

## Switzerland

### 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.**

The most relevant provisions regarding predatory pricing in the Swiss Cartel Act (LCart) are Article 7(1) and 7(2):

"Article 7: Unlawful practices of enterprises having a dominant position

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.

...

2. The following in particular may constitute unlawful practices:

...

- the under-cutting of prices or other conditions directed against a specific competitor;

..."

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

If the LCart is applicable, abuse of dominant position is a relevant concept in cases of predatory pricing. In a predatory situation the dominant firm has power in a particular market and can abuse it by carrying out a "predatory plan" against a specific competitor or competitors (behavior does not have a business justification).

**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**

The LCart does not specific measures of cost but prices might be part of the analysis.

- i. *If yes, please identify which of the following measures is/are used, as applicable:*

Cost benchmark/measure	Used?		Comment
	Yes	No	
<u>Below marginal cost</u> (the cost of producing one more unit of output)			
<u>Below average variable cost</u> (cost that varies with output)	X		Areeda and Turner 's test is generally the most common tool in this kind of investigations and would it probably also be for the swiss authority. This method considerates predatory prices when it is impossible for enterprises to cover the average variable cost nor the total cost.
<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)			
Other measure of cost			

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

An abuse of a dominant position is given, when enterprises use their financial capacity to define a price below the average variable cost, that means, costs change when the quantity of the product changes. The method assumes that when an enterprise can not cover the average variable costs, it won't be able to cover the costs.

- c. *Is the same cost measure applied in all cases?* Yes/No Not applicable

- i. *If different cost measures can be applied, for example on the basis of industry, please explain and provide examples, as available.* Not applicable
- 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.* Not applicable

- d. ***If price must be shown to be below cost, for which of the dominant firm's sales must this be shown?*** Not applicable
- 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 Not applicable
1. ***If no, over which of the dominant firm's sales can cost be compared?*** Not applicable
- e. ***Could a firm's price above average total cost ever be found to be predatory?*** Yes/No Not applicable
- i. ***If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement.***  
Not applicable
- 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.*** Not applicable

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.***

Predatory pricing can take place in a market, in which the predator is not a dominant firm.

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?***

In a predatory plan, the behavior must address a specific competitor (competitors) for a certain period of time, because in the future the enterprise can recover "*the investment*" and obtain higher economic profits. In this sense, there is no further guidance for the definition of a time period.

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

In predatory practices it is considered as normal that enterprise shows a specific behavior and this is usually characterized by various behaviors, for example: decrease in price, not remunerable price levels, specific intention to restrict or eliminate a specific competitor, limited duration of the practice, future possibility of recuperation of economics losses, and anticompetitive behavior has to address a specific enterprise or group of enterprises.

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.***

The Swiss authority relied on cost data provided by the claimant in a case where the claimant was able to achieve a certain positive margin so that it was assumed that the defendant's margin would be positive as well.

***c. What other data or information is used, if any? Please provide examples as relevant.*** Not applicable.

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

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

In a predatory plan the behavior has to carry out different conditions, prices are part of the evidence but not sufficient. According to Art 7 (2. d.) LCart prices do not have to be below a specific level to be qualified as abusive. In each case it is necessary to elaborate a complete economic analysis and to distinguish among anticompetitive behavior, i.e. "a plan of competitors elimination", or an other temporary business situation, for example price war.

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

Predatory analysis is a combination of the following aspects: entry barriers to the market, buyer power of the enterprise, predatory plans and selective behavior, cost analysis, and possibilities of recovering "the investment". In this sense, it is very important to understand the effective market conditions.

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

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

There is a special situation where prices can be below average marginal cost in total, but superior average marginal cost variable. In this case the situation is not considered as abusive, because enterprises can define prices, search for elimination of competitors and eliminated enterprises which don't have financial capacity to resist to the competition.

Furthermore, dominant enterprises can carry out a specific practice, with the intention of selling its products with more favorable conditions for a strategic conduct. An other possibility is when a dominant enterprise reduces its profits for a short amount of time, because there is a price war, stocktaking accumulation, or new products.

***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***

***If so:***

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

Predation analysis is an integrated process, as different aspects have to be evaluated, such as market power, decrease in prices, not remunerable price levels, specific intention of

reduction or elimination of a specific competitor, limited duration of the practice, *possibility of recuperating future economic losses*, and anticompetitive behavior must be addressed to a specific enterprise or group of enterprises.

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

The possibility of recouping profits is a basic condition, that forms part of a “predatory plan” because the enterprise can be sure that after competitors are eliminated, future profits will be higher than the present loss, but there is no specific method to weigh this up.

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

i. *If so, what is this?* Not applicable.

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

i. *If so, what is it?* Not applicable

**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.* Not applicable

**f. What degree of likelihood of recoupment is required (e.g., possibility or probability)?**

ii. *Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment.*  
Not applicable

**10. Is the firm’s intent relevant in predatory pricing cases? Yes/No**

**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 include detailed different types of intents or evidence in this matter.

**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.*

Predatory behavior is a combination of different actions against one or more competitors, not exclusively when pricing exceeds a certain cost benchmark.

**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.* Not applicable

## ***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. For example,**

Dominant enterprises can carry out a specific business practice, if the practice is justified by an economic theory, i.e. "legitimate business reasons", e.g. a dominant enterprise can reduce its profits temporarily because there's a price's war, stocktaking accumulation, or new products.

**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?**

As a general rule, the Swiss Competition Commission has to prove clearly what the real market and company situation is, that means, the authority needs to obtain the relevant information in order to prove an infringement of Art 7 LCart.

## ***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).** None

**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

**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

**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 predatory pricing? Yes/No.**

**a. Please provide a short description of representative examples, as available.** Not applicable.

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

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

In predatory cases there are two possibilities, either the competition authority can file an administrative claim or the affected party can file a civil one.

The LCart specifies that in case of a violation of Article 7, the enterprise has to pay up to 10% of its sales in Switzerland, within the past three fiscal years. In case of violation of a friendly agreements or administrative decision the enterprise has up to 10% of its sales in Switzerland

within the past three fiscal years. However, imprisonment is not foreseen as a sanction under the LCart.

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

Not applicable.

**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.**

Up to now all predatory pricing cases were finished within the preliminary phase. That is why there are not any representative cases.

**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.**

To date, predatory pricing cases did not play a relevant role in our investigations. The Swiss Competition Commission does not expect any major developments or changes within the following years regarding this tendency.

**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.

### **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.**

The most relevant provisions regarding exclusive dealing/single branding in the Swiss Cartel Act are Article 7 and Article 5.

*“Article 7: Unlawful practices of enterprises having a dominant position*

*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.*

*2. The following in particular may constitute unlawful practices:*

- refusal to deal (e.g. refusal to supply or buy goods);...*
- the imposition of unfair prices or other unfair conditions of trade; ....”*

“Article 5: Unlawful agreements

...

4. The elimination of effective competition is also presumed in the case of agreements between enterprises at different levels in the market regarding fixed or minimum prices as well as in the case of agreements in distribution contracts regarding the allocation of territories in so far as sales by other distributors into these territories are not permitted...”

*In addition, the Notice on the Competition Law Treatment of Vertical Agreements (Vertical Notice) 2 July, 2007)<sup>1</sup> categorizes in a particular manner the general conditions under which specific types of agreements may be justified by economic efficiency.*

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

If the LCart is applicable, the abuse of a dominant position is a relevant concept in cases regarding exclusive dealing. In the mentioned situation the dominant firm has the power in a particular market to abuse its position against a specific competitor (competitors) without legitimate business reasons.

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<sup>1</sup>Notice on the Competition Law Treatment of Vertical Agreements, 2 July 2007  
<http://www.weko.admin.ch/publikationen/00213/index.html?lang=en>.

## **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).**

An exclusive distribution system is a system in which an enterprise grants exclusive sales rights to a specific enterprise on its products or services.

According to the Vertical Notice more than 80% of the annual sales is a considerable obligation of non-competition.

However, this rule is not applicable in cases of abuse of a dominant position (Article 7 LCart).

**4. Is the duration of the arrangement relevant to your assessment? Yes/No**

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

The Vertical Notice indicates, that an anticompetitive situation can be considered, when the arrangement lasts for more than five years or throughout an undefined time period. This rule is however not applicable in cases of abuse of a dominant position (Article 7 LCart).

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

The competitive effects need not be analyzed if the enterprise does not overtake more than 15% of market and does not have any accumulative effects of parallel networks (cases of less importance). There are no accumulative effects if only 5% - 30% of the market is covered with parallel networks.

However, this rule is not applicable in cases of abuse of a dominant position (Article 7 LCart).

**6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier? Yes/No Not applicable**

**a. If so, how and why? Not applicable**

**7. Might otherwise legal exclusive dealing/single branding arrangements be deemed abusive if they contain other provisions, e.g., an “English Clause” (requiring e.g., the customer to report any better offers to the supplier, and prohibiting the customer from accepting the offer unless the supplier does not match it), rights of first refusal (right of, e.g., the supplier to enter into an agreement with the customer according to specified terms, before the customer is entitled to enter into an agreement with a third party)? Yes/No Not applicable**

**a. If so, please explain and provide examples. Not applicable**

## **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.**

In general, exclusive dealing arrangements are presumed illegal, when the above mentioned manner of distribution decreases the competition and no efficiency justification is given.

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

**i. If so, what must be shown to rebut the presumption?**

An agreement can be justified by efficiency considerations, for example by improving the production chain, or improving coordination among enterprises. If there is an agreement that evidently affects competition and there are no grounds of economic efficiency, the agreement is unlawful.

**9. Is there a "safe harbor" from a finding of liability under your single branding/exclusive dealing provisions? Yes/No**

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

The Vertical Notice stipulates that verticals are considered justified if the market share of the supplier does not exceed 30%, however, other specific conditions need to be considered and this rule is not applicable in cases of abuse of a dominant position (Article 7 LCart).

### **Effects**

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

**a. How is market foreclosure defined in your jurisdiction? Not applicable**

**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. Not applicable**

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

Not applicable

**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.**

### **Justifications/Defenses**

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

- 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?**

An agreement can be justified by economic efficiency grounds:

- when it is necessary to reduce production or distribution costs,
- to improve products or production processes,
- to promote research into or dissemination of technical or professional know-how,
- to exploit resources more rationally,
- when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.

The Vertical Notice sets out a number of specific justification grounds.

However, this is not applicable in cases of abuse of a dominant position (Article 7 LCart).

- b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defense without consideration of harm?** Not applicable
- c. Is there a meeting competition defense?** Yes/ No. Not applicable  
**ii. 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?**

As a general rule, the Swiss Competition Commission has to prove clearly what the actual situation in the market and the one of the enterprises is, which means, that the authority needs to obtain the relevant information in order to be able to evaluate whether the behavior infringes the LCart or not.

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

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

- a. ***Please provide a short description of representative examples, as available.*** Not applicable

***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.***

Not applicable

***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.***

Not applicable