

South Africa

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.

Note:

The Competition Commission has not referred any cases to the Competition Tribunal on predatory pricing. However, one airline carrier lodged an interim relief application with the Competition Tribunal in about 2000 alleging, amongst other things, that its competitor (a dominant airline carrier in SA) was pricing below cost.¹

The analysis below concerns mostly the cases which the Competition Commission has investigated and either non-referred or which are still under investigation and the abovementioned case decided by the Competition Tribunal.

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 8(d)(iv) of the South African Competition Act 89 of 1998, as amended, ("the Competition Act") provides as follows:

8. Abuse of dominance prohibited

It is prohibited for a dominant firm to -

- (a)*
- (b)*
- (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or*
- (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act -*

¹ Case 92/IR/Oct00, available on www.comptrib.co.za

- (i)
- (ii)
- (iii).....
- (iv) *selling goods or services below their marginal or average variable cost;...*

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

- Dominance, as defined in section 7 of the Competition Act, based on market share and market power (see response to previous UCWG questionnaire on measuring dominance)
- The sale of goods or services below their marginal or average variable cost;
- Anti-competitive effect must outweigh the technological, efficiency or other pro-competitive gain

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

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)	yes		
<u>Below average variable cost</u> (cost that varies with output)	yes		
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)	Yes, if under 8(c)		
<u>Below average long run incremental cost</u> (average variable costs and product-specific fixed costs)	Yes, if under 8(c)		
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)	Yes, if under 8(c)		

Other measure of cost (Please identify)	Yes, if under 8(c)		
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According to the Competition Tribunal in the matter between Nationwide Airlines and South African Airways (92/IR/Oct00): *‘The burden on the complainant in a complaint of predatory behavior is higher under this section [section 8(c)] therefore than under section 8(d)(iv). On the other hand the complainant is not bound to follow the prescribed cost formula suggested in 8(d)(iv). In other words if a complainant, relying on section 8(c), can show that a respondents costs are below some other appropriate measure of costs not mentioned in the section it may prevail provided it adduces additional evidence of predation beyond mere evidence of costs. To determine what that should be we need to examine the phenomenon of predatory pricing and then examine some of the approaches taken in other jurisdictions.’*

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

There is no definition provided for marginal cost or average variable cost in the Competition Act. However, we take guidance from foreign case law and the literature.

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

No.

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

According to the Competition Tribunal: *‘this price-cost relationship [for a test under 8(c)] need not be the one referred to in 8(d)(iv) but should have some support in the literature as an appropriate measure of costs’*. Therefore, any cost measure will be considered as long as it can be demonstrated to be an appropriate measure of cost.

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.

NA

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

No, the sales being assessed depends on the context of the case.

e. Could a firm's price above average total cost ever be found to be predatory? Yes/No

No

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? Yes/No

Not necessarily, although this has not been tested.

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

Duration and continuity of the behaviour are not specified elements which must be proven in terms of the Competition Act. However, in weighing up the anti-competitive effect of the conduct against the pro-competitive benefits arising from it, the duration and continuity of the behaviour will be taken into account.

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

a. Are cost data used? Yes/No

Yes

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

Yes, and from comparable firms, including the complainant

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

Yes

i. If so, please specify the circumstances.

The complainant, although generally an 'as efficient competitor' standard would be used, but this has not been tested in any detail.

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

Following international standards, for the pricing to be exclusionary and have an anti-competitive effect (and for the dominant firm to have market power) there would be expected to be some barriers to entry. In the Tribunal's words, in the 'logic of predation' consumers would ultimately be forced to pay supra-competitive prices in future following successful predation, although the Tribunal did not adopt a formal recoupment test. Instead, the assessment turns rather on the definition of an exclusionary act as one that impedes or prevents a firm entering into, or expanding within, a market.

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

Yes

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

The presumption is irrebuttable. However, the firm concerned can provide technological, efficiency or other pro-competitive gains which justify its pricing below cost. *By way of example a respondent could explain that its conduct is justified in order to meet the competition, introduce new products or get rid of obsolete stock.* (92/IR/Oct00)

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? Yes/No**

Yes

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

If the pricing is above the cost measures then it would not meet the test under 8d(iii). It could, in principle, still be subject to 8(c)

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**

No. According to the Competition Tribunal: *'We would prefer not to insist on recoupment as a requirement as do the U.S. courts. For instance a firm operating in multimarkets may use predation as a form of investment in a reputation for being a tough competitor. Thus a predation strategy in market A would send a message to its competitors not only in market A, but also in markets C, D and E. Predation here has a broader strategic value beyond any recoupment it may attain in market A.'* (92/IR/Oct00)

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

No, effect is relevant.

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

No

- 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. If the conduct is evaluated under section 8(d)(iv), no further effects need to be shown. The Competition Tribunal has previously found that the practices listed under section 8(d) are per se anti-competitive. If the conduct is evaluated under section 8(c), then further anti-competitive effects would need to be shown. Evidence of recoupment would meet this test, as well as any other harmful effects. Under section 8(c), *‘First the complainant must establish that the respondent is pricing below cost for a sustained period. This price-cost relationship need not be the one referred to in 8(d)(iv) but should have some support in the literature as an appropriate measure of costs. Secondly there must be some additional evidence of predation. We do not wish to be prescriptive as to what this should be, but evidence of recoupment would meet this second test.’* (92/IR/Oct00)

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.**

‘By way of example a respondent could explain that its conduct is justified in order to meet the competition, introduce new products or get rid of obsolete stock.’ (92/IR/Oct00)

- 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 noted by the Tribunal, *‘Section 8(c) is the residual category or “catch all” of abuse practices. Unlike section 8(d) where a closed list of abuses is catalogued this section is non-specific and flexible. The crucial difference is that under 8(c) the onus is on the complainant to establish that the anti-competitive nature of the act “outweighs the technological, efficiency or other pro-competitive gain”*

The burden on the complainant in a complaint of predatory behavior is higher under this section therefore than under section 8(d)(iv). On the other hand the complainant is not bound to follow the prescribed cost

formula suggested in 8(d)(iv). In other words if a complainant, relying on section 8(c), can show that a respondents costs are below some other appropriate measure of costs not mentioned in the section it may prevail provided it adduces additional evidence of predation beyond mere evidence of costs. (92/IR/Oct00)'

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).**
 - 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.**

As noted, there has only been the one case decided as an Interim Relief application. There have been other complaints subject to an initial screening assessment, but not cases that have been subject to a full investigation.

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

Yes

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

The one case referred to here was brought by the private complainant as an application for Interim Relief.

Where the Competition Commission has non-referred a case i.e has found that the conduct did not contravene the Act, the complainant may refer the case to the Tribunal on its own.

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

Civil

- 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.

The one case referred to above related to air travel and specifically a complaint by an airline (Nationwide) that the dominant player in the local market, and specifically on three city pairs (SAA) had not increased its prices as costs had increased and was pricing below cost. The ruling is available at: <http://www.comptrib.co.za/comtrib/comtribdocs/8/92IROCT00.pdf>

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.**
 - 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.

Note: this is not a well developed area. The answers given below are thus limited to the legal provisions in the Competition Act.

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 8:

It is prohibited for a dominant firm to -
(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –
(i) requiring or inducing a supplier or customer to not deal with a competitor;

Other sections which could apply:

Section 5(1) of the Act states that:

An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

Section 8(c) of the Act is also relevant in this respect and is quoted above.

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

Yes, is relevant to anti-competitive effect

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

No

 - 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)? Yes/No**

No

 - 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? Yes/No**

No
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.**

Effects

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

Yes, in terms of there being substantial prevention or lessening of competition (under section 5(1) or an exclusionary act (under Section 8(c))

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

Technological, efficiency or other pro-competitive defenses are available to a dominant firm in terms of section 8(c) and 8(d)(i) of the Competition Act.

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

No

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

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).**
 - 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? Yes/No**

Yes

 - 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.**
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.**