

THE REGULATION OF MARKET DOMINANCE IN ZAMBIA

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BY

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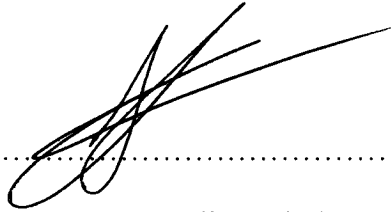
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**AN OBLIGATORY ESSAY SUBMITTED TO THE SCHOOL OF LAW AT THE
UNIVERSITY OF ZAMBIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (LLB)**



DECLARATION

I, JASON DALITSO CHULU, do hereby declare that this Directed Research Essay is my genuine work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorisation in writing of the author.

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ABSTRACT

In a free market economy, certain enterprises emerge stronger than others. With this strength comes the ability to independently influence the forces of competition and prices of products and services. Such strength must therefore be regulated, in order to ensure that it is not abused to the detriment of not only the other players in the market, but also the consumers.

This essay therefore considers the regulation of market dominance in Zambia. It discusses the concept of market dominance, and the indicators used to determine it. It also considers the sort of behaviour considered to amount to an abuse of market dominance. The paper considers the role of the Competition and Consumer Protection Act No. 24 of 2010 (the “Act”) in the regulation of market dominance. It also focuses on the role performed by the Competition and Consumer Protection Commission (the “Commission”) in implementing the provisions of the Act.

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With the help of documented cases, interviews, and raw data, the essay analyses the position of the Commission in relation to the regulatory duty placed upon it. The essay provides a brief comparison of the regulation of market dominance in Zambia, with that of the United Kingdom, to provide more insight on the phenomenon. Finally, based on an analysis of its salient points of discussion, the essay draws profound conclusions and recommendations on how this regulatory system can be improved and concludes with a synopsis of the aforementioned.

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Finally, a special thank you to the staff and team at the CCPC, especially Kondwani Kaonga, whom I followed around like a pest. Your input was truly invaluable.

DEDICATION

This work is dedicated to the memory of my mother, Winnie Antonia Zaloumis Chulu. You live on through me and I hope I continue to make you proud...this is only the beginning. May your soul rest in eternal peace.

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CHAPTER ONE

THE RELEVANCE OF THE REGULATION OF MARKET DOMINANCE

1.1 Introduction

In the early 1990s, Zambia broke new ground by making the transition from a closed, to a more liberalised economy. With the introduction of an open economy, and its emerging market trends and players, it became apparent to Government that there needed to exist a legal framework within which this new market phenomenon was to be regulated. Due to the complexity in the market economy, a greater need arose to monitor, control and prohibit market practices that adversely affected competition.¹ This was to be done through competition law. Competition law is thus seen as a ‘referee’ to ensure that sound market practice is exercised for the well-being of every stakeholder in the liberal economy.

Competition has generally been known to aid markets by making them more efficient, less costly for consumers, and more innovative. Manufacturers incessantly strive to stay afloat and compete for a market share of goods and services; and they are driven to become more adept in lowering costs, enhancing quality, and increasing in technological innovation.² Additionally, competition helps increase the managerial efficiency of businesses as firms are constantly striving to develop better ways of organizing and managing their resources.³

¹ T. Kaira, *Harmonizing the Objectives of Competition Policy and Regulation*. Paper presented at the Multi-Year Expert Meeting on Services, Development and Trade: The Regulatory and Institutional Dimension in Geneva, 17-19 March 2009.

² S. J. Evenett, *Links Between Development and Competition Laws in Developing Countries* (London: DFID, 2003). 67-68

³ Evenett, *Links Between Development and Competition Laws in Developing Countries*, 67-68

Gandoo⁴ stresses this importance of sound competition in an economy by suggesting that issues incidental to fair trade and competition, bear a significant correlation to the economic, social, and political characteristics of a country.⁵ Therefore, a competitive environment, practicing fair and equitable trade, generates a resounding effect on other sectors of the country.⁶

One of the dangers posed to wholesome competition in a market is market dominance. Market dominance has a high propensity of leading those that assume the dominant position to promulgating unfair and anti-competitive trade practices.⁷ Owing to this position that allows an enterprise or a group of enterprises to dictate market forces, the exploitation of consumers and other stakeholders is prone to occur, culminating into a series of grievances among traders and consumers.⁸ This may in turn have the ‘ripple effect’ of leading to instability in the economic, social and political structure of the country.⁹

In light of the foregoing, the essence of this paper is to examine the role of competition law in Zambia particularly that of the Competition and Consumer Protection Act No. 24 of 2010 (the “CCPA”) and the Competition and Consumer Protection Commission (the “CCPC”), in regulating market dominance. In order to achieve this, the paper shall begin by discussing the concept of market dominance, the factors to consider when determining it, and its general definitions.

⁴ H. M. Gandoo, *Consumer Protection Law in Zambia*, Obligatory Essay submitted to the School of Law in partial fulfillment of the award of the Bachelor of Laws Degree, 1983/84. 15

⁵ Gandoo, *Consumer Protection Law in Zambia*. 18

⁶ Office of Fair Trading, Cartels and the Competition Act 1998: A guide for purchasers. [http:// www.oft.gov.uk](http://www.oft.gov.uk), accessed 4th October, 2012

⁷ UNCTAD, ‘*Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa: Series on Issues in Competition Law and Policy*,’ Geneva. UNCTAD, 1999

⁸ The Director, CCPC, abuse of dominance <http://www.ccpc.org.zm/index.php/abuse-of-dominance>, accessed on 9th October, 2012.

⁹ Gandoo, *Consumer Protection Law in Zambia*. 20

The paper shall then consider what is considered to amount to abuse of such dominance and discuss the regulative mechanisms set in place under the CCPA and how they are implemented by the CCPC. It will highlight the functions of the CCPC and their investigatory powers pertaining to the regulation of market dominance and the prevention of its abuse.

Furthermore, the paper shall provide an account of actual cases concerning market dominance and its abuse that have been investigated by the CCPC, and shall render a commentary on the operations of the CCPC in this regard. A comparative study on the prevention of abuse of dominant position with the United Kingdom shall also be provided and significant contributions will be drawn. Finally, the paper shall give a general conclusion based on the aforementioned and will go on to provide insightful recommendations aimed at enhancing the regulation of market dominance in Zambia.

1.2 Statement of the Problem

Competition law, being a fairly new body of law in Zambia, has substantial room for growth and improvement. Particularly, in the area of the regulation of market dominance, Zambian competition law has to be analysed, identifying its strengths and weaknesses, with a view to building a framework that wholesomely responds to the regulatory needs of a developing country. This research will therefore address the problem of abuse of market dominance in Zambia, and how dominant firms are regulated in order to prevent it.

1.3 Objectives of the Study

The general essence of this paper is to analyse the regulation of market dominance, from a Zambian competition law perspective. The essay aims to study the regulation of market

dominance, which is aimed at averting the abuse of dominant position in the market. In these premises, the specific objectives of the paper are:

- a) to discuss the concept of market dominance;
- b) to discuss the concept of abuse of market dominance;
- c) to identify the mechanisms or protocols currently being used in Zambia for the regulation of market dominance, thus preventing its abuse;
- d) to evaluate how effective these regulatory mechanisms are;
- e) to render a comparison of the regulation of market dominance in Zambia with that of the United Kingdom; and
- f) to draw significant recommendations on how the regulation of market dominance might be enhanced based on the findings of the research and the comparative study.

1.4 Significance of the Study

In an age of increased innovation, technology, and rampant industrialisation, it has become exceedingly ostensible that markets shall keep growing, consumers shall need more protection, and ultimately market dominance, shall need more regulation. The significance of this study cannot be underscored as it serves the vital role of providing elementary response systems to the issue of efficient regulation of market dominance. It can also be used as a foundation upon which a more comprehensive mechanism for the prevention of abuse of market dominance can be built.

1.5 Methodology

This research, in order to deliver comprehensively on its objectives shall have to utilise secondary data in the form of literary writings and foreign jurisprudence. The paper shall also make use of interviews and field research with relevant authorities such as officers of the CCPC.

1.6 Conclusion

Under this chapter, the relevance for the regulation of market dominance in Zambia has briefly been highlighted. This indelible requirement having been established must now become the focus of this study.

The next chapter shall therefore consider market dominance as a phenomenon and how it is perceived in Zambia.

CHAPTER TWO

THE CONCEPT OF 'MARKET DOMINANCE'

2.1 What is Market Dominance?

The idea of a prohibition of abuse of dominant position in the market is the cornerstone upon which competition laws around the world is based. However, before one begins to even consider 'abuse' of dominant position, it is critical to first gain a precise understanding of what amounts to a dominant position within the market. While generally there is a common consensus with respect to the prohibition of market abuse, there exists quite some disparity in the manner in which market dominance is defined in different jurisdictions.¹⁰

The phenomenon of market dominance goes beyond the idea of economic power over price. It is not the same thing as economic monopoly, though a monopoly would clearly be dominant.¹¹ The general definition of market dominance in by the European Commission (the "EC") and in the United Kingdom (the "UK") focuses largely on the ability of a firm or enterprise to behave independently of its competitors.

In *N. V. Netherlands Banden Industries Michelin v Commission of the European Communities*¹² it was observed that "dominant position" under Article 86 of the EC Treaty is

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

¹⁰ OECD, *Competition law and Policy in the European Union* (OECD, 2005), 42

¹¹ OECD, *Competition law and Policy in the European Union*, 42

¹² *N. V. Netherlands Banden Industries Michelin v Commission of the European Communities* [1983] ECR 3461

to behave to an appreciable extent, independently of its competitors, its customers and ultimately of the consumers.

Although the Competition Act of the United Kingdom¹³ (the “UK Act”) does not provide a definition of ‘dominant position’, the Competition Authorities of the United Kingdom have relied on the definition of dominant position as provided under Community law. In the case of *Napp Pharmaceutical Holdings Ltd. v Director General of Fair Trading*¹⁴, the Competition Appeal Tribunal observed (citing *Hoffman La Roche v Commission of the European Communities*) that a dominant position is

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, its customers and ultimately of the consumers.¹⁵

Section 2 of the CCPA defines ‘dominant position’ as “a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market and to adjust prices or output, without effective constraint from competitors or potential competitors.”

Drawing from the foregoing definitions, conclusions can be derived about the general legal position as regards market dominance in the UK and in Zambia. It follows that the critical or defining element must be whether an enterprise, or indeed a group of enterprises, is able to

¹³ Section 18 Competition Act of United Kingdom, 1998

¹⁴ *Napp Pharmaceutical Holdings Ltd. v Director General of Fair Trading* [2002] CAT 1

¹⁵ *Napp Pharmaceutical Holdings Ltd. v Director General of Fair Trading* [2002] CAT 1

materially influence or alter factors such as prices or output, without formidable opposition from potential or already existing competitors.

2.2 Determining Market Dominance

The definition of market dominance, by its reliance on a market, stresses the fact that dominance cannot occur in the abstract, but is always in relation to a particular market. Therefore, in order to determine market dominance, an analysis must be focused on three essential concepts of a market. These are the ‘relevant market’, the ‘geographical market’, and ‘market power’.¹⁶

2.2.1 Relevant product market

It was observed in the case of *Decca Navigaton System*¹⁷ that market power can only exist when it relates to the supply of particular goods and services. The Court in the case of *Europemballage Corporation and Continental Can Co In. v Commission*¹⁸ held that when identifying a dominant position, the demarcation of the relevant product market was of paramount importance.

Determination of the relevant market does not have a strictly definitive legal test. However, based on case law, it would be logical to conclude that where the goods or services offered are regarded as being interchangeable, they will be considered to fall in the same product market.¹⁹

The Court in the *Continental Can* case stated that for the purpose of delimiting the market, one must investigate “those characteristics of the products in question by virtue of which are

¹⁶ Richard Whish, *Competition Law*, 2nd Ed. (London: Butterworths, 1989). 279

¹⁷ *Decca Navigaton System* OJ[1989]L 43/27

¹⁸ *Europemballage Corporation and Continental Can Co In. v Commission* [1973] CMLR 199 at paragraph 32

¹⁹ Whish, *Competition Law*. 280

particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.”²⁰

When considering whether a product is interchangeable with another, the starting point would have to be an analysis of the demand market.²¹ The question must be whether a purchaser of a product or service regards it as being interchangeable with other products. However, the supply side of the market must also be considered with respect to how easy it would be for a supplier of a product or service to adapt their line of production so as to supply interchangeable products or services with those under consideration.²²

Demand side interchangeability

One key pointer of interchangeability in the demand side of the market is obtained by measuring the cross elasticity of demand between the products or services. Cross elasticity of demand measures the responsiveness of the demand for a good to a change in the price of another good.²³

Where an increase in the price of one product or service corresponds with a significant demand for another, there is an indication that the two products or services are in the same market since the consumers have easily replaced the more expensive product or service with a cheaper one.²⁴

However, the measurement of cross elasticity, though a valuable indicator, cannot be relied on as conclusive evidence for the existence of interchangeability. This is owing to the fact that on a practical application, such a measurement poses massive logistical and statistical constraints.²⁵

²⁰ Whish, *Competition Law*. 280

²¹ Whish, *Competition Law*. 281

²² D.G. Goyder, *EEC Competition Law* (New York: Oxford University Press, 1988). 299

²³ Robert Frank, *Microeconomics and Behaviour*, 7th Ed. (Boston: McGraw-Hill, 2007). 38

²⁴ Frank, *Microeconomics and Behaviour*. 38

²⁵ Goyder, *EEC Competition Law*. 301

Furthermore, the selection of the products or services to be measured pre-emptively affects the results. Additionally, even if aptly executed, such a measurement might still not be wholesomely representative as it could have been performed at a time when competition in the relevant market was already distorted.²⁶ Due to the inconclusive nature of cross elasticity, added criteria must be used to determine interchangeability. Particularly, issues such as the ‘physical characteristics’, ‘price’, and ‘intended use’ of the product or service are useful supplements.²⁷

The physical characteristics of products can serve as a useful tool in determining their interchangeability with others so as to identify their market. In the case of *United Brands v Commission*²⁸ the Court considered that the “softness, seedlessness, taste, and handling quality of bananas” was relevant in deciding whether they could be capable of forming a distinct market from that of fruit in general.

Price can serve as an indicator by observing the effect it has on the market in question. Products may or may not be interchangeable on the basis of differences in price.²⁹ For example, a cheap suit would essentially serve the same purpose (that of clothing) as an expensive custom fitted Italian suit. However, the two suits, on the basis of their considerable difference in price and luxury connotations, cannot be said to be interchangeable.

With respect to the intended use of the product or service, the rationale is that if a person needs a certain product for a specific purpose, that product will fall in the same market as other products that fulfill the same purpose.³⁰ In the case of *ICI and Commercial Solvents Corporation v*

²⁶ Goyder, *EEC Competition Law*. 301

²⁷ Frank, *Microeconomics and Behaviour*. 43

²⁸ *United Brands v Commission* [1978] 1 CMLR 429

²⁹ Whish, *Competition Law*. 282

³⁰ Whish, *Competition Law*. 282

Commission³¹. CSC, a producer of nitropropane supplied it to an Italian company called Zoja which processed it into ethambutol, a drug used for the treatment of tuberculosis. CSC decided to stop supplying the nitropropane and Zoja claimed this amounted to an abuse of dominant position in the market. CSC claimed that nitropropane was part of a wider market from which other raw materials could be obtained by Zoja for the manufacture of their drug.

The Court rejected the argument advanced by CSC as the raw materials it suggested as an alternative, could not be processed into ethambutol without considerable cost to Zoja. Therefore, from Zoja's perspective and intended use, the relevant market consisted only of those products from which it could realistically continue to produce ethambutol.

In addition to cross elasticity, physical characteristics, price, and intended use, the structure of supply and demand in the market need also be considered in order to determine interchangeability.³² An example of such a consideration can be observed from the ruling of the Court in *N. V. Netherlands Banden Industries Michelin v Commission of the European Communities*³³ where it upheld the Commission's identification of the market of 'replacement' tyres for heavy vehicles. The reasoning behind the ruling of the Court was that even though tyres as a whole formed one product, replacement tyres varied from tyres fitted onto new vehicles with respect to the circumstances under which they were purchased. Their demand and supply structures by virtue of this difference demanded a distinction of the two markets.

³¹ICI and Commercial Solvents Corporation v Commission [1974] ICMLR

³²Goyder, *EEC Competition Law*. 301

³³*N. V. Netherlands Banden Industries Michelin v Commission of the European Communities* [1983] ECR 3461

Supply side Interchangeability

Though the test for interchangeability is mostly dependent on an examination of the market from the customer's perspective (the demand side), it is also helpful to consider the degree of interchangeability from the supply side. The principle behind this consideration can be more accurately elucidated by an illustration. Suppose two suppliers, D and G produce products 'Delta' and product 'Gamma' respectively. If it is a fairly simple matter for D the supplier of Delta to alter his production so as to supply Gamma, then products Delta and Gamma should be regarded as part of the same market.³⁴

Analysis of supply side interchangeability was demonstrated in *Tetra Pak 1 (BTG licence)*³⁵ where the Commission took into account the fact that certain producers of milk-packaging machines could not readily or easily adapt their production to make aseptic packaging machines and cartons. Therefore, the producers were in a different market from the one under consideration.

2.2.2 The Geographical Market

In order to determine whether an enterprise has market power it is necessary to define the geographical extent of the market in which it operates. This helps establish a sound understanding of exactly which enterprises it is in competition with. While certain products can easily be supplied throughout the country or region with relative ease, there are instances in which this may not always be possible due to technical, legal, or practical constraints.³⁶

³⁴ Whish, *Competition Law*. 288

³⁵ Tetra Pak 1 (BTG licence)OJ[1988] L 272/27

³⁶ Whish, *Competition Law*. 288

The *United Brands* case highlighted the need to identify the geographical market by stating that an enterprise needs to be evaluated “with reference to a clearly defined geographic area in which the product is marketed and where the conditions are sufficiently homogenous.”³⁷ Therefore, in order to define a geographical market, recourse must be had to the objective conditions of competition of all the relevant enterprises in the market, establishing that they are in fact the same.³⁸ For instance, if one were to consider the question of whether a localised enterprise belonged to a broader geographical market, it would be crucial to consider whether from an objective perspective, the enterprise is able to compete on an even platform with the other players in the broader geographical territory.

2.2.3 Market Power

From the definition of market dominance, both under the CCPA and other jurisdictions, it is decipherable that market dominance depends heavily on the existence of a certain degree of market power that allows the dominant firm to behave exclusively of the forces of competition. The problem that this brings to the fore though is how exactly this market power is to be assessed.

Market shares

Market shares, among other indicators of dominance can serve as a useful tool when assessing market power. Though market shares are not conclusive, there is a general presumption that the larger the market share exhibited by an enterprise, the more likely a finding of dominance.³⁹ This

³⁷ *United Brands v Commission* [1978] 1 CMLR 429 at p. 429 paragraphs 10-11

³⁸ Whish, *Competition Law*. 289

³⁹ Whish, *Competition Law*. 292

presumption is however rebuttable as it is possible that although a firm might exhibit a high market share, that market share could emanate from the firm's pricing policy. For instance, it could be that the firm is charging its products at marginal cost, or competitive rate, and any increase in price would see an instantaneous influx of new entrants into the market.⁴⁰

Alternatively, a large market share could be the result of a geographical market that tends to overstate the real position of the undertaking in question. This would be the case for instance where the market has been drawn up too narrowly due to the existence of significant competitive pressure emanating from outside the market.⁴¹

Regarding the correlation between a large market share and the existence of dominance, the Court in *Hoffmann-La Roche v Commission*⁴² stated "very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position." Recognition is therefore made that in 'exceptional' circumstances, a large market share might not always mean that the firm in question is dominant. This is due to the fact that a large market share held only briefly before the emergence of new competition would suggest that no market power ever truly existed.⁴³

Evidently, market shares are not the sole issue when determining whether a firm has market power. Other factors labelled 'indicative of dominance' must be considered in order to attain a resolve as regards the position of an undertaking in the market. The most obvious factor of

⁴⁰ Whish, *Competition Law*. 292

⁴¹ Frank, *Microeconomics and Behaviour*. 43

⁴² *Hoffmann-La Roche v Commission* [1979] 3 CMLR 211

⁴³ Frank, *Microeconomics and Behaviour*. 44

consideration is that of barriers to entry, and a few others such as the conduct and performance of the firm itself.⁴⁴

Barriers to entry and other factors indicative of dominance

There are various factors that can be deemed to constitute a barrier to the entry of a particular market, including the provisions of national legal systems.⁴⁵ For instance, in the case of *Hugin v Commission*⁴⁶ the Court accepted that Hugin was dominant in the market for spare parts for its cash registers because other firms could not produce them for fear of being sued by Hugin under the UK Design Copyright Act of 1968. Other obvious legal barriers to entry would include certain government licencing requirements and planning regulations. These would undoubtedly present new entrants with a considerable challenge with respect to entering the market.

The technology of a firm would also be relevant in deciding whether it has market power. This reasoning is placed against the background that an established firm would ideally have superior technology (in comparison to potential entrants) translating into more efficient and cost effective production processes.⁴⁷ A new entrant into the market would therefore assume the added challenge of meeting the technological proficiency of the established firm along with all other incidental impediments associated with a start-up business. This, as has been contended, ultimately results in a barrier to entry.

This contention however attracts criticism as it is not always the case that a new entrant will not be as technologically adept as the established firm. In some cases the converse would actually

⁴⁴ Whish, *Competition Law*. 295

⁴⁵ Whish, *Competition Law*. 295

⁴⁶ *Hugin v Commission* [1979]3 CMLR 345

⁴⁷ Whish, *Competition Law*. 295

subsist. For instance, the new entrant may not have to deal with all the costs of research and innovation into a product or process as the established firm might already have made most information vital to such operations available to the public domain through instruments such as patent disclosures.⁴⁸ Additionally, technology by nature is not static and at the point at which the new entrant might be attempting entry into the market the costs associated with research and development might have reduced significantly due to technological advances.

Other factors such as product differentiation and the overall size and strength of the undertaking are also relevant for the purpose of establishing dominance. However, the mere fact that a brand image is well known or that a firm is large does not in itself conclusively point towards a dominant position in the product market. Further, the conduct of an allegedly dominant firm, as well as its performance may form part of the key indicators of dominance that can be used in making a final determination.⁴⁹

2.3 Market Dominance in Zambia

Determining market dominance in Zambia utilises both the CCPA as well as the discussed principles of determination. Section 15 of the CCPA gives a basis for the presumption of market dominance by providing that a dominant position, in relation to the supply of goods and services exists in Zambia if “thirty percent or more of those goods or services are supplied or acquired by one enterprise; or sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises.”

⁴⁸ Whish, *Competition Law*. 296

⁴⁹ Whish, *Competition Law*. 296

The CCPA therefore makes it automatic that with respect to the supply of goods and services, a firm will automatically be presumed to be in a dominant position provided that it falls into the prescribed categories of market share. Firms such as the Zambia Electricity Supply Corporation (“ZESCO”) and the Zambia Telecommunications Company Limited (“ZAMTEL”) are by virtue of their monopoly in the electricity distribution and fixed lined telephone markets respectively, deemed to be dominant. This example though is perhaps redundant since both ZESCO and ZAMTEL are monopolies, and monopolies are essentially, by their nature, dominant.

A more suited example for the purposes of Section 15 of the CCPA would possibly be that of the Direct to Home Television (“Digital Television”) market. This market in Zambia is composed of only three players: Multichoice, Go TV, and Strong TV. These firms are therefore, by virtue of Section 15 (b) of the CCPA, dominant in the Digital Television market.⁵⁰

2.4 Conclusion

In conclusion, it can be stated that market dominance is a phenomenon that is present in almost every economic structure. There must be a prescribed guideline for its determination in order to create a platform for the prevention of its abuse. Market dominance itself is not a harmful occurrence. It is however, its abuse that distorts beneficial competition and consumer protection.

The next chapter will therefore discuss the abuse of market dominance, and how it is prevented in Zambia through the regulation dominant firms.

⁵⁰ CCPC, “*Why should Zambian Consumers be interested in competition policy & Law*” (Lusaka: CCPC, 2012). 27

CHAPTER THREE

ABUSE OF DOMINANCE AND THE REGULATION OF DOMINANT FIRMS IN ZAMBIA

3.1 Introduction

When it has been established that a firm is dominant in its relevant market as demonstrated in the preceding chapter, it becomes incumbent upon the competition authorities to define what exactly amounts to an abuse for the purposes of regulation. ‘Abuse of dominance’ is not universally defined; it is dependent on the definition that is advanced under a particular jurisdiction.⁵¹ Different conducts have therefore been declared to amount to abuse of dominance under the competition laws of different jurisdictions.

3.2 Definition of Abuse of Market Dominance in Zambia

The CCPA expressly prohibits the abuse of dominant position in the market by stating that “an enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.”⁵² It goes further to define ‘abuse’ as including any one of the following practices:

- (a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

⁵¹ Mallika Ramachandran, *Comparative Study: Law on Abuse of Dominant Position* (New Delhi: GGS1 University Press, 2006). 23

⁵² Section 16 (1)CCPA

- (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts;
- (e) denying any person access to an essential facility;
- (f) charging an excessive price to the detriment of consumers; or
- (g) selling goods below their marginal or variable cost.⁵³

From the wording of the prohibition, and the above list of practices that would amount to abuse of dominance, it is apparent that the CCPA clearly envisages that a dominant enterprise would be abusing such dominance if it was being *exploitative* or *anti-competitive*. As was stated by the Court in the case of *Michelin v Commission*⁵⁴, a dominant firm “has a special responsibility not to allow its conduct to impair undistorted competition on the common market”.⁵⁵ This is clearly the kind of backdrop against which the CCPA regards dominant firms as its overall objective is to “safeguard and promote competition” and to “protect consumers against unfair trade

⁵³ Section 16 (2) CCPA

⁵⁴ *Michelin v Commission* [1983] ECR 3461

⁵⁵ *Michelin v Commission* [1983] ECR 3461

practices.”⁵⁶ Any exploitative or anti-competitive action taken by a dominant firm is therefore likely to amount to an abuse of its position.

3.2.1 Exploitative Practices

Exploitative practices are simply those practices that by virtue of its dominant position, a firm carries out in order to exploit its consumers. From the examples of abuse given by the CCPA, these would obviously include excessive product pricing, denying access to certain facilities, and imposing unfair purchase or selling prices. This however is not at all exhaustive as in its colloquial or literal sense exploitation suggests the earning of monopoly profits at the expense of the customer.⁵⁷

With the quasi-monopolistic position that a dominant firm acquires, comes the freedom from the need to innovate and improve in order to keep ahead of competitors. This freedom is capable of developing into inefficiency which in itself can also be regarded as a form of exploitation.⁵⁸

3.2.2 Anti-competitive Practices

Anti-competitive practices are practices considered to have a negative effect on wholesome competition. These practices fall into a much broader category and some of them seem to overlap with exploitative practices. An action can therefore be both exploitative to the consumer, and at the same time distort the competitive forces in the market.⁵⁹

⁵⁶ Preamble of the CCPA

⁵⁷ Whish, *Competition Law*. 305

⁵⁸ Whish, *Competition Law*. 305

⁵⁹ Whish, *Competition Law*. 306

For instance, excessive pricing and price discrimination while being exploitative can also be anti-competitive. Excessive pricing, where it is used as a tool to obstruct matching importing to limit intra-brand competition, is to such an extent anti-competitive. Price discrimination on the other hand has a more overt element of anti-competitiveness as it places one trading party at a competitive advantage over the others.⁶⁰

Other anti-competitive practices would include the use of export or import bans or restrictions as these would limit intra-brand competition. For instance in the case of *BL v Commission*⁶¹, the Court held that BL's pricing policy in respect of a certain kind of approval certificate had the effect of reducing imports of BL cars from the continent into the United Kingdom, and was therefore anti-competitive.

Refusal to supply is also considered an anti-competitive practice and though not expressly included in the examples of abusive practices under the CCPA, it would nonetheless be captured. In the case of *Commercial Solvents v Commission*⁶², the Court upheld a decision that Commercial Solvents, which was dominant in the market for nitropropane, had abused its dominance by refusing to supply it to a company called Zoja.

The prohibition of abuse of dominant position considered in its colloquial sense as well as its intended purpose would also prohibit mergers that would have the effect of restraining competition.⁶³ It would in a sense be futile to prevent activities or agreements by dominant firms that distort competition but then go on to allow mergers which would result in the elimination of

⁶⁰ Goyder, *EEC Competition Law*. 318

⁶¹ *BL v Commission* [1987]1 CMLR 185

⁶² *Commercial Solvents v Commission* [1974]ECR 223

⁶³ Section 61 of the CCPA

competition.⁶⁴ Mergers are therefore central to the prevention of abuse of market dominance as there regulation is a pre-emptive rather than a remedial measure.

It is pertinent to reiterate that the examples of abuse of dominance listed in the CCPA are far from being exhaustive. The scope of abuse is much broader than these examples and the ultimate test should be the effect that an activity of a dominant firm has, not only on consumers, but also on the competitive forces prevailing in the relevant market.

Various actions not particularly defined as abuse in competition legislation have nonetheless been held to be so. In the case of *Decca Navigation System*⁶⁵ for instance, the Commission held that it was an abuse for a dominant firm to enter into an agreement with an actual or potential competitor with the intention of sharing markets or stifling the efforts of other competitors.

3.3 Regulating Dominant Firms

In Zambia, the CCPC is the body that is primarily charged with the implementation of the provisions of the CCPA. Therefore, it is the central agent through which the regulation of dominant firms is carried out with a view to averting abusive practices. In light of this, the CCPA endows the CCPC with several powers and functions that are to be exercised in furtherance of the attainment of wholesome competition and consumer protection.

⁶⁴ Whish, *Competition Law*.306

⁶⁵ *Decca Navigation System* OJ [1989] L 43/27

3.3.1 Functions and Powers of the CCPC

As per section 5 of the CCPA, the functions of the CCPC are to review market operations in Zambia and their conditions of competition. It is also charged with the task of reviewing the trade practices that are pursued by enterprises that carry on business in Zambia.

The CCPC is also mandated to investigate and assess restrictive agreements, and of particular concern to this paper, the abuse of dominant positions. It is required to carry out investigations concerning the potential effect of certain mergers on the competitive forces.⁶⁶ It is through this process of investigation that the CCPC actually obtains information enabling it to make decisions that act as a control for dominant firms, ensuring that they do not abuse their position. Such investigations similarly target firms already alleged to be abusing their dominant position by determining the authenticity of such allegations.

The CCPC is tasked with investigating unfair trade practices and unfair contractual terms that might be carried out or imposed by enterprises, including dominant firms. It is also given the power to impose sanctions in this regard where necessary.⁶⁷ It is through this function of investigation, that the CCPC mostly exercises its regulatory powers, as will be demonstrated later in this chapter.

Furthermore, the CCPC has other functions ancillary to its position as primary enforcer of the provisions of the CCPC. It is for instance required to undertake and publish studies on the effectiveness of competition in various sectors of the Zambian economy and on other matters

⁶⁶ Section 5 (c) of CCPA

⁶⁷ Section 5 (d) of CCPA



that might be of concern to consumers. In this regard, it is to act as the primary advocate for fair competition and effective consumer protection.⁶⁸

Additionally, the CCPC is expected to advise the Zambian government on the laws affecting competition and consumer protection.⁶⁹ Through this function, the CCPC is seen to perform the crucial role of ensuring that legislation passed is in conformity with the principles of fair competition and consumer protection. This means that the CCPC is capable of indirectly regulating market dominance by making certain that legislation governing statutory monopolies allows them to exercise their power in a manner that does not amount to an abuse of their dominant position.

Through its role of providing information for the guidance of consumers regarding their rights under the CCPA, the CCPC sensitises the consumers, ensuring that they are well-informed of what amounts to abuse of dominance by firms.⁷⁰ This serves to rein in potentially abusive firms that are made wary of their practices since consumers become more astute as to their rights under the CCPA, and the obligations owed to them by enterprises.

3.3.2 Investigations by the CCPC

The investigations carried out by the CCPC as mentioned earlier, form the cornerstone of its regulatory role. The CCPC can undertake an investigation at its own initiative, or in response to a

⁶⁸ Section 5 (e) and (f) of CCPA

⁶⁹ Section 5 (g) of CCPA

⁷⁰ Section 5 (h) of CCPA

complaint made, if it has reasonable grounds to believe that the provisions of the CCPA are being, or a likely to be contravened.⁷¹

To commence the investigation, the CCPC is required to issue a notice of the investigation to the enterprise that is subject to investigation, specifying the subject matter as well as the purpose of the investigation.⁷² It may then, require the enterprise to furnish any information pertaining to any matter related to the investigation, that the CCPC deems relevant.⁷³

The CCPC uses an array of tools to carry out its investigations which include interviews with concerned parties and reviews of relevant documents and reports from its' appointed inspectors.⁷⁴ These inspectors are given the mandate to search the premises of any enterprise under investigation for any documents and other materials relevant to the investigation.⁷⁵

The CCPA ensures that every complaint that warrants an investigation is given the consideration it deserves by stipulating that where the CCPC determines that a complaint lacks merit, it should inform the party making such a request of its decision not to investigate and outline its reasons for coming to such a decision.⁷⁶ This acts as a control for the CCPC by making certain that it does not push aside complaints of abusive practices without critically assessing their veracity.

At any time during or after the investigation, the CCPC is allowed to enter into a consent agreement with any dominant firm under investigation. This means that the CCPC, subject to confirmation by the Competition and Consumer Protection Tribunal (the "CCPT") can strike a

⁷¹ Section 55 (1) CCPA

⁷² Section 55 (3) CCPA

⁷³ Section 55 (4) CCPA

⁷⁴ Section 55 CCPA

⁷⁵ Section 7 CCPA

⁷⁶ Section 56 CCPA

compromise with the firm under investigation by allowing it to refrain from taking any further actions that are the subject of the investigation.⁷⁷ This is the ultimate manifestation of regulation as it demonstrates the CCPC's ability to direct the activities of the erring firm without issuing an express order to that effect.

Notwithstanding the ability to enter into a consent agreement, the CCPC, following an investigation that reveals that a dominant enterprise is guilty of conduct that has the effect of preventing, restricting or distorting competition, or is exploitative of this position may take steps to "remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or remedy, mitigate or prevent any detrimental effects on users and consumers so far as they have resulted from , or are likely to result from the adverse effects on, or the absence of, competition."⁷⁸

These powers to direct the faulting dominant firm vest in the CCPC, an ability to ensure that following an investigation, the adverse effects of the conduct of an abusive firm are reversed. They do also pre-emptively thwart any potential adverse effects where a dominant firm is found to be in a position likely to have distorted competition.

With respect to mergers that are likely to create a position of such dominance resulting in competition in the relevant market being substantially lessened, the CCPC has the power to direct that such a merger not be completed.⁷⁹ However, if it is to be completed, this is to be

⁷⁷ Section 57 CCPA

⁷⁸ Section 59 (b) CCPA

⁷⁹ Section 61 of CCPA

carried out in accordance with certain conditions that the CCPC considers would eliminate or lessen the adverse effects on competition.⁸⁰

3.4 Conclusion

In conclusion, this chapter has considered what amounts to abuse of dominant position under the CCPA. It has further demonstrated the regulatory role played by the CCPC in ensuring that dominant firms act in accordance with the spirit of the CCPA, that is the safeguarding and promotion of competition, and the protection of consumers against unfair trade practices. It has also highlighted the role of the CCPC in assessing mergers to ensure that they do not result in dominant positions that hinder fair competition.

The next chapter will provide an in-depth case study of how the CCPC acts with regard to allegations or complaints of abuse of market dominance. It will also consider how the CCPC deals with mergers that potentially distort competition due to the dominant positions they create. Additionally, it will critically evaluate the effectiveness of the regulation of market dominance in Zambia, using the United Kingdom as a benchmark.

⁸⁰ Section 61 of CCPA

CHAPTER FOUR

ANALYSIS OF THE REGULATION OF MARKET DOMINANCE IN ZAMBIA

4.1 Introduction

Having given an outline of the framework under which the CCPA operates in its bid to regulate market dominance and avert its abuse, this chapter shall now analyse the actual regulatory mechanism. In order to attain this, the chapter shall begin by giving two ‘in-depth’ studies on market dominance: one on an allegedly abusive enterprise, and another on a potentially ‘dominant position inducing’ merger. The chapter shall then go on to consider some of the administrative challenges faced by the CCPC in its regulation of dominant enterprises. Finally, the chapter shall compare the regulation of market dominance in Zambia, with that of the UK.

4.2 Case Studies on the Regulation

The first of the two cases under consideration has to do with an investigation by the CCPC into the conduct of an allegedly abusive dominant firm.⁸¹ On 2 June, 2011, the CCPC received a complaint from Chongwe camp against the Royal Zambezi Lodge (“Royal Zambezi”), which owned an airstrip. It was the complainant’s allegation that this airstrip was critical to the survival of the tourism business in the region and that by its introduction of a charge of US\$2000 per bed per year for competitors to use the airstrip, Royal Zambezi had abused its dominance.

The CCPC commenced investigations on 3 June, 2011, in accordance with sections 8, 16 and 55 of the CCPA in order to establish the facts surrounding the allegations levelled against Royal

⁸¹ Report of the Technical Committee of the Board of Commissioners on the Allegations of Abuse of Dominance against Royal Zambezi Lodge (Case File No. CCPC/RBP/014).

Zambezi. Furthermore, pursuant to the provisions of section 62 of the CCPA, the CCPC wrote a letter to Royal Zambezi on the same date, directing it not to proceed with implementing the proposed US\$2000 fee.⁸²

The crucial points for the consideration of the CCPC in relation to abuse of dominance were with respect to the alleged unfair trading, contrary to section 16 (2)(a) of the CCPA; and restriction of an essential facility, contrary to section 16 (2)(e) of the CCPA. Ergo, in order to assess the facts more astutely, the CCPC flew two of its officers to the Chiawa Game Management Area (“GMA”) with a view to establishing the facts surrounding the allegation.⁸³

From the research carried out by the CCPC, it was found that the relevant market, for the purposes of the inquiry was the airstrip in the Chiawa GMA. The market share percentages, could not however be established as the statistics were not available. Notwithstanding the absence of these statistics, the CCPC took note of the fact that there were only two airstrips in the area, namely, the Royal Zambezi airstrip, and the Kayila airstrip. The CCPC therefore inferred from this fact that the market was duopolistic dominated by Royal Zambezi and Kayila.⁸⁴

The CCPC further considered the issue of barriers to entry in its determination of Royal Zambezi’s market dominance. It was the CCPC’s finding that in order to enter the market of airstrips, several structural and regulatory constraints existed. For instance, several licensing procedures were required by the Department of Civil Aviation and the Environmental Council of Zambia (now the Zambia Environmental Management Agency). Furthermore, by policy, airstrips

⁸² Report of the Technical Committee of the Board of Commissioners.

⁸³ Report of the Technical Committee of the Board of Commissioners.

⁸⁴ Report of the Technical Committee of the Board of Commissioners.

were required to have a distance of no less than 3 km from one another. It was therefore the CCPC's view that Chongwe camp, being less than 3 km from Royal Zambezi, could not be reasonably expected to build its own airstrip.⁸⁵

Additionally, from its investigations, it was the conclusion of the CCPC that the Royal Zambezi airstrip had earned a brand reputation to international travellers travelling to the Chiawa GMA because it was the first of its kind and therefore travellers were prone to make their travelling decisions with this fact in mind. In light of the foregoing considerations, it was the conclusion of the CCPC, that there were barriers to entry into the airstrip market.⁸⁶

The next factor for consideration by the CCPC was that of countervailing power. The CCPC considered the fact that a firm would be in clearer position to exert high prices in a situation where buyers did not offer substantial countervailing power in terms of their options to acquire substitutes. The CCPC found that the buyers (consumers) did not exert effective countervailing power and Royal Zambezi would be more likely to charge inordinately high prices.⁸⁷

Based on its factual and market considerations, the CCPC found that Royal Zambezi was a dominant firm and its actions had the effect of substantially lessening competition in the market of airstrips. This accordingly amounted to an abuse of Royal Zambezi's dominant position. The CCPC further observed that the proposed conduct of Royal Zambezi amounted to imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions

⁸⁵ Report of the Technical Committee of the Board of Commissioners.

⁸⁶ Report of the Technical Committee of the Board of Commissioners.

⁸⁷ Report of the Technical Committee of the Board of Commissioners.

especially considering the fact that the proposed increment had coincided with the peak period of tourism.⁸⁸

Furthermore, it was the finding of the CCPC that the Royal Zambezi airstrip amounted to an essential facility and was critical to the operations of the other lodges in the area. The proposed action by Royal Zambezi was therefore construed by the CCPC as having been calculated to deny its competitors access to this essential facility, and therefore, abusive of a dominant position.⁸⁹

In light of its findings, the CCPC, on 28 June, 2011, invited the complainants and the representatives of Royal Zambezi to its offices. This was with a view to achieving an amicable settlement; one that addressed Royal Zambezi's claim for maintenance contributions, while insuring the prevalence of sound competition.⁹⁰ The CCPC recommended that the complainants pay for use of the Royal Zambezi airstrip on a pro rata basis, and it was agreed that a fee of US\$25 per passenger per landing would be a reasonable fee.⁹¹

The second case under consideration in this chapter demonstrates how the CCPC regulates market dominance by reviewing the potential effect of mergers.⁹² The CCPC received an application for approval of a merger (the "Transaction") involving Continental Outdoor Media Zambia Limited ("Continental") and Impact Media Limited ("Impact").⁹³ The nature of the

⁸⁸ Report of the Technical Committee of the Board of Commissioners.

⁸⁹ Report of the Technical Committee of the Board of Commissioners.

⁹⁰ Pursuant to its powers of entering into consent agreements in section 57 of the CCPA.

⁹¹ Report of the Technical Committee of the Board of Commissioners.

⁹² Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052

⁹³ Pursuant to section 25 and 26 of the CCPA.

transaction involved Continental offering to purchase advertising equipment, site leases, and advertising contracts belonging to Impact.⁹⁴

The relevant points of investigation identified by the CCPA included the question of whether the Transaction had the potential effect of: preventing, restricting, distorting or substantially lessening competition in the relevant market.⁹⁵ Additionally, it had to be established whether or not the Transaction, through abuse or acquisition of a dominant position of market power, was likely to limit access to the market or otherwise unduly restrain competition. The cardinal concern was whether it was likely to have adverse effect on trade or the general economy.⁹⁶

To commence its analysis, the CCPC had to identify the relevant geographical and product market under consideration. It took into account phenomena such as consumer preferences, product substitutability, and the general nature of advertising. It was the conclusion of the CCPC that the relevant product market was that of outdoor advertising, which was a peculiar form of advertising from others. The geographical market was identified as existing in most areas of high economic activity. Therefore, there was a Lusaka province market, Copper-belt province market, and a Southern province market; all of which had to be considered.⁹⁷

The next point of consideration for the CCPC was a determination of the market concentration and market share. The Organisation for Economic Cooperation and Development (“OECD”) defines concentration as a reference to the extent to which a small number of firms or enterprises

⁹⁴ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052

⁹⁵ Section 30 (1) of CCPA

⁹⁶ Section 30 (2) (h) of CCPA

⁹⁷ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 5

account for a large proportion of economic activity such as total sales or assets.⁹⁸ The CCPC adopted this OECD definition but was limited in its analysis as there was no database of market shares for market players in the relevant markets. However, the CCPC conducted a market inquiry in five selected districts from the identified geographical markets, and made use of information submitted by the local authorities to determine the market shares as well as market concentrations.⁹⁹

Using revenues generated by local authorities from each outdoor advertising firm from billboard rentals, the CCPC established a proxy of their respective market shares in the relevant market. This was owing to the fact that the CCPC found that there was not any readily available revenue data for the respective outdoor advertising companies.¹⁰⁰

The CCPC established that the Lusaka relevant market was not concentrated because its calculated concentration ratio for the top three outdoor advertising companies was below the required 60% for it to be deemed concentrated. Furthermore, it noted that the Lusaka relevant market was very competitive due to the presence of more than forty (40) outdoor advertising companies. However, the CCPC concluded that all the relevant markets outside Lusaka were concentrated.¹⁰¹

The next point of consideration in relation to the relevant market was that of barriers to entry. The CCPC's review of the industry revealed that the limited availability of 'prime sites' for outdoor advertising was the biggest barrier to entry in the relevant markets. It was further

⁹⁸ Glossary of Industrial Organisation Economics and Competition Law (Organisation for Economic Cooperation and Development). 23

⁹⁹ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p.6

¹⁰⁰ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p.6

¹⁰¹ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 7

observed that these limited prime sites were mainly located in the central business districts and along the major roads and once they were occupied, no further entry in the relevant markets was possible.¹⁰² Additionally, the local authorities regulating these relevant markets were making significant moves to decongest the prime sites and this constituted a formidable barrier to market entry. The conclusion of the CCPC on this point was therefore that the relevant markets had high barriers to entry.¹⁰³

The next consideration by the CCPC is of particular relevance to this paper as it addressed the issue of creation of a dominant position by virtue of the Transaction, and the likelihood of abuse. The CCPC had to determine whether the Transaction would create a dominant position according to the definition in section 15 of the CCPA.

The CCPC's assessment of the Transaction revealed that it would result into Continental becoming dominant in all the relevant markets. It observed that if the Transaction were to be implemented, Continental would have estimated market shares in the respective relevant markets in the following percentages: Lusaka (32.4%), Kitwe (42.5%) and Ndola (33%).¹⁰⁴ These estimates indicated that the resulting 'merged entity' would meet the required threshold of 30% or more with regards the supply of structures in the relevant markets.¹⁰⁵

It was further observed that Impact was a vigorous competitor to Continental as it offered a competitive price of advertising per square metre, and it had a wide coverage that almost matched that of Continental. Therefore, the Transaction would eliminate the vigorous

¹⁰² Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 7

¹⁰³ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 7

¹⁰⁴ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 8

¹⁰⁵ Section 15 (a) of CCPA.

competition between the two firms, leading to potential abuse of dominance.¹⁰⁶ In addition, because the merging parties had secured prime sites in most relevant markets and faced minimal competition, the CCPC considered that the Transaction would increase their supply power and potential for abuse. Additionally, it was the determination of the CCPC that the lack of a wider base of suppliers of the services supplied by the merging parties in the relevant markets outside Lusaka would further reduce the choice of the suppliers for the consumers if the parties merged.¹⁰⁷

Based on the foregoing, the CCPC denied its authorisation of the Transaction with respect to the Copper-belt and Southern Province geographical markets as that was where the markets were seen to be mostly concentrated. The transaction would therefore have resulted in a substantial lessening of competition, and a creation of a dominant firm, likely to abuse that dominance.¹⁰⁸ However, the application was granted for the Lusaka market as the CCPC concluded that there were a substantial number of competitors and the Transaction would not have the calamitous effects as would be experienced in the other relevant markets.¹⁰⁹

4.3 Commentary on the operations of the CCPC

The above discussed cases show that the CCPC adheres to the principles of market investigation highlighted in chapter 2 of this essay. Furthermore, the procedure taken in carrying out investigations concerning alleged abuse of market dominance and mergers resulting in a dominant position appears to be in strict conformity with the provisions of the CCPA. However, the operations of the CCPC must now be analysed from a factual and administrative perspective.

¹⁰⁶ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 9

¹⁰⁷ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 9

¹⁰⁸ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 10

¹⁰⁹ Continental Outdoor Media Zambia Limited and Impact Media Limited Case No. CCPC/MER/052 at p. 10

From the discussed cases, it is apparent that one outstanding constraint stifles the operations of the CCPC; this is the lack of comprehensive statistical resources. The CCPC, in its regulation of market dominance, is expected to rely heavily on statistical information on factors such as market share, pricing tendencies, supply and demand projections, and substitutability phenomena.¹¹⁰ In order to aptly define the relevant product and geographical markets for the sake of establishing market dominance, such information is of paramount importance.

These cases however, were decided mostly in the absence of such information and this largely affects their accuracy. The decisions in the *Royal Zambezi* and *Continental* cases which were made mostly with mere inferences to such crucial information and as such, the quality of the decisions bears significant doubt.

It would be highly beneficial if the CCPC could combine its efforts with the Central Statistical Office (“CSO”) in order to develop a database that catalogues the various markets of the key industries in Zambia. Such a database would require considerable resources, but its contribution to more refined CCPC decisions in the future would be invaluable.

The government would have to be a key contributor to such a development through an increased budgetary allocation to both CSO and the CCPC. Furthermore, efforts could be coupled with the Patents and Company Registration Agency (“PACRA”) to ensure that already registered and future business enterprises are included in the database and are closely regulated. In order to ensure that the database, once implemented, is effectively maintained, a nominal fee of every registered enterprise could also be implemented by PACRA.

¹¹⁰ Interview with Kondwani Kaonga, Researcher, CCPC, carried out on 15 June, 2013.

Another evident flaw in the operations of the CCPC is the lack of exposure of the general public, not only to competition law, but also to their rights as consumers under the CCPA. A random study engaged in with 20 enterprises in Lusaka, yielded a number of only 3 that knew of the CCPC and what it seeks to achieve.¹¹¹ In terms of individual complaints, the CCPC records an average of slightly over 50 complaints per week in its Lusaka office.¹¹² This reflects a general lack of interest or awareness of competition law in the average Zambian. This is amplified by the fact that the CCPC has existed for almost 20 years from the time it was established as the ZCC in 1994 and later renamed the CCPC in 2010.

The CCPC could therefore do more to ensure that individual consumers and business enterprises are made more informed of its functions and the rights protected under the CCPA. Various modes of advertising, workshops, seminars, and outreach programmes could be initiated to pioneer such exposure. The government is again seen as being central to such a programme through its allocation of funding.

The CCPC being a statutory body draws all its funding from the government and is largely constrained not only in terms of the implementation of such proposed plans, but also in its allocation of human resource to tend to its routine investigations.¹¹³ This dependence on government and the insistence on parliamentary approval before most of the CCPC's programmes or reports are released, tends to draw away from the autonomy that should be given to the CCPC by virtue of its crucial role.

¹¹¹ Random Sample Survey carried out in the Town centre of Lusaka between 10 and 14 June, 2013.

¹¹² Complaints Desk, CCPC, Lusaka Office, as of 24 June 2013.

¹¹³ Interview with Kondwani Kaonga, Researcher, CCPC, conducted on 19 June, 2013.

4.4 Comparative study on Abuse of Dominance

To gain a broader perspective on the law against the abuse of market dominance, which is the ultimate goal of regulation, it would be shrewd to gain insight into the competition laws of other jurisdictions. Particularly, the jurisdiction of the UK would be a good reference for Zambia owing to the similarities in the two jurisdictions' legal systems.

In the UK, the EC Treaty¹¹⁴ and the Competition Act of 1998 (the "UK Act") both prohibit, in certain circumstances, conduct by one or more undertakings which amounts to an abuse of dominant position. The prohibitions are set out in Article 82 of the EC Treaty ("Article 82") and section 18(1) of the Act (the "Chapter II prohibition"). According to EC Regulation 1/2003, designated National Competition Authorities of the Member States and the various courts of the Member States are required to apply and enforce Article 82 as well as their respective national competition laws when considering an abuse of dominance.¹¹⁵

The equivalent of the CCPC in the UK is the Office of Fair Trading ("OFT") and it is empowered to apply two substantive provisions which prohibit conduct by one or more dominant undertakings which might amount to abusive behaviour, these are Article 82 and the Chapter II prohibition. Article 82 provides that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States." The Chapter II prohibition which is based on Article 82 provides that "...any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom."

¹¹⁴ The Treaty establishing the European Community

¹¹⁵ Office of Fair Trading, "*Abuse of Dominant position: Understanding Competition Law*" (2004). 2

The above provisions prohibit a dominant ‘undertaking’ from carrying out abusive actions. The term ‘undertaking’ though not defined in the EC Treaty or the UK Act, has been set out in Community law as covering any natural or legal person engaged in economic activity. Therefore it would apply to companies, partnerships, firms, businesses, and individuals operating as sole traders.¹¹⁶

This is in contrast to section 16 of the CCPA which only prohibits an ‘enterprise’ from abusive conduct. An enterprise is defined under the CCPA as “a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities....” This definition in the CCPA can therefore be said to be lacking as it could easily exclude individuals running a sole trader business as they are natural and not juridical persons. Furthermore, given the lack of significant jurisprudence in Zambia, no strong reference exists to broaden the scope of what exactly amounts to an ‘enterprise’.

Like the CCPA, the tests applied under Article 82 and the Chapter II prohibition has two common elements: whether an undertaking is *dominant* in a *relevant market*; and, if so, whether it is *abusing* that dominant position. Therefore, the OFT, like the CCPC, would only find an undertaking's behaviour abusive after a detailed examination of the market concerned and the effects of the undertaking's conduct.¹¹⁷ Furthermore, the Chapter II prohibition and Article 82, like the CCPA, give an almost identical non-exhaustive list of what exactly would amount to abusive behaviour.¹¹⁸

¹¹⁶ Office of Fair Trading, “*Abuse of Dominant position: Understanding Competition Law*”. 3

¹¹⁷ Office of Fair Trading, “*Abuse of Dominant position: Understanding Competition Law*”. 3

¹¹⁸ Section 18 (2) of the UK Competition Act.

As regards consequences for infringement of the provisions against abuse of dominance, the OFT, like the CCPC¹¹⁹, is mandated with the power to enforce financial penalties and/or directives on the abusive firm. The OFT imposes the same fine as the CCPC of not more than 10 per cent of the abusive undertaking's turnover.¹²⁰

The UK Act however, unlike the CCPA, in order to avoid the prohibition regime being overbearing on small businesses, provides limited immunity from financial penalties for 'conduct of minor significance' in relation to infringements of the Chapter II prohibition.¹²¹ Conduct is considered to be of minor significance if the annual turnover of the undertaking is not in excess of £50 million.¹²² Undertakings are only entitled to benefit from immunity from financial penalties for infringement of the Chapter II prohibition where the OFT is satisfied that they acted on the reasonable assumption that on the facts, they qualified for the limited immunity for conduct of minor significance.¹²³

This provision of limited immunity may not settle well in the CCPA as most enterprises in Zambia hardly ever exceed the £50 million threshold, that is to say, most enterprises are relatively small. Ergo, such a provision would more or less be rendered redundant.

The competition laws of the UK allow for third parties who are adversely affected by conduct which they believe to be abusive to (in addition to or instead of making a complaint to the OFT) take action in the courts to stop the behaviour and/or to seek damages.¹²⁴ This perhaps is one

¹¹⁹ Section 16 (3) of the CCPA.

¹²⁰ Section 36 of the UK Competition Act.

¹²¹ Section 40 of the UK Competition Act.

¹²² The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

¹²³ Office of Fair Trading, "*Abuse of Dominant position: Understanding Competition Law*". 7

¹²⁴ Office of Fair Trading, "*Abuse of Dominant position: Understanding Competition Law*". 7

provision that Zambian competition laws would do well to adopt. The prospect of a complainant receiving compensatory damages for abusive dominant behaviour would serve as an effective check on the market tendencies of dominant firms. However, the current state that only allows for redress through the strict investigation procedures of the CCPC has the potential effect of making dominant firms lax in their attempts at sound market practices.

Another notable feature of the UK Act is that unlike the CCPA, it provides certain exclusions to the Chapter II provisions.¹²⁵ These exclusions are with respect to certain types of mergers, market concentrations, and other admitted ‘general exclusions’.¹²⁶ Furthermore, the Secretary of State is given the power to add any other exceptions as seen fit, or to amend the Schedule of exclusions.¹²⁷

The rationale behind these exclusions is that certain kinds of conduct that would normally be deemed abusive might be relevant for the expansion and creation of other markets. Certain mergers and transactions are thus classified as being beneficial (in the long-run to effective competition) and therefore not prohibited. Furthermore, in some instances, a particular kind of conduct, normally amounting to an abuse may be necessary for the purposes of complying with some legal requirement.¹²⁸

The CCPA, could also benefit from the addition of certain exclusions to the general prohibition in instances where certain behaviours are already captured by some other form of regulatory mechanism. For instance, a dominant firm may decide to withhold supply of a particular product or service in accordance with some domestic or international legal requirement. The CCPA, as it

¹²⁵ Section 19 of the UK Competition Act

¹²⁶ Detailed in Schedules 1 and 3 of the UK Competition Act

¹²⁷ Section 19 (2) of the UK Competition Act

¹²⁸ Office of Fair Trading, “*Abuse of Dominant position: Understanding Competition Law*”. 5

is, with no form of exception to the general rule against abusive conduct, would not permit such an instance and the hypothetical firm in question would be susceptible to sanctions for abusive conduct.

4.5 Conclusion

In conclusion, this chapter has considered detailed examples of how the CCPC carries out its regulation of market dominance from its consideration of the two recorded cases. The chapter has also given a commentary on the operations of the CCPC as a body, highlighting the various challenges it faces. Furthermore, a comparative study with the law against abuse of market dominance in the UK has been deliberated and a few salient points that could be used to improve the regulation of market dominance in Zambia have been highlighted.

The next chapter shall give general recommendations on the entire scope of the regulation of market dominance in Zambia, and outline a few legally profound conclusions on this crucial aspect of competition law.

CHAPTER FIVE

GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 General Conclusion

This essay has demonstrated the importance of competition laws in a free-market economy such as that of Zambia. It has established the indelible correlation between competitive markets and social-economic development. Clearly, at the core of every free-market economy is the need to ensure that sound market practices are carried on by all players in the economy, ensuring vibrant growth, equal opportunity for all, and exemplary consumer protection.

The paper has identified the need for the regulation of market dominance as one of the key areas of concern for competition law. Without its regulation, market dominance could potentially lead to abuse which heralds unsavoury market practices, anti-competitive behaviour, and consumer exploitation. These are all potentially disastrous phenomena not only to a mature economy, but more so to a growing one, like the Zambian economy. Such an economy requires the utmost level of sound competition to be able to compete on an international platform.

The essay, before considering its regulation in Zambia, has discussed the concept of market dominance itself. It has considered a few international definitions of market dominance so as to get a more rounded idea of the phenomenon, before providing the CCPA definition. Furthermore, the paper has appreciated that in order to discuss the regulation of market dominance, it is cardinal to know precisely how such dominance is determined so as to avert arbitrary inferences of a dominant position. In light of this, the paper has identified and discussed the three major principles of concern when determining market dominance, which are: the

‘relevant market’, the ‘geographical market’ and ‘market power’. It has further demonstrated how these principles are utilised both by the CCPA and the CCPC, when determining whether or not an enterprise is dominant in a particular Zambian market.

Having established the significance of market dominance and acknowledging that a dominant position in itself is not of primary concern to competition laws, the paper turned its attention to the purpose of regulation, which is to prevent abuse. The first point that the paper has made with respect to the abuse of market dominance is that ‘abuse’ depends on the definition advanced by the relevant jurisdiction. As such, internationally, ‘abuse of dominance’, might tend to vary in certain respects.

However, the essay has concluded that in order for an enterprise to be deemed abusive, it will normally exhibit *exploitative* or *anti-competitive* behaviour. Section 16 of the CCPA in its prohibition against abuse of dominant position clearly factors in exploitative or anti-competitive behaviour as is evident from its non-exhaustive list of practices that are considered abusive. The preamble of the CCPA is further illustrative of this point as it clearly establishes that its overall objective is not only to “safeguard and promote competition”, but also to “protect consumers against unfair trade practices.”¹²⁹

The paper has also discussed the role of the CCPC, the central agent for the implementation of the provisions of the CCPA, in the regulation of market dominance. It has highlighted the functions of the CCPC, and also the manner in which the CCPC conducts its investigations, pursuant to the provisions of the CCPA.

¹²⁹ Preamble of the CCPA

Finally, using two documented cases, the paper has provided an actual ‘hands on’ documentation of how the CCPC regulates market dominance in Zambia. It has provided a commentary on this regulation and has also laid out a comparative analysis of the regulation of market dominance in Zambia, with that of the UK.

5.2 Recommendations

This paper, based on its reviewed content, has identified a few areas of the regulatory mechanism for market dominance in Zambia that could be improved in order to achieve more effective and wholesome regulation.

5.2.1 The CCPA

The CCPA which is the primary source of regulation of market dominance has to be wholesomely structured to aptly capture all the relevant issues. As was highlighted in the preceding chapter, simple provisions such as the definition of an ‘enterprise’ could have the effect of allowing sole traders to ‘slip through the cracks’ of regulation. This paper therefore recommends that the definition of an ‘enterprise’ in the CCPA must be amended to include natural persons, thereby averting such a risk of narrow interpretation.

Additionally, as regards the procedure for the determination of whether or not an enterprise is dominant in a relevant market¹³⁰, the CCPA should be more precise in how this is to be achieved. It currently merely states that the Minister may, acting on the advice of the CCPC, prescribe a procedure. This paper recognises that the determination of dominance is central to its regulation and the CCPA must therefore provide for a broader and more robust mechanism for its determination.

¹³⁰ Section 17 of the CCPA

Furthermore, it is this paper's recommendation that the CCPA include a few exemptions to the prohibition of abuse of market dominance. This should be in relation for instance to mergers that could in the long run be beneficial to the general well-being of the economy. Arbitrarily prohibiting mergers because they apparently pose a short term distortion in competition could lead to 'missing out' on the broader picture. An analysis of certain mergers, if yielding positive long term benefits, could therefore benefit from an exception to abuse of dominance provisions, being placed in the CCPA.

Another useful inclusion in the CCPA would be a provision that allows a person or entity that adversely suffers the effects of abuse of dominance, to bring an action for damages against the guilty undertaking. As already highlighted in the preceding chapter, such a provision would heighten the level of vigilance on abusive firms, and would also ensure that dominant firms do their best to adhere to sound market practices.

Additionally, Parliament could also consider domesticating the Common Market for Eastern and Southern Africa ("COMESA") Competition Regulations of 2004 (the "COMESA Regulations"), to supplement the CCPA. This is in recognition of the fact that competition and dominance issues traverse national boundaries, therefore, the CCPA might be inadequate as a regulatory framework for international cases. The domestication of the COMESA Regulations could therefore aid the CCPA by ensuring that the regulation of market dominance is not constrained by jurisdictional and territorial limitations.

5.2.2 The CCPC

The CCPC being the core agent for the carriage of competition law and the regulation of market dominance, has to be operating at optimum efficiency and should be poised to utilise a vast broad of resources to enable it fulfil its functions.

Awareness

It was the determination of this paper that competition law in Zambia has little awareness amongst the stakeholders. It is therefore recommended that the CCPC bolsters its efforts to ensure that the provisions against abuse of market dominance are disseminated to the concerned entities. Aggressive advertising, workshops, seminars, and outreach programmes could be used to generate interest in such issues, thus aiding the CCPC's investigatory work. It would be redundant to have exceptionally good provisions in the CCPA regarding the regulation of market dominance, and have no way of bridging the gap between those provisions, and the entities they are designed for. Awareness programmes by the CCPC are therefore cardinal to effective regulation.

Investigations

It is only through thorough investigations, that the CCPC can be capable of making informed decisions concerning issues of existing or potential abuse of market dominance. This paper therefore recognises that the CCPC's power to investigate as provided under Part VIII of the CCPA is at the crux of its operations.

It is the recommendation of the paper that in order for the CCPC to generate accurate results from relevant market inquiries, it would do well to combine efforts with the CSO, PACRA, and

the Zambia Revenue Authority (“ZRA”). The CSO being vested with the ‘know how’ of statistical and database management, could develop a database system for the CCPC that allows it to obtain accurate representations of market share, sales data, and revenues.

PACRA, being at the helm of enterprise registration could serve as a useful tool for the CSO and CCPC by providing the necessary data on all registered business entities. Furthermore, it could provide a useful resource centre for the management of the CSO engineered database by ensuring that all registered entities pay a nominal fee for inclusion into the database. ZRA on the other hand, would be instrumental to such a movement by providing information on the annual returns of relevant entities which would serve as vital data for formulating market statistics.

Such a well-coordinated and engineered reference system would aid the CCPC in carrying out its market analysis by providing information of a refined nature. Inquiries into the existence of a ‘dominant’ position would therefore be more accurate and less time consuming.

Resources

Sound market practices lead to social and economic development, which in turn leads to political stability. The government should therefore be extremely concerned with the fostering of favourable market practices and the aversion of abuse of market dominance. The CCPC could therefore benefit from an increased budgetary allocation for its operations as it currently experiences vast financial constraints in the implementation of its programmes.

The growing market brings with it growing enterprises and behaviours that call for the attention of the CCPC. The two offices in Lusaka and Kitwe hardly suffice to cater to the rapidly growing economy and the correlating growth in cases requiring investigation. An increased budgetary

allocation would aid the CCPC with employing more officers, purchasing more equipment (office, research, logistics), and carrying out awareness campaigns.

Autonomy

Currently, the CCPC requires parliamentary approval for the release of reports on investigations. This dependency on Parliament leads to the ‘dragging’ of cases that might require the urgent action of the CCPC. Furthermore, the CCPC must be seen as autonomous from the government to enable it carry out its investigations and publish its findings. In Zambia, where statutory monopolies such as ZESCO might need to be investigated for abuse, a clear dichotomy between government and the CCPC must exist for the purposes of objectivity.

It is therefore the recommendation of this paper that the CCPC be granted the mandate to carry out its operations, issue reports, and implement decisions, with the least possible interference from government.

5.3 General Recommendation

Competition law is a fairly new body of law in Zambia, with the liberalisation of the economy only occurring in the early 1990s. As such, there lacks sufficient jurisprudence to aid the CCPC and the Courts in reaching decisions. This paper therefore recommends that the CCPC and the courts in Zambia be open to the changing trends and themes of competition law at an international level. Decisions from jurisdictions such as the UK and other commonwealth nations could serve as a useful guide for the Zambian Courts.

Furthermore, the CCPC could vastly enhance its efficiency by emulating other enforcement agencies such as the OFT in the UK. Carrying out regular training of its officers and expanding

their knowledge base would keep the CCPC 'up to date' with contemporary principles in competition law. Competition law is dynamic and if the CCPC is to be able to respond to the constantly growing need for market regulation, it should be able to adapt to emerging themes on the subject.

5.4 Conclusion

In conclusion, this essay posits that the regulation of market dominance in Zambia, owing to its novelty, could benefit from modelling that of more established jurisdictions. Though the CCPA captures most of the themes relating to the regulation of market dominance and the prohibition of abuse, it is redundant if the CCPC is not adequately poised and equipped to effect such provisions. In light of this, this essay has considered the concepts of market dominance and its abuse, and has attempted to demonstrate how the CCPC performs its role in relation to these concepts. It is the final submission of the essay that in order to attain optimum market regulation, there should be a harmonious coordination from the various stakeholders in the economy and the government. Furthermore, the CCPC, being at the crux of the regulation, must have access to the resources and emerging trends of competition law.

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