

**IN THE MATTER BEFORE THE BOARD
OF THE COMPETITION AND CONSUMER
PROTECTION COMMISSION**

CASE NO. CCPC/AOD/040

BETWEEN

**COMPETITION AND CONSUMER PROTECTION COMMISSION
COMPLAINANT**

AND

**AVIAN VENTURES TRADING AS FARM DEPOT
RESPONDENT**

BEFORE:

**Commissioner Dr. Aubrey M. Chibumba
Commissioner Dr. Chenga Chisha
Commissioner Nsangwa Allen Ngwira
Commissioner Fredrick Imasiku**

**- Chairperson
- Member
- Member
- Member**

DECISION

Below is a summary of the facts and findings presented by the Competition and Consumer Protection Commission (the “Commission”) to the Board following investigations it carried out in the aforementioned case.

Introduction and Relevant Background Information

It was submitted that:

1. In March 2021, the Competition and Consumer Protection Commission (the “Commission”) initiated investigations against Avian Ventures, trading as Farm Depot (“Farm Depot”) for the alleged conduct of tying in Kitwe, Solwezi and Mansa. Specifically, the allegations were that Farm Depot was imposing on customers, the condition that if they wanted to purchase day old chicks (“DOCs”), they could only purchase them together with either Zamfeed, Master Farmer, Nutri Feeds or Novatek chicken feed. Farm Depot was not selling DOCs separately. The case was authorised for investigation on 16th March 2021.

Investigations Conducted

It was submitted that:

2. The Commission investigated this conduct by way of sending separate Notice of Investigations (“NOIs”) to Farm Depot, Ross Breeders Zambia Limited (“RBZ”) and Zambeef Products Plc (“Zambeef”) on 25th March 2021. The Commission also conducted desktop research as relates to the conduct and the market for DOCs, held a meeting with the Poultry Association of Zambia, contacted hatcheries and conducted site visits in Mansa, Kitwe and Solwezi where the customers and competitors were interviewed.

Legal Provisions and Assessment Tests

It was submitted that:

3. The alleged conduct by the Respondents appeared to be a contravention of Sections 16(1) and 16(2)(d) as read together with Section 15 of the Competition and Consumer Protection Act No. 24 of 2010 (the “Act”).
4. Section 15 of the Act states that;

“A dominant position exists in relation to the supply of goods or services in Zambia, if

(a) thirty percent or more of those goods or services are supplied or acquired by one enterprise; or

(b) sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises.”

5. Section 16(1) of the Act states that:

“An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition or has or is likely to have adverse effect on trade or the economy in general”.

6. Section 16(2) (d) of the Act states that:

“For purposes of this Part, “abuse of a dominant position” includes-

- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their or according to commercial usage have no connection with the subject matter of the contracts;”*

Findings

The parties

The Complainant

It was submitted that:

7. The Competition and Consumer Protection Commission (the “Commission”) is a statutory body corporate established under Section 4 of the Competition and Consumer Protection Act, No. 24 of 2010 (“the Act”). The Commission is mandated by the Act to inter alia, safeguard and promote competition as well as to protect consumers against unfair trading practices. The Commission investigated this matter in accordance with section 55 of the Act.

The Respondent

First Respondent (*Farm Depot*)¹

It was submitted that:

12. Farm Depot is a company incorporated in Zambia. The company was incorporated on 30th September 2019 and its company registration number is 320190014297. The registered offices for the company are situated at Stand No. 47, Kabengele Avenue, Town Center, Kitwe. The main business activities of Farm Depot include support activities for animal production and crop production.

Second Respondent (*Ross Breeders Zambia Limited*)²

It was submitted that:

¹ Patents and Companies Registration Agency printout obtained 25th March 2021

13. Ross Breeders Zambia Limited (“RBZ”) is a company incorporated in Zambia. The company was incorporated on 1st December 1991 and its company registration number is 119990043729. The registered offices for the company are situated at Unit B, Counting House Square, Thabo Mbeki Road, Lusaka. The main business activity of RBZ is mixed farming, specifically, RBZ is engaged in, among other things, the growing and processing of DOCs and the production of chicken feed³.

Third Respondent (Zambeef Products Plc)³

It was submitted that:

14. Zambeef Products Plc is a company incorporated in Zambia. The company was incorporated on 24th June 1994 and its company registration number is 119940031824. The registered offices for the company are situated at Plot No. 4970, Manda Road, Industrial Area, Lusaka. The main business activity of Zambeef Products Plc is production, processing, distribution and retailing of beef, chicken, pork, eggs, dairy, fish, flour, stockfeed and DOCs.

Market Definition

The Relevant Market

It was submitted by the Technical Committee (TC) of the Board that:

14. The relevant product markets identified were:
- i. The sale of day-old chicks in Mansa
 - ii. The sale of day-old chicks in Solwezi
 - iii. The sale of day-old chicks in Kitwe
 - iv. The sale of chicken feed in Mansa
 - v. The sale of chicken feed in Solwezi
 - vi. The sale of chicken feed in Kitwe.

Market shares and Market Power

The sale of DOCs

It was submitted by the TC that:

15. Based on the total sales of DOCs in the relevant markets, the following were the market shares for Farm Depot and its competitors:

³ Patents and Companies Registration Agency printout obtained 9th April 2021

Table 1: 2021 market shares estimates in the sale of DOCs in Solwezi⁴

Name of Company	Percentage (%)
Farm Depot	48.3%
Zamchick	19.2%
Tiger	14.1%
Hybrid	12.1%
Omnia Fertiliser	4.3%
Quantum Foods	2%
Total	100%

Table 2: 2021 market shares estimates in the sale of DOCs in Kitwe⁴⁸

Name of Company	Percentage (%)
Hybrid	37%
Farm Depot	28%
Zamchick	25%
Tiger	7%
Quantum Foods	3%
Total	100%

Table 16: 2021 market shares estimates in the sale of DOCs in Mansa⁵

Name of Company	Percentage (%)
Hybrid	45%
Zamchick	29%
Tiger	25%
Farm Depot	1%
Total	100%

⁴ Based on information
obtained from hatcheries ⁴⁸

Based on information
obtained from hatcheries

⁵ Based on information obtained from hatcheries

The sale of chicken feed

It was submitted that:

16. Market shares for the sale of chicken feed could not be established as the market is fragmented and some customers of DOCs make their own feed.

Competition Analysis and Relevant Observations

Analysis regarding Section 16 of the Act

Consideration of Abuse of dominance

It was submitted by the TC that:

17. Section 16(1) of the Act defines abuse of dominance as engaging in, “*any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition or has or is likely to have adverse effect on trade or the economy in general.*” Therefore, in the analysis of the conduct, the following assessment tests were used:

Whether Farm Depot is an enterprise

It was submitted by the TC that:

18. Section 2 of Act defines an enterprise as “a firm, partnership, joint venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them.”
19. The Commission established that Farm Depot is an enterprise within the ambit of Section 2 of the Act because it is registered with the Patents and Companies Registration Agency with registration number – 320190014297. It was also established that Farm Depot is engaged in commercial activities.

Whether Farm Depot has a dominant position in the Relevant Market

It was submitted the TC that:

20. The Act⁶ defines a dominant position as “*a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors*”. In addition,

⁶ Competition and Consumer Protection Act No 24 of 2010

Section 15 (a) of the Act states that, “A *dominant position exists in relation to the supply of goods or services in Zambia, if-*

(a) *thirty percent or more of those goods or services are supplied or acquired by one enterprise.*

(b) *sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises.”*

21. Further, a legal definition of a dominant position in EU law was given by the European Court of Justice (ECJ) in **United Brands and Hoffmann-La Roche**⁷ which stated that, “a position of economic strength enjoyed by an undertaking which 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 of its consumers”.
22. In defining market dominance, one must see to what extent a product, brand, or firm controls a product category in a given geographic area. There are several ways of **measuring market dominance**. According to CCPC Guidelines on Abuse of Dominance of 2018, the most direct way to measure dominance is by way of market shares based on sales of an enterprise or company’s total cost of sales.
23. It was established that Farm Depot was dominant in the sale of DOCs in Solwezi with 48.3%. The Commission further established that Farm Depot was not dominant in Mansa (1%) and Kitwe (28%) and as such, Mansa and Kitwe were not the focus of this investigation and will not be discussed further⁸. It could not establish whether Farm Depot was dominant in the market for the sale of chicken feed. This is because the market is fragmented. It was observed that in the case of Farm Depot, chicken feed was a slow-moving product. In this regard, the Commission inferred that Farm Depot was not dominant in the sale of chicken feed but was leveraging on the sale of DOCs to drive up sales of chicken feed.

Whether there was a conduct

It was submitted by the TC that:

24. Abuse exists through a conduct; unilateral or collective. The Oxford Dictionary defines “conduct” as, “the manner in which a person behaves, especially in a particular place or situation.” In addition, abuse will occur in the presence of dominance. Without having market shares of the Respondent, it is very difficult to ascertain if abuse exists.

⁷ Case 85/76 *Hoffmann-La Roche & Co AG v Commission*, [1979] ECR 461, para. 38, Case 2/76 *United Brands v. EC Commission* [1978] ECR 207, para. 65.

⁸ Market shares calculated based on information obtained from hatcheries

25. The Black's Law Dictionary, Eighth Edition, defines "conduct" as, "*the manner in which a person behaves*". It was established that Farm Depot was behaving in such a manner that it was making the sale of DOCs on condition that customers purchase DOCs together with chicken feed. The Commission, through site visits conducted in Solwezi established that Farm Depot was engaging in the conduct of tying DOCs with chicken feed. Further, in a Facebook post by Farm Depot dated 29th March 2021, Farm depot confirmed that some of its stores only had DOCs in bundle form which could not be sold separately. Farm Depot further stated that due to shortage of chicks, it only had enough DOCs for its bundle customers.
26. It was also established that Zambeef and RBZ did not engage in the conduct of tying the DOCs with the Chicken feed. The Commission established this through site visits in the affected towns, where it was revealed that Zamchick, a subsidiary of Zambeef was selling DOCs separately. Further, with regards to RBZ, they do not have retail outlets in the affected towns as they make their sales through the re-seller (Farm Depot). However, the reseller agreement between the RBZ and Farm Depot does not have any clauses which points to them directing Farm Depot to tie or bundle RBZ products (DOCs and chicken feed).

Whether the conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general

It was submitted by the TC that:

27. Tying adversely affects the demand for rival products in the tied market and consequently results in anti-competitive foreclosure⁹. The conduct of tying by Farm Depot had the likelihood of negatively affecting its competitors' demand for chicken feed in Solwezi. The Commission established that Farm Depot was the only store with available DOCs in Solwezi while its competitors such as Tiger Animal Feed, National Milling Corporation and Olympic Milling did not have readily available DOCs for sale at the time of the site visit. It was established that due to the shortage of DOCs in Solwezi, Farm Depot, being the only one with available stock of DOCs, made the purchase of DOCs on condition that customers purchase the DOCs together with the chicken feed. By doing so, Farm depot's conduct has the potential of limiting other chicken feed suppliers (its competitors) access to those customers who would have otherwise purchased chicken feed from them.

⁹ Unilateral Conduct Workbook. Accessed from <https://www.internationalcompetitionnetwork.org/working-groups/unilateral-conduct/>

28. It was observed that the time lapse in delivery of new orders of DOCs between Farm Depot and its competitors gave Farm Depot an advantage which enabled it to engage in tying in Solwezi. It was noted that customers did not have available options where they could access DOCs consistently other than Farm Depot and for as long as customers were purchasing DOCs from Farm Depot, they could not purchase chicken feed from Farm Depot's competitors. Therefore, the conduct by Farm Depot was found to be both exclusionary and exploitative. Exclusionary in the sense that the conduct was preventing customers from accessing chicken feed from Farm Depot's competitors. The conduct was exploitative to customers because it was expensive as there were other suppliers of chicken feed whose price of a 50kg bag of chicken feed was lower than Farm Depot by K30 to K50. The Commission also established that the conduct by Farm Depot was exploitative in the sense that it was taking away a customer's choice when making a purchasing decision.
29. It was also established that since it would not be rational for a customer to purchase the bundled chicken feed from Farm Depot and at the same time purchase more feed from Farm Depot's competitors, the conduct by Farm Depot not only limited access to the chicken feed market in Solwezi, but also had the likelihood of affecting trade and the economy in general. This is because the limited access to the chicken feed market in Solwezi is a disincentive to chicken feed suppliers who would most likely reduce their supply of chicken feed in this relevant market which would consequently entail a reduction in the production of feed (that is, a reduction in demand or trade for inputs such as maize and soya beans). A reduction in chicken feed production consequently has the likelihood of affecting the Gross Domestic Product ("GDP").
30. Therefore, Farm Depot was found to be in violation of Section 16(1) in Solwezi as it limited access to the chicken feed market and unduly restrained competition in this market.

Whether the conduct by the Respondent made the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts

It was submitted by the TC that:

31. Dominant firms may engage in different forms of abuse of dominance practices by imposing conditions which are not necessary in the sale of their goods or services to customers. This is usually meant to exploit customers and, in some cases, lead to exclusion of competitors for the dominant firm. There are different types of exploitative conducts imposed by dominant firms,

among them include tying of products and services supplied by the dominant firm.

32. Tying is defined as a dominant firm selling one product only on the condition that the buyer also purchases a different product or agrees that it will not purchase the tied product from another supplier. It also includes the sale of products or services that could be viewed as separate but are only sold together as a bundle¹⁰.
33. It was established that there was an agreement to sale DOCs in exchange for money between Farm Depot and its customer in Solwezi. It was noted that Farm Depot made the conclusion of the contract (i.e., the sale of DOCs) on the supplementary condition that customers purchase chicken feed as well. It was observed that the nature of the sale of DOCs has no connection to the sale of chicken feed because the two products can be sold separately, that is, DOCs and chicken feed are separate products. This means that in the absence of chicken feed, Farm Depot could still make sales of DOCs as customers could still buy chicken feed from other suppliers. Similarly, Farm Depot could still make sales of chicken feed in the absence of DOCs as customers could still buy DOCs from other suppliers. In this regard, there was no need for Farm Depot to tie the DOCs and chicken feed, and as such, Farm Depot was found to be in violation of Section 16(2)(d) of the Act in Solwezi.
34. In the case of ***Tombwe Processing Limited and Two others Vs. the Commission and Two others***¹¹, it was held that *unlike the European Commission law which offers specific justifications to escape abuse of dominance by the parties, section 16 of the Act does not offer defences*. It was further held *that enterprises can use section 14 of the Act to make applications to the Commission of agreements that may otherwise tend to contravene the law*. In view of the above recent case law, it is evident that
35. Section 16 does not allow justifications to be given by the parties for engaging in a prohibited conduct under Section 16 of the Act. The case law is clear that should parties wish to enter into agreements and/or contracts that may contravene the law, the parties have an option of making applications to the Commission under Section 14 of the Act to justify their conduct.

¹⁰

https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/07/UCWG_SR_TyingBundDisc.pdf

¹¹ Tribunal Judgement on Tombwe Processing Limited and Two others Vs. the Competition and Consumer Protection Commission and two others cause N0.2017/CCPT/001/CON, N0.2017/CCPT/002/CON/ and N0.2017/CCPT/003/CON dated 11th February, 2021, Paragraph 188, 192 and 194

Board Deliberations

36. Based on the above findings and assessment, the Board deliberated that there were no significant differences in the various breeds of DOCs which could make it difficult for customers to switch from one breed to another. It was determined that in the eyes of a customer, the various DOC breeds are close substitutes. It was also noted that there were no significant differences among various brands of chicken feed that could sufficiently affect the purchasing decision of customers other than the price. Therefore, the relevant markets were:
- i. The sale of day-old chicks in Mansa*
 - ii. The sale of day-old chicks in Solwezi*
 - iii. The sale of day-old chicks in Kitwe*
 - iv. The sale of chicken feed in Mansa*
 - v. The sale of chicken feed in Solwezi*
 - vi. The sale of chicken feed in Kitwe*
37. The Board deliberated that there was a shortage of DOCs in Solwezi and that Farm Depot was the only one with available DOCs for sale, which it was tying to the chicken feed, at the time it conducted the physical site visit on 23rd August 2022. It was deliberated that while Farm Depot's competitors in the sale of DOCs were an alternative that customers could go to, these competitors did not have a consistent supply of DOCs and would take about a month or two to deliver an order of DOCs to customers.
38. The Board Deliberated that the nature of the sale of DOCs had no connection to the sale of chicken feed because the two products could be sold separately. It was deliberated that Farm Depot was engaging in the conduct of tying and abused its dominant position in Solwezi. It was noted that the conduct of tying was perpetuated by Farm Depot alone and as such, Zambeef and RBZ fell off the investigation. The Board also deliberated that the conduct of tying by Farm Depot was found to be both exclusionary and exploitative as analysed in this report above.
39. It was deliberated that Farm Depot was an enterprise as defined in the Act and was dominant in the sale of DOCs in Solwezi with 48.3% market share. The Board deliberated that it was also established that Farm Depot was not dominant in Mansa and Kitwe.
40. In this regard, it was deliberated that Farm Depot was in violation of Sections 16(1) as read with 16 (2)(d) of the Act, in Solwezi.

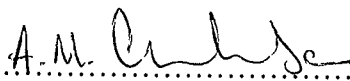
Board Decision

41. The Board hereby directs that the following actions be taken:-

- (i) That Farm Depot is fined 3% of their 2021 annual turnover for violating Section 16(1) as read with 16 (2)(d) of the Act;
- (ii) That Farm Depot is directed to desist from making the purchase of DOC's together with chicken feed mandatory;
- (iii) That the case against Zambeef and RBZ be closed as a violation of the Act could not be proved; and
- (iv) The case is closed.

Note: Any party aggrieved with this order or directive may, within thirty (30) days of receiving the order to direction, appeal to the Competition and Consumer Protection Tribunal.

Dated this 5th December, 2022

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Chairperson
Competition and Consumer Protection Commission