

EC/DG Competition

Predatory Pricing¹

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.

Text of Article 82 EC

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (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 such contracts."

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

The test for predation requires an assessment of the dominant firm's *ex ante* perspective of whether the conduct is likely to lead to a sacrifice, of whether this is likely to lead to foreclosure, and of whether this is likely to enable the dominant firm to maintain or increase its market power (thus harming consumers) and recoup its sacrifice.

¹ Note that DG COMP's reply does not cover related price abuses, such as margin squeeze.

- Concept of "sacrifice": A conduct is considered predatory if it can be shown that it *clearly* entails a "sacrifice" (loss) for the dominant undertaking, which it suffers deliberately. The concept of sacrifice is not necessarily linked to a particular cost benchmark. It can also be shown by comparing the allegedly predatory conduct with conduct that would also have been (realistically) possible. If the conduct leads in the short term to net revenues *lower* than could have been expected from reasonable alternative conduct, this means that the dominant firm incurred a loss that it could have avoided by not producing, or opportunity costs which could have been avoided by choosing a more profitable alternative.
- Anti-competitive foreclosure: The element of foreclosure is part of the general framework for analyzing all kinds of exclusionary conduct, not only predation. "Foreclosure" is used to describe a situation where rivals' access to the market is hampered or eliminated as a result of the conduct of the dominant firm, thereby reducing these rivals' ability and/or incentive to compete. It can occur even if the foreclosed competitors are not forced to exit the market. Foreclosure is considered anticompetitive if it hinders competition on the market and thereby harms consumers. In most cases this means the foreclosure is anticompetitive because it helps to maintain or increase the substantial market power of the dominant firm, as the firm would then be likely to increase prices and thereby harm consumers. In the case of price based abuses such as predation, it is assumed that in general only conduct which would exclude a hypothetical "as efficient competitor" is capable of being abusive. Consequently, it has to be established whether a hypothetical competitor operating as efficiently as the dominant firm would be able to survive the alleged exclusionary price based conduct if it were the target. The relevant question is whether the dominant firm itself, without its demand related advantages, would be able to survive the alleged exclusionary price based conduct in the event that it would be the target. Foreclosure of an as efficient competitor is in general only possible if the dominant firm prices below its own costs.²
- Strengthening/maintaining dominant position: The objective of Article 82 is to ensure that consumers are not harmed by exclusionary or exploitative conduct by one or more dominant undertakings.³ Article 82 prohibits exclusionary conduct which harms consumers through actual or likely anticompetitive foreclosure where the negative effects of that foreclosure are not outweighed, from a consumers' perspective, by any efficiencies and where the conduct is not objectively justified.
- Consumer harm: Consumers are likely to be harmed if the dominant firm can expect its market power after the conduct comes to an end to be greater than it would have been had the firm not engaged in that conduct in the first place. Such consumer harm includes effects that occur in the short, medium or long term. The concept of 'consumers' encompasses direct and indirect users of the products covered by the conduct, including intermediate users for whom the product is an input for the creation of other goods, distributors of the product, and final consumers of either goods containing the product, or the product itself. Consequently, the fact that the conduct

² Firms that are equally or more efficient than the dominant firm should, if challenged by the dominant firm with price cuts where the resulting price remains above LRAIC, in general be able to follow such price cuts and the ensuing price competition would normally be characterised as competition that benefits consumers.

³ Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 26; Suiker Unie, paragraphs 526 and 527 and Case T-228/97 Irish Sugar plc v Commission [1999] ECR II-2969 paragraph 111.

affects competitors is not in and of itself a problem. It is the impact on competition that matters, not the mere impact on competitors at some level of the supply chain.

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)		no ⁴	
<u>Below average variable cost</u> (cost that varies with output)	yes		ECJ in <i>Akzo</i> held that a dominant firm has no interest in pricing below AVC except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss. ⁵
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)	yes		AAC is used as a starting point. Is in most cases a clear indication of conduct containing a sacrifice. AAC is often the same as AVC, as often only variable costs can be avoided. ⁶
<u>Below average long run incremental cost</u> (average variable costs and product-	yes		Pricing below LRAIC may foreclose "as efficient" competitors

⁴ Marginal and variable costs are related in the sense that marginal costs are the variable cost of the last unit produced. The reason why AVC are used for the purposes of assessing predation is that marginal cost are very difficult to establish.

⁵ See Case 62/86 AKZO Chemie BV v Commission [1991] ECR I-3359, paragraph 71. However, there may be (rare) cases where firms may price below AVC or AAC in order to minimise losses in the short run (i.e. re-start up costs; strong learning effects; sale of old stock such as perishable inventory or phased out or obsolete products).

⁶ In circumstances where AVC and AAC differ, the latter better reflects possible sacrifice: for example, if the dominant firm had to expand capacity in order to be able to predate, then the sunk costs of this extra capacity should be taken into account in looking at the dominant firm’s losses. These costs would be reflected in the AAC, but not the AVC

specific fixed costs)			from the market.
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)	yes		Similar to LRAIC in the case of single product undertakings. ⁷
<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.

The definitions correspond to the ones given in the first column of this table. In general, various cost measures can be relevant in establishing the various elements of "predation" (i.e. sacrifice, foreclosure and increase of market power: see explained in more detail in reply to question 2 above).

- 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.

The Commission has taken decisions on abuses involving predation in different industries (both in services and manufacturing industries, ranging from telecommunication to the chemical products or packaging). As a rule, the cost measures or benchmarks are not dependent on the industry under investigation. Depending on the specific circumstances of the case under investigation, different cost measures may be used in one industry to help prove the existence of predation.

For example, in *Akzo* (chemical products) the ECJ concluded that Akzo's pricing strategy in the particular context, which consisted in pricing below ATC, was predatory.⁸ In *Tetra Pak II* (manufacturing of aseptic and non-aseptic cartons) the pricing behaviour of the dominant company had varied over time. The court confirmed the Commission's use of two different cost measures: below AVC (triggering an assumption of predation) and between AVC and ATC (indication of predation when combined with a predatory strategy to eliminate competition). The court recently confirmed this position in its judgment in *France Telecom*⁹, where the Commission looked at both pricing well below variable costs and at pricing significantly below total costs, as applied by Wanadoo during two distinct time periods. In this context it may be added that the Commission, when examining pricing abuses involving different product markets relied on the concept of LRAIC as a cost benchmark.¹⁰

⁷ If multi-product firms realise economies of scope LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. This implies that in case of a dominant multi-product firm, single product competitors are only considered as efficient if their costs do not exceed the long run incremental costs of the dominant firm of including this product in its multi product bundle.

⁸ The court stated that “Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them”; Case 62/86 AKZO Chemie BV v Commission [1991] ECR I-3359 paragraph 72

⁹ See Case T-340/03 France Telekom SA v Commission (under appeal)

¹⁰ See the Commission's decision in Deutsche Post AG (COMP/35.141-Unitel Parcel Service/DP AG, 20 March 2001). In this case the Commission concluded that the incremental costs solely comprise costs incurred in

- 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.

In a given case, the dominant undertaking may indeed apply different pricing behaviour or strategies at different times, which can under certain circumstances be regarded as predatory. Different pricing behaviour may also occur in a given case in different product or geographical markets, or vis-à-vis different customers. For the rest, see reply to question 3 c i) above).

- 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/**No**

Depending on whether the predation strategy is applied by lowering the price for all units sold or only selectively for some units sold or for those units sold to certain customers, the relevant price is the average price over all units or the price for these selected deals.

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

If there are selective price cuts it is of course the price of the units for which the price is lowered.

- e. Could a firm's price above average total cost ever be found to be predatory?
Yes/**Normally not.**
 - i. If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement. **NA**
- 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. **NA**

- 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.

A dominant firm may engage in predatory conduct if it protects or strengthens its dominant position either by predating in the market where it is dominant, or, less commonly, in another, for instance adjacent market, if that has the effect of protecting or strengthening its position in

providing a specific parcel service. They do not include the fixed costs incurred by DP to provide several services (the common fixed costs).

the *dominated market*.¹¹ It may also be envisaged, albeit in rare circumstances, that a company predates in a market where it is *not* dominant AND where the conduct will only have effects in this market, but this will rarely constitute an abuse.¹² Such situation could arise in sectors where there is a legal monopoly. Under these circumstances, the incumbent may cross-subsidize its predatory activities in another market and thereby create a dominant position in this other market.

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?

As mentioned in response to question 2 above and further explained in the answer to question 11 below, for predation to be abusive, there are further elements which need to be established, not only a certain below-cost pricing behaviour. The duration of the conduct and its continuity are important elements to consider when establishing anti-competitive foreclosure. There is no specific time period applied to predatory conduct. Furthermore, the effect will also determine on the percentage of sales affected. Certain conduct may never be capable of having a foreclosure effect, for example where the low price is part of a one-off temporary promotion campaign and the duration and / or the extent of that campaign are limited.

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.**
 - i. If so, please specify the circumstances.

If (reliable) cost data from the dominant firm is not available other comparable data could also be used, such as for example industry surveys concerning the industry's efficiency.

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

In some cases it will be possible to rely upon direct evidence of a predatory strategy consisting of documents from the dominant firm, such as a detailed plan to sacrifice in order to exclude a rival, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action. Such evidence needs to be sufficiently clear about the

¹¹ Such was for instance the situation in the *Akzo* case, where Akzo was considered predating in the market of flour additives in order to protect its dominant position in the market for organic peroxides. See Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359

¹² In *Tetra Pak II*, for example, the court followed the Commission to prohibit predatory pricing that took place and had its effect only in a non-dominated market. However, it should be noted that in this case the markets at stake (aseptic and non-aseptic cartons) were strongly linked and Tetra Pak had a quasi monopoly for aseptic cartons and a leading position in non-aseptic cartons. See Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-00755.

predatory strategy and for instance indicate the specific steps the dominant firm is taking. Absent direct evidence, indirect evidence may also be used. For instance, the conduct of the dominant firm may be shown to be part of a strategy to predate if the dominant firm actually incurs specific costs in order to react to entry and / or selectively targets certain customers with low prices. The same holds in case the low prices are selectively targeted at those customers that might switch to a potential entrant in case entry is imminent. Such evidence of sacrifice may be considered stronger if other exclusionary practices are also present.

7. Does pricing below a particular cost benchmark create a presumption of predatory pricing? **Yes/No (see below explanation)**

a. If yes, is this presumption rebuttable or irrebuttable? Please explain.

There is no legal presumption of predation if a firm prices below a certain cost benchmark. However, according to case law and jurisprudence pricing below AAC (or AVC) in most cases is a *clear indication* of a conduct entailing a "sacrifice", although there are further elements which must be proven (i.e. is the loss deliberately incurred/are the profits deliberately foregone?).

b. If the presumption is rebuttable, what must be shown to rebut the presumption?
NA

8. Is there a "safe harbor" from a finding of predatory pricing for pricing above a particular cost benchmark? **Yes/No**

There is no legal "safe harbor", although pricing above ATC will normally not constitute an abuse.

a. If yes, please explain, including the terms of the safe harbor.

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** (but see explanation below)

The likelihood of "recoupment" is relevant in the assessment of predation cases under Article 82 EC, when examining whether the dominant firm will increase its market power through the conduct in question (and is thus likely to harm consumers). When assessing predatory pricing abuses the Commission will examine whether there is a (deliberate) sacrifice and whether the conduct of the dominant firm is such as to indicate likely recoupment.

However, it should be pointed out that neither the case-law of the Court of Justice nor the decision-making practice of the Commission requires proof that initial losses were actually recouped before a finding can be made of abuse: there is no need to "mechanically calculate" actual recoupment.

If so:

a. Is this assessment conducted separately from the analysis of the firm's market power and the predation? **Yes/No** (integrated assessment)

The test for predation requires an assessment of the dominant firm's ex ante perspective of whether the conduct is likely to lead to a sacrifice, of whether this is likely to lead to

foreclosure, and of whether this is likely to enable the dominant firm to maintain or increase its market power and recoup its sacrifice. However, as mentioned above, there is no need to demonstrate that the dominant firm will be able to actually recoup the sacrifice i.e. by raising prices following the elimination/weakening of competition.

b. What factors are employed in assessing recoupment in your jurisdiction?

European court jurisprudence and practice suggests that a firm would already infringe Article 82 EC if it denies other operators their right to access markets competing on the merits, whether it finally manages to recoup the losses or not. The CFI's judgment in *Tetra Pak II*¹³ (upheld upon appeal) suggests that recoupment is *not* a mathematical calculation but can be demonstrated by assessing the likely foreclosure effect of the conduct. To prove "predation" the Commission thus has to demonstrate that competition is likely to be hindered or eliminated, i.e. by assessing the likely foreclosure effect of the conduct, combined with other factors such as the entry barriers to the market, the (strengthened) position of the firm resulting from the foreclosure of close competitors, and foreseeable changes to the future structure of the market.

c. Is there a specific recoupment calculation or amount to be shown? **Yes/No**

i. If so, what is this? **NA**

d. Is there a relevant time period for recoupment? **Yes/No**

i. If so, what is it? **NA**

e. Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? **Yes/No**

i. If so, please explain and provide relevant examples.

This could happen under certain circumstances. In particular in case of a multi market situation where the aim of predating in one market is to build up a reputation of aggressiveness towards entry in general and the effect may be to scare off entry also in other adjacent markets where the dominant firm is also active.

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.

¹³. See Case T-83/91; *Tetra Pak II International SA v Commission* [1994] ECR II-00755, (paragraph 150), upheld on appeal to the ECJ in Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951. In *Tetra Pak II* the Court found that the sale of Tetra Rex cartons constantly below not only their cost price but also their variable direct cost could be regarded as sufficient evidence that the applicant pursued a policy of eviction from 1976 to 1981. The Court concluded that by their scale and their very nature, the purpose of such losses, which cannot reflect any economic rationale other than ousting the competitor, was unquestionably to strengthen Tetra Pak' s position on the markets in non-aseptic cartons where it already had a leading position, thereby weakening competition on those markets. The Court ruled that it is not necessary to demonstrate specifically that the undertaking in question had a reasonable prospect of recouping losses so incurred.

What matters is always the *ex-ante* perspective of the sacrifice, likely foreclosure *and* likely recoupment. For example, recoupment will be more likely if the dominant firm selectively targets specific customers with low prices, as this will limit the losses incurred by the dominant firm. By contrast, recoupment is unlikely if the conduct concerns a general price decrease which has already been going on for a very long period. In some cases, predation may be more difficult than expected, and as a consequence the total costs to the dominant firm of predating could outweigh its later profits and thus make actual recoupment impossible, while it may still be rational to decide to continue with the predatory strategy that it started some time ago. Demonstrating that a dominant firm can offset its losses with profits earned on other sales is not sufficient to conclude that there is recoupment.¹⁴ On the other hand, demonstrating that a dominant firm cannot offset its losses with profits earned in the same period on other sales is not sufficient in itself to disprove predation.

10. Is the firm's intent relevant in predatory pricing cases? **Yes/No** (see explanation below)

- a. If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples.
- 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.

As mentioned above, the ECJ confirmed that the concept of abuse is an objective one. Intent is thus not a separate necessary element in the assessment. However, the Commission, i.e. when evaluating internal documents or business plans of the dominant firm, will be looking at any evidence suggesting a *predatory strategy*, such as a detailed plan to sacrifice in order to exclude a rival, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action. (see also answer to question 6 c 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.

Anti-competitive foreclosure

Anti-competitive foreclosure is a central part of the examination of predatory pricing and other exclusionary abuses. (see also reply to question 2 above).

As regards the evidence which can be used to show foreclosure effects, both direct and indirect evidence may be used (see in more detail reply to question 6 c). The information on the costs of the dominant firm itself will normally serve as a good proxy for those of an as

¹⁴ However, it can show that the dominant firm is less dependent on external financing and, in specific circumstances, such as a multi-market situation or selective price cutting, it may also indicate that recoupment is already taking place.

efficient competitor. But if this information is not available it may be necessary to use cost data of competitors.

Consumer harm

In a predatory pricing case, consumers benefit in the short run from low prices, but suffer in the longer term as the dominant firm exploits its strengthened market position and the entry barrier it has created through its predatory pricing. Consumers are likely to be harmed if the dominant firm can expect its market power after the conduct comes to an end to be greater than it would have been had the firm not engaged in that conduct in the first place (see also answer to question 2 above). This does not mean that the dominant firm should be able to increase its prices above the level persisting in the market before the conduct. It is sufficient that the conduct avoids or delays a decline in prices that would otherwise occur.

As regards to the evidence required to show consumer harm, the latter can be demonstrated by assessing the likely foreclosure effect of the conduct, combined with other factors such as the entry barriers to the market, the (strengthened) position of the firm resulting from the foreclosure of close competitors, and foreseeable changes to the future structure of the market. Similar to the element of "recoupment", identifying consumer harm is therefore not a mechanical calculation of profits and losses.

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.

Conduct which might otherwise be abusive escapes the prohibition of Article 82 if the dominant firm provides an objective justification for its behaviour. However, in the case of alleged predatory conduct, an objective justification cannot be applied as long as, directly or indirectly, a sacrifice has been established. The fact that the dominant firm makes a sacrifice implies that it had other, more profitable alternatives which it chose not to apply so as to foreclose competitors.

The dominant firm may also demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition.¹⁵ In the case of alleged predatory conduct the dominant firm might, for example, be able to prove that the low pricing or other forms of aggressive conduct help it achieve economies of scale or efficiencies related to expanding the market, such as promoting a shop location, reducing costs through learning effects or increase the value of its product through network externalities. However, even if clear efficiencies can be shown, it is still necessary to show that the likely efficiencies brought about by the conduct concerned outweigh the likely negative effects on competition and on consumer welfare and that predation is the least restrictive way to achieve them.

- 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?

¹⁵ See Case C-95/04 P *British Airways plc v Commission*, 15 March 2007 (paragraph 86)

The Commission has to prove the anticompetitive foreclosure of the conduct absent efficiencies, while the burden is on the dominant firm to prove an objective justification or efficiencies.

In case of efficiencies, the dominant firm must demonstrate *with a sufficient degree of probability*, and with independently verifiable evidence, that a) the efficiencies have been or will be realised, and they are a result of the conduct; b) the conduct is indispensable to the realisation of these efficiencies; c) the likely efficiencies brought about by the conduct concerned outweigh the likely negative effects on competition and on consumer welfare and d) the conduct does not eliminate competition, by removing most or all existing sources of actual or potential competition in the relevant market. Under these conditions it may be possible to conclude that an allegedly abusive conduct generates efficiencies that are sufficient to outweigh the likely negative effects on competition resulting from the conduct and thereby no net harm to consumers is likely to arise.

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).

This information is not readily available.

- 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) Decisions of the Commission finding an infringement under Article 82 EC relating (at least in part) to predatory pricing as defined for the purposes of this questionnaire (see definition in first par.):

1997:

- Decision of the Commission of 14.05.1997 in the case *Irish Sugar* (Official Journal: L 258 - 22/09/1997)

2001:

- Decision of the Commission of 20 March 2001 in case COMP/35.141-*United Parcel Service / Deutsche Post AG* (OJ L 125, 05.05.2001)

2003:

- Decision of the Commission of 16 July 2003 in case COMP/38.233-*Wanadoo*¹⁶

¹⁶ See <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38233/en.pdf>

- 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").

This information is not readily available.

- 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.

(i) Prohibition decisions which were challenged in court:

- Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969

partly OVERTURNED
- Case T-340/03, *France Télécom (formerly Wanadoo Interactive) v Commission* UPHELD

14. Does your jurisdiction allow private cases challenging predatory pricing? Yes/No. (see explanation)

Under EC law both the Commission/DG COMP on the one hand and the Member States' competition authorities (whether agencies, courts or tribunals) on the other hand, apply Article 82 EC (in line with the principles set forth in the guidelines on work sharing in antitrust cases¹⁷). Several EU member states allow private litigation (claims for compensation of damages) in competition cases when applying EC and/or national competition law, either as follow-on actions or independently from a decision by the competition agency. There is, however, no possibility for a private individual or a company to introduce damage compensation claims before the European courts against the undertakings concerned in competition cases.

- a. Please provide a short description of representative examples, as available. **NA**

15. Is predatory pricing a civil and/or a criminal violation of your jurisdiction's antitrust laws?

Civil violation: Companies can be subject to cease and desist orders and/or fines by the Commission. Remedies can be imposed by the Commission and commitments offered by the undertakings concerned can be made binding by the Commission (Article 9 decision under Regulation 1/2003¹⁸).

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

¹⁷ See Commission Notice on Cooperation within the Network of Competition Authorities (Official Journal C 101, 27.04.2004)

¹⁸ See <http://ec.europa.eu/comm/competition/antitrust/legislation/regulations.html>

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.

Akzo:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61986O0062:EN:HTML>

Irish Sugar:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=judgements&numaff=T%25&datefs=&d atefe=&nomusuel=&domaine=CONC&mots=&resmax=1000>

Tetra Pak II:

<http://ec.europa.eu/comm/competition/publications/cpn/cpnv1n03.pdf>

(Competition Policy Newsletter autumn/winter 1994)

Wanadoo:

http://ec.europa.eu/comm/competition/publications/cpn/cpn2003_3.pdf

(Competition Policy Newsletter Nr. 3 2003)

Deutsche Post AG (DPAG) :

http://ec.europa.eu/comm/competition/publications/cpn/cpn2001_3.pdf

(Competition Policy Newsletter Nr. 3 2001)

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 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.

The current thinking regarding the methodology and practical application of Article 82 to predatory pricing abuses -as reflected in the above answers to the questionnaire- is in line with past practice and court jurisprudence. The general thrust of addressing predation and other exclusionary pricing abuses is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources – which will in turn benefit the consumer.

- 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).

Regarding the first question it can be said that the concern of false positives/negatives is not specific to investigations into predatory pricing but is a general concern to be taken into consideration whenever competition authorities intervene. For interventions in abuse cases the risk of false positives is already limited due to the strict dominant assessment which is a prerequisite of finding an abuse. On the second issue (other pricing regulation) it is important to note that -unlike certain Member States' legislation- Community law does *not* contain a general ban on below-cost pricing. On the third issue (problem to prove consumer harm) it is important to clarify that consumer welfare effects are established when looking at the likelihood of an increase in market power of the dominant firm. A numerical calculation of consumer welfare effects is *not* required in this respect. On the last issue (complications when running predation cases), it is fair to say that access to reliable data in general, is crucial to carry out a proper investigation into any kind of abuses of dominance. In particular in predation cases, reliable cost data are crucial for establishing whether or not there was an abuse, and there are not many alternatives¹⁹ if these cost data cannot be obtained.

¹⁹ See however reply to question 10 b i).

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.
2. Laws and guidelines on exclusive dealing/single branding.

Text of Article 82 EC

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (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 such contracts."

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

"Exclusive dealing" can be described as conduct whereby the dominant firm tries to foreclose its competitors by hindering them from selling to customers through use of exclusive

purchasing/single branding obligations²⁰ and/or from purchasing from suppliers through use of exclusive supply obligations or incentives.

Anti-competitive foreclosure through exclusive purchasing/single branding arises in particular where, *absent the exclusive purchasing obligations*, an important competitive constraint is exercised by competitors who either are not yet active in the relevant market when the obligations are concluded or by actual competitors, who cannot compete for the total demand of the respective customers. By contrast, if competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are unlikely to foreclose *unless* customers' switching of supplier is made more difficult due to the duration of the exclusive purchasing obligation. Other relevant factors to assess the impact of exclusive dealing (see also replies to questions 4, 5 and 10 b below) include the position of the dominant firm and of its competitors and customers, the conditions in the market concerned and the characteristics of the allegedly abusive conduct.

Exclusive supply obligations require a supplier to sell, in general or for the purposes of a specific use, *exclusively* or *to a large extent* only to the dominant firm. Exclusive supply incentives may have similar effects as exclusive supply obligations. Incentives include the dominant firm offering to pay a higher purchase price if the supplier sells a higher percentage of its output to the dominant firm, or the supplier being required to pay a lump sum in order to be present on the shelves of the dominant firm.

A practical example is the case *IRI/Nielsen* where the Commission had provisionally concluded that Nielsen had abused its dominant position on the European market for retail tracking services by concluding exclusivity contracts with retailers, preventing the latter from providing certain kinds of market data (raw information crucial to produce retail tracking reports) to Nielsen's competitors.²¹

A more recent example for an exclusive supply relationship is the Commission's decision in *De Beers/Alrosa*, whereby De Beers agreed to purchase substantial amounts of rough gem diamonds from ALROSA under a "willing-buyer-willing-seller" arrangement.²² The decision was annulled by the CFI on procedural grounds and due to a lack of proportionality regarding the commitment. However, the CFI noted that, according to settled case-law, an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC. The court went on to state that, applied to a purchaser in a dominant position, that case-law means that for De Beers to reserve to itself the whole of Alrosa's production exported outside the CIS could, even if the latter consented, constitute an abuse in the context of their relations.

²⁰ Or rebates, which are however *not* subject of this questionnaire!

²¹ See 1996 Annual Report; http://ec.europa.eu/comm/competition/annual_reports/rap96en_en.pdf The case was settled by an undertaking from Nielsen which addressed the main competition concerns and ensured a level playing field in the European markets for retail tracking services.

²² The Commission took the preliminary view that through this agreement Alrosa would be obliged to sell (a large quantity of raw diamonds) to the Beers and that this would lead to *de facto* distribution exclusivity to the benefit of De Beers.

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).

Exclusive dealing may constitute an abuse under Article 82 if customers/sellers are required (i.e. by a written or oral contract) or induced (i.e. through economic incentives) to purchase exclusively or *to a large extent* (i.e. not necessarily 100%) only from the dominant firm. For example, in *Hoffman La Roche*²³ exclusivity obligations were contained in agreements with customers, some of these agreements obliging the latter to obtain quantities which were close to their total requirements.

Article 82 further covers both cases of legal and *de facto* exclusivity. In the *Van den Berg Foods* case the Commission concluded that HB, the dominant supplier of impulse ice-cream to Irish retail outlets, had abused its dominant position by supplying freezers to retailers free of charge against a commitment preventing retailers to use the freezers for selling competing brands. The CFI upheld the Commission’s decision. It found that although retailers were not legally prevented from selling brands other than HB (i.e. by placing them in a distinct freezer), the exclusivity *de facto* restricted the sales of competing brands.²⁴ The court thus clarified that obligations such as stocking requirements, that appear to fall short of requiring exclusive purchasing, may *in practice* lead to such exclusivity to the extent that they effectively require the customer to purchase all or a significant part of its requirements from the dominant supplier.²⁵

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

In general, the longer the duration of the obligation, the stronger the likely foreclosure effect, in particular if new entrants are affected. However, even in case of a short duration - or a right for the customer of the dominant firm to terminate supply at short notice – an exclusive purchasing obligation can lead to foreclosure, in particular if there are no adequate substitutes to the dominant supplier’s product for a good part of demand on the market.²⁶ This could for example be the case if the product of the dominant company is a so –called “must stock” or if rivals are facing capacity constraints.

5. Must the firm’s use of such arrangements cover a substantial portion of the market?
Yes/No

²³ See Case 85/76 *Hoffman- La Roche v Commission* [1979] ECR 461.

²⁴ Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653 paragraph 264.

²⁵ In this case cooler exclusivity was considered to lead to outlet exclusivity because most outlets do not have space or means to have a second freezer.

²⁶ See Case T-65/89 *BPB Industries plc and British Gypsum Ltd v Commission* [1993] ECR II-39, paragraphs 68 and 73 in which the CFI held that where an economic operator holds a strong position in the market, the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market.

- 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?

Exclusive purchasing obligations are more likely to result in anti-competitive foreclosure the larger the part of the market covered by the conduct taken cumulatively – the total tied market share – and the higher the percentage of individual customer’s purchases required by the obligation.

The requisite *threshold* of the tied market share indicating an abuse may differ depending on the specificities of the case. For example, in its judgment in the case *Van den Bergh Foods* the CFI held that the fact that an undertaking with a market share of more than 75% tied 40% of outlets in the relevant market by an exclusivity clause which in reality created outlet exclusivity constituted an abuse.²⁷ It further also matters whether the dominant firm applies the exclusive purchasing selectively to buyers which are of particular importance for potential entrants or expansion by existing competitors (even if the tied market share may be rather modest).

Exclusive supply obligations or incentives are only likely to result in anti-competitive foreclosure (and thus constitute an abuse) if they tie most of the efficient input suppliers²⁸ and if customers competing with the dominant firm are unable to find alternative efficient sources of supply, i.e. by way of upstream integration or sponsoring entry of new suppliers.

6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier? Yes/**No**

As the ECJ’s ruling in *Hoffmann-La Roche* suggests, a dominant company cannot invoke that the exclusive purchasing obligation was requested by its customers: "*An undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position....*").

Although it may be in the individual interest of certain customers to enter into the exclusive purchasing obligation with the dominant firm, this does not mean that all the obligations, when taken together, are beneficial for the whole category of customers concerned. It is in particular unlikely that customers collectively benefit when each individual exclusive purchasing obligation is unlikely to be decisive for whether entry or expansion of rivals occurs or not, but when the *combined effect* of all the exclusive purchasing obligations has the effect to foreclose (i.e. when there are many small buyers).

- a. If so, how and why? **NA**

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

²⁷ See Case T-65/98 *Van den Bergh Foods Ltd v Commission*, [2003] *ECR II-4653*, upheld on appeal in Order of the Court in Case C-552/03 P, *Unilever Bestfoods (Ireland) Ltd v Commission* 28 September 2006, paragraph 160.

²⁸ See for example the Commission’s decision in case COMP/E-2/38.381-*De Beers/Alrosa*, where

specified terms, before the customer is entitled to enter into an agreement with a third party)? Yes/**No** (but see explanation below)

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

Under the *EC Guidelines on Vertical Restraints* ‘English clauses’ are defined as clauses requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does *not* match it. According to the Guidelines²⁹ such a clause can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer. In addition, by increasing the transparency of the market, an English clause may facilitate collusion between suppliers. Because English clauses and single branding can be expected to have the same effects and to reinforce each other, they will have to be assessed together if applied at the same time. In *Hoffmann-La Roche* the ECJ stated that even in the most favourable circumstances, the English clause, if combined with single branding, does not in fact remedy to a great extent the distortion of competition caused by the exclusivity requirements given that it is for the dominant company to decide whether or not it will permit competition.

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.

There is no statutory presumption of incompatibility of exclusive dealing/single branding as *per se* abuses.

However, the margin of maneuver for dominant undertakings in this respect is rather limited, both by the Commission's enforcement practice and Court jurisprudence. The ECJ in *Hoffmann-La Roche* stated that exclusive dealing obligations as applied by a dominant undertaking are incompatible with the objective of undistorted competition within the common market, because.... “-*unless there are exceptional circumstances which may make an agreement between undertakings in the context of article 85 (now 81) and in particular of paragraph (3) of that article , permissible- they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.*”³⁰

- b. Is the presumption rebuttable? Yes/**No NA**

- 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**

²⁹ Commission notice - Guidelines on Vertical Restraints (*OJ C 291, 13.10.2000, p. 1–44*); para. 152
³⁰ See Case 85/76 *Hoffman- La Roche v Commission* [1979] ECR 461; par. 90

- a. If so, please explain, including its terms. **NA**

Effects

10. Must a market foreclosure effect be shown for an abuse? **Yes/No**

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

The element of *anti-competitive foreclosure* is part of the general framework for analyzing all kinds of exclusionary conduct, not only exclusive dealing. "Foreclosure" is used to describe a situation where rivals' access to the market is hampered or eliminated as a result of the conduct of the dominant firm, thereby reducing these rivals' ability and/or incentive to compete. It can occur even if the foreclosed competitors are not forced to exit the market. Foreclosure is considered anticompetitive if it hinders competition on the market and thereby harms consumers. This means the foreclosure is anticompetitive when it helps to maintain or increase the substantial market power of the dominant firm, as the firm would then be likely to increase prices or reduce output and thereby harm consumers.

- 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.

See answer to question 2 above: All the elements mentioned in 10 b) are taken into account to assess the market foreclosure effect. In general, both for exclusive purchasing and supply obligations, the extent of anti-competitive foreclosure is likely to be *stronger* if at the level of the dominant firm there are significant scale economies, learning curve or network effects or if there are entry barriers at the level of the customers or input suppliers. Furthermore, the market foreclosure effect will be greater if the dominant firm is an unavoidable trading partner for its customers (i.e. the relevant product is a must stock item preferred by many final customers or alternative suppliers face capacity constraints) and this leads to a situation where a large part of demand can only be provided by the dominant company.³¹ In addition, it is assessed whether competitors of the dominant firm may have counter-strategies at their disposal (i.e. concentrate their sales with certain customers; stronger ex-ante competition; sponsoring entry or vertical integration provided customers are not final consumers and entry barriers in the downstream market are insignificant).

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

³¹ See for example Case T-65/98 Van den Bergh Foods Ltd v Commission, [2003] ECR II-4653; upheld on appeal (Case C-552/03 P) or Case T-219/99 British Airways v Commission, [2003] ECR II-5917; upheld upon appeal (Case C-95/04P).

Article 82 addresses actual or likely foreclosure effects produced by exclusive dealing/single branding (see reply to question 2 above). As regards the evidence which can be used to show foreclosure effects, both direct and indirect evidence may be used.

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.

Article 82 prohibits exclusionary conduct which harms consumers through actual or likely anti-competitive foreclosure (see above observations). Consumer harm includes short-, medium or long-term effects. The concept of consumers includes direct and indirect users of the products covered by the conduct. Where intermediate users are actual or potential competitors of the firm, the assessment focuses on the effects of the conduct on the end-users. Conduct, which does not harm consumer welfare, is not prohibited by Article 82 (see further below).

Justifications/Defenses

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

Conduct including exclusive dealing/single branding, which may otherwise be abusive under Article 82, may escape the prohibition if the dominant firm provides an objective justification or demonstrates that the conduct generates efficiencies which outweigh the possible anti-competitive effects.

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?

Exclusive dealing/single branding may have efficiency enhancing effects. In the case of exclusive dealing/single branding the most frequent type of efficiencies may consist in the incentives for the dominant firm to make relationship-specific investments in order to supply a particular customer or purchase the product of a particular supplier. An investment is considered relationship-specific if after termination of the contract with that particular supplier or customer, the investment cannot be used by the dominant firm and can only be sold at a loss. General or market-specific investments in extra capacity are normally *not* regarded as relationship-specific.

Exclusive supply obligations may also allow the dominant firm to reduce input costs (for example reduction of double mark-ups) or reduce transaction costs or facilitate innovation in the input market. If these effects materialise, exclusive supply obligations may benefit final consumers.

b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defense without consideration of harm?

A finding of an abuse under Article 82 EC requires that the anti-competitive effects of the conduct (including exclusive dealing/single branding) are balanced against, and not outweighed by pro-competitive effects (i.e. efficiencies).

c. Is there a meeting competition defense? Yes/ No.

i. If yes, please explain. **NA**

d. What is the standard of proof applicable to these defenses? What type of evidence is required to demonstrate that the defenses are met?

The dominant firm must demonstrate the elements mentioned under 12 a) with a *sufficient degree of probability*, and with *independently verifiable evidence*. In case of efficiencies, the dominant firm has to show that the efficiencies have been or will likely be realised as a result of the conduct; that the conduct is indispensable in order to realize these efficiencies and, finally, that the likely efficiencies outweigh the likely negative effect, and that the conduct does not eliminate effective competition.

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).

This information is not readily available.

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) Decisions of the Commission finding an infringement under Article 82 EC relating (at least in part) to exclusive dealing as defined for the purposes of this questionnaire (see definition in first par.)

1998:

- Decision of the Commission of 11.03.1998 in case COMP IV/34395 -*Van Den Bergh Foods* (Official Journal: L 246 - 4/09/1998)

2000:

- Decision of the Commission of 13 December 2000 in case COMP/39.046 *Carbonate de Soude-Ici* (Official Journal: L 10, 15.01.2003)

2006:

- Decision of the Commission of 29 March 2006 in case COMP/38.113 *Prokent/Tomra* (not published³²)

(ii) Commitment decisions of the Commission under Article 9 of Regulation 1/2003 (*preliminary finding of an abuse with settlement*)

2005:

- Decision of the Commission of 22 June 2005 in case COMP/39.116 - *Coca-Cola* (OJ L 253, 29.09.2005)

2006:

- Decision of the Commission of 22 February 2006 in case COMP/E-2/38.381 –*De Beers/Alrosa* (Official Journal: L 205, 27/07/2006).

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”).

This information is not readily available.

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.

(i) Prohibition decisions which were challenged in court:

- Case T-65/98 *Van Den Bergh Foods Ltd v Commission* [2003] ECR II-4653
UPHELD

(ii) Commitment decisions which were challenged in court:

- Case T-170/06 *Alrosa v Commission* Official Journal: 2007/C 199/70
OVERTURNED³³

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

a. Please provide a short description of representative examples, as available. **NA**

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.

³² See press release reference IP/06/398 Date: 29/03/2006

³³ The decision is currently under appeal. It was not overturned on the finding of an abuse but on procedural grounds and for the lack of proportionality of the remedy.

Hoffmann-La Roche:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976J0085:EN:HTML>

Van den Bergh Foods:

<http://ec.europa.eu/comm/competition/publications/cpn/cpn19982.pdf>

(Competition Policy Newsletter June 1998)

Judgment of the CFI of 23 October 2003 in Case T-65/98:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=judgements&numaff=T%25&datefs=&datefe=&nomusuel=&domaine=CONC&mots=&resmax=1000>

IRI/Nielsen :

http://ec.europa.eu/comm/competition/annual_reports/rap96en_en.pdf

(1996 Policy Newsletter)

BPB Industries and British Gypsum:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989A0065:EN:NOT>

Coca Cola:

http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf

(Competition Newsletter Nr. 3 2005)

De Beers/Alrosa :

http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_2.pdf

(Competition Policy Newsletter Nr. 2 2006)

Prokent/Tomra :

http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_2.pdf

(Competition Policy Newsletter Nr. 2 2006)

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.

The current thinking regarding the methodology and practical application of Article 82 to exclusive dealing abuses is already reflected in the above answers to the questionnaire. In the past cases were sometimes argued using a more form-based approach, although the conduct at

stake in those cases would in general also have been addressed under the effects-based approach as described in this questionnaire. The latter is also reflected in the more recent case law (i.e. the *Van den Bergh Foods* case mentioned above).