Technical assistance to the SADC Secretariat to enhance regional integration and harmonization of competition and consumer policy in the SADC Member States

Best Practices for Abuse of Dominance Cases

This and the other best practice guidance documents under the Project focus on the “best enforcement and analytical practices” that are already applied by SADC Competition Authorities. Significant attention is given as well to best practices developed elsewhere, which, based on the judgement of the Project Team, the consultations held and the discussions at the End of Project Workshop on 1-2 December 2011, should be considered by SADC CAs and stakeholders in the future.

The sources for the best practices are often indicated in the references in the main text and in the bibliography of each document. Other sources include the many interactions with competition authority officials during the Project and the previous work of Project Team members and the SADC Secretariat Programme officer.

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Summary: Major Lessons and Best Practices for Abuse of Dominance (AOD) Cases in the SADC Region

a) It is important to understand why and how dominance was established in the first place.

b) High market shares do not necessarily indicate market dominance, and market dominance does not necessarily translate into market power that substantially harms competition and consumers.

c) AOD case selection, investigation and analysis require a careful, fact intensive, rule of reason approach which assesses both market structure and business conduct, applies the substantiality and competitive effects tests in a consistent manner, and employs a dynamic and risk based analytical framework.

d) Annex A to this document provides a checklist of the 18 factors and indicators that are important to determining whether a dominant position increases or decreases the risk of market power and of substantial harm to competition and consumers once a dominant position has been established.

e) The risk is higher when dominance was achieved through highly aggressive foreclosure, exclusionary and related practices, which can become anticompetitive conduct and abuse of dominance after the company becomes a dominant company within a relevant market.

f) The risk is lower when dominance is achieved through superior competitive performance, and the relevant market continues to be contestable because of comparatively low entry barriers, a competitive fringe and a maverick producer among the remaining competitors.

1. Principles Underlying Abuse of Dominance under Competition Law

The abuse of dominance provisions in SADC Member State, European Union, Canadian, and other competition laws in OECD and emerging market economies, and the monopolization case law under the American antitrust statutes, are based on one overarching principle.

Companies with a high market share in a relevant market should not be investigated and penalized under competition law unless the company is abusing that dominant position in a manner that has adverse effects on competition and consumers, substantially lessens competition, and/or is likely to substantially prevent business entry and competition in the future (see e.g. Kububa 2009).

In short, a high market share does not necessarily indicate dominance, and a dominant position does not necessarily translate into market power and the motivation and ability to abuse a dominant position.

Some duopoly markets can be highly competitive and rivalrous, while an oligopoly market with four suppliers of roughly equal size can be much less competitive because
of conscious parallelism, tacit collusion, collective dominance and lazy non-aggressive “live and let live” management. Under certain circumstances, a supplier with a smaller market share can be the company with the market power to control prices and restrict entry, through anti-competitive exclusionary and foreclosure practices (Republic of Zambia 2011:26 and Reckon 2008 on the famous United Brands case of the EU).

Under other circumstances, the major supplier may have market power but may decide to not “abuse” its market power for fear of an AOD or predation case that can be expensive in legal and other costs and even more costly to its reputation as a socially responsible corporation. Accordingly, “dominance is not necessarily a sin, and can often be a virtue when based on superior performance.”

These new approaches require that competition authorities move away from a form based on a legalistic and structural approach to AOD, whereby some or most conduct by a dominant firm is judged to be per se illegal; and instead adopt a competitive effects based approach in abuse of dominance cases.

The competitive effects approach requires competition authorities to prove explicitly a causal link between a particular conduct of the dominant firm and substantial harm to competition and consumers, and to allow for an efficiency defense, or at a minimum a substantive consideration of efficiencies and superior competitive performance (see e.g. Jenkins et al 2009, Theron and Boshoff 2009 and Carlton 2004).

Best practices for AOD investigations therefore attempt to find the appropriate balance between:

(i) encouraging companies to expand their revenues and market shares through being more entrepreneurial and efficient, producing high quality products, and serving their business customers and final consumers better than their rivals; while,

(ii) discouraging companies from maintaining and abusing their dominant position by means of anti-competitive conduct and arrangements that prevent potentially more efficient firms from entering and expanding in the relevant market.

Striking the right balance is both necessary and more challenging in SADC emerging market economies, where overly restrictive competition law enforcement directed at larger and more dominant firms supplying to smaller markets could discourage entrepreneurship, innovation and risk taking.

While overly permissive enforcement, which permits entry deterrence strategies by incumbents including predatory, foreclosure and exclusionary practices, could prevent promising new entrepreneurial start-ups and other potentially high growth firms called “gazelles” from having the access they need to essential business services, other intermediate inputs and networks and essential facilities (Birch 1987, Khemani 1999, Dutz, Ordover and Willig 2000, Carlton 2004, Gavil 2004, Werden 2006 and Fox 2007).

Therefore, companies that enjoy supra-competitive prices and profits because of a dominant position in a relevant SADC market should be monitored and assessed carefully to ensure that their distribution and other practices are on balance promoting
competition and consumer welfare. SADC competition authorities should be in a position to move flexibly and quickly when e.g. a distribution strategy of dubious economic and consumer value is being used by a dominant incumbent to prevent entry by a new and promising competitor (Gavil 2004 and the Mauritius Kraft monopoly case summarized on the Mauritius Commission’s website - CCM 2011; see as well Kariga and Saurombe 2009).

One of the major implications of this overarching principle that was illustrated in the Microsoft and Intel cases was that the legitimate pro-competitive business practices employed by aggressive companies to achieve higher revenues and market shares can become anti-competitive business practices once dominance is achieved (Ireland 2007, Mazzone and Mingardi 2011 and Republic of Zambia 2011:24).

Similar to best practice in merger review, an AOD enforcement case takes account of both market structure and business conduct, and high market share on its own is not sufficient grounds to penalize a company for achieving a dominant position through superior competitive performance, an efficiency enhancing merger, historical accident, or other market developments.

Another principle and emerging best practice in AOD and merger cases is to apply the “no economic sense test” to the business conduct of a dominant firm. Under this test, the conduct of the dominant firm is not considered to be exclusionary or predatory unless the conduct would make no economic sense for the defendant company, except for the tendency and likelihood that the conduct will lessen or prevent competition and substantially harm consumers (Werden 2006 and Muris 2005:183-184).

Such a test places the responsibility on the SADC competition authority to prove that the conduct would not be rational for the defendant company except for this anti-competitive tendency, likelihood and possible.

The test recognizes that some potentially harmful business conduct, which is not intentionally anti-competitive and does not pass the substantiality and competitive effects tests, should be tolerated to avoid the potentially even greater harm of discouraging entrepreneurship, risk taking and inter-firm rivalry.

These principles and enforcement practices are for the most part consistent with current SADC approaches to abuse of dominance, exploitative and exclusionary practices and related provisions in their competition laws and with current enforcement practices among SADC CAs.¹ The principles and enforcement practices are particularly important to AOD cases in SADC Member States, which often have: (i) small and fragmented markets, (ii) high entry barriers, (iii) less developed enterprise sectors including SMEs and micro-enterprises in the informal sector that are often not competitive, and (iv) recently commercialized and privatized “monopoly” service providers in the telecommunications, energy, financial and other previously regulated sectors that are important to household budgets and the ease and costs of doing business. These and

other factors combined together increase the risk\(^2\) of dominance and of abuse of dominance in relevant markets.

Abuse of dominance best practices indicate that SADC competition authorities in conducting an AOD case need to: (i) address why and how dominance was achieved in the first place, (ii) the indicators to be used to monitor a dominant position and to decide to start an AOD investigation, and (iii) the analytical methods to be used in an AOD case. These are summarized in the next three sections.

2. Reasons for a Dominant Position in a Relevant Market

Some but not all SADC competition laws and other countries’ laws include a market share threshold as part of the definition of a dominant position (Gangi and Bienen 2010:142-144). The purpose is to provide a market share safe harbour to companies.

SADC CAs should recognize however that determining the relevant market is one of the most important and complex early steps in any AOD, merger or other “rule of reason” case. As a consequence, the market share of the alleged dominant firm provided by a complainant, the media or other source will at best be an order of magnitude estimate that can either exaggerate or under-estimate dominance depending on the source.

Therefore, important weight in deciding whether to open an enforcement case and in conducting the investigation is given to collecting preliminary evidence on why and how a possible dominant position was achieved. The following divides these reasons into anti-competitive and pro-competitive reasons.

2.1 Possible Anti-Competitive Reasons

1. Merger to monopoly or a dominant position or dominance because of other market developments – when the transaction and/or dominance are allowed for example because national champion policies trump competition policy and law.

2. Merger which results in a stronger but not yet dominant company, which then uses foreclosure, exclusionary, price and non-price predation and other anti-competitive strategies to increase market power and achieve dominance after the transaction is completed.

3. Dominance through the anti-competitive and questionable business practices and strategies of the now dominant domestic firm - including smaller merger transactions which individually do not raise competition issues which are often conducted over an extended period.

4. Dominance as a consequence of the entry of a highly competitive, efficient and aggressive foreign firm from a more advanced SADC MS or other more highly developed economy, which has a history of using aggressive competitive and anti-competitive strategies to prevent entry and the expansion of smaller competitors, and to facilitate the exit of smaller and less efficient incumbents.

\(^2\) Risk includes both probability and consequences.
5. Dominance by one firm as a consequence of the financial difficulties of a second firm, which becomes a failing firm that exits the market - in part or wholly because of the anti-competitive strategies and practices of the now dominant firm.

6. Joint dominance through e.g. the two or three largest suppliers acting in a coordinated manner through tacit collusion, conscious parallelism, price leadership, informal market sharing arrangements and so on³.

7. Dominance that results from the privatization or commercialization of a state owned corporation or public undertaking in a market or industry that previously was heavily regulated.

8. Often, the state owned or recently privatized incumbent enjoys a dominant position after privatization or commercialization because the introduction of competition was badly managed, the relevant market is too small to accommodate more than one supplier operating at minimum efficient scale, or the advantages of incumbency are so great that timely and consequential entry is virtually impossible (Khemani 1999:91-92)

2.2 Possible Pro-Competitive or Neutral Reasons

1. Dominance through superior business acumen and competitive performance, which meets the needs of business customers and final consumers, or as a consequence of “historical accident” (Vickers 2005: F247)

2. Merger which results in a stronger but not yet dominant company, which then achieves dominance through superior competitive performance after the transaction is completed, based in part on achieving merger specific efficiencies and sharing the merger and other efficiencies with business customers and final consumers

3. Dominance as a consequence of the poor management of a failing firm that exits the market – whose assets are purchased in whole or in part by a major incumbent that becomes the dominant supplier because of these acquisitions. This transaction could be investigated under merger review but the transaction would likely be approved quite quickly through applying the failing firm factor or defense

4. Dominance because declining market demand forces the smaller and often less efficient firms to exit the market – leaving perhaps a dominant firm and a fringe of

³ Joint dominance (also called collective dominance) lies between unilateral and coordinated conduct and covers possible enforcement cases, whereby a group of firms with a collectively dominant market share are using tacit collusion and coordination and collective strategic behaviour such as predation, exclusion or “facilitating practices” to maintain and entrench their collective dominant position.

Joint dominance cases allow a CA to address allegations of tacit collusion and coordination and “conscious parallelism” that would not meet the higher evidentiary burden and penalties of a criminal cartel case (Scheffman and Coleman 2003, Iacobucci and Winter 2009, Canadian Competition Bureau 2009, Csorgo 2009 and Banicevic and Katz 2009).
very small firms, which are no longer competitive and therefore able to discipline the conduct of the dominant firm.

5. Dominance through exchange rate devaluation and new external and internal trade and investment barriers, which mean that the relevant market is no longer competitive or even contestable and therefore suppliers in neighbouring countries and neighbouring product and geographic markets no longer discipline the price, quality and other decisions of the now dominant supplier

3. Indicators for Monitoring Dominance and Deciding Whether an AOD Case is Warranted

Among these twelve reasons for a dominant position, only reasons two through six and perhaps in some situations reason seven would provide a comparatively strong foundation for a successful abuse of dominance case.\(^4\) The first reason theoretically should also be investigated but this depends on the competition’s authority’s independence from government, senior economic ministries and industry lobbying.

For the other reasons and situations including those that are relatively benign or pro-competitive\(^5\), the competition authority, with the assistance of competitors, business customers, suppliers, consumer and other civil society groups and interested parties, could monitor competition in the relevant market using the factors and indicators in Annex A to identify whether dominance is being transformed into abuse of dominance.

Annex A lists 18 factors and considerations that can be important to determining whether dominance is being transformed into abuse of dominance and therefore would warrant further investigation and possible enforcement actions. Each factor is categorized and grouped together, depending on whether it indicates higher or lower risk of adverse competitive effects.

The 18 factors and considerations are fully consistent with the overarching principle for abuse cases described in the first section. As noted under factor 5 in Annex A, the interactions between competition and consumer protection law can be particularly important to AOD cases in SADC Member States. In addition to the conventional anti-competitive strategies of predation, foreclosure and exclusion, firms that are attempting to achieve market dominance can also employ what the literature calls strategies of “confusopoly”, “obfuscation” and “complexification”,\(^6\) whereby the firm first achieves and then entrenches its dominant position through manipulating and exploiting:

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\(^4\) The more likely instruments for reason seven would be competition advocacy at the time of the privatization and commercialization, and if mandated under the competition law or regulations, assessment for adverse competitive effects under the merger review section (see the merger guidelines project document).

\(^5\) Since changes in market conditions and the policy and institutional environment can make anti-competitive strategies more attractive to dominant firms that in the past had preferred pro-competitive and neutral strategies.

\(^6\) Through these strategies, a company “confuses” and places at a disadvantage its competitors, business customers and final consumers through non-transparent business practices, overly complex product features and information which differentiate their products and services but often provide little value, overly
(i) information asymmetries, their information advantages and the information problems of their small business suppliers and customers and final consumers, and

(ii) the behavioral biases of “boundedly rational” business customers and final consumers as well as competitors, regulators and other government agencies,

in order to further discourage entry, marginalize existing competitors and maintain and extend their market power and supra-competitive profits (Gans 2005a and 2005b, Schoemaker 1990, and Yao 1988).

Such strategies are particularly effective and attractive in highly concentrated markets because the dominant player will be able to capture the vast majority of the benefits from information and behavior based abuse of dominance strategies. SME and consumer disadvantages and vulnerability in combination with information failures and continual change can make abuse of dominance strategies even more effective for the dominant firm and harmful to competition and consumer welfare in the SADC region.

In this manner, the investigation of exploitative business practices addressed in many SADC AOD and monopolization sections would be extended to included violations of consumer protection laws and of the unfair trading practices and related sections of many SADC competition laws (Gangi and Bienen 2010 pp. 23-27 and 142-148).

4. Analytical Methods for an AOD Case

There are many similarities between merger review and the analytical methods for an abuse of dominance case. The major difference is that in an AOD case most (but not all) of the analysis is on past and current market structure, conduct and competitive and anti-competitive strategies, rather than on predictions of market structure, conduct, business entry and the achievement of efficiencies in the future. Some of the key steps in analysing an AOD case include the following:

1. Define the relevant market, with emphasis on identifying other suppliers that produce close product substitutes; or produce the same or similar product in a neighbouring geographic market and perhaps could be included in the relevant market in the future when trade, foreign investment, business entry and other barriers are reduced and then eliminated.

2. Investigate past and current conduct of the dominant and other suppliers within the relevant market, to identify conduct, business practices and strategies that could meet the abuse of dominance test of substantially lessening competition and substantially preventing entry and competition in the future.

complex contracts, and of course product misrepresentation and confusing and misleading advertising and other marketing programs.

7 See the project document on analytical methods.
3. Assess current and future entry conditions in the relevant market to determine whether entry is likely to be timely and sufficient to discipline the pricing, product quality and other decisions of the dominant supplier.

4. Determine whether a maverick producer or the emergence of a competitive fringe will discipline the dominant firm’s conduct in the years ahead.

5. Analyse whether dominance was achieved through superior competitive performance - which is anticipated to continue now that the firm is a dominant producer.

6. Assess whether competition and entry conditions in the relevant market are likely to change significantly in the years ahead because of: rapidly expanding demand in the relevant market; domestic economic reforms which reduce barriers to entry and expansion and the cost of doing business; lower trade and investment barriers in the SADC region; and improvements in the country’s and SADC region’s enterprise sectors and transportation and telecommunications networks.

7. Determine whether feasible and implementable structural and behavioral remedies are available – including remedies that would reduce trade, investment and entry barriers within the Member State and in other parts of the SADC region.

An important part of any AOD case is the identification of remedies that are implementable, will reduce and eliminate the anti-competitive conduct and adverse competitive effects of the dominant position and will prevent the anti-competitive conduct from recurring in the future. Structural remedies are generally preferred over behavioral remedies for AOD, mergers, and other rule of reason cases, but also can involve major risks.

Forced divestment of strategic assets may undermine the long-term competitiveness of the company and therefore would not be proportionate to the violation. Finding buyers for the assets to be divested can be problematic in smaller or less developed SADC economies where enterprise sectors are underdeveloped and markets for company assets are thin.

At the same time, monetary sanctions may be too low and have little effect because they are seen as simply a cost of doing business by the dominant firm. For some cases, behavioural remedies may be the only reasonable option despite the monitoring burden that these place on the competition authorities (OECD 2008).

To summarize, AOD remedies should satisfy the following conditions: The remedies should be feasible, implementable, effective and proportional to the violation. Monetary penalties should be sufficient to eliminate anti-competitive conduct and effects. And with the assistance of suppliers, customers and other interested parties, behavioral remedies should involve oversight and monitoring costs and risks that are manageable and affordable for the competition authorities (see the penalties, sanctions and remedies project document).

If these conditions are not fully satisfied, the only solution may be lower trade and investment barriers and related domestic reforms that will promote foreign and domestic
entry in the long term. The acceleration of such tariff reductions and other reforms could be part of the remedy package.

5. Extending the AOD Principles and Analytical Methods to Related Business Practices and Arrangements

The best practices and basic principles applied in merger and AOD cases have been extended to vertical restraints, non-merger horizontal arrangements and other arrangements and conduct that do not involve explicit “hardcore” cartels. When one of the participating companies does not have a dominant position and market power in the relevant product and geographic markets, vertical arrangements and restraints and non-merger arrangements and R&D and other joint ventures and strategic alliances are much less likely to generate adverse competitive effects and are more likely to be efficiency enhancing and to support superior competitive performance.

Moreover, even with market dominance, vertical restraints and other non-merger arrangements can still increase efficiency and consumer welfare as long as one of the participants is not abusing its market dominance and power.

SADC competition authorities may receive many complaints that refusals to supply and deal, exclusive arrangements and other vertical restraints involving suppliers, distributors and retailers are preventing the complaining companies from entering or expanding in the relevant market and supply chain. If there is evidence of abuse of dominance, then the complaint may have competition merit.

However, if the arrangements and restraints improve efficiency and customer service through reducing production, transaction and other costs, enforcement action would not be warranted. Overly restrictive application of competition law sections on exclusion, foreclosure and vertical restraints penalizes superior competitive performance and often leads to vertical mergers, which mean that the complaining company will have no opportunity in the future to compete for this business (UNC\TAD 2005:104-107).

On the other hand, smaller SADC economies and markets with limited manufacturing capacity, small consumer markets, and a high dependence on imports for essential goods and services often find that imported goods are distributed by a single distributor, which has established an exclusive arrangement with the producer in the second country. This sole distributor is well positioned to charge excessive prices and abuse its dominant position and market power in other ways – while the remedies available to the CA in the smaller economy are limited without cooperation and positive comity from the second CA where the producer is located.

This situation illustrates how complex cross-border supply chains with dominance, market power and anti-competitive vertical restraints at two or more stages in different countries can challenge several CAs and cooperation across SADC competition authorities. This section also illustrates that, similar to horizontal mergers and dominant positions, vertical restraints, agreements and mergers in SADC economies will more often be efficiency enhancing, and as well will more often raise complex competition issues.
As SADC national economies expand and their consumers become more prosperous, retail and other forms of franchising have become more prominent in many SADC economies; and will likely expand to all SADC economies in the near future.

In many cases, the franchisor will be a larger company in one SADC Member State and the generally much smaller franchisee will be in a second MS. This can lead to possible cross-border irritants that will encompass trade and competition policies, corporate governance, contractual relationships and the bargaining power of franchisors and franchisees.

Retail and other franchise agreements involve a complex mix of vertical restraints, possible abuses of dominance and market power including refusal to supply, and other competition, consumer and non-competition issues. There is a danger that franchisees in less developed Member States will request relief from a retail or other franchise agreement that they argue is unfair, but does not have substantial adverse effects on competition and consumers.

In sum, similar to vertical restraints more generally, most franchise agreements without dominance are unlikely to substantially lessen and prevent competition and hurt consumers. At the same time, SADC Member States through time will need to become more familiar with the franchise literature and the franchise and related enforcement situations and cases addressed by CAs in SADC and other regions - in order to better understand when, and under what SADC conditions, franchise agreements can pose a substantial risk to competition and consumers.

Applying the same or similar competitive effects and substantiality tests in a consistent manner across the full range of non-cartel conduct, arrangements and enforcement cases that apply the rule of reason provides greater consistency and predictability in analytical methods and outcomes, assists in building CA and outside experience and skills in competition analysis methods, and helps to ensure that the limited financial, personnel and technical resources of SADC competition authorities and their business communities are allocated to those cases that are most likely to substantially lessen and prevent competition and have adverse effects on consumers.

An interesting extension to the AOD prohibition is the separate section on administrative monopolies in China’s new competition law called the Anti-Monopoly Law, which became fully operational in 2009. This section essentially prohibits the abuse and exploitation of dominance by state owned enterprises, public undertakings and related anti-competitive arrangements, restrictive business practices and restraints to internal (within country) trade, which are created and/or protected by national and sub-national governments in China (see e.g. Fox 2008, Mehra and Meng 2008 and Owen et al 2005 and 2008).

Adding administrative monopolies to the AOD section or giving administrative monopolies its own section sends a strong signal that the competition law and authority addresses in an equal manner both private and public sector impediments to competition.

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8 See e.g. OECD 1996 which sets out an analytical framework that could be used by CAs to examine franchising agreements, as well as Land 2009.
and consumer welfare; and provides the national government with a potentially powerful instrument to address government restraints to competition at both the national and sub-national levels (see as well Muris 2005 and Blumenthal 2009).

This Chinese competition law innovation may be of interest to SADC Member States and other emerging markets where government interference in the economy is still a major source of anti-competitive arrangements, practices and restraints; and where eliminating these government constraints will allow some dominant positions to continue and some questionable mergers in more highly concentrated markets to proceed. Such a section could also be considered in preparing SADC region wide competition rules.

6. Possible Frictions between Trade and Competition Policy and Law

Vertical restraints, non-merger and non-cartel arrangements and related exclusionary practices may not discriminate between foreign and domestic producers but may impede market access for foreign companies. This issue is a major source of debate and conflict between the international trade and competition policy and law communities (see e.g. Marsden 1998 and 2003 and UNCTAD 2005). The trade and competition literatures provide two very different propositions that require further research that is targeted on SADC Member States and the total SADC region.

One the one hand, vertical restraints, non-merger horizontal arrangements and related exclusionary practices will more often involve anti-competitive practices, abuses of market dominance and power, and substantial adverse competitive effects in the SADC region compared with larger and more advanced competition law jurisdictions.

This is because of the higher risk of market dominance and power at one or more stages of the relevant supply chain of SADC’s often small and fragmented markets. The consequence is that the frictions between trade policy concerns with market access and the concerns of competition policy and law with market power and adverse competitive effects may arise less often within SADC Member States and across the SADC region.

On the other hand, vertical restraints and other non-discriminatory exclusionary practices are more likely to enhance efficiency and consumer welfare in many SADC Member States, especially in those MS where distribution systems and the retail sector are not well developed. This in turn leads to two different outcomes for frictions between trade and competition policy and law.

When a foreign firm enters and uses vertical restraints and other instruments to establish an efficient distribution or retail system, the goals of both competition and trade policy are achieved. Whereas when foreign entry is impeded because a domestic firm has applied vertical restraints and other measures to establish an efficient distribution or retail system, the trade policy goal of market access and the competition goals of efficiency and consumer welfare can be in conflict (see UNCTAD 2005:27-29 and 57-59.)
### Annex A: Checklist of Factors for Monitoring Dominance and Selecting and Investigating AOD Cases

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<tr>
<th>Factor or Indicator</th>
<th>Higher or Lower Risk of Adverse Competitive Effects</th>
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<tr>
<td>Factors and indicators leading to higher risk of adverse competitive effects</td>
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<tr>
<td>1. Reasonable evidence that the abusive, exclusionary and exploitative conduct of the dominant firm is hurting competition and consumers, and in particular is hurting smaller businesses and farmers, less prosperous consumers and households, and other more disadvantaged groups. As indicated by complaints from business customers, competitors and consumers groups, exclusive contracts, high space-to-sales ratios (Theron and Boshoff 2009:17 and Zimbabwe 2009:7-11) and other indicators from evidence and theory.</td>
<td>Much Higher -- while recognizing that vertical restraints and arrangements, exclusive dealing and other exclusionary practices can under some circumstances enhance efficiency and consumer welfare – perhaps especially in some MS with less developed distribution systems.</td>
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<tr>
<td>2. Strategies of joint and collective dominance appear stable and sustainable through time, resulting in a material price increase, poorer product quality and service, and/or less product innovation over an extended period (see as well the merger enforcement guidelines project document).</td>
<td>Much Higher.</td>
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<tr>
<td>3. The dominant firm is well positioned to conduct rent seeking activities to entrench its dominant position through working with government officials and agencies to impose new barriers to entry and to expansion by competitors, which are government constructed and protected (see McWilliams et al 2002, Muris 2005:170-173 and Canadian Competition Bureau 2007).</td>
<td>Much Higher – Can be major source of entrenched dominant positions in SADC MS where role of government is still very important and CA is not yet in place or has limited experience and influence .</td>
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<tr>
<td>4. Dominant position is established by a business or enterprise group, conglomerate or other large company with deep pockets, multimarket contacts, and strong connections with political leaders and key economic government ministries.</td>
<td>Generally Higher Risk – but depends on the market, country and business group.</td>
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<tr>
<td>5. Whether the dominant position is being sustained by questionable business practices – which on their own may not warrant competition law investigation and enforcement – as well as by possible violations of consumer protection and unfair trading laws. Can occur when the dominant firm is abusing its information advantages/asymmetries, stronger negotiating position, and the behavioral biases of smaller less experienced business customers and more vulnerable consumers.</td>
<td>Much Higher Risk – May require coordinated enforcement between competition and consumer protection authorities.</td>
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<td>6. Complaints from business customers, final consumers and the media that a previously highly regulated</td>
<td>Likely to be a major source of AOD complaints and cases in recently</td>
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<tr>
<td>Factor or Indicator</td>
<td>Higher or Lower Risk of Adverse Competitive Effects</td>
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<td>telecommunications, energy, financial or other service provider is abusing and exploiting their dominant position and market power after privatization and/or commercialization of their operations through deregulation.</td>
<td>liberalized SADC emerging market economies. Requires MOUs, joint committees, and informal relationships between CAs and sectoral regulators to share information and, based on the merits, determine the regulator that is best positioned to address the adverse competitive effects (Sogerom SA 2010).</td>
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**Factors and indicators leading to lower risk of adverse competitive effects**

7. The dominant firm is a superior competitive performer producing high quality products at reasonably competitive prices for business customers and final consumers – and has invested heavily in its reputation as a good corporate citizen, high quality producer and industry leader, and would not want to undermine that reputation and those investments through anti-competitive and abusive business practices (in some respects the Microsoft and Intel arguments which of course were not successful). Much Lower – but recognize that as firms mature, face more dynamic competitors and potential entrants, and become more complaisant and less innovative, a superior competitive performer can become an abuser of a dominant position in order to protect market share and profits.

8. A competitive fringe exists or is starting to emerge after near dominance or dominance (e.g. 70% market share) has been achieved. Somewhat Lower – depending on related market conditions.

9. One or more of the remaining small suppliers are or are becoming maverick producers that will discipline the conduct of the dominant firm. Somewhat Lower.

10. Some evidence that the dominant firm is adopting accommodation over aggressive anti-competitive strategies towards the remaining competitors and potential entrants. In some markets and countries, aggressive strategies to achieve and entrench dominance can be more costly and risky than accommodating entry and expansion — in part because the dominant firm knows that it could be subject to a very expensive and high risk AOD or monopolization case. Somewhat Lower – since market conditions and strategies can change in the future.

11. The relevant market continues to be contestable and therefore the pricing, product quality and innovation and other decisions of the dominant supplier continue to be disciplined by the threat of relatively easy and low cost expansion by existing suppliers or by the threat of uncommitted or low cost and risk committed entry. Much Lower – as long as favorable entry and market conditions and reduction and elimination of entry barriers continue in the years ahead.

12. There is some evidence that dominant firm conduct is hurting competitors but little evidence that the conduct is harming competition, business customers and final consumers. Lower – CA requires some evidence of harm to competition and consumers before opening an AOD case.
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<tr>
<th>Factor or Indicator</th>
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<tr>
<td>13. The business customers of the dominant firm are also large firms with countervailing power that can discipline the pricing and other conduct of the dominant firm.</td>
<td>Much lower – unless there is some formal or informal link between the two companies (e.g. affiliates of the same business group or network).</td>
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<tr>
<td>14. Relevant market is a high growth market with comparatively low entry barriers, which would facilitate expansion by existing small suppliers or entry at minimum efficient and feasible scale by a domestic or foreign company.</td>
<td>Much lower – but recognize that in some industries and markets high growth is not associated with declining concentration (Kwoka and White 2000).</td>
</tr>
<tr>
<td>15. Rapid changes in technology and new product or process innovations will make the dominant market position transitory.</td>
<td>Much Lower – over the longer term (need to compare short-term harm with potential long-term benefits).</td>
</tr>
<tr>
<td>16. External developments: changes in tariff, non-tariff, investment and other barriers, in exchange rates, in market integration within the country or with neighbouring countries through bilateral or regional trade arrangements, is expected to make the relevant market more competitive and contestable in the future.</td>
<td>Much Lower – but depends on when these improvements are fully implemented – which could be accelerated through AOD remedies, conditions and undertakings.</td>
</tr>
<tr>
<td>17. Major competitor or competitors or potential entrants of the firm with a dominant position are affiliates of business or enterprise groups, or subsidiaries/divisions of a conglomerate or large company with deep pockets, multimarket contacts, and the will and ability to discipline the pricing and other decisions of the dominant supplier.</td>
<td>Generally Much Lower Risk – but also depends on the business group, market, industry and country.</td>
</tr>
<tr>
<td>18. Effective, implementable and proportionate sanctions, penalties and remedies are available to reduce and in time eliminate the anti-competitive conduct and adverse competitive effects of the dominant firm.</td>
<td>Much Lower Risk – as effective sanctions are important to both effective case resolution and voluntary compliance with the AOD provisions of the competition law.</td>
</tr>
</tbody>
</table>

**Bibliography**


Csorgo Lilla (2009) Canada’s Draft Abuse of Dominance Guidelines: A Comparative Look, Canadian TD MacDonald Chair Canadian Competition Bureau

Du Plessis Louise and Lizel Blignaut (2009) “Staying safe – dominant firms’ pricing decisions in industries where high prices do not attract entry” Third Annual Competition Conference and Ten Year Celebration South African Competition Commission September 3-4 2009


Jenkins Dr. Helen, Dr. Gunnar Niels and Robin Noble (2009) The South African Airways Cases: blazing a trail for Europe to follow?” Third Annual Competition Conference and Ten Year Celebration South African Competition Commission September 3-4 2009


Mazzone Luca and Alberto Mingardi (2011) “Innovation, Competition and Antitrust: An Examination of the Intel Case” Economic Affairs June 2011 pp. 68-75


Sogero m SA (2010) “Assistance to the SADC Secretariat to Draft Competition Laws for Countries in the SADC Region” P-36 PROJECT AOR.119-P136 Prepared for the TradeCom Facility and the SADC Secretariat

Strydom Odie (2009) Intrabrand competitive analysis in South Africa: “Get the Economics Right” Third Annual Competition Conference and Ten Year Celebration South African Competition Commission September 3-4 2009


Vickers John (2005) Abuse of Market Power The Economic Journal 155 (June) F244-F261
