CUTS INTERNATIONAL 7UP3 PROJECT

NATIONAL TRAINING WORKSHOP ON COMPETITION POLICY AND LAW

DOMINANCE AND ABUSE OF DOMINANCE[1]

INTRODUCTION

The subject of dominance and its abuse in the area of competition policy and law is a very fascinating one in that it is generally accepted that the state of being in a dominant position in itself is not anti-competitive, but the abuse of that position, or the exercise of the market power that comes with dominance. Cases involving dominance and its abuse therefore must be dealt with using the 'rule of reason' approach[2], and at two distinct stages: (i) establishing dominance; and (ii) assessing the competitive effects of the alleged abusive practices. The complexity of the subject of dominance and its abuse is further increased by the fact that the different types of business practices that are considered as being abusive vary on a case-by-case basis and across countries.

Abuse of dominance is one of the three primary focuses of competition analysis, together with anti-competitive agreements and anti-competitive mergers. Concerns over dominance and its abuse are such that the term 'abuse of dominant position has been explicitly incorporated in the competition legislation of various countries such as Canada and the European Union. In the United States, the counterpart provisions would be those dealing with monopoly and attempts to monopolise, or monopolisation of a market.

Nearer home, the Competition and Fair Trading Act of Zambia specifically mentions the term abuse of dominant position in its enumeration of anti-competitive trade practices. The Competition Act of South Africa has a whole Part on abuse of dominance in the Chapter dealing with prohibited practices. The Competition Act of Zimbabwe does not specifically mention the term dominant position but mentions the similar-meaning term 'substantial market control'[3].

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2 'Rule of Reason' approach is where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anti-competitive effects in order to decide whether or not the practice should be prohibited (the opposite of the rule of reason approach is to declare certain business practices *per se* prohibited, that is, always prohibited without any extenuating considerations).

3 In terms of section 2(2) of Zimbabwe's Competition Act [*Chapter 14:28*], "a person has substantial market control over a commodity or service if: (a) being a producer or distributor of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to raise or maintain the price of the commodity or service above competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe; (b) being a purchaser or user of the commodity or service, he has the power, either by himself or in concert with other persons with whom has a substantial economic

DOMINANCE

The standard dominant firm model assumes that there is one big firm and a large number of small price-taking firms, typically referred to as the "competitive fringe, and because of its position, the dominant firm is modelled as selecting a price that the fringe firms take as given in deciding how much to supply[4]. A firm is in a dominant position in a market when it is in a position to exercise a high degree of market control. A person in a dominant position will be able to set prices or other market conditions without significant constraint from competitors or consumer reaction. A person in a dominant position will thus be able to initiate and maintain an appreciable increase in price, or reduction in supply, quality or degree of innovation, without suffering an adverse impact on profitability in the short or long term.

As stated in a CUTS International Monograph on Investment and Competition (2000), a firm enjoying dominant position in the market gets certain advantages similar to those of a monopolist, such as fixing the price and allowing demand to determine output, or setting output and allowing demand to set the price[5].

Dominance therefore comes with market power. The concept of market power thus is important in the consideration of dominance and its abuse. Anderson, Daniel and Heimler (1999)[6] explained the concept as follows:

> "The concept of market power refers to the ability of a firm (or a group of firms acting jointly) to profitably maintain prices above competitive levels for a significant period of time. The qualifier 'profitably' is important – it denotes the fact that in order to exercise market power, a firm must be in a position to raise prices without losing sales so rapidly that the price increase is unprofitable and must be rescinded, as would be the case in a competitive market. In addition to higher than competitive prices, the exercise of market power can be manifested through reduced quality of product or service or a lack of innovation in the relevant market(s).".

In its Monograph on Investment and Competition Policy # 6[7], CUTS International referred to the term '*dominant position of market power* as "a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services. It refers to the actual or potential control of the market by an enterprise or enterprises acting together, or forming an economic entity. The control can be measured on the basis of market shares, total annual turnover, size of assets, number of employees, etc. Furthermore, the measurement should focus on the ability of a firm or firms to raise prices above (or depress prices below) the competitive level for a significant period of time.".

It is however important to note that firms may achieve legitimately a dominant position in the market, for example, through innovation, superior production or distribution methods, or greater

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connection, profitably to lower or maintain the price of the commodity or service below competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe.

4 W. Kip Viscusi, John M. Vernon and Joseph E Harrington Jr., *Economics of Regulation and Antitrust,* 2nd Ed., The MIT Press, Cambridge, Massachusetts, 1998.

5 CUTS Monograph on Investment and Competition Policy #6, *All About Competition Policy & Law For the Advanced Learner,* CUTS Centre for International Trade, Economics & Environment, Jaipur, 2000.

6 Robert Anderson, Timothy Daniel and Alberto Heimler, "Abuse of Dominance", in *A Framework for the Design and Implementation of Competition Law and Policy,* The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

7 Ibid.

entrepreneurial efforts. Care must therefore care be taken in cases involving dominance that efficient business practices are not inadvertently curbed[8].

In many jurisdictions therefore, dominance *per se* is not anti-competitive. It is its abuse, or exercise of the market power that comes with the dominance, that is cause for competition concern.

ABUSE OF DOMINANCE

A firm enjoying dominant position in the market may not only exercise its market power by exerting a significant influence on the market price or restrain the market output of a specific commodity or service, but may also create barriers for restricting entry or the freedom of other enterprises to operate in the market.

According to some competition analysts, two broad types of business conduct by dominant firms have traditionally been recognised as abusive by competition laws and competition authorities: (i) *exploitative abuses* (in which a firm takes advantage of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices); and (ii) *exclusionary abuses* (in which a firm attempts to suppress competition, for example, by refusing to deal with a competitor, raising competitors' costs of entering a market, or charging predatory prices)[9].

In a typical competition case involving abuse of dominance it is necessary to first define the relevant market in which the possible abuse is occurring to establish the existence of a dominant position by the firm or group of firms alleged or suspected to be abusing the dominant position, and then to identify the specific practices that may be harmful to competition and assess their overall effects in the relevant market(s).

Market Definition

Market definition specifying the relevant product and geographic markets is usually the first, and often the most important, task in competition analysis. Defining markets not only provides the basis for analysis but also contributes in the assessment of the competitive effects. In cases involving dominance and its abuse, defining the market two widely results in lower market shares for incumbent firms in the market, thereby overlooking any dominant positions that might exist in the market. Likewise, a too narrow definition of the market results higher market shares for incumbents that might overstate dominant positions in the market.

A theoretically sound way of defining a market accurately is using what is known as the SSNIP Test[10]. It should however be noted that while the SSNIP Test provides an excellent conceptual framework, it is sometimes difficult to apply because there might not be enough data available to use the test in a rigorous way.

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8 Ibid.

9 Ibid.

10 SSNIP is an acronym formed from the phrase "a **S**mall yet **S**ignificant and **N**on-transistory **I**ncrease in **P**rice". Under the SSNIP Test, if a hypothetical profit-maximising firm imposes a small yet significant and non-transitory increase in price of its product and buyers of the product switch other substitute products, assuming all other terms of sale remain constant, then the other products should be included in the relevant product market. Using the Test on defining the relevant geographic market, if one supplier imposes a small increase in the price of a product and the customer is able to easily switch to another supplier of the product, then both suppliers can be considered to be in the same geographic market.

In abuse of dominance cases, defining the relevant markets facilitates determining whether or not a firm occupies a dominant position, depending on the firm's market share. As explained by Clark (1999)[11]:

> "In a case involving possible abuse of dominance ... if the defined market is small and the enterprise under investigation has a large share of that market, the enterprise could be considered dominant. If, on the other hand, the defined market is larger and the enterprise's share is small, it might not be considered dominant.".

There is no general rule as to the level of market share that a firm should attain to be considered dominant. The determination differs from one jurisdiction to another. In South Africa, for example, that country's competition legislation provides that "a firm is dominant in a market if: (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market unless it can show that it does not have market power[12]; or (c) it has less than 35% of that market, but has market power.

Zimbabwe's competition legislation, the Competition Act [*Chapter 14:28*] has no provisions on how the competition authority should determine dominance. Administratively, however, the authority has ruled that a firm cannot be said to have substantial market control (or dominance) if it has a market share of less than 25%, and that firms with market shares of over 50% should be considered as having substantial market control.

Empirical study has shown that in addition to its own market share, a firm's ability to abuse dominance by exercising its market power may depend on the size of other firms in the market. For example, if there is at least one other firm in the market that also has a relatively large market share, the existence of that firm could provide countervailing check on the abuse by the dominant firm of its dominance. It has also been found that even where a single firm has a large share of a market, its exercise of market power is checked if entry by new firms or expansion by incumbent firms is easy.

In general, the greater the market share of an alleged dominant firm, the more likely for it to exercise market power, subject of course to the existence of countervailing power and/or absence of entry barriers in the market.

Abusive Practices

The abusive practices of a firm in a dominant position are particularly anti-competitive because the market does not offer alternatives for consumers (subject of course to the ease of entry into the market). Abusive practices of a dominant firm are of different types and come in different forms, such as: (i) excessive pricing; (ii) price discrimination; (iii) tied and conditional selling; (iv) refusal to deal; (v) predatory pricing; (vi) raising rivals' costs; and (vii) various forms of vertical restraints.

The Box below lists and describes the common types of abusive practices by dominant firms, and their effects on competition:

Common Types and Effects of Abusive Practices of Dominant Firms

11 John Clark, "Market Definition and Assignment of Market Shares", in *A Framework for the Design and Implementation of Competition Law and Policy,* The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

12 The term 'market power' is defined in the Competition Act No.89 of 1998 of South Africa as to mean "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

Abusive Practice	Description and Competitive Effect
Excessive Pricing	This refers to setting prices above competitive levels. This is one of the most common rent-seeking exploitative practices of firms in dominant or monopoly positions. It distorts competition and operates against consumer welfare. In dealing with excessive pricing, however, competition authorities should be more concerned with the reasons that lead to high prices and profits than with the prices themselves[13]. The Competition Act [*Chapter 14:28*] of Zimbabwe is very clear on this point. The Act provides that the competition authority should be concerned with excessive pricing only if it is satisfied that the price being charged by the person concerned is connected to and essential to the maintenance of a restrictive practice. It is extremely difficult for a competition authority to determine a firm's costs for the purposes of judging whether prices charged are excessive, and of setting the "right" prices.
Price Discrimination	This occurs when customers in different market segments are charged different prices for the same good or service, for reasons unrelated to costs (a discriminatory strategy can also involve charging the same price to customers even though there are different costs of supplying them). Price discrimination can be anti-competitive if dominant firms lower prices in particular markets for exclusionary purposes in order to eliminate vigorous local competitors.
Tied and Conditional Selling	This refers to situations where the sale of one good is conditioned on the purchase of another good not directly related to the product sold. One variant of tied selling is full-line forcing, in which a seller forces a complete line of products on a buyer who is interested in only a specific product. Tied selling is sometimes a means of price discrimination. Competition concerns have been expressed that tying may foreclose opportunities for other firms to sell related products or increase barriers to entry for those that do not offer a full line of products.
Refusal to Deal	This refers to refusal by a dominant firm to grant access to a firm producing a scarce input necessary to operate in a downstream market in which the dominant firm also operates. It should however be noted that competition law does not generally impose on firms a duty cooperate with competitors, but if refusal to deal is used by a dominant firm as a deliberate strategy of restricting competition then it is anti-competitive.
Predatory Pricing	This is the practice of a dominant firm selling its products at prices so low as to drive competitors out of a market and to prevent new entry in order to monopolise the market. Once the predator has successfully driven out existing competitors and deterred entry of new firms it can raise prices and earn higher monopoly profits. The costs of predation can be high, but a predator expects future discounted profits to outweigh present losses and forgone profits. Predation is therefore condemned because it is likely to lead to reduced output and higher prices in the future.
Raising Rivals' Costs	This is a form of predation aimed at excluding competitors from the market, which is a cheaper form than predatory pricing since it does not require a direct reduction in profits for the dominant firm. Examples of raising rivals' costs include: (i) offering

[13] Robert Anderson, Timothy Daniel and Alberto Heimler, 'Abuse of Dominance', in *A Framework for the Design and Implementation of Competition Law and Policy,* The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

artificially high salaries and wages for employees in the industry; (ii) engaging smaller rivals in costly litigation; and (iii) strategically advertising to such a degree that it raises sunk-cost investments for small rivals and potential entrants.

The European Commission amply noted the interaction between competition law and IP law in a recent document on 'Competition Policy and the Exercise of Intellectual Property Rights'.[16] The relevant views expressed in that document are reproduced in the Box below:

> **Competition Law and IP Law**
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> Early copying of an innovation and free riding on an innovator's efforts undermine the incentive to innovate. This is why IP laws grant the innovator a legal monopoly. They provide the innovator the right to exclusively exploit the innovation and exclude others from exploiting it. A legal monopoly may, depending on the availability of substitutes in the relevant market, in turn lead to market power and even monopoly as defined under competition law. One would therefore come to the conclusion that there is source of conflict: that competition law would take away the protection which IP law is providing. If the aims of IP law and competition law are truly different, this might impose serious limits on the application of competition law to IP.
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> However, this is only an apparent source of conflict. At the highest level of analysis IP and competition law are complementary because they both aim at promoting consumer welfare. Competition policy aims at promoting consumer welfare by protecting competition as the driving force of efficient and dynamic markets, providing at all times the best quality products at the lowest prices. The objective of IP laws is to promote technical progress to the ultimate benefit of consumers. This is done by striking a balance between over- and under-protection of innovators' efforts. The aim is not to promote the individual innovator's welfare. The property right provided by IP laws is awarded to try to ensure a sufficient reward for the innovator to elicit its creative or inventive effort while not delaying follow-on innovation or leading to unnecessary long periods of high prices for consumers. A delay in follow-on innovation may result when the innovation consists of an improvement on earlier ideas that have been granted patent protection already. Unnecessary long periods of high prices will result when the innovation allows the IPR holder to achieve market power in the market(s) where the IPR is exploited and where the IPR protects this monopoly position longer than is required to elicit the innovative effort.

Therefore, while IPRs are exempted from the application of most competition laws, including that of Zimbabwe[17], and it has been noted that competition policies in major developed countries or regions generally take a favourable attitude to IPRs[18], intervention by competition authorities may be warranted and undertaken where a pragmatic case-by-case analysis indicates IPR-based market power is unreasonably restraining competition in relevant markets. There is concern about cartel-like restraints, exclusionary conduct and monopoly leveraging by dominant firms, refusals to licence IPRs or to sell IPR-protected products, etc.

Examples of effects of IPRs on competition and consumer welfare include the following (Khor, 2005)[19]:

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[16] Paper by the European Commission submitted at UNCTAD's Eighth Session of the Intergovernmental Group of Experts on Competition Law and Policy held in Geneva, Switzerland, during the period 17 – 19 July 2007.

[17] The Competition Act [*Chapter 14:28*] of Zimbabwe exempts from its application a number of IPRs, such as industrial designs, patents and trademarks, "except to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other consideration in a manner contemplated in the definition of 'restrictive practice' ".

[18] "Competition Policy and the Exercise of Intellectual Property Rights", report by UNCTAD Secretariat to the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 3-5 July 2002.

[19] Ibid.

- *effects on competition and market structure*: the monopoly provided by patents enables the patent holder to block or otherwise discourage rival firms entering the market, or even in some cases to undertake research and innovation;

- *effects on competition, prices and access to essential goods*: the monopoly rights granted to patent holders enables them to restrict competition and charge monopoly prices;

- *patenting of lifeforms*: an example of abuse of the patent system is in the patenting of biological resources and the misappropriation of these resources and associated traditional knowledge.

The IGE Round Table Discussion on Competition Policy and the exercise of IPRs discussed competition policy and intellectual property systems as the two key normative systems governing markets and determining economic efficiency, consumer welfare, technological innovation and the harnessing of knowledge for development. While both systems aim to promote these objectives, the anti-competitive exercise of IPRs may sometimes adversely affect innovation or the diffusion of technology and welfare.

It was therefore generally agreed that there should not be conflict between competition policy and IPR since both aim at achieving the same objectives. While IPRs should be protected in order not to curb innovation and research and development, competition policy should be used to prevent the abuse of the IPRs. Anti-competitive practices arising from the exercise of IPRs should therefore be treated as abuse of dominant positions.

Treatment of Abusive Practices

Some jurisdictions in developed countries treat abusive practices of dominant firms using the 'rule of reason' approach. It is noted in this regard that while the practices may have some anti-competitive elements, they can be pro-competitive and promote efficiency. Vertical restraints, in particular, have been seen to have strong efficiency and consumer welfare benefits. Other jurisdictions, however, particularly those in developing countries, view some abusive practices of dominant firms as inherently harmful and that they should be *per se* prohibited. Examples of such practices include resale price maintenance and predatory pricing, and even exclusive dealing[20].

Remedies

Given the nature and common types of abusive practices of firms in dominant positions, remedies against the practices are mostly of a behavioural rather than of a structural nature, such as ordering the dominant firm to cease engaging in the abusive practice, or requiring the compulsory licensing of technology (in cases of abuse of IPRs) or the provision of access to essential facilities to establish competition in markets in which it had been suppressed by the dominant firm. It is my view that since it has generally been accepted that dominance *per se* is not bad, but that only its abuse is anti-competitive, structural remedies involving breakup of the dominance would not be appropriate[21]. Remedies in abuse of dominance cases may involve restitution and payment of damages.

[20] The Competition Act [*Chapter 14:28*] of Zimbabwe *per se* prohibits abusive practices such as predatory pricing, resale price maintenance and exclusive dealing.

[21] A structural order to establish competition in an industry that had been monopolised was the break-up in the United States of America of AT&T (American Telephone and Telegraph Company) by a court order in the early 1980s. The current Microsoft case might also be concluded with structural remedies.

According to Anderson, Daniel and Heimler (1999)[22], a checklist of possible remedies in abuse cases, as applied in different jurisdictions, would include the following:

- order to cease the abusive behaviour;
- imposition of fines on the firm (criteria for fixing fines include gravity of the infringement, length in time of the infringement, effect of the infringement, non-enforcement of the infringement, difficult market conditions, size and profitability of the undertaking, cooperation of the undertaking, state of the law, repeated infringement, continuation of infringement following clarification of the law, governmental pressure, and amount of unlawful profit from infringement);
- fines on individuals and imprisonment, or both (except in extreme circumstances, however, these sanctions are inappropriate in abuse of dominance cases, which typically do not involve criminal intent);
- order to repay ‘undue profits’ (in jurisdictions where such a remedy is possible, however, it is rarely used because such a calculation is extremely difficult to make);
- divestment or divisions of firms;
- order to take certain action, if, for instance, it is necessary to ensure fair treatment of competitors or other market participants;
- informal settlements (these can sometimes be preferable to lengthy proceedings but should remain an exception);
- award of damages.

A CASE STUDY

The Case Study outlined in the Box below demonstrates how the competition authority of Zimbabwe handled a case involving abuse of dominant position:

Investigation into Allegations of Unfair Business Practices in the Clear Beer Manufacturing and Distribution Industry in Zimbabwe

The Commission in November 1999 received a complaint from Nesbitt Brewery (Pvt) Limited of Chiredzi, a small town situated in the Lowveld of Zimbabwe, over the alleged unfair business practices by the National Breweries Limited (Natbrew). In their letter of complaint, Nesbitt Brewery submitted as follows:

> “Nesbitt Brewery has no problem with promotions taking place to promote products, but this needs to be fair. We have a situation whereby National Breweries over the past two months, have reduced the price of beer in one outlet by $2.00 per 340ml. This $2.00 is then paid to the outlet by National Breweries. This is only being done in one outlet in the whole of Chiredzi and is the biggest outlet,

[22] Robert Anderson, Timothy Daniel and Alberto Heimler, ‘Abuse of Dominance’, in *A Framework for the Design and Implementation of Competition Law and Policy,* The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

where by Nesbitt Breweries have a larger share of the market. We compete with National Breweries in all other outlets on the same level. We feel that we are being prejudiced in this outlet and none of the other outlets throughout Chiredzi are being offered this promotion or for that matter nationwide. These promotions are aimed at Nesbitt Brewery not at their product, as these types of promotions are not offered nationwide, even at centres where our products are being sold.

We hereby appeal to you to comment in this regard, because as a small emerging brewery, we are unable to compete with this unfair promotion. This will also jeopardise a new venture and the jobs that have been created. All we ask is for a fair playing field."

The Commission investigated the complaint as constituting predatory behaviour on the part of Natbrew, which is a prohibited restrictive practice as defined in terms of section 2(1) of the Competition Act [*Chapter 14:28*]. The relevant market under investigation was defined as the distribution of clear malt draught beer in the town of Chiredzi. In that market, Natbrew was found to be dominant, with a market share of over 90% (the small remaining market share was accounted for by Nesbitt Brewery and some imports).

From its investigation, the Commission established the following: (i) wholesale and retail prices of Natbrew's *Castle* beer brand were found to be lowest in Chiredzi despite the fact that Natbrew's Chiredzi Depot got its supplies from as far as Bulawayo or Harare (483kms and 495kms away respectively); (ii) even though Natbrew claimed that it was running a promotion in order to push up sales volumes and to take advantage of the Festive Season, evidence showed that the promotion was specifically targeted at Nesbitt Brewery because it was for a longer period than similar promotions elsewhere, it ran beyond the normal Festive Period, and it was more aggressive in Chiredzi than anywhere else in the country.

It was also found that Natbrew stopped its anti-competitive promotion in Chiredzi in April 2000 following the commencement of the Commission's investigation. The Commission therefore agreed to negotiate with Natbrew in terms of section 30 of the Competition Act an undertaking aimed at preventing future predatory practices against Nesbitt Brewery (in February 2001, Delta Corporation, the parent company of Natbrew, signed a consent agreement in which it gave the Commission an undertaking that Natbrew would refrain from engaging in price reduction promotions at Chigarapasi Council Beerhall in Chiredzi, where the predatory practices against Nesbitt Brewery occurred).

In the above case:

- The relevant market under investigation was clearly identified in terms of both its product and geographic characteristics, as *clear malt draught beer distributed in the small town of Chiredzi.*

- In that market, it was found that National Breweries was clearly dominant, with a market share of over 90%. The complainant, Nesbitt Breweries, was therefore a very small player in the market.

- The abusive practices of National Breweries were identified as predation, since they were aimed at driving Nesbitt Breweries out of the market. The practices were clearly predatory since they were particularly aimed at Nesbitt Breweries. They involved both pricing and non-pricing forms of predation for maximum effect.

- The Commission's remedial action against the predatory behaviour of National Breweries was of a behavioural nature and involved a cease and desist order against the predator.

The competition authority of Zimbabwe is highly conscious of the need to ensure that its remedial action in cases involving abuse of dominance are targeted at addressing the identified abusive practices rather than breaking the dominant position, since that could lead to "throwing the dirty water together with the baby". The following abuse cases give good examples of the above position: (i) in the *Ammonium Nitrate Supply Case*, the competition authority found that the supply agreement between Sable Chemicals and ZFC/ Windmill constituted a monopoly situation but its remedial action was aimed at opening up the market and not to terminate the agreement; (ii) in the *Clear Beer Brewing Case* (outlined above)*,* the dominant position of National Breweries was not challenged but that company's predatory behaviour; (iii) in the *Coal Distribution Case,* the dominant position of Wankie Colliery Company in the coal industry was also not challenged but its abusive practices of an exclusionary and exploitative nature; (iv) in the *Automotive Glass Case,* no penalties were imposed on the Plate Glass Company Zimbabwe even though that company was in a monopoly position in the local manufacture of automotive glass because no evidence was found that it was abusing that position; (v) in the *Orange Juice Concentrate Case,* no evidence was found that Mazoe Citrus Estates was abusing its dominant position and the company was therefore not penalised for merely being in the dominant position; and (vi) in the *Waste Paper Collection Case,* it was found that National Waste Company (NWC) was not abusing its dominance of the industry and the case was accordingly closed without penalising NWC for being in that dominant position.

CONCLUSION

It is important to point out that the issue of concern to most competition authorities, including Zimbabwe, is the *abuse* of the dominant position or substantial market control rather than the *holding* of the position. It therefore follows that the prohibition in most legislation is on abuse of the dominant position, not the holding of the position. The argument being that in cases involving abuse of dominance or monopolization it is essential to ensure that application of the law does not inadvertently curb efficient business practices. It is important to recognize that firms may achieve legitimately a dominant position in a market. For example, through innovation, superior production or distribution methods, or greater entrepreneurial efforts.

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