

Predatory Pricing in Switzerland

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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)

By way of general comment it should be noted that there are only very few published cases in Switzerland in which the Swiss Competition Commission (**SCC**) pursued an allegation of predatory pricing under the Swiss Cartel Act and there are, to our knowledge, no published cases in which the investigation proceeded beyond the preliminary phase or where a dominant undertaking was ultimately sanctioned/fined for engaging in predatory pricing (there may be unpublished cases of which we are not aware). There are, however, a number of cases in which the SCC concluded after a preliminary investigation ("*Vorabklärung*") that abuse could not be established for a lack of dominance. In those cases, if the SCC nevertheless proceeded to discuss aspects of abuse (i.e. predatory pricing), those comments have necessarily been made *obiter* and cannot be said to constitute reliable precedents (those dicta are, in any event, often unclear and not comprehensively reasoned). It is for those reasons that we have answered "N/a" to a number of questions rather than setting out the (untested) views of individual scholars as found in the literature.

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

The main provisions governing predatory pricing are set out on the one hand in Articles 7(1) and 7(2)(d) of the Swiss Cartel Act (**LCart**) and on the other hand in Articles 2 and 3(f) of the Swiss Act Against Unfair Competition (**UCA**). The relevant provisions read as follows:

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LCart:

Article 7(1): Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.

Article 7(2)(d): The following in particular may constitute unlawful practices: the under-cutting of prices or other conditions directed against a specific competitor.

UCA:

Article 2: All forms of misleading behaviour or practices, or behaviour or practices entered into *mala fide*, which has an effect on the relationship between competitors or between suppliers and purchasers are unfair and illegal.

Article 3(f): A person is acting unfairly if he repeatedly sells specific goods, work-products or services below cost while at the same time advertising these offers in the media thus deceiving customers as to his own efficiency | performance | productivity or that of his competitors. Deceit is presumed if the sales price is below the cost price of comparable goods, work-products or services. If the accused can prove the actual cost price it is that which shall be used for the analysis.

In the following, only predatory pricing under the Cartel Act will be analysed further as it is only the LCart which contains provisions applicable to dominant undertakings. The provisions on the UCA, on the other hand, govern unfair methods of competition in general, independent of the size of the undertaking(s) employing them.

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

In order to be abusive, the following criteria have to be fulfilled:

- a) The LCart must be applicable (notable areas which are excluded from the ambit of the LCart are (1) provisions which establish an official market or price system, (2) provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights and (3) effects on competition resulting exclusively from laws governing intellectual property).
- b) The accused must be an undertaking.
- c) The undertaking must be dominant on a particular market for goods or services.
- d) The undertaking must have abused its dominant position e.g. through the practice of predatory pricing thus harming competitors.
- e) There must not be any legitimate business reasons which might explain the allegedly abusive behaviour. This last criterion constitutes essentially

the flip-side of d) above: Either there are legitimate business reasons in which case the behaviour does not constitute an abuse, or the behaviour is abusive which precludes the possibility of there being any legitimate business reasons.

In particular in relation to predatory pricing, the following criteria have to be fulfilled cumulatively [cf. Radio- und TV-Markt St Gallen, RPW 2002/3, S. 431, Rz. 6 and Cornèr Banca SA/Telekurs AG, RPW 2004/4, S. 1002, Rz. 50]:

- f) The practice must be carried out "systematically" i.e. over a certain period of time and directed against particular competitors.
- g) The practice must be directed against a weaker actual or potential competitor. The competitor need not be weaker in the relevant market in which the abuse occurs but must rather be weaker in general.
- h) The practice must form part of a "plan" to eliminate a competitor (unless prices are below average variable costs in which case they are presumed abusive with no need to show a "plan", see 3.a below). In practice, this is often achieved through cross-subsidisation.
- i) The practice will not allow the alleged predator to maximise his profits in the short run.
- j) There will be a period of recoupment.

3. Please explain the circumstances under which a firm's pricing is, or may be, considered "predatory" in your jurisdiction, by responding to the following questions:

a. As part of your analysis, does the price have to be below one or more measures of cost? Yes/No

There is some indication in the cases that the price must be below marginal cost ("*Grenzkosten*") [cf. Espace Media Groupe/Berner ZeitungAG/Solothurner Zeitung, RPW 2003/1, S. 62, Rz. 22 and Swisscom ADSL, RPW 2004/2, S. 407, Rz. 160].

Elsewhere the SCC seemed to apply a test similar to the one used in the European Union, namely that prices below total cost ("*Selbstkosten*") are only abusive if accompanied by a plan to eliminate a competitor, whereas prices below average variable costs can "naturally" be presumed to be abusive [cf. Cornèr Banca SA/Telekurs AG, RPW 2004/4, S. 1002, Rz. 50].

Lastly, it should be noted that the LCart does not require prices to be below cost at all in order to be abusive (although prices below total cost may be an indication for abusive or predatory pricing) [cf. Cornèr Banca SA/Telekurs AG, RPW 2004/4, S. 1002, Rz. 50 f.].

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)			
<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)			

N/a

- b. For each cost measure employed, please provide the definition of the measure used in your jurisdiction.**

N/a

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

N/a

- 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?**

N/a

- 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**

N/a

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? Yes/No**

N/a

- 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? Yes/No**

No.

- a. **If no, please explain.**

The secretariat of the SCC has indicated that predatory pricing can occur in a market in which the predator is not dominant. This principle was, however, never applied in practice [cf. Espace Media Groupe/Berner ZeitungAG/Solothurner Zeitung, RPW 2003/1, S. 62, Rz. 14].

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**

The behaviour must be "specific" or "targeted" (see under 2 above). According to the SCC, this seems to imply that the practice takes place over a certain period of time. No further guidance is, however, available from the decisional practice of the SCC.

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

N/a

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

N/a

- a. **Are cost data used? Yes/No**

Yes [cf. Espace Media Groupe/Berner ZeitungAG/Solothurner Zeitung, RPW 2003/1, S. 62, Rz. 34]

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

Yes [cf. Espace Media Groupe/Berner ZeitungAG/ Solothurner Zeitung, RPW 2003/1, S. 62, Rz. 34]

- b. **Are there circumstances when cost data of other firms can be used? Yes/No.**

Yes.

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

In a case involving the market for credit card acquiring by financial institutions, the SCC relied on cost data provided by the claimant. As the claimant was able to achieve a certain positive margin it was assumed that the defendant's margin would also be positive on the basis that the defendant's cost structure would be similar to that of the claimant [cf. Cornèr Banca SA/Telekurs AG, RPW 2004/4, S. 1002, Rz. 53].

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

N/a

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

There are *dicta* suggesting that prices below average variable cost give rise to the "natural presumption" that prices are predatory [cf. Cornèr Banca SA/Telekurs AG, RPW 2004/4, S. 1002, Rz. 50 f.]. However, it should be remembered that according to the wording of Article 7(2)(d) LCart prices do not have to be below cost at all in order to be qualified as abusive.

- 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 harbour” from a finding of predatory pricing for pricing above a particular cost benchmark? Yes/No**

Yes

- a. **If yes, please explain, including the terms of the safe harbour.**

An allegation of predatory pricing cannot stand if net prices are above those of competitors [cf. Télécom PTT/Flexnet, RPE 1997/3, S. 308, Rz. 25].

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**

Yes

If so:

- a. **Is this assessment conducted separately from the analysis of the firm’s market power and the predation? Yes/No**

An assessment of recoupment forms part of the overall test for predation (i.e. no predatory pricing without a period of recoupment) but it is independent from an assessment of market power [cf. Radio- und TV-Markt St Gallen, RPW 2002/3, S. 431, Rz. 6d].

- 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? Yes/No**

N/a

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

N/a

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

N/a

- 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? Yes/No**

N/a

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

N/a

- 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? Yes/No**

Yes

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

The LCart does not specify the type of intent and there are no precedents which might offer any relevant guidance either.

- 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**

Yes

- i. **If so, please explain.**

According to the wording of the LCart, prices need not be below cost to be predatory. This follows from the wording of Article 7(2)(d) LCart which outlaws "the under-cutting of prices or other conditions directed against a specific competitor". Therefore, as soon as a price-cut is "directed" against one or several competitors, that behaviour may be illegal even if the prices of the alleged predator are still above cost. Intent will therefore be necessary to show targeted behaviour without which an allegation of predation will fail.

11. **In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability? Yes/No**

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.**

N/a

Justifications and Defences

- 12. What type of justifications or defences, if any, are permitted for predatory pricing, e.g., an efficiency, meeting competition or objective necessity defence? Please explain and provide examples, as relevant.**

A defendant to an allegation of predatory pricing can raise the defence of "legitimate business reasons". Legitimate business reasons are primarily those which are based on economic or industrial theory. Examples for legitimate business reasons which have successfully been applied in predatory pricing cases are industry-wide practices which are also applied by non-dominant firms [cf. Espace Media Groupe/Berner ZeitungAG/ Solothurner Zeitung, RPW 2003/1, S. 62, Rz. 19] or economies of scale [cf. Swisscom AG, Swisscom Fixnet AG/Weko, RPW 2005/3, S. 505, Para. 5.4.5].

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

As a general rule, in administrative proceedings the SCC has to prove the constituents of a breach of Article 7 LCart on the balance of probabilities whereas in civil and criminal proceedings the standard is commonly acknowledged to be "beyond reasonable doubt" ("*nach richterlicher Überzeugung muss jeder vernünftige Zweifel ausgeschlossen sein*").

The burden of proof is generally on the party trying to derive a benefit from the facts to be proven. This means that in administrative proceedings, the burden of proof is on the SCC whereas in civil proceedings it is on the claimant. However, in both cases it is effectively upon the defendant to prove the existence of any defences or justifications [cf. Schweizerischer Buchhändler- und Verleger-Verband, Börsenverein des Deutschen Buchhandels e.V./ Wettbewerbskommission, RPW 2007/1, S. 129, Rz 10 ff.].

Enforcement

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

Please note that our answers below refer only to published cases.

- a. The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase).**

None to our knowledge which concerned solely or primarily predatory pricing abuses (rather than, for example, rebates). Two if cases concerning rebates etc are included [cf. Markt für Schlachtschweine - Teil A, RPW 2004/3, S. 674, Rz. 129 and Swisscom ADSL, RPW 2004/2, S. 407, Rz. 160]

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

None to our knowledge.

- 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").**

None to our knowledge

- 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 to our knowledge.

- 14. Does your jurisdiction allow private cases challenging predatory pricing? Yes/No.**

Yes

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

N/a

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

An allegation of predatory pricing can either be pursued by way of administrative claim brought by the SCC or as a civil claim brought by a party who suffered harm as a result of the allegedly abusive behaviour. The former can lead to administrative sanctions such as fines whereas the latter may lead to damages being payable to the claimant. Injunctive (interim) relief can be granted in both cases. Other than that, Swiss competition law also allows for criminal penalties to be imposed against recidivists (natural persons only). Imprisonment is, however, not foreseen as a sanction under Swiss competition law.

- a. If both, what are the differences in the criteria applied to these categories?**

N/a

- b. On what basis does the agency choose to bring a criminal or civil case?**

N/a

As to whether a case is pursued by the SCC following the administrative route or rather by the claimant himself through the civil courts, it should be noted that the SCC has a certain discretion to pursue only those cases the resolution of which is in the public interest. In many predatory pricing cases, in which a competitor feels aggrieved as a result of the

allegedly abusive pricing practices of another competitor, the "public interest" test is unlikely to be fulfilled. As a result, the SCC could (or should even) decline to follow up on a complaint by an allegedly aggrieved party, thus requiring the aggrieved to pursue the matter through the civil courts.

- 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.**

To our knowledge, there are no predatory pricing cases which proceeded beyond the preliminary phase. Of those, there is none which could be seen to be the leading case, going into any greater detail of the principle of predatory pricing than others.

- 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.**

In our opinion, predatory pricing has not so far played an important role in Swiss competition law (if anything, Switzerland is known for having prices which are too high rather than too low) and/or enforcement and we have no reason to believe that this will change in the foreseeable future.

- 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).**