

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.

Article 3° of the Competition Act provides that *"Any person who enter into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition, or tends to produce such effects, will be subject to the measures prescribed by article 26 of this law, notwithstanding the other corrective or restrictive measures that may be imposed in each case"* (Subsection 1).

Then, the same provision indicates -in its letter c)- that, among others, *"Predatory or unfair competition practices conducted in order to attain, maintain or increase a dominant position"* shall be considered acts that prevent, restrict or hinder free competition.

The Competition Act can be found at the FNE website (<http://www.fne.cl>) in Spanish and English.

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

The Competition Court's (TDLC) direct experience with predatory pricing cases is very limited; there is only one decision on this matter. According to this decision -N° 39-, for a pricing scheme to be considered predatory, two conditions must be met. First, the firm must have sufficient market power to recover the losses caused by this strategy. Second, the price that the firm charges for the product must be lower than the relevant costs (see answer to question 3.a).

The Supreme Court revoked the decision of the TDLC, considering that if a firm charged prices below total costs, then these prices were predatory. The Supreme Court also

considered that the firm did not necessarily have to have market power; the predatory pricing strategy can give market power to the firm.

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.**
 - 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)			
<u>Below average variable cost</u> (cost that varies with output)	X		Used as a proxy of average avoidable cost
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)	X		The TLDC wanted to use this cost, but only had information of average variable cost
<u>Below average long run incremental cost</u> (average variable costs and product-specific fixed costs)			
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)			
<u>Other measure of cost</u> (Please identify)			

- b. For each cost measure employed, please provide the definition of the measure used in your jurisdiction.
 - i. **Average avoidable cost: cost that depends exclusively of variations of output.**
 - ii. **Average variable cost: cost that varies with output.**
 - c. Is the same cost measure applied in all cases?

Yes (there has only been one case)

- i. If different cost measures can be applied, for example on the basis of industry, please explain and provide examples, as available. [N/A](#)
 - 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. [N/A](#)
- d. If price must be shown to be below cost, for which of the dominant firm's sales must this be shown?
- 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 \(because of lack of better information in the case\).](#)

- 1. If no, over which of the dominant firm's sales can cost be compared? [N/A](#)

- e. Could a firm's price above average total cost ever be found to be predatory?

[There haven't been any cases.](#)

- i. If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement. [N/A](#)

- 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. [N/A](#)

4. To be unlawful, must the alleged predatory pricing occur in the market in which the firm holds a dominant position/substantial market power?

[According to the TDLC, yes. According to the Supreme Court, no.](#)

- a. If no, please explain.

[According to the TLDC, the firm must be dominant in the market, so as to be able to recoup the losses absorbed by the predatory strategy. According to the Supreme Court, it is enough if the firm's market share grows as a result of the alleged predation.](#)

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?

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

Yes. The duration or continuity of the pricing behaviour might be relevant to establish its effects.

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.
 - i. If so, are cost data from the firm used? Yes.
 - b. Are there circumstances when cost data of other firms can be used? No.
 - i. If so, please specify the circumstances. N/A
 - c. What other data or information is used, if any? Please provide examples as relevant.

Any data that might be useful to define the relevant market and to establish the defendant's market share and evolution is used; for example, total sales and prices. Also, market structure is taken into account in the analysis (especially barriers to entry).

7. Does pricing below a particular cost benchmark create a presumption of predatory pricing?

No. Competition Law does not establish any cost benchmark presumption.

- a. If yes, is this presumption rebuttable or irrebuttable? Please explain. N/A
 - b. If the presumption is rebuttable, what must be shown to rebut the presumption? N/A
8. Is there a "safe harbor" from a finding of predatory pricing for pricing above a particular cost benchmark?

No. Competition Law does not establish any safe harbour.

However, according to Decision N° 39, TDLC decided that setting prices above average variable cost (as a proxy for average avoidable cost) did not constitute predatory pricing, since the defendant was entering the market, and at the time of the case the firm had been operating in Chile for only three years.

- a. If yes, please explain, including the terms of the safe harbor. N/A
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?

No. Competition Law neither provides a definition of predation nor requirements to be deemed as an infraction.

However, in Decision N° 39, TDLC analyzed the possibility of recoupment via the analysis of threats of entry and market structure.

If so:

- a. Is this assessment conducted separately from the analysis of the firm's market power and the predation? **In the case decided by TDLC, no.**
- b. What factors are employed in assessing recoupment in your jurisdiction? **In the case decided by TDLC, market structure was analyzed to check if it was consistent with a profitable application of predatory prices by the defendant.**
- c. Is there a specific recoupment calculation or amount to be shown? **In the case decided by TDLC, no.**
 - i. If so, what is this? **N/A**
- d. Is there a relevant time period for recoupment? **In the case decided by TDLC, no.**
 - i. If so, what is it? **N/A**
- e. Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? **In the case decided by TDLC, yes.**
 - i. If so, please explain and provide relevant examples. **According to Decision N° 39, the defendant sold two different products in two different markets; both products were produced with the same fixed assets. The TDLC considered that, since each type of product was priced above its variable cost (as a proxy for incremental cost), and therefore both products contributed to financing the joint fixed costs, there was no recoupment in another market. The Supreme Court revoked this decision, and stated that the firm was conducting a predatory price strategy in the first market –by selling below average total cost–, and that it recouped its losses in the second market.**
- f. What degree of likelihood of recoupment is required (*e.g.*, possibility or probability)? **N/A**
 - i. Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment. **N/A.**

10. Is the firm's intent relevant in predatory pricing cases? In the case decided by TDLC, no.

- a. If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples. N/A
- b. If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment -- are not demonstrated, does intent matter? N/A
 - i. If so, please explain.

11. In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability?

Yes. In accordance with article 3° of Competition Law, effects must be considered to assess an infraction. Not only conducts that prevent, restrict or hinder free competition are illegal, but also conducts that tend to produce such effects.

- 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.

In the case decided by TDLC, the market structure was analyzed to assess the effects of the conduct.

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.

No. Competition Law does not provide justifications or defenses permitted for predatory pricing. TDLC should analyze defenses case to case, based on a rule of reason, considering all the relevant factors that might be available.

- 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?

In accordance with general rules, facts that constitute defenses must be proved by the party that cites its existence. Therefore, regarding defenses, the burden of proof is allocated on the defendant.

In accordance with article 22° of the Competition Law, all the evidence that might be useful to establish the pertinent facts is admissible.

Enforcement

13. Please provide the following information for the past ten years (as information is available):
- The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase). *Since the TDLC was established in 2004, one case has been decided.*
 - The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules (0); (ii) a settlement with relief. (0)
 - 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"). (1)
 - Each of the number of agency decisions or settlements that were (i) challenged in court (1) and, of those, either (ii) overturned by court decision (1, *overturned by the Supreme Court*) or (iii) confirmed by court decision (0).
14. Does your jurisdiction allow private cases challenging predatory pricing?

*Yes. In accordance with N° 1 of article 18°, cases regarding infractions to Competition Law can be initiated by the *Fiscal Nacional Económico* (National Economic Prosecutor), or by any interested party.*

- Please provide a short description of representative examples, as available. *The case decided by TDLC is an example.*
15. Is predatory pricing a civil and/or a criminal violation of your jurisdiction's antitrust laws?

Predatory pricing, as every other competition infraction, is a civil infraction.

- If both, what are the differences in the criteria applied to these categories?
N/A
 - On what basis does the agency choose to bring a criminal or civil case?
N/A
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.

The predatory pricing case that generated Decision N° 39 has its origin in an accusation by two small producers of fibre cement backerboards, a construction material. These

firms had accused James Hardie, an entrant to this market, of predatory pricing before the Preventive Commission (one of the competition authorities at the time) in 2003. The Preventive Commission stated that James Hardie had sold its products in the national market at prices below total production costs, and that if it insisted in this practice, this conduct could be considered predatory.

Since, according to the accusers, James Hardie continued fixing predatory prices after the Preventive Commission's decision, they accused the firm of not complying with this decision before the TDLC.

The TDLC analyzed the defendant's position in the market, concluding that the defendant was not the market leader –the market leader had a market share of over 60%-, but since its entrance into the Chilean market, the defendant had reached a market share of 30%.

Given the fact that the market leader was a multi-product firm that offers a series of construction materials, and that no barriers to entry were identified, the Tribunal considered that the defendant did not have enough market power to be able to recoup its short term losses. The predatory pricing hypothesis was rejected because of this. However, a cost analysis provided by the National Prosecutor's Office was taken into account.

This analysis showed that the average sale price of James Hardie's backerboards was below the average total costs of production, but above average variable costs. Average variable costs were considered as a proxy for the incremental cost of production. Since the sale price was set above this cost and since both the backerboards and the other product that James Hardie produced –and that shared costs with the backerboards-contributed to financing the fixed shared costs, the pricing strategy was not deemed predatory by the TDLC.

The decision was revoked by the Supreme Court, who stated that since the defendant had increased its market share, and had sold its product at a price below cost, therefore applying predatory prices in this market.

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.

No comments.

- 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).

No comments.

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.

Article 3° of the Competition Act provides that "Any person who enter into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition, or tends to produce such effects, will be subject to the measures prescribed by article 26 of this law, notwithstanding the other corrective or restrictive measures that may be imposed in each case" (Subsection 1).

Then, the same provision indicates -in its letter b)- that, among others, “the abusive exploitation by a corporation, or corporations having a common holding company, of a dominant position in the market, fixing prices, restraining production or assigning themselves market zones or quotes, or imposing other similar abuses” shall be considered acts that prevent, restrict or hinder free competition.

The Competition Act can be found at the FNE website (<http://www.fne.cl>) in Spanish and English.

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

Since its creation in 2004, the Chilean Competition Court (TDLC) has only studied one case regarding monopolization based on exclusive dealing.

From 1992 onwards, the Competition Commissions -that were replaced by the TDLC- approved exclusive dealing agreements, on the basis that the relevant market was competitive enough.

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).

Competition Law neither provides a definition of single branding or exclusive dealing, nor percentages of the sales of the distributor that must come from the provider..

Nevertheless, in accordance with competition commission’s previous decisions, single branding and exclusive dealing were defined as arrangements or contracts where a supplier gives the title of exclusive reseller to a distributor. The TDLC also understands that suppliers can design pricing schemes that make exclusive dealing convenient to the distributors, thereby, in practice, blocking the entry of competitors to the distribution market of the good.

4. Is the duration of the arrangement relevant to your assessment?

Yes. The effects that exclusive dealing might produce in the relevant market must be established to decide if this practice is against Competition Law or not. Therefore, the duration of the agreement might be relevant.

- a. If so, please explain how and why, providing examples. N/A

5. Must the firm’s use of such arrangements cover a substantial portion of the market?

Yes, for the same reasons expressed on the answer to question N° 4.

- 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?

The TDLC does not use predetermined thresholds. In the case that led to decision N° 26, the market share of the exclusive dealer was above 90%.

6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier?

Yes, for the same reasons expressed on the answer to question N° 4.

- a. If so, how and why? The effects that might produce an exclusive dealing agreement are different if the firm does not have market power.
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.

- a. If so, please explain and provide examples.

As said above, Competition Law has no provision regarding this issue and TDLC has only had one experience with monopolization based on exclusive dealing.

However, in accordance with the Competition Commission’s previous decisions, an approved exclusive dealing agreement might be deemed an infraction to Competition Law if it contains other provisions that prevent, restrict or hinder free competition, or tend to produce such effects.

Presumptions and Safe Harbors

8. Are there circumstances under which a firm’s use of single branding or exclusive dealing arrangements is presumed illegal?

No, Competition Law does not establish any presumptions.

- a. If so, please identify the circumstances. N/A
 - b. Is the presumption rebuttable? N/A
 - i. If so, what must be shown to rebut the presumption? N/A

9. Is there a “safe harbor” from a finding of liability under your single branding/exclusive dealing provisions?

No, Competition Law does not establish any safe harbours.

- a. If so, please explain, including its terms. N/A

Effects

10. Must a market foreclosure effect be shown for an abuse?

Yes. In accordance with article 3° of Competition Law, effects must be considered to assess an infraction, being illegal not only those conducts that prevent, restrict or hinder free competition, but also those conducts that tend to produce such effects.

- a. How is market foreclosure defined in your jurisdiction?

Competition Law does not provide a definition of market foreclosure.

- 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.

As said above, Competition Law has no provision regarding this issue. TDLC should define the effects case to case, based on a rule of reason, considering and analyzing all the relevant factors that might be available.

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

In accordance with article 22° of the Competition Law, all the evidence that might be useful to establish the pertinent facts is admissible.

As said above, when assessing an infraction, TDLC should consider actual or potential effects.

11. Must other effects, *e.g.*, on consumer welfare, be shown for an abuse?

No.

- a. If yes, please specify what must be demonstrated and the evidence required. *N/A.*

Justifications/Defenses

12. What justifications/defenses are available to the dominant firm, *e.g.*, efficiency, meeting competition or objective necessity defense? Please specify.

No. As said above, Competition Law has no provision regarding this issue and TDLC has no experience with monopolization based on exclusive dealing.

However, TDLC should analyze defenses case to case, based on a rule of reason, considering all the relevant factors that might be available.

- 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? *N/A*
- b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defense without consideration of harm? *N/A*
- c. Is there a meeting competition defense? *N/A*
 - i. If yes, please explain. *N/A*
- d. What is the standard of proof applicable to these defenses? What type of evidence is required to demonstrate that the defenses are met?

In accordance with general rules, facts that constitute defenses must be proved by the party that cites its existence. Therefore, regarding defenses, the burden of proof is allocated on the defendant.

In accordance with article 22° of the Competition Law, all the evidence that might be useful to establish the pertinent facts is admissible.

Enforcement

13. Please provide the following information for the past ten years (as information is available):

TDLC has no experience with monopolization based on exclusive dealing.

- a. The number of exclusive dealing/single branding cases your agency reviewed (investigated beyond a preliminary phase). *1.*
- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief. *The only case in which the TDLC has resolved resulted in a decision that the conduct violates antitrust rules.*
- 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"). *0.*
- 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. The only decision issued by the TLDC was challenged in the Supreme Court, and was confirmed by it.

14. Does your jurisdiction allow private cases challenging exclusive dealing/single?

Yes. In accordance with N° 1 of article 18°, cases regarding infractions to Competition Law can be initiated by the *Fiscal Nacional Económico* (National Economic Prosecutor), or by any interested party.

a. Please provide a short description of representative examples, as available. Please refer to answer to the next question.

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.

The exclusive dealing case that generated Decision N° 26 has its origin in an accusation by the smaller of the two producers of cigarettes in Chile, Philip Morris. This firm accused CCT (Compañía Chilena de Tabacos) of creating barriers to entry to the distribution market of cigarettes, with the intention of blocking Philip Morris's participation, among other conducts, via providing distributors with pecuniary incentives to not exhibit the cigarettes of its competitor and further incentives for the percentage of their total sales of products of the dominant firm.

The TDLC analyzed the defendant's position in the market, concluding that the defendant was the market leader –with a market share of over 90%–.

The TDLC analysed exclusive marketing agreements with important distributors, which stated that the distributors could not announce in any way that they also sold Philip Morris's cigarettes. The TDLC considered that these agreements, in practice, were an objective limitation to the commercialization of Philip Morris's cigarettes.

Furthermore, in some exclusive marketing agreements, there were clauses that conditioned pecuniary incentives to the share of the defendant in the distributor's total cigarette sales. For example, CCT offered up to a 2% monthly discount if the share of their product in the distributor's total sales was above 96%. This 2% discount was guaranteed if the defendant's share was higher than 99%. The TDLC considered that these clauses were the illicit exercise of CCT's power in the cigarettes distribution market.

The TDLC decided that CCT had to eliminate the exclusive marketing and incentive clauses from all its distribution contracts, and set a fine of 10.000 UTM (approximately US\$ 790.000).

The decision was confirmed by the Supreme Court.

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 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.

No comments.