between the two products outweigh their price differential. Hence a price increase in one product could lead to buyers switching to the other product.

[1] This follows a similar approach to that of the Competition Commission of Mauritius

[2] An extensive discussion of market definition in the context of abuse of dominance cases at pp. II-6-12 of "Reference Document on Abuse of Dominance," vol. 1, Bureau of Competition Policy, Canada.

3.10 The important issue is whether a hypothetical monopolist could profitably sustain prices above competitive levels. The more quickly buyers can switch, the greater the constraint on the exercise of market power. Depending on the case, products for which buyers take longer than one year to switch in response to a price increase are generally not included in the same market.

Relevant Geographic Market

3.11 The relevant geographic market comprises the area in which the enterprises concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

3.12 The geographic market refers to the area over which substitution takes place. If buyers will travel further afield to buy products when their local prices are increased, then the geographical spread of the market is wider and vice versa. If sellers from afar will now supply to local markets because the local price has risen, then the geographic market is also wider than the situation where only local sellers are willing to supply.

3.13. The geographic scope of the market can be defined using the same framework used to analyse the product market, while putting emphasis on three particular categories of issues:

- Demand-side issues (usually for defining retail markets);
- Supply-side issues (usually for defining wholesaling and manufacturing markets); and
- Imports.

3.14 The process for defining the begins by looking at a relatively narrow geographic area, which usually refers to the focal area, by asking if a small (5%- 10%) but significant increase in the price of a product in one area would lead to buyers switching to sellers in neighbouring areas. If a significant number of buyers are likely to switch to other sellers, this would restrain the ability of a hypothetical monopolist to charge higher prices in its area. These neighbouring areas would be included in the market definition.

3.15 In addition, the potential for enterprises in neighbouring areas to supply to buyers should also be considered. As in the product market definition, these sellers should be considered if they can respond in the short run, (for example, within one year) without incurring significant costs.

3.16 The costs of transportation should also be considered. If buyers and sellers face high transportation costs, then the geographic market will be smaller than when transport costs are low. The -higher the costs of transportation, the smaller the geographic market is likely to be.

3.17 Significant imports of a particular product may indicate that the market is wider than Seychelles, although not always the case. Imports could come solely from the international operations of domestic sellers, in which case they may not act as an independent constraint on domestic undertakings. When imported products, including products bought on the internet are close substitutes for domestic products, the overseas suppliers are part of the relevant market.

3.18 On the other hand, a lack of imports does not necessarily imply that the market could not be a regional or a wider international market. The potential for imports may still be an important source of supply-side substitution should prices rise. This possibility could constrain the exercise of market power by existing sellers.

Precedent

3.19 In some cases a market may previously have been investigated and defined by the FTC or by another competition authority. While such precedents can provide useful insights, the market definition used in a previous case may not always be the correct one to use in subsequent cases.

3.20 FTC will use examples, concepts and cases from other jurisdiction as guidance in any investigation that may arise. Decisions taken in other jurisdiction has no binding precedent on the FTC.

4. Assessing Dominance[3]

4.1 The European Court has defined a dominant market position as:

'*...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*.[4]

4.2 An enterprise will not be deemed dominant unless it has substantial market power.

4.3 Market power arises where an enterprise does not face sufficiently strong competitive pressure. Both suppliers and buyers can have market power. However, for clarity, market power will in this guideline refer to supplier market power. Where buyer market power is the issue, the term **buyer power** is employed to differentiate such market power from supplier market power. Market power and buyer power are not absolute but are matters of degree; the degree of power will depend on the circumstances of each case.

4.4 Market power can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An enterprise with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation.

Existing Competition

4.5 Existing competition refers to competition from enterprises already in the relevant market, to which consumers might switch if the alleged dominant enterprise sustained prices above competitive levels. The market shares of competitors in the relevant market are one measure of the competitive constraint from existing competitors.

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[3] Annex 1 (Diagram).

[4] Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429. This definition has been used in other cases.

Market Shares and Market Power

4.6 The European Court has stated that "*dominance can be presumed in the absence of evidence to the contrary if an enterprise has a market share persistently above 50 per cent*."[5]

4.7 The FTC considers it unlikely that an enterprise will be individually dominant if its share of the relevant market is below 40 per cent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in that market and high entry barriers) provides strong evidence of dominance.

4.8 An enterprise's market share is an important factor in assessing dominance but does not, on its own, determine whether an enterprise is dominant. For example, it is also important to consider the positions of other enterprises operating in the same market and how market shares have changed over time. An enterprise is more likely to be deemed as dominant if its competitors have relatively weak positions and it has enjoyed a persistently high market share over time.

4.9 This part considers the extent to which market shares indicate whether an enterprise possesses market power, how market shares may be measured, the sort of evidence likely to be relevant, and some potential problems. These issues are important when considering the intensity of existing competition.

4.10 In general, market power is more likely to exist if an enterprise (or group of enterprises) has a persistently high market share. Likewise, market power is less likely to exist if an enterprise has a persistently low market share. Relative market shares can also be important. For example, a high market share might be more indicative of market power when all other competitors have very low market shares.

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[5] Case C62/86, AKZO Chemie BV v Commission [1993] 5 CMLR 215.

4.11 The history of the market shares of all enterprises within the relevant market is often more informative than considering market shares at a single point in time, partly because such a snapshot might not reveal the dynamic nature of a market. For example, volatile market shares might indicate that enterprises constantly innovate to get ahead of each other. This is consistent with effective competition. Evidence that enterprise with low market shares have grown rapidly to attain relatively large market shares might suggest that barriers to expansion are low, particularly when such growth is observed for recent entrants.

4.12 While the consideration of market shares over time is important when assessing market power, an analysis of other factors affecting competition is also important. The following factors may be considered by FTC:

- **Low entry barriers**: An enterprise with a persistently high market share may not necessarily have market power where there is a strong threat of potential competition. If entry into the market is easy, the incumbent might be constrained to act competitively so as to avoid attracting entry over time by potential competitors.

- **Bidding markets**: Sometimes buyers choose their suppliers through procurement auctions or tenders. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where tenders are large and infrequent (so that suppliers are more likely to bid), where suppliers are not subject to capacity constraints (so that all suppliers are likely to place competitive bids), and where suppliers are not differentiated (so that for any particular bid, all suppliers are equally placed to win the contract). In these types of markets, an enterprise might have a high market share at a single point in time. However, if competition at the bidding stage is effective, this currently high market share would not necessarily reflect market power.

- **Successful innovation**: In a market where enterprisess compete to improve the quality of their products, a persistently high market share might indicate persistently successful innovation and so would not necessarily mean that competition is not effective.

- **Product differentiation**: Sometimes the relevant market will contain products that are differentiated. In this case enterprises with relatively low market shares might have a degree of market power because other products in the market are not very close substitutes.

• **Responsiveness of customers**: Where enterprises have similar market shares, this does not necessarily mean that they have similar degrees of market power. This may be because their customers differ in their ability or willingness to switch to alternative suppliers.

• **Price responsiveness of competitors**: Sometimes an enterprise's competitors will not be in a position to increase output in response to higher prices in the market. For example, suppose an enterprise operates in a market where all enterprises have limited capacity (e.g. are at, or close to, full capacity and so are unable to increase output substantially). In this case, the enterprise would be in a stronger position to increase prices above competitive levels than an otherwise identical enterprise with a similar market share operating in a market where its competitors are not close to full capacity.

Measuring Market Share: Evidence

4.13 Data on market shares may be collected from a number of sources including:

• Information provided by enterprises themselves. Enterprises are usually asked for data on their own market shares, and to estimate the shares of their competitors;

• Regulators, National Statistics Bureau, Agencies etc….

• Market research reports.

4.14 The appropriate method of calculating market shares depends on the case at hand. Usually sales data by value and by volume are both informative. Often value data will be more informative, for example, where goods are differentiated.

4.15 The following issues may arise when measuring market shares:

- **Production, sales and capacity**: Market share is usually determined by an enterprise's sales to customers in the relevant market. Market share is normally measured using sales to direct customers in the relevant market rather than an enterprise's total production (which can vary when stocks increase or decrease)

- **Sales values**: When considering market shares on a value basis, market share is valued at the price charged to an enterprise's direct customers. For example, when a manufacturer's direct customers are retailers, it is more informative to consider the value of its sales to retailers as opposed to the prices at which the retailers sell that manufacturer's product to final consumers.

- **Internal production:** In some cases, a supplier may be using some of its capacity or production to meet its own internal needs. In the event of a rise in price on the open market, the supplier may decide to divert some or all of its "captive" capacity or production to the open market if it is profitable to do so, taking into account effects on its downstream business that is now deprived of the captive supply. The extent to which "captive" capacity or production is likely to be released onto the open market (or might otherwise affect competition on the open market) will be taken into account in assessing competitive constraints.

Barriers to Entry

4.16 This part considers barriers to entry and expansion and how they will be assessed in practice by the FTC.

4.17 Entry barriers are important in the assessment of potential competition. The lower the entry barriers, the more likely it will be that potential competition will prevent enterprises already within a market from profitably sustaining prices above competitive levels.

4.18 Entry barriers are factors that allow an enterprise profitably to sustain supra-competitive prices in the long term, without being more efficient than its potential rivals. Even if there are no existing competitors, an enterprise is unlikely to be able to sustain supra-competitive prices in the long term, in the absence of entry barriers.

4.19 Even an enterprise with a large market share in a market with very low entry barriers would be unlikely to have market power. However, an enterprise with a large market share in a market protected by significant entry barriers is likely to have market power.

4.20 Entry barriers arise when an enterprise has an advantage (not solely based on superior efficiency) over potential entrants from having already entered the market and/or from special rights (e.g. to production or distribution) or privileged access to key inputs. Entry barriers may make new entry less likely or less rapid by affecting the expected sunk costs of entry and/or the expected profits for new entrants once they are in the market, or by establishing physical, geographic or legal obstacles to entry.

4.21 There are many ways in which different types of entry barriers can be classified, but it is useful to distinguish between the following factors which, depending on the circumstances, can contribute to barriers to entry:

- Sunk costs;
- Limited access to key inputs and distribution outlets;
- Regulation;
- Economies of scale;
- Network effects;
- Exclusionary behaviour by incumbents.
- Other Constraints

Sunk costs

4.22 Sunk costs are costs that cannot be recovered on exiting an industry, and hence serve to commit a firm or firms to staying in the market. The U.S. Department of Justice Horizontal Merger Guidelines defines sunk costs as "*the acquisition costs of tangible or intangible assets that cannot be recovered through redeployment of those assets outside the relevant market*."

4.23 Entry will occur only if the expected profit from being in the market exceeds any sunk costs of entry.

4.24 There are three important aspects of sunk costs that influence entry and exit decisions. **First**, sunk costs increase the risk of entering an industry because they cannot be recouped on exiting. **Second**, sunk costs create a cost asymmetry between entrants and incumbents. Once costs are sunk they are no longer a portion of the opportunity costs of production, and hence an incumbent will require a lower return on costs in order to stay in an industry than will be required to enter. Asymmetries of this type have been modeled by *Dixit (1979, 1981)* and many others. **Third**, sunk costs can serve as a commitment by incumbent firms not to exit the industry. (For this reason *Gilbert (1989)* refers to them as "exit costs. ") Thus sunk costs are central to the calculations of potential entrants because if entry involves sunk costs it will be deterred if they are unlikely to be recouped, and incumbent firms may be able to exploit this fact strategically in a variety of ways.

4.25 It is useful to consider the extent to which sunk costs give an incumbent an advantage over potential new entrants and to what extent sunk costs might affect entry barriers. The mere existence of sunk costs in any particular industry, however, does not necessarily mean that entry barriers are high or that competition within the market is not effective.

Access to Essential Facilities

4.26 The essential facility doctrine has its antecedents in US antitrust; the first case is considered to have been *United States v/s Terminal Railroad Association of St Louis*,[6] although the term was not used in that case.

[6] 224 US 383 (1912); the scope of essential facilities doctrine has been raised by the Department of Justice and Federal Trade Commission as amici curiae, available at http://www.ftc.gov/ogc/briefs/02-682. pdf, in a case before the Supreme Court Verizon Communications v/s Law Offices of Curtis Trinko.

4.27 Under the EC law the provision from the essential facilities doctrine has been incorporated under Article 82 of the EC Treaty where a refusal to deal constitute an abuse of dominant position. In the context of Article 82 the essential facility doctrine is a natural consequence of the judgment in *Commercial Solvents,* that a refusal to supply a customer in a downstream market would amount to an abuse if the effect would be to eliminate all competition in that market.

4.28 As a matter of economics, the point about these cases is that one firm controls an essential input which is necessary for a competitor to be able to compete in a downstream market.

4.29 FTC assessment of whether a particular facility is essential will be on a case-by-case basis. A facility will only be viewed as essential where it can be demonstrated that access to it is indispensable in order to compete in a related market and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy). Generally if a rival does not have access to an essential facility, it cannot enter the market.

4.30 The FTC will apply the essential facility doctrine with caution and recognize the importance of limits. Demanding that a dominant firm (private sector) should grant access to its facilities might be a major intervention on the part of FTC and an excessive application of the essential facility doctrine can have harmful economic effects. This is not only because there is an element of expropriation in requiring one firm to grant access to its property to a competitor, but also because the prospect that third party might be able to demand a 'free ride' on the fruits of another's investment might deter the latter from making the investment in the first place.

4.31 There will be circumstances in which difficulties accessing inputs or resources constitute an entry barrier without those assets or resources meeting the strict criteria required to be defined as "essential facilities".

Regulation

4.32 Regulation may affect barriers to entry. For example, regulation may limit the number of enterprises which can operate in a market through the granting of licences. Also, licences may be restricted so that there is an absolute limit to the number of enterprises that can operate in the market.

In this case a licence can be thought of as a necessary input before production can take place and so regulation will act as an entry barrier.

4.33 Sometimes regulation sets objective standards. Where these apply equally to all enterprises, such as health and safety regulations, they might not affect the costs for new entrants any more than they affect the costs for incumbents. However, regulation can lead to entry barriers when it does not apply equally to all enterprises. For example, incumbents might lobby for standards that are relatively easy for them to meet, but harder for a new entrant to achieve.

Economies of Scale[7]

4.34 Economies of scale exist where average costs fall as output rises. In the presence of large economies of scale, a potential entrant may need to enter the market on a large scale (in relation to the size of the market) in order to compete effectively. Large scale entry might require relatively large sunk costs and might be more likely to attract an aggressive response from incumbents. These factors may in some circumstances constitute barriers to entry.

4.35 Attaining a viable scale of production may take time and so require the new entrant to operate in the market for some time at a loss. For example, a new entrant at the manufacturing level might need to secure many distribution outlets to achieve a viable scale. If, perhaps due to long term contracts, many input suppliers or distributors are locked-in to dealing with the incumbent, the new entrant might not be able to achieve an efficient scale of production over the medium term. This could deter entry.

4.36 Even when entry is not completely deterred, entrants may take time to achieve efficient levels of production, obtain the relevant information, raise capital and build the necessary plant and machinery. In this case, even if entry occurs, the incumbent could nevertheless retain market power for a substantial period of time.

[7] Annex 2 (Diagram).

Network Effects

4.37 Certain markets are characterized by 'network effects', which arise where the value of a product increases with the number of other customers consuming the same product. The telecommunications sector is a good example of an industry characterized by network effects; the more customers that are connected to a particular telephone network, the more valuable the network is to each customer.[8]

4.38 Network effects may have positive effects on competition, since consumers become better off as a product becomes more popular. However, network effects also give rise to the possibility of one or a small number of firms dominating a market, in particular because there may be 'tipping effects' where all the customers in a particular market decide to opt for the product of one firm or for one particular technology.

4.39 Network effects, just like economies of scale, may make new entry harder where the minimum viable scale (e.g. in terms of users of the network) is large in relation to the size of the market.

Exclusionary Behaviour

4.40 The term"exclusionary behaviour" refers to anti-competitive behaviour which harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market. The following paragraphs set out some examples of how exclusionary behaviour can create barriers to entry.

Predatory Response to Entry

4.41 An enterprise contemplating entering a market weighs up its expected profit from being in the market with the expected sunk costs of entering. Expected profits from being in the market may depend on how the entrant expects the incumbent to react when it enters the market: the potential entrant might believe that the incumbent would, for example, reduce prices substantially if it entered and so reduce the prospective profits available.

[8] See OFT Economic Discussion Paper 3 (OFT 377) Innovation and Competition Policy (Charles River Associates, March 2002).

4.42 While low prices are generally to be encouraged, if a new entrant expected an incumbent to respond to entry with predatory prices, this could deter entry. For example, if an incumbent has successfully engaged in predatory behaviour in the past, it may have secured a reputation for its willingness to set predatory prices. Any future potential entrants to this market (or to any other market where the incumbent operates) might then be deterred from entering due to the likelihood of facing an aggressive response.

Vertical Restraints

4.43 In general, vertical restraints are restrictions imposed by either a buyer or seller operating at different stages of the production and distribution chain. Many vertical restraints may be beneficial or benign, especially if there is effective competition at both the upstream and downstream levels. However, a vertical restraint imposed by a dominant undertaking may also affect entry.

4.44 For example, a dominant manufacturer might have a series of exclusive purchasing agreements with most retailers in a particular geographic market. This might limit the ability of a new manufacturer to operate on a viable scale in that market and therefore deter entry.

Other Exclusionary Practices

4.45 Discounts designed to foreclose markets, margin squeezes, and refusals to supply might also be used in a way that raises entry barriers.

5. Assessing Entry Barriers

5.1 Assessing the effects of entry barriers and the advantages they give to incumbents can be complex. A variety of steps may be involved. For example, incumbents and potential entrants might be asked for their views on: the sunk costs associated with a commitment to entry; the relative ease of obtaining the necessary inputs and distribution outlets; how regulation affects the prospect of entry; the cost of operating at a minimum viable scale; and any other factors that may impede entry or expansion in the market.

5.2 Claims that potential competition is waiting in the wings are more persuasive if there is fully documented evidence of plans to enter a market or where hard evidence of successful entry in the recent history of the market is provided. In the latter case, such evidence might include a historical record of entry into the market (or closely related markets), including evidence that new entrants had attained in a relatively short period of time a sufficient market share to become effective existing competitors.

5.3 It is important, but not necessarily straightforward, to assess the time that may elapse before successful entry would occur. Some producers, most likely those in neighbouring markets, may be able to enter speedily (e.g. in less than a year) and without substantial sunk costs by switching the use of existing facilities. Where this is possible, it will sometimes be taken into account in defining the market (as supply-side substitutability). New entry from scratch tends to be slower than entry from a neighbouring market, for a variety of reasons, which depend on the market concerned – obtaining planning permission, recruiting and training staff, ordering equipment, appointing distributors and so on. The nature of the market may also limit the times at which entry may occur. For example, where customers award long-term contracts, a potential entrant may have to wait until these contracts are renewed before it has an opportunity to enter the market. It may be also important to assess whether enough contracts would come up for renewal to allow the entrant to attain a viable scale.

5.4 Growth, or prospective growth, of a market will usually have a bearing on the likelihood of entry. Entry will usually be more likely in a growing market than in a static or declining one because it will be easier for an entrant to achieve a viable scale, for example by selling to new customers.

5.5 In markets where products are differentiated, enterprises compete not only on price but also on features such as quality, service, convenience and innovation. Where there is a scope for differentiation, this may facilitate entry, for example where a new entrant targets untapped demand by differentiating itself from incumbents (provided that incumbents have not already pre-empted all possible niches in the market).

5.6 In markets where brand image is important, a new entrant may have to invest heavily in advertising before it can attain a viable scale. However, even where advertising expenditure is a sunk cost, this does not necessarily mean that entry barriers are high. For example, incumbents may have had to establish their brands and may also have to advertise heavily to maintain them, and so will not necessarily have a cost advantage over potential entrants.

5.7 The rate of innovation is also important. In markets where high rates of innovation occur, or are expected, innovation may overcome product market barriers to entry relatively quickly (provided that there are no barriers to entry into innovative activity). Indeed, any profits that result from an advantage created by successful innovation (e.g. from intellectual property rights) may be an important incentive to innovate.

Barriers to Expansion

5.8 New entry is not simply about introducing a new product to the market. To be an effective competitive constraint, a new entrant must be able to attain a large enough scale to have a competitive impact on undertakings already in the market. This may entail entry on a small scale, followed by growth. Barriers to entry are closely related to barriers to expansion and can be analysed in a similar way. Many of the factors discussed above that may make entry harder might also make it harder for undertakings that have recently entered the market to expand their market shares and hence their competitive impact.

Other Constraints

5.9 The strength of buyers and the structure of the buyers' side of the market may constrain the market power of a seller. Buyer power requires that the buyer has a choice between alternate sellers. A buyer's bargaining strength might be enhanced if:

- The buyer is well-informed about alternative sources of supply and could readily, at little cost to itself, switch substantial purchases from one seller to another while continuing to meet its needs;

- The buyer could commence production of the item itself, or ”sponsor” new entry by another seller relatively quickly, for example, through a long-term contract, without incurring substantial sunk costs (i.e. irretrievable costs).

• The buyer is an important outlet for the seller, that is, the seller would be willing to cede better terms to the buyer in order to retain the opportunity to sell to that buyer;

• The buyer can intensify competition among sellers through establishing a procurement auction or purchasing through a competitive tender.

5.10 In some sectors, the economic behaviour of enterprises (such as the prices they set or the level of services they provide) is regulated by the Government or an industry sector regulator, and an assessment of market power may need to take that into account. Although an enterprise might not face effective constraints from existing competitors, potential competitors or buyer power in the market, it may still be constrained from profitably sustaining prices above competitive levels by the Government or an industry sector regulator. However that is not to say that market power cannot exist when there is economic regulation. It is feasible, for example, that regulation of the average price or profit level across several markets supplied by an enterprise may still allow for the enterprise to profitably sustain prices above competitive levels in (one or more of) these markets and/or to engage in exclusionary behaviour of various kinds.

6. Collective Dominance

6.1 A dominant position may be held collectively when two or more legally independent enterprises are linked in such a way that they adopt a common policy on the market. The European Court confirmed the principle of collective dominance in the *Italian Flat Glass* case:

'There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis à vis the other operators on the same market.'[9]

The links may be structural or they may be such that the undertakings adopt a common policy on the market[10]. For example, the nature of the market may be that enterprises might adopt the same pricing policy on the market without ever explicitly agreeing on price.

[9] Cases T-68/69 etc *Società Italiano Vetro SpA v Commission*, [1992] II ECR 1403, [1992] 5 CMLR 302.
[10] Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge SA and others*, [2000] ECR I-1365 paragraph 45.

7. Abuse of Dominance[11]

7.1 If FTC establishes that an enterprise is dominant in the relevant market, the second part of the test is to assess whether the enterprise's behavior might be regarded as an abuse of its dominant position. The conduct of a dominant enterprise has the potential to significantly impact competitive conditions in Seychelles.

7.2 In assessing cases of alleged abuse, the FTC may consider if the dominant enterprise is able to objectively justify its conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the buyer. However, the dominant enterprise will still have to show that it has behaved in a proportionate manner in defending its legitimate commercial interest. It should not take more restrictive measures than are necessary to do so. The FTC may also consider if the dominant enterprise is able to demonstrate any benefits arising from its conduct. It will still be necessary for a dominant enterprise to show that its conduct is proportionate to the benefits claimed. Such conduct will not be allowed if its primary purpose is to harm competition.

7.3 The following provides more details on how the FTC may assess certain types of conduct by dominant enterprises (whether individually or collectively dominant) that may infringe FCA 2009, Section 7. The examples are not exhaustive; and conduct not covered by or referred to in this part, should not be assumed to be beyond the scope of the mentioned section above. The FTC will consider the likely effects on competition, based on the specific facts and circumstances of each case.

<u>Predatory Pricing</u>

7.4 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.

[11] Annex 3. (Diagram).

7.5 Low prices are normally evidence of effective, vigorous competition as enterprises seek to undercut one another's prices. Very vigorous competition on price is in customers' interests. If the FTC 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. Worse, it might result in enterprises being reluctant to cut prices in future, for fear of being investigated.

7.6 Because of these concerns, and because we are aware that businesses will often bring complaints of predatory pricing, with the aim of softening competition, FTC will adopt a strict set of rules concerning the behaviour they might consider to be predatory. The intention is that competition law should protect competition and the competition process, not protect competitors.

7.7 The FTC will consider pricing to be predatory only if the pricing strategy would be unprofitable unless it results in the elimination or significant weakening of competition.

7.8 This will only be the case if three conditions are met:

(a) The pricing strategy must be clearly unprofitable for the alleged predator[12] in the short term. Prices must be below average variable cost (as a simple proxy for short-run marginal cost), so that the supplier is losing money on every additional item sold.[13]

(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.[14]

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[12] The profitability test relates to the predator not the other enterprises in the market. An enterprise may well find itself facing prices lower than it can profitably meet, if its rival has lower costs. This is not predatory pricing.

[13] This is a much stronger condition than requiring that prices be above *average total* cost, which is the condition for the product to be profitable overall sales. Prices could be below average cost but still above variable costs, if fixed costs of production are high. At this point, the seller is making a loss but as long as prices are above variable cost, the supplier will be better off the more products are sold, and therefore it is not clearly unprofitable to hold prices at these low levels.

[14] Either effect can only be expected to occur only in industries in which economies of scale are significant, for example those in which there are significant fixed costs of doing business.

(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 that damage to competition is, for a significant period, irreversible. It would not be a successful predatory strategy to price low to eliminate a rival, if the resulting monopoly cannot sustain high prices because rivals simply enter again.

7.9 If these conditions do not hold, the FTC will not regard low prices as predatory, whatever their effect on competitors.

Excessive Pricing

7.10 Dominant firms may be able to charge 'excessively high' prices as a result of their anti-competitive conduct in the market: after neutralizing competitors, they can act independently and therefore exercise market power. Excessive pricing tends to be more common in concentrated markets.

7.11 Despite the theoretically simple relationship between market power and price levels, the assessment of excessive pricing practices has some pitfalls for FTC and Competition Authorities in general. First of all, a clear definition of 'excessive prices' must be available, i.e. a threshold which distinguishes a 'normal price' from an 'excessive price'. Furthermore, establishing whether a price is excessive would require that the FTC can determine the dominant firm's underlying costs. Access to such information can be difficult to obtain, particularly when firms produce several products: since many production and distribution costs may be common, their allocation among different products may be problematic.

7.12 In order to address these two issues, a number of instruments have been developed. The basic idea behind all of these instruments is that the observed, potentially excessive price is benchmarked against some proxy for the competitive price. The main instruments are:

- Comparison of observed prices with cost plus reasonable margin: This requires FTC can measure costs and a 'reasonable' margin needs to be set.

- Comparison of prices charged to different consumers in the same market: If the lower prices charged are profitable, higher prices can be considered excessive. This approach requires, first, that the supplier engages in price discrimination and, second, the FTC knows the suppliers cost structure.

- Comparison of prices charged to consumers in different geographical markets (transportation costs): If low prices charged in one market are profitable, higher prices can be considered excessive.

- Comparison of observed prices with prices of like goods in competitive markets.

7.13 FTC's approach to 'excessive pricing' will follow internationally recommended practices set and used by other Competition Authorities. The most common approach and intervention in order to restore competitive prices is the elimination of the dominant firm's restrictive rather than trying to determine the 'right' market price to be charged by the dominant firm. This is because of 3 reasons:

- Due to information constraints, FTC will find it difficult to determine the right price.

- Secondly, price setting is usually an instrument of regulation rather than competition policy.

- Thirdly, prices represent important signals for firms when deciding whether to enter or exit a market. High prices may convince firms to enter a market because they are lured by the opportunity to make high profits.

Price Discrimination

7.14 Price discrimination refers to the practice by a supplier of selling the same product at different prices to customers, for example according to their willingness to pay. In order to have price discrimination two conditions must be fulfilled.

7.15 **First** there must be a way to classify customers according to their effective willingness to pay a price. This classification can take place either through self-selection (e.g. quantity discounts) or by grouping customers based on observable characteristics (e.g. special prices for student, pensioners etc...).

7.16 The **second** condition for price discrimination to work is that the supplier must be in the position to impede arbitrage, i.e. the possibility for disadvantaged customers to buy from customers buying at lower prices. Often, the ability of customers to engage in arbitrage is clearly limited, due to inertia and lack of information favouring price discrimination.

7.17 It is important to appreciate that price discrimination can be positively beneficial in terms of allocative efficiency, since it may result in an increase in output.[15] Discrimination does not have to take place on the basis of price only. For example, an enterprise which controlled the supply of a key input might supply a downstream enterprise with a poorer quality of service than it provides to its own business competing in the same downstream market (longer delivery times, for instance). If the difference in service quality were not reflected in the pricing by the upstream enterprise, the enterprise could be regarded as acting in a discriminatory way. As with the analysis for price discrimination, non-price discrimination will not necessarily be abusive. It would be abusive only where it harms (or is likely to harm) competition.

[15] See Schmalensee 'Output and welfare implications of third degree price discrimination' (1981) 71 American Economic Review 242.

7.18 The FTC will adopt the approach that price discrimination which leads to an increase in sales should not be necessarily considered as anti-competitive, particularly taking into account that more customers will be supplied than with price uniformity. A possible result is that consumer welfare will increase (total welfare will increase in any case). However, if price discrimination results in a contraction of total sales, it has a negative effect on welfare.

Raising Rivals' Costs

7.19 A form of abusive behaviour may be raising the costs of other competitors, thereby improving one's own competitive position. For example, a firm may invoke regulatory procedures – environmental permitting, land-use laws, etc. -- as a means of slowing or discouraging entry or expansion by its rivals.

7.20 In discussing this sort of conduct, three conditions must be met for a firm to find it feasible and profitable to place its rivals at such a disadvantage. First, the value of the exclusion must be greater to the excluding firm than to the rival. Second, the rivals must not be able to find substitute suppliers which would restore their competitiveness. Third, the excluding firm must have some market power. *(Ordover and Saloner, p. 566)*

Vertical Restraints

7.21 Vertical restraints are restrictions imposed by either a buyer or seller operating at different stages of the production and distribution chain. Most vertical restraints are beneficial or benign, especially if there is effective competition at both the upstream and downstream levels. For example, vertical restraints can generate benefits through the promotion of efficiencies, non-price competition (to the benefit of consumers) and investment and innovation. The FTC will consider evidence of such benefits in its assessment; however, it will still be necessary for the dominant enterprise to show that its conduct is proportionate to the benefits produced.

7.22 A vertical restraint imposed by a dominant enterprise may be abusive where it harms (or is likely to harm) competition. Vertical restraints can take many forms, and again, it is important to note that it is the effect of the vertical restraint on competition, rather than its form, which will determine whether or not it is abusive.

7.23 A vertical restraint can be an agreement between a manufacturer and a retailer, a manufacturer and a wholesaler, a wholesaler and a retailer, a retailer and an end buyer or between two manufacturers (or wholesalers or retailers) which for the purposes of the agreement, operate at different stages in the production and distribution chain. Vertical restraints can either be imposed unilaterally by the dominant firm or made by agreement.

Foreclosure

7.24 Anticompetitive foreclosure is said to occur when the conduct of a monopoly enterprise restricts or eliminates the effective access of actual or potential competitors to customers or to supplies, to the detriment of consumers or the economy in general. 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.

7.25 Anticompetitive foreclosure will only be held to occur if consumers or the economy more generally are harmed as a result of the effect on competition – not simply because competitors are harmed. In the remainder of this document 'foreclosure' should be read to mean 'exclusion of competitors in a manner that damages consumers or the economy in general', not simply 'exclusion of competitors'.

7.26 All of the practices described in this section would only constitute abuse of dominance if they have these effects. The practices described here should therefore not be taken to be prohibited for all businesses. In most cases, businesses' dealings with their customers or strategies to compete against their rivals will be in no way anti-competitive and are matters solely for the businesses concerned.

7.27 Complete foreclosure, driving 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).

7.28 Foreclosure cannot therefore be expected to occur unless the industry in question exhibits economies of scale and barriers to entry or expansion.

7.29 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 anticompetitive.

7.30 In assessing foreclosure, the FTC will normally consider whether the conduct is likely to result in increased profits for the monopoly/dominant enterprise, as a result of reduced competition. Conduct which is not expected to result in higher profits is less likely to be considered to be anticompetitive foreclosure. Conduct that would only be profitable if it results in a reduction in competition is particularly likely to be considered to be anticompetitive.[16]

Margin Squeeze

7.31 The term margin squeeze (or price squeeze) is a convenient label for some forms of exclusionary abuse involving an interaction between two levels in a supply chain. This applies in particular to cases where the controller of an infrastructure facility with a dominant position seeks to "reserve to itself" parts of a related downstream market.

7.32 A margin squeeze is a form of exclusionary abuse characterized as follows:

- The firm accused of abuse operates as a vertically integrated entity over several levels of a supply chain.

- The firm holds a dominant position at one level of the supply chain — say, upstream.

[16] For example, refusing to purchase from a cheaper supplier is more likely to be considered anticompetitive than refusing to purchase from a more expensive supplier, as it is hard to see how the former conduct can be in the foreclosing enterprise's interests unless the behaviour results in a reduction in competition.

- The firm faces competition or the prospect of competition, at another level of the supply chain— say, downstream.
- The firm has some influence on downstream market prices (this need not be a second dominant position).
- The relationship between the upstream price (set by the firm in a dominant position) and the prevailing price in the downstream market is such that a competitor or potential competitor is forced out of the downstream market.

7.33 A margin squeeze claim can be analyzed in two ways:

- As predatory abuse; or
- As a constructive refusal to supply.

7.34 Claiming predatory abuse in a margin squeeze situation involves showing that the prices offered by the accused firm in the potentially competitive market are so low that their object was to use the upstream dominant position so as to exclude one or more competitors from the downstream market.

7.35 This would need to rest on evidence that:

- The downstream pricing policy (considered on its own) involved a sacrifice of profits without an objective justification (e.g. promotional investment).
- Considered objectively, this sacrifice of profit could only have had as its object the elimination of a competitor from the downstream market.
- There is a risk that competitors will be eliminated as a result of the sacrifice.

- The upstream dominant position was instrumental in the elimination strategy (analyzed objectively) — for example, it might have been used to prevent some forms of downstream entry, or by funding downstream losses.

7.36 Claiming constructive refusal to supply would require evidence that support a different set of assertions:

- The prices offered in the upstream market (under a dominant position) were higher than what could be objectively justified.

- Considered objectively, the object of these high upstream prices was to prevent one or more downstream competitors from gaining access to the upstream product.

- These competitors cannot operate competitively in the downstream market without effective access to the upstream product (as is the case, for example, if the upstream product is access to a monopoly network).

Tying and Bundling

7.37 There is a variety of ways in which products can be packaged together by a single firm; these combinations are commonly categorized as tying and bundling. Tying occurs when a firm that produces two or more products requires a buyer to purchase more than one product as a condition of sale; in other words, the firm refuses to sell product A to a buyer unless that buyer also purchases product B from the firm as well (and potentially products C, D, and so on).[17] Bundling typically refers to situations

[17] Tying is often combined with contractual or induced exclusivity, so that the buyer must purchase all of its requirements for product B, now and potentially in the future, from the firm in order to purchase product A, and not just a negligible amount. Tying may also be technological if a firm can use operational controls or compatibility requirements to enforce the tie, such as with software and hardware.

whereby products are sold together in fixed proportions, *i.e.*, product A is sold in a package with product B (and potentially products C, D, and so on).[18]

7.38 Tying and bundling are ubiquitous in many, if not most, markets – cars, for example, are usually sold with four tires (a bundle of car and tires) and require service under warranty from the same manufacturer (a tie between product and service). Generally speaking, there are often strong cost efficiencies that motivate tying and bundling; it may be less costly for firms to manufacture and/or package products together, and it may be more convenient for consumers to purchase that package than search for each individual product. This convenience can also serve to increase demand among consumers who prefer to buy the products together. Tying and bundling may help firms achieve economies of scope, which often leads to higher quality products or lower total prices than if each product were forced to be sold separately and may also prompt firms to broaden their product offerings in order to maintain as complete a set of products as that of their competitors. Tying is also often used, like exclusive dealing, as a means of ensuring product quality and service levels, particularly in aftermarkets.

7.39 In some cases, demand for a package of products may be sufficient such that that tie or bundle is no longer a combination of individual products, but a product market in itself.

7.40 Tying and bundling may also allow firms to engage in various forms of price discrimination. One rationale is metering demand, such as where a firm ties or bundles aftermarket products to the sale of the principal product. For instance, a firm that sells a printer may require that consumers also use that firm's aftermarket ink cartridges, either through technological restrictions or through exclusive supply arrangements. The net result is that the firm can charge more to high-demand consumers that use the printer more (*i.e.*, require more ink cartridges). In some cases, the ability to meter can ensure that both low and high-demand consumers are able to purchase the principal product; if the firm can charge only a single price for its product and is unable to meter demand through tying, its profit-maximizing price

[18] Products A and B may or may not be available separately for sale. When products A and B are not available outside of a bundle (*e.g.*, shoes and shoelaces), this is referred to as pure bundling. When they are available separately but the bundle is offered on more favourable terms than the sum of the individual products (*e.g.*, fast food meal deals), this is referred to as mixed bundling.

may exclude low-demand consumers. If it can instead meter demand, it may be able to charge a lower price for the principal product.[19]

7.41 Aftermarket tying that creates exclusivity, such as the examples above of a car requiring service under warranty from the manufacturer and printers requiring ink cartridges from the same firm, is one of the most common forms of tying in consumer markets. As a general principle, aftermarket tying raises competition issues only under limited circumstances. While aftermarket tying may restrict third-party access to service a particular brand, a brand itself will not necessarily constitute a relevant product market if consumers see other brands and products as substitutes, and so the owner of a particular brand will not necessarily hold a dominant position. Where aftermarket tying is common across brands within a particular product market – i.e., most or all of the firms in a market engage in aftermarket tying – the FTC will examine the extent to which those firms compete for the customer in the first instance. If customers can choose between competing firms when buying the initial product and are widely aware of the subsequent aftermarket tying for that product, the FTC will consider customers as taking that condition into account when purchasing the initial product, and firms as competing amongst each other across several dimensions of competition, including aftermarkets, when attempting to capture that customer.

7.42 However, there are certain circumstances under which both tying and bundling can be anti-competitive, if they are able to make it more difficult for non-tying/bundling rivals to compete. Theoretically, tying and bundling can be anti-competitive in two ways. First, to the extent that tying and bundling may raise the costs (or reduce the revenues) of non-bundling rivals, it may become more difficult to compete in the market(s) for standalone products, leading to possible exclusion or disciplining of otherwise effective competitors. Second, by discounting a package of products, tying or bundling may constitute predatory conduct. Where that package of products is properly classified as a separate relevant product market (*i.e.*, the bundle itself is seen as a single product, not a package of separate products), the FTC will analyze it as predatory conduct to determine whether the bundle, as a single product, is being sold below its total average avoidable cost.

[19] While metering can potentially improve firms' incentives to increase output and make products available, unlike the other efficiency reasons noted above, the motivation for tying in such a situation is not cost minimization, but rather the ability to efficiently capture consumer surplus at the margin. This may be associated with higher prices for at least some subset of consumers.

7.43 One traditional concern with tying (which can hold for bundling as well) is "monopoly leveraging", where a firm with market power in one market attempts to achieve a similar position in an otherwise competitive second market by engaging in tying between two markets. This will only be considered as potentially anti-competitive if it can deter the entry or expansion of rivals in the second market. Anti-competitive "monopoly leveraging" is possible only under certain conditions; as noted above, a necessary condition is that it artificially raises rivals' costs (or reduces rivals' revenues). For example, if the tie captures enough customers desiring both products to keep rivals from obtaining efficient scale or covering the fixed costs of serving only standalone customers, or if the tie raises rivals' costs or reduces their revenues by increasing consumer switching costs, for which consumers would have to be compensated, this theory may hold. In industries characterized by important fixed costs of production, this can also occur over time if tying discourages investment in research and development by competitors, or otherwise discourages potential dynamic innovation that would be profitable for competitors only if a larger portion of the market were contestable. Where it appears that a firm with market power is engaging in tying for the purpose of an intended negative effect on a competitor (or competitors) without a valid business justification as discussed above, the FTC will examine the extent to which this may raise competitors' costs or reduce their revenues, with the result that competition in a market is substantially lessened or prevented.

7.44 Tying and bundling (particularly bundling) can also be viewed as direct price competition. Where it appears a firm is selling a bundle of products primarily as a means of offering discounts to buyers, the FTC may choose to examine such conduct under a predatory standard, in order to avoid chilling legitimate price competition. In this case, the key issue is whether the appropriate relevant market definition is the entire set of products, or whether component products comprise separate relevant product markets. Where the bundle is determined to be a single product market, the Bureau will assess whether the total bundle, as opposed to individual products within the bundle, is below average avoidable cost. In such a case, the FTC will then examine whether this will result in a substantial lessening or prevention of competition, namely whether the bundling firm is able to engage in recoupment by raising the price of its bundle once its standalone competitors have been disciplined or eliminated. Where the appropriate market definition is separate products (for example, there are distinct groups of consumers that purchase the bundle and purchase some or all of the products on a standalone basis), it may be more appropriate to assess the extent to which the bundling firm can raise the costs of rivals offering standalone products, as described above.

Discounts

7.45 Some forms of sales 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 requirement.

7.46 Most forms of discounting and rebate are pro-competitive, as they represent healthy price competition. Discounts of less than 100 per cent on additional sales volumes will not be considered to be anticompetitive. However:

(a) Discounts relating to the share of a customer's business could be achieved by reducing purchases from rivals instead of increasing purchases from the discounting enterprise, and are therefore more likely to be considered to have foreclosure effects

(b) Retrospective rebates, such as a rebate on all purchases over a year if the sales exceed a target threshold, may have foreclosure effects because they can result in very powerful incentives for a customer just below the threshold to increase purchases

(c) Rebates only on the additional volumes above a threshold are generally not anticompetitive. However, a very high discount on additional volumes, so that the supplier is making a loss on those additional volumes, may be considered anti-competitive.

7.47 Such rebate schemes are not necessarily anti-competitive, but might be if the effect is to foreclose rival enterprises to the detriment of consumers or the economy as a whole.

7.48 The key test for the FTC 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 anticompetitive.

Refusals to Supply and Essential Facilities

7.49 Enterprises generally have the freedom to decide whom they will deal, or not deal with. Therefore, a refusal to supply, even by a dominant enterprise, would not normally be an abuse. However, in certain circumstances, a refusal to supply by a dominant enterprise may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified. Objective justifications might include the buyer's poor creditworthiness, or capacity constraints, for example.

7.50 A refusal to supply may constitute an abuse, for example, where a dominant enterprise stops supplying an existing buyer, or withholds supplies from a new buyer, with the result of (likely) substantial harm to competition. A refusal to supply could result from a refusal to allow access to an essential facility.

7.51 Facilities are rarely considered to be"essential". A facility will be viewed an essential only where it can be demonstrated that access to it is indispensable in order to compete in a related market, and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy).

7.52 Market definition will be important in determining if a particular facility is essential. An asset will not be regarded as an essential facility, if other similar facilities compete within the same relevant market (i.e. if there are potential substitutes), or if the facility is not indispensable to the provision of the product in question.

7.53 As with refusals to supply in general, a refusal to allow access to an essential facility will constitute an abuse only if there is evidence of (likely) substantial harm to competition and there is no objective justification for the dominant undertaking's behaviour.

7.54 In determining whether a refusal to allow access to an essential facility constitutes an abuse, and if so, on what terms access should be granted, care must be taken not to undermine the incentives for undertakings to make future investments and innovations, especially where the essential facility is a result of a previous innovation.

8. Abuse in Related Markets

8.1 It is not necessary for the dominant position, the abuse and the effects of the abuse, to be in the same market.

8.2 The table below sets out the different possible scenarios. The scenarios set out below are for illustration; whether such conduct will amount to an abuse will depend on the facts and circumstances of each case.

Dominance, Abuse and Related Markets

Example 1[20]

Scenarios	Market A	Market B
Y may be dominant in Market A and use a predatory strategy to eliminate competitors from Market A.	Dominance Abuse Effect	
Y may be dominant in Market A, and It provides the raw material essential to production in Market B, in which it is also a market player. To strengthen its own position in Market B, it may abuse its dominant position in Market A, by refusing to supply the raw material in question to its competitors in Market B.	Dominance Abuse	Effect
Y may be dominant in Market A, but not dominant in the related Market B. Y may offer special discounts in Market B, to buyers who remain loyal to it in Market A, so as to help maintain its dominant position in Market A.	Dominance Effect	Abuse
Y may be dominant in Market A. It may try to leverage its market power in Market A to Market B, by tying the sale of its products in Market A to the sale of its products in the related Market B.	Dominance	Abuse Effect

[20] Competition Commission of Singapore

Example 2[21]

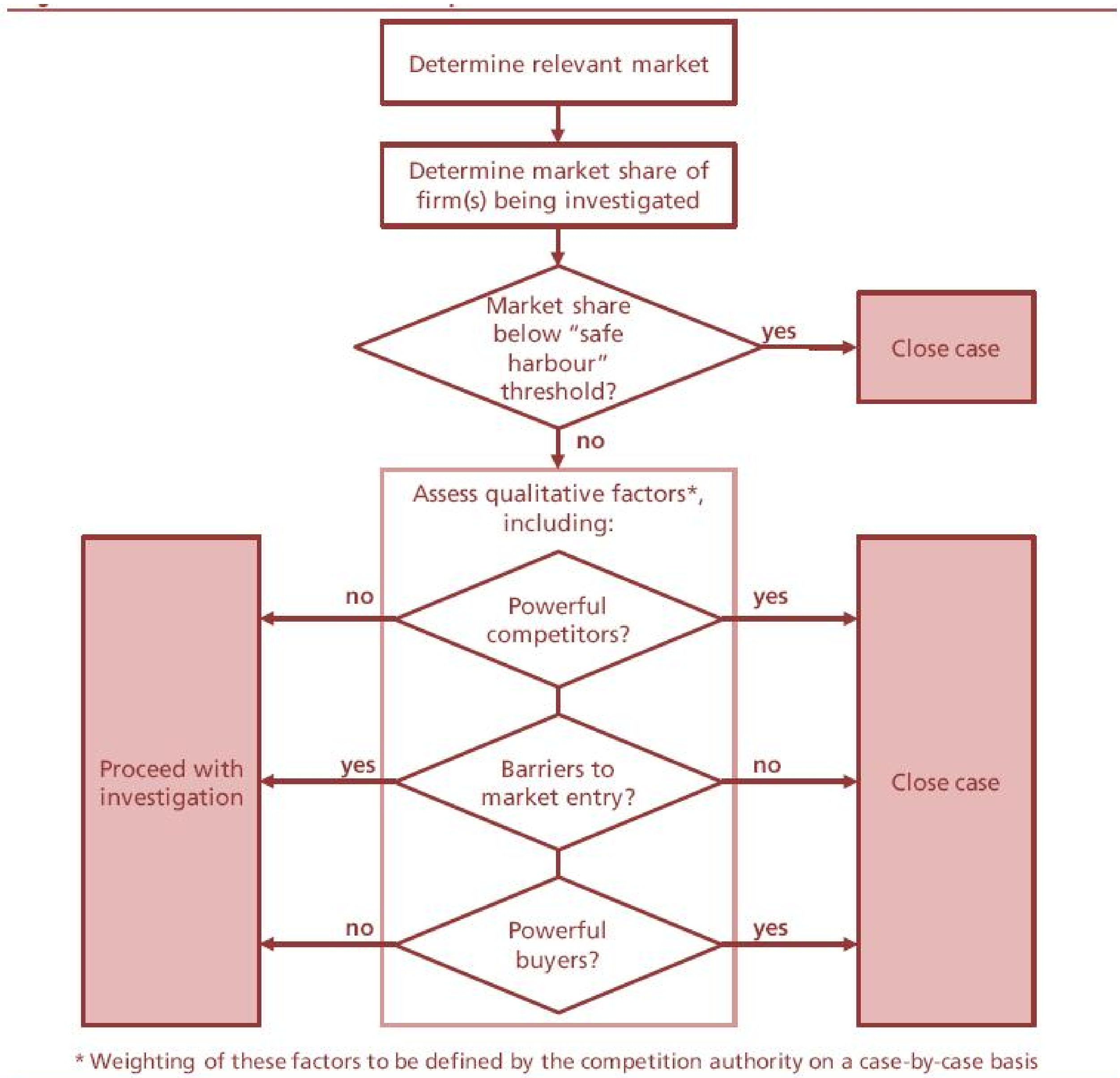
Case	Market A	Market B
Michelin v Commission	Dominance Abuse Benefit	
Commercial Solvents; Telemarketing; De Poste-La Poste; Sealink decisions	Dominance Abuse	Benefit
British Gypsum	Dominance Benefit	Abuse
Tetra Pak v Commission	Dominance	Abuse Benefit

9. Request, Notification and Effect of Guidance.

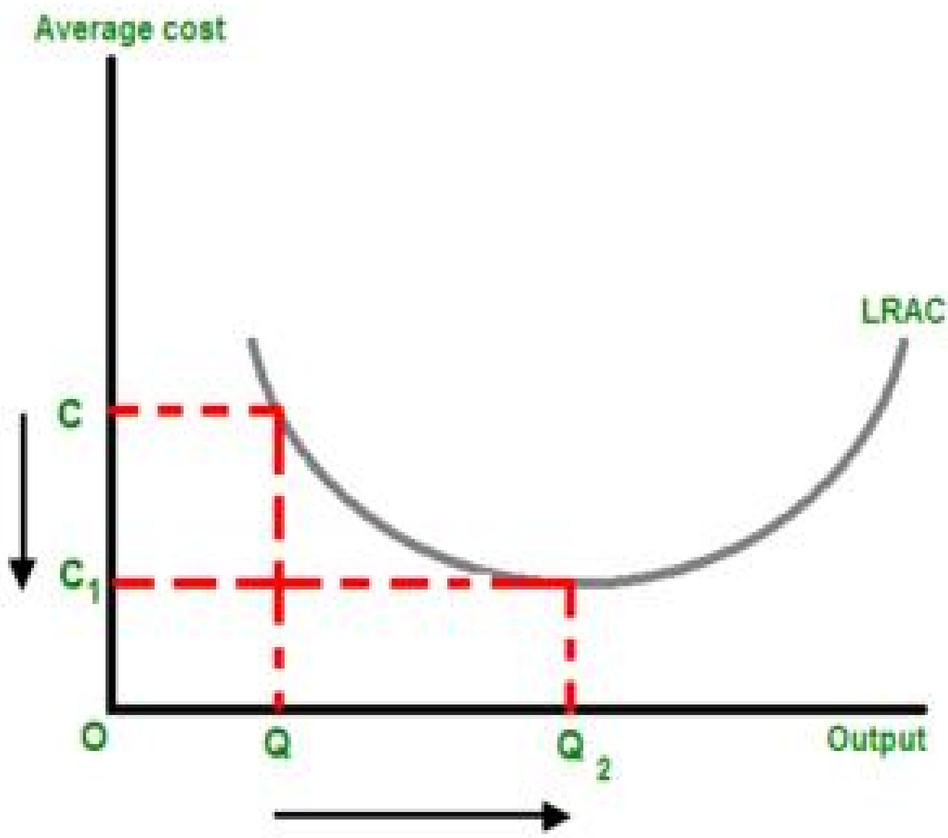
This will apply according to FCA 2009, Section 8, 9 and 10.

[21] Whish. R. 2005. Competition Law. Fifth Edition. Chapter 5. Pg 202. Oxford University Press.

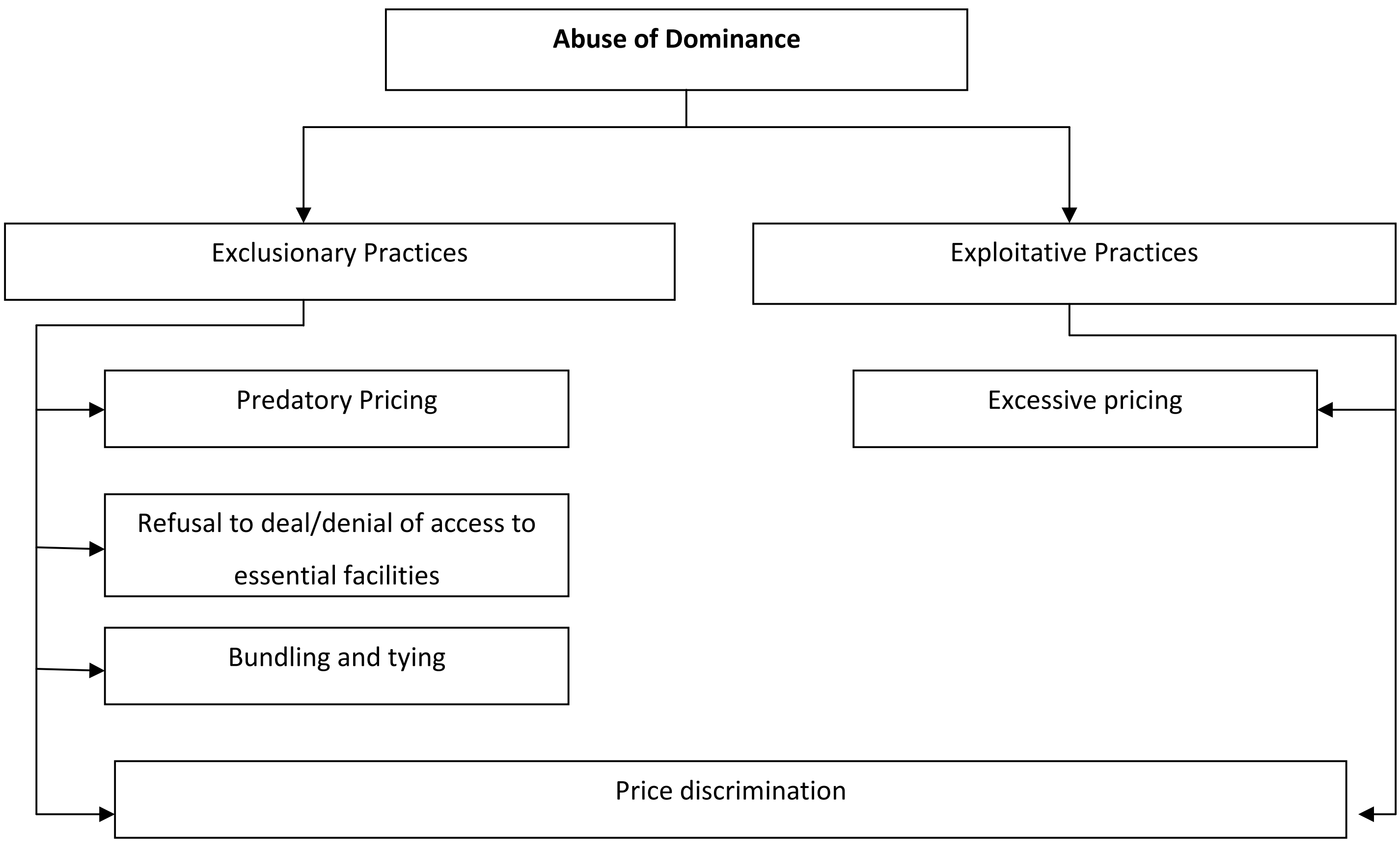
Annex 1: Determination of Dominance (Gangi & Bienen, 2010)



Annex 2: Graphical Presentation.



Annex 3. Typology of abuse of dominance. (Gangi & Bienen, 2010)



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