

## BRAZIL

### Predatory Pricing

This questionnaire seeks information on ICN members' analysis and treatment of predatory pricing claims. Predatory pricing typically involves a practice by which a firm temporarily charges low prices in order to limit or eliminate competition, and thereby allows the firm to raise prices subsequently. This questionnaire concerns only treatment of single product discounts; rather than pricing practices involving multiple products (including bundling, tying, and related prices). Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

#### *Analysis (elements and evidence)*

1. Please provide the main relevant texts (in English if available) of your jurisdiction's laws and guidelines on predatory pricing.

#### Law # 8884/94

(...)

Article 20. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

I - to limit, restrain or in any way injure open competition or free enterprise;

II - to control a relevant market of a certain product or service;

III - to increase profits on a discretionary basis; and

IV - to abuse one's market control.

Paragraph 1. Achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in item II above.

Paragraph 2. Market control occurs when a company or group of companies controls a substantial share of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology.

Paragraph 3. The *dominant position* mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20%) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy.

Article 21. The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

(...)

XVIII - to unreasonably sell products below cost;

#### Resolution 20:

(<http://www.cade.gov.br/internacional/Resolution%2020%20-%201999.pdf>)

**Directive SEAE 70/2002**

(not available in English – This Directive provides definitions, presumptions and criteria for investigating predatory prices. All definition, presumptions and criteria are presented in the answers below. It is important to mention that Brazilian jurisdiction does not have much experience on predatory pricing issues.)

- 2. Please list your jurisdiction’s criteria for an abuse of dominance/monopolization based on predatory pricing.

It is important to be said there is no case of predatory pricing found guilty in this jurisdiction. Moreover, rule of reason must be taken into consideration –

The Resolution and the Directive above establishes as criteria: price below unreasonably benchmark costs; short run loss; market foreclosure; exclusion of rivals; price increases after rivals’ exclusion; long run recoupment.

- 3. Please explain the circumstances under which a firm’s pricing is, or may be, considered “predatory” in your jurisdiction, by responding to the following questions:
  - a. As part of your analysis, does the price have to be below one or more measures of cost? Yes/No
    - i. If yes, please identify which of the following measures is/are used, as applicable:

Cost benchmark/measure	Used?		Comment
	Yes	No	
<u>Below marginal cost</u> (the cost of producing one more unit of output)		<b>X</b>	
<u>Below average variable cost</u> (cost that varies with output)	<b>X</b>		
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)	<b>X</b>		
<u>Below average long run incremental cost</u> (average variable costs and product-specific fixed costs)	<b>X</b>		
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)	<b>X</b>		if there is neither a reasonable demand contraction, nor reasonable productive capacity boom, and if the “predator” is not an “entrant”

Other measure of cost (Please identify)			
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- b. For each cost measure employed, please provide the definition of the measure used in your jurisdiction.

Average variable cost: A cost that fluctuates directly with output changes such as labor, materials, energy, promotional spend.

Fixed Cost: investment in physical capital and machinery as well as other fixed assets whose do not varies according to the production.

Average total cost: Average variable cost plus average fixed cost

- c. Is the same cost measure applied in all cases? Yes/No

- i. If different cost measures can be applied, for example on the basis of industry, please explain and provide examples, as available.

Not applicable

- ii. If more than one cost measure can be applied in any individual case, please explain why and whether, in practice, this has raised issues.

average variable cost and average total cost can be applied. If the price is unreasonably below the average variable cost: predatory pricing. If the price is above the average variable cost and below average total cost and moreover if there is neither a reasonable demand contraction, nor reasonable productive capacity boom: predatory pricing. In markets in which there is idle capacity, shall be applied the incremental and avoidable cost measures.

- d. If price must be shown to be below cost, for which of the dominant firm's sales must this be shown?

It must be shown to be below costs for the sales of the product within predatory pricing practice.

- i. Is the only relevant comparison between the cost measure and the dominant firm's average price for all of its sales in the relevant market? Yes/No

1. If no, over which of the dominant firm's sales can cost be compared?

- e. Could a firm's price above average total cost ever be found to be predatory? Yes/No
- i. If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement.

Not applicable

- f. If prices do not have to be below a cost benchmark to be considered predatory, please explain the circumstances under which the firm's prices are considered predatory.

Not applicable

4. To be unlawful, must the alleged predatory pricing occur in the market in which the firm holds a dominant position/substantial market power? Yes/No

- a. If no, please explain.

There is a possibility of cross-subsidy within the firm or group in order to hold a dominant position/substantial market power in other market (the one in which predatory pricing occur)

5. Apart from the cost criteria referenced in question 3 above, must other objective criteria, such as the duration or continuity of the pricing behavior, be demonstrated for a finding of liability under a predatory pricing theory? Yes/No

- a. If so, please explain. For example, if the behavior must be sustained over a certain time period, why, and for what period?

There is no a certain time period for this.

6. On what type of evidence do you rely to prove predatory pricing? Please explain, including examples as appropriate.

- a. Are cost data used? Yes/No

- i. If so, are cost data from the firm used? Yes/No

- b. Are there circumstances when cost data of other firms can be used? Yes/No. (Brazilian jurisdiction has no experience of that)

- i. If so, please specify the circumstances.

- c. What other data or information is used, if any? Please provide examples as relevant.

Market share, financial capacity, barriers to entry the relevant market, productive capacity, cost *versus* price

7. Does pricing below a particular cost benchmark create a presumption of predatory pricing? Yes/No
- a. If yes, is this presumption rebuttable or irrebuttable? Please explain.
- Rebuttable. It must be reasonable, as a promotional price. The firm must justify why are the prices below the benchmark.
- b. If the presumption is rebuttable, what must be shown to rebut the presumption?
- The party must prove there is no possibility of market foreclosure nor recoupment. See answer above.
8. Is there a “safe harbor” from a finding of predatory pricing for pricing above a particular cost benchmark? Yes/No
- a. If yes, please explain, including the terms of the safe harbor.
- If the price is above the firm’s average total cost, it is not considered predatory pricing
9. Is recoupment (obtaining additional profits that more than offset profit sacrifices stemming from predatory pricing) required for a finding of liability under predatory pricing rules in your jurisdiction? Yes/No
- If so:
- a. Is this assessment conducted separately from the analysis of the firm’s market power and the predation? Yes/No
- b. What factors are employed in assessing recoupment in your jurisdiction?
- financial capacity (both of the rivals and the party) and economic profit capacity after rivals exclusion.
- c. Is there a specific recoupment calculation or amount to be shown? Yes/No
- i. If so, what is this?
- (Brazilian jurisdiction does not have experience of recoupment calculation)
- d. Is there a relevant time period for recoupment? Yes/No
- i. If so, what is it?
- e. Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? Yes/No –
- Brazilian jurisdiction has had no case.

- i. If so, please explain and provide relevant examples.
  - f. What degree of likelihood of recoupment is required (*e.g.*, possibility or probability)?
    - i. Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment. Brazilian jurisdiction has had no case.
10. Is the firm's intent relevant in predatory pricing cases? Yes/No
- a. If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples.
 

See answer 7 above. Airline industry – It was carried out an investigation in order to find out whether there was predatory pricing practice in an airline firm ticket's sales. It was demonstrated there was no possibility of rivals exclusion neither the establishment of monopoly prices after their exclusion. It was also proved the sales below the average variable costs was due to a promotional strategy of the party, which had not dominant position/substantial market power and had idle capacity (the reasonability of the price). Considering the idle capacity, it was demonstrated that shall be applied the incremental and avoidable cost measures.
  - b. If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment – are not demonstrated, does intent matter? Yes/No
    - i. If so, please explain. See answer above
11. In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability? Yes/No
- a. If yes, please explain the elements assessed (*e.g.*, exit or delayed entry of competitors, price increases, prevention or delay of price decreases) and the types of evidence required to do so.
 

short run loss; market foreclosure; exclusion of rivals; price increases after rivals' exclusion; long run recoupment

***Justifications and Defenses***

12. What type of justifications or defenses, if any, are permitted for predatory pricing, *e.g.*, an efficiency, meeting competition or objective necessity defense? Please explain and provide examples, as relevant.
- Market share (not holding dominant position), financial capacity, barriers to entry the relevant market, productive capacity, cost *versus* price, meeting competition - demand contraction, reasonable productive capacity boom, no exit of rival.

- a. What is the standard of proof applicable to these defenses? Who bears the burden of proof? What evidence is required to demonstrate that these defenses or justifications are met?

The party bears the burden of proof. The proof must be likely and probable.

### ***Enforcement***

13. Please provide the following information for the past ten years (as information is available):
  - a. The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase). **26 cases**
  - b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief. **No case**
  - c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction's predatory pricing rules (*i.e.*, "clearance decisions"). **26 cases**
  - d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision. **Not available**
14. Does your jurisdiction allow private cases challenging predatory pricing? **Yes/No.**
  - a. Please provide a short description of representative examples, as available. **Not available**
15. Is predatory pricing a civil and/or a criminal violation of your jurisdiction's antitrust laws? **Both civil and criminal**
  - a. If both, what are the differences in the criteria applied to these categories? **Borden of proof**
  - b. On what basis does the agency choose to bring a criminal or civil case? **It is not an agency's choice.**
16. As relevant, please provide a short English summary of the leading predatory pricing decisions/cases in your jurisdiction, including information on the method used to calculate costs, to the extent applicable, and, if possible, a link to the English translation, an executive summary or press release of the case. **Not applicable**
17. Please provide any additional comments that you would like to make on your experience with predatory pricing rules and their enforcement in your jurisdiction, including, as appropriate but not limited to:

- a. Whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess predatory pricing, explaining these developments as relevant.
- b. Whether there are significant policy and/or practical considerations that may lead to greater or lesser agency enforcement against predatory pricing pursuant to unilateral conduct rules in your jurisdiction, *e.g.*, concern with the risks of false positives/false negatives, the existence of related laws such as a general ban on below-cost pricing, limited evidence of consumer harm, and/or difficulties in obtaining reliable cost data (please provide explanation as relevant).

## Exclusive Dealing/Single Branding

This questionnaire seeks information on the analysis and treatment of exclusive dealing (referred to as single branding in some jurisdictions) by ICN member competition authorities. For purposes of this questionnaire, we refer to “exclusive dealing” and “single branding” as conduct that requires or induces customers or suppliers to deal solely or predominantly with that firm. Nevertheless, this questionnaire does not cover tying, bundling, loyalty discounts, rebates or related practices, which your responses should therefore not address. Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

### ***Legal Basis and Specific Elements***

1. Please provide the main relevant texts (in English if available) of your jurisdiction’s laws and guidelines on exclusive dealing/single branding.

Law # 8884/94:

*Article 20. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:*

*I - to limit, restrain or in any way injure open competition or free enterprise;*

*II - to control a relevant market of a certain product or service;*

*(...)*

*IV - to abuse one's market control.*

*Paragraph 1. Achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in item II above.*

*Paragraph 2. Market control occurs when a company or group of companies controls a substantial share of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology.*

*Paragraph 3. The dominant position mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20%) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy.*

*Article 21. The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:*

*(...)*

- IV - to limit or restrain market access by new companies;*
- V - to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service;*
- VI - to bar access of competitors to input, raw material, equipment or technology sources, as well as to their distribution channels;*
- (...)*

It is important to mention that, as can be noticed, the Brazilian Competition Law does not define exclusive dealing/single branding specifically. The Law states general conducts which shall be considered likely to cause harm effects to the competition, in which exclusive dealing and single branding practices can be included.

2. Please list your jurisdiction's criteria for an abuse of dominance/monopolization based on exclusive dealing.

Brazilian Competition Law considers the market power and the rule of reason

### ***Exclusive Purchasing and Supply Arrangements***

3. How does your jurisdiction define single branding or exclusive dealing? For example: Must a firm require that all purchases come from it or that all sales go to it? Can something less than "all purchases" or "all sales" be considered single branding or exclusive dealing? Please specify (providing actual percentages, as relevant).

As have been already mentioned, there is no legal definition for single branding/ exclusive dealing. It is take into consideration the likelihood of harmful effects such as market foreclosure.

4. Is the duration of the arrangement relevant to your assessment? Yes/No
  - a. If so, please explain how and why, providing examples.

Some merger reviews allow 5 years agreements. It depends on the sector as well as on the contract design, which can justify the agreement.

5. Must the firm's use of such arrangements cover a substantial portion of the market? Yes/No
  - a. If so, how do you interpret this requirement, including any relevant percentage thresholds for the purchase or supply covered, and the evidence needed to determine whether this is met?

This requirement must be interpreted according to the percentage threshold for presumption of market power – 20% presumption of market power –

*Article 20. Paragraph 3. The dominant position mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20%) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy.*

6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier? Yes/No
  - a. If so, how and why?
7. Might otherwise legal exclusive dealing/single branding arrangements be deemed abusive if they contain other provisions, *e.g.*, an “English Clause” (requiring *e.g.*, the customer to report any better offers to the supplier, and prohibiting the customer from accepting the offer unless the supplier does not match it), rights of first refusal (right of, *e.g.*, the supplier to enter into an agreement with the customer according to specified terms, before the customer is entitled to enter into an agreement with a third party)? Yes/No
  - a. If so, please explain and provide examples.

The Brazilian Law focuses on the effects of the conduct – actual or likely.

However, there is no presumption of illegality.

### ***Presumptions and Safe Harbors***

8. Are there circumstances under which a firm’s use of single branding or exclusive dealing arrangements is presumed illegal? Yes/No
  - a. If so, please identify the circumstances.
  - b. Is the presumption rebuttable? Yes/No
    - i. If so, what must be shown to rebut the presumption?
9. Is there a “safe harbor” from a finding of liability under your single branding/exclusive dealing provisions? Yes/No
  - a. If so, please explain, including its terms.

Inexistence of market power

### ***Effects***

10. Must a market foreclosure effect be shown for an abuse? Yes/No – it is not necessary to be actual. It can potential or likely
  - a. How is market foreclosure defined in your jurisdiction?

There is no legal definition. (rule of reason – case-by-case)
  - b. Which factors are taken into account to assess a market foreclosure effect (level of dominance, percentage of market demand/purchases or supply covered by the arrangement, existence of alternative sources of

supply, entry barriers, scale economies, possibility and practicability of switching, others)? Please specify the factors considered, including, as relevant, the percentage of demand/supply covered.

Entry barriers, switch cost, minimum viable scale, elasticity, level of dominance.

- c. What evidence is used to demonstrate these effects and must the effects be actual, likely or potential effects?

The effects must be potential.

11. Must other effects, *e.g.*, on consumer welfare, be shown for an abuse? Yes/No
- a. If yes, please specify what must be demonstrated and the evidence required.

### ***Justifications/Defenses***

12. What justifications/defenses are available to the dominant firm, *e.g.*, an efficiency, meeting competition or objective necessity defense? Please specify.
- a. If there is an efficiencies defense, what efficiencies are considered (*e.g.*, relationship-specific investments, facilitating innovation, reduced transaction costs)? How are claims of improved service quality or reputation assessed?
- b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defense without consideration of harm?
- c. Is there a meeting competition defense? Yes/ No.
- i. If yes, please explain.
- d. What is the standard of proof applicable to these defenses? What type of evidence is required to demonstrate that the defenses are met?

Brazilian jurisdiction does not have an expressive number of cases. However, all legal types of proofs admitted in the Brazilian Law such as quantitative/qualitative studies, hearings, documents, inspections, etc, can be applicable to defense.

### ***Enforcement***

13. Please provide the following information for the past ten years (as information is available):
- a. The number of exclusive dealing/single branding cases your agency reviewed (investigated beyond a preliminary phase).

60 cases

- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.

(i) 50 cases (ii) 1 case

- c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction's exclusive dealing/single branding rules (*i.e.*, "clearance decisions").

9 cases

- d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision. **Not available.**

14. Does your jurisdiction allow private cases challenging exclusive dealing/single? **Yes/No**

- a. Please provide a short description of representative examples, as available. **Not available**

15. As relevant, please provide a short English summary of the leading exclusive dealing/single branding cases in your jurisdiction and, if possible, a link to the English translation of the decision, an executive summary or the press release of the case.

CADE held in 2004 that the Iguatemi shopping centre in the city of São Paulo violated Article 20 by forbidding its tenants from locating in any other shopping centre in the city. Iguatemi had a 30.9 per cent share of shopping centre store rental revenues in the relevant geographic market in São Paulo and a 29 percent share of revenue from shopping centre sales. CADE concluded that Iguatemi had sufficient market power to restrain competition among shopping centres by means of the exclusivity provision. A fine was imposed equal to 1 per cent of Iguatemi's gross revenues. The case was followed in early 2005 by a similar exclusivity case against Shopping Centre Norte ("SCN"), also located in the city of São Paulo but in a different relevant geographic market. SCN, which had a 69.6 percent share of store rental revenues and a 71.6 per cent share of store sales revenues in its market, prohibited tenants from operating another outlet within one thousand meters of the SCN site. CADE found this condition to be an unduly restrictive and fined SCN 1 per cent of gross revenues.

16. Please provide any additional comments that you would like to make on your experience with exclusive dealing/single branding rules and their enforcement in your jurisdiction, including, as appropriate but not limited to whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess exclusive dealing/single branding, explaining these developments as relevant