Predatory Pricing in Nigerian Competition Law

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Introduction

Competition laws are designed to enhance market competitiveness, ultimately reducing consumer prices and improving consumer welfare. On these terms, predatory pricing may appear as a paradox, because a predatory pricing claim asserts that a low price is anticompetitive. However, this so-called paradox is not profound. The traditional theory of predatory pricing is quite straightforward.

The three critical elements in Nigerian law are (a) pricing theory that fails at least one of the three tests, (b) dominance in the market and (c) consumer harm. These are rational elements that are welcome to separate illegal predatory pricing from pro-consumer competitive pricing, as the Air Peace saga will show.

In this article, we examine the concept of predatory pricing, the various theories of analysing predatory pricing, and predatory pricing under Nigerian law.

What is Predatory Pricing?

Predatory pricing refers to the practice of selling goods at low rates to push rivals out of the market, discourage new entry, and monopolize the market.[1] It typically involves two phases. During the first phase, the predator would price its product significantly low so that rival companies would not be able to sell at that price or so that if they sell, they will incur losses and leave the market. If the predator succeeds under the first phase, the predator would, in the second phase, be able to charge supra-competitive prices and earn constant excess revenues and profits in the market. Most predators will in fact not go on to the second phase because regulators will harass them and dead rivals will come back to life.

For predation to be rational, there must be some expectation that these present losses (or foregone profits), like any investment, will be made up by future gains. This implies that the predator has some reasonable expectation of gaining exploitable market power following the predatory episode and that profits of this later period will be sufficiently great to warrant incurring present losses or foregoing present profits. The theory also implies that some method exists for the predator to outlast its victim(s), whether through greater cash reserves, better financing, or cross-subsidisation from other markets or other products.

What Does Not Constitute Predatory Pricing?

Predatory pricing is different from typical competitive price wars or price reductions.[2] For example, smaller or new players offering temporary, deep discounts would not be considered predatory as they may not drive bigger firms out of the market. It is commonly viewed that predation can only be a rational strategy for a very dominant company, that is, a company with a very high market share.[3]

Conversely, a firm can reduce its product price for a variety of reasons. It can reduce the price because of real or ostensible variations in the operational cost or consumer demand for the product. Also, a company can reduce the price of its product as a marketing strategy.

Courts have also acknowledged the difficulty in determining whether or not a firm's reduction in the price of its product is predatory. In ***Brook Group Ltd v. Brown & Williamson Tobacco Corp.*** (509 U.S. 209 (1993)), the United States Supreme Court stated thus: "*the mechanism by which a firm engages in predatory pricing-lowering prices—is the same mechanism by which a firm stimulates competition;*

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[1] Daniel A Crane, 'The Paradox of Predatory Pricing' (Cornell Law Review) 2005 <https://scholarship.law.cornell.edu/clr/vol91/iss1/1 > accessed June 10th 2024.

[2] Patrick Bolton, Joseph F Brodley and Michael H Riordan, 'Predatory Pricing: Strategic Theory and Legal Policy – A Response to Critique and Further Elaboration' (2001) <https://www.columbia.edu/~mhr21/papers/bbr-response.pdf > accessed February 22nd 2025.

[3] *Ibid*.

because cutting prices in order to increase business often is the very essence of competition… Mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect.[4]

The Economics of Predation—Evaluating Below-Cost Pricing

Generally, it is difficult to ascertain whether or not a firm's reduction of the price of its product is geared toward attaining monopoly or benefiting consumers. As a result, various cost-based models have been developed to assist the courts and antitrust agencies in determining predatory pricing practices.

In predatory pricing suits, the plaintiff must examine the defendant's costs and revenues. If the former exceeds the latter, the plaintiff may have established a *prima facie* case of predatory pricing. There are, however, a number of different ways to examine costs and revenues, and there have been ongoing debates, in particular, on how to measure the cost component.

1. Areeda-Turner Test/Marginal Cost Test

The most prominent test for analyzing alleged predatory pricing was introduced by Harvard law professors Areeda and Turner in 1975 and has been widely adopted by US courts. It is the standard test for identifying predatory pricing, despite being applied with variations.[5]

Prices are recognized as predatory if they are below the short-run marginal costs of providing the product or service. Marginal cost refers to the cost incurred by a company when producing an additional unit of output. Marginal cost is also known as incremental cost.

Thus, when a monopolist sells a product below marginal cost, it would be selling at a loss and such sale enhances the chances that other competitors would be squeezed out or foreclosed from the market on grounds that are unconnected with the monopolist's efficiency.

2. Average Variable Cost[6]

A price would be predatory if a firm sells below the average variable cost because, in the long run, a company that fixes the price of its product below the average variable cost will not minimize losses and get returns on its sale.

Variable costs are costs that increase with output. For example, in relation to airlines, variable costs include costs that increase with the addition of each passenger such as ticket processing, in-flight food and liability insurance as well as expenses that increase with each additional flight such as pilot, flight attendant, and fuel expenses; takeoff and landing fees; and aircraft maintenance. The average variable cost is calculated by adding all the variable cost components and dividing them by the total output.

3. Average Avoidable Cost[7]

Average avoidable cost entails the average *per* unit cost that the predator would have avoided during the period of below-cost pricing had it not produced the predatory increment of sales.

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[4] *Brook Group Ltd* v *Brown & Williamson Tobacco Corp* 509 US 209, 226 (1993).

[5] Hovenkamp Herbert, 'Predatory Pricing under the Areeda-Turner Test' (2015) < https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2827&context=faculty_scholarship > accessed 10th June 2024.

[6] FCCPA s. 72(2)(d)(iv).

[7] The Regulations reg. 13(4)(a).

According to this cost model, if a firm sets its prices below the average avoidable cost for a particular period, the firm would be held to have engaged in predatory pricing. This is because the company incurs losses when it sets such prices, which it would not have experienced if an amount of product were not produced.

Average avoidable cost encompasses the additional fixed cost and average variable cost of the company during a particular period. Such fixed costs do not change as output increases or decreases. Overhead and equipment are examples of fixed costs because the business incurs these costs whether it produces few or many products.

Predatory Pricing Under Nigerian Law

Under Nigerian law, predatory pricing is prohibited. The Federal Competition and Consumer Protection Act, 2018 ("**FCCPA**") provides that an abuse of a dominant position occurs where a dominant undertaking engages in the selling of goods or services below their marginal or average cost.[8] Accordingly, the primary cost model for assessing a predatory pricing conduct under the FCCPA is whether it is below marginal or average cost. Basically, any pricing of goods or services by a dominant undertaking below marginal or average cost will be presumed to be predatory.

The FCCPC Abuse of Dominance Regulations, 2022 (the "**Regulations**") provides a contrasting framework on predatory pricing. Under the Regulations, predatory pricing involves an undertaking deliberately setting the price of its products below its own cost to incur short-term losses on the sale of products in the market for a period of time sufficient to eliminate, or deter the entry or expansion of a competitor in the expectation that the dominant undertaking will thereafter recoup its losses by charging higher prices than would have prevailed in the absence of the impugned conduct.[9] Predatory pricing can be implicit (through discounts or rebates), or explicit. Implicit in the FCCPA and the Regulations are (a) the silence about the average available cost test, and (b) a requirement that the predator must already have "dominance" in the market.[10]

With respect to the price criteria to adopt in determining when a dominant company's pricing model is considered predatory, the FCCPA and the Regulations provide different mechanisms. Under the FCCPA, the dominant company selling products below the marginal costs and average costs would be an abuse of a dominant position, unless the undertaking can prove pro-competitive gains that outweigh the anti-competitive effect of such sale.[11]

On the other hand, the Regulations provide that the Federal Competition and Consumer Protection Commission (the "**FCCPC**") will consider a dominant company to be engaged in predatory conduct if the dominant company sets a price below the average avoidable cost.[12] It is our opinion that the FCCPC may regard any one of the three tests as sufficient to find predatory pricing, considering that they are all statutorily provided for.

In determining whether a dominant undertaking is engaging in predatory pricing, the FCCPC shall examine whether the dominant undertaking incurs losses that it would have avoided when compared to economically rational and practical alternatives that may realistically be expected to be more profitable, but for the elimination of competitors.[13] In other words, the FCCPC will assume predation

[8] FCCPA s. 72(2)(d)(iv).
[9] The Regulations, reg. 13(1).
[10] Insisting on (b) is peculiar. Other jurisdictions do not insist on it.
[11] FCCPA s. 72(2)(d)(iv)
[12] The Regulations reg. 13(8).
[13] The Regulations reg. 13(3).

where the price of a product is so low that the only reasonable explanation for such low price is the exclusion of actual or potential competitors.

In calculating the average avoidable cost of a company, all the company's avoidable costs[14] would be divided by its output. Hence, if a company is being accused of predatory pricing over a particular period, the first step would be to calculate what costs the company would have avoided if it had not produced the units that were the subject of predation over the particular period. Once the avoidable costs are calculated, the next step is to divide the avoidable costs by the outputs for the said period.

The Regulations distinguish predatory pricing from permissible below-cost pricing. The FCCPC would achieve this by considering several factors such as direct evidence of a strategy aimed at excluding competitors and the likelihood thar equally efficient competitors would enter the market in the absence of the conduct in question or the period during which lower prices are sustained.[15]

Under Nigerian law, it is not necessary to demonstrate that recoupment took place or that initial losses were actually recouped before a finding of predation is made.[16] Also, it is not necessary to show that competitors actually exited the market as a result of predation although it is vital to demonstrate consumer harm arising from the predatory conduct of the dominant undertaking.[17]

An entity that so desires to seek redress over predatory pricing claims can approach the FCCPC[18] and appeals against decisions of the FCCPC can be filed at the Competition and Consumer Protection Tribunal (the "**Tribunal**").[19] Further, any party who is not satisfied with a ruling, award or judgment of the Tribunal may appeal to the Court of Appeal upon giving notice in writing to the Registrar to the Tribunal within thirty (30) days after the date on which the ruling, award or judgment was given.[20]

There is a complete absence of Nigerian cases on predatory pricing whether before administrative tribunals or before the courts. It is hoped that the courts will consider predatory pricing claims and develop case laws on this issue in the near future.

A Case Study of Air Peace and the International Airlines Saga

Air Peace Airlines, a Nigerian airline, launched its Lagos-London route on March 30, 2024, with a drastic slash in airfares. The airline slashed the economy class price from an average price of *circa* ₦3,500,000 (Three Million, Five Hundred Thousand Naira) from Lagos to London to about ₦1,200,000 (One Million, Two Hundred Thousand Naira) - a reduction of approximately 66%. Prior to Air Peace's inaugural flight to London, a one-way economy class ticket from Lagos to London on British Airways used to cost about ₦3,500,000 (Three Million, Five Hundred Thousand Naira) and ₦11,000,000 (Eleven Million Naira) for business class.

This bold move did not go unnoticed by industry giants as they responded swiftly with their own dramatic price cuts. On Lufthansa, a one-way economy class ticket from Lagos to London which also cost about ₦3,000,000 (Three Million Naira) and ₦9,000,000 (Nine Million Naira) for Business class was later set at ₦2,000,000 (Two Million Naira) for economy class and ₦7,000,000 (Seven Million Naira) for Business Class respectively. On Virgin Atlantic, the same flight route used to cost about ₦2,000,000 (Two Million Naira) for an economy class ticket, ₦5,000,000 (Five Million Naira) for

[14] Avoidable costs are the costs that could have been avoided by a company if the company had not produced the identified amount of products in question. The dominant company would be better off producing nothing and avoiding these costs altogether.
[15] The Regulations reg. 13 (5).
[16] The Regulations reg. 13(4)(b).
[17] The Regulations reg. 13(6)(a).
[18] FCCPA s. 17 (h)
[19] FCCPA s. 38
[20] FCCPA s. 55

economy premium ticket, and ₦12,000,000 (Twelve Million Naira) for Business Class cost ₦1,500,000 (One Million, Five Hundred Thousand Naira) million for economy class ticket, ₦3,000,000 (Three Million Naira) for economy premium, and ₦6,000,000 (Six Million Naira) for a business class ticket.

The price cuts by the airlines have led to the question of whether these foreign airlines engaged in predatory pricing by simply undercutting with the sole aim of frustrating and eliminating Air Peace from the Lagos-London route.

It would appear that an in-depth analysis of the Air Peace and foreign airlines saga does not establish predatory pricing upon evaluating the legal criteria and economic realities. To establish predatory pricing, several critical elements must be present. In competitive markets, it is common for companies to adjust their prices in response to market conditions, consumer demand, and competitive actions. Price reductions are typically a legitimate strategy to attract customers, increase market share which is what was done by the foreign airlines.

While predatory pricing cases usually involve a single dominant company, multiple companies acting together (either explicitly or implicitly) can be guilty of predatory pricing. In the United States, two or more entity can be found guilty of predatory pricing, although it is less common than cases involving a single dominant firm.[21] This situation is usually referred to as collective predatory pricing or concerted exclusionary conduct. The courts usually require proof that these entities have coordinated their pricing with an intent to eliminate competition and later recoup losses through higher prices.[22] in Nigeria, although it is rare to find two or more entities guilty of predatory pricing, if it is shown that there is dominance and consumer harm by these entities, then the issue of predatory pricing may arise.

The key factor that differentiates competitive pricing from predatory pricing is profitability and sustainability. In the case of Air Peace, despite the price reductions implemented by the international airlines, Air Peace still continued to operate profitably as the price adjustments did not lead to pricing the tickets below cost. Also, there is no evidence that Air Peace has incurred significant losses as a result of these pricing strategies. Conversely, there is no evidence that the international airlines suffered losses due to the price cuts.

Thus, it is crucial to consider the broader market context. Price reductions can be a natural response to increased competition and shifts in consumer preferences. In a dynamic and competitive market, companies often need to adjust their pricing strategies to maintain their market position.

Predatory pricing is a quite common phenomenon in the airline industry globally. In the case of *Spirit Airlines Inc. v Northwest. Airlines, Inc*. (6TH CIR. 2005), Spirit Airlines claimed that Northwest Airlines, the dominant air carrier in Detroit, engaged in predatory conduct on two domestic routes from Northwest's Detroit hub. Spirit Airlines alleged that Northwest reduced its prices from $189 to $49 and increased its capacity upping its number of nonstop roundtrips from 8.5 to 10.5 and using planes with more seating. Spirit Airlines experienced a decline in bookings following Northwest's decision to lower its fares. Spirit Airlines cancelled its services from Detroit to Philadelphia in September 1996. Following Spirit Airline's cancellation of its Detroit-Philadelphia and Detroit-Boston flights, Northwest increased its fares on both routes. Northwest's one-way fare averaged more than $270 by January 1997.

The district court found that there was no evidence that Northwest had engaged in predatory pricing and granted summary judgment to Northwest. Spirit appealed. The United States Court of Appeals for

[21] U.S. antitrust law under the Sherman Act s. 1 and the Robinson-Patman Act.
[22] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993).

the Sixth Circuit reversed the district court's holding in December 2005. The court found the evidence submitted by Spirit compelling and ruled that a reasonable trier of fact could find: (1) distinct leisure and business passenger markets on the contested routes; (2) average variable costs were equivalent to the marginal cost of serving the leisure passengers; and (3) Northwest had sufficient opportunity to recoup losses sustained during the period of alleged predation. Furthermore, the court indicated that a reasonable jury could find predation even if Northwest priced its service above its cost

Conclusion

The key difficulty in establishing a case of predation is that it is easily confused with usual competition. A price reduction is not automatically predatory and, in fact, lowering prices can be a direct manifestation of intense competition. Accordingly, care must be applied in analysing predatory pricing cases to avoid a signal that prevents dominant firms from lowering their prices to the competitive level for fear of being charged with predatory pricing.

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