

## **GUIDELINES**

### **SECTION 3: ABUSE OF DOMINANT POSITION**

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## **1. Introduction**

- 1.1 The Competition Commission of Pakistan (the “Commission”) is empowered under the Competition Act 2010 (the “Act”) to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and protect consumers from anti-competitive conduct.
- 1.2 The Commission's mandate as to competition-related administration and enforcement extends to all markets in Pakistan, notwithstanding technical and economic regulation carried out by sector-specific regulatory authorities.
- 1.3 These Guidelines on Abuse of Dominant Position (the “Guidelines”) have been issued by the Commission under Sections 28, 29 and 62 of the Act read with Regulation 41 of the Competition Commission (General Enforcement) Regulations 2007 to explain the scope and application of Section 3 of the Act. They indicate the process which the Commission undertakes to give effect to the provisions of the Act and associated rules and regulations when assessing an alleged abuse by a dominant undertaking.
- 1.4 These Guidelines are not a substitute for the Act, or the rules and regulations made thereunder and have no binding legal effect. The hypothetical scenarios in the Guidelines are for illustration purposes only. They are not exhaustive and do not limit the investigation and enforcement powers and functions of the Commission.
- 1.5 It is intended that the Guidelines should be of assistance to those undertakings which hold a dominant position as well as consumers and other businesses. Readers are advised to carefully study the Act and to seek legal advice wherever necessary.

## **2. Abuse of Dominant Position**

- 2.1 The abuse of a dominant position by an undertaking(s) is prohibited under Section 3 of the Act. However, a dominant position itself does not amount to a violation of this provision. In terms of the Act, abuse of dominant position is deemed to exist when an undertaking engages in practices which prevent, restrict, reduce, or distort competition, directly or indirectly, in a relevant market in Pakistan.
- 2.2 While evaluating an alleged abuse of dominant position, the Commission conducts a detailed assessment of the relevant market and the effect of the undertaking's conduct on competition.
- 2.3 The Commission applies a step-wise approach to assess if an undertaking's conduct is anti-competitive in terms of Section 3, which includes but is not limited to:
  - i. *Defining the undertaking(s) concerned;*
  - ii. *Defining the relevant market;*
  - iii. *Assessing whether the undertaking(s) is dominant in the relevant market(s); and*
  - iv. *Assessing whether it is abusing its dominant position.*

### *Undertakings*

- 2.4 'Undertaking' as defined under Section 2(1)(q) of the Act means:
- any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings.
- 2.5 While assessing whether an entity is an undertaking for the application of section 3, the key consideration is whether it is engaged in commercial or economic activity in Pakistan or any part of it. The formal structure of the entity is not a factor in the identification of an undertaking for the purposes of the Act.
- 2.6 When identifying an undertaking for application of the Act, the Commission may consider one or more undertakings. Where one or more undertakings are identified for assessment, their dominance in relevant markets may be assessed individually or collectively, or both. In cases of collective dominance, the possibility of tacit coordination may also be considered by the Commission in its evaluation. The elements of tacit coordination are outlined in paragraph 2.21.

### *Relevant Market*

- 2.7 To assess whether or not an undertaking holds a dominant position, the Commission first defines and delineates the relevant market. The definition of a relevant market comprises of two dimensions: *the relevant product market*, and *the relevant geographic market*, which are defined under Section 2(1)(k) of the Act as:

[...] a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, prices and intended uses.

A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;

- 2.8 While defining markets, the Commission will consider direct or indirect information, data and facts, among other things, that are relevant to the case at hand. Market definition however, is only an analytical tool and not an end in itself.
- 2.9 A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.

- 2.10 A relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas by reason of difference of market dynamics.

For more detail, refer to the Commission's Guidelines on Market Definition and Relevant Market.

***Dominance (Significant Market Power)***

- 2.11 These Guidelines only provide a general analytical framework for the assessment of dominance and its abuse. The Commission's actual assessment will be carried out on a case by case basis with regard to the specific circumstances of the case.
- 2.12 According to Section 2(1) (e) of the Act, a dominant position of one or more undertakings in a relevant market shall be deemed to exist if :

[...] such undertaking or undertakings have the ability to behave to an appreciable extent independently from competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.

- 2.13 The ability of an undertaking to increase and sustain its prices above competitive levels or to restrict output or quality below competitive levels over a period of time indicates that the undertaking is not subject to effective competitive restraints and can exploit its customers or indulge in exclusionary or discriminatory conduct.
- 2.14 Dominance of an undertaking is presumed when it holds a market share of 40% or above. To assess if an undertaking is dominant or has significant market power (SMP) in a relevant market, the Commission considers conditions *inside* the relevant market such as market shares of the undertaking(s) concerned, as noted above. However, the market share of an undertaking does not constitute the sole indicator of dominance or SMP. The Commission may also examine conditions *outside* the market, such as barriers to entry and countervailing buyer power, among other factors. Where such factors exist, an undertaking whose market share is below 40% may also be considered dominant.
- 2.15 More than one undertaking can be found to be dominant in a relevant market. For example, where a relevant market comprises of two market players, holding 45% and 55% market share respectively, or three market players, each holding 33.33% market share may be considered individually and/or collectively dominant.
- 2.16 It is important to highlight here that the fact of dominance itself is not prohibited under the Act. The existence of monopolies, natural or otherwise, can in many cases induce risk-taking and innovation that drives economic growth.

***Collective Dominance***

- 2.17 A dominant position need not be held by a single undertaking. The Section 3 prohibition extends to abusive practices on the part of one or several undertakings, which are linked in such a way that they are able to adopt a common policy in the relevant market.

- 2.18 Two or more legally and economically independent entities might be considered to hold a collectively dominant position when they are united by (i) economic links (such as through agreements or licences), or (ii) structural links (such as when separate legal entities belong to the same corporate group) affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers.
- 2.19 Undertakings are able to align their behaviour when any or all of the following market conditions are present:
- a. **Transparency:** each undertaking in a relevant market has the ability to monitor and adopt a common policy or understanding as to pricing, output and quality amongst others ; and/or
  - b. **Incentives:** each undertaking has the incentive not to depart from the common policy and to maintain co-ordination over time for the purposes of sustainability of their collectively dominant position; and/or
  - c. **Deterrence:** there must exist an inherent deterrence mechanism in the relevant market to discourage deviation from the common policy or understanding; and/or
  - d. **No-Challenge:** the foreseeable reaction from competitors and customers must not threaten the stability of the common policy or understanding.

### *Abuse*

- 2.20 According to Section 3(2) of the Act an abuse of a dominant position
- [...] shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.
- 2.21 One or several undertakings with substantial market power may have the ability and incentive to harm competition in different ways, for instance, by weakening existing competition, raising barriers to entry or slowing down innovation. Other factors such as the existence of powerful buyers and economic or technical regulations can provide useful tools in assessing abuse of dominance.
- 2.22 Abusive practices by one or several undertakings may be categorised in one of two main categories: exploitative or exclusionary. Exploitative abuses are most directly concerned with consumer harm since they encompass all conduct by a dominant undertaking which results in direct loss of consumer welfare (for example, excessive prices, unfair discrimination). Exclusionary abuse refers to practices by dominant undertakings that harm competition by impairing their competitors' ability to compete effectively in the market, and covers behaviour impairing the market structure which indirectly harms consumers. There is no rigid demarcation between these two categories as the same behaviour may exhibit both characteristics.

2.23 Section 3 covers not only abuses which may directly prejudice consumers, but also abuses which indirectly prejudice them by impairing the effective competitive structure. While assessing an alleged abuse, the Commission may take into account whether the dominant undertaking has an objective justification for its conduct and whether it has behaved in a proportionate manner.

***Examples of Conduct That May Constitute Abuse***

2.24 Section 3(3) provides a non-exhaustive, illustrative list of practices which constitute abuse of dominance:

- a. limiting production, sales and unreasonable increases in prices or other unfair trading conditions;
- b. price discrimination by charging different—  
Prices for the same goods or services from different customers in the absence of objective justification that may justify different prices;
- c. tie-ins, where the sale of goods or service is made conditional on the purchase of other goods or services;
- d. making conclusions of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;
- e. applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;
- f. predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;
- g. boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provisions of any service; or
- h. refusal to deal

2.25 Various forms of abuse often exist as overlapping combination: for example, the abuse of dominant position may consist of both application of the price-squeeze, refusal to deal and discrimination. Some of the possible scenarios which may constitute abuse of dominant position are illustrated through examples below.

**Price discrimination**

2.26 Price discrimination occurs when identical or largely similar goods or services are sold at different prices by the same manufacturer/supplier in the same market or different markets. Given the market conditions, any price discrimination by one or several dominant undertakings is prohibited under section 3. It is not necessary for the abuse and its effects to be in the same market.

#### Hypothetical Scenario - PRICE DISCRIMINATION

X holds a dominant position in providing wholesale internet services to various internet service providers (ISPs). Y and Z are ISPs, active in the retail internet services market.

Y and Z both purchase wholesale access from X. X gives substantially lower rates to Y as opposed to Z and other ISPs in the market, based on Y meeting certain sales targets rather than overall quantities or quality of services.

Such price discrimination may constitute abuse of dominant position by X.

#### Predatory pricing

- 2.27 Predatory pricing is an act of setting or maintaining prices lower than below cost pricing i.e. below average variable cost, by an undertaking with substantial degree of market power to eliminate competition or drive the competitor(s) out from the market. A deliberate, artificial and gradual decrease in pricing may lead to price war between and among the competitors.

#### Hypothetical Scenario - PREDATORY PRICING

X, Y and Z are mobile cellular operators in Pakistan.

X was offering its services at a highly profitable price with the largest market share. Upon a change in ownership and management, Z began offering its services at comparatively lower prices and the market shares of both X and Y began to decline.

In response, X cut its prices below its average variable cost, which was insufficient to cover its costs. Even though X suffered losses, it continued to offer its services. Z similarly reduced prices, but was eventually rendered unable to compete with X's pricing strategy, and forced to exit.

Post Z's exit, X regains its market power and the ability to set prices as it wants.

- 2.28 In the short run, the dominant undertaking(s) might incur losses, while the consumers might benefit from decreased prices. In the longer run, however, if the dominant undertaking(s) wins the price war, it will have more market power- leading to monopolistic, duopolistic, or oligopolistic market structure. This will eventually harm competition driving competitors out of the market, or by undermining their ability to compete effectively, and/or creating higher barriers for potential entrants.

#### Margin Squeeze

- 2.29 Pricing practice by a dominant undertaking may also take the form of margin squeeze. Typically, margin squeeze involves practices in which a vertically integrated dominant undertaking impedes its downstream rival's competitiveness by (a) raising the wholesale price of its essential input and/or (b) reducing the retail price of the product/services offered by it in the downstream market.



#### Hypothetical Scenario - MARGIN SQUEEZE

X is a dominant undertaking in the telecommunication market and has infrastructure and facilities in wholesale broadband services. X is also vertically integrated in the downstream market and provides retail broadband services in the market.

Y is active in the downstream market of providing retail broadband services. X charges high prices from Y to provide access to wholesale broadband services, which is an essential input to operate in the retail market.

Y cannot recoup its investment because of the very low margin it is earning and cannot operate at minimum efficient scale in the downstream market. Given the market conditions, X's conduct may constitute margin squeeze, hence abuse of dominance.

- 2.30 While assessing whether a conduct amounts to margin squeeze, the Commission may take into account: (i) the nature of the upstream input concerned in terms of its indispensability from the perspective of the downstream market, whether or not viable economic alternatives are available in the upstream market, and (ii) the level of squeeze in terms of difference between the prices charged by the dominant undertaking and the upstream prices it charges from in the downstream for such input.

#### Supplementary Obligations: Tying and Bundling

- 2.31 Where a dominant undertaking imposes supplementary obligations in its contracts between and among its upstream or downstream competitors to purchase products, which by their nature or commercial usage have no connection with the subject of the main contract between the undertakings, it may amount to abuse of dominant position.
- 2.32 Tying occurs where a manufacturer makes the sale of one good- the base good (or the tying good), conditional to the purchase of the second good- the variable good (or the tied good). Where an undertaking holding dominant position in the relevant market and/or related market induces consumers to purchase the tied goods or services, it may amount to abuse of a dominant position.

#### Hypothetical Scenario- TYING

X is a leading supplier of surgical devices to hospitals and clinics. In its contracts, it stipulates that the variable inputs to its medical devices must be purchased from it. Given the market conditions and market power of X, such a contractual arrangement amounts to tying.

The same analysis might be applicable where X imposes conditions on its consumers to exclusively avail its or any of its affiliate's services for maintenance and repair of the devices purchased from it. X's conduct may amount to abuse of dominance.

- 2.33 'Bundling' is a commercial arrangement which involves selling two or more goods or services as a package, often at a discount. Bundling can be pure or mixed. In pure bundling, individual goods are not sold separately but in combination, which may amount to tying in certain circumstances. In mixed bundling, both individual goods and

packages thereof are made available. The latter is less harmful to effective competition in the market. In certain circumstances, bundling may also amount to price discrimination.

#### Refusal to deal

As a general rule, undertakings are free to do their business and might not desire to enter into trading relationships with other undertakings for a variety of legitimate commercial reasons. When a vertically integrated dominant undertaking refuses input /access to customers who are actual or potential competitors downstream, it may constitute refusal to deal.

#### Hypothetical Scenario- REFUSAL TO DEAL

X is a dominant undertaking in the oil refining market, and provides its refined petroleum products to various oil marketing companies (OMCs) downstream.

X refuses to supply its products to Y- an OMC, without any objective justification, while it supplies its product to others and/or gives preferential treatment to Y's competitor.

X's conduct may lead to **reduction, distortion or** elimination of competition in the OMC segment, hence amounting to abuse of its dominant position in the oil refining market.

### 3. Enforcement

- 3.1 The Commission may initiate an enquiry to assess the conduct of an undertaking which could potentially be engaged in the abuse of its dominant position. An enquiry under Section 37 of the Act can be initiated through one of three methods:
  - a. By the Commission itself;
  - b. Upon reference to the Commission by the Federal Government; or
  - c. Upon complaint to the Commission by another undertaking.
- 3.2 While investigating into Section 3 prohibition, the Commission will issue a show cause notice to the undertaking concerned to provide it an opportunity of hearing before adjudicating on the issue and passing an order under Section 31 of the Act.
- 3.3 An undertaking or undertakings found by the Commission to be engaged in conduct amounting to abuse of dominant position may, through an order, be subject to:

**Remedial Orders:** to take such actions as may be necessary to restore competition in the relevant market; and/ or

**Financial Penalty:** up to 75 Million Pakistani Rupees, or up to ten percent (10%) of the annual turnover of the undertaking.

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- 3.4 Under Section 32 of the Act, the Commission may also pass interim orders after giving the undertaking concerned an opportunity of being heard if it appears that the issue of a final order is likely to take time and serious damage may occur in the intervening period.
  
- 3.5 Undertakings may prefer appeals against final orders of the Commission before the Competition Appellate Tribunal (CAT). Appeals against orders of CAT lie before the Supreme Court of Pakistan.

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