

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.

As a new competition authority, we have not had any predatory pricing cases; our policy in this area is hence not well developed as yet

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.

Under Section 47 of the Competition Act, any conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in any market in Singapore is prohibited. Annex C of the CCS Guidelines on the Section 47 Prohibition provides more details on the CCS' approach towards the assessment of predatory pricing cases¹.

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

In respect of all forms of abuse of dominance cases, the prohibition applies only where:

1) the undertaking is dominant in a relevant market, either in Singapore or elsewhere

Generally, the CCS considers a market share above 60% as likely to indicate that an undertaking is dominant in the product and geographic market respectively. However, dominance could potentially be established at a lower market share, if other relevant factors such as the number of existing competitors, potential competitors, existence of powerful buyers and economic regulation provide strong evidence of market power. Similarly, market shares greater than 60% may not indicate dominance if entry is easy, for example.

¹ Available at http://www.ccs.gov.sg/NR/ronlyres/A67B68FC-DB6F-415B-9DF1-5A97FC6855A9/17206/s47_Jul07FINAL.pdf

2) the undertaking is abusing its dominance in a market in Singapore.

The CCS will consider the extent to which the allegedly abusive conduct harms competition. The CCS may also consider if the dominant undertaking is able to objectively justify its conduct to defend its legitimate commercial interest, not take more restrictive measures than are necessary to do so and demonstrate that its conduct is proportionate to the benefits produced.

Factors relevant to whether predatory pricing is taking place include pricing below the relevant measure of cost. Predation may be presumed if price is below average variable cost in the absence of objective justification for charging below AVC. Where price is above average variable cost but below average total cost, the CCS may also consider other evidence such as whether there is an intention to harm competition. The CCS may also consider the feasibility of recouping losses.

Please refer to answers to Qn 3 for more details with respect to the CCS' approach towards predatory pricing.

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)	√		Predation may be presumed in the absence of objective justification for charging below AVC.
<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)	√		If price is above AVC and below ATC, this may be evidence of predation; in

			determining if predation is taking (or has taken) place, the CCS may consider other evidence on whether the conduct is intended to harm competition.
<u>Other measure of cost (Please identify)</u>			

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

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- c. Is the same cost measure applied in all cases? **Not necessarily.**

Cost benchmarks used may differ according to the facts of each case. For example, in some cases, incremental costs may be a more appropriate benchmark.

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

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1. If no, over which of the dominant firm's sales can cost be compared?
- e. Could a firm's price above average total cost ever be found to be predatory? **Unlikely**
- i. If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement.

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.

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

a. If no, please explain.

It is not necessary for the dominant position, the abuse and the effects of the abuse, to be in the same market.

For a finding of infringement under the section 47 prohibition (against abuse of dominance), it suffices that the undertaking is found to be dominant in a relevant market, and that it is abusing its dominance in a market in Singapore. For example, an undertaking found to be dominant in a relevant market outside of Singapore, but which abuses that dominance to the detriment of competition in a market in Singapore through predatory pricing, will be subject to the section 47 prohibition.

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?

As a new competition authority, we have not had any predatory pricing cases; our policy in this area is hence not well developed as yet.

However, other relevant criteria may include the criterion mentioned above, the intention to eliminate a competitor, and the feasibility of recouping losses.

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.

a. Are cost data used?

i. If so, are cost data from the firm used?

b. Are there circumstances when cost data of other firms can be used?

i. If so, please specify the circumstances.

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

As a new competition authority, we have not had any predatory pricing cases; our policy in this area is hence not well developed as yet. The data or information that will be relevant is likely to depend on the individual case.

However, factors such as direct documentary evidence may be used to determine whether an undertaking intended to engage in predatory pricing. Internal documents or evidence from a credible witness may prove that an undertaking intended to harm competition.

The behaviour of the undertaking may also provide indirect evidence of its intention to engage in predatory behaviour. For example, if the dominant undertaking targeted price cuts against a competitor, while maintaining higher prices elsewhere, that might indicate predatory intent.

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

Predation may be presumed in the absence of objective justification for charging below AVC.

Some legitimate commercial reasons considered for the pricing of products below AVC include loss leading, where a retailer cuts the price of a single product in order to increase sales of other products, short run promotions, which involves selling below AVC for a limited period, especially where a new product is introduced to a market, or option value, where in response to an unexpected fall in demand, an undertaking incurs short run losses so as to maintain a presence in the market, in case demand returns to profitable levels.

- 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?
8. Is there a “safe harbor” from a finding of predatory pricing for pricing above a particular cost benchmark?
- a. If yes, please explain, including the terms of the safe harbor.

As a new competition authority, we have not had any predatory pricing cases; our policy in this area is hence not well developed as yet. However, if the price is above ATC, the CCS considers that this is unlikely to indicate predation.

9. Is recoupment (obtaining additional profits that more than offset profit sacrifices stemming from predatory pricing) required for a finding of liability under predatory pricing rules in your jurisdiction?

No, but it is one of the factors relevant to the CCS’ assessment.

If so:

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

- b. What factors are employed in assessing recoupment in your jurisdiction?
- c. Is there a specific recoupment calculation or amount to be shown? Yes/No
 - i. If so, what is this?
- d. Is there a relevant time period for recoupment? Yes/No
 - i. If so, what is it?
- e. Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? Yes/No
 - i. If so, please explain and provide relevant examples.
- f. What degree of likelihood of recoupment is required (*e.g.*, possibility or probability)?
 - i. Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment.

10. Is the firm's intent relevant in predatory pricing cases?

Yes, the firm's intent may be relevant.

- a. If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples. No cases as yet.
- b. If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment -- are not demonstrated, does intent matter?
 - i. If so, please explain.

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

As a new competition authority, we have not had any predatory pricing cases; our policy in this area is hence not well developed as yet. However, in general, the CCS takes on an effects-based approach in assessing cases, and will consider the extent to which competition is harmed, *e.g.* through the removal of an efficient competitor, limiting competition from existing competitors or excluding new competitors from entering the market.

- 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.

The CCS will consider some possible legitimate commercial reasons for pricing below AVC. They include loss leading, where a retailer cuts the price of a single product in order to increase sales of other products, short run promotions, which involves selling below AVC for a limited period, especially where a new product is introduced to a market, or option value, where in response to an unexpected fall in demand, an undertaking incurs short run losses so as to maintain a presence in the market, in case demand returns to profitable levels.

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

The onus is on the undertaking allegedly abusing its dominant position to demonstrate objective justification.

Enforcement

13. Please provide the following information for the past ten years (as information is available): N.A.
- a. The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase).
- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (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").
- 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.
14. Does your jurisdiction allow private cases challenging predatory pricing?
- 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?

It is a civil infringement.

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

Exclusive Dealing/Single Branding

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

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

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is hence not well developed as yet.

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.

Under Section 47 of the Competition Act, any conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in any market in Singapore is prohibited.

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

In respect of all forms of abuse of dominance cases, the prohibition applies only where:

1) the undertaking is dominant in a relevant market, either in Singapore or elsewhere

Generally, the CCS considers a market share above 60% as likely to indicate that an undertaking is dominant in the product and geographic market respectively. However, dominance could potentially be established at a lower market share, if other relevant factors such as the number of existing competitors, potential competitors, existence of powerful buyers and economic regulation provide strong evidence of market power. Similarly, market shares greater than 60% may not indicate dominance if entry is easy, for example.

2) the undertaking is abusing its dominance in a market in Singapore.

The CCS will consider the extent to which the allegedly abusive conduct harms competition. The CCS may also consider if the dominant undertaking is able to objectively justify its conduct to defend its legitimate commercial

interest, not take more restrictive measures than are necessary to do so and demonstrate that its conduct is proportionate to the benefits produced.

Exclusive Purchasing and Supply Arrangements

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

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is hence not well developed as yet. However, the CCS’ general approach is that it will consider the effects of the restraint on competition, rather than its form.

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

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is not well developed as yet. However, the CCS’ general approach is that it will consider the effects of the restraint on competition, rather than its form.

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

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

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is not well developed as yet. However, the CCS’ general approach is that it will consider the effects of the restraint on competition, rather than its form.

- 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?

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

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is not well developed as yet. It is likely to depend on the facts of the case.

- a. If so, how and why?

7. Might otherwise legal exclusive dealing/single branding arrangements be deemed abusive if they contain other provisions, *e.g.*, an “English Clause” (requiring *e.g.*, the customer to report any better offers to the supplier, and prohibiting the customer from accepting the offer unless the supplier does not match it), rights of first refusal (right of, *e.g.*, the supplier to enter into an

agreement with the customer according to specified terms, before the customer is entitled to enter into an agreement with a third party)?

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is not well developed as yet. It is likely to depend on the facts of the case.

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

Presumptions and Safe Harbors

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

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is not well developed as yet.

- a. If so, please identify the circumstances.
- b. Is the presumption rebuttable?
 - 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?

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

Effects

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

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is not well developed as yet. However, the CCS generally takes an effects-based approach in assessing cases.

- a. How is market foreclosure defined in your jurisdiction?
- 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.
- c. What evidence is used to demonstrate these effects and must the effects be actual, likely or potential effects?

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

No.

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

Justifications/Defenses

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

In assessing cases of alleged abuse, the CCS may consider if the dominant undertaking is able to **objectively justify** its conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the buyer. However, the dominant undertaking will still have to show that it behaved in a proportionate manner in defending its legitimate commercial interest. It should not take more restrictive measures than are necessary to do so. The CCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct. It will still be necessary for a dominant undertaking to show that its conduct is proportionate to the benefits claimed. Such conduct will not be allowed if its primary purpose is to harm competition.

- 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?

As stated in the answer to the question above, the CCS may consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct. It will still be necessary for a dominant undertaking to show that its conduct is proportionate to the benefits claimed. However, as a new competition authority, we have not completed any exclusive dealing cases; therefore policy in this area is not well developed as yet.

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

Please see preceding answer.

- c. Is there a meeting competition defense?

As a new competition authority, we have not completed any exclusive dealing cases; policy in this area is hence not well developed as yet.

- 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?

The onus is on the undertaking allegedly abusing its dominant position to demonstrate objective justification.

Enforcement

13. Please provide the following information for the past ten years (as information is available): [N.A.](#)
 - a. The number of exclusive dealing/single branding cases your agency reviewed (investigated beyond a preliminary phase).
 - b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (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 exclusive dealing/single branding rules (*i.e.*, "clearance decisions").
 - 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.
14. Does your jurisdiction allow private cases challenging exclusive dealing/single?
 - 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. [N.A.](#)
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. [N.A.](#)