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FACULTY OF LAW

COURSE CODE: PPL812

COURSE TITLE: INTERNATIONAL COPYRIGHT PATENT AND COMPETITION LAW II

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COURSEGUIDE

PPL812: INTERNATIONAL COPYRIGHT, PATENT AND COMPETITION LAW II

COURSE DEVELOPERS: **DR. JUSTICE C. NWOBIKE**

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INTRODUCTION

Competition law is an interesting subject which any student will find enlightening. This course is created to provide you with knowledge on the legal concept of competition law and the laws regulating competition in Nigeria and around the world. This course will prepare you to act and advise, where necessary on issues of competition in various sector both within and outside Nigeria. It will also arm the interested student with necessary tools to solve some basic problems encountered in undertaking on a daily basis.

This course material consists of three Modules made up of eight units of study in all. The course material is designed to give easy understanding of the course to the students. Each unit contains in-text questions and self-assessment exercises to aid your understanding. There is also a list of materials for further reading, answers to self-assessment exercises at the end of every unit. These will help you to assess your understanding of the course. You are advised to take them seriously and try to answer them on your own using the course material and other references. You are further advised in your study of competition law, not to restrict your study to this course material. Ensure that you refer to the materials listed for reference and further reading. You may also source and read other relevant materials which will help to enrich your knowledge.

It is also advisable to apply what you have studied in this course materials to situations in day to day business activities or news reports that you may come across from time to time. That way you will deepen your practical understanding of the concepts taught in this course. Good luck!

What You Will Learn in This Course:

This course is about the legal aspects of competition regulation. The course is meant to expose the law regulating competition both in Nigeria and other jurisdictions. A minimum study time of 4 hours per week is required for the duration of course i.e. one semester. To better understand this course, you will need to get acquainted with the various pieces of legislation and cases mentioned in the course. You must also note any new developments in the area of competition regulation in and outside Nigeria.

You should take note of the various terms/concepts introduced in this course as certain terms will inevitably impact on your proper analysis and discussion of the topics. As much as possible we have tried to simplify the concepts to aid understanding. You can also refer to the glossary to refresh your memory on the meaning of any new concept. Get used to these terms and learn to use them in your personal study, group discussions or analyses of competition law issues.

Importance of Statutes and Case Law

It is essential to note that this course for this semester finds its basis from statutes, and case law. Some of the statutes include but are not limited to the Federal Competition and Consumer Protection Act 2019, Nigeria Communications Act 2004, Electric Power Sector Reform Act 2005, Companies and Allied Matters Act, Treaty on the Functioning of the European Union (TFEU or 'Treaty of Rome') and other international legislative instruments. Competition law being relatively new in Nigeria, a number of cases discussed in this course material are foreign cases. Nigerian case studies are also provided where possible.

Other sources include textbooks, journals and monographs on issues relating competition law. You will be referred to some of these texts and you are expected to make adequate use of them along with this course material. Relevant sections of statutes may be quoted or cited to give specific references during discussion of a topic. You are expected to get yourself familiar with these as much as they are relevant.

Course Aims

This course aims at providing learners with basic knowledge and clear understanding of the law with respect to competition in business. It is aimed at giving you the requisite knowledge of the facts, background, and development of competition law in Nigeria. You will learn about both statutes and case law regulating competition in Nigeria. You will also learn about the evolution of competition law in Nigeria and globally. Each of the topics in the course will be discussed in sequence and relevant terms defined to enable a clear understanding of them.

Course Objectives:

At the completion of the course, you should be able to:

1. Discuss the concept of market power, its sources and how it impacts on the ability of undertakings to compete effectively in the market.
2. Explain the practical steps for market definition and the role of the regulator in ensuring that the market is properly defined.
3. Identify the different constituents of the relevant market in theoretical and practical terms.
4. Analyse the concept of dominance, abuse of dominant position and regulatory prescriptions to prevent same.
5. Analyse the essential facilities doctrine, its history and applicability in Nigeria

Study Units

There are ten (10) study units in this course as follows:

Module 1 – Market Power

Unit 1 Definition and Sources of Market Power

Unit 2 Measuring Market Power

Module 2 – Market Definition

Unit 1 Meaning and Importance of Market Definition

Unit 2 Defining the Relevant Market – Substitutability

Unit 3 Constituents of the Relevant Market (1)

Unit 4 Constituents of the Relevant Market (2)

Module 3 – Abuse of Dominant Position

Unit 1 What is Dominance?

Unit 2 Abusive Conduct which Exploits Customers

Unit 3 Abusive Conduct which Seeks to Weaken or Exclude Competition

Unit 4 Essential Facilities Doctrine

Course Marking Scheme

The following table lays out how the actual marking is done.

Tutor Marked Assignments	**30% of Course Marks**
Final Examination	**70% of Overall Course Marks**
Total	**100% of Course Marks**

Hopefully, you will find this course interesting. We wish you the best of luck!

MODULE 1: MARKET POWER

UNIT 1 DEFINITION AND SOURCES OF MARKET POWER

1.1 Introduction

Business activities are usually competitive activities carried out by various undertakings within specific markets. Though products may be similar or identical, levels of influence will differ as some undertakings may possess more influence in the market. They can leverage on this influence to control the market to their advantage. This influence and the ability to so leverage is referred to as 'market power'. In this unit we will learn about different ways in which market power hs been defined, the relevance of market power in competition and sources of market power.

1.2 Learning Outcomes

At the end of this unit you should be able to:

a. Define market power

b. Explain the relevance of market power to competition regulation

c. Identify various sources of market power

1.3 Main Content

1.3.1. What is Market Power?

The term 'market power' is used frequently in competition law. Some parties use the term interchangeably with 'monopoly', 'market control' and 'market dominance'. It is not a new term but has been defined by various authorities. Some are reproduced below.

- "Where undertakings can persistently behave over substantial periods of time in a manner which differs from the behaviour that the competitive market would impose on competitive undertakings facing similar cost and demand conditions, they can be identified as possessing market power" **- Kaysen and Turner (1959)**

- ‘The ability of an undertaking (or group of undertakings acting jointly) to raise prices above the competitive level without losing so many sales so rapidly that the price increase becomes unprofitable.’ **Landes and Posner**

- **‘**an undertaking's ability to affect directly other participants in the market or such market variables as prices and promotion practices’ - **Brandow**

- ‘the ability to raise prices "above the levels that would be charged in a competitive market’- **Parish**

- “The ability to raise prices consistently and profitably above competitive levels (or where a buyer has market power, the ability to obtain prices lower than their competitive levels).” - **UK Competition Commission**

In-Text Question What do you understand by ‘market power’?

3.2 Relevance of Market Power in Competition Regulation

It is often assumed that, as long as nothing illegal is done to undercut competitors in the market, any practices employed by undertakings to benefit their business is allowed. To a layman, this assumption may even be applauded as ‘sharp business sense’. However, completion regulation frowns at this notion because some ‘legal’ business practices may harm the market and place consumers at a disadvantage because of the relative market power of the undertakings in that market.

Some competitive practices which would ordinarily be allowed in markets where undertakings are of equal or similar power may be disallowed if the undertakings who engage in such practices are (individually or jointly) dominant or possess market power. Where undertakings are of equal or similar market power, competition within the market is unlikely to be detrimental because competition among undertakings will restrain abusive market behaviour. On the other hand, where market power is unequal there will not be sufficient competition in the market to guard against abusive market behaviour without some form of regulatory intervention.

Note that market power is not illegal or undesirable. It may be a consequence of perfectly legal business activities on the part of the dominant player, or inevitable due to the nature of the market. However, it is always necessary for the regulator to think about the effects of such power on competition and consumer welfare. From a regulatory perspective, the first step is usually to determine the market power of an undertaking suspected of anti-competitive behaviour. If it is determined that the undertaking has market power, then further investigations become necessary to ascertain the possible or actual effect of the practices complained of. Determination of market power or the likelihood of strengthening same, may also be necessary to pre-empt future anticompetitive practices. See for instance, Section 90 and 92 NCA, Section 82 of EPSRA and Section 92 (2) FCCPCA.

Self-Assessment Exercise 1

Give 2 examples of situations where possession of market power may be legal.

1.3.3 Sources of Market Power

Some sources of market power are:

a. Large Market Share

Market share refers to the percentage of customers loyal to a particular undertaking in a market. It is not fixed but may fluctuate overtime in a competitive market. The nature of the market may also impact on the market share of undertakings within it. For instance, some sectors can only be operated by natural monopolies. Examples of such sectors are public utilities (electricity, water etc.), railway operations, pipelines etc.

Sometimes, market share size may impact on market power especially when market share comes with market influence. Undertakings with large market share may therefore have the ability to influence the market through pricing, production or promotion. Hence, an undertaking with large market share and added influence may be successful if it chooses to modify the market situation. For instance, if the company with large market share drops prices, the rivals are likely to do the same to prevent their customers switching to the undertaking with larger market share.

b. Deep Pockets

This refers to the size of financial resources and/or capital at an undertaking's disposal. The deeper an undertaking's pockets, the easier it will be for the undertaking to invest in add-ons e.g. improved production methods, public relations, promotions or advertisements, skilled manpower and influence for lobbying regulatory agencies and policy makers where necessary that may help it consolidate or increase its market power.

c. Product Diversification

Product diversification refers to the ability of an undertaking to produce various related or unrelated products. Diversified undertakings, do not depend on one product for profit. More significantly, should they decide to engage in anti-competitive pricing practices, the possibility of cross-subsidisation holds the potential to protect them from the losses that competitors may suffer. Product diversification can take different forms such as;

i. Simple diversification i.ewhere an undertaking produces several products in the same or related market.

ii. Complex Diversification exists where an undertaking is involved in the production of different unrelated products.

iii. Geographical extension i.e. the extension of the same product acrossvarious local and international markets.

iv. Vertical integration occurs where an undertaking operates at various levels of production and/or distribution either with one product constituting add-on for the production of another, or with each product constituting a different market.

In-Text Question

Discuss the forms of product diversification that you have learnt about in this unit

d. Product Differentiation

Product differentiation refers to the production of a single product but giving it an edge over competing products. Product differentiation may sound similar to product diversification but they are not the same. Diversification involves the production of different products but differentiation involves a single product.

e. Elasticity of Demand

Elasticity of demand is the extent to which the demand for a good is affected by changes in other economic variables such as price or supply. Where a change in a variable results in an increase or decrease in demand for a particular product, demand is said to be elastic. The less elastic the demand for a product, the higher the likelihood that the producer of that product has large market power.

f. Efficiency

Efficient allocation of resources can result in increased market share. Efficiency cuts across production, distribution, marketing, branding and research/development. It can guarantee brand loyalty and higher profits which translate into larger market share on the long run. See for instance,

United Brands V. Commission (1978) CMLR 429 (the Chiquita Banana Case); Hoffman- La Roche V. Commission (1979) 3 CMLR 211

g. Ownership of an essential facility

Where an undertaking owns a facility that is an essential ingredient for the production of goods/services in the market and its competitors require access to the facility in order to compete in the market, the owner of that facility has the added advantage of determining the terms upon which competitors may access it. This may translate to larger market share. The essential facilities doctrine is discussed further in this material.

h. Technological Superiority and/or Ownership of Intellectual Property Rights

Where an undertaking owns intellectual property rights (IPR) to a particular product it is likely to possess market power and a large share in the market whether or not the IPR has been licensed to other producers of the same product. This is even more so if the product subject of IPR is an essential facility.

i. Nature of the Market

The nature and products in a particular market may also contribute to market power. As we learnt in Competition Law I, there are different types of competition in the market. A market that is largely monopolistic or oligopolistic is likely to have fewer players – each with large market share. On the other hand, a market that is perfectly competitive with many sellers and buyers is likely to be populated with undertakings which possess small market share.

Self-Assessment Exercise 2

Mention 7 sources of market power.

1.4 SUMMARY

In this unit, we have learnt what market power means and the sources of market power. We have also learnt about the statutory powers of Nigerian competition regulators to regulate market power in various sectors and as part of merger control. We have further noted that market power is not always negative as it may be the natural consequence of the nature or economic activities in a sector.

Market power refers to the ability of an undertaking or group of undertakings to influence the market to its/their advantage with or without adverse consequences for competitors. Market power may be acquired from various sources. They include large market share, product diversification, product differentiation, control of an essential facility, market elasticity, efficiency, deep pockets etc.

It is recognised that possession of market power is not necessarily bad. However, competition regulators guard against an anti-competitive exercise of market power aimed at reducing competition in the market. Nigerian competition regulators (FCCPC, NCA and NERC) are empowered by their respective enabling statutes to investigate and guard against anti-competitive exercise of market power in their sector of influence. Furthermore, the FCCPC is also empowered to scrutinise proposed mergers prior to approval to ensure that such mergers do not result in a strengthening of market power which may lessen competition in the sector.

1.5 REFERENCES/FURTHER READING/WEB SOURCES

1. Whish, R., *'Competition Law'* 5th Ed. LexisNexis Butterworths (2003)

2. CUTS Centre for International Trade, Economics and Environment, '*Competition Policy & Law Made Easy' (CUTS, 2001)*

3. Jenny, F. '*Competition Law and Competition Policy: Lessons from Developing and Transition Economies'* (2007)

4. Elhauge, Einer; Geradin, Damien (2007) *Global Competition Law and Economics*

5. Wilberforce, R., Campbell, A. and Elles, N., *The Law of Restrictive Practices and Monopolies*, 2nd edition, London: Sweet and Maxwell (1966)

6. Gerber, D. J. '*Competition Law'* The American Journal of Comparative Law, Vol. 50, (Autumn, 2002), pp. 263- 296 available at http://www.jstor.org/stable/840879

7. Kuoppamaki, P. '*Lectures on EU Competition Law' (2013)* available at www.helsinki.fi/yliopisto

8. Office of Fair Trading '*A quick guide to competition and consumer protection laws that affect your undertaking'* (2007) available at

9. ‘Chapter 4: International Regulatory Models’ Parliament of Australia website.

1.6 ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

Market power may be legal if

a. It is a consequence of efficiency or legal business activities on the part of the dominant player, or
b. It is inevitable due to the nature of the market.

SAE 2

Any 7 of the following sources of market power:

a. Large Market Share
b. Deep Pockets
c. Product Diversification
d. Product Differentiation
e. Elasticity of Demand
f. Efficiency
g. Ownership of an essential facility
h. Technological Superiority and/or Ownership of Intellectual Property Rights
i. Nature of the Market

MODULE 1: MARKET POWER

UNIT 2 MEASURING MARKET POWER

2.1 Introduction

In the previous unit, we defined market power and examined some of the sources of market power. Market power is measurable. In this unit we will examine measurement of market power and factors to take into consideration when measuring same.

2.2 Learning Outcomes

At the end of this unit you should be able to:

a. Discuss the different approaches to measuring market power

b. Apply Whish's tabular analysis of market share thresholds

c. Identify the factors to consider when measuring market power.

2.3. Main Content

In order to determine whether an undertaking possesses market power measurement is necessary. Due to the practical impossibility of conducting a consumer census per time, market power is measured with the aid of quantitative tests carried out by experts relying on data, observation and other related factors such as industry data, sales figures, relative sizes of fixed costs or investments or conduct of undertakings. In *Michelin V. Commission (1978) 1 CMLR 282* the European Commission, in determining that Michelin had market power, considered Michelin's price discrimination practices.

In-Text Question
Identify three factors you may consider if you had to measure an undertaking's market power

2.3.1 Approaches to Measurement of Market Power

Market power may be measured using various approaches. Two of them are discussed below:

a. Measurement of Concentration Index

This is the measurement of the level of concentration in a particular market based on the total number and size distribution of the undertakings in a particular sector. Depending on the number of undertakings in the market, an inference can be made as to how concentrated the market is. Markets where perfect competition exists will be deemed less concentrated, while markets tending towards monopolies will be deemed more concentrated. The more concentrated a market is, the likelihood that competition in the market is low and the largest undertakings in the market possess market power.

A face-value assessment of market power based on market concentration may be misleading. The presence of a few undertakings with large market power may not be indicative of low competition in the market because inefficient competitorsmay have been forced out of the market. Also some markets may be naturally concentrated and predisposed to monopoly or oligopoly. So the presence of a few undertakings may not translate to market power.

Self-Assessment Exercise 1
How do you measure market power with reference to market concentration?

b. The Price – Cost Margin

This model follows Parish's definition of market power.

(**Refresh your memory: look up Parish's definition in Unit 1**).

The price-cost margin test measures the difference between the price of a product and the cost of production and from the result, infers whether the undertaking in question has market power.

When the price set by an undertaking exceeds the cost of production and this is sustained over a period of time without losing patronage, that undertaking has market power. The price – cost margin test cannot be applied to all sectors. Sometimes, cost of production goes beyond expenditure on production processes. Pre-production investments and sunck costs may not be influence cost of production indirectly.

Self-Assessment Exercise 2 To what extent can it be said that the price-cost margin test is a reliable means of measuring market power?

2.3.2 Market Share and the Risk of Exercise of Market Power

Market share is usually a major factor to consider in measuring market power. This is because, all things being equal, an undertaking with larger market share is better able to influence the market to its advantage. On a general note, an undertaking with a market share of 40% or more will be deemed to be dominant. However, market share thresholds may differ per sector. S**ection 70(3) FCCPCA** empowers the FCCPC to publish the size of market share that may constitute dominant position in particular markets.

Note that market power is not necessarily bad. It only becomes damaging if the undertaking exercises its power to harm competition or force out competitors from the market – such actions impacting on consumers negatively.

Large market share does not automatically translate to market power. Other factors may constrain an undertaking with large market share to abide by the rules and compete legally within the market. Some of such factors include:

a. **Barriers to entry or exit**:

Entry and exit barriers refer to those factors which the ease with which an undertaking is able to commence or discontinue business in a particular sector. Such barriers may be regulatory (e.g.

licensing fees, regulation, policy etc.), economic (e.g.sunk costs, pre-production processes) or practical (e.g. social licence from host communities, distance from raw materials etc.).

In a market where entry/exit barriers are low, the market is likely to be competitive and competitors may come and go at will. This may constrain undertakings with market power to keep pricing steady as they risk loss of market share if they raise prices or restrict supply regularly.

b. Competition within the market

Notwithstanding an undertaking's market share, competition may constitute an added constraint on an undertakings behaviour. In a competitive market it is easy for consumers to switch to a competing product. Hence, an undertaking with large market share may lose some of its market share if it raises prices or restricts supply in a competitive market.

c. Consumer Choice

The "countervailing power" of customers in the market may constitute a restraint on exercise of market power. If customers see the service offered by the undertaking as a service they can do without, it will be difficult for the undertaking to charge a premium for that service.

2.3.3 Prof. Whish's Tabular Analysis of Market Share Thresholds

On a general note, an undertaking is deemed to be dominant when it is found to possess a minimum of 40% share of the relevant market. Regulatory rules on applicable thresholds are subjective depending on the nature of market being examined. Competition regulators may determine applicable thresholds for dominance, super-dominance or a monopolies taking consideration of unique market characteristics per sector and the national goals for regulating competition.

Prof Whish's tabular analysis of market share thresholds provides a summary of thresholds considered by EU competition regulators, when and what regulatory action may be taken to prevent these undertakings from leveraging their market power for anti-competitive purposes. The table is reproduced below with necessary modifications to suit the Nigerian context.

S/N	**Market Share Threshold**	**Likely determination under UK/EU Competition Law (note that UK competition thresholds may change following completion of the post-Brexit process).**
1.	0%	No likely determination of anti-competitive behaviour
2.	5% or more	Vertical agreements of the undertaking may significantly to any cumulative foreclosure effect of parallel networks of similar agreements. **See European Commission notice on agreements of minor importance (*de minimis* notice), OJ 2001, C 368/13** – i.e. agreements that do not appreciably restrict competition.
3	10% or more	Horizontal Agreements are not deemed of minor importance under the European Commission notice on agreements of minor importance supra. No block exemptions for some specialisation agreements, research and development agreements if they extend to joint distribution.
4.	15%	Vertical Agreements are not deemed of minor importance under the European Commission notice on agreements of minor importance supra Substantial information on markets in which market share exceeds 15% will be required before proposed horizontal mergers are reviewed
5	20%	No block exemptions for some specialisation agreements, research and development agreements No block exemption for some co-insurance agreements
6	25%	No presumption that a merger between the undertaking and another will not create or strengthen competition.

		No block exemption for research and development agreements, no block exemption for certain reinsurance agreements No right to follow the simplified procedure for vertical mergers
7	30%	No vertical agreements can benefit from the block exemption
8	40%	The undertaking may be declared dominant with the added responsibility not to hinder competition. No horizontal or vertical agreements can benefit from block exemption
9	50%	There is a presumption that the undertaking is dominant
10	80%	The undertaking may be presumed to be super dominant with the responsibility not to indulge in abusive behaviour
11	90%	The undertaking is approaching the level of being a quasi-monopoly
12	100%	The undertaking is a monopoly.

In-Text Question

Take a look at NCC's telecommunication industry statistics at https://ncc.gov.ng/accessible/statistics-reports/industry-overview . Compare the market shares of each of the mobile telephone operators in Nigeria with Prof. Whish's analysis and advise whether regulatory action is necessary.

2.4 SUMMARY

In this unit, we have learnt about approaches to measurement of market power, sources of data on market power and factors to consider when measuring market power. We have also considered Prof. Whish's analysis of market share thresholds and their likely regulatory implication.

One of the functions of an effective regulator is to ensure that no undertaking exercises market power to the detriment of its competitors thereby harming competition in the market. In most cases, possession of large market share may be an indication of market power. However, other factors such as level of competition in the market, consumer choice and entry/exit barriers may influence the extent to which market share results in market power.

Market power depends on data for measurement. Some sources of data include industry data, sales figures barriers to entry/exit, size of fixed costs and conduct of undertakings in the course of business. Market power may be measured using the concentration index approach or the price-cost margin test. Each approach has its benefits but may not be applicable to all sectors.

Regulators are empowered to set market share thresholds which may be indicative of market power. As a general rule a threshold of 40% may result in a presumption of market power necessitating further investigation and regulation to prevent negative effects on competition. Below the 40% threshold, an undertaking may not be flagged except in specific cases such as horizontal agreements, and specific research & development agreements which extend to joint distribution. Above the 40% threshold, there is a presumption of dominance gradually rising to monopoly.

2.5 REFERENCES/FURTHER READING /WEB SOURCES

1. Whish, R., *'Competition Law'* 5th Ed. LexisNexis Butterworths (2003)
2. CUTS Centre for International Trade, Economics and Environment,'*Competition Policy & Law Made Easy' (CUTS, 2001)*
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10. Boone, J. (2008) 'A New Way to Measure Competition' The Economic Journal, Vol. 118, Issue 531, pp 1245 – 1261, August 2008 available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227171

2.6 POSSIBLE ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Measure the level of concentration in a particular market based on the total number and size distribution of the undertakings in the sector.

SAE 2

The test is not fool-proof. It does not take cognisance of pre-production costs that may impact on pricing.

MODULE 2 – MARKET DEFINITION

UNIT 1 MEANING AND IMPORTANCE OF MARKET DEFINITION

1.1 Introduction

One abiding function of a competition regulator is to ensure that the market remains competitive. A first step in fulfilling this function must therefore be an understanding of the market and its boundaries. Whether or not regulation is sector-specific or sector-neutral, the regulator must be able to identify the particular market subject to its regulation. This function is relevant for every market and entails what is known in competition law as 'market definition'.

1.2 Learning Outcomes

By the end of this unit, you should be able to:

a. Explain the meaning of 'market definition'
b. Discuss the relevance of market definition, and
c. Explain the effects of market definition on competition

1.3 Main Content

1.3.1. What is Market Definition?

To better understand what 'market definition' means, it is important to define each component of the phrase. First, what is the meaning of the term 'market'? To the unlearned, the term evokes an idea of a geographical location where buying and selling takes place. However, for purposes of competition law, the economics-based definition of market is more relevant.

Economists view 'market' in a wider sense to include products, production, demand and consumption. A market is therefore defined as 'a collection of goods and services that are regarded as substitutes by consumers; a set of buyers, whose preferences together with their budget constraints determine their willingness to pay for those products; and a set of sellers, endowed with production technologies whose physical properties determine the minimum price at which they are willing to transfer property of their goods or deliver their services.'

In-Text Question

How does a layman's definition of 'market' differ from that of an economist?

1.3.2 Importance of Market Definition?

The concept of market definition is one of the fundamental concepts of competition law. It provides an analytical framework for the ultimate enquiry whether a particular conduct or transaction is likely to produce anticompetitive effects. It is used to ascertain and determine the 'relevant market' for competition analysis and likely effect of market power on competition. See §**2 European Commission Notice on Definition of the Relevant Market for the Purposes of Community Competition Law (1998) 4 CMLR 1777.** Market definition is important for the following reasons:

a. To determine likely and actual competitive constraints in a market

b. To determine whether an undertaking possesses dominant power. See**Section 92 NCA 2003**

c. To identify competitors to an undertaking that may be capable of influencing the market behaviour of that undertaking

d. To properly delineate a market in its product and geographic dimensions

e. To determine the substitutes available for a particular product

f. To determine whether an agreement between undertakings may restrict competition See **Section 96 – 100 of the NCA 2003**

g. For merger control, to determine the likely effect of a proposed merger on competition within the market. See **Part XII FCCPCA**

h. To identify and define the boundaries of competition between undertakings.

Self-Assessment Exercise 1 Mention 5 reasons why market definition is important.

1.3.3 Effects of Market Definition

Market definition is a specialised and important area of competition law because of its potential to influence the market positively or negatively. It is also very sensitive because of its implication for competition regulation. It determines the possible effect of market power within a particular market and the extent of regulatory activity necessary. Where the regulation of competition is concerned, undertakings would prefer a determination of smaller market share than they actually possess because small market share eliminates suspicion of abusive tendencies.

Market definition must be done carefully not to give a lower or higher impression of actual market size. Where the market is defined too narrowly, there is the risk that undertakings will be assumed to possess a higher market share than they actually do resulting in over-regulation. On the other hand, an unduly broad market definition may result in an undertaking's anti-competitive conduct being overlooked to consumers. Either way, competition in the market will be negatively affected if the market is not properly defined.

Market power or the likelihood of strengthening it, may be considered even when no abusive conduct has taken place. For instance, as part of its regulatory function, the NCC may determine that a telecomm licensee is in a dominant position and order the operator to reduce its market power even. See**Section 92 (1) – (3) NCA.**

To properly determine market share, the 'relevant' market must be identified and the market share of the undertaking under review ascertained within the relevant market. The relevant market is of different types and many factors influence its delineation. These will be considered in more detail in the next unit.

In-Text Question

Differentiate between the effects of market definition where the market is defined too broadly and when it is defined too narrowly.

1.4. SUMMARY

In this unit, we have learnt about the meaning and importance of market definition. We have also examined the nature of market definition as a specialised and sensitive regulatory function, as well as the likely effects of inaccurate market definition.

Market definition is one of the fundamental concepts of competition regulation. It provides a framework for competition-based enquiry into the effect of an undertaking's conduct on competition. At various points in regulatory activities, every competition regulator will be required to engage in market definition. Its relevance transcends various issues which may influence competition such as merger control, dominance/monopolisation etc.

Market definition is relevant for determining likely and actual competitive constraints in a market, whether or not an undertaking is dominant or whether a proposed merger may negatively impact on the market – to mention a few.

Being a sensitive and specialised concept of competition regulation which impacts on the level of market power ascribed to undertakings and by extension, the extent to which such undertakings will be subject to regulation, market definition must be approached carefully and with precision. Where a market is defined wrongly i.e. too broadly or too narrowly, an undertaking may be ascribed less or more market power respectively and this will have negative implications for competition in the market.

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1.6 POSSIBLE ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

a. To determine likely and actual competitive constraints in a market

b. To determine whether an undertaking possesses dominant power. See **Section 92 NCA 2003**

c. To identify competitors to an undertaking that may be capable of influencing the market behaviour of that undertaking

d. To properly delineate a market in its product and geographic dimensions

e. To determine the substitutes available for a particular product

f. To determine whether an agreement between undertakings may restrict competition See **Section 96 – 100 of the NCA 2003**

g. For merger control, to determine the likely effect of a proposed merger on competition within the market. See **Part XII FCCPCA**

h. To identify and define the boundaries of competition between undertakings.

MODULE 2 MARKET DEFINITION

UNIT 2 - DEFINING THE RELEVANT MARKET: SUBSTITUTABILITY

2.1. INTRODUCTION

In defining the relevant market, one of the factors to consider is the degree of substitutability of a product. In examining the concept of relevant market, bear in mind that there are two types – relevant product market which is the focus of this unit and relevant geographic market which we will look at later. In this unit, we will focus on the relevance of substitutability to market definition, the types of substitutability and how to test for it.

2.2. LEARNING OUTCOMES

At the end of this unit, you should be able to:

1. Define substitutability
2. Differentiate between demand-side and supply-side substitutability
3. Explain the application of the SSNIP Test

2.3. MAIN CONTENT

Substitutability is also called 'interchangeability'. Section 167(12) of the FCCPCA identifies substitutability as one of the elements of the relevant market. It examines the existence (or not) or substitutes to a particular product. The extent of substitutability determines whether the particular product and its perceived substitute can be classed within (or outside) the same market. Products which constitutes substitutes are categorised to be within the relevant market.

Substitutability is of two types:

a. Demand-side substitutability

b. Supply-side substitutability

In-Text Question
What do you understand by 'substitutability'?

2.3.1. Demand Side Substitutability

Demand side substitutability refers to the possibility that consumers will switch from a particular product to a competing product used for the same purpose in the event of a small but permanent change in the price. It is the main factor examined when defining the relevant market. It helps one determine which products can be viewed as substitutes to the particular product under review. If consumers will switch, then the product(s) to which they would switch are substitutes and therefore within the same market (relevant market). If not, then the products are not substitutes.

It is not always the case that price changes alone would influence consumer behaviour. Other factors may be relevant though they may not be as persuasive as pricing.

Self – Assessment Exercise 1 Explain how demand side substitutability works

3.2 Supply side Substitutability

Supply side substitutability is also hinged on pricing but focuses on producer' behaviour. It refers to the extent to which producers, following an increase in the relative price of a product can readily switch production facilities to produce a substitute competing product such that the attempted price increase is rendered unprofitable. See **Paragraphs 20 – 23 of the European Commission Notice on Market Definition** In *Tetra Pak 1 (BTG Licence) (1988) 4 CMLR 47*, the supply substitutability test was applied and it was determined that that the market for production of milk packaging machines was not the same as the market for aseptic packaging machines because there was evidence that producers of milk packaging machines cold not adapt their production to switch to aseptic packaging machines without incurring risks/loss.

In the US, an examination of supply side substitutability is done after market definition. However, an examination of supply side substitutability is not always employed in market definition – especially where the result of a demand-side substitutability test is significant.
The supply-side substitutability test must be applied with caution as it may broaden the relevant market and may give the impression that an undertaking possesses less market share than it actually does.

In-Text Question How would you differentiate between demand side substitutability and supply side substitutability?

2.3.3 The SSNIP Test

The main test for determining substitutability is the **SSNIP Test.** Also known as the **Hypothetical Monopolist Test.**

The test has its origins in US antitrust law. Similar approaches having been used in antitrust cases in the 1970s, thetest was formally introduced by the US Department of Justice under its 1982 Merger Guidelines. The European Commission applied the test for the first time in the **Nestle/Perrier case** in 1992. The test was also officially recognised in the European Commission's Notice on the Definition of the Relevant Market 1997. It is now popularly applied in market definition by competition authorities in many jurisdictions.

SSNIP is an acronym for **S**mall but **S**ignificant **N**on-transitory **I**ncrease in **P**rice. It measures the extent to which consumers may be inclined to switch to a different product, if their producer of choice should increase the price of their product by a small but significant percentage (about 5% but no than10%). Though the change in price is small, the SSNIP test will only apply if it is relatively permanent (usually about one year). If, following such an increase, customers/buyers are likely to switch to other competing products (all other factors permitting), then there is substitutability and the products are categorised within the same market. If not, then the products are not in the same market. This means that the producer cannot be restrained by competition in the market and may become a ‘hypothetical monopolist’.

The SSNIP test may also be used to determine the relevant geographic market. We shall consider the relevant geographic market in the next unit.

2.3.4 Critiques of the SSNIP Test

a. The Cellophane Fallacy

The SSNIP test must be applied with caution as it may not yield the expected results in all cases or may result in a broader or narrower market definition. For instance, where a dominant producer/supplier was already charging prices way above the competitive average for a monopolised product customers in switching, may not be constrained by price per se. They may do without the product altogether or switch to another product which is not necessarily a substitute to avoid continuing to pay the monopoly price.

This problem of application of the SSNIP test to a monopolised product is popularly known as the *‘cellophane fallacy’.* It arose in the American case of *United States v. El du Pont de Nemour Co 351 US 377 (1956)* where Du Pont was using IP rights over flexible wrapping material to monopolize the cellophane market – charging a monopolistic price and restricting its production. Following a challenge under the Sherman Act, Du Pont contended that it could not raise its price beyond the current price otherwise its consumers would switch to a substitute product. On this basis, the court therefore agreed with Du Pont that the relevant market was the market for ‘wrapping materials’ which included that for the substitutes to cellophane. The market being defined so broadly, Du Pont was held to possess a smaller market share and little market power. The problem with this reasoning was that the assessment was done on the basis of the monopoly price and not a competitive price. Hence, consumer behaviour in switching was not because those other wrapping materials were necessarily substitutes to cellophane but in protest for yet another increase in monopoly pricing.

b. The inapplicability of the SSNIP test in all contexts

The SSNIP test may not be applicable in contexts where there are is no data on demand or substitutes. In *British Interactive Broadcasting (2000) 4 CMLR 901*, the regulator could not apply the SSNIP test in delineating the market for interactive broadcasting services because there were no data available on the existence of the product. See also *Endemol Entertainment Holding BV v. Commission (1999) 5 CMLR 611*.

c. Beyond Pricing, demand for a product may be driven by other factors

An objective assessment of market definition based on the SSNIP test may be misleading because demand for a product may be influenced by other factors. Such factors include the unique purpose for which a product is required, customer preference, class conciousness, brand loyalty etc.

Self – Assessment Exercise 2

a. SSNIP is an acronym for ………………

b. The SSNIP test originated in …………..

c. In applying the SSNIP test, you examine consumer reaction to ………..

d. SSNIP test may give misleading results if it is applied to …………… pricing

2.4. SUMMARY

In this unit we have considered the concept of substitutability. We have also considered the application of the SSNIP test in ascertaining substitutability and cases where the SSNIP test may not give a clear picture of substitutability and by, extension an accurate definition of the relevant market. We have also examined the risk of the cellophane fallacy in the event of a SSNIP test on monopoly pricing and ways to prevent an unusually broad definition of the market because of this error of judgment.

Market definition relies greatly on substitutability both from a demand-side and supply side. Substitutability usually relies on pricing. However the difference between demand-side and supply-side substitutability is that while the test of the former relies on consumer behaviour, that of the latter relies on producer behaviour.

The main test for substitutability is the SSNIP test which determines the effect of a small but permanent increase in price (5 - 10%) on consumers switching to a competing product or producers switching their production to a competing product without short term loss. The SSNIP test may be used to determining both the relevant product market and the relevant geographic market. However, it must be applied with caution especially where the product under review is subject to monopoly pricing. An incorrect application to the SSNIP test to such a product may result in broader market definition. Hence, the SSNIP test should always be applied on the basis of competitive pricing. The SSNIP test may also not be applicable in all contexts especially where not much data is available on demand or substitutes, or where other factors may influence consumer behaviour.

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2.6 POSSIBLE ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

If consumers will switch from a particular product to a competing product used for the same purpose in the event of a small but permanent change in the price, then both products are substitutes and are within the same market.

SAE 2

a. Small but Significant Non-Transitory Increase in Price

b. The US

c. Price change

d. Monopoly

MODULE 2 – MARKET DEFINITION

UNIT 3 CONSTITUENTS OF THE RELEVANT MARKET (1)

3.1. INTRODUCTION

As discussed in the previous unit, market definition is a fundamental function of competition regulation. This unit engages in a practical discussion on the process of market definition i.e. defining the relevant market. Owing to the extensive nature of this topic, it will be examined in this and succeeding units. This unit is focused on the constituents of the relevant market generally and pays particular attention to the relevant product market.

3.2. LEARNING OUTCOMES

By the end of this unit you should be able to:

a. Explain what is meant by the relevant market

b. List the constituents of the relevant market

c. Explain the issues to consider in determining the relevant product market

d. Discuss the meaning and dimensions of substitutability.

3.3. MAIN CONTENT

The relevant market includes the particular goods and/or service that an undertaking produces together with all the products that buyers or suppliers will see as close substitutes of the good or service. The relevant market has various components/constituents. They include:

1. The relevant product market
2. The relevant geographic market
3. The temporal market
4. The functional market

The above constituents of the relevant market are represented in the figure below. We will consider them in detail in this and succeeding units.

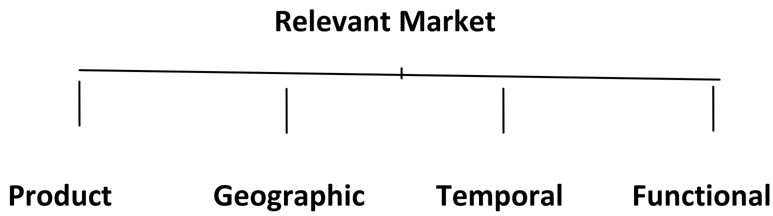

Figure 1: Constituents of the Relevant Market

In-text Question What do we mean by 'relevant market' and what are its constituents?

3.3.1 The Relevant Product Market

Regulators always consider this constituent when defining the relevant market. In ***Europemballage Corporation V. Continental Can Co. (1973) CMLR 199, para 32 (Continental Cans case)***,the European Court of Justice stated that defining the relevant product market was of fundamental importance when determining whether a company is dominant. See also***United Brands Continental B.V. V. Commission (1978) Case 27/76 of 14 February 1978 ECR 1978 -00207 (United Brands Case)***

The gist of relevant product definition is **substitutability.** We discussed substitutability in the previous unit. We will continue that discussion here.

In the United Brands case, the Commission in determining that United Brands had abused its dominant position, defined the relevant market to be the market for bananas. Following the argument by United Brands that banana was in the same market as all 'fresh-fruits', the European Court of Justice noted that whether the relevant market can be said to be the market for fruits or the market for bananas will depend on whether banana could be '*singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible'*.Based on this substitutability test, the ECJ agreed with the Commission that the relevant market was the market for bananas where United Brands held 45% and was therefore dominant. See **United Brands Case supra at paragraph 22**

Self-Assessment Exercise 1

In contending that the market for bananas is the same as the market for 'all fresh fruits' what was United Brands trying to achieve?

3.3.2 Potential Competition

In determining the relevant market you examine for substitutability and potential competition.Section 167(12) of the FCCPCA provides:

> Every reference in this Act to the term, "market" is a reference to a <u>relevant market</u> in Nigeria for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are <u>substitutable</u> for them and the meaning of the term relevant market shall be based on examination of <u>demand substitutability</u>, <u>supply substitutability</u> and <u>potential competition</u>.

We have dealt with demand side and supply side substitutability in the previous unit. We will therefore only explain what potential competition means. Potential competition relates to how easily potential producers can enter into and operate in the market. Like supply side substitutability, the subject of examination are producers and not consumers. However, unlike supply side substitutability examines the behaviour of existing producers, potential competition examines the behaviour of potential producers.

In-Text Question

Differentiate between supply side substitutability and potential competition.

3.3.3 Other factors to consider in defining the relevant product market

While the substitutability test remain valid test for market definition, other factors may be taken into consideration on a case-by-case basis.

1. **Customer preference/brand loyalty**: This may affect the substitutability of a product. If the consumers of a particular product prefer it to a competing product produced by another brand, it is unlikely that they will be interested in switching simply because of a slight increase in price.

2. **Barriers to switching of demand:** Where consumers may find switching difficult, they are not likely to switch, even in the event of a price increase. Switching may be easier in some sectors than others.

3. **Evidence of substitution in the recent past**: This is relevant if there was a recent price increase due to an uncontrollable event. The question to ask is therefore would be whether such price increase catalysed substitution.

4. **Marketing or Consumer Surveys**: These provide useful information on the market and may be reliable if independently conducted.

5. **Quantitative Tests:** These are usually carried out by consultants and/or academic researchers. They contain results of econometric and statistical tests which may reveal the level of own-price elasticity and cross-price elasticity of demand for a product.

Self-Assessment Exercise 2
Mention four other factors that may impact on the definition of the relevant market

3.4. SUMMARY

In this unit we have learnt about the process of defining the relevant market. The relevant market has various constituents including product, geographic, functional etc. We have also learnt that the relevant product market is most important in market definition and that it is determined with reference to substitutability which has various dimensions including demand-side and supply-side. Beyond substitutability, other factors may impact on the definition of the relevant market. Hence, defining the relevant market is usually a costly and time-consuming exercise which is largely reliant on expertise.

As easy as this process of market definition may sound, it is a complicated process. It may be quite costly and time consuming especially for products that are available countrywide or worldwide. It is important to note that, an undertaking suspected of possession market power is usually small. It must possess reasonable market share for an assumption of market power to arise in the first place.

Market power relies on data. However, data may be a problem especially in Nigeria. There may be no data available or the data available may be insufficient or misleading. Hence, the regulator may need to invest time and resources (including dependence on third-party experts) in generating relevant data – at least for the first time.

The above issues notwithstanding, market definition is of such importance that it must be done carefully and systematically. In practice, many undertakings refer market definition to consultants who carry out relevant studies, obtain relevant data and advise them. In developing countries where there are few specialists with requisite skills to conduct such analysis in regulatory agencies, regulators also refer market definition to consultants. For instance, in determining whether any service providers possess market power in particular sectors of the Nigerian mobile telecommunications sector, the NCC has been known to engage the services of KPMG to carry out the relevant study. Such results may be more readily accepted having proceeded from studies conducted by independent consultants.

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7. NCC Determination of Dominance in Selected Communications Markets in Nigeria

3.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

United Brands was trying to push for a broader definition of the relevant market such the market will be larger than the market for bananas where United Brands is dominant. If that had been achieved, then its market share in such larger market would be much smaller and the market would be perceived to be more competitive with United brands having less market power.

SAE 2

1. Customer preference/brand loyalty
2. Barriers to switching of demand
3. Evidence of substitution in the recent past
4. Marketing or Consumer Surveys
5. Quantitative Tests
6. Potential competition

MODULE 2 – MARKET DEFINITION

UNIT 4 CONSTITUENTS OF THE RELEVANT MARKET (2)

4.1 INTRODUCTION

In the previous unit, we listed four dimensions of the relevant market – can you remember them? Having examined the relevant product dimension, we will now focus on the three other dimensions. We will begin with the relevant geographic market and thereafter consider the temporal market and the functional markets.

4.2. LEARNING OUTCOMES

By the end of this unit, you should be able to:

a. Explain the difference between the relevant product market and the relevant geographic market.
b. Discuss the applicability of temporal dimension to seasonal products
c. Explain the meaning and application of the functional market.
d. Identify the factors that may impact on market definition

4.3. MAIN CONTENT

In defining the relevant market, there may be a need to look beyond the relevant product market – substitutability with other products, market share and other product-related considerations. Market definition may entail considerations indicative of an undertaking's level of influence in particular spheres and for specific purposes. That is where the geographic, functional and temporal dimensions come in.

In-Text Question
Mention the 4 dimensions of the relevant market

4.3.1 The Relevant Geographic Market

Beyond an undertaking's product, an examination of its geographic reach may be necessary when defining the market. With globalisation and cross-border trade in goods and services, this has become even more significant especially for IT companies. Opportunities for cross-border commerce are indicative of an undertaking's area of influence and market power. Beyond the economic definition of markets focused on products/consumers/producers, geographical considerations also influence market size especially for companies with foreign subsidiaries and IT companies that do not need physical presence in a particular location to operate. **Note**that the fact that a product is available in a particular location may not necessarily mean that the location constitutes part of its relevant geographic market. Remoteness may impact on the availability of the product.

Defining the relevant geographic marketis important in measuring the extent of actual/proposed dominance in competition investigations but it cannot take the place of the relevant product market.
The SSNIP test is also employed in defining the relevant geographic market. In this case, the test considers consumers' ability to switch suppliers of the same product in the event of a SSNIP. Accordingly, if consumers are likely to switch their purchases from their local suppliers to suppliers in another location (usually more distant than their local suppliers) in the event of a SSNIP, then the relevant geographic market will include both the location of the local supplier and the location of the distant supplier. See *Paragraph 4.2.2,US DOJ and FTC Horizontal Merger Guidelines states in*

In the EU, The SSNIP test was used to determine the relevant geographic market in the proposed merger between Volvo and Scania (producers of buses and trucks in Europe). Following a delineation of the relevant geographic market the European Commission disallowed the merger because it would have resulted in increased market shares for the applicants in Sweden, Finland, Norway and Ireland. See *Volvo/Scania Case No. COMP/M. 1672*.

Self-Assessment Exercise 1

Differentiate between the use of the SSNIP test for measuring the relevant product market and for measuring the relevant geographic market.

It is important to note that:

a. The relevant geographic market may be national, regional or global. See *British Telecommunications V. Commission (1983) 1 CMLR 457, WorldCom/MCI (1999) 5 CMLR 876.*

b. The fact that a few people in a distant location consume the relevant product will not constitute the basis for the delineation of that distant location as part of the relevant geographic market. What matters is remoteness i.e. whether the producer actively offers its product for sale in that distant location.

c. For products to be determined to be in the same relevant geographic market, it will not be sufficient that they are readily available (even in large numbers with specific suppliers) in various locations. If the conditions of competition are different for suppliers in the different locations, it is not likely that the locations will form part of the relevant geographic market. In the ***United Brands*** case, it was determined that though United Brands' bananas were available all over the EU, the conditions of competition were not the same for suppliers in the UK, Italy and France. Accordingly, these countries were all not deemed part of the relevant geographic market.

d. As with the use of the SSNIP test for defining the relevant product market, other factors should be considered in defining the relevant geographic market. *See Paragraph 28 of the Commission Notice on Market Definition.*

In-Text Question

Why was United Brands' argument on the EU wide geographic market for bananas rejected?

4.3.2 The Temporal Market

The temporal market is recognised by the UK OFT as a different dimension for market definition. It relates to the competitive quality of a particular product as influenced by seasonal changes or services where peak and off-peak variants exist. An investigation of the temporal market for a relevant product which falls under this category may serve to broaden or narrow the relevant market and/or differentiate between similar products for purpose of substitutability. For instance, demand for ice cream increases during the dry season and reduces during the rainy season. For umbrellas, the reverse is the case.

Unlike the product and the geographic market, the need for definition of the temporal market arises on a case by case basis. In **United Brands** case**,** United Brands led evidence in support of their claim of substitutability of other fruits for banana fruit. They argued that the cross-price elasticity of bananas varied between summer and other seasons. Hence, during summer when other fruits are available, they face more competition as demand for bananas drop following substitution of banana for other fruits. This argument was rejected by the Commission and the ECJ both of whom determined that the relevant market in that case was not the market for fruits but the market for bananas.

Self-Assessment 2
What types of products are best suited for temporal market definition?

4.3.3 The Functional Market

Like the temporal dimension, the functional dimension of the relevant market is considered as one of the factors which may influence the relevant product or geographic market. As such market definition is not based solely on this dimension as it could be for the relevant product market.

The functional dimension to market definition was introduced by the Australian Guidelines on Mergers. It makes reference to a relevant 'functional market' which may be delineated through the identification of vertical stages or production and/or substitution which comprise the relevant market. To achieve this the reviewer should consider both the efficiencies of vertical integration, commercial reality or possibility of substitution at adjacent vertical stages. Though the functional dimension does not usually constitute part of the process of market definition in the EU, the UK OFT recognises that conditions in the downstream and upstream markets [different levels of functionality] may affect the assessment of demand-and-supply substitution.

Self-Assessment 3
Mention two factors to consider in applying a functional market definition.

4.4 SUMMARY

In this unit we have learnt about the geographic, temporal and functional dimensions of the relevant market. We have also learnt how to apply the SSNIP test to the relevant geographic market and factors that may impact on the definition of the relevant geographic market. We have also learnt how the temporal and functional dimensions are relevant to the definition of the relevant product market

Beyond the relevant product market, other dimensions of the relevant market include the relevant geographic market, temporal and functional market. The relevant geographic market also depends on the SSNIP test with an examination of the possibility for customers to switch to a different supplier in the event of a SSNIP. Like the relevant product market, an examination of the relevant geographic market must be carried out carefully especially since the availability of a product in a particular geographic location may not necessarily imply that the location constitutes part of the relevant geographic market. Furthermore, factors like customer loyalty, additional costs associated with switching and unique occurrences may impact on market definition.

Two less popular dimensions of the relevant market are the temporal and functional market. While the temporal market depends on seasonal/practical variations which may impact on demand and pricing, the functional market depends on substitutability at different functional levels of production. These dimensions may impact on the definition of the relevant product market.

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4.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

In determining the relevant product market, the focus is on the possibility of a customer switching to a different product upon a SSNIP but in relevant geographic market, the focus is not on a switch to a different product but a switch to a different supplier.

SAE 2

Seasonal products or products which have peak and off-peak variants

SAE 3

a. Efficiencies of vertical integration

b. Commercial reality

c. Possibility of substitution at adjacent vertical stages

MODULE 3 ABUSE OF DOMINANT POSITION

UNIT 1 WHAT IS DOMINANCE?

1.1. INTRODUCTION

The previous module dealt extensively with the concept of the relevant market. It serves to lay a foundation for this module which is focused on abuse of dominant position. As you will understand as we make progress in this module, various business practices may be abusive especially where the undertaking engaging in them is dominant. A question that therefore comes to mind is – when is an undertaking dominant? That question will be answered in this unit. We will consider various legal definitions of dominance, the threshold for determining that an undertaking is dominant, the relationship between market share and dominance and factors which may impact on dominance.

1.2. LEARNING OUTCOMES

By the end of this unit you should be able to:

a. Define dominance

b. Explain the factors that may be considered in determining whether an undertaking is dominant

c. Explain how market share may/may not result in dominance

d. List the measures usually employed by regulators to prevent a dominant undertakings from abusing their dominance.

1.3. MAIN CONTENT

According to the Canadian Competition Bureau, abuse of a dominant position occurs when 'a dominant firm in a market, or a dominant group of firms, engage in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially'. With the above definition as a backdrop, this unit will examine in detail what is meant by the word 'dominant' in competition law and when anundertaking/group of undertakings will be deemed to be dominant.

In the previous module, we looked at the concept of market power and pointed out that large market share is not necessary indicative of market power. Again we noted that large market share or market power are not bad in themselves as long as they are not used in restricting competition. The same is true of dominance. The fact that a business is dominant need not be an issue as long as the dominant position is not abused. However, a dominant company bears some obligations which we will consider later in this module.

In-Text Question
From what you learnt in previous units, state why dominance in itself is not a bad thing.

1.3.1 What does the term'Dominant'mean?

The term 'dominant' is also referred to as'dominance' or 'market power' depending on the context in which it is used. Various definitions have been advanced for term.

Under US antitrust law, dominance is also referred to as monopoly which is defined as 'the power to exclude competitors'. See *United States v. Grinnell Corporation 384 U.S. 576 (1966).*

In Section 4 of the Competition Act of Finland, dominance is defined as a situation where

> *'one or more business undertakings or an association of business undertakings, who, either within the entire country or within a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution.'*

A similar definition is used in the EU where dominance is defined as 'a position of economic strength that gives the undertaking the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. See *Hoffman-LaRoche & Co. AG v.*

*Commission, Case No. 85/76 919790 ECR 461.*Adopting the spirit of this definition, the ECJ in **United Brands** extended the definition to include the negative impact of an abuse of dominance defining it 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**'.*

There are two parts to **United Brands**definition of dominance - the ability to 'prevent competition', and the ability to 'behave independently of competitors, customers and consumers'. Though it was not expressly stated whether both segments must be present before a finding of dominance will be made, Whish opines that the essential issue for competition is the ability to act independently of competitors, consumers and customers as it will be indicative of market power and would amount to 'freedom from economic constraint' which would form the basis for the ability to prevent effective competition.

The FCCPCA essentially replicates the aforementioned definition of dominance in United Brands, In Section 70(2) the FCCPCA defines dominant position thus:

> *A dominant position in a relevant market exists where an undertaking enjoys a position of economic strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers.*

It is instructive to note that the FCCPCA differentiates between dominance and monopoly. While the former is as defined above, the Act does not define the latter butempowers the FCCPC to determine by regulations, when a monopoly situation may be said to exist.

The EPSRA takes a different approach defining dominance in terms of market power – essentially making no specific reference to dominance but by implication equating dominance with 'market power' which it defines as '*the ability of a seller or group of sellers to maintain prices above competitive levels, or to maintain stable prices while reducing the quality of product or service provided, for a significant period of time'*. See Section 100 EPSRA

Section 92 empowers the NCC to determine that a licensee is in a dominant position in any aspect of the Nigerian communications market and to publish guidelines/regulations on how it shall apply the test of dominant position to licensees. Though the Act does not specifically define dominant position, some of the matters that the NCC may take into consideration in applying the 'dominant position test clearly lean towards equating market power with dominance. In section 92 (2) (c) and (d) the NCA refers to market share and ability to make independent rate setting decisions respectively.

Self-Assessment Exercise 1

Mention two foreign and two local definitions of dominance.

1.3.2 Collective Dominance

Collective dominance is also called 'joint dominance'. It refers to a situation where two or more legally independent undertakings which individually may be found not to hold a dominant position increase their market power as a result of structural, technological or economic linkages. In *Airtours/First Choice (2000) 5 CMLR 494*, the Commission investigated a proposed hostile takeover of First Choice by Airtours. Investigations revealed the possibility of a collective dominant position being created in the market for short haul package holidays. Seealso*Ernst & Young France/Anderson France Case No. COMP/M 2498*on possible collective dominance in the market for consultancy services.However note thatthe fact that the undertakings have such linkages may not necessarily indicate collusion to influence the market. This was the reasoning of the Court of First Instance in overturning the Commission's decision to oppose the **Airtours/First Choice** takeover.

In the Nigerian communications sector, the NCC made a finding of joint dominance against Glo/MTN who together held 62% of the (upstream) wholesale leased lines and transmission capacity market – a necessary resource for the provision of voice and data services downstream where both Glo and MTN were in operation together with other competitors who would constitute their customers in the upstream market. It was further noted that there is a possibility of an abuse of the Glo/MTN dominance to restrict competition downstream. See NCC's determinations on Glo/MTN's joint dominance in the upstream sector in*NCC Determination of Dominance in Selected Communications Markets in Nigeria p.8*

Following a determination of collective dominance the regulator may impose obligations on the undertakings in order to curtail the exercise of market power and/or prevent an abuse of dominance. Following from the NCC's aforementioned determination against Glo/MTN, it required them to implement accounting separation, submit to a price cap for whole sale services and price floor for retail services and to submit specific details on its operations as the need arises from time to time. See *NCC Determination of Dominance in Selected Communications Markets in Nigeria' p.14*

Self-Assessment Exercise 2

From your assessment as a consumer in Nigeria, access whether collective dominance could exist in the following sectors:

a. Aviation (commercial local flights)
b. Importation of fuel
c. Production of sachet water

1.3.3 Super Dominance

We have defined a monopoly as ownership of almost 100% market share. In most cases, especially in the past, some undertakings operated as natural monopolies with statutory backing in government owned sectors such as utility companies (NEPA, NITEL), the health sector (government owned hospitals before the advent of private medical practitioners), and the oil sector (NNPC before the Petroleum Industry Act).

The term 'super-dominance' is also referred to as 'paramount position' or 'quasi-monopoly'. It has no formal or legal definition but is recognised as a situation where an undertaking has market power tending towards a monopoly such that the power of its competitor(s) is, at best, marginal with no significant effect on the super-dominant undertaking's market power. An example of a super-dominant undertaking was Microsoft whose Windows Operating System held over 90% share in the market for computer operating systems at some point.

Super dominant undertakings have a special responsibility not to impede competition in the market. Hence, the standards for judging whether a super-dominant undertaking's conduct is competitive are higher. In C*ompagnie Maritime Belge Transports SA V. Commission ((2004) 4 CMLR 1076,* anundertaking holding over 90% market share with only one competitor was determined to have abused its dominant position by engaging in selective price cutting though it did not incur any losses in cutting prices for some customers. The decision was based on the market share of the undertaking and purpose of the conduct which, though not manifestly illegal, was adjudged to be targeted at eliminating the undertaking's competitor from the market.

In-Text Question

In your opinion, would it be unfair to subject a super-dominant undertaking which rose to super dominance by investment and efficiency to stricter controls on competitive conduct?

1.3.4 Measurement of Dominance

There are two steps to determining whether anundertakingis dominant. First the regulator must define the relevant market. Thereafter, it must determine whether the undertaking possesses (significant) market power in the said market. The previous module dealt in detail with the definition of the relevant market. So assuming that market definition has been done and the relevant market has been ascertained, the next step would be to determine whether the undertaking under investigation possesses (significant) market power in that market.

In determining whether anundertaking is dominant in a market, several factors are considered. This list is not exhaustive as determination of dominance is done on a case by case basis. Since it is likely that no two undertakings can be subject to the same set of factors in the same context, the relevant factors are applicable in each case are usually determined by the context of that case.

Section 92(2) of the NCA 2003 provides a list of some of the factors that the NCC will consider in determining whether anundertaking is dominant in the Nigerian communications sector;

(a) the relevant economic market ;

(b) global technology and commercial trends affecting **market power** ;

(c) the **market share** of the licensee ;

(d) the licensee's power to make independent rate setting decisions ;

(e) the degree of product or service differentiation and sales promotion in the market ; and

(f) any other matters which the Commission is satisfied are relevant.

See also **Sections 71 and 72(3) FCCPCA**

1.3.5 Market share as an indication of dominance

In determining whether anundertaking has market power, one of the first factors considered is the market share. However, remember that large market share does not always translate into market power especially in situations where the sector where sector can only accommodate a few undertakings at the same time.

Following Whish's tabular analysis of market thresholds in the UK and EC, anundertaking may be presumed dominant if it holds market share of 40% - 50% market share. See *AKZO Chemie BV v. Commission (1993) 5 CMLR 215*.However, the 40% threshold for dominance may not always be correct. Hence, blanket reliance on figures may be risky and other countervailing factors constraining or influencing market must be taken into consideration. In *Hoffman La Roche V. Commission (1979) 3 CMLR 113 – 117,* it was held on appeal that Roche was not dominant in the Vitamin B3 market though it held about 43% market share. On the other hand, in *Virgin/British Airways (2000) C 20/21,* the European Commission was of the opinion that despite having a market share of less than 40%, British Airways was dominant in the UK air travel agency market because its position in the air transport market made it an obligatory business partner for travel agents.

For an example of dominance in Nigeria. seeNCC's determination on the market share of Starcomms in the Nigerian fixed voice sector and MTN in the mobile voice sector in **'NCC Determination of Dominance in Selected Communications Markets in Nigeria'**

Self-Assessment Exercise 3
With the aid of relevant cases, explore whether the 40% threshold for determining dominance is absolute in the EU

1.3.6 Other Factors that may Impact on Dominance

a. Existing competition
b. Potential competition
c. The nature or tastes of buyers in the market
d. Levels of regulation in the sector
e. Ownership of intellectual property and control of an essential facility

1.3.7 Regulatory Controls to prevent abuse by dominant undertakings

Where anundertaking is found to be dominant, the regulator may prevent any abuse of dominance by imposing additional obligations on the dominant undertaking. Some of the obligations imposed on dominantundertakings include

a Management separation and/or accounting separation in mergers or to prevent joint dominance
b. Obligations to align interconnection prices with costs (this is applicable in the telecommunications sector).
c. Mandatory publication of reference interconnection offers
d. Submission of necessary information as required by the regulator
e. Price caps or price floors
f. Collapse of on-net/ off-net retail tariffs

In-Text Question

How may a regulator curtail the powers of a dominant undertaking?

1.4. SUMMARY

In this unit we have learnt about the concept of dominance. We have examined various legal definitions of the term, situations when collective dominance or super-dominance may exist. We also learnt about the steps and factors for determining whether an undertaking is dominant and measures a regulator may employ to prevent an abuse of dominance.

Dominance refers to a situation where an undertaking is able to prevent competition in the market and act independently of its customers, competitors and consumers. It may be collective where two or more independent undertakings in the same sector jointly possess the capacity to influence themarket as a dominant undertaking would. Also, super dominance exists where a quasi-monopoly with significant market power exists in a market where competition is marginal and insufficient to influence its behaviour.

To determine whether an undertaking is dominant, the regulator must define the relevant market and determine the market share of that undertaking in the market. As a general rule, anundertaking with 40% market share or above may be declared dominant. However, market share may not be indicative of dominant in all cases. Other factors that may be taken into consideration in investigating whether an undertaking is dominant include the nature of the market, existing or potential competition, customer trends/behaviour, level of regulation etc. Where an undertaking is declared dominant, the regulator may adopt measures to prevent an abuse. Some of such measures include price caps/ price floors, accounting separation, reporting obligations etc.

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1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Foreign Definitions:

- 'the power to exclude competitors'. - US

- situation where one or more business undertakings or an association of business undertakings, who, either within the entire country or within a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution.' - Finland

- ‘a position of economic strength that gives the undertaking the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. See *Hoffman-La Roche & Co. AG v. Commission, Case No. 85/76 919790 ECR 461*.-EU

Local definitions

- A dominant position in a relevant market exists where an undertaking enjoys a position of economic strength enabling it to prevent effective competition beingmaintained on the relevant market and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers. - FCCPCA

- Market power is ‘the ability of a seller or group of sellers to maintain prices above competitive levels, or to maintain stable prices while reducing the quality of product or service provided, for a significant period of time’. EPSRA

SAE 2

a. Aviation (commercial local flights) – Yes. Players few enough and could work together to squeeze out competitors.

b. Importation of fuel – No. NNPC is the sole importer of fuel.

c. Production of sachet water – No. Too many players and state bound operations.

SAE 3

It is not absolute.

AKZO Chemie BV v. Commission (1993) 5 CMLR 215.- 40% threshold used.

Hoffman La Roche V. Commission (1979) 3 CMLR 113 – 117, 43% market share not held to be dominance

Virgin/British Airways (2000) C 20/21- less than 40% market share held to be indication of dominance

MODULE 3 ABUSE OF DOMINANT POSITION

UNIT 2 ABUSIVE CONDUCT WHICH EXPLOITS CUSTOMERS

2.1. INTRODUCTION

Part of competition in business includes undertakings engaging in different practices to attract or retain consumer patronage. While this is recognised as a hallmark of a competitive market, the regulator always has the consumer-focused goal of competition regulation in mind and may interfere where necessary to prevent this goal being impeded. The regulator will therefore be required to identify abusive business practices and prevent them.

As a general rule, unless a business practice is manifestly illegal or constitutes a crime, it may be practised in the market without interference from the regulator. However, the perceive effect of such a practice, will determine whether it is allowed by the competition regulator. As we will see in this unit, the same competition rules do not apply to the all undertakings in the market. Instead, the higher the market power of an undertaking, the stricter the rules concerning the kind of business practices it can engage in.

2.2. LEARNING OUTCOMES

By the end of this unit, you should be able to:

a. State the categories of abusive behaviour

b. Explain the meaning of

  i. Refusal to deal

  ii. Tying

  iii. Excessive pricing

  iv. Predatory pricing

  v. Price discrimination

c. State the difference between excessive and predatory pricing.

2.3. MAIN CONTENT

It has been argued that the concept of abuse of a dominant position is unfair because it punishes innovation and efficiency whilst leaving weaker competitors to reap where they have not sown. However, as we learnt in Competition Law I the focus, object and beneficiary of competition regulation is not the competitor but the consumer. Hence, the point of preventing an abuse of dominant position is to ensure that competition is not restricted or eliminated in the market to the detriment of customers, consumers and competitors – competitors are added to this category because of their importance for maintaining competition in the market for the ultimate benefit of the consumer.

In the business world, undertakings employ various marketing/business strategies to attract patronage. In a moral sense, these practices may be viewed as unfair however, they may not be frowned upon if the market is sufficiently competitive because undertakings which engage in such practices may not be able to sustain it for long since their competitors will also come up with strategies to ensure that they remain in the market so competition is preserved.

Business behaviour may not be deemed abusive if the undertaking engaging in it is not dominant. However, where the undertaking engaging in such behaviour is dominant, it will be precluded from engaging in such behaviour because of its likely effect on competition in the market.

In-Text Question
Why may a dominant undertaken be prevented from engaging in business behaviour which its non-dominant competitors may be free to engage in?

There are two major categories of abusive behaviour:

a. Conduct which exploits customers or suppliers such as excessive pricing, price discrimination, predatory pricing and tying.

b. Conduct which seeks to weaken or exclude existing competitors, or conduct which establishes or strengthens entry barriers in order to weaken potential competition such as refusal to deal, abuse of intellectual property rights and vertical agreements.

The first of these categories will be examined in this unit.

Self-Assessment Exercise 1 What are the major categories of abusive behaviour known to competition law?

2.3.1 Conduct which exploits customers and suppliers

Abusive conduct which exploits customers/suppliers is possible because of the market power of a dominant undertaking. This category of conduct clearly exemplifies the definition of dominance as the ability <u>to behave independently of suppliers, consumers and customers.</u>Some examples of such abusive practices include various abusive pricing strategies and tying/bundling.

a. Excessive Pricing

Section 72(2)(a) of the FCCPCA provides that a dominant undertaking abuses its position if it charges an excessive price to the detriment of consumers. In the EU, excessive pricing is defined as the practice of *'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.*' See Article 102 TFEU.

The test for excessive pricing was provided in the **United Brands case.** For a dominant undertaking to be held to have breached Article 102, it must be proven that:

a. the difference between costs and the actual price charged is excessive, **and**
b. the price is unfair when considered on its own or in comparison with competing products.

Note that both conditions must be proven for a breach to be held to have occurred.

The regulator, in satisfying the first condition may carry out benchmark comparisons, explore things like the nature of the market, the economic value of the product and/or alternatives to the product, other benefits that may outweigh costs and for which consumers may be willing to pay a premium etc. In like manner, the regulator in determining whether pricing is unfair must look beyond actual costs to hidden costs e.g. cost of research & development invested in creating the product (this will include failed attempts at creation), cost of marketing, sales and distribution, cost of raising capital, expected returns for those who invested in the product before profitability was guaranteed, and the company's portfolio i.e. its market for sale of the product, the size of the market to which the product is sold, price regulation etc.

For practical examples of how the regulator carries out such investigations, see for instance *Competition and Markets Authority investigation of Pfizer/Flynn for excessive pricing of Phenytoin Sodium (anti-epilepsy) capsules (2016),* See also *Danish Competition Council investigation of CD Pharma for excessive pricing of Syntocinon labour-inducing tablets (2018).*

In-Text Question
What may a regulator consider in investigating an allegation of excessive pricing.

b. Predatory Pricing

This practice is the opposite of excessive pricing. Section 72(2)(d)(iv) of the FCCPCA classifies predatory pricing as an exclusionary act which constitutes an abuse of dominance.

Predatory pricing occurs where a dominant undertaking crashes the price of its product below marginal or average cost – taking on losses in order to eliminate competition in the market. The intention of such an undertaking in crashing its prices is to provoke a switch by competitors' consumers to that of the dominant undertaking, prevent prospective competitors coming into the market and force competitors out of the market since they (possessing no market power) may not be able to match the low prices of the dominant undertaking and will be forced out of the market. Thereafter, the dominant undertaking may then regularise its pricing and recoup its profit having gained a larger market share.

Self-Assessment Exercise 2
Differentiate between excessive and predatory pricing.

c. Price discrimination

Price discrimination involves the imposition of different prices for the same product in different regions, groups or market segments with a view to driving out competitors in particular regions/groups/market segments. Price discrimination is not always classed as abusive as it may result in pro-competitive effects. For instance in regulated industries like telecommunications, price discrimination between peak and off-peak periods is legal. Hence, the purpose/effect of price discrimination largely determines its legality/illegality.

d. Tying and bundling

This refers to the practice of conditioning the sale of one good on the purchase of another unrelated good. In section 72(2)(d)(iv) the FCCPCA classifies tying as an exclusionary act which entails selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to object of a contract. See also section 102 TFEU**.**

Tying may be necessary in some cases to improve efficiency of products. Hence, for an undertaking's act of tying to be ruled abusive it must have as its object or intention the foreclosure of competition in the market for the tied product. This test was applied in the caseagainst Microsoft by the EC resulting in Microsoft being found to have breached (now) Article 102(d) TFEU byleveraging its near monopoly on operating systems (Windows) onto the market for media players which it provided for free in all computer systems using the Windows operating system. Microsoft was therefore ordered to offer a version of Windows without Media player and pay a hefty fine for its abuse of dominance. See also *Hilti AG v. EuropeanCommission Case T-30/89 of 1991*relating to tying of nails to a specialised nail-gun used in the construction sector.

In-Text Question

'Tying is an anti-competitive practice which is always illegal'.
How true is the above statement?

e. Refusal to deal/Refusal to Supply

This occurs when a dominant undertaking refuses or denies the supply of its product to a purchaser (usually another undertaking engaged at the same level and market as the dominant undertaking or at a different level of the same market of the product). This practice is captured as an abusive practice in Section 72(2)(d)(ii) of the FCCPCA which prohibits a refusal to supply scarce goods to a competitor when supplying those goods is economically feasible,

Whether an undertaking has abused his dominant position in refusing to deal/supply is judged on a case by case bases. A dominant undertaking may validly refuse to supply/deal with a purchaser if it has an objective justification for its refusal. For instance it can validly refuse to deal if the purchaser is a bad credit risk or does not provide adequatebranding or advertising for the dominant undertaking's product. Also a refusal to supply scarce goods will also be valid. These scenarios are clearly encapsulated in FCCPCA's caveat to the effect that a refusal to supply will only be illegal when such supply is 'economically feasible'.

Self-Assessment Exercise 3
Give 2 examples of when a dominant undertaking can validly refuse to deal.

2.4. SUMMARY

In this unit, we learnt that there are two broad categories of abusive practices which dominant undertakings are prohibited from engaging in. We learnt about specific examples of abusive practices which seek to exploit customers and statutory prohibitions of same. We also learnt that such practices though per se illegal may be allowed where a dominant undertaking has a valid justification for engaging in them or where the intention is not to foreclose competition.

Some business practices may be deemed abusive if engaged in by undertakings in dominant position. Abusive practices are broadly categorised into two namely conducts which exploit customers and conducts which seek to weaken or exclude competition. Conducts which exploit customers are possible because dominant undertakings have sufficient market power which enables them to behave independently of consumers, customers or suppliers.

Various abusive practices which exploit customers exist. Some examples of such practicesinclude excessive pricing, predatory pricing, price discrimination, refusal to deal and tying/bundling. Though generally deemed illegal, dominant undertakings may be allowed to engage in these practices if they have no negative impact on competition or where there is an objective justification for engaging in such practice

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2.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

a. Conduct which exploits customers or suppliers

b. Conduct which seeks to weaken or exclude existing competitors, or conduct which establishes or strengthens entry barriers in order to weaken potential competition

SAE 2

- Excessive pricing involves unreasonable increase in price above cost whilst predatory pricing involves an unreasonable decrease in price below cost
- Excessive pricing is always damaging to the consumer but predatory pricing may benefit the consumer on the short run
- Excessive pricing always result in profit for the abusive undertaking but predatory pricing results in a short term loss to the abusive undertaking.

SAE 3

- When it is not economically feasible
- Where the recipient fails to meet specific conditions such as credit rating, advertising, branding etc.
- When resources are scarce.

UNIT 3 ABUSIVE CONDUCT WHICH SEEKS TO WEAKEN OR EXCLUDE COMPETITION

3.1. INTRODUCTION

As stated earlier in this module, abusive practices relating to dominance are broadly categorised into two. In the previous unit, we examined the first category - anti-competitive practices designed to exploit customers. The focus of this unit is on the second category – abusive conduct designed to weaken or exclude competition. As you will learn in this unit, such abusive conduct though directed at competitors in the same market, ultimately results in reduced competition in the market and by extension places consumers at a disadvantage.

Note: You must always remember that where such conduct is practised in a fully competitive market with no dominant undertaking, it will not be challenged as anti-competitive or illegal. It only becomes so if it is practised by a dominant undertaking in a non-competitive market characterised by unequal market power.

3.2. LEARNING OUTCOMES

By the end of this unit, you should be able to:

1. Identify some forms of abusive conduct which may weaken or exclude competition.
2. Explain the pros and cons of exclusionary conduct
3. Define horizontal and vertical agreements
4. Compare and contrast between vertical and horizontal agreements

3.3. MAIN CONTENT

Another name for abusive conduct which seeks to weaken or exclude competition is **exclusionary conduct**. It can be difficult to clearly delineate what constitutes exclusionary conduct or whether or not conduct viewed by some as exclusionary merely amounts to vigorous competition. Some exclusionary practices may be beneficial –especially in the short term. In the

*United States v. Microsoft 253 F.3d34 (D.C. Cir. 2001)*the Circuit Court of Washington DC noted

> "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern… [hence] the challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."

In-Text Question

Give another name for the term 'abusive conduct which seeks to weaken or exclude competition'.

3.3.1 Tests for Exclusionary conduct

Some of the tests which may help in determining whether particular business conduct should be classed as exclusionary and therefore penalised are as follows:

a. Profit-Sacrifice Test

Profit-sacrifice test is focused pricing practices. It explores the purpose and intent of dominant undertaking's sacrificial pricing conduct. The focus of the test is to determine whether in engaging in business conduct which may be deemed sacrificial such as predatory pricing, the undertaking may have sought to sacrifice some of its profit in order to exclude existing competitors or deter potential competitors from the market and thereafter achieve or strengthen a position of dominance. See *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983);* See also *Konkurrensverket v TeliaSonera Sverige AB (Case C-52/09) [2011] ECR I-527*.

The profit-sacrifice test was applied in*Verizon Communications., Inc. v. Law Offices of Curtis V. Trinko, LLP - 540 U.S. 398, 124 S. Ct. 872 (2004)* (*Trinko*) where the US Supreme Court noted that "unilateral termination of a voluntary and (thus presumably profitable) cause of dealing suggests a willingness to forsake short-term profits in to achieve an anti-competitive end".

A claim of exclusionary conduct by profit-sacrifice is rebuttable with proof that the defendant's intention was not anti-competitive. For instance, the need to reduce imminent loss by selling

Self-Assessment Exercise How may a claim of exclusionary conduct by profit-sacrifice be rebutted?

products close to their expiry dates at a significant discount will be sufficient proof.

b. Potential Effects Test

Also called **effects balancing test**. The objective of this test is to balance between the pro-competitive and anti-competitive effects of a seemingly anti-competitive conduct. The test is also useful for undertakings to carry out self-assessment of the legality of their business policies to prevent them inadvertently falling foul of the law.

The test acknowledges that some *prima facie* anti-competitive conduct may have beneficial effects for the consumer. In measuring whether an undertaking's conduct is exclusionary, the focus is on the (potential) impact of such conduct on consumers. Where the pro-competitive effect of such conduct outweighs its anti-competitive effect it will not be classified as exclusionary.

See *C-525/16 MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência Judgment of the Court (Second Chamber) of 19 April 2018* *<https://curia.europa.eu/juris/document/document.jsf;jsessionid=B8D40C70F805908039D59A2311BD2F4B?text=&docid=201264&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2467727>*

The FCCPCA appears to endorse the potential effects test. In Section 72(2) (c) and (d) the Act prohibits exclusionary acts except the undertaking engaging in them can show that technological efficiency and other pro-competitive gains outweigh anti-competitive effects.

c. Efficient Competitor Test

The test is based on the rationale that efficiency should be encouraged. Hence, an efficient undertaking should not be penalized for having lower production costs than its competitors and pricing accordingly. As Posner opined

> "It would be absurd to require the undertaking to hold a price umbrella over less efficient entrants. . . . [P]ractices that will exclude only less efficient undertakings, such as the monopolist's dropping his price nearer to (but not below) his cost, are not actionable, because we want to encourage efficiency."

Exclusionary conduct may therefore be allowed if it is proven to be a function of business efficiency resulting in reduced production costs in comparison to less-efficient competitors. Such demonstration of efficiency will be encouraged because it holds long-run benefits for the market and by extension the consumer.

Unlike the potential effects test which considers consumers, the focus of the equally efficient competitor test is on competitors within the relevant market and their pricing models. Pricing at or slightly above cost may be allowed even when such pricing places the undertaking at an advantage compared to pricing by other competitors. On the other hand, pricing below cost entails the threat of equally efficient competitors being driven out of the market with the possibility for recoupment by the anti-competitive undertaking at the expense of consumers. This is clearly exclusionary and anti-competitive. See **Ortho Diagnostic Systems Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 466**.

In-Text Question
Differentiate between potential effects test and efficient competitor test.

3.3.2 Intellectual Property Rights and Exclusionary Conduct

The World Trade Organisation defines intellectual property rights (IPRs) as rights given to persons over the creation of their 'minds' i.e. rights giving the creator of an intellectual property exclusive use of the creation for a certain period of time.

Possession of IPRs usually gives the IPR holder market power which may extend to dominance and/or monopolization. This is generally not a problem as IPRs constitute the fruit of extensive research and capital investment to which the creator entitled to exclusive use and enjoyment over a period of time. However, there is the possibility for IPR holders to abuse the aforementioned power - this is what competition authorities seek to prevent. In doing so, they strike a balance between the right of the IPR holder to enjoy the fruits of investment, the need to encourage invention/innovation and the need to protect or ensure the continuance of competition for the benefit of consumers.

It may be assumed that IPR holders will be more desirous to exist as a monopolies or dominant undertakings in order to maximize profits. However, cooperation with competitors or suppliers may also be beneficial both to the IPR holders (e.g. through extended reach for their products) and consumers (e.g. through improved access to products or newer/cheaper products incorporating IPR). Where necessary, IPR holders may be required to grant licences to their competitors and other dealers on **f**air,**r**easonable **a**nd **n**on-**d**iscriminatory (FRAND) terms. The focus of the FRAND requirement is in the interest of all parties - including the IPR holder and the market that depends on competition for growth.

In Nigeria, the FCCPCA prohibits conduct and agreements with exclusionary objectives. Section 64 expressly prohibits restrictive licensing agreements where applied to patented goods or goods made by a patented process. Similarly, specific anti-competitive conduct such as refusal to deal, refusal to license, refusal of access to essential facilities etc. which result in restriction of competition or exclusion of competitors from the market are also prohibited.

In the EU, abusive conduct or anti-competitive agreements involving IPRs are prohibited under articles 101 and 102 TFEU. Whilst article 101 regulates technology transfer agreements, article 102 regulates anti-competitive conduct. As a general rule, technology transfer or IP licensing agreements which have restrictive objects or may produce appreciably restrictive effects are illegal unless the parties to the agreement can demonstrate that they are justifiable on grounds of efficiency or fall within one of the block exemptions available under EU competition law.

Self-Assessment Exercise 2

What does ‘FRAND’ mean?

3.3.3 Examples of Abusive Behaviour for Specific forms of IP

a. Patents

Technology has made interoperability between various media possible especially in sectors dependent on information technology and communications media. Hence, interconnection of unrelated products is usually necessary for the provision of novel services. In the telecommunications sector for instance, standard essential patents (SEP) are required for linking telecommunications accessories, security, biometrics, power and industrial equipment to mention a few. Refusal to licence an SEP therefore has far-reaching negative anti-competitive effects necessitating pre-emptive and or corrective regulation by competition authorities. See *Microsoft v. Motorola SEP case, Apple v. Samsung/Motorola SEP cases and Huawei cases.*

With the recent COVID-19 crisis and various novel ailments, pharmaceutical companies and patents for new drugs have become even more relevant – with relevance comes power. Owing to the race to produce 'that breakthrough cure' pharmaceutical companies may engage in anti-competitive practices in order to strengthen their powers and/or refuse to licence patents for the production of cheaper generic versions of their patented drugs.

In the EU for instance, the competition regulator has had to weigh in to prevent or punish several of such practices. In *AstraZeneca-Losec case* – the locus classicus on abuse of Article 82 (now 102) in the pharmaceutical sector, the Commission found Astra-Zeneca guilty of abusive conduct through its misuse of the patent-extension system to extend valid patents Omeprazole and selectively deregister patents for Losec capsules. Both acts were intended to impede market entry for competitors producing generic variants of Losec.

Closely connected to the above acts is the power of patent holders to fix prices not representative of market realities. While this is generally not frowned at during the subsistence of the patent, it becomes a problem after the expiration or licensing of patents, if the patent holder engages in conduct which empowers it to continue to charge a premium for the product. In the *Aspen Pharmaceutical* case, Aspen (a powerful pharmaceutical company engaged in the production of important cancer drugs) was found to have engaged in 'price gouging' (an unjustified price increase) which they backed with threatened and/or actual withdrawal of essential medicines to force buyers to purchase at the excessive prices. Following a Commission investigation into Aspen's abusive conduct, Aspen committed to a 73% price-reduction for six of its critical cancer medicines.

In-Text Question
How may a pharmaceutical company strike a balance between the need to recoup cost of R&D and the benefit to consumers of having access to affordable COVID vaccines?

b. Trademarks, Image Rights and Copyrights

Section 64 of the FCCPCA only made express reference to patents. However, abusive conduct is known to extend to other forms of IPR. For abusive conduct relating to trademarks, undertakings in dominant position may seek to constrict the market by imposing restrictions on retailers to prevent dilution of their brand for instance through online sales. Competition authorities recognise the need for exclusive brands to restrict over-distribution of luxury goods and preserve the quality and exclusivity of such brands. In*Coty Germany GmbH, Case C-230/16*the European Court of Justice affirmed that luxury brands may restrict distribution of their goods through third party online platforms like Amazon or eBay where such restriction is necessary to preserve the luxury image of their goods.

Whether or not restriction on online sales is for protection of luxury images is a question of fact. Where such restriction goes beyond a basic requirement for the protection of quality standards the competition authority may deem it to be anti-competitive. In the *Adidas Kits Case (B3-137/12 of 2014)* the German competition regulator – Bundeskartellamt disallowed Adidas attempt at selective ban of sale of its products via so-called ‘open marketplaces’ on the internet (which it interpreted to include trade between private consumers, trade in and sale of used/damaged goods and offer of same products by several sellers) and imposition of conditions which made it impossible for consumers to call up the Adidas site via third party platforms with the logo of such platforms visible. The regulator ruled such conduct as attempts to restrict competitive access to the market and consolidate market power which went beyond image protection.

Competition authorities also discourage the use of copyright to restrict or exclude competition. Examples of such conduct include Microsoft’s tying of its Media Player to computers using the windows operating system. This was found to be anti-competitive since it effectively locked out competitors like Real Player. See also*Intel Corporation v. Commission Case C-413/14 P*on Intel’s abusive conduct relating to its X-86 CPU in the EU.

Self-Assessment Exercise 3

When may a restriction on online sales of luxury designer items be deemed anti-competitive?

3.3.4 Vertical Agreements

The EU Commission Regulation No. 330/2010 defines a vertical agreement as "an **agreement or concerted practice** entered into between **two or more undertakingseach of which operates**, for the purposes of the agreement or the concerted practice, **at a different level of the production or distribution chain**, and **relating to the conditions** under which the parties may purchase, sell or resell certain goods or services."An example of a vertical agreement is an agreement between the producer of a product and its authorised dealer/reseller.

Vertical agreements are not automatically anti-competitive. They may be beneficial where they are targeted at improving efficiency in business especially for cross-border products. Some benefits of vertical agreements include reduction of transaction costs, elimination of logistical technical and financial issues and improvement in sales.

As indicated from the EU definition, a business practice need not be in writing to bring be classed as a vertical agreement where there is proof of 'concerted' action, that will suffice. Hence any arrangement understanding or action in concert whether formal or informal, verbal, written or by conduct may be classed as a vertical agreement. In *Shri Shamsher Kataria and Honda Siel Cars (India) Ltd. et al Case number 3 of 2011*, the Competition Commission of India ruled that unwritten understanding between automobile manufacturers and their authorised dealers which restricted them from selling automobile spare parts to third parties on the open market amounted to vertical agreements.

Vertical agreements are different from horizontal agreements. For vertical agreements, the parties do not function at the same level of the production or distribution chain. They are therefore not competitors. By contrast, parties to a horizontal agreement operate at the same level of production or distribution and are therefore competitors. As seen in *Shamsher Kataria* case above, automobile manufacturers and dealers in automobile spare parts function at different levels of the automobile manufacturing market hence, their concerted practice was rightly classed as a vertical agreement.

Horizontal agreements are clearly more likely to be anti-competitive and therefore subject to stricter regulation. However vertical agreements may also be anti-competitive if they have as their object or effect the prevention, exclusion, or restriction of competition.

Vertical agreement may take the form of an exclusive dealing arrangement. The FCCPCA defines exclusive dealing as

> any practice whereby an undertaking as a condition of-
> (a) supplying goods and services to a customer-
> (i) requires the customer to deal only or primarily in goods or services supplied or designed by undertaking or its nominee, or refrain from dealing in a specified class or kind of goods or services, except as supplied by the undertaking or its nominee, or
> (ii) induces a customer to meet such condition by offering to supply goods or supply goods or services to the customer on more favourable terms or conditions if the customer agrees to meet that condition;
> (b) purchasing a specified class or kind of goods or services from a supplier, requires the supplier to refrain from supplying the same class or kind of goods or services to other undertakings

Notwithstanding the use of the words ‘undertaking’ and ‘customer’ in the above definition, it is important to note that the provisions relate to contracts between undertakings usually at different levels of the supply chain. Hence the undertaking in this context may be the upstream supplier while the 'customer' may be a downstream supplier who either resells the product produced by the upstream supplier or incorporates the product into its (the downstream supplier) production process to come up with a different product. Examples of these scenarios include arrangements between airlines and travel agents (see *British Airways Case C-95/05*), and loyalty rebates granted by a computer CPU (central processing unit) manufacturer to computer equipment manufacturers who incorporate its CPU in the computers they manufacture (*Intel v. Commission Case T-457/08 [2014] E.C.R. II-0000*) respectively.

In-Text Question
Give examples of when vertical agreements may be beneficial.

3.4. SUMMARY

In this unit, we learnt about exclusionary conduct by undertakings directed at competitors. Exclusionary conduct seeks to weaken or exclude existing competition. We also learnt that there are various tests for determining when exclusionary conduct goes beyond vigorous competition and veers to exclusionary conduct. They include the profit-sacrifice test, the potential effects test and the efficient competitor test. We also learnt about vertical agreements (including exclusive dealing) as particular examples of exclusionary conduct. As with anti-competitors directed against consumers, vertical agreements (including exclusive dealing) may be per se illegal.

Abusive practices directed at competitors are known as exclusionary conduct. They seek to weaken or exclude competition in the market thereby causing harm to the interests of consumers in the market. Exclusionary conduct may be beneficial especially for those undertakings who engage in them especially in the short term. Hence for tests to distinguish between exclusionary conduct which benefit competition and those which harm same. There are various tests for determining whether competitive conduct may be exclusionary. They include the profit-sacrifice test, the potential effects test and the efficient competitor test.

With the increase in inventions and extension of IPR to patents, trademarks and copyrights, market power of IPR holders may be substantial. There is therefore need to ensure that IPR holders do not engage in anticompetitive exclusionary conduct. Majority of IPR based exclusionary conduct relate to refusal to licence IPRs or grant of licence on onerous terms. IPR holders may also exploit the market using their IPR privileges as AstraZeneca attempted to do in connection with its Omeprazole and Losec capsules. For IPRs relating to image rights and exclusivity of luxury brands, restriction of distribution may be valid though exclusionary, where necessary to preserve luxury images.

Vertical agreements constitute another form of exclusionary conduct. Though they may have some procompetitive benefits, they are also anti-competitive. This necessitates the need for the regulator to strike a balance between these benefits and burdens. Exclusive dealing arrangements are classed under vertical agreements. Though some may be beneficial, they are subject to regulation to prevent anti-competitive abuse of power using such arrangements.

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3.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

A claim of exclusionary conduct by profit-sacrifice may be rebutted by providing proof that the defendant's intention was not anti-competitive.

SAE 2

FRAND is an acronym for**f**air, **r**easonable **a**nd **n**on-**d**iscriminatory. It refers to the terms under which IPR holders are required to grant licences to their competitors and other dealers in the interest of preserving competition.

SAE 3

A restriction on online sales may be anticompetitive if it goes beyond a basic requirement for the protection of quality standards.

MODULE 3 ABUSE OF DOMINANT POSITION

UNIT 4 ESSENTIAL FACILITIES DOCTRINE

4.1 INTRODUCTION

The previous two units have been focused on the concept of dominance and some anti-competitive business practices directed against consumers on the one hand, and competitors on the other. In Unit 2 we considered abusive practices designed to exploit customers (including undertakings who require a dominant undertaking's product as an add-on or consumers of the product). Unit 3 concentrated on abusive practices designed to weaken or exclude competition in the market where the dominant undertaking operates. This unit explores the essential facilities doctrine - a variant of the refusal to supply concept which sits astride both broad categories of abusive conduct.

4.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

1. Explain how the essential facilities doctrine operates
2. Identify essential facilities in everyday business activities
3. Explain the application of the doctrine in specific sectors

4.3. MAIN CONTENT

Pitofsky defines an essential facilities doctrine as a mandatory access remedy which places limitations on a monopolist's [or dominant undertaking's] ability to exclude rivals (actual or potential) from competing with it by restricting their access to an essential facility wholly owned or controlled by the said monopolist [or dominant undertaking]. In essence, the doctrine originated as a tool encourage competition in sectors where there would otherwise be none due to monopoly power held by the owner/controller of an essential facility. As with the overarching objective of competition law, the essential facilities doctrine seeks to ensure that competition exists or is preserved in the market for the benefits of consumers. Hence, though it may be beneficial to an undertaking who seeks its application, the goal is to ensure undertakings remains in the market for the benefit of consumers.

On the face of it, the doctrine may be assumed to punish innovation or capital investment. This is not the case - the doctrine is applied carefully and guided by public interest. As stated above, access is not usually ordered simply because it will be useful or convenient to do so. Furthermore, the controller of the essential facility is entitled to charge reasonable rates for granting access. Again, the doctrine is only directed at dominant undertakings who possess the market power to exclude competitors and harm competition in the market. Hence where the controller of an essential facility is not dominant, it will not be constrained to grant access. This is in recognition of the fact that businesses have no duty to cooperate with their rivals. All undertakings must innovate and compete on favourable terms with their peers. See *Aspen Skiing Company v. Aspen Highlands Skiing Corporation 472 U.S. 585 (1985).*See also*Berkley Photo v. Eastman Kodak Co 603 F.2d 263 (2nd Cir. 1979).* For the doctrine to apply, there must first be an essential facility. Which brings us to the question – what is an ‘essential facility’?

In-Text Question
What is the goal of the essential facility doctrine?

4.3.1 Definition of ‘Essential Facility’

The term ‘essential facility was defined by the European Community in *B&I Line v. Sealink Harbours (1992) 5 CMLR 255*. The court defined it as is a facility to which undertakings require access to provide develop goods or services, but cannot bereplicated by any reasonable means. Note that replication may not just a financial matter. It may be a matter of practicability or expediency. For instance, it may be unnecessary or wasteful to construct another essential facility where the essential facility in existence can cater to its owner/controller as well as competitors who require access.

The word 'facility' as used in the context of the essential facilities doctrine includes any input, raw material, infrastructure or item – whether tangible or intangible depending on the specific sector in which the facility is used. Examples of tangible products which may be classified as essential facilities include harbours, pipelines and ports. By their nature, they are expensive to construct and impracticable to replicate. See*Sea Containers Ltd. v. Stena Sealink Ports and Stena Sealink Ltd (1995) 4 CMLR 84*where the essential facility to which competitors required access was a port. ***E***xamples of intangible essential facilities include computer source codes, and technical information like computerised airline reservation systems which to which competitors require access as was the case in *Aer Lingus v. British Midland OJ (1992) l96/34, and London European – Sabena OJ (1998) L 317/47***.**

Owing to the above definition, the essential facilities doctrine will be applicable in all sectors as long as business or production activities in such sectors are dependent on a facility which is practically or reasonably impossible to replicate by other means. Whether or not access will be granted is another matter which we will consider later in this unit.

Though usually invoked in relation to access disputes between dominant undertakings and their competitors, the essential facilities doctrine is also applicable where a dominant undertaking seeks to exclude potential competitors. See for instance *Commercial Solvents v. Commission Cases 6/73 &7/73 (1974) ECR 223 (Commercial Solvents Case v. Commission)*where access to an essential facility was ordered in order to prevent a dominant undertaking from excluding both current and potential competitors. Similarly, in *Irish Continental Group v. CCI Morlaix (1995) 5*

CMLR ***177*** where ferry operators intending to commence services in particular routes successfully challenged dominant port owners' refusal of access.

Self-Assessment Exercise 1 Give examples of tangible and intangible essential facilities

4.3.2. Characteristics of an Essential Facility

Not every facility to which access may be is required can be classed as an essential facility. Furthermore, the fact that access to a facility would be cheap or convenient for a competitor to have, will not guarantee that the facility will be classified as an essential facility. As we will see later in this unit, the doctrine is not meant to encourage free riding. Undertakings must be willing and able to compete, evolve/innovate and earn their place in the market. In *Oscar Bronner v. Mediaprint Case C-7/97*, the European Court of Justice refused to grant access to Bronner who had argued that Mediaprint's nationwide newspaper home-delivery scheme was indispensable for its distribution of daily newspapers. The Court reasoned that though a grant of access would be more advantageous for Bronner, distribution by post or sale in shops constituted valid (but less advantageous) alternatives.

For a facility to be classified as an essential facility, it must possess two mutually reliant and co-occurring characteristics:

a. It must be reasonably or practicably impossible to duplicate

On impossibility of duplication, it is important to note that the existence of alternative means of duplication will not bar a facility being deemed essential if such duplication can only be achieved through unreasonable means such which will require huge investment or effort. For instance, it is possible to construct more than one airport in a city. However, where one already exists which can accommodate additional economic activities, it will be wasteful and impracticable to construct another airport.

b. It must be indispensable to economic activity'

The fact that a facility is 'needful', 'suitable' or 'convenient' does not make it an essential facility. What is important is that refusal of access to the facility can result in the elimination of competition. See for instance, *Flip Side Productions Inc. v. Jam Productions Ltd 843 F.2d 1024 (7th Cir. 1988)*where it was held that an auditorium will not constitute an essential facility if competitors of a dominant concert promoter are not precluded from staging concerts in the auditorium on dates not already booked by the dominant producer or where other venues may be used by the competitors.

On the indispensability characteristic of an essential facility, the EU Green paper on the Application of Article 82 [now 102] of the TFEU to Exclusion Agreements explains that:

> 'a facility is an indispensable input only when duplication of the existing facility is impossible or extremely difficult, either because it is physically or legally impossible to duplicate, or because a second facility is not economically viable in the sense that it would not generate enough revenue to cover its costs.'

In-Text Question

Discuss the characteristics of an essential facility and which of them must be specifically established to succeed in a claim for access.

4.3.3 Elements of an Essential Facilities Claim

As indicated above, a claim for access to an essential facility is not always a guaranteed success. The courts may refuse to order access if the claimant is unable to establish its claim. *In MCI*

Communications Corporation v. AT & T 702 f.2d 1081, the courts pointed out that a claimant must establish that:

i. The facility to which access is requested is an essential facility - See the *Sealink and Oscar Bronner cases.*

ii. The facility is in control of a dominant undertaking. – See the *Kodak Eastman Case*

iii. It is feasible for the dominant undertaking to grant access to the facility.

iv. The dominant undertaking has denied the claimant the use of the facility or is allowing use on terms less favourable than that of its services or subsidiaries. See *Frankfurt/Main AG 98/190/EC Decision of 14 January 1998*. See also *US v. Microsoft 253 F.3d 34 (1998)* and *Microsoft Corporation v. Commission T-201/04*.

The above elements are questions of fact which must be demonstrated proven with the aid of supporting data, facts etc. See *GlaxoWellcome (Pty) Ltd v. National Association of Pharmaceutical Wholesalers. Case No. 15/CAC/Feb0f2* (South Africa)

4.3.4 Sector Neutral Application of the Essential Facilities Doctrine in Nigeria

The FCCPC as the sector-neutral regulator of competition in Nigeria recognises that refusal of access to an essential facility may harm competition. It therefore classes such refusal as an abuse of dominant position. In Section 72(2) (b) the FCCPCA provides that refusal to give a competitor access to an essential facility when it is economically feasible to do so is an abuse of dominant position. By the express inclusion of economical feasibility as a condition for such abuse, the FCCPCA aligns with the prescription of competition case law in developed jurisdictions.

4.3.5 Sector-Specific Application of the Essential Facilities Doctrine in the Nigerian Telecommunications Sector

Section 4(1)(d) of the Nigerian Communications Act empowers the NCC as the sector-specific regulator of the Nigerian communications sector to promote fair competition and protect communications services and facilities providers from misuse of market power or anti-competitive and unfair practices from other service or facilities providers or equipment suppliers. The telecommunications sector is characterised by high barriers to entry, huge sunk costs and the presence of few suppliers at a time. Also, technological superiority and first-mover advantage makes dominance a possibility. Hence the need for proper regulation albeit light touch because multiplicity and flexibility of consumers makes the market highly competitive with practical constraints on market power.

Where essential facilities are concerned, one easily identifiable essential facility is operators' networks to which access is required by other service providers in order to generate and terminate telephone calls. In a properly competitive market, access is obtained through interconnection on mutually agreed rates. A dominant telecommunications provider with large subscriber base may exert its market power by refusing access to its network to enable its competitors' subscribers generate or terminate calls to the dominant provider's call – thereby constraining subscribers to remain on its network or switch from competing network in order to access its large subscriber base. Such refusal of access would run afoul of the essential facilities doctrine. To prevent such occurrence, Sections 96 – 100 of the NCA obligates network operators to satisfy interconnection requests from competitors on the same terms as those granted to such operators' subsidiaries. Section 101 extends the same rule to network access requests.

4.3.6 Sector-Specific Application of the Essential Facilities Doctrine in the Nigerian Power Sector

Like the telecommunication sector, the power sector is characterised by high barriers to entry, huge sunk costs, vertical integration and the presence of few undertakings in the sector. Though the sector has been privatised, competition is still lacking as commercial service providers operate as monopolies within their area of influence while power transmission remains solely within government control. NERC, sectoral regulator is empowered to regulate competition in the Nigerian power sector and prevent/mitigate abuse of power.

Owing to its indispensability for power transmission and impossibility of replication, transmission lines and equipment constitute an essential facility. Transmission stands as link to power generation on the one hand, and power distribution on the other – both of which enjoy some measure of private/commercial ownership. At present, the transmission function is carried out by the Transmission Company of Nigeria (TCN) which is wholly owned by the Federal Government. In view of its strategic importance of transmission, it is advantageous that transmission remains a public function because the TCN as a government owned company may enjoy neutrality and is unlikely to engage in anti-competitive behaviour since its sole focus is not profit-making. Furthermore, the NERC, by virtue of its competition regulation function, is empowered to resolve any issues which may arise where TCN fails to meet its non-discrimination obligation. No such issue has arisen since the Nigerian power sector was liberalised.

Self-Assessment Exercise 2

How true is the statement below:

'The essential facilities doctrine is not applicable under Nigerian competition law'

4.4 SUMMARY

In this unit, we learnt about the essential facilities doctrine. We have learnt that it is a mandated access remedy which originated as an off-shoot of the refusal to supply concept. We have also learnt that an essential facility must be indispensable and practically impossible to replicate. Furthermore, that a claimant under the doctrine must prove that the facility required is an essential facility, that it is in the control of a dominant undertaking, that it is feasible for the dominant undertaking to grant access to the essential facility and that the claimant has been denied use of the essential facility or that access has been granted on terms less favourable that the terms on which the dominant undertaking grants access to its subsidiary. We have also learnt that access to an essential facility is not automatic but may be validly refused where the claimant is unable to prove the aforementioned facts or there are valid reasons for refusal of access.

We have further learnt that the essential facilities doctrine is applicable in Nigeria under the FCCPCA, the NCA and the EPSRA which mandate Nigerian competition regulators to prevent abuse of market power and harm to competition by refusal of access to essential facilities such as telecommunication or power transmission networks.

An essential facility is any resource, facility or infrastructure which is indispensable to economic activities in a specific market but is reasonable or practically impossible to replicate. The essential facilities doctrine requires that a dominant undertaking grants access to an essential facility within its ownership or control on reasonable and non-discriminatory terms where access is required to ensure the protection of competition in the market.

The focus of the doctrine is to ensure the protection of competition in the market and prevention of harm to consumers following market exclusion of competitors by a dominant undertaking in control/ownership of an essential facility. In ensuring these benefits, the regulator must strike a balance between the need to prevent free-riding by competitors and the need to encourage innovation. Hence, a dominant undertaking may validly refuse a request for access where the facility is not deemed indispensable or it where it is not feasible for the dominant undertaking to grant access. Where access is mandated, the dominant undertaking is entitled to charge for granting a licence to a competitor to enable it access the dominant undertaking's essential facility. However, such grant of licence must not be on terms less favourable to the dominant undertaking's subsidiaries.

The FCCPC and NCC/NERC as Nigerian competition regulators are also empowered by their enabling laws to prevent abuse of power. In the telecommunications sector, subscriber networks and interconnection constitute essential facilities. The NCA mandates service providers to grant access to their networks and satisfy interconnection requests on the same terms as it would grant to its subsidiaries. The doctrine has been applied in catalysing competition in the telecommunications sector and curtailing of abuse of market power by dominant service providers who sought to constrain competition and exclude competitors from the sector. Transmission equipment constitute essential facilities in the power sector. To prevent any abusive constriction of access to this facility, transmission is the exclusive function of the TCN – a government owned company. Owing to government neutrality, the TCN aggregates power from commercial power generation companies and transmit same to distribution companies on equal and non-discriminatory basis.

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4.6 SUGGESTED ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

Examples of tangible Essential Facilities

- Ports
- Airports
- Oil pipelines
- Stadia

Examples of intangible Essential Facilities

- Computer source codes
- Airline reservations system
- Special essential patents
- Computer software

SAE 2

The statement is incorrect. The essential facilities doctrine is applicable in Nigeria both on a sector-neutral basis under the FCCPCA and on sector-specific bases under the NCA for telecommunications sector and EPSRA for the electric power sector.