GRA
GIBRALTAR REGULATORY AUTHORITY

THE CHAPTER 2 PROHIBITION

DRAFT GUIDELINES

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FOREWORD

The Competition Act 2020 (the "Act") prohibits, in certain circumstances, conduct by one or more undertakings which amounts to an abuse of a dominant position. The prohibitions are set out in section 10 of the Act, otherwise known as the Chapter 2 Prohibition.

These guidelines explain how the Gibraltar Competition and Markets Authority (the "GCMA") will carry out its powers under the Act, in assessing the conduct of dominant undertakings. It also specifies some of the factors which the GCMA considers are relevant in determining whether an undertaking is dominant and whether its behaviour will or may be regarded as abusive.

The guidelines are intended to be of assistance not only to those undertakings which are dominant in their market or markets, but also to their customers and other businesses.

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1. ACKNOWLEDGEMENTS

Where appropriate, the Gibraltar Competition and Markets Authority will seek to ensure that locally published guidance notes are consistent with those published by fellow Competition Authorities in other jurisdictions.

As well as reflecting the existing competition standards and practices in Gibraltar, parts of this document reflect and/or incorporate the guidance from the UK's Competition and Markets Authority.

The following documents were used in the drafting of these guidelines:

(a) "OFT402: Abuse of a dominant position", Office of Fair Trading (UK)[1]

(b) "OFT415: Assessment of market power", Office of Fair Trading (UK)[2]

The competition cases cited in this guidance document represent landmark decisions which at the time of publication represent the latest positions within each particular field of competition law.

[1] "OFT402: Abuse of a dominant position", Office of Fair Trading (UK), 12/04/2000 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf>, accessed 12/10/23.

[2] "OFT407: Enforcement", Office of Fair Trading (UK), 12/04/2000 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284436/oft407.pdf>, accessed 12/10/23.

2. INTRODUCTION

The Gibraltar Regulatory Authority (the "Authority") is designated as the competent authority for the promotion and enforcement of competition law in Gibraltar. Pursuant to such designation, the Authority must discharge all the functions, duties and obligations in accordance with the Competition Act 2020 (the "Act"), acting in its capacity as the **Gibraltar Competition and Markets Authority (the "GCMA").**

The Act prohibits, in certain circumstances, conduct by one or more undertakings which amounts to an abuse of a dominant position. The prohibitions are set out in section 10 of the Act, otherwise known as the Chapter 2 prohibition.

These guidelines explain how the GCMA will carry out its powers under the Act, in assessing the conduct of dominant undertakings. It also specifies some of the factors which the GCMA considers are relevant in determining whether an undertaking is dominant and whether its behaviour will or may be regarded as abusive.

The guidelines are intended to be of assistance not only to those undertakings which are dominant in their market or markets, but also to their customers and other businesses.

It is important that the GCMA continually adapts its approach to the application and enforcement of the Chapter 2 prohibition to ensure that it is fulfilling its statutory duty in light of a dynamic and evolving economy. It therefore reserves the right to amend these guidelines from time to time in line with regulatory experience gained and expertise acquired.

3. ABUSE OF A DOMINANT POSITION (PROVISIONS)

SCOPE OF THE PROVISIONS

The GCMA is empowered to apply two substantive provisions which prohibit conduct by one or more dominant undertakings[3] which amounts to abusive behaviour.

Section 10(1) of the Act provides that,

"*any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within Gibraltar*".

The tests applied under the Chapter 2 prohibition have two common elements: whether an undertaking is dominant in a relevant market; and, if so, whether it is abusing that dominant position. The Chapter 2 prohibition relates to the abuse of the dominant position, not the holding of the position. The GCMA would find an undertaking's behaviour an abuse only after detailed examination of the market concerned and the effects of the undertaking's conduct.

In the case of the Chapter 2 prohibition, the dominant position must be held within Gibraltar. Section 10(2) of the Act considers that conduct may constitute an abuse if it consists of,

"(a) directly, or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(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 subject of the contracts".

These are no more than examples and are not exhaustive. The important issue is whether the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably.

EXCLUSIONS

Schedules 1 (mergers) and 2 (general exclusions) of the Act specifically exclude from the Chapter 2 prohibition certain categories of conduct:

- to the extent to which it would result in a merger within the merger provisions of the Act;

[3] The term undertaking is not defined in the Competition Act 2020, but its meaning has been set out in European Community law. It refers to any entity engaged in economic activity, regardless of its legal status and the way in which it is financed – See case *Network Rail Infrastructure v Achilles Information Ltd* (2020) EWCA Civ 323.

- which is carried out by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking;

- to the extent to which it is made to comply with a legal requirement;

- which is necessary to avoid conflict with international obligations and which is also the subject of an order by the Minister for Business (the "Minister");

- which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister.

The Minister also has the power to add, amend or remove exclusions under certain circumstances.

PENALTIES

CONSEQUENCES OF INFRINGEMENT

Conduct which amounts to the abuse of a dominant position is prohibited and the undertaking or undertakings involved may be subject to a financial penalty and/or to directions appropriate to bring the infringement to an end.

The GCMA may impose a financial penalty of up to 10 per cent of the turnover of an undertaking for an infringement of the Chapter 2 prohibition.

LIMITED IMMUNITY FOR CONDUCT OF MINOR SIGNIFICANCE

In order to avoid the prohibition regime being unduly burdensome on small businesses, the Act provides limited immunity from financial penalties for conduct of minor significance in relation to infringements of the Chapter 2 prohibition[4]. Conduct will be considered to be of minor significance if the annual turnover of the undertaking concerned does not exceed £19 million[5]. Undertakings will benefit from immunity from financial penalties for infringement of the Chapter 2 prohibition if the GCMA is satisfied that they acted on the reasonable assumption that on the facts they qualified for the limited immunity for conduct of minor significance.

The GCMA may still investigate conduct of minor significance and can decide to withdraw the immunity from financial penalties if, having investigated the conduct, it considers the conduct is likely to infringe the Chapter 2 prohibition. Withdrawal of the immunity in this way cannot have effect before the date of the decision[6].

[4] Section 37 of the Competition Act 2020.

[5] Competition (Small Agreements and Conduct of Minor Significance) Regulations 2021 https://www.gibraltarlaws.gov.gi/legislations/competition-small-agreements-and-conduct-of-minor-significance-regulations-2021-5809/download

[6] Section 37(7) of the Competition Act 2020.

4. DOMINANCE

There are two tests common to assessing whether the Chapter 2 prohibition applies:

- whether an undertaking is dominant, and
- if it is, whether it is abusing that dominant position.

The first test raises two questions which are considered below:

(i) the definition of the market in which the undertaking is alleged to be dominant (the relevant market); and

(ii) whether it is dominant within that market.

Additionally, in determining whether the Chapter 2 prohibition applies, it is necessary to consider in which territory the dominant position is held. Pursuant to section 10 of the Act, a "dominant position" means a dominant position within Gibraltar.

MARKET DEFINITION

Before assessing whether an undertaking is dominant, the relevant market must be determined. This relevant market will have two dimensions:

- the relevant goods or services (the product market), and
- the geographic extent of the market (the geographic market).

THE PRODUCT MARKET

The market is determined by taking the product (or service) relevant to the investigation - the focal product - and looking at the closest substitute products, usually those products to which consumers would switch, if the price of the focal product rose. These substitute products are included in the same market as the focal product if customers would switch to them in sufficient volumes in response to the hypothetical situation where the price of the focal product is sustained significantly above competitive levels. The alternative products do not need to be perfect substitutes for the focal product, but alternatives which would fill a similar role to the focal product.

In addition to this substitution by customers (demand-side substitution), the price of the focal product can also be constrained by the potential behaviour of suppliers producing other products (supply-side substitution). This might occur where businesses which are not currently supplying the focal product could, at short notice, switch some of their existing facilities to supplying the focal product (or close substitutes) in response to prices of the focal product being sustained significantly above competitive levels. Where such switching would occur within one year and without substantial sunk costs[7], supply-side substitutes may also be included in the relevant market.

[7] Sunk costs are costs which cannot be recovered when an undertaking leaves a market.

THE GEOGRAPHIC MARKET

Similar methods are used to define the geographic market. Usually, the GCMA would consider an area in which the focal product was sold as a candidate for the relevant geographic market. Then the GCMA would consider whether, in response to the hypothetical situation where the price of the focal product in that area was being sustained significantly above competitive levels, customers would switch a sufficient volume of purchases to the same products sold in other areas. If so, these other areas will be included in the relevant geographic market. Supply side substitution might also occur whereby suppliers in other areas would quickly (for example, within one year), and without substantial investment, supply the candidate market in response to the higher prices there.

Due to its small size, for the purposes of competition law, the geographic market is usually the entirety of Gibraltar.

ASSESSING DOMINANCE

A dominant position is a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately consumers[8].

An undertaking will not be dominant unless it has substantial market power.

Market power arises where an undertaking does not face sufficiently strong competitive pressure. Both suppliers and buyers can have market power. However, for clarity, market power will in these guidelines refer to supplier market power. Where buyer market power is the issue, the term buyer power is employed to differentiate such market power from supplier market power. Market power and buyer power are not absolute but are matters of degree; the degree of power will depend on the circumstances of each case.

Market power can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. However, although market power is not solely concerned with the ability of a supplier to raise prices, this guideline, for convenience, often refers to market power as the ability to profitably sustain prices above competitive levels.

In assessing whether an undertaking is dominant, the GCMA considers whether that undertaking faces constraints on its ability to behave independently. The most important constraints are existing competition and potential competition. Other factors, such as the countervailing influence of powerful buyers, or regulation, are sometimes relevant as well.

[8] Case 1001/1/1/01 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* (2002) CAT 1, para 156, citing para 38 of Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36.

EXISITING COMPETITION

Existing competition refers to competition from undertakings already in the relevant market, to whom consumers might switch if the alleged dominant undertaking sustained prices above competitive levels. The market shares of competitors in the relevant market are one measure of the competitive constraint from existing competitors.

MARKET SHARES

There are no market share thresholds for defining dominance under the Chapter 2 prohibition. An undertaking's market share is an important factor in assessing dominance but does not, on its own, determine whether an undertaking is dominant. For example, it is also necessary to consider the position of other undertakings operating in the same market and how market shares have changed over time. An undertaking is more likely to be dominant if its competitors enjoy relatively weak positions or if it has enjoyed a high and stable market share.

An undertaking with a market share of 50 per cent or more will be presumed to be dominant other than in exceptional circumstances; that undertaking bears the evidential burden of establishing it is not dominant[9]. The GCMA considers it unlikely that an undertaking will be individually dominant if its share of the relevant market is below 40 per cent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in that market and high entry barriers) provide strong evidence of dominance.

POTENTIAL COMPETITION

Potential competition refers to the possibility that undertakings would enter the relevant market and gain market share at the expense of an alleged dominant undertaking that sustained prices above competitive levels. The strength of potential competition is affected by barriers to entry.

OTHER FACTORS

The ability of an alleged dominant supplier to exercise market power may be diminished by the existence of powerful buyers. Nevertheless, the existence of powerful buyers in a relevant market would not, in itself, preclude the GCMA from finding a supplier to be dominant in that market[10].

Economic regulation is a further relevant factor when assessing market power in industry sectors where, for example, prices and/or service levels are subject to controls by the government or an industry sector regulator. In this situation, an undertaking may still be considered to be dominant. Economic regulation may, however, limit the extent to which that dominant position may be abused.

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[9] Case 1046/2/4/04 *Albion Water Ltd v Water Services Regulation Authority* (2006) CAT 36.

[10] An undertaking with strong buyer power my itself be dominant.

INTELLECTUAL PROPERTY RIGHTS (IPR'S)

The GCMA considers that ownership of an IPR does not necessarily create a dominant position. Whether or not dominance results from the ownership of an IPR depends upon the extent to which there are substitutes for the product, process, or work to which the IPR relates.

COLLECTIVE DOMINANCE

The Chapter 2 prohibition prohibits conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. A dominant position need not be held by a single undertaking. Separate undertakings may be found to hold a dominant position together where certain conditions are met.

The General Court's judgement in Piau v Commission[11] found that there were three cumulative conditions for a finding of collective dominance:

- each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy;

- the situation of tacit coordination must be sustainable over time, meaning that there must be an incentive not to depart from the common policy on the market;

- the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.

It is also important to note that there is no legal requirement of an agreement or other links in law between undertakings for there to be a finding of collective dominance[12]. It is therefore possible that undertakings could be held to be collectively dominant where the oligopolistic nature of the market is such that they behave in a parallel manner, thereby appearing to the market as a collective entity.

[11] Case T-193/02 EU:T:2005:22.

[12] Such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question. Cases C-395/96 etc *Compagnie Maritime Belge Transports v Commission* EU:C:2000:132.

5. ABUSE

The following paragraphs give some guidance on the second part of the test for assessing whether the Chapter 2 prohibition applies, that is, when an undertaking's behaviour might be regarded as an abuse of a dominant position.

CONCEPT OF ABUSE

Section 10 of the Act lists broad categories of business behaviour, within which particular examples of abusive conduct are most likely to be found. In general, the GCMA considers that the likely effect of a dominant undertaking's conduct on customers and on the process of competition is more important to the determination of an abuse than the specific form of the conduct in question. Conduct may be abusive when, through the effects of conduct on the competitive process, it adversely affects consumers directly (for example, through the prices charged) or indirectly (for example, conduct which reduces the intensity of existing competition or potential competition). A dominant undertaking is under a special responsibility not to allow its conduct to impair undistorted competition.

The Act does not contain a provision under which an abuse can be exempted because it produces benefits, but conduct may not be regarded as an abuse, even if it restricts competition, where there is an objective justification for the conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the customer. However, it will still be necessary for a dominant undertaking to show that its conduct is proportionate.

CATEGORIES OF ABUSE

Abusive conduct generally falls into one or both of the following categories:

- conduct which exploits customers or suppliers (for example, excessively high prices), or

- conduct which amounts to exclusionary behaviour, because it removes or weakens competition from existing competitors, or establishes or strengthens entry barriers, thereby removing or weakening potential competition.

Exclusionary behaviour may include excessively low prices and certain discount schemes, where its (likely) effect is to foreclose a market, as well as vertical restraints or refusals to supply where these (are likely to) foreclose markets or dampen competition. However, whatever the form of the behaviour in question, its likely effect on competition will depend on the circumstances at hand and the GCMA assesses alleged abuses on a case-by-case basis.

ABUSE IN RELATED MARKETS

As explained above, the Chapter 2 prohibition implies two tests: whether an undertaking is dominant, and whether it is abusing that dominant position. It is not necessary to show that the abuse was committed in the market which the undertaking dominates. In certain circumstances, the Chapter 2 prohibition may apply where an undertaking that is dominant in

one market commits an abuse in a different but closely associated market. This principle was set out by the European Court in the case of Tetra Pak II[13].

[13] *Tetra Pak II* OJ (1992) L72/1, upheld on appeal to the General Court Case T-83/91 *Tetra Pak International SA v Commission* EU:T:1994:246, and on appeal to the Court of Justice Case C-333/94 P *Tetra Pak International SA v Commission* EU:C:1996:436. In this case the European Court found that Tetra Pak's activities in relation to the markets in non-aseptic machines and cartons constituted an abuse of its dominant position in the distinct, but closely associated, markets for aseptic machines and cartons intended for the packaging of liquid foods.

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