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Assessment of dominant position

How does the Competition Act 2007 define dominance?

Section 46(3)(a) of the Competition Act 2007 (the 'Act') defines dominance as the ability of an enterprise or a group of enterprises to operate on the market, adjust prices or output without effective constraints from competitors or potential competitors.

Why should dominance be assessed?

The review of a monopoly situation by the Competition Commission is subject to, amongst other conditions, that the enterprise in question should be in a dominant position.

It is unlikely that an enterprise which is not in a position of dominance will have the ability to restrict, prevent or distort competition. Whereas, a dominant firm will have the ability to distort competition by engaging in anti-competitive practices to eliminate existing or potential competitors.

Dominant firms can also engage in exploitative conduct such as excessive pricing. Ultimately, consumers are harmed.

How is dominance assessed?

Assessment of dominance starts with the relevant market, which identifies the product and geographic boundaries of competition between firms. Competing products and rival firms are identified and thus provides for a basis for the assessment of the market shares and degree of concentration.

While market share might be an indication of dominance, it has to be complemented with the assessment of conditions for entry and expansion.

Expansion by rivals or the possibility of entry of potential competitors are considered in determining whether a firm has dominance in a market or not. An enterprise is more likely to be dominant with a high market share in a concentrated market and where scope for expansion by rivals is limited and entry barriers are very high.

Barriers to entry and expansion can include for instance

- licensing requirements, which entail lengthy administrative procedure;
- huge upfront investment costs;
- minimum economies of scale;
- high brand loyalty or switching costs for consumers;
- unavailability of key assets or inputs.

In absence of such barriers, it is unlikely that an enterprise, though with high market share, can have dominance. It is unlikely to be able to adjust price or output without effective constraints. For instance, following an increase in price consumers would shift demand to other competing products. At the same time, other firms would be incentivised to supply the product, thus making the price increase unsustainable.

Factors considered when assessing dominance

- Existing competition in the relevant market:
  - competing products and firms.
  - market shares and concentration.
  - durability of market power.
- Buyer countervailing power.
- Potential competition - ease of entry and expansion:
  - licensing requirements
  - minimum efficient scale.
  - customer loyalty to existing brands or switching costs.
  - availability of key assets or inputs.
  - history of entry.

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