**Competition law – Chapter II prohibition**

This element introduces the Chapter II prohibition on abuse of a dominant position

**Introduction**

We now turn to a second scenario regulated by competition law. Section 18 Competition Act 1998 (‘**CA**’) prohibits the abuse by one or more undertakings of a dominant position.

We will consider how to recognise when an undertaking is in a dominant position and then go on to consider the sorts of activities that will constitute an abuse of that position.

**An example**

A classic example of a dominant position would be Microsoft’s position in relation to certain software products, in particular PC operating systems. It would be highly detrimental to consumers if such an undertaking were permitted to take advantage of its strength, for example by charging consumers excessively high prices for PC operating system software, knowing it would not be easy for them to find a reasonably-priced alternative product.

**Dominant position in a market**

If it is alleged that a company is engaging in an abuse of a dominant position, that position must be assessed by reference to a specific market (the ‘relevant market’).

For this reason, establishing dominance breaks down into two steps:

identify the relevant market on which the undertaking is active; andassess whether the undertaking’s position on that market is dominant.

Answering the former question is a prerequisite to addressing the latter. The wider the relevant market, the lower any one company’s market share will be and, as we shall see, the less likely it will be regarded as dominant.

**Relevant market definition**

The relevant market in a given scenario is comprised of all the products (or services) that are substitutable with each other within a certain geographical area. Hence both the relevant product market (‘**RPM**’) and relevant geographical market (‘**RGM**’) must be identified. As a general rule, the process of defining the relevant market is conducted as follows:

Identify the RPM. This is comprised of all goods or services that are interchangeable or substitutable with the products under scrutiny – good or services that a purchaser might choose instead if there was asmall but significant increase in price in the products under scrutiny.Once the RPM is defined, identify the RGM.This is the area in which the conditions of competition between suppliers to the RPM are sufficiently similar, and different from the surrounding areas, to constitute a distinct market.

Definition of the relevant market in a given scenario is a complex question of fact. The extent to which legal analysis can help provide an answer is limited. A client’s key advisor on this particular issue would be an expert economist.

**Dominant position**

When considering whether there is an abuse of a dominant position in the UK, once you have established the market, you will then need to go on to consider whether the party or parties have a dominant position on that market.

Dominance is a question of fact. In practice we can consider several issues to establish dominance:

(i) market share; and

(ii) other factors.

As a rule of thumb, a market share of over 50% or below 40% offers very strong evidence of dominance or non-dominance respectively, but it does depend on all the factors. Time is a relevant factor: for example, where an undertaking’s relatively high market share is long-established this is likely to weigh in favour of dominance.

Another relevant factor is the existence of ‘barriers to entry’ - structural costs to a new competitor of entering the market. The greater the barriers to entering the market, the less likely it is that a market constrains the behaviour of the accused firm which already operates in that market and therefore the more likely that the undertaking is dominant.

**Abuse**

It is crucial to note that no action is taken against a party simply because it is in a dominant position.

Only when that party takes steps that constitute an abuse of its position is it in breach of competition law.

Therefore it is important to identify one or more acts on the part of the undertaking and assess whether (and if so, how) such act(s) amount(s) to abusive conduct.

The prohibition applies where the abusive conduct ‘may affect trade within the United Kingdom’.

**Abusive conduct**

What amounts to abusive conduct is set out in ss 18(2)(a)-(d) and is summarised as follows:

a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions eg setting high prices knowing that customers have little choice but to pay them.

b) Limiting production, markets or technical development to the prejudice of consumers eg refusing to deal with a particular party.

c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage eg the imposition of other contract terms which favour certain customers over others.

d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the contracts eg where a supplier agrees to supply Product X only if the purchaser agrees to also purchase unrelated Product Y.

Remember that the objective of competition law is to protect consumers, not competitors, from suffering harm, and so harm to consumers must be shown.

**Summary**

• The Chapter II prohibition concerns an abuse by a dominant party (or parties) on the market.

• First step is to work out the market on which the dominant party is operating. You need to consider both the relevant product market and the relevant geographical market. The wider the market is, the less likely it is that a party (or parties) will be dominant on it.

• Dominance is a question of fact, taking into account:

• market share; and

• other factors.

• No action is taken against a party simply because it is in a dominant position. It is abusive conduct by a dominant party that will trigger a breach of s18 CA.

• You will need to identify conduct which constitutes an abuse of a dominant position. S18(2) sets out a non-exhaustive list of conduct which may constitute an abuse.