

Kenya

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.

Section 10 (3)(a) of The Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504
(<http://www.treasury.go.ke/documents.php?docID=24>)

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

<http://www.treasury.go.ke/documents.php?docID=24> Section 10(3) (a)
Selling or threatening to sell at prices below AVC

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)	Yes Section 10		Prices intended to drive out or deter a

	(3) of Cap.504		competitor are also considered
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)			
<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. AVC
- c. Is the same cost measure applied in all cases? Yes/o
- 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?

Sales in the relevant market

- 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/o
 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? es/No
- 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? es/No
 - a. If no, please explain. The firm might be practicing predation to create dominance or gain entry into a relevant 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? es/No
 - a. If so, please explain. For example, if the behavior must be sustained over a certain time period, why, and for what period?
6. On what type of evidence do you rely to prove predatory pricing? Please explain, including examples as appropriate **Cost and sales data**
 - a. Are cost data used? Yes/o
 - i. If so, are cost data from the firm used? Yes/o
 - b. Are there circumstances when cost data of other firms can be used? Yes/o.
 - i. If so, please specify the circumstances. **Data from competitors for comparison purposes**
 - c. What other data or information is used, if any? Please provide examples as relevant. **Information from competitors, employees and financial capability of the firm.**
7. Does pricing below a particular cost benchmark create a presumption of predatory pricing? Yes/o
 - a. If yes, is this presumption rebuttable or irrebuttable? Please explain.
 - b. If the presumption is rebuttable, what must be shown to rebut the presumption? **The intent of the firm's pricing**
8. Is there a "safe harbor" from a finding of predatory pricing for pricing above a particular cost benchmark? es/NO o
 - 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? es/NO o

If so:

- a. Is this assessment conducted separately from the analysis of the firm's market power and the predation? Yes/No N/A
 - b. What factors are employed in assessing recoupment in your jurisdiction? N/A
 - c. Is there a specific recoupment calculation or amount to be shown? es/No
 - i. If so, what is this?
 - d. Is there a relevant time period for recoupment? es/No
 - i. If so, what is it?
 - e. Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? Yes/No
 - i. If so, please explain and provide relevant examples.
 - f. What degree of likelihood of recoupment is required (*e.g.*, possibility or probability)? **Its never considered**
 - i. Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment.
10. Is the firm's intent relevant in predatory pricing cases? Yes/o
- a. If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples.
 - *to drive a competitor out of business*
 - *to induce a competitor to sell assets to, or merge*
 - *to induce a competitor to shut down*
 - *to induce a competitor to desist from producing or trading*
 - b. If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment -- are not demonstrated, does intent matter? Yes/o
 - i. If so, please explain. **See 10 (a)**
11. In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability? es/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.

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 provision**
- 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? **N/A**

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). **Four (4)**
- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; **None** (ii) a settlement with relief.
- 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"). **Four (4)**
- 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. **N/A**
14. Does your jurisdiction allow private cases challenging predatory pricing? /No
- a. Please provide a short description of representative examples, as available.
15. Is predatory pricing a civil and/or a criminal violation of your jurisdiction's antitrust laws? **Criminal**
- a. If both, what are the differences in the criteria applied to these categories?
- b. On what basis does the agency choose to bring a criminal or civil case?
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.

An independent petroleum retailer complained that another retailer (Kenol/ Kobil) was selling petrol at prices which in his view were

predatory. Investigators examined the cost and sales data of both companies. No evidence was found to prove the allegations because the prices charged were found to be below the Independent retailers prices but not necessarily predatory.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. **The government is reviewing the current competition legislation in order to align it with the situation in the economy and also best international practice**
- 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). **See 17(a)**

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.

Section 6 (1)(a) of The Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504

(<http://www.treasury.go.ke/documents.php?docID=24>)

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

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 Purchasing and Supply Arrangements as stated in Section 6 (1)(a) of The Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504***
4. Is the duration of the arrangement relevant to your assessment? es/No
 - 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? es/No
 - a. If so, how do you interpret this requirement, including any relevant percentage thresholds for the purchase or supply covered, and the evidence needed to determine whether this is met? N/A

6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier? es/ No o
 - a. If so, how and why? N/A
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)? es/No
 - a. If so, please explain and provide examples N/A
8. Are there circumstances under which a firm’s use of single branding or exclusive dealing arrangements is presumed illegal? Yes/o
 - a. If so, please identify the circumstances. **Refer 6(1) (d)**
 - b. Is the presumption rebuttable? es/No
 - i. If so, what must be shown to rebut the presumption?
9. Is there a “safe harbor” from a finding of liability under your single branding/exclusive dealing provisions? es/No
 - a. If so, please explain, including its terms.

Effects

10. Must a market foreclosure effect be shown for an abuse? es/No
 - a. How is market foreclosure defined in your jurisdiction? **Not defined**
 - 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. N/A
 - c. What evidence is used to demonstrate these effects and must the effects be actual, likely or potential effects? N/A
11. Must other effects, *e.g.*, on consumer welfare, be shown for an abuse? es/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.*, an efficiency, meeting competition or objective necessity defense? Please specify. **No justifications**
- 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? es/ No.
 - i. If yes, please explain.
 - d. What is the standard of proof applicable to these defenses? What type of evidence is required to demonstrate that the defenses are met? N/A

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). **Forty (40)**
 - b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; **Forty (40)** (ii) a settlement with relief. **Forty (40) by expunging the restrictive clauses from the agreements**
 - 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"). None
 - 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. **None**
14. Does your jurisdiction allow private cases challenging exclusive dealing/single? es/No
- a. Please provide a short description of representative examples, as available.
15. As relevant, please provide a short English summary of the leading exclusive dealing/single branding cases in your jurisdiction and, if possible, a link to the

English translation of the decision, an executive summary or the press release of the case. **An overseas money remittance company (OMRC) entered into an exclusive agreement with a local agent. The exclusive clause had indicated that the agent could not enter into any other money transfer arrangement with any other OMRC. The Commission ordered for the deletion of the exclusive clause.**

16. Please provide any additional comments that you would like to make on your experience with exclusive dealing/single branding rules and their enforcement in your jurisdiction, including, as appropriate but not limited to whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess exclusive dealing/single branding, explaining these developments as relevant. **The current law does not define vertical restraints and their enforcement explicitly. There is a move to improve on this with the proposed law.**