ABUSE OF DOMINANCE

Competition Policy Seminar
December 10-11, 2013
Saint Lucia

Objectives of this Presentation

The objectives of this short presentation is to introduce the audience to the basic concepts of abuse of dominance. The presentation will cover:

- The definition of dominance
- How a dominant position is achieved by firms
- The types of abuses of a dominant position that exist
- How dominance is determined
- What action can be taken when an abuse of dominance is found

What is Dominance?

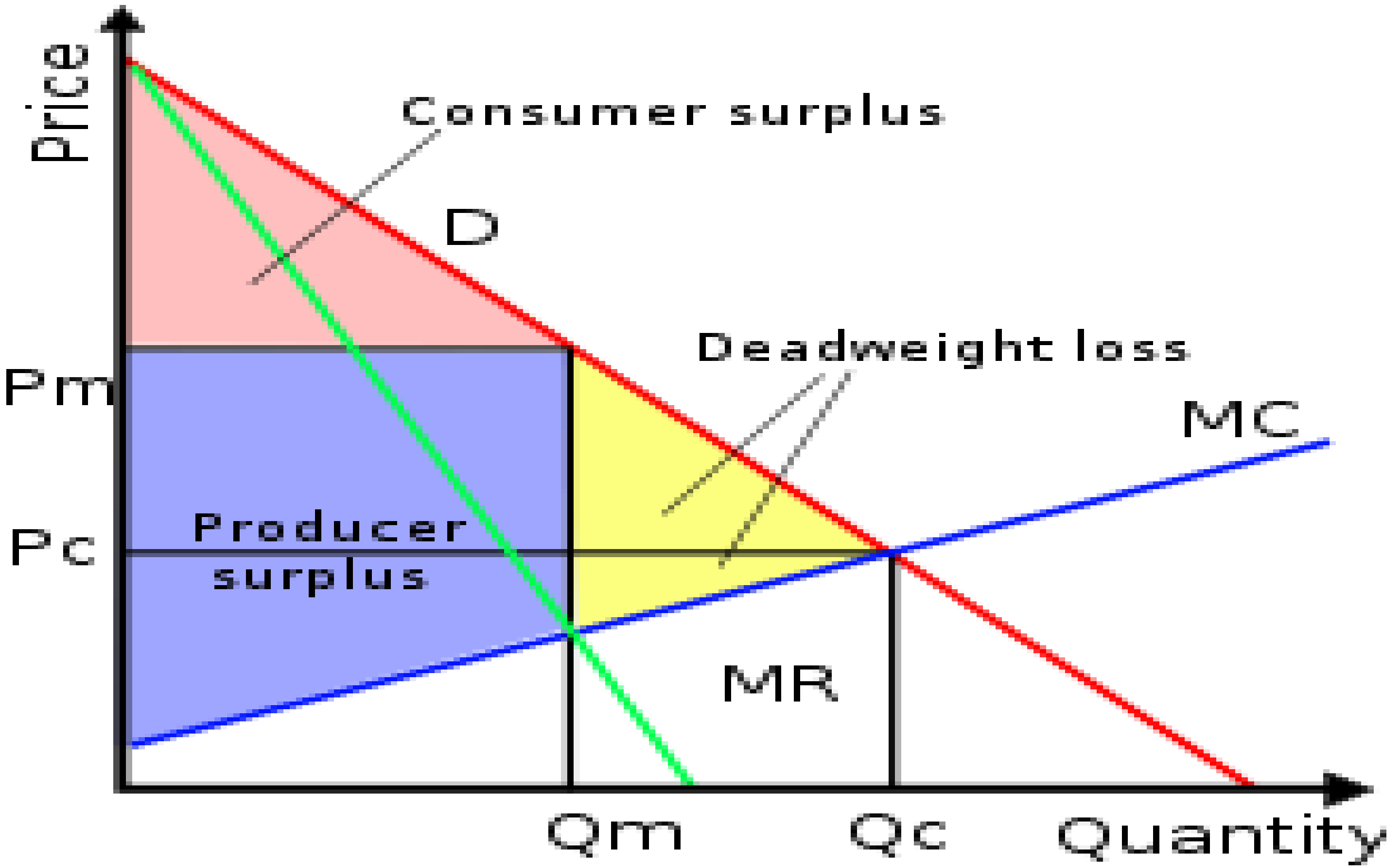
Definition under the Revised Treaty :

a) an enterprise holds a <u>dominant position in a market</u> if by itself or together with an interconnected enterprise, it occupies such as <u>position of economic strength</u> as will enable it to operate in the market without <u>effective constraints from its competitors or potential competitors</u>;

b) any two enterprises shall be treated as interconnected enterprises if one of them is a subsidiary of the other or both of them are subsidiaries of the same parent company

What is Dominance?

- For economists dominance equates to the term "market power".
- A firm with market power has the ability to profitably raise its prices (and without a significant loss of customers) without any regard to competitors. Economists refer to these firms as price makers.
- In contrast, in a perfectly competitive market, all firms participating in that market have no market power and are referred to by economists as price takers.



Price
Consumer surplus
D
Pm
Deadweight loss
MC
Pc
Producer surplus
MR
Qm
Qc
Quantity

How is Dominance achieved?

Dominance can be achieved in several ways:

- Patents, copyrights and trade marks
  - **E.g. pharmaceuticals**
- High sunk costs
  - **High infrastructural costs – e.g. power companies (power plant, erecting poles and stringing power lines), cable companies (sub-sea cables or satellite technology)**
- Regulations
  - **E.g. prohibitive tariffs, applications for licenses, technical regulations (in agriculture high food safety standards may act as a barrier to entry)**
- Superior competitive performance
  - **E.g. enterprises that are efficient producers**

Is Dominance bad?

THE ANSWER IS NO!

- If dominance in itself was bad then firms would not have an **<u>incentive</u>** to invest money in costly infrastructure, or to undertake research & development.

- What is considered bad is the **<u>abuse</u>** of a dominant position!

- The abuse refers to practices that the firm may engage in to lessen competition in the market or to exploit customers.

Types of Abuses of Dominance

Abuses laid out in the Treaty:

- restricts the entry of any enterprise into a market;
- prevents or deters any enterprises from engaging in competition in the market;
- eliminates or removes any enterprise from a market;
- directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;
- limits the production of the goods or services for a market to the prejudice of consumers;
- 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;
- engages in any business conduct that results in the exploitation of its customers or suppliers

So as to frustrate the benefits expected from the establishment of the CSME

Common Types of Abuses

Tied Selling:

- This occurs when a company with a dominant position in a market provides its product (or service) on the condition that customers purchase an additional product (or service) from the same or related company.

- **Example 1:** Firm A has a dominant position in the market for the supply of hammers in St. Lucia. Firm A however now wants to commence selling nails in that country. Consequently, the firm insists that purchasers of its hammers also purchase its nails as well.

- **Example 2:** Microsoft has a dominant position in the supply of operating systems for personal computers. Microsoft pre-installs Internet Explorer on its operating system, consequently foreclosing competition from other internet browsers such as Firefox, Chrome, etc.

Common Types of Abuses

Margin squeezing:

- Relates to profit sacrificing by a firm enjoying a dominant position in a product market to make it less attractive for actual or potential competitors. Cases of margin squeezing are typically found when firms are vertically integrated (i.e. the firms are both wholesalers and retailers of their products). The vertically integrated firm may sell its product (or service) to a retailer, at a wholesale price that does not allow companies in the retail market to effectively compete.

- **Example 1**: From 1998 to 2001, Deutsche Telekom charged its competitors for accessing the so-called local loop a price higher than that paid by its direct retail customers. This made it impossible for competition to develop in the downstream telecoms market.

- **Example 2**: European Commission fined the Spanish telecoms operator Telefónica €151 million for abuse of its dominant position in the Spanish broadband market. Between 2001 and 2006, Telefónica's wholesale prices charged to competitors and retail prices charged to its own customers were set at a level that forced competitors to make losses if they wanted to match Telefónica's retail prices.

Common Types of Abuses

- **<u>Directly or indirectly imposing unfair purchase or selling prices</u>**

- **Example**: In Jamaica, LIME complained to JFTC about high mobile termination fees of Digicel. Digicel was the dominant mobile operator controlling 68 percent of the market. The JFTC investigated and found the fees to be excessive and concluded that:

a) Digicel was abusing its dominance under Section 20(d) of the Fair Trading Act;
b) the practice was likely to lessen competition in the mobile market; and
c) that consumers were likely to be worse off from the Digicel's pricing strategy

How is abuse of dominance determined?

According to the Treaty consideration shall be given to:

a) the relevant market defined in terms of the product and geographic context;
b) the concentration level before and after the relevant activity of the enterprise;
c) The level of competition amongst the participants in terms of the number of competitors, production capacity and product demand;
d) The barriers to entry of competitors; and
e) The history of competition and rivalry between participants in the sector of activity.

How is abuse of dominance determined?

Practical Steps used by competition authorities:

First Dominance must be Determined

Step 1 - Define the relevant product market:

- The relevant product market comprises all those products and/or services that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;

- The relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous

How is abuse of dominance determined?

Step 2 – Market share analysis

- **Thresholds, e.g. a firm with greater than 40 percent of the market may be considered dominant (see Guyana and Trinidad and Tobago competition law)**

Step 3 – Identify barriers to entry

After dominance is established abuse must be determined

Step 1 – Examine the relevant activity of the enterprise for abuse in accordance with the Treaty.

Step 2 – Determine whether or not the exclusions listed in Article 179.3 applies (e.g. efficiency, enforced right under a copyright or patent or trade mark, and/or superior competitive performance).

Step 3 – Determine whether or not the activity lessened competition or resulted in harm to consumers

What action can be taken when abuse is found?

Article 174.4 states:

The Commission shall, to the extent required to remedy or penalise anti-competitive business conduct referred to in Article 177:

- (b) order the termination or nullification as the case may require, of agreements, conduct, activities or decisions prohibited by Article 170;
- (c) direct the enterprise to cease and desist from anti-competitive business conduct and to take such steps as are necessary to overcome the effects of abuse of its dominant position in the market**, or any other business** conduct inconsistent with the principles of fair competition set out in this Chapter;

- (i) order payment of compensation to persons affected; and
- (j) impose fines for breaches of the rules of competition.

THANK YOU!!!