UDO UDOMA & BELO-OSAGIE

Predatory Pricing and Abuse of Dominance Under Nigerian Competition Law

Yinka Edu
Partner

Tobechi Nwokocha
Senior Associate

Omeiza Alao
Associate

Introduction

For many Nigerian businesses, pricing is no longer only a commercial decision; it may also raise consumer protection, reputational and competition law considerations. For consumer-facing businesses in Nigeria, including those in the fast-moving consumer goods sector, pricing decisions such as discounts, rebates, promotions and regional price cuts may raise competition law questions where the business has significant market power. The ability to set or manipulate prices in ways that distort the market, rather than reflect it, lies at the heart of what competition law describes as an abuse of a dominant position. Predatory pricing is one form of such abuse, and involves a dominant business using below-cost pricing as an exclusionary strategy against competitors. In this article, we shall discuss predatory pricing under Nigerian law and the prohibitions under the Federal Competition and Consumer Protection Act 2018 ("**FCCPA**") and its subsidiary legislation. This article discusses how predatory pricing is distinguished from legitimate competitive pricing, and reviews the framework which guides the Federal Competition and Consumer Protection Commission ("**FCCPC**" or the "**Commission**") in its investigations and enforcement of the FCCPA.

What is Predatory Pricing?

Predatory pricing involves setting the price of a product below an appropriate measure of cost, with the effect or intention of incurring short-term losses for a period sufficient to eliminate or deter competitors. This conduct is performed with the expectation that the undertaking will thereafter recoup its losses by charging higher prices than would have prevailed without the predatory behaviour. By absorbing losses that a competitor with a smaller market share and financial resources cannot sustain, the dominant undertaking seeks to force its rival out of the market or deter potential entrants from competing in the relevant market.

The strategy is rational only where two conditions are met: first, the dominant undertaking must be capable of sustaining the period of loss-making longer than the target competitor; and second, the market must be structured in a way that makes future recoupment of those losses a plausible prospect. Once the dominant undertaking has been able to suppress competition, it is able to recover its losses by raising the price of its goods or services significantly, at the expense of the consumers it had initially appeared to benefit. Thus, although the strategy appears to favour consumers in the short term, by making products cheaper, the long-term effect is negative for both the consumer and the market.. A good example of this is the Qualcomm case, which was investigated by the European Commission. Qualcomm was the dominant supplier of UMTS baseband chipsets and sold certain chipsets to Huawei and ZTE below cost price, a pricing position it could sustain by virtue of its substantial financial resources and market position. Internal documents recovered during the investigation revealed the

purpose explicitly, with communications showing that Qualcomm aimed to secure a 100% share at Huawei and to eliminate its main competitor, Icera, from the market entirely.[1]

Predatory Pricing vs. Competitive Pricing

The challenge in any predatory pricing analysis is that low prices are, in the ordinary course, a sign of healthy competition rather than a signal for anticompetitive conduct by a dominant undertaking. An undertaking that reduces its prices in response to a new entrant, or that sets introductory prices to build market share for a new product, engages in behaviour that is more likely to be deemed competitive. There is, therefore, a thin line between predatory pricing and competitive pricing.

The analytical tool most widely used to make this distinction is the relationship between price and cost. An undertaking that prices above its relevant cost benchmark, however that benchmark is defined, is, in principle, recovering its costs and therefore competing on the merits. On the other hand, an undertaking that sets its price below that benchmark is incurring losses that only make commercial sense if the purpose is to inflict greater losses on a smaller market competitor. The relationship between price and cost is therefore the starting point for the analysis. Different jurisdictions, however, have adopted varying approaches to determining which cost benchmark is most appropriate, and the choice of benchmark can be decisive in whether a dominant undertaking's conduct is found to be predatory or legitimate. The three commonly used benchmarks are: (i) Average Variable Cost (AVC); (ii) Average Total Cost (ATC); and (iii) Average Avoidable Cost (AAC).

Under the AVC approach, the relevant cost benchmark is limited to those costs that vary directly with the level of output, such as raw materials, fuel and labour. If a dominant undertaking prices below these costs, it is generally regarded as the clearest possible indicator of predatory intent, as the likely rationale would be to harm a competitor because the undertaking loses money on every additional unit sold. The most likely explanation is that the pricing is intended to harm a competitor rather than compete on the merits.

Under the ATC approach, the cost measure is broader. It includes both variable costs and a proportion of the undertaking's fixed costs, representing the full cost of producing each unit. Pricing below this level is more ambiguous and is not automatically considered predatory. Businesses may legitimately price between AVC and ATC for commercial reasons, such as clearing excess inventory or responding to temporary market conditions. However, where a dominant undertaking deliberately maintains below-ATC prices to target a particular competitor or that competitor's customers, the conduct is more likely to be regarded as predatory.

[1] See Qualcomm Inc v European Commission (Case T-671/19). The General Court upheld the Commission's finding of predatory pricing and confirmed a fine of EUR 238.7 million, making it the most significant concluded predatory pricing decision in over a decade.

The AAC approach asks a different question. Instead of considering the undertaking's total production costs, it examines the costs that the undertaking would have avoided if it had not produced the output in question. These include variable costs and any fixed costs that are specific to the relevant product line, but exclude costs that would have been incurred regardless of whether the output was produced. AAC, therefore, focuses on the incremental costs associated with the allegedly predatory sales.

Accurately identifying these cost measures is essential because they help distinguish predatory pricing from legitimate price competition. Different jurisdictions rely on different cost measures when determining whether pricing by a dominant undertaking is unlawful.

Predatory Pricing under Nigerian Law

The FCCPA prohibits any abuse by one or more undertakings of a dominant position in a market. An undertaking is considered dominant where it is able to act independently of its customers, consumers or competitors, and enjoys a position of economic strength enabling it to prevent effective competition in the relevant market.[2] For the dominance thresholds, the FCCPC's Abuse of Dominance Regulation 2022 ("**ADR 2022**") presumes single-firm dominance at a market share of 40% or above, with collective dominance presumed at 50% for three or fewer undertakings, or two-thirds for five or fewer undertakings.

Dominance is not, in itself, unlawful; it is the abuse of that dominant position that the Act prohibits. Thus, for the question of predatory pricing to be relevant, the undertaking engaging in such conduct must have a dominant position within the relevant market.

Under the FCCPA, predatory pricing is treated as a form of exclusionary abuse. Section 72(2)(d)(iv) specifically refers to the sale of goods or services below their marginal or average cost." In simple terms, the concern is that a dominant undertaking may deliberately sell below cost, not as a normal commercial discount, but as a strategy to weaken or exclude competitors.

The ADR 2022 gives further guidance on how the FCCPC may assess this conduct. It recognises that predatory pricing may be direct, through an ordinary price reduction, or indirect, through discounts, rebates or similar pricing mechanisms. The FCCPC is required to consider whether the undertaking has incurred losses that it could reasonably have avoided, when compared with other commercially sensible alternatives that would have been more profitable but for the objective of eliminating competitors.

This approach suggests that the ADR 2022 uses AAC as the main cost benchmark for assessing predatory pricing.[3] Where a dominant undertaking prices below its AAC as part of a short-term

[2] FCCPA, section 70(1)-(2).
[3] ADR 2022, regulation 7.

strategy, subject to market conditions, the FCCPC may presume that the conduct is predatory.[4] Importantly, the ADR 2022 provides that the FCCPC does not need to prove that the dominant undertaking actually recouped, or was likely to recoup, the losses it incurred from below-cost pricing.[5] This reduces the evidentiary burden on the FCCPC, while increasing the compliance risk for dominant undertakings. In practice, the FCCPC is likely to look at factors such as internal documents showing an exclusionary strategy, the impact on equally efficient competitors, whether competitors could have entered or remained in the market absent the conduct, and how long the low prices were maintained. At the same time, not every low price will be treated as predatory. The FCCPC may accept that a low price is sustainable, rather than predatory, where the dominant undertaking is able to maintain it over a significant period.[6] The ADR 2022 does not, however, clarify the length of time that may be considered "significant".

A dominant undertaking can escape liability by relying on the efficiency defence in section 72(3) of the FCCPA, which excuses otherwise abusive conduct where it improves production or distribution, passes a fair share of the resulting benefits to consumers, is indispensable to those gains, and does not eliminate competition in a substantial part of the market. On this note, the FCCPC recognises an undertaking's need to sell excess, obsolete or perishable products at below-cost prices or their use of below-cost promotional pricing to induce customers to try a new product as a pro-competitive rationale for low pricing.

The penalties available upon a finding of predatory pricing are considerable. Administrative fines of up to 10% of annual Nigerian turnover may be imposed, with the base sum at 1% of the undertaking's annual turnover.[7]

FCCPC and Predatory Pricing

There is yet to be any public information available regarding entities found to have engaged in predatory pricing, and the FCCPC has not yet issued a published predatory pricing decision. This does not mean that the FCCPC is less concerned with the pricing strategies of dominant undertakings. The FCCPC's record in adjacent areas of single-firm conduct demonstrates its willingness to investigate dominant undertakings in sectors in which below-cost pricing concerns are most likely to crystallise. The FCCPC has been particularly sensitive to the pricing strategy adopted in the aviation, cement and telecommunications industries, especially following sustained public concern over the concentration of market power. The immediate concern in those sectors relates to excessive pricing

---

[4] ADR 2022, reg 13(4)(a).
[5] This stands in deliberate contrast to the position adopted by the United States Supreme Court in *Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 U.S. 209 (1993),* which treats recoupment probability as an indispensable element of the plaintiff's case. Rather, Nigeria's position is similar to that of the European Union and South Africa.
[6] ADR 2022, Regulation 13(6)(b).
[7] The Federal Competition and Consumer Protection Commission (Administrative Penalties) Regulation, 2020, Schedule 1.

rather than predatory pricing. However, the structural conditions — high concentration, high entry barriers and vertically integrated supply chains — are precisely those in which a dominant producer might, in the future, deploy selective below-cost pricing to discipline a regional entrant or deter imports.

Predatory pricing should be distinguished from other pricing-related abuses. The FCCPA expressly recognises certain pricing abuses, including excessive pricing and below-cost pricing. Other pricing strategies, such as discriminatory pricing, exclusionary rebates, bundled pricing or margin squeezing, may also raise concerns where they amount to an abuse of dominance or have the effect of foreclosing competitors. Predatory pricing is specifically concerned with below-cost pricing used as a weapon of exclusion.

Conclusion

Although the FCCPC has not yet issued a published predatory pricing decision, this should not lead dominant undertakings to conclude that the risk of enforcement is remote or theoretical. The legal framework is in place, the FCCPC has demonstrated a clear willingness to investigate single-firm conduct across concentrated sectors, and the ADR 2022 provides the Commission with a detailed and workable set of tools to assess pricing behaviour against established cost benchmarks. The question for dominant undertakings is therefore not whether the FCCPC will act, but whether they are prepared for the scrutiny that may follow when it does.

This publication has been authored by the Competition and Antitrust team of Udo Udoma & Belo-Osagie. The team is well-placed to provide companies with the necessary guidance and assistance to ensure compliance with the Federal Competition and Consumer Protection Act and the Federal Competition and Consumer Protection Commission's policies and directives.

AUTHORS

Yinka Edu (Partner), Tobechi Nwokocha (Senior Associate), Omeiza Alao (Associate)