THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA
COMESA

COMESA GUIDELINES ON ABUSE OF DOMINANCE

2ND APRIL 2019

PREPARED IN ACCORDANCE WITH THE COMESA COMPETITION REGULATIONS, 2004

DISCLAIMER

These Guidelines are for general guidance to the implementation of Article 18 of the COMESA Competition Regulations of 2004 ("the Regulations") dealing with abuse of dominant position. It does not constitute legal advice and should not be relied on as a statement of law relating to the Regulations. These guidelines should be read together with the Regulations and other guidelines for complementarity. Stakeholders are encouraged to seek legal advice should they have any doubt about whether any conduct may breach the Regulations.

INTERPRETATION

In these Guidelines, any word or expression to which a meaning has been ascribed in the Regulations bears the same meaning as in the said Regulations unless the context indicates otherwise.

CITATION

These Guidelines may be cited as: “The COMESA Guidelines on Abuse of Dominance, 2019.”

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DEFINITIONS

In these Guidelines unless the context provides otherwise:

"**Anti-competitive**" means a conduct which appreciably restrains competition between the Member States and is not otherwise exempt by law or authorised in a manner required by the Regulations;

"**Arrangement**" includes a contract, agreement or understanding whether or not legally enforceable;

"**Board**" means the Board of Commissioners as established by Article 12 of the Regulations;

"**Commission**" means the COMESA Competition Commission established by Article 6 of these Regulations;

"**Common Market**" means the Common Market for Eastern and Southern Africa (COMESA) established by Article 1 of the Treaty;

"**Competition**" means the striving or potential striving of two or more persons or organisations engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another which results in greater efficiency, high economic growth, increasing employment opportunities, lower prices and improved choice for consumers;

"**Consumer**" includes any person -

(a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale; and

(b) to whom a service is rendered;

"**Dominant position**" means a dominant position as stipulated in Article 17 of these Regulations;

"**Goods**" when used with respect to particular goods, includes any other goods that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints;

"**Market**" means a market in the Common Market and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services;

"**Merger**" means merger as defined in Article 23 of these Regulations;

"**Member State**" means a Member State of the Common Market;

"**Person**" means a natural or legal person;

"Regulations" means the COMESA Competition Regulations;

"**Services**" includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;

“**Trade**” includes any business, industry, profession or occupation relating to the supply or acquisition of “goods” or “services”;

“**Treaty**” means the Treaty establishing the Common Market for Eastern and Southern Africa;

“**Undertaking**” includes any “person”, public or private, involved in the production of, or the trade in, goods, or the provision of services.

SECTION 1: PREAMBLE

1. These Guidelines set out the enforcement priorities that will guide the Commission's action in assessing the conduct of dominant undertakings.

2. Article 18 (1) of the Regulations prohibits abuse of a dominant position. The Regulations do not prohibit the holding or the acquisition of a dominant position. However, any undertaking in a dominant position has a special responsibility not to allow its conduct to prevent, restrict or distort competition and affect trade in the Common Market.

3. The Commission may launch an investigation into any alleged abuse of dominance upon request of any person or on its own initiative pursuant to Articles 21 and 22 of the Regulations respectively.

4. Enforcement of Article 18 is an integral part of enhancing regional economic integration in the Common Market and enhancing intra-regional trade among Member States. The goal of Article 18 is to protect the process of competition in the Common Market as a means to enhancing regional trade, ensuring efficient allocation of resources in the Common Market and to protect consumers against offensive conduct by market actors.

5. A competitive open single market is acknowledged to be a prerequisite to enhancing intra-regional trade among Member States.

SECTION 2: PURPOSE AND SCOPE OF THE GUIDELINES

6. The aim of these Guidelines is to provide clarity, predictability and transparency as regards the general analytical framework of the Commission in determining cases of abuse of dominance and to help undertakings better assess whether their behavior is likely to constitute an infringement of Article 18(1) of the Regulations. The Guidelines apply to undertakings which hold a dominant position on one or more relevant markets with emphasis on conduct that have an appreciable effect on trade between Member States.

7. The application of the Guidelines puts emphasis on preventing dominant undertakings from excluding their rivals by means other than competition that is fair or exploiting consumers in case of exploitative conduct.

8. The application of the Guidelines is case specific. The Commission looks at the circumstances of each case by analyzing the effects of each conduct on trade between Member States and on competition and consumer welfare.

SECTION 3: GENERAL APPROACH TO ASSESSING ABUSE OF DOMINANCE

9. Article 17 of the Regulations defines dominance as follows:

a) an Undertaking holds a dominant position in a market if by itself or together with an interconnected company, it occupies a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors".
b) Any two companies shall be treated as interconnected companies if one of them is a subsidiary or associate of the other, or both of them are subsidiaries of the same parent company;
c) a "dominant position", means an ability to influence unilaterally price or output in the Common Market or any part of it."

10. Accordingly, a dominant position may be held by one or several legal entities provided that they all belong to the same undertaking.

11. Article 18(1) of the Regulations, which prohibits abuse of a dominant position, is only relevant once dominance has been established. The Article provides that any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States, if it:

a) restricts, or is likely to restrict, the entry of any undertaking into a market;
b) prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market;
c) eliminates or removes, or is likely to eliminate or remove, any undertaking from a market;
d) directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;
e) limits the production of goods or services for a market to the prejudice of consumers;
f) as a party to an agreement makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement; or
g) engages in any business activity that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market.

12. The dominant undertaking/s suspected of having committed an abuse may mount a defense that their conduct did not harm competition and justify the conduct by demonstrating that it produces pro-competitive effects or efficiencies that outweigh its anti-competitive effects and, consequently, does not result in one of the effects listed in Article 18(1) of the Regulations.

13. The burden of proving that the conduct concerned is objectively justifiable in that its efficiency claim outweighs its anti-competitive effects lies with the dominant undertaking.

14. The dominant undertaking must demonstrate that the conduct contributes to improving the production and distribution of goods or to promoting technical or economic progress, and allows consumers a fair share of the resulting benefits. The dominant undertaking must also show that the conduct does not impose restrictions which are not indispensable to the attainment of the efficiencies and does not afford it the possibility of eliminating competition in respect of a substantial market for the goods or services in question.

SECTION 4: DETERMINATION OF DOMINANCE

15. An undertaking holds a dominant position in a market if by itself or together with an interconnected undertaking, occupy such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors. The level of price increase or output reduction and duration are key to determination of dominance and they must be substantial, durable and appreciable. If the exercise of the perceived dominance is only temporary and can be remedied by market forces in a reasonable time then, a firm is not dominant. An assessment of dominance will focus on specific characteristics of the undertaking concerned, as well as structural factors related to competitive constraints facing the undertaking.

Buyer Power

16. Buyer power is concerned with how downstream firms can affect the terms of trade with upstream suppliers. There are two types of buyer power: monopsony power and bargaining power. The welfare implications, and therefore the appropriate enforcement policies, of the two types of buyer power are very different. Both result in lower input prices, but the exercise of monopsony power usually results in higher prices downstream. Reductions in input prices in the case of bargaining power are typically beneficial, so requiring an explanation of how increases in bargaining power would harm downstream consumers will help to avoid inadvertently deterring pro-competitive behavior.

17. Distinguishing between the exercise of buyer power and conduct that creates, enhances or maintains buyer power is important. The key to identifying monopsony power in practice is recognizing that it is the existence of alternatives for sellers that determines the extent of a buyer‘s monopsony power.

18. When the number of buyers and sellers is small, bargaining is likely to be over the incremental surplus available to a buyer and seller relative to their outside options. The distribution of that surplus depends on relative bargaining power. Conduct that gives rise to bargaining power might warrant scrutiny if (i) the lower wholesale prices obtained from this conduct lead to lower downstream market prices that decrease the profitability of a buyer‘s competitors, leading to their exit and an increase in its downstream market power, harming final consumers; or (ii) the lower wholesale prices obtained from this conduct by a buyer with market power results in an increase in the wholesale price to other buyers a so-called waterbed effect that results in an increase in prices to downstream consumers. Meanwhile the exercise of buyer power may affect dynamic efficiency by reducing the incentives of upstream firms to invest. But bargaining power may be a countervailing factor that mitigates the possibility of an increase in market power from a merger.

Factors for Determination of Dominance

19. In determining whether an undertaking is in a dominant position, Article 18(2) of the Regulations provides that consideration shall be given to the following factors:
    a) relevant market defined in terms of the product and the geographic context;
    b) level of actual or potential competition in terms of number of competitors, production capacity and product demand;
    c) barriers to entry of competitors; and
    d) history of competition and rivalry between competitors in the sector of activity.

Relevant Product and Geographic Markets

20. Pursuant to Article 18(2) (a) of the Regulations, the market strength of the undertaking must be assessed within the context of the relevant market. The relevant market has two dimensions:

    a) **The relevant product market**, which determines which relevant goods or services are included in the market. 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.
    b) **The relevant geographic market**, which determines the geographic scope of the market. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.

21. Refer to the Commission`s Guidelines on Market Definition for more clarity.

Level of Competitive Constraints

22. This clarifies the market position of an undertaking *vis-a-vis* its competitors. The Commission shall take into consideration the level of actual or potential competition in the relevant market. In that regard, the Commission will assess the competitive constraints imposed by existing or potential competitors in the relevant market. The Commission considers that market shares provide a useful first indication of the degree of competition in the market and of the relative importance of the various market players. The Commission will generally consider that: an undertaking holding a market share of at least 30% of the relevant market is presumed to hold a dominant position. It is for the undertaking in question to rebut the presumption and demonstrate that it is not dominant. The Commission will also consider an undertaking holding a market share of less than 30% to be dominant if it has market power; in this case the burden of proof will lie with the Commission.

23. When assessing the existence of monopsony power as described in paragraph 17 above, the Commission will generally consider an undertaking to have monopsony power when it accounts for 30% or more of purchases in the relevant market(s).

Threat of Potential Entry

24. Article 18(2)(b) of the Regulations specifically provides that an assessment of dominance should take into consideration the level of potential competition. In that regard, the Commission will assess whether the threat of entry by potential competitors' functions as a competitive constraint. The Commission will assess the constraints imposed by credible threat of r entry by potential competitors. If such entry is possible within a short timeframe (usually, approximately 1 to 2 years), the undertaking may be prevented from profitably raising prices of the products in question.

25. The Commission will generally consider that an undertaking is not in a dominant position if or entry of potential competitors is likely, timely and sufficient to deter the dominant undertaking from sustaining prices above competitive levels or restricting output. Entry is likely to occur if it would be profitable to do so. If barriers would substantially delay entry

the impact may not be sufficiently timely to affect the incumbent’s conduct. Entry must also be sufficient to defeat the exercise of market power: it must be large enough, and of a character, to constrain the firm alleged to be dominant or in possession of substantial market power.

26. The Commission will also rely on other factors to assess the level of competitive constraints, such as countervailing buyer power. Countervailing buyer power exists when a buyer, or group of buyers, have sufficient bargaining strength to constrain an undertaking from acting to an appreciable extent independently of its customers. Such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to credibly threaten to resort to alternative sources of supply in response to a significant price increase (or equivalent reduction in output or quality) by the dominant undertaking. Buyer power may also manifest in the ability of the buyer to instigate entry of new suppliers in the market or to vertically integrate with an existing alternative supplier to create an in-house supply.

27. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.

Barriers to Entry

28. The level of potential entry depends on existing barriers, as specified in Article 18(2)(c) of the Regulations. Low barriers contribute to easy expansion or entry. As a result, an undertaking would be less likely to profitably sustain prices above competitive levels or restrict output despite holding a significant market share. New entrants are more likely to constitute an effective competitive constraint if they are able to act on a large scale, either immediately or after growth within the short to medium term.

29. Barriers to entry may give advantage to incumbent undertakings over potential competitors and entrants. These may include tariffs or quotas, or advantages specifically enjoyed by the dominant undertaking such as economies of scale and scope, privileged access to essential inputs or natural resources, important technologies or an established distribution and sales network. Further, the barriers to entry may be determined from the views of sector regulators and business associations. ’Barriers may also take the form of costs and other impediments for customers when switching to a new supplier.

30. Barriers to entry notably include:
    a. Tariffs and quotas: tariffs and quotas may make it more difficult to enter the market by means of imports;
    b. Regulation: regulation may constitute a barrier to entry for example, by requiring adaptation of products manufactured in another jurisdiction or requiring undertakings to hold a particular license;
    c. Economies of scale and scope: large economies of scale and scope may require entrants to enter the relevant market on a large scale relative to the size of the relevant market or to enter several markets at the same time, which entails large sunk costs;
    d. Privileged access to essential inputs, natural resources, important technologies and distribution channels: such a privileged access may result from regulation or the existing factual situation;
    e. Sunk costs: large sunk costs, i.e. investments specific to entering the relevant market which cannot be recovered if the company exits the market, may reduce the attractiveness and profitability of market entry;

f. Network effects: where the value of goods or services increases to potential customers as the number of existing customers using the product or service increases. The attractiveness of a good or service to a customer depends on the extent to which the good or service platform is used and accepted by incumbent customers. Network effects become a barrier to entry or expansion because the incumbent firm(s) may have significant network effects which a new or potential entrant may lack.

31. The Commission may obtain information regarding the ease of entry into the market from a number of sources taking into consideration the risk of bias including:
    a) incumbent firms which deal with the barriers themselves or often recognize them in their business documents;
    b) potential entrants who often encounter these entry barriers;
    c) suppliers and customers who may have relevant information regarding the incumbent's contracting arrangements;
    d) investment analysts and industry analysts who often discuss barriers to entry in their analyses debates or reports;
    e) examination of recent entry or expansion (or the lack thereof) can provide useful clue;
    f) a history of entry in the market can provide sound evidence that potential obstacles to expansion or entry are or are not decisive;
    g) business associations

History of Competition and Rivalry between Competitors

29. The history of competition and rivalry between competitors in the sector of activity is a useful indication of the level of competition in the relevant market. The Commission will notably take into consideration the evolution in market shares and, more generally, the competitive dynamics on the relevant market over time. For instance, high stable market shares may be indicative of market power. By contrast, rapid fluctuation in market shares may be indicative of the absence of market power. Previous instances of actual coordination may also be relevant.

30. The Commission will also consider the distribution of market shares on the relevant market, especially if the market is mature. A company holding a high market share is more likely to be dominant if its market share is significantly higher than the market share held by its closest competitors. However, as above mentioned, other additional factors will be assessed to inform a decision on the issue.

SECTION 5: ABUSE OF A DOMINANT POSITION

Concept of Abuse of a Dominant Position

31. The concept of abuse of a dominant position is clarified by Article 18(1) of the Regulations. The Article prohibits abuse of dominant position and not the existence of a dominant position itself. Emphasis is on establishing significant competitive harm arising from the conduct of the dominant undertakings.

32. Article 18 must be read in conjunction with Article 2 which provides that the Regulations prevent "restrictive business practices and other restrictions that deter the efficient operation of markets, thereby hampering the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors". Pursuant to Article 2 of the Regulations, a conduct that produces one of the effects listed in Article

18(1) of the Regulations may thus constitute an abuse if it harms competition and reduces consumer welfare.

33. The Commission will assess whether a conduct by a dominant undertaking constitutes an abuse of dominant position on the basis of objective factors. Evidence of subjective intent on the part of the dominant undertaking to restrict competition is a relevant, albeit not necessary, factor that may be taken into account.

34. In determining whether there is an abuse, the Commission will consider the likely effect of a dominant undertaking's conduct rather than the form of the conduct.

Abuse Affecting Trade between Member States

35. An alleged abuse "may affect trade between Member States" within the meaning of Article 18(1) of the Regulations if the conduct may have a direct or indirect, actual or potential, appreciable influence on the pattern of trade between Member States. Practices that do not appreciably affect trade between Member States fall outside the scope of Regulations.

36. The required actual or potential effects on trade between Member States may occur in the directly related product market (direct effects) or in a related product market (indirect effects) such as the downstream or upstream markets.

37. The assessment must be carried out on the basis of objective factors such as the nature of the conduct, the nature of the products or services, the market position of the undertakings concerned and the legal and factual context. Intent to affect trade between Member States is not required, although it constitutes a relevant factor to take into consideration where such intent is established.

38. The direct or indirect, actual or potential, influence on the pattern of trade between Member States must be appreciable. The stronger the market position of the parties, the more likely the practice is likely to affect trade between Member States. Practices in a single Member State can also affect trade between Member States. For instance, an export ban imposed by a supplier on a distributor which prevents the distributor from re-importing into the Member State could have an effect on trade between member states.

39. This is especially true where there is a significant differential between prices in the different territories, where that differential could not be eroded by customs duties and transport costs and where significant volumes of a product could be exported from the third country to the Member State.

SECTION 6: ANALYSIS OF SOME SPECIFIC CONDUCT RELATING TO ABUSE OF DOMINANCE

40. Article 18 of the Regulations prohibits both exclusionary and exploitative abuses by dominant undertakings.

41. Exclusionary abuses refer to practice which:
    a) Restricts, or is likely to restrict, the entry of any undertaking into a market;
    b) prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market;
    c) eliminate or remove or is likely to eliminate any undertaking from a market;
    d) directly or indirectly imposes unfair purchase or selling prices or other restrictive practices; or

e) [as part of an agreement] makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to the commercial usage, have no connection with the subject of the agreement.

42. Exploitative abuses are abuses by the dominant undertaking which directly and significantly exploits suppliers or customers by taking advantage of its market power. These are for instance conduct which:

a) limits the production of goods or services for a market to the prejudice of consumers;
b) results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market; or
c) directly or indirectly impose unfair purchase or selling prices or other restrictive practices.

This section will discuss certain specific abuses of dominant position.

Exclusive Purchasing

43. Exclusive purchasing means the obligation for a customer to purchase exclusively or to a large extent only from the dominant undertaking in a specific market. The Commission considers that an obligation to purchase at least 50% of the customer’s requirement amounts to exclusivity.

44. An exclusive purchasing obligation may constitute an abuse of dominant position if it significantly affects the market and leads to anti-competitive foreclosure. In its assessment, the Commission will notably take into account the competitive constraints exercised by both actual and potential competitors; the stability of market shares; the likelihood of new entry; the portion of the market affected by such conduct and the duration of the exclusive purchasing obligation.

45. The Commission considers that exclusivity obligations of long duration are more likely to have a foreclosure effect on the market than obligations of short duration. Long or short duration will be determined on a case by case basis. However, the Commission will consider the duration of 2 or more years to be long. In both cases, the Commission considers that the dominant undertaking must be an unavoidable trading partner for most customers.

46. In some cases, purchasing obligations of short duration may lead to anti-competitive foreclosure if the dominant undertaking is an unavoidable trading partner of all or most customers.

47. By contrast, an exclusive purchasing obligation does not constitute an infringement of the Regulations if only a small portion of the relevant market is affected so that there remains sufficient demand on the market to allow equally efficient competitors or potential competitors to compete viably on almost equal terms for each individual customer's entire demand.

48. The same principles would apply with regard to exclusive supply obligations whereby the dominant undertaking would oblige a supplier exclusively or to a large extent to supply only to the dominant undertaking on a specific market.

Conditional Rebate

49. Conditional rebate means conduct whereby a customer is granted a rebate if its purchases over a defined reference period exceed a predetermined target. No rebate is granted if the target is not met at the end of the reference period. The target may be expressed in terms of volume or percentage of the customer's requirement. Conditional rebates may be retroactive, i.e. applying on the total volume of products bought during the reference period; or incremental i.e. may apply to the units bought after the target has been reached. However, from an economic point of view, both types of rebates have similar effects. Exclusivity rebates will be assessed under the same principle as an exclusivity obligation.

50. Rebates are an extremely common practice and usually directly benefit consumers by resulting in a lower price. However, conditional rebates granted by a dominant undertaking may constitute an abuse of dominance if it forecloses equally efficient competitors or potential competitors, thus reducing the level of competition in the market to the detriment of consumers in the long run. Standardized volume rebates may generally be less likely to give rise to competition concerns than individualized rebates that are tailored to each customer. However, the Commission will base its assessment of the compatibility of a rebate scheme primarily on the basis of its likely effect rather than its structure.

51. The Commission will generally presume that a conditional rebate is abusive if the effective price of the products or services, after having applied the rebate is below the dominant undertaking's average variable costs. This will apply whether the rebate is on the quantity bought after the target has been met for incremental rebates or on the contestable part of the demand for retroactive rebates.

52. The Commission will also take other factors into account. For instance, rebates with shorter reference periods (less than a year) are generally less likely to lead to anti-competitive effects because competition for the customer's requirement starts anew at the end of each reference period. The Commission also considers that rebates characterized by lack of transparent criteria are more likely to raise competition concerns. The Commission will also take into account the countervailing power of the buyers and the affected portion of the relevant market.

Tying, Bundling and Multi-product Rebates Conducts

53. **Tying** refers to situations where customers that purchase one product (tying product) are required also to purchase another product (tied product) from the dominant undertaking. Tying conduct can result from an express contractual stipulation or a unilateral refusal to supply the tying product until the tied product is also purchased. Tying can also take place on a technical basis. A technical tying would occur if the tied product is integrated into the tying product so that it is impossible to purchase only one of them; or if the tying product is so designed that it only works properly with the tied product.

54. **Bundling** refers to the way products are offered and priced by the dominant undertaking as a single package. Pure bundling refers to the situation when products are only sold jointly in fixed proportions.

55. On the other hand, **multi-product rebate or mixed bundling refers** to situation where the products are also made available separately, but the sum of the prices of the individual elements of the bundle when sold separately is higher than the bundled price.

56. The Commission will consider that these conducts constitute an infringement of Article 18(1) of the Regulations only if the three cumulative conditions are met:
    a) First, the undertaking is dominant in the primary product market[1];
    b) Second, the products are distinct products from the consumer's point of view. The Commission will assess whether in the absence of such conduct, a substantial number of customers would have bought the products from the dominant undertaking without the tied product, which may notably be evidenced by the presence on the market of producers specialized only in the manufacture and sale of one of the two products; and
    c) Third, these conducts are likely to lead to foreclosure. The conducts may also lead to anti-competitive effects in the relevant markets, even when their aim is to protect the dominant undertaking's position. The conduct has as effect to foreclose competitors from the tied market.

57. The Commission will tend to consider a multi-product rebate as anti-competitive on the tied or the bundling market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

Predatory Pricing

58. Predatory pricing refers to a situation where a dominant undertaking deliberately charges prices below costs and incurs losses in the short term in order to foreclose an existing competitor or a potential new entrant; and thereafter raises its prices. Once the competitor is foreclosed, the dominant undertaking will raise its prices again, typically at supra-competitive level, thereby harming consumers.

59. Low prices are pro-competitive and benefit consumers. In order to assess whether a dominant undertaking is engaged in predatory pricing, the Commission will examine whether the dominant undertaking incurs losses that it would have avoided when compared to economically rational and practical alternatives that may realistically be expected to be more profitable, but for the elimination of competitors.

60. The Commission considers a dominant undertaking to be engaging in predatory conduct if it sets a price below the average variable cost for a significant period of time subject to market conditions. It is, not necessary to demonstrate that recoupment took place or that initial losses were actually recouped before a finding of predation is made.

61. The Commission will also take into account other factors, such as direct evidence of a plan aimed at excluding competitors, the likelihood for equally efficient competitors to have entered the market in the absence of the conduct in question or the period during which lower prices are sustained. The Commission considers that targeted prices below costs that exclude certain competitors are more likely to be predatory. It is not necessary to show that competitors actually exited the market as a result of predation though it is vital to demonstrate consumer harm arising from the predatory conduct of the dominant undertaking.

62. If the dominant undertaking maintains a low price over a significant period of time, it would appear that this price is a sustainable low price rather than a predatory price and it is unlikely that its conduct constitutes predatory pricing. It would be important, though, to assess if an equally efficient competitor would survive in the particular market scenario.

[1] The product on which other products are bundled or tied

Refusal to Supply or Deal

63. Dominant undertakings are in principle free to decide whether or not to contract and to choose their business partners. Imposing an overbroad duty to supply may deter undertakings from investing or may encourage free riding on investments made by dominant undertakings. However, a dominant undertaking's unilateral refusal to supply goods or services may lead to an infringement of Article 18(1) of the Regulations in exceptional circumstances.

64. Problematic refusals to deal may typically occur where the dominant undertaking in one market is also competing with its customers in a downstream market. The Commission will generally consider that a refusal to supply is abusive if the following cumulative conditions are satisfied:
    a) Where a refusal relates to a product, a service or an essential facility that is objectively necessary for the undertaking to compete effectively on a downstream market. There is no indispensability if there are alternative solutions – albeit less advantageous – which enable equally efficient competitors to remain viably on the market. A facility is likely to be essential where:
        i. access is indispensable in order to compete on the relevant market; and
        ii. where duplication is very difficult owing to physical, geographic or legal constraints;
    b) Where a refusal is likely to lead to the elimination of effective competition or the prevention of its emergence in the downstream market. The higher the market share and the less capacity-constrained the dominant undertaking is, the more likely effective competition will be eliminated;
    c) Where a refusal is likely to lead to consumer harm. This will particularly be the case if the refusal is likely to prevent innovation or limit technical development, for instance by preventing the emergence of a new product that is not a mere duplicate of the dominant undertaking's product.
    d) Where the requirement to deal will not significantly deter the dominant undertaking's incentives to invent and the refusal to deal is not otherwise objectively justified.

65. A refusal to deal may take several forms, from an outright refusal to more subtle forms such as margin squeeze. Margin squeeze describes a situation where the dominant undertaking charges a price for the product in the upstream market which, compared to the price it charges in the downstream market, does not allow an equally efficient competitor to trade profitably in the downstream market on a lasting basis. For instance, the downstream operation of the dominant firm would not be profitable if the dominant firm internally charged itself the same price that it charges its downstream competitor.

Excessive Pricing

66. The Commission considers excessive pricing in the case where dominant undertakings take undue advantage of consumers by using their market power to charge grossly excessive prices or impose unjustifiably unfair terms and this may constitute an exploitative abuse of dominance.

67. The Commission will first assess whether the market is characterized by high barriers to entry; whether consumers have no credible alternatives to the products or services of the dominant undertaking; and whether firms compete in a mature environment, where investment and innovation play little or no role.

68. If at least one these market conditions is not met, the Commission considers that it is unlikely that very high prices could constitute abusive excessive pricing. Indeed, high prices can be regulated by new entrants or innovation.

69. If the market conditions are satisfied, the Commission will assess whether the price actually charged significantly exceed:
    a) the costs actually incurred;
    b) the price that would have been expected to be charged by an efficient undertaking in a competitive market;
    c) prices of competing products or in comparable geographic markets.

70. A price will only be excessive if the difference with the above cost/price benchmarks is substantial.

SECTION 7- MISCELLANEOUS

General Penalties and Fines

71. Pursuant to Article 8(5) of the Regulations any person who contravenes or fails to comply with any regulations or any Rules made or any directive or order lawfully given or any lawfully imposed under the Regulations or any Rules made for which no penalty is provided shall be determined to have breached the Regulations and shall be liable pursuant to that determination to fine in an amount as determined by the Rules and or such other penalty as may be assessed.

Review of the Guidelines

72. These Guidelines may be reviewed from time to time to reflect changing market circumstances and law governing their implementation.

Entry into Force

73. These Guidelines shall enter into force upon approval by the Board.

APPROVED by the Board at Mombasa, Kenya on the 2nd of April 2019.