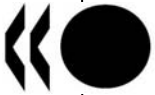


**Unclassified**

**DAF/COMP(2005)14**



Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

**15-Mar-2005**

**English/French**

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**DAF/COMP(2005)14  
Unclassified**

**PREDATORY FORECLOSURE**

**JT00180386**

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Predatory Foreclosure which was held by the Competition Committee in October 2004.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled “Competition Policy Roundtables”.

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d’origine dans laquelle elle a été soumise, relative à une table ronde sur les pratiques d’éviction des marchés, qui s’est tenue en octobre 2004 dans le cadre du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l’OCDE, afin de porter à la connaissance d’un large public les éléments d’information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée « Les tables rondes sur la politique de la concurrence ».

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## EXECUTIVE SUMMARY

*by the Secretariat*

Considering the discussion at the roundtable, the delegates' submissions and the background paper, several key points emerge:

1. *Competition law and policy on predatory foreclosure should be used to protect competition, not to protect competitors*

There was wide agreement among delegates that the goal of competition law enforcement with respect to predatory foreclosure ought to be the protection of competition, not of competitors. Although the wording of some jurisdictions' competition laws suggests that they aim to prevent harm to competitors, the competition authorities' practice is nevertheless to focus on harm to competition rather than on harm to individual firms. Several tests that help to detect predation, and predatory pricing in particular, take this distinction into account and aim to catch only behaviour that damages competition. For example, most jurisdictions require that an alleged predator's prices be set below its own costs before those prices can be deemed predatory. To penalise a firm simply because its prices are below those of a competitor would be to protect competitors from the effects of competition. Similarly, the recoupment test (discussed further below) does not capture predatory conduct that merely eliminates certain competitors; the conduct must result in the predator's eventual ability to act without the restraining effects of competition.

2. *There is no consensus on the best cost benchmark to use in predatory pricing cases, or even on whether an ideal measure exists. Although the average avoidable cost test is gaining support among scholars and practitioners, several delegates expressed a preference for maintaining enough flexibility to tailor the cost measure used to the facts of each case*

Practices vary widely among jurisdictions concerning the cost measures used to analyse predatory pricing. Traditional tests such as the average variable cost (AVC) and average total cost (ATC) tests have long been criticised but continue to be used because they often have the virtue of being easier to apply than other cost tests. AVC, for example, has a tendency to drop below marginal cost (a theoretically ideal but virtually unobtainable measure in practice) at the higher output levels where predation is most likely to occur. In some industries, including many of those where network effects are present, it makes little sense even to try to approximate marginal cost because it is close to zero, whereas fixed costs are relatively high. In other industries, it may be hard to distinguish variable from fixed costs in the first place. ATC, on the other hand, is usually difficult to apply without introducing a degree of arbitrariness into the process. Furthermore, both measures may be too lenient in predatory capacity expansion cases where costs tend to increase in large increments, rather than gradually over specific portions of output. That problem has led several jurisdictions to consider and/or apply the average avoidable cost test, which focuses solely on the range of a firm's output that is allegedly predatory. It also takes fixed costs into account when they are specifically associated with the capacity expansion that accompanies a predatory campaign.

3. *A dominant firm's price may be considered predatory in some jurisdictions even if it is above all measures of the firm's own cost*

There is no consensus among jurisdictions on the question of whether prices above cost, particularly ATC, can be considered predatory. In New Zealand, for example, although pricing below cost is a relevant factor, it is not requisite to determining that the line between legitimate competition and anti-competitive conduct has been crossed. Setting a price above total costs in Korea could still be considered predatory if that price is below the "ordinary transaction price." Most other jurisdictions, however, do not consider prices to be predatory unless they are below some measure of a firm's costs. The economic rationale underpinning that policy is that an equally efficient competitor would not be excluded by a price that is above all measures of cost. Therefore, to punish firms that merely cut their prices without setting them below cost would be to promote the entry and survival of inefficient firms. That, in turn, would protect competitors rather than competition.

4. *The recoupment test should be routinely applied in predatory pricing cases*

The recoupment test aims to determine whether a company's allegedly predatory pricing strategy would be likely to eliminate and deter competition, and whether it is likely that the predator would then be able to collect at least enough profit to recover the losses it sustained during its predatory attack. In other words, it does not focus on whether a predatory campaign was actually undertaken, but rather it assumes that one was and asks whether it matters. The recoupment test's primary value is its ability to help competition agencies ensure that they are targeting behaviour likely to harm consumer welfare, and that they do not inadvertently reduce that welfare. The test accomplishes this by screening out cases in which the characteristics of the incumbent firm and the market make recoupment implausible, even if the firm sustained losses with the intent of eliminating competition and gaining the ability to charge supra-competitive prices. Such conditions may exist, for example, when entry barriers are low or when rivals are well-funded and determined to survive a price war. When recoupment is implausible, consumers are at low risk of long term harm. In fact, they are made better off by the dominant firm's price cutting while it lasts, which is why it could be harmful if a competition agency nevertheless intervenes.

5. *Many competition agencies now take recoupment into account in predatory pricing cases, even if the law in their jurisdiction does not require them to do so. Agencies should be mindful, though, that testing for dominance is not equivalent to doing a recoupment analysis*

The discussion at the roundtable revealed that a number of competition agencies now habitually consider recoupment theory when analysing predatory pricing cases, even if they do so only as a cross-check to ensure that their conclusions about dominance are correct. Some commentators have suggested that performing a separate recoupment analysis may not be necessary because the process of testing for dominance overlaps with the recoupment test. The overlap is only partial, however. It is important to recognise that the elements of a complete recoupment analysis are not all presently reflected in the dominance test used by most, if not all, countries. Factors such as relative financial strength and excess capacity, for example, are vital in recoupment analysis but usually do not play a role in testing for dominance. Therefore, it should not be assumed that recoupment is plausible whenever the dominance test is met.

6. *Because of reputational effects, recoupment does not have to take place in the same market in which predation occurs*

A reputation for being willing to absorb losses over time in order to eliminate rivals and discourage potential entrants can significantly increase the likelihood of recoupment for a

predator. A predatory reputation may not only have lasting effects on the market in which a predatory attack is carried out, but it could be even more helpful to a business that operates in multiple markets. In that situation, the effects of notoriety gained in one market may echo throughout the firm's other markets. The predator may then be able to reap the rewards of predatory pricing in multiple markets while incurring the costs in only one. This is a rather potent theoretical concept because it means that adequate recoupment does not have to come from the market in which the predation occurred. In fact, predatory losses may never be recouped from the market in which the predation took place, but because multi-market reputational effects may enable the predator to recoup in other markets, the strategy may still harm consumers.

7. *Below-cost pricing – even by dominant firms – is not always predatory. Competition authorities should take into account any legitimate business justifications offered by alleged predators*

Firms sometimes price below cost for legitimate reasons. For example, even dominant firms may implement promotional pricing from time to time to get rid of obsolete or perishable inventory. In addition, recent studies have shown that setting customers' membership fees below cost in network effects industries enhances competition. Therefore, it cannot be inferred automatically that below-cost pricing is necessarily anti-competitive. To make such an inference, a competition authority should have evidence that such pricing is part of a long run strategy to inflict losses on or deter competitors, so that profits increase in the long run due to the exclusion of competition. Ordinarily, the burden of establishing a legitimate business justification for predatory pricing will fall on the alleged predator. The company will need to show that it was pricing below cost for non-predatory reasons, and it should be able to support the conclusion that it would have set the same prices even if doing so would not have harmed competition.

8. *The “meeting competition” defence is recognised in many jurisdictions, but its rationale is not entirely sound and it can be difficult to apply in the presence of non-price competition*

The meeting competition defence allows a dominant firm to lower its price to meet the price of a competitor, even if the dominant firm must charge less than its own costs to do so. The defence is often justified by stating that it would be contrary to the purpose of the competition laws to force a company to maintain non-competitive prices, or that even dominant firms must be allowed to compete. Those rationales beg the question of what legitimate competition is. If dominant firms are always permitted to match the prices of any other firm, then even far more efficient entrants may never be able to win the customers they need to survive. Therefore, they may be unable to bring competition to the market over the long run. Furthermore, the meeting competition defence permits incumbent firms to build reputations as aggressive price-cutters who are willing to sustain losses in order to stave off entrants with superior cost structures. Such reputations may deter entry. Finally, the meeting competition defence cannot account for differences in quality, which may enable an incumbent, in effect, to undercut its rivals' prices while technically satisfying the condition of matching their prices. In other words, incumbents go beyond merely meeting the competition when their product is of higher quality than their competitors' products are. It is difficult for courts to take such differences into account. Although such exercises have been attempted, they have the appearance of being arbitrary.

9. *Several lessons about law enforcement methods against predation may be learned from recent cases brought against airlines*

A comparison of recent cases in the airlines industry shows how divided different jurisdictions still are in terms of the cost measures used in their predation analyses. It also shows that the

basic framework used in predatory pricing cases can also be applied in predatory capacity expansion cases. Courts still apply price-costs tests, as in predatory pricing cases. Emphasizing the capacity expansion aspect of a case may, however, help to focus the court's attention on the incremental segment of output that is allegedly losing money. In other words, characterising the incumbent's behaviour as predatory capacity expansion encourages use of the average avoidable cost test. Finally, some jurisdictions still allow the meeting competition defence in predation cases, while others refuse to apply it.

10. *Not all predatory behaviour involves pricing strategies. Companies may also use "cheap exclusion" tactics to eliminate and deter competition*

Predatory pricing is an expensive way to eliminate competition in comparison to other alternatives that may be available. Cheap exclusion strategies, for example, are capable of inflicting substantial harm on competition even though they cost far less to implement than most predatory pricing campaigns. Such strategies include simple, inexpensive, but often highly effective conduct such as lying to regulatory bodies in ways that disadvantage rivals. A feature of such cheap exclusion is often the effort to use governmental or quasi-governmental authority to create impediments to competition. Alternatively, an incumbent may find it much less expensive to try to raise its rivals' costs than to engage in a predatory pricing strategy. Some cheap exclusionary behaviour, however, is efficiency-enhancing. Exclusive dealing is one possible example. Therefore, agencies should focus only on conduct that has no plausible efficiency enhancing defence.

## SYNTHÈSE

### *par le Secrétariat*

Compte tenu de ce qui est ressorti de la discussion qui s'est engagée lors de la table ronde et des observations figurant dans les contributions des délégués et dans le document de référence, plusieurs points méritent de retenir l'attention :

1. *Les dispositions du droit et de la politique de la concurrence relatives aux pratiques d'éviction des marchés devraient être utilisées pour protéger la concurrence, et non pour protéger les concurrents*

Un large consensus s'est dégagé parmi les délégués autour de l'idée que la finalité des dispositions du droit de la concurrence relatives aux pratiques d'éviction des marchés devrait être la protection de la concurrence, et non celle des concurrents. Bien que la manière dont les dispositions du droit de la concurrence en vigueur dans certains pays sont rédigées donne à penser qu'elles visent à prévenir les préjudices susceptibles d'être portés aux concurrents, les autorités de la concurrence concentrent néanmoins leurs efforts dans la pratique sur les atteintes portées à la concurrence plutôt que sur le préjudice causé à une entreprise en particulier. Certains des critères utilisés pour détecter les comportements abusifs, la pratique de prix d'éviction en particulier, prennent en considération cette distinction de sorte que seuls les comportements portant atteinte à la concurrence retiennent l'attention. C'est ainsi que dans la plupart des pays, il faut que l'entreprise soupçonnée de pratiquer des prix d'éviction applique des prix inférieurs à ses coûts de revient pour que l'on considère qu'elle s'est rendue coupable d'un comportement abusif. Le fait de pénaliser une entreprise uniquement parce que les prix qu'elle affiche sont inférieurs à ceux fixés par un concurrent aurait pour effet de placer les concurrents à l'abri de la concurrence. En appliquant le critère de récupération des pertes (dont il sera question dans la suite du document), on laisse également de côté les comportements abusifs qui ont simplement pour effet d'éliminer certains concurrents ; encore faut-il que ce type de comportement permette en fin de compte à son auteur de s'affranchir des contraintes de la concurrence.

2. *Aucun consensus ne s'est dégagé au sujet du meilleur critère de coût à appliquer dans des affaires relatives à la pratique de prix d'éviction, encore moins autour de l'idée qu'il existe un critère idéal en la matière. Bien que le critère du coût moyen évitable recueille de plus en plus les faveurs des chercheurs et des praticiens, plusieurs délégués ont indiqué préférer conserver une latitude suffisante pour pouvoir adapter la mesure des coûts en fonction des circonstances propres à chaque situation*

Les mesures des coûts utilisées pour analyser les pratiques de prix d'éviction varient énormément selon les pays. Les critères les plus fréquemment appliqués, comme le coût variable moyen (CVM) et le coût total moyen (CTM), donnent lieu depuis longtemps à des critiques, mais continuent à être utilisés parce qu'ils ont souvent le mérite d'être d'un emploi plus facile que d'autres critères de coût. Le CVM par exemple a tendance à passer en dessous du niveau de coût marginal (qui constitue une mesure du coût idéale en théorie, mais quasiment impossible à obtenir dans la pratique) à des niveaux de production élevés, c'est-à-dire lorsque le risque de voir se manifester des comportements abusifs a tendance à augmenter. Dans certains secteurs d'activité, notamment dans un grand nombre de secteurs où on observe des effets de réseau, il n'est guère judicieux ne serait-ce que de tenter de calculer approximativement le coût marginal,

proche de zéro, alors que les coûts fixes sont relativement élevés. Dans d'autres secteurs, il est parfois difficile d'établir d'emblée une distinction entre coûts variables et coûts fixes. Le CTM est en revanche généralement difficile à appliquer sans introduire une certaine dose d'arbitraire. Par ailleurs, l'une et l'autre mesure risquent de se révéler insuffisantes dans des situations où une entreprise accroît ses capacités à des fins d'éviction et qui se caractérisent par des augmentations brutales des coûts plutôt que par une évolution progressive concernant certains segments de la production. Cette difficulté a conduit plusieurs pays à envisager d'appliquer, voire à appliquer, le critère du coût moyen évitable, qui porte uniquement sur la fraction de la production pour laquelle une entreprise est soupçonnée de se livrer à des pratiques d'éviction. Ce critère tient également compte des coûts fixes lorsqu'il existe une corrélation précise entre ceux-ci et l'accroissement des capacités qui accompagne la mise en œuvre d'une stratégie d'éviction.

3. *Les prix appliqués par une entreprise en position dominante peuvent parfois être assimilés à des prix d'éviction dans certains pays même lorsqu'ils sont supérieurs à toutes les mesures des coûts*

On n'observe pas de convergence entre les pays sur la question de savoir si des prix supérieurs aux coûts, en particulier au CTM, peuvent néanmoins être considérés comme des prix d'éviction. En Nouvelle-Zélande par exemple, même si le fait que les prix soient inférieurs aux coûts est considéré comme un élément pertinent, il ne constitue pas une condition nécessaire pour décider que la ligne de démarcation entre un comportement imputable à l'exercice d'une concurrence légitime et un comportement anticoncurrentiel a été franchie. La Corée pour sa part estime que, même lorsque les prix pratiqués par une entreprise sont supérieurs aux coûts totaux, celle-ci peut néanmoins être accusée d'avoir un comportement d'éviction s'ils sont inférieurs aux prix fixés ordinairement pour des transactions similaires. La plupart des autres pays considèrent cependant que les prix appliqués par une entreprise ne peuvent être assimilés à des prix d'éviction que s'ils sont inférieurs à une quelconque mesure des coûts de revient. La logique économique qui sous-tend ce raisonnement repose sur l'idée qu'un concurrent de force égale ne peut être évincé dès lors que les tarifs appliqués sont supérieurs à toutes les mesures de coûts susceptibles d'être utilisées. Sanctionner des entreprises qui se contentent d'abaisser leurs prix sans les faire passer au dessous du niveau des coûts reviendrait donc à encourager l'entrée sur le marché et la survie d'entreprises inefficaces, ce qui conduirait, par le fait, à protéger les concurrents plutôt que la concurrence.

4. *Le critère de la récupération des pertes devrait être utilisé systématiquement dans les affaires concernant la pratique de prix d'éviction*

Le critère de la récupération des pertes vise à déterminer si la stratégie consistant à appliquer des prix d'éviction qu'une entreprise est soupçonnée de mener a des chances d'avoir pour effet d'entraver, voire d'éliminer, la concurrence et, si tel est le cas, si la coupable se donne ainsi les moyens de recueillir un bénéfice couvrant au moins les pertes subies durant la période pendant laquelle elle conduit son offensive. Autrement dit, il ne s'agit pas, grâce à cette méthode, de déterminer en priorité si une campagne d'éviction a effectivement été menée, mais plutôt de partir du principe que tel a été le cas et de se demander si celle-ci a eu des effets sur la concurrence. L'intérêt essentiel du critère de la récupération des pertes tient au fait qu'il permet aux autorités de la concurrence d'être plus sûres qu'elles concentrent leur action sur les auteurs de comportements risquant de porter atteinte au bien-être des consommateurs et qu'elles n'agissent pas, sans le vouloir, à l'encontre de leurs intérêts. Il permet en effet d'écarter les situations dans lesquelles, compte tenu des caractéristiques du marché et de celles de l'entreprise incriminée, cette dernière a peu de chances de recueillir les fruits d'une stratégie au nom de laquelle elle a accepté de supporter des pertes dans l'intention d'éliminer la concurrence et de se donner les moyens d'imposer par la suite des prix non soumis à la concurrence. Une telle situation peut en effet se produire par exemple sur un marché où les obstacles à l'entrée sont peu

élevés ou lorsque les concurrents sont solidement implantés sur le marché et déterminés à survivre à une guerre des prix. Lorsqu'il est peu probable qu'une entreprise récupère ce qu'elle a investi dans la mise en œuvre d'une stratégie d'éviction, le risque d'un préjudice à long terme est faible pour les consommateurs. En fait, ceux-ci sont les premiers bénéficiaires de la réduction des prix imposée par l'entreprise en position dominante tant qu'elle dure, auquel cas une intervention des autorités de la concurrence pourrait se révéler préjudiciable.

5. *Dans bien des cas, les autorités de la concurrence prennent en considération le critère de la récupération des pertes dans des affaires de prix d'éviction même lorsque le droit en vigueur ne les y oblige pas. Elles devraient toutefois être conscientes du fait que l'application des critères permettant d'établir l'existence d'une position dominante n'équivaut pas à une analyse portant sur la récupération des pertes*

Les débats auxquels a donné lieu la table ronde ont montré que dans un certain nombre de pays, les autorités de la concurrence se fient désormais couramment à la théorie de la récupération des pertes lorsqu'elles procèdent à l'analyse d'une situation où une entreprise est soupçonnée de pratiquer des prix d'éviction même si elles n'utilisent ce critère que pour confirmer l'exactitude de leurs conclusions concernant l'existence d'une position dominante. Certains observateurs ont suggéré qu'il n'est peut-être pas nécessaire de procéder à une analyse distincte portant sur la récupération des pertes dans la mesure où le processus qui permet d'établir l'existence d'une position dominante et l'analyse portant sur la récupération des pertes ont tendance à se recouper. Néanmoins, le recouplement n'est que partiel. Il importe de ne pas oublier que les éléments d'une analyse complète portant sur la récupération des pertes ne sont pas tous pris en compte pour le moment dans les critères utilisés dans la plupart des pays, si ce n'est dans tous, pour établir l'existence d'une position dominante. Certains facteurs déterminants pour une analyse portant sur la récupération des pertes, tels que la puissance financière par rapport à la concurrence et l'existence de capacités excédentaires, n'ont souvent aucune pertinence dans le cadre d'un exercice visant à déterminer l'existence d'une position dominante. C'est pourquoi il convient de ne pas partir du principe que la récupération des pertes est probable dès lors que les critères utilisés pour établir l'existence d'une position dominante sont remplis.

6. *Pour des raisons tenant à des phénomènes de réputation, la récupération des pertes ne se concrétise pas nécessairement sur le même marché que celui sur lequel s'exercent les pratiques d'éviction*

Le fait, pour une entreprise qui cherche à évincer ses concurrents, d'avoir la réputation d'être prête à supporter des pertes pendant un certain temps pour éliminer ses rivaux et décourager des candidats potentiels à l'entrée sur le marché peut sensiblement améliorer ses chances de récupérer les pertes consenties. Une telle réputation peut certes avoir des effets durables sur le marché sur lequel elle met en œuvre sa stratégie d'éviction, mais elle peut aussi se révéler très productive lorsque l'entreprise exerce son activité sur plusieurs marchés à la fois. Dans ce cas, les retombées de la réputation acquise sur un marché sont parfois ressenties sur les autres marchés sur lesquels l'entreprise est présente, lui permettant ainsi de recueillir les fruits de sa politique d'éviction par les prix sur plusieurs marchés en même temps alors qu'elle ne supporte de pertes que sur un seul marché. Il s'agit là d'un argument convaincant puisqu'il en découle que la récupération des pertes ne doit pas obligatoirement survenir sur le marché sur lequel l'entreprise se livre à des pratiques d'éviction. En fait, il se peut que les pertes supportées par une entreprise qui cherche à évincer ses concurrents ne soient jamais récupérées sur le marché où l'offensive a été menée, mais parce que les effets d'une réputation vont au-delà d'un seul marché, cette stratégie d'éviction peut permettre au prédateur de récupérer sur d'autres marchés, et là encore de pénaliser les consommateurs.

7. *L'application de prix inférieurs aux coûts, même lorsqu'elle est le fait d'entreprises en position dominante, ne constitue pas toujours une pratique d'éviction. Les autorités de la concurrence devaient prendre en considération tous les arguments commerciaux légitimement avancés par les entreprises soupçonnées de se livrer à des pratiques d'éviction*

Les entreprises fixent parfois des prix inférieurs à leurs coûts pour des motifs parfaitement légitimes. Même une entreprise en position dominante peut par exemple être amenée à pratiquer de temps à autre des tarifs promotionnels pour se débarrasser d'articles obsolètes ou de denrées périssables. En outre, des études récentes ont montré que dans les secteurs soumis à des effets de réseau, le fait d'imposer aux clients des droits d'accès inférieurs aux coûts a pour effet d'intensifier la concurrence. On ne peut donc déduire de manière automatique que la fixation de prix inférieurs aux coûts est une pratique obligatoirement anticoncurrentielle. Cette déduction ne s'impose que lorsque les autorités de la concurrence arrivent à apporter la preuve qu'une telle pratique s'inscrit dans une stratégie à long terme visant à infliger des pertes aux concurrents de l'entreprise incriminée ou à les éliminer afin de doper à terme ses bénéfices une fois ses rivaux écartés. Généralement, la charge de la preuve incombe à l'entreprise soupçonnée de se livrer à des pratiques d'éviction. C'est donc à elle de démontrer que sa politique de prix est justifiée par des motifs commerciaux légitimes et qu'elle a appliqué des prix inférieurs aux coûts pour des raisons n'ayant rien à voir avec une éventuelle volonté d'évincer des concurrents, ce qui suppose qu'elle soit en mesure d'étayer une argumentation selon laquelle elle aurait fixé les mêmes prix même si cette décision n'avait dû en aucune façon porter atteinte à la concurrence.

8. *L'argument de l'"alignement sur la concurrence" est admis dans beaucoup de pays, mais la logique qui le sous-tend n'est pas totalement convaincante et ce critère peut se révéler difficile à appliquer dans des situations où la concurrence ne s'exerce pas à travers les prix*

L'argument de l'alignement sur la concurrence autorise une entreprise en position dominante à abaisser ses prix pour s'aligner sur les prix affichés par un concurrent même si cette réduction la contraint à appliquer des tarifs inférieurs à ses coûts de revient. Cet argument trouve sa justification dans l'affirmation qu'il serait contraire à la finalité même du droit de la concurrence de contraindre une entreprise à maintenir des prix non concurrentiels et que même les entreprises en position dominante doivent être autorisées à rivaliser avec leurs concurrentes. Ce type de raisonnement pose la question de savoir ce qu'est une concurrence légitime. Si les entreprises en position dominante sont dans tous les cas autorisées à s'aligner sur les prix d'une autre entreprise quelle qu'elle soit, même les concurrents potentiellement les plus dangereux arrivant sur un marché ne pourront conquérir la clientèle dont ils ont besoin pour survivre, ce qui veut dire qu'ils seront incapables de soutenir la concurrence à long terme. En outre, l'argument de l'alignement sur la concurrence autorise les entreprises installées sur un marché à se forger la réputation d'être prêtes à sacrifier leurs prix et à supporter des pertes pour neutraliser de nouveaux entrants ayant des structures de coûts plus performantes. Une réputation à elle seule peut en effet avoir des effets dissuasifs. Enfin, l'argument de l'alignement sur la concurrence ne prend nullement en considération les différences qui peuvent exister entre les concurrents au niveau de la qualité et qui peuvent permettre à une entreprise installée sur un marché de vendre dans les faits moins cher que ses concurrents tout en satisfaisant techniquement le critère de l'alignement sur les prix de la concurrence. Autrement dit, les entreprises solidement implantées sur un marché vont au delà de l'alignement sur la concurrence lorsque leur produit est d'une qualité supérieure à ceux de leurs concurrents. Or il est difficile de prendre la mesure de ces différences de qualité. Les tentatives qui ont été faites dans ce domaine semblent quelque peu arbitraires.

9. *Plusieurs enseignements concernant la mise en application du droit peuvent être tirés de l'analyse de procédures récentes concernant des compagnies aériennes accusées de pratiques d'éviction*

Une comparaison entre plusieurs procédures concernant des compagnies aériennes fait apparaître à quel point les pays sont encore partagés sur les mesures des coûts utilisées dans les analyses des pratiques d'éviction. Elle montre également que le cadre de base appliqué à l'analyse des dossiers relatifs à des pratiques de prix d'éviction peut également l'être à l'analyse d'affaires dans lesquelles une entreprise est accusée d'avoir accru ses capacités à des fins d'éviction. Les tribunaux continuent d'utiliser dans ces affaires des critères de prix et de coût, comme pour les affaires portant sur des pratiques de prix d'éviction. Le fait de mettre l'accent sur l'accroissement des capacités dans un dossier peut toutefois contribuer à attirer l'attention de la justice sur le surcroît de production dont on pense qu'il occasionne des pertes. Autrement dit, lorsqu'on estime qu'une entreprise bien implantée sur un marché a accru ses capacités à des fins d'éviction, il est préférable d'utiliser le critère du coût moyen évitable. Enfin, il apparaît que certains pays continuent de retenir l'argument de l'alignement sur la concurrence dans des affaires concernant des pratiques d'éviction tandis que d'autres s'y refusent.

10. *Toutes les pratiques d'éviction ne passent pas par des stratégies de prix. Les entreprises peuvent aussi recourir à des tactiques d'éviction moins coûteuses pour entraver et éliminer la concurrence*

La pratique de prix d'éviction est un moyen coûteux d'éliminer la concurrence par comparaison avec d'autres. D'autres stratégies d'éviction permettent aussi de porter gravement atteinte à la concurrence bien qu'elles coûtent beaucoup moins cher que la plupart des offensives consistant à appliquer des prix d'éviction. Elles font appel à des pratiques simples, peu onéreuses, mais souvent très efficaces consistant par exemple à mentir aux organismes de réglementation pour porter préjudice à des concurrents. Une caractéristique d'une éviction si peu onéreuse est souvent l'effort qui est fait d'avoir recours à une autorité gouvernementale ou quasi gouvernementale pour créer des obstacles à la concurrence. Une entreprise solidement implantée sur un marché peut aussi juger beaucoup moins coûteux de faire en sorte de renchérir les coûts de ses concurrents plutôt que d'engager une stratégie de prix d'éviction. Certaines pratiques d'éviction à moindre coût ont toutefois vocation à améliorer l'efficacité, à l'instar des contrats d'exclusivité. C'est pourquoi les autorités devraient se concentrer uniquement sur les pratiques qui ne semblent pas pouvoir être justifiées par un souci d'améliorer l'efficacité.

DAF/COMP(2005)14

## BACKGROUND NOTE

### 1. Introduction

Predation is among the most frequently discussed topics in competition law and economics. It has attracted a great deal of attention over the years not only because of some high-profile cases, but because the theoretical issues surrounding predatory conduct have sparked several interesting debates among academics and practitioners alike. Yet, in spite of all that has been written about predatory conduct, some core issues remain unresolved. A multitude of conflicting views remains among different nations concerning how to detect and deter predatory conduct. Even within some jurisdictions, a clear position still has not been adopted by the various courts and competition authorities. This note addresses issues that competition authorities will usually need to consider when trying to distinguish competitively harmful predation from merely aggressive but competitively benign or beneficial conduct. It also compares the advantages and disadvantages of several types of analysis that are currently in use.

Many different varieties of business conduct may be considered potentially “predatory,” but they generally fall into two categories: predatory pricing and non-price predation. When a company pursues a predatory pricing strategy, it offers its goods or services at unrealistically low prices in the short term in order to achieve a longer term objective. More specifically, the company sacrifices profits for some period of time because it believes that by doing so it will drive its rivals out of the market, discipline them, and/or deter entry. It is rational to employ a predatory pricing strategy only when a company expects to acquire or maintain some degree of market power as a result of that strategy. Thus, a general definition is that pricing is predatory when it cannot be profitable unless competition is eliminated or at least restrained.<sup>1</sup> Once a predator has acquired or successfully maintained market power, it hopes not only to recoup the losses it sustained during the predatory period, but to enhance profits by holding its prices above the competitive level. Therefore, when a predatory pricing scheme is successful, even though consumers benefit from unrealistically low prices in the short run, they ultimately suffer due to the loss of competition.

The key controversies concerning predatory pricing are 1) what the best measure of cost to use in price-cost tests is; 2) whether to use a recoupment test; 3) whether and when intent evidence is relevant; and 4) whether the meeting competition defence should be allowed. This paper addresses each of those subjects and makes recommendations based on the academic literature and recent jurisprudence.

Non-price predation often involves making excessive investments that have the sole purpose and likely effect of weakening or eliminating competitors. Predatory investments could be made, for example, in extra capacity, product differentiation, or advertising. Furthermore, businesses may adopt strategies designed to raise their rivals’ costs. Because predatory pricing cases are more common than non-price predation cases, this note focuses on the former. There has, however, been a flurry of cases brought against airlines in recent years involving allegations not only of predatory pricing, but of predatory capacity expansion and product differentiation, as well. Together, these cases make an excellent laboratory in which to study predatory behaviour. In fact, the airline cases were a primary reason for the Committee’s decision to hold a roundtable on predatory foreclosure. Accordingly, one section of the paper is devoted specifically to them.

The key points of this paper are:

- A number of price-cost tests are available to help detect predatory prices. Although the Areeda-Turner test (which relies on average variable cost) has historically been the most widely accepted price-cost test, support appears to be growing for the average avoidable cost test. The latter test can focus solely on the range of a firm's output that is allegedly predatory. It can also take fixed costs into account when they are specifically associated with the capacity expansion that accompanies a predatory campaign.
- Some commentators recommend taking action against incumbent firms that lower their prices in reaction to entry, even when those prices do not go below any measure of the incumbent's cost. At least one major court decision has followed that approach. Other commentators are sharply critical of this idea, noting that its effect on consumer welfare is uncertain at best and that it encourages inefficient entry. Tolerating limit-pricing strategies seems to be preferable to encouraging higher prices and accommodating inefficient entrants.
- Recoupment is a controversial area in predatory pricing analysis. Depending on the policy objectives behind competition laws, the recoupment test may serve an essential function in predation cases. It helps to sort out which predatory actions are likely to harm competition (as opposed to competitors), and therefore acts as a safeguard of consumer welfare. It may also save agencies and courts from the difficulty that is sometimes encountered in conducting price-cost tests. If objectives other than consumer welfare are important, however, the recoupment test may be less vital.
- A likelihood of recoupment is not necessarily established when a firm is found to be dominant. Several other factors have to be considered, such as the ability to expand capacity, relative financial strength, and reputational effects.
- Another controversial subject is the relevance of intent evidence. There is a difference between general evidence of intent to eliminate a competitor and a specific, detailed plan to absorb losses in the short term for the purpose of eliminating competition and reaping supra-competitive profit in the long term. The former type of evidence is not particularly meaningful because it is commonplace for firms to strive to defeat their rivals in one way or another. The latter type is more helpful because it shows that, at the very least, the alleged predator believed that its plan could succeed. Nevertheless, it may be best to limit the use of such evidence to rebutting defendants' attempts to establish legitimate business justifications for their below-cost prices, as opposed to using intent evidence to establish the prima-facie violation.
- Just because a firm is pricing below cost does not necessarily mean its actions are harming competition. There are some circumstances under which such pricing is not only benign, but actually pro-competitive. Agencies should thoroughly investigate any justifications that alleged predators proffer for their pricing.
- One justification that has generated disagreement among jurisdictions is the so-called "meeting competition" defence. Defendants using that defence are arguing that they should not be punished for merely matching a competitor's price, as opposed to undercutting it, and that they have a right to defend themselves against firms who undercut them, even if that means pricing below the defendant's own costs. The relationship between the defendant's price and cost, however, is much more informative than the relationship between its price and someone else's price. A price should not be deemed predatory just because it is below a rival's price. But by the same token, it should not be deemed non-predatory just because it is not below a rival's price. A

matching price still has the power to exclude in some situations, such as when there are differences in the relevant products' quality.

- In addition to having broad abuse-of-dominance statutes, some nations have specific resale-below-cost laws that punish retailers for pricing below their own costs. The elements of proof are much easier to satisfy than the elements under a traditional abuse-of-dominance framework. As a result, these resale-below-cost laws appear to capture pro-competitive conduct and have the effect of keeping prices higher in order to protect smaller, possibly less efficient competitors.
- A comparison of recent cases in the airlines industry shows how deeply divided different jurisdictions are in terms of their predation analyses. It also shows that the basic framework used in predatory pricing cases can also be applicable in predatory capacity expansion cases.

## **2. Predatory Pricing**

### **2.1 *The Concept of Predatory Pricing***

In general, prices are predatory when they are so low that they can be considered rational only because they ultimately eliminate or deter competition, thereby enabling the predator to achieve or maintain some degree of market power. For example, in a classic predatory pricing scenario, an incumbent monopolist reacts to entry by lowering its price to a point at which the entrant is forced to operate at a loss. Under most definitions, a predatory price will force the incumbent to sustain losses, as well. By maintaining its low price for a period of time, the predator strives to damage the entrant to such an extent that it must exit the market. At that point, the predator raises its price to the monopolistic profit-maximising point and collects more than enough profits to compensate for its predatory losses.

There are many variations on that classic scenario. The predator does not necessarily have to be a monopolist, or even a dominant firm, for example. It might, in fact, be an oligopolist. Furthermore, predatory prices may not be aimed at eliminating an existing rival, but rather at deterring entry by potential competitors. Moreover, there is a spectrum of price cuts – usually measured against the predator's costs – that may or may not be considered predatory, depending on the circumstances of each case and the jurisdiction in which it occurs.

Much of the theoretical work on predatory pricing was done during the 1970s, when academics began the long-running debate over the best way to detect it.<sup>2</sup> During the 1980s, the rising popularity of "Chicago-school" economics largely stifled the debate because that school considered predatory pricing to be so rare and irrational that it was not worthwhile to devote much attention to it.<sup>3</sup> That view prevailed until the work of "post-Chicago-school" academics invigorated support for the position that predatory pricing is neither so irrational nor so rare as had been previously thought, and competition agencies started to bring more predatory pricing cases.

Regardless of whether one believes predatory pricing is rare or not, if a company engages in it successfully, it will damage competition. On the surface, though, it seems odd that competition laws might be used to attack prices on the ground that they are not high enough. After all, the philosophy behind competition laws in general is that they are intended to promote competition, which is supposed to enhance consumer welfare by keeping prices lower than they would be if markets were more concentrated, collusive, or restrictive. Indeed, few consumers ordinarily believe that there is such a thing as a price that is too low. It is true that even successful predatory pricing improves consumer welfare in the short run, since the strategy involves unusually low prices at first. Predation, however, is a dynamic process, and when it succeeds, the resulting higher prices are detrimental to both consumers and allocative efficiency in

the long run. If incumbent firms were allowed to absorb losses in order to undercut and eliminate rivals, then the benefits of competition would not be fully realised.

A key difficulty for enforcement agencies is that predatory pricing resembles legitimate competitive behaviour. It can therefore be extremely difficult to distinguish one from the other. A price cut in response to entry or the threat of entry is exactly what one would normally expect from an incumbent that had been enjoying more than a competitive level of profits. Over the years, many different tests have been devised to aid agencies and courts in sorting out predatory behaviour from tough competition. The major tests are described in the next section.

## **2.2 Tests for Detecting Predatory Pricing**

### **2.2.1 Price-Cost Tests**

The aim of price-cost tests is to discern whether a company is incurring losses that are rational only if they are part of a predatory pricing strategy. By comparing objective cost and price data, these tests do not directly address the more subjective question of whether a company intended to engage in predatory pricing, but rather they provide information about whether it is actually doing so. This objectivity is crucial because *how* an incumbent attacks its rivals is more significant in economic terms than whether it *intended* to do so.

For example, if a firm forces a competitor out of business by pricing such that the competitor must operate at a loss to meet that price, then it may be true that the elimination was intentional, that the firm intended to send a signal to deter potential entrants, and even that it wished to do these things so that it could achieve or maintain a dominant position. If that firm is more efficient than the competitor was, however, and it was therefore able to accomplish these goals simply by undercutting the competitor's price while continuing to cover its own costs, then the outcome described above is consistent with normal competitive behaviour. On the other hand, if the firm priced below its own costs, then the competitive process was distorted and the firm may have expelled a more efficient competitor from the market.

What qualities are desirable in a price-cost test, then? Ideally, the cost benchmark would be set such that the firm could not possibly price above it and still manage to eliminate or deter competitors and potential competitors that are at least equally efficient.<sup>4</sup> At the same time, care would have to be taken that the cost benchmark is not too high. "Too high" in this context means a rule that would force businesses to raise prices above the competitive level to avoid violating the law. In that situation, consumers, whose welfare the law is presumably intended to promote, might be paying higher prices than necessary because the law would protect less efficient firms from competition. Moreover, the more efficient firms would be collecting supra-competitive profits.

Most jurisdictions use some type of price-cost test when analysing predatory pricing cases. The agreement largely ends there, however, because different jurisdictions consider different measures of cost to be most appropriate for detecting predatory pricing. Furthermore, some jurisdictions use more than one cost measure, while others have not yet decided what the best measure is.

#### **a) Cost Measures**

The following measures are often mentioned as possible cost benchmarks:

- marginal cost ("MC") is the cost of producing the last unit of output;

- average variable cost (“AVC”) describes how MC behaves, on average, over a given range of output. AVC is calculated by identifying those costs that vary with output, adding them together, and dividing the result by the total number of units produced;
- average avoidable cost (“AAC”) is the sum of all costs that a firm can avoid by not producing a certain quantity of output, divided by the total number of units not produced. The avoidable costs are defined as the variable costs and product-specific fixed, but not sunk, costs that were incurred to produce the given range of output;
- average total cost (“ATC”) is calculated by dividing a firm’s total costs – variable plus fixed, including common costs – by the total number of units produced. Common costs are fixed costs that support a number of activities or product lines. For example, the salary of a company’s receptionist is a common cost. It is an essential position, but no part of the salary is caused by any specific product alone.

#### b) The Areeda-Turner Test

In a 1975 article that stimulated great interest in predatory pricing, Areeda and Turner introduced what is now the most famous test for predation.<sup>5</sup> They proposed that a price less than short run marginal cost is predatory, and that any price above that amount is not predatory. The rationale for this test is straightforward: in the theoretical state of perfect competition, market forces will force firms to price at MC. Accordingly, as long as a price is at or above that level, it cannot be deemed too low because that is the level that would prevail in the most competitive kind of market structure. Furthermore, as long as an incumbent’s price does not exceed that level, the price cannot exclude a competitor who is at least as efficient as the incumbent.

The authors were well aware that MC data is not easy to find, though. MC is more of a conceptual tool for economists than an easily measurable, empirical reality. Therefore, Areeda and Turner recommended using AVC as a surrogate.

Most of the criticisms levelled at the Areeda-Turner test can be grouped into either of two categories: 1) short run MC is not a good test because even though most prices below it are predatory, some prices above it can be predatory, too; 2) assuming that short run MC is a good test, AVC is often a poor substitute because it tends to fall below MC (and therefore underestimate it) at higher output levels, leading to false negatives when testing for predation.<sup>6, 7</sup> Another significant criticism is that the AVC standard favours defendants with high fixed and low variable costs, such as firms in the transportation and software sectors. In those industries, it is relatively easy for low prices to remain above AVC. Therefore, using the AVC test might allow incumbents to keep new entrants from recovering their (fixed) capital costs for a very long time, which in turn would deter entry.

Despite the criticisms, the Areeda-Turner test has probably had more worldwide influence on predatory pricing litigation than any other price-cost test has. Many courts and agencies seem to have taken the position that what the test may lack in accuracy is compensated for by the fact that it is relatively easy to use. Furthermore, the test is not without some substantive merit. A price that is persistently below AVC indicates that the firm is not even covering all of its variable costs, let alone its fixed costs. Usually, when a firm is experiencing such losses over time, it shuts down because continuing to operate would create bigger losses than going out of business would. Therefore, a firm that stays in business in those circumstances could be a predator (unless it has a legitimate justification).<sup>8</sup>

## c) The Average Total Cost Test

One of the drawbacks to using AVC in a price-cost test is that it fails to detect some forms of below-cost pricing. Not only can it underestimate MC, but it also overlooks prices that are above AVC yet below ATC. When pricing in that range of its costs, a firm is covering its variable costs but not all of its fixed costs. Therefore, the firm may be failing to charge enough to cover items like rent, interest payments, and depreciation. A price in this range will not inflict losses on an equally efficient competitor to the same extent that a price below AVC would, but holding price below ATC for a lengthy period can still cause financial damage to both the predator and its rival(s).

Consequently, some jurisdictions, such as the European Union, incorporate an ATC test in their predatory pricing analysis. Usually, the test is part of a framework that roughly resembles one first proposed by Joskow and Klevorick.<sup>9</sup> Those authors favoured a joint AVC-ATC approach in which prices below AVC are always deemed predatory, and prices greater than AVC but less than ATC are deemed predatory unless the defendant has a reasonable justification for the price.

The ATC test is not without drawbacks of its own. First, while it may seem that measuring ATC should be easy, it turns to be difficult – so difficult, in fact, that some economists have argued that accurately measuring ATC for a good sold by a multi-product firm is impossible. The basic problem is that when a firm produces several products, attributing common costs to a single product line is an arbitrary process. As William Baumol has observed,

. . . . Outside a textbook, there probably exists no such thing as a single-product firm, and all multiproduct firms have fixed costs incurred in common on behalf of two or more of their products. There is, however, no economically defensible way of dividing such costs up among the firm's various products. As is well known, all methods for the allocation of common fixed costs are arbitrary.

Before the courts or regulatory agencies, ATC (fully allocated costs) are always manipulated to produce whatever answers are desired by the party that puts them forward. Moreover, as I show elsewhere, the amounts by which these contrived cost figures can easily be manipulated is [sic] enormous. Thus, though to economists it may seem obvious, for practitioners in the antitrust arena it is hardly redundant to suggest [that] any conclusion about the predatory character of a price that is based on a calculation of average total cost must be disregarded.<sup>10</sup>

One might be tempted to solve the allocation problem by assigning shares of common costs to the firm's different product lines according to the percentage of overall corporate revenue they each produce. The problem with this easy fix is that sometimes it will be clear in an ordinal sense that one business line uses a source of common costs more than another business line, but it will not be clear how the two compare in a cardinal sense. In other words, one may be able to tell which line is the heavier user, but not by how much. Thus it may be quite obvious that a relatively low revenue product line is using a certain common resource more heavily than a high revenue product line, but there might be no way to measure the difference. This might be the case with a receptionist's services, for example. If the common cost is nevertheless allocated according to revenue, there will be a clear error in allocation, though it will not be measurable.

Another drawback to the ATC test is that pricing below ATC for some period of time may be a rational response to entry even if its result is not the elimination of competition. For example, after a new firm enters with a low price, an incumbent may experience a decline in demand such that marginal cost pricing allows it to cover its variable, but not all of its fixed, costs. As long as those costs remain fixed, it

is rational for the firm to cover at least some of them if it can. In contrast, if it were to hold prices steady at the pre-entry level, the firm might suffer an even greater decline in demand, such that it was not even able to cover its variable costs. The possibility that below-ATC prices are non-predatory does not mean that all of them are, but it has led some well-known academics to conclude that they should be permitted because it is too difficult to sort them out.<sup>11</sup>

#### d) The Average Avoidable Cost Test

The use of AAC in price-cost tests has been gaining momentum in recent years.<sup>12</sup> The AAC test is really a variant of the Areeda-Turner test. Under the AAC test, price is compared to the average of variable costs plus product-specific fixed, but not sunk, costs over a given range of output. The objective is to determine how much a firm would save by not producing a range of output.

One advantage of using AAC is that it is a better estimate than AVC of the true cost that a firm incurs when it produces output that is sold at an allegedly predatory price. When a firm increases output in a predatory campaign,<sup>13</sup> it may have to incur more costs than just those that happen to vary with every unit of output sold, which the AVC test measures. Sometimes a predator will also incur substantial fixed costs when it increases its capacity to absorb extra demand. For example, a baker might have to buy another oven, or a tour guide might have to buy another tour bus. Those kinds of expenses are incurred step-wise, rather than increasing evenly with every additional cake or ticket sold. Thus, it can also be seen that by incorporating product-specific fixed costs, the AAC test blunts the criticism that the Areeda-Turner test is too easy to pass in high fixed-cost industries.

Alternatively, a predator might reallocate a fixed-cost input from one of its other product lines to the line in which it is carrying out its predatory plan. The avoidable cost concept captures that possibility, as well, which is appropriate when that input could have been used profitably where it was.

Another advantage of the AAC test is its flexibility. It can be used to study several dimensions of a firm's pricing. For instance, it could be used to test the pricing of overall output for a product. In that case, the total revenues from sales of that product would be compared with the costs the firm would save if it completely withdrew the product from the market. The AAC test is equally capable of testing the pricing to a subset of customers, in which case revenues from sales of the product to those customers alone would be compared to costs that the firm would have saved by not supplying those customers.<sup>14</sup>

Precisely what should be counted as an avoidable cost also depends, in part, on the time period considered. Ordinarily, the longer the time period, the larger the total and average avoidable costs will be. This is true because more and more sunk costs become avoidable costs over time. A contract may expire, for instance, or a buyer may eventually be found for an unusual piece of machinery. It is clear, then, that the AAC test becomes harder and harder to pass as the time period lengthens. The logical time period to consider, in turn, is that in which the allegedly predatory pricing occurred.<sup>15</sup> The AAC test therefore becomes harder and harder to pass the longer the allegedly predatory prices cuts persist.

## e) Above-Cost Prices

One possibility that has generated considerable debate recently is whether pricing can ever be considered predatory when the alleged predator is not pricing below any measure of its cost, but is nevertheless failing to maximise short-run profit. Essentially, the question is whether limit pricing should be unlawful. When using that strategy, an incumbent sets its price at a profitable level, but below the short-run profit maximising point, choosing a corresponding level of output that leaves just a bit too little residual demand for entry to be profitable (*i.e.*, the entrant would not be able to recover its ATC at the prevailing price). By sacrificing some of its profit, the incumbent keeps entrants out and is able to earn at least some supra-competitive profit. This strategy harms consumer welfare when entrants would have become at least as efficient as the incumbent if they could have gotten a foothold in the market, gained experience and volume, and eventually lowered their operating costs.

To address the harm of limit pricing strategies, Aaron Edlin has proposed that incumbent monopolists should be prevented from responding to entry by cutting price substantially or making significant product enhancements until entrants have had an opportunity to become viable or perhaps even until the monopolist loses its dominant position.<sup>16</sup> Einer Elhauge argued in response that a workable rule to stop above-cost predatory pricing does not exist, and even if it did, it would fail to yield a more competitive outcome.<sup>17</sup>

Elhauge gets the better of this argument because Edlin's rule encourages inefficient entry, forcing lower-cost incumbents to accommodate it despite uncertain results. It can be difficult for competition agencies (or anyone else) to make accurate predictions about whether entrants would have eventually been more efficient and viable. Furthermore, it is uncertain whether consumers are better off with an efficient incumbent who is forced to keep its prices high in the short term in order to encourage possibly inefficient competitors in the long term, who may nevertheless be eliminated, or with lower incumbent prices in the short term that deter entry by any firm that cannot immediately or quickly become as efficient as the incumbent.

In other words, it is hard to predict whether society would be better off with limit prices on goods produced by an efficient incumbent or with lower prices on goods produced by inefficient firms. In fact, it is not even clear that social welfare would be improved by moving from *monopoly* prices set by an efficient incumbent to lower prices set by inefficient producers.<sup>18</sup>

Moreover, by making the attainment of a dominant position much less attractive, Edlin's rule would remove some of the incentive for firms to compete vigorously in the first place. In the end, that could be far more harmful to competition, innovation and long-run consumer welfare than a limit-pricing strategy.<sup>19</sup>

A significant problem with profit-maximisation tests in general is that determining whether a firm was pricing at the short-run profit maximising level can be very challenging. As one court observed, a profit-maximisation test "would require extensive knowledge of *demand* characteristics – thus adding to its complexity and uncertainty."<sup>20</sup> In contrast, from a consumer welfare perspective it is perfectly clear that limit-pricing is preferable to monopoly-level pricing. Thus, in the face of the uncertainties just mentioned, it seems better to allow limit pricing rather than to force monopolists to reduce consumer welfare further by maximising their profits. Consequently, provided the incumbent's price stays above ATC, it is usually permissible to set a price below the short-run profit maximising level even if the motive is purely malicious.<sup>21</sup>

### 2.2.2 *Recoupment*

Unlike price-cost tests, the recoupment test is not used to determine whether predatory pricing is actually occurring. Instead, this test assumes that predatory pricing is happening and asks whether it is likely to succeed in light of the characteristics of the relevant market, the predator, and its target(s). Specifically, the recoupment test aims to determine whether a company's predatory pricing campaign would be likely to eliminate and deter competition, and whether it is likely that the predator will then be able to amass at least enough supra-competitive profit to recover the losses it sustained during the attack.<sup>22</sup>

The recoupment test is based on the premise that the policy objective of competition law is to promote consumer welfare. If other objectives, such as the preservation of small competitors or minimising market concentration for its own sake, are seen as policy goals or factors contributing to some other (non-economic) type of consumer welfare, then the recoupment test has less importance. However, as a means of helping competition agencies and courts to ensure that they are targeting behaviour likely to harm consumer welfare, and that they do not inadvertently reduce that welfare, the recoupment test is quite valuable.

This point is clarified by considering that the recoupment of predatory losses necessarily involves harm to consumer welfare. Predatory losses can be recovered only by setting and sustaining a price higher than the price that would have been charged if the predatory attack had not eliminated or deterred competition. It is the above-competitive price that harms consumers. Thus, if the recoupment test indicates that there is little or no likelihood of recoupment, then predatory pricing would not only be irrational, it would be unlikely to harm consumer welfare. Indeed, in that case a predatory pricing campaign should actually boost consumer welfare for as long as the predatory attack lasts, with little or no danger of harm to consumers in the longer run. Therefore, under the logic of the recoupment test, even if a company is pricing below cost, when recoupment is implausible the best course of action for the competition agency (and the courts) is to do nothing.

To put it another way, allegedly predatory prices can harm competition only if they cause rivals to exit, discourage them from entering, or discipline them into becoming price followers. That the low prices may be inconvenient to other competitors, or that they might harm competitors, is an insufficient basis to prohibit price cutting because all competitive behaviour inconveniences competitors and "harms" them in one way or another. The recoupment test helps to sort out the prices that are likely to harm not only competitors, but competition itself.

The recoupment test is intended to serve as a threshold inquiry. If it shows that predation is unlikely to eliminate or deter rivals, or that recoupment of losses is ultimately implausible, then this test enables agencies and courts to dismiss allegations of predatory pricing without having to conduct a price-cost test. This is quite useful because the process of determining whether prices are predatory based on their relationship to some measure of cost is often quite difficult.<sup>23</sup> If the test shows that recoupment is likely, however, then it must be used in conjunction with a price-cost test to establish that the alleged predator actually is charging predatory prices.

Before examining the various factors that should be taken into account in a recoupment test, it is important to note that recoupment differs according to whether the predatory attack was launched against an existing competitor or against an entrant/potential entrant. In the former case, the target is a rival who has been exercising a downward influence on the predator's price. After a successful predatory pricing attack eliminates or disciplines the pricing behaviour of the rival, the predator will raise its price above the pre-predation level. By doing so, it will eventually recover the losses incurred during the predatory period and earn even more, as well. There would, after all, be no reason to undertake this risky strategy if there were not supra-competitive profits to be gained through its success.

In the case of predation against an entrant or potential entrant, the predator lowers its price in order to make entry appear unviable so that the recent entrant exits and/or the potential entrant is deterred. If and when that strategy succeeds, the predator will raise its price back to the pre-predation level. It will not, in all likelihood, try to raise it above that level, for if it could do so profitably, it would have been pricing at that level before the entrant appeared. Thus, in this case, recoupment is not achieved through an ability to reap profits as never before, but through the restoration of a position that provides the previous level of supra-competitive profits.

Recoupment analysis takes into account a variety of conditions that contribute to the likelihood that a predatory pricing strategy will be successful. Not all of the conditions must be present to establish a likelihood of success.

a) Dominance or Market Power

Even in jurisdictions that do not use a recoupment test, this condition will probably be considered if for no other reason than that the competition laws in most member countries have a dominance or market power requirement that must be met before unilateral conduct can be deemed unlawful.<sup>24</sup> It is not the purpose of this note to explore the different nuances of those thresholds. The important points here are simply that defendants in predatory pricing cases in most member countries must have a dominant position or market power (collectively referred to as “dominance” hereafter), or else be in the process of acquiring it,<sup>25</sup> and dominance implies a higher likelihood of recouping predatory losses.

Having a dominant position makes recoupment more likely for a predator in two ways. The first way has to do with the fact that predatory pricing requires both a price decrease and an output increase. Price cutting alone will not work because the objective is to take market share away from rivals. If the predator cannot produce enough extra output to cover what was supplied by those rivals, then market demand at the predatory price will outstrip what the predator is able to supply. Furthermore, even if the predator is the sole producer in a market and is using predatory pricing to deter entry rather than to eliminate competitors, its price cuts will still stimulate additional demand that must be met.<sup>26</sup> If the predator cannot produce enough to satisfy both that additional demand and any demand previously supplied by existing rivals, then existing and potential competitors will not only be able to make sales, but will be able to do so at prices above the level set by the predator. That is exactly what a predator would not want to happen.

Consequently, to produce the necessary additional output, the predator must have excess capacity. This is where it helps to be a dominant firm. The excess capacity required in a predatory campaign against existing rivals varies inversely with the predator’s market share, and dominant companies tend to have relatively high market shares. In other words, less excess capacity is required for a predator with a high market share than a predator with a low market share. For example, a predator with 80 percent of the market will need to expand only moderately to capture its rivals’ entire market shares.

In contrast, a firm with only 25 percent of the market facing three competitors of the same size would have a much more difficult time carrying out a predatory strategy. Putting aside demand elasticity effects, even if the firm doubled its output, it would be able to take only 25 percent more of the overall market share from the other three firms. That extra amount will most likely come from the three rivals proportionally, rather than from a single one. Consequently, unless this small predator can expand greatly and take over the entire demand previously met by its competitors, its attacking power will be diluted.

Suppose that one of the competitors is so weak that the small predator succeeds in eliminating it from the market. The distributional problem occurs again. The exiting firm’s market share will probably not all go to the predator; instead, it will likely be divided among the three remaining firms.

The second reason dominant firms are more likely to be able to recoup predatory losses is that, by definition, such firms operate in markets with entry barriers. As explained in the next section, entry barriers are essential to recoupment.

b) Barriers to Entry and Re-entry

Entry and re-entry barriers are part of the analysis of dominance and thus will be considered as a matter of course in nearly all predatory pricing cases. These barriers are essential if a predator is to have any hope of recovering the losses it will incur in a predatory strategy. Once it drives its rivals out, or deters a potential entrant, the predator needs to raise its price high enough to earn the supra-competitive profits that will justify its predatory losses. Ordinarily, those profits attract entrants, which tend to drive prices down to the normal, competitive level. In a market with high entry barriers, though, the predator is shielded from the threat of entry, so it can raise its price without having to worry so much about competition.<sup>27</sup>

Re-entry barriers are equally important. If it is easy and inexpensive for a defeated rival to regroup and resume its business a few months later, when the would-be predator has raised its price, the predator's recoupment period will probably be short-lived. Re-entry barriers exist, for example, when it is difficult and expensive for a firm that has left the market to repair the damage done to its reputation when it exited. Alternatively, it may be difficult for some firms to rehire the specialists who lost their jobs when the firm went out of business, or to find new ones to replace them.

When considering entry and re-entry barriers in a predation case, competition agencies should pay attention not only to the likelihood of entry, but to the time that will be necessary to accomplish it. If entry is likely but will take several years, for example, then a predatory pricing strategy could still be profitable.

At this point it may seem reasonable to think, because most relevant competition laws have a built-in dominance requirement, which also necessarily calls for an analysis of entry and re-entry barriers, that it does not matter whether there is a separate recoupment test or not. This is not the case, however, because a dominant position and entry barriers alone are not enough to establish that recoupment is likely. Several other structural and behavioural features of the market and its participants have to be weighed.

c) Relative Financial Strength

Predatory pricing is a financial war of attrition. To win it, a predator not only has to be financially strong in general, it has to be stronger than its opponents in particular. The more cash reserves a predator has and the cheaper its access to capital is relative to that of its rivals, the more likely it is to survive and succeed in its predatory campaign. On the other hand, if the predator has a weak balance sheet with low cash reserves and it faces relatively expensive terms of credit, and if its rivals are willing and able to invest more money in a price war than the predator is, then the predator is less likely to succeed. In fact, it cannot succeed in those circumstances unless its other costs are lower than its rivals' costs, in which case it probably would not have resorted to predation in the first place.

An interesting feature of predatory pricing is that the closer a firm gets to eliminating its rivals, the more expensive getting rid of them becomes. This point follows from the fact that the predator is losing money, by some measure of cost, on every unit of output it sells. As it takes more and more market share away from its failing competitors, the predator incurs losses on more and more units of output. The predator must have the financial staying power and determination necessary to fund all of its losses and finish the war.

d) Low Price Elasticity of Demand<sup>28</sup>

This characteristic is not essential, but it does make predatory pricing more likely to succeed for two reasons. First, it reduces the amount of excess capacity required in a predatory attack. In this sense it is similar to dominance or market power, but here the concern is whether the predator can absorb the extra market demand stimulated by its price cuts, rather than whether the firm can satisfy the demand previously supplied by its competitors. The lower the price elasticity of demand, the less excess capacity a predator must have in order to satisfy the new market demand generated by the predatory prices.

Second, a low price elasticity of demand also facilitates recoupment because demand will decline relatively less when the firm raises the market price. A high elasticity of demand, in contrast, would mean that even if the predator succeeded in raising price to a monopoly level, it might lose so much demand that the magnitude of its profits might not be sufficient cover its predatory losses.

e) Excess Capacity

For reasons already mentioned, excess capacity is virtually a prerequisite for a predator. The predator must be able to absorb all of the new demand created by its price cuts, and in the case of predation against existing rivals, the predator must also be able to absorb the rivals' sales. If it cannot do both of those things, demand will exceed the predator's output and prices will have to rise, which will take pressure off of the rivals and allow them to survive, or at least to survive longer.

It is especially noteworthy that dominant firms do not necessarily have excess capacity. If they have little or no excess capacity, and are incapable of acquiring some quickly, then predation is probably implausible. Thus it is not true that recoupment tests are essentially built into the dominance standard that most competition laws have.

One option for a capacity-constrained predator may be to purchase its competitors' assets, if there are any existing competitors. But the more dominant the predator is, the more likely this strategy is to run into difficulty with the competition agency's merger review process. That, in turn, will likely bring unwanted attention to the predatory campaign even if the merger itself would otherwise be permissible.<sup>29</sup> Thus, acquiring a rival's assets is not always an attractive option.

f) Market Share Trends

Examining market share trends is elementary in recoupment analysis. If the shares did not change during the period of alleged predation, or if the alleged predator actually lost market share during that period, then recoupment would appear to be impossible (or, if the alleged predation is ongoing, recoupment would at least appear to be unlikely). On the other hand, for example, if the alleged predator's market share fell and its rival's share rose prior to the alleged predation, and that trend reversed itself during that period, recoupment would be more plausible.

g) Brand Loyalty

This factor is not essential, but it does increase plausibility. The more brand loyalty the incumbent has, the less costly its predatory campaign will be. This is so because, in order to take sales away from its rivals, the predator will not have to lower its price as far as it would have had to if it enjoyed less brand loyalty.

## h) Relative Efficiency

The more efficient the incumbent is relative to its rivals, the less expensive (and thus easier) it will be to conduct a predatory campaign. Conversely, the less efficient the incumbent is relative to its rivals, the more expensive a predatory campaign will be. One might wonder whether an incumbent would ever find it desirable to adopt a predatory pricing strategy if it is relatively efficient compared to its rivals. Information is often imperfect, however. The incumbent may not realize that it has an efficiency advantage. Furthermore, if it is in a hurry to get rid of its rivals, the incumbent may want to speed up the process of wearing its competitor down. Still, an incumbent's efficiency advantage will often be sufficient, in the long run, to vanquish a rival even without resorting to below-cost pricing. Ironically, this means that it is much easier for an incumbent who least needs to adopt a predatory scheme to afford it and make it work than it is for an incumbent who would probably face eventual extinction by a more efficient rival. In fact, the more an incumbent "needs" to predate, the less likely it is to succeed (holding other considerations constant) because it will be necessary to make price cuts that go deeper and deeper below its costs to eliminate its more efficient competitor(s).

## i) Reputational Effects

Acquiring a reputation for being willing to absorb losses over time in order to eliminate rivals and discourage potential entrants can significantly increase the likelihood of recoupment for a predator. First, a predatory reputation may have lasting effects on the market in which the predatory attack is carried out. If a firm's predatory pricing strategy succeeds in eliminating rivals, and any potential entrants to that market believe that the predator would employ the same strategy again, the potential entrants will be less likely to enter. As a result, the predator may actually be winning several battles at once when it defeats a rival in the present. Its ability to reap supra-competitive profits may therefore extend farther into the future than would be the case if there were no reputational benefit. This does not mean that reputational effects make recoupment plausible in all predatory pricing schemes. In combination with other factors, however, a convincing reputation as a predator does make recoupment more likely.<sup>30</sup>

Furthermore, a predatory reputation could be even more helpful to a business that operates in multiple markets. In this situation, the effects of notoriety gained in one market may reverberate throughout the firm's other markets. The predator may then be able to reap the rewards of predatory pricing in multiple markets while incurring the costs in only one. This is a rather potent theoretical concept because it means that adequate recoupment does not have to come from the market in which the predation occurred. Predatory losses may never be recouped from the market in which they took place, yet because of multi-market reputational effects, the strategy may still be perfectly rational. Note, however, that this scenario depends on the incumbent *not* having to incur more predatory losses in its other markets because if it did, then those losses would have to be recouped, too.

Reputational effects are not easy to measure, but they can at least be taken into account in a qualitative manner. They are, in fact, showcased prominently in the recent post-Chicago school literature that has helped to revive concerns that predatory pricing can be a sensible strategy.<sup>31</sup> To date, however, courts have largely ignored or rejected theories based on these effects.<sup>32</sup> This may not be very surprising, since the theory's effects are hard to verify quantitatively. Even at a qualitative level, if plaintiffs are allowed to count all of a multi-market defendant's markets as sources of recoupment, it seems that only a very weak case would not pass the test.

## j) Price Discrimination

If the incumbent is able to offer its predatory price only to those customers who are seriously considering buying a rival's product, rather than having to implement the predatory price across all of its

output, then the cost of the predatory strategy will be minimised, which not only makes it easier to finance but lowers the break-even point in the recoupment process.

k) Cross-Subsidisation

If a firm can fund its predatory losses in one market with supra-competitive profits from another market, then its chances of sustaining predatory prices long enough to eliminate and deter rivals are increased.

2.2.3 *Predatory Intent*

One controversial area in predatory pricing analysis is the value of evidence showing that the defendant had predatory intent. Some jurisdictions, such as the European Union, expressly incorporate intent in their predation analysis (along with price-cost tests), whereas others, such as the United States, are more sceptical toward intent as an indicator that predatory conduct is occurring or is likely to harm competition. Proponents of using intent evidence in predation cases tend to support their position by pointing out that business managers, not government agencies or judges, are in the best position to determine whether a predatory pricing scheme would be likely to eliminate competition and ultimately be profitable or not. Since these managers are knowledgeable, rational actors, any evidence showing that they intended to carry out a predatory plan or harm a competitor is more reliable than guesswork by outsiders about whether recoupment is likely.

On the other side of the fence, opponents of using predatory intent evidence tend to dismiss harsh-sounding language in memos and business plans as indistinguishable from the typical, but innocuous, corporate chest-thumping or cheerleading that is part of good, tough competition:

Firms ‘intend’ to do all the business they can, to crush their rivals if they can. . . . Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. . . . Almost all evidence bearing on ‘intent’ tends to show both greed-driven desire to succeed and glee at a rival’s predicament. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one’s rivals is entirely consistent with, often is the motive behind, competition. . . . Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition.<sup>33</sup>

One possible explanation for the disagreement over intent derives from the fact that some jurisdictions use juries in competition law cases and some do not. As Judge Easterbrook’s quote above suggests, juries may be more susceptible to being misled by intent evidence than judges are. Therefore one might expect that intent evidence would be frowned upon in the United States, where juries are used in some cases, and readily accepted in the European Union, where they are not.

Even where juries are used, and despite the criticism above, when there is evidence of a specific intent to engage in predatory pricing, as opposed to merely general ill will toward competitors, such evidence probably should be weighed, since it shows that at least the defendant itself expected the scheme to work.<sup>34</sup> It is submitted, however, that the analysis should not end there. In other words, it should not be enough to prove only predatory intent and below-cost pricing.

Ultimately, the question competition agencies and courts face in competition law cases is whether they should intervene or not. If the correct policy objective is to stop and punish all attempts by dominant firms to engage in predatory pricing, then it makes sense to pursue all dominant firms that fail a price-cost test and an intent test, without specifically considering whether the predatory plan really will work. If the

correct policy objective is to promote consumer welfare by protecting competition, however, then there needs to be more assurance that competition will be harmed than just the confident assertions of a defendant who is losing money. In other words, there needs to be a recoupment test.

First, business managers are far from flawless. It is not unusual for business plans to fail. As we will see below in the discussion of the *Aberdeen Journals* case, companies may believe they can subdue competition with a predatory pricing strategy and yet be completely wrong. The predator could easily have made a mistake about market conditions, the resiliency or sheer resolve of its competitor(s), or its own ability to sustain a money-losing price war. After all, predatory pricing would not be considered such a risky strategy if it were easy to execute.

Second, if the presence of predatory intent is an element of the test for predation, then an absence of proof of such intent suggests that the defendant should be exonerated. This could lead to undesirable outcomes for competition and consumer welfare, since a well-advised company might execute a successful predatory attack without leaving a telltale paper trail.<sup>35</sup>

Third, allowing liability based on price-cost and intent evidence alone encourages private litigation (where private suits are permitted). It is questionable whether any legitimate policy aim is served by encouraging lawsuits from defeated competitors who believe they were bullied but cannot show any effect on competition.

In any event, if an agency is looking for evidence that an alleged predator intended to adopt a predatory pricing strategy, it will wish to consider the following things:

- *Below-cost price cuts that are targeted toward rivals, as opposed to across-the-board price changes.* For example, if a firm operates in several geographic markets but implements price cuts in the only one in which it faces competition, that behaviour is at least consistent with predatory intent. Alternatively, if it decreases its prices in all its geographic markets, that suggests a more innocuous motive, such as that the firm's costs have declined and it is legitimately adjusting its prices to maximise profits.
- *Attempts to acquire the target company.* If the alleged predator has tried to acquire the target firm in the past, or is trying to do so while the alleged predation is occurring, this may be an indication of predatory intent. Having failed to get rid of its rival through a merger, the predator may be resorting to predation. Alternatively, it may be attempting to weaken the target firm via predatory pricing, so as to drive the acquisition cost down.
- *An unusual history of price movements consistent with predation.* The timing, duration and extent of price cuts by the incumbent may help to establish predatory intent. The typical pattern to look for in the alleged predator's prices is a decrease that lasted long enough to eliminate or deter competition (or is ongoing) and, unless the predatory campaign is still taking place, a price increase back to the pre-predation level (in the case of predation to deter entry) or above that level (in the case of predation to eliminate an established competitor). On the other hand, price histories may reveal that an industry is cyclical, and that the allegedly predatory prices merely reflect that the bottom of the cycle has been reached. Pricing is seasonal in some industries, for example.
- *Direct evidence of intent.* Obviously, if an investigation turns up documents or testimony indicating that high-level officers within a company purposefully engaged in predatory pricing, this will be helpful in establishing predatory intent.

#### 2.2.4 *Legitimate Business Justifications*

This topic is related to predatory intent, in a sense, but legitimate business justifications (“LBJs”) are used to exonerate defendants, not condemn them. An LBJ exists when behaviour that otherwise fails predatory pricing tests should be excused because of special circumstances that render the conduct reasonable. No matter what test has been used to detect predatory pricing, the analysis will be incomplete unless it considers any plausible LBJs because there are valid, even pro-competitive reasons why firms occasionally price below cost. “[I]t is hard to imagine a firm that has never found it expedient or even necessary to sell products for at least a brief period at a price below [] cost, for reasons ranging from product introduction to distress sales of products that are perishable or subject to obsolescence.”<sup>36</sup>

Typically, the burden of establishing an LBJ falls on the alleged predator. To make its case, the company will need to show that it was pricing below cost for legitimate, non-predatory reasons. It must be able to support the conclusion that it would have set the same prices even if doing so would not have harmed competition. Specifically, the company should have to show either that circumstances forced it to price below cost, or that its prices were part of a normal business practice involving a brief period of losses. Furthermore, if the company makes that showing, even critics of predatory intent evidence would probably agree that it is appropriate for an agency to use any such evidence it has to rebut the proffered LBJ.

A wide variety of circumstances may constitute LBJs. The following list is representative, not exhaustive.

##### a) Product Introductions

Temporary below-cost prices are sometimes nothing more than part of a reasonable effort to break into a market and establish a new brand. Provided the prices do not remain below cost long enough to harm competition, and that the promotional pricing does not occur repeatedly, such pricing is rational even though it is not profit maximising in the short run.<sup>37</sup> “Promotional” below-cost pricing by a firm in a market in which it is already dominant, however, should not be permitted.

Promotional pricing is particularly likely to occur in network effects markets,<sup>38</sup> where a new entrant must compensate customers for the fact that it does not yet have a strong network, or pay them for helping to establish one.<sup>39</sup> The firm’s early investment in attracting customers is recovered over the longer term when the firm has a larger market share. Unfortunately, it will often be difficult to distinguish innocuous below-cost promotional pricing that is necessary to gain viability from predatory pricing that winds up tipping the entire market and eliminating more efficient competitors. In fact, one of the relatively recent developments in economic theory that has helped to turn the tide against Chicago school scepticism about the existence of predatory pricing concerns network effects.

It turns out that predatory below-cost pricing can be shown to be a perfectly rational, profitable strategy in network effects markets, whether the predator is already a monopolist who is fighting off potential entrants, or it is an aspiring monopolist trying to eliminate its competitor(s).<sup>40</sup> The most famous example is Microsoft’s browser war with Netscape, in which Microsoft priced its product at zero (among other tactics) to eliminate Netscape.<sup>41</sup> Not surprisingly, though – and consistent with the concept that there should be an exemption for some promotional pricing behaviour – the theoretical work also shows that below-cost pricing strategies in network effects markets are sometimes welfare-enhancing rather than harmful.

The key point is that in such markets below-cost pricing may be necessary to establish critical mass. In fact, it may be the only way a firm can survive in what will turn out to be a winner-takes-all situation.<sup>42</sup>

Some models show that firms in network effects markets will price below cost even if they face no competitors or potential competitors.<sup>43</sup> That means that their behaviour should not be called predatory because it cannot be said that their pricing is rational only because it will eliminate competition. If competition authorities were to intervene against such behaviour, they might thwart network development and thereby harming consumers. Moreover, even if the market did develop, if there are strong network effects then in the end there is likely to be only one winning firm anyway. Taking all of these factors into account, ten Kate and Nielsen conclude that the wisest choice is to let this severe form of competition determine for itself who will survive.<sup>44</sup>

b) Loss Leading

Sometimes a company may price one or more of its products below cost in order to entice customers to buy additional products sold by the company at higher profit margins. This is known as a loss leader strategy. For example, a grocery store may run an advertisement offering orange juice at a price below cost, reasoning that the ad will attract customers who are likely to buy other, higher margin items once they are in the store. Loss leading should be permitted as long as it is not used to destroy a competitor (or potential competitor) who sells only the product that the incumbent is pricing below cost, and thereby to reduce competition in that market.

c) Systems Pricing

This strategy can be an effective way of increasing overall sales and profits when there are demand complementarities among two or more of the company's products. Personal computer printers are often sold at relatively low prices, for instance, when the manufacturers also sell print cartridges that go with them and the margins on the cartridges are much higher. This tactic, called systems pricing, is a form of price discrimination that enables the manufacturer to earn greater revenues from customers who will use the printer more than others and thus are willing to pay more for the cartridges. Price discrimination has indeterminate effects on consumer welfare. A below-cost price on one component of a system may be part of a competitive pricing structure. As with loss leading, if an alleged predator can show that its systems pricing is not being used to destroy a competitor who sells only the product that the incumbent is selling below-cost, and thereby to destroy competition, then systems pricing should be permitted. In any case, systems pricing is ordinarily easy to distinguish from predatory pricing because a genuine systems pricing strategy should remain in effect as long as the products are on the market. In contrast, a predatory pricing strategy usually involves an obvious period of low prices followed by higher, recoupment-level prices on a single component in the system.<sup>45</sup>

d) Obsolete inventory

Sometimes pricing below cost may be necessary to clear out older products and make room for new stock. In general, this should be permissible.

e) Industry Downturn

Relatively sudden decreases in demand can create excess capacity that may cause firms to price below cost even though they have no intention to engage in predatory pricing. This is the case of a "sick industry." Firms in such markets may decide to stay in business and absorb losses for a while. In doing so, however, they are not looking forward to a period of monopoly-level pricing; they are simply trying to survive in the hope that demand will increase in the future. Over time, if demand does not recover, some firms will leave the market in order to cut their losses, resulting in a realignment of capacity with demand. Thus, below-cost prices in a sick industry are probably not predatory, but are part of the market's normal corrective process.

f) Cyclical Industries

Demand is cyclical in some industries, and firms may need to sell below cost during the slumps to maintain customer relationships, avoid shutdown and re-start costs, and/or storage costs.

g) Adjustment to a New Entrant

Large-scale entry can reduce each incumbent's share of demand rapidly, thereby creating excess capacity and leading to the same situation as an industry downturn.

h) Learning Curves

If there is a steep learning curve for participants in an industry, a firm may decide to hold its price below its present cost in an effort to sell more units and thus work its way down the learning curve more quickly. This behaviour is actually pro-competitive when a learning curve is clearly present and prices are not held below cost long enough to harm competition. If new firms in such industries were not permitted to price below their initial costs, they might never remain competitive long enough to lower their costs and become viable.

i) The "Meeting Competition" Defence

Whether a dominant firm's below-cost prices may be excused when they match, rather than undercut, a competitor's price is yet another controversial topic related to predatory pricing. The "meeting competition" defence ("MC defence") was developed under U.S. law in the context of discriminatory pricing under the Robinson-Patman Act,<sup>46</sup> but it has also been applied in Sherman Act predatory pricing cases. In the U.S., courts have ruled that "[a] company should not be guilty of predatory pricing, regardless of its costs, when it reduces prices to meet lower prices already being charged by its competitors," and that "to force a company to maintain non-competitive prices would be to turn the antitrust laws on their head."<sup>47</sup> More recently, a different U.S. court rejected the idea that the MC defence is available to defendants in Sherman Act cases, setting up a conflict among the circuit courts.<sup>48</sup>

In Europe, the Commission and the Community Courts have not specifically ruled on the MC defence in a predatory pricing case. The ECJ has stated more generally that if a dominant firm is attacked, it may take reasonable and proportionate steps to protect its own commercial interests.<sup>49</sup> In the United Kingdom, however, Bellamy J. rejected it in a judgment of the Competition Commission Appeal Tribunal, reasoning that dominant firms have a special responsibility not to diminish competition and must protect their commercial interests only by "reasonable and proportionate" means.<sup>50</sup>

In Canada, the defence appears to be accepted. In *Boehringer Ingelheim v Bristol-Meyers Squibb*, the court decided that a below-cost price that merely matches a competitor's price and goes no lower is non-predatory.<sup>51</sup>

From an economic standpoint, the decisions accepting the MC defence do not appear to be well-reasoned. The key question in determining whether a price is predatory has nothing to do with its relationship to competitors' prices. Instead, the question is whether the price is below the alleged predator's costs, regardless of whether the price "merely" met a rival's price.

Suppose a new entrant is more efficient than the incumbent and therefore undercuts the latter's price. What if the entrant was counting on being able to continue undercutting the incumbent in order to maintain the demand it needed to operate efficiently? In other words, suppose that the entrant cannot reach its minimum efficient scale unless it has the demand it captures from the incumbent when the incumbent is pricing high enough to cover its own (higher) costs. If the incumbent is permitted to respond by lowering

its price below its costs to match the entrant's price, then the entrant will be prevented from gaining the minimum sales volume it needs, and would have had but for the incumbent's below-cost pricing. Society is worse off if the more efficient competitor is forced to exit.

Another logical drawback to the MC defence is that it cannot take differences in quality and reputation into account. Thus, while an incumbent may be matching an entrant's price, it is still doing much more than merely "meeting" the competition if its product is of higher quality or is more trustworthy in the minds of consumers than the unknown entrant's product is. It would be difficult indeed for a court to take such differences into account. Although such exercises have been attempted, they have the appearance of being arbitrary.<sup>52</sup>

## 2.3 *Approaches to Predatory Pricing in a Sampling of Member Jurisdictions*

### 2.3.1 *European Union*

The current approach to predatory pricing in the E.U. is a blend of price-cost tests and an intent test, based on Article 82's proscription against abuse of a dominant position. The approach was first set forth by the European Court of Justice ("ECJ") in the *AKZO* decision.<sup>53</sup> In that case, the ECJ held that prices below AVC are presumed to be illegal, prices above AVC but below ATC are illegal when coupled with intent to eliminate a competitor, and prices above ATC are conclusively legal.

The holding in *AKZO* suggests that prices below AVC are always unlawful, leaving no room for a defendant to offer LBJs. 1996's *Tetra Pak II* decision confirms that interpretation.<sup>54</sup> Later decisions, however, state that the *AKZO* presumption is rebuttable "by showing that such pricing was not part of a plan to eliminate its competitor."<sup>55</sup>

The European Commission has refined the *AKZO* approach by issuing a special notice regarding the cost measure that it will use in certain industries.<sup>56</sup> The notice explains that the *AKZO* framework may be too lenient in "network" industries, such as telecommunications, in which pricing at the AVC level may still be predatory due to relatively high fixed, common costs among several product lines. The notice states that the Commission will therefore use an average incremental cost measure (similar to average avoidable cost, but including common costs) instead.<sup>57</sup>

A recoupment test is not currently required in the E.U. In *Tetra Pak II*, the ECJ ruled that there is no need to prove that an alleged predator had even a "realistic chance" of recouping its losses, let alone a likelihood of doing so. The decision states that "[i]t must be possible to penalise predatory pricing whenever there is a risk that competitors will be eliminated."<sup>58</sup> This reasoning contrasts with the rationale behind the recoupment test, and that contrast may reflect different views about the purpose of competition laws. As stated earlier, the recoupment test is grounded on the premise that the primary objective of competition laws is to promote consumer welfare. Under that view, it is of no consequence that a firm's unilateral conduct may eliminate a competitor so long as the elimination of that competitor does not result in economic harm to consumers. The ECJ's statement, on the contrary, shows concern for the fate of competitors who may be affected by a dominant firm's below-cost pricing, regardless of whether their elimination would affect consumer welfare.

That same concern for competitors can be seen in the 1998 *Compagnie Maritime Belge* decision. In that case, the *AKZO* elements were not met because the defendant was not pricing below ATC. Nevertheless, the ECJ held that under Article 82 it was abusive for a dominant defendant to adopt a strategy of reacting to entry by cutting prices, regardless of whether the prices remained above cost, when 1) the price cuts were reactive and selective; (2) the reduced prices matched the entrant's prices; (3) the

price cuts reduced the defendant's profits compared to what they would have been at the previous prices; and (4) the defendant's purpose was to eliminate the entrant.<sup>59</sup>

Significantly, the Court in *Compagnie Maritime Belge* acknowledged the risk that condemning above-cost pricing could shield inefficient rivals from the full effects of legitimate competition. The Court still held, however, that there was abuse in this case because the selective price cuts were aimed at eliminating an entrant and thereby eliminating competition.

It is clear that the ECJ was substantially influenced by the defendant's intent to eliminate competition. The difficulty with this is that every rational firm aspires to eliminate competition. Every firm would like to be free of competitors and potential competitors so that it can gain a dominant position and reap monopoly profits. There is no certain harm in the mere intention to eliminate a competitor. What matters is how a firm goes about trying to do that. Does it do so in a way that harms consumer welfare in the long run or not?

Einer Elhauge has criticized *Compagnie Maritime Belge* on four grounds. First, attacking above-cost price cuts is unwise because it pays for an uncertain long-term effect (the survival of relatively inefficient firms) with a guaranteed short-term loss (the loss of the defendant's lower pricing). Restricting such price cuts may wind up increasing prices and harming consumer welfare in the majority of cases.

Second, restricting selective *above-cost* price cuts will often penalise efficient pricing behaviour. In many markets, incumbent firms can maximise profits and output only by charging more to customers that value the product more highly, thus making them bear a greater proportion of common costs. In such markets, selective discounts to customers on the margin will augment output and welfare. Third, restricting above-cost price cuts will reduce the pressure on rivals and potential entrants to become more efficient, which will raise costs and decrease quality for society. Finally, these adverse effects are aggravated by implementation difficulties that are an inevitable consequence of trying to regulate firm pricing, output and responsiveness to entry.<sup>60</sup>

Predatory pricing policy in Europe is at an important point in its evolution. The Commission is currently reviewing its policy on the abuse of dominance – including predatory pricing – to determine how its policy could be made more effective.<sup>61</sup> Meanwhile, the Court of First Instance is due to issue a decision in the *Wanadoo* predatory pricing case, in which the Commission went so far as to “investigate[] the possibility of recoupment, without using it as a key element in the final decision.”<sup>62</sup> Furthermore, recoupment analysis is beginning to show up in the Member States' decisions. In the *State Railways* case, the Swedish Market Court explored the likelihood of recoupment.<sup>63</sup> Very recently, in the private *AOL v. Wanadoo* case, the French Competition Council rejected the plaintiff's predatory pricing claim, noting that although the defendant seemed to be pricing below cost, it was steadily losing market share while several new entrants had gained share, indicating that the market is competitive.<sup>64</sup>

Some commentators have argued that recoupment should be part of the predatory pricing analysis used by the Commission and the European courts.<sup>65</sup> Their arguments will gain weight if private plaintiffs begin to bring more predatory pricing cases before national courts in Europe. In the U.S., where the vast majority of predatory pricing claims are brought by private plaintiffs, one function of the recoupment test is to weed out frivolous and abusive claims. In Europe, as long as the Commission brings most of the predatory pricing cases, that problem is not very worrisome. If that changes, however, then the case for a recoupment test will become more formidable.

### 2.3.2 United Kingdom

The U.K. has its own competition law, the Competition Act 1998, but the legal analysis of predatory pricing in the U.K. follows the precedents set by the ECJ in *AKZO* and *Tetra Pak II*. The elements of the U.K. analysis are therefore the same as those of the E.U. analysis. The *Aberdeen Journals* decision is an apt example.<sup>66</sup> In that case, the publisher of a free, weekly newspaper (“the *Independent*”) complained to OFT that another publisher, Aberdeen Journals, was selling advertising space in its free weekly newspaper at below-cost prices. OFT opened an investigation to determine whether Aberdeen Journals had abused a dominant position.

The Director General of Fair Trading (“DGFT”) found that Aberdeen Journals did have a dominant position in the relevant market. In reaching that conclusion, DGFT conducted an assessment of entry barriers in the newspaper market. DGFT took multi-market reputational effects into account by recognising that an incumbent could raise entry barriers in several of its markets by developing a predatory reputation in one of them. Notably, the defendant publisher was active in several geographic markets.<sup>67</sup> DGFT’s assessment of dominance was not phrased in terms of recoupment analysis, but it could easily be viewed as contributing to that end. Market power, entry barriers, and reputational effects are all major factors that affect recoupment. They are not, however, the only considerations that should be weighed in a full recoupment analysis.

Next, DGFT determined that Aberdeen Journals had held its prices below ATC, and sometimes below AVC, with a handful of exceptions, for 45 months. It further found that the defendant had intentionally priced below ATC in an effort to eliminate the *Independent*. Aberdeen Journals failed to proffer an objective justification, so DGFT ruled that it had abused its dominant position and, accordingly, imposed a fine.

It is worth pondering what might have happened if the facts of this case had been subjected to a recoupment test. Would it have been adequate that the defendant had a dominant position, that there were high entry barriers, and that it appeared that the defendant could benefit in multiple markets from a predatory reputation earned in one market? The most troubling fact, from a recoupment standpoint, is that after roughly four years of below-cost pricing, the targeted publisher was still in business and had shown no signs of giving up.<sup>68</sup> Consumers of advertising space were therefore enjoying quite a lengthy period of low prices with no apparent detriment, or danger of detriment, to their long-run welfare.

On the other hand, the finding that the defendant could obtain a strong, multi-market reputation for fighting entry means that further analysis might have solved that problem. The decision’s discussion of reputational effects ended there, though, which was proper given that the analysis was addressing dominance, not recoupment. If it could have been shown, though, that supra-competitive profits would likely have been obtained in other markets as a result of Aberdeen Journals’ predation against the *Independent*, and that those profits would have been large enough to compensate for the defendant’s predatory losses, then the recoupment test would have been passed. But because that likelihood was neither proved nor disproved, it is not as clear as it could be whether consumers were helped or harmed by the *Aberdeen Journals* decision.

Predatory pricing policy in the U.K., like that at the E.U. level, seems to have arrived at an important node in its evolution. In a recent speech, John Vickers, Chairman of the OFT, stated, in the context of a discussion of a theoretical model in which a ban on selective price cuts would have ambiguous effects on welfare and consumers, that “a rule against selective price cuts could often be bad for consumers in contested markets, and sometimes detrimental to consumers overall.”<sup>69</sup> Chairman Vickers also noted that the law on abuse of market power in Europe “could now develop in either of two broad directions, with emphasis increasingly either on form or on economic effect,” and he advocated the latter approach.<sup>70</sup>

### 2.3.3 New Zealand

One of the most recent predatory pricing decisions issued by any nation's highest court concerns a case brought in New Zealand. *Carter Holt Harvey Building Products Group Limited v. Commerce Commission* is notable, for purposes of this paper, because it shows that a) the recoupment test is gaining international momentum, and b) the same may be true of the meeting competition defence.<sup>71</sup> The case stemmed from a price war in New Zealand's insulation market. The defendant was a major wood fiber products manufacturer. Its subsidiary, INZCO, responded to the entry of New Wool Products ("NWP"), a manufacturer with a superior, wool-based product, by releasing its own wool-based product. The price of INZCO's new product was higher than NWP's, though, and INZCO continued to lose market share. Eventually, INZCO reduced its price by 50 percent, sending it below average variable cost. Sales of NWP's product then fell sharply, and it complained to the Commerce Commission.<sup>72</sup> The Commission filed a lawsuit alleging that the defendant's predatory pricing strategy violated Section 36 of the Commerce Act 1986.<sup>73</sup>

The Privy Council took no issue with lower court findings that the defendant was in a dominant position and that it implemented its price cut in order to prevent or deter NWP from competing, or to eliminate it. The Council also accepted lower court findings that INZCO priced below its AVC. It held, however, that this was not enough to conclude that INZCO's conduct violated the Commerce Act. There must be evidence that the defendant somehow *used* its dominance for a prohibited purpose, and use – in the context of a predatory pricing case – means price-cutting “with a view to” recouping losses by raising prices without fear of losing market share.<sup>74</sup>

The Privy Council determined that there was no evidence that INZCO's pricing was implemented with a view to being able to charge supra-competitive prices in the future. Its reasoning at this juncture takes a surprising turn. Earlier in its decision, the Council had observed that, in light of other established facts, even if the defendant's predatory pricing strategy had succeeded in eliminating NWP, another wool-based product similar to NWP's probably would have been introduced within a short time.<sup>75</sup> That fact might have played a larger role in the decision because it seems to show that entry barriers were low and that recoupment was therefore implausible.

Placing its emphasis elsewhere, though, the Council fashioned the equivalent of a meeting competition defence for INZCO. It found that the defendant's pricing “was a response to competition in an area of a market which it dominated but where it had nevertheless been shown to be vulnerable.”<sup>76</sup> The decision continues, “The price level had been set by NWP, and no one could sell a product comparable to [NWP's] at a higher price and be competitive. Without the offer of a comparable product . . . INZCO was at risk of losing its market share[.]”<sup>77</sup> Earlier, the decision states that “[t]he obvious response, in a truly competitive market, was to cut the price of [INZCO's product] to a level that was competitive.”

In a truly competitive market, INZCO would have eventually been displaced by the more efficient NWP, or else INZCO would have had to improve its own efficiency. Thus, although it may have been an obvious response, it does not seem evident that cutting and sustaining a price below AVC in order to fend off a more efficient rival should be lawful – unless there is no likelihood of recoupment. A disquieting aspect of *Carter Holt Harvey* is that even though it holds that a recoupment test is necessary, it never really addresses the defendant's prospects of recoupment. Instead, the Privy Council ruled that, because the defendant lowered its price to meet the competition of a low-cost entrant, and because the defendant would have continued losing market share if it had not done so, the defendant's actions were merely aimed at preserving its share and were therefore permissible.

It is worth noting that the defendant's below-AVC prices had been in place for seven months when management became aware of the Commission's investigation and altered its pricing. It should also be

noted that NWP had ceased production while INZCO's low prices were in effect.<sup>78</sup> Thus it is not clear from this part of the decision that INZCO could not have eventually elevated its prices back to their pre-entry level, regained its original market share, and thereby recouped its losses.

In any event, the decision is perfectly clear that a recoupment test is required under New Zealand law in predatory pricing cases. In this regard, New Zealand's approach is now consistent with Australia's.

#### 2.3.4 *Australia*

Australia is another country whose highest court recently issued a predatory pricing decision. In fact, it was the High Court's first statement regarding an allegation of predatory pricing. In *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*, the High Court ruled that the recoupment test is mandatory. In addition, the decision highlights the anomaly mentioned above<sup>79</sup> that some competition laws do not seem well-equipped to catch predators who are not dominant at the time they carry out their predatory campaign, but acquire dominance later as a result of their predatory actions. Rather, such laws seem to be effective only when the predator can be said to be able to execute a successful predatory strategy because it was dominant in the first place.

In *Boral*, it was alleged that the defendant had violated Section 46 of the Trade Practices Act 1974 by setting the prices of its concrete masonry products below their avoidable cost of production for 30 months in order to eliminate a more efficient new entrant, C&M. The ACCC argued at an advanced level, contending that Boral recognised that its rival's ability to fund a price war by borrowing in capital markets did not match Boral's own ability to do so, and that Boral desired to benefit from gaining a predatory reputation that would deter entry in the future.

The case turned on whether Boral would be able to recoup its predatory losses once C&M had been eliminated. The trial court had determined that Boral lacked the market power necessary for recoupment because structural barriers to entry in the relevant market were too low. On appeal, the Full Court of the Federal Court accepted the argument that a showing of recoupment was not necessary under Section 46. It is sufficient, that court ruled, to show that a defendant had the ability to price below avoidable costs for an extended period and to eliminate a competitor, regardless of whether the firm also lacked the ability to raise prices high enough to recoup losses. The High Court reversed that decision:

A firm does not possess 'substantial market power' if it does not have the power to recoup all or a substantial part of the losses caused by price-cutting by later charging supra-competitive prices. If it cannot successfully raise price to supra-competitive levels after deterring or damaging . . . competitors by price-cutting, the conclusion is irresistible that it did not have substantial market power at the time it engaged in the price-cutting.<sup>80</sup>

One would like to have seen a phrase such as "or afterward" at the end of that quotation, which would have indicated that Section 46 could capture conduct by a predator who *acquires* substantial market power *as a result of* its predatory behaviour. That was not possible, however, because Section 46 is predicated on the defendant firm already having substantial market power at the time of the conduct in question. Justice McHugh was well aware of this problem but, unless and until the law is changed, even the High Court cannot solve it.<sup>81</sup>

#### 2.3.5 *United States*

The United States is one of the jurisdictions that have not yet decided which measure of cost is best to use in price-cost tests, at least not at the Supreme Court level. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court declined to adopt a specific cost measure and ruled instead that a

plaintiff “must prove that the prices complained of are below an appropriate measure of its rival’s costs.” In addition, the Court established the requirement that a predatory pricing plaintiff must prove that there is a dangerous probability that the defendant will recoup “its investment in below-cost prices.”<sup>82</sup>

Implicit in the Court’s approval of the general concept of using price-cost tests is the rejection of the idea that above-cost prices can ever be deemed predatory. In the Court’s view, predatory pricing requires pricing below the defendant’s costs not because prices at or above cost would necessarily guarantee an absence of anticompetitive pricing, but because that standard leaves intact the crucial role of price-cutting as a legitimate means of competition. In other words, the Court made a compromise, knowing that its ruling would allow some conduct that could have been classified as “predatory” to go unpunished, but deciding that it was more important to ensure that the antitrust laws themselves did not chill reasonable, competitive conduct.

Prohibiting price cuts that result in above-cost pricing would trade a clear, present benefit to consumers for uncertain future benefits, and it is preferable to encourage prices to move closer to efficient, competitive levels, despite some risk that they could have gotten even closer. Of course, that same point could be used to defend below-cost prices, and indeed the Court recognised that, at least in the short term, “[l]ow prices benefit consumers regardless of how those prices are set.”<sup>83</sup> But the Court also made the distinction that unlike below-cost pricing, low but above-cost pricing may exclude a competitor simply because of “the lower cost structure of the alleged predator, and so represents competition on the merits.”<sup>84</sup> Finally, attempting to identify anticompetitive above-cost pricing may be “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.”<sup>85</sup>

Regarding recoupment, *Brooke Group* relied on the earlier *Matsushita* decision, which imposed the recoupment requirement on predatory pricing plaintiffs because “[t]he success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator’s losses and to harvest some additional gain.”<sup>86</sup> Picking up on that theme, the Court further explained its insistence on proof of a likelihood of recoupment:

Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. . . . [U]nsuccessful predation is in general a boon to consumers.

That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: it is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*[.]<sup>87</sup>

The scarcity of successful predatory pricing lawsuits in the U.S., despite the relatively high number of claims brought there, suggests that the current tests in that country may be too harsh. Not only have plaintiffs had a difficult time satisfying the recoupment test, they have also struggled with the Areeda-Turner test. Although the latter test has influenced virtually every American predatory pricing case since the authors wrote their 1975 article, seven years passed before a plaintiff managed to satisfy a court that the test had been met.<sup>88</sup> Furthermore, since 1993’s *Brooke Group* decision, no predatory pricing claim has been successful. This has been due, in large measure, to the influence of Chicago-school thought. With post-Chicago school scholarship gaining at least a mention in recent decisions, however, plaintiffs’ fortunes may begin to change.<sup>89</sup>

### 2.3.6 *A Pragmatic Approach to Predatory Pricing Based on Promoting Consumer Welfare*

In view of the theories, literature, and jurisprudence discussed above, some suggestions may be made about analysing predatory pricing cases.

- *Use Average Avoidable Cost in Price-Cost Tests.* As is already widely agreed, there should be a price-cost test. Its purpose should be to determine whether an alleged predator is pricing in a manner that could enable it to exclude an equally or more efficient competitor. Average avoidable cost is the predatory pricing benchmark of choice for most economists today.<sup>90</sup> For that reason, as well as reasons discussed above, it is the recommended measure here, as well.
- *Use a Recoupment Test.* In light of Australia's *Boral* decision, New Zealand's *Carter Holt Harvey* decision, established U.S. law, and early indications that recoupment may become a more frequent part of the European Commission's analysis, there already seems to be an international trend in favour of the recoupment test. In fact, the trend appears to be substantially stronger today than it was in 2000, when scholars first began to notice it.<sup>91</sup> For reasons already discussed, it is also recommended here.
- *Consider Legitimate Business Justifications.* It should be possible for a defendant who fails the price-cost and recoupment tests to escape condemnation if it can establish that there were special circumstances that render its pricing reasonable. A proffered justification can be legitimate only if the firm would have set the same prices even if doing so would not have harmed competition. Therefore, the company should have to show either that circumstances forced it to price below cost, or that its prices were part of a normal business practice involving only a brief period of losses. If competition agencies have contrary evidence showing that the defendant's intent was actually predatory, then the agencies should use that evidence in rebuttal.
- *Do Not Recognise the "Meeting Competition" Defence.* The meeting competition defence is neither economically sound nor workable in practice without being arbitrary. It should not be allowed. Instead, the agency's inquiry should focus on the relationship between the defendant's own prices and costs.

### 2.4 *Resale-Below-Cost Laws*

Having reviewed the basic theory and some of the law on predatory pricing, it is appropriate to address the specialised laws on below-cost retail pricing that some countries have. These laws do not replace, but rather coexist with the more general competition law governing the abuse of a dominant position. The resale-below-cost statutes do not necessarily require other elements of proof (besides a retail price below the overall wholesale costs paid by the retailer), such as evidence of a dominant position or predatory intent, though some do. For example, Germany's Act Against Restraints of Competition ("AARC") prohibits a business with "superior market power in relation to small and medium-sized competitors from offering goods or services not merely occasionally below its cost price, unless there is an objective justification."<sup>92</sup> This provision seems at least to resemble the analysis in certain predatory pricing frameworks, given that it considers the relationship of price to cost, the degree of the defendant's market power, and possible justifications. As it has been applied, however, the AARC is even stricter than the stern predatory pricing standards used in Article 82 cases.

In December 2002, the German Supreme Court ruled that retailer Wal-Mart had violated the AARC by setting the price of certain food items below its purchase cost. Wal-Mart was involved in a price war with two major competitors. Eventually, Wal-Mart lowered its price on sugar below its purchase cost. It also held its milk prices steady despite a sudden spike that pushed costs above those prices.

First, the Court held that under the AARC, it did not matter whether there was any harmful effect on competition. The Act requires only that the defendant have “superior” market power, that it priced below cost, and that there be no objective justification. The Court then determined that Wal-Mart had the superior market power required by the AARC. Superior market power in relation to small and medium-sized competitors, however, is very different from dominance. The AARC does not inquire whether a defendant has superior market power in relation to large, established competitors, two of which Wal-Mart was confronting. That latter fact alone would probably prevent Wal-Mart from being considered dominant, and thus would put its pricing beyond the reach of Article 82.

Finding that Wal-Mart’s prices were indeed below its cost, and that there were no objective justifications, the Court upheld an earlier decision ordering Wal-Mart to increase its prices so as to avoid driving smaller shops out of business.

It is difficult to rationalise this decision on consumer welfare grounds since there was no finding that *competition* was harmed or likely to be harmed. The Court very clearly based its decision on the finding that Wal-Mart’s conduct might have harmed smaller competitors. The policy objective of the AARC therefore seems to be to insulate small competitors from the effects of below-cost pricing, even if harm to small competitors would not necessarily mean harm to competition, and even if the below-cost pricing was therefore beneficial to consumers.

Title IV of France’s competition law contains even stronger controls on below-cost retail pricing than the AARC does. Title IV nominally concerns “transparency, practices that restrict competition, and other prohibited practices.” Like Germany’s law, however, it is closer to a fair dealing statute because it addresses practices that do not necessarily harm competition in order to protect small businesses. One provision imposes penalties for setting retail prices below purchase cost, which is defined as invoice price plus taxes and transport costs.<sup>93</sup> There is no need to show superior market power, dominance, any likelihood of exclusion, or any effect on competition whatsoever. There are exceptions for changes in season, style, or upstream price levels. Small resellers are allowed to meet the price of another seller in the same area, but only if the other seller’s price is legal. Furthermore, prices may be cut for food products that are about to spoil, but the lower price cannot be advertised outside the store. Again, it is difficult to justify this law on consumer welfare grounds because it prevents consumers from enjoying certain low prices even when those prices would not have damaged competition.

Another example is Ireland’s Restrictive Practices (Groceries) Order of 1987, which prohibits selling groceries at prices below the net invoice prices paid for the goods. Like its counterpart in France, this law does not consider any market structure conditions or effects on competition. The Irish Competition Authority has spoken out in favour of repealing the Act, arguing that it prohibits legitimate loss-leading behaviour and that it enables upstream distributors to set minimum resale prices downstream. As of this writing, however, the Order remains in effect.<sup>94</sup>

### **3. Predatory Foreclosure in the Airline Industry**

There were five different airline predation cases around the world in 2002 and 2003.<sup>95</sup> Each of them involved very similar allegations of predatory conduct: an incumbent, confronted with an entrant offering lower fares, lowered its own fares and increased its capacity in an effort to eliminate or discipline the entrant. The outcomes of these cases, however, differed markedly. This makes the 2003 airline cases quite useful for studying the implications of several different approaches to predation.

### 3.1 *The American Airlines Case*

In *United States v. AMR Corp.*, the government alleged that American Airlines (“AA”) had violated the Sherman Act by expanding its capacity on routes that low cost carriers (“LCCs”) had entered, such that the incremental costs incurred in the expansion were not covered by the incremental revenue it added. Summary judgment for AA was affirmed on appeal on the bases that the government had not presented valid measures of incremental cost, and AA had not priced below its route-wide average variable costs.<sup>96</sup> The case is significant because the court a) treated a predatory capacity expansion claim in exactly the same manner as a predatory pricing claim; b) was willing to consider newer theories about the appropriate costs to use in price-cost tests, even though it found that those costs were not correctly calculated in this case; and c) refused to apply the meeting competition defence.

AA carried about 70 percent of domestic passengers at Dallas/Fort Worth International Airport (“DFW”), one of its biggest hubs. LCCs, who generally have lower costs than the major carriers, had begun to make inroads on some routes departing from or arriving at DFW by undercutting AA’s fares. At first, AA responded to these entrants by matching their fares on a limited number of seats. But when it began to sense that an LCC might be winning enough business to form a hub of its own at DFW, AA targeted the LCC’s route, adding many more fare-matching seats by bringing in more planes – and in some cases larger planes – from other routes in AA’s system. AA’s CEO knew this strategy “would definitely be very expensive in terms of AA’s short term profitability[.] If you are not going to get them out then no point to diminish profit.”<sup>97</sup>

By pursuing its capacity-expanding strategy on certain routes, AA ignored its own planning models, which had previously shown that such a plan would be unprofitable. In each case, the evidence showed, the competing LCC was unable to establish a presence, opted to move its operations, or ceased operating altogether. Once the competitor was no longer a threat, AA returned to its former strategy by reducing capacity and raising fare prices until they were comparable to the former levels.<sup>98</sup>

The government’s argument focused on the exclusionary effect of AA’s capacity expansion rather than its pricing per se. Essentially, what allegedly killed competition was not just that AA matched the entrants’ fares, but that AA inundated the market with available seats at those fares. Facing so much oversupply in the affected routes, the LCC’s lost volume and consequently could not survive.

Furthermore, what made the inundation unlawful, according to the government, was that it cost AA more than it generated in revenue, and it was rational only because AA expected it to eliminate competition, thereby enabling AA to recover its losses later. That recoupment was plausible because AA hoped to benefit from a predatory reputation not only on the routes where it had added the excess capacity, but on other routes where its predatory reputation would deter competition.

The government’s description of AA’s money-losing plan was crafted so as to discourage application of the Areeda-Turner test, which would have compared all of the variable costs (and none of the fixed costs) with all of the revenues across the entire supply of seats on the routes in question. Instead, the government wanted the court to compare the costs and revenues that were associated only with the incremental capacity that AA added on those routes as part of its allegedly predatory strategy. In other words, the government wanted to use an avoidable cost test.<sup>99</sup>

The district court was not prepared to take that unfamiliar step, so it chose to apply the Areeda-Turner test over the entirety of AA’s operations on the relevant routes. Under that test, it found AA’s actions to be lawful and granted summary judgment for AA.<sup>100</sup>

The appellate court was unreceptive to the government's attempt to focus on the illegality of AA's capacity expansion, as opposed to its price cuts. It held that "prices and productive output are two sides of the same coin," and that "these actions must be analyzed in terms of their effect on price and cost. Thus, . . . the government must meet the standards of proof for predatory pricing cases established in *Brooke Group*."<sup>101</sup> However, the court did open a new door for the government by holding that AVC is not the only possible appropriate measure of cost in all cases. It then turned its attention to four incremental cost measures proposed by the government without criticising the general concept of using an incremental cost measure. This suggested – but did not state outright – that the court found the principle of examining only the allegedly predatory range of output to be acceptable.

At this point things began to go badly for the plaintiff, as the court proceeded to find flaws in each of the four proposed incremental cost measures. Each of them was based on data from AA's own accounting system. In a nutshell, two of the tests used cost accounts that allocated 97 to 99 percent of AA's total costs down to the individual flight level. These were rejected on the basis that they included some costs that would not have been avoidable even if AA had abandoned the entire route. The other two tests used cost accounts that allocated only 72 percent of AA's total costs down to the flight level. One was rejected because it amounted to a short-run profit maximisation test. The other was rejected because it contained four arbitrarily allocated variable common costs that the appeals court apparently found on its own, without the help of either the defendant or the trial court.<sup>102</sup>

Clearly, it made no difference to the appeals court that AA had relied on the cost measures in its accounting system to make strategic decisions. What mattered to the court was simply whether the government's proposed cost measures accurately reflected average avoidable cost.<sup>103</sup> Finding that none of them did, it relied on the uncontested evidence that AA's prices never fell below AVC and therefore affirmed the trial court's order granting summary judgment.

There was one other bright spot for the government. The district court had ruled that even if AA had priced below cost, it would still have granted summary judgment because AA had merely met the prices of its competitors, not undercut them. The appellate court disapproved that ruling, deciding instead that the meeting competition defence is inapplicable in the context of a monopolisation claim.<sup>104</sup>

Intuitively, the outcome in *AMR* seems misguided from an enforcement perspective. *AMR* had a roughly 70 percent market share in the relevant market. It lost money by adopting a plan that had no chance of being profitable unless it eventually eliminated entrants, and it did eliminate them even though they were more efficient than *AMR*. Finally, *AMR* raised its price and reduced its capacity after its rivals exited. Yet, in the end, the fact that *AMR*'s conduct never resulted in a price below *AMR*'s overall AVC enabled it to prevail. This case exemplifies the level of difficulty that exists in bringing a successful predation case in the U.S. today.

On the positive side, *AMR* shows that at least one appellate court in the U.S. is willing to consider newer thinking on predation analysis. The court acknowledged that "recent scholarship" has shown that predation can be profitable, "especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets." Furthermore, the court's careful attention to the AAC test suggests that it might have validated the government's claim if there had not been a quirky problem with the cost data.

There was no such problem in the next case.

### 3.2 *The Air Canada Case*

Canada has taken an unusually precise legislative approach to predation in the airlines industry. Special regulations (the “Airline Regulations”) were adopted in 2000 because of concerns about Air Canada’s ability to abuse market power when it became, by far, the largest domestic airline due to its acquisition of Canadian Airlines. The new regulations made it unlawful for an airlines company to operate or increase capacity at fares that do not cover the avoidable cost of providing the service.<sup>105</sup>

In *Commissioner of Competition v. Air Canada*, Canada’s Competition Tribunal was called upon to decide whether Air Canada had violated the Airline Regulations and section 79 of the Competition Act by engaging in behaviour virtually identical to the conduct at issue in the *AMR* case.<sup>106</sup> It was alleged that Air Canada had responded to the entry of two LCCs on some routes with a blended strategy of matching the entrants’ fares and increasing capacity in a manner that did not cover the avoidable cost of operations on the affected routes. The Tribunal split the proceedings into two phases and so far has ruled only on the issue of whether Air Canada failed the AAC test on two sample routes.<sup>107</sup>

First, the Tribunal held that the appropriate increment of output to examine in the avoidable cost test is an individual, one-way flight, as opposed to examining an entire route.<sup>108</sup> This is the same approach that the plaintiff in *AMR* was advocating.

The Tribunal also held that avoidable costs consist of the variable costs, and the product-specific fixed costs that are not sunk, which can be avoided by not producing the good or service in question.<sup>109</sup> In identifying which costs are avoidable, the issue of redeployment opportunities came up. Essentially, the question is whether the fact that a resource could have been profitably redeployed to another flight following the cancellation of a given flight renders any of the costs associated with that resource avoidable. For example, if the aircraft, pilots and flight crew on a cancelled flight can be profitably reallocated to other flights (including newly scheduled ones), then are their wages avoidable?<sup>110</sup> After finding that Air Canada has many such opportunities for profitable redeployment of its resources, the Tribunal answered that question in the affirmative.<sup>111</sup>

The government took the position that all of Air Canada’s costs, except those that can be characterised as overhead, are avoidable within a time frame of three months. It also took the position that income known as the “beyond contribution” or as “follow-on” revenues should not be included in the calculation of Air Canada’s revenues for purposes of comparing them with avoidable costs.<sup>112</sup> Instead, according to the government, such income could be considered in a later analysis of legitimate business justifications. The Tribunal agreed with both positions, though it shortened the time frame to one month.<sup>113</sup> By agreeing to include all of the non-overhead costs, the Tribunal seems to have taken a different approach from that of the *AMR* court, which rejected one of the plaintiff’s proposed tests because it included arbitrarily allocated common costs.

The beyond contribution is a means of taking into account the demand complementarities present in the hub and spoke systems used by major airlines. A passenger may buy a ticket, for example, that takes her from A to C via hub B, where she switches onto a different aircraft. She has paid only one fare, but there are two routes on her trip. Flying from A to Hub B is a way for the airlines company to consolidate traffic and offer service to C. In other words, if it were not for the company’s ability to provide a flight from A to B, it might never have been able to attract a passenger going to C because there might not be enough volume for the company to justify direct flights from A to C. Thus, a measure of the conceptual profit from the B to C flight is attributed to the A to B flight (and vice-versa).<sup>114</sup>

Ultimately, the Tribunal found that Air Canada had operated or increased capacity at fares that did not cover its avoidable costs on two routes.<sup>115</sup> It will be interesting to see whether the avoidable cost measure gains acceptance by Canadian courts in predation cases arising in other industries, as well.

### 3.3 *The Germania Case*

The analysis in this case was completely different from those used in *AMR* and *Air Canada*, and shows a more activist posture by both the competition agency and the courts. The *Germania* decision reflects an uncommon willingness to force incumbents to make room for entrants and to dictate the terms of that accommodation with precision.

When Germania Fluggesellschaft mbH (“Germania”) entered one of Lufthansa’s routes with a much lower one-way fare of 99 euros, Lufthansa responded with a 100 euro economy fare, which it eventually raised to about 105 euros. Unlike American Airlines and Air Canada, Lufthansa did not raise its capacity. After reviewing a complaint from Germania, the Federal Cartel Office (“FCO”) concluded that Lufthansa had abused its dominant position because its economy fare did not cover its average total costs. Later, the Düsseldorf Court of Appeals affirmed.<sup>116</sup>

When it calculated Lufthansa’s ATC, the FCO included foregone revenues as a cost component. The interesting thing about this step is that the foregone revenues were calculated based on the theory that by offering a reduced fare, Lufthansa was losing money because some passengers who would have paid the higher fare would now prefer the economy fare. This concept is quite different from the foregone opportunities that were considered in the *Air Canada* decision, which concerned the prospect of deploying resources more profitably on other routes. Under the *Germania* approach, Lufthansa was penalised for failing to charge all that the market would bear. Furthermore, this method appears to have a double-counting effect against the defendant. Not only were revenues reduced when customers who would have paid full fares paid economy fares instead, but the FCO increased its approximation of the defendant’s cost by the same amount, as well.

The FCO concluded that Germania needed to take some passengers away from Lufthansa in order to survive. It further concluded that Lufthansa’s nearly matching fare, in combination with its superior quality (in the form of frequent flier miles, free newspapers, and higher flight frequencies, reputation, etc.), was preventing Germania from doing that. In other words, even though Lufthansa’s fare was slightly higher, in effect it was still undercutting the new entrant.

The FCO then implemented a remedy designed to ensure that Germania was able to compete. Monetary values were assigned to each of Lufthansa’s differentiated services, based on the perceived value of those services to customers, not on their actual costs. Ultimately, the FCO decided that, in order to be comparable to Lufthansa’s offering, the Germania flight had to cost 35 euros less. It therefore ordered Lufthansa to keep its fares at least 35 euros above Germania’s, up to a maximum of 134 euros each way, for two years.

On appeal, Lufthansa relied heavily on the meeting competition defence, and the Düsseldorf Court of Appeals agreed that it is applicable in abuse of dominance cases. Nevertheless, it ruled that in this case, despite the fact that Lufthansa’s fares were nominally higher than Germania’s, the defence could not be claimed. The court agreed with the FCO that when Lufthansa’s differentiated services were taken into account, Lufthansa had actually undercut Germania’s fare. The Court of Appeals also approved of the remedial concept of quantifying Lufthansa’s higher quality, but was not satisfied with the FCO’s calculation. It therefore adjusted the differential figure from 35 euros to 30.5 euros.<sup>117</sup>

This decision suggests that the FCO and the Court of Appeals were following a policy based on the principle that more competitors are always better for competition, regardless of the means taken to ensure their survival. By using the most aggressive of all cost measures (ATC) in its price-cost test, counting price cuts as opportunity costs, and assigning values to differentiated services,<sup>118</sup> the *Germania* analysis makes it difficult for incumbents to do anything other than accommodate entrants, regardless of whether they are more efficient. Moreover, by pegging the remedy to Germania's entry price without inquiring whether it could have been profitably lowered (and still covered Germania's costs), consumer welfare could be harmed. Other LCCs, with this analysis in mind, could enter other routes at prices well above their own costs, but below Lufthansa's, in the hope that they will be similarly shielded from Lufthansa's competition.

### 3.4 *The Spirit Airlines Case*

This decision is noteworthy because it used the more conventional AVC test rather than the AAC test, and because it refused to allow the meeting competition defence. Mirroring the allegations in *AMR* and *Air Canada*, Spirit Airlines sued Northwest Airlines, alleging predatory capacity expansion and pricing on two routes involving Northwest's hub in Detroit.<sup>119</sup> Spirit, an LCC, had begun service on the two routes by undercutting Northwest's fares. The latter responded by adding new capacity and matching Spirit's low fares on a number of seats. Subsequently, Spirit exited the routes, whereupon Northwest reduced its capacity and raised its fares.

One of the defences Northwest claimed was the meeting competition defence. The court soundly rejected it on the basis that it would allow a predator to price below its own costs in order to match a rival, even if the rival were more efficient and pricing at what was, for it, a profitable level. Therefore, the court reasoned, to allow the defence would be to allow exactly the kind of predatory conduct that the law aims to prevent. Furthermore, in contrast to *Germania*, the *Spirit Airlines* court had no confidence in its ability to determine whether Northwest had really "matched" Spirit's fares or not, given the differentiation between services offered by the two airlines.

Nevertheless, the court granted summary judgment to Northwest. Deeming AVC to be the most appropriate measure of cost, it found that there had been only one month in which the defendant did not pass that test – even when Northwest's "beyond contribution" revenues were not taken into account. Yet there is something unsatisfying about this analysis.

By adopting the AVC test, the court had reduced plaintiff's chances of success substantially compared to what they would have been under the AAC test. First, the court was comparing Northwest's route-wide revenues and costs, rather than just the incremental figures related to the flights Northwest had added. If Northwest was flying relatively more empty seats on the newly added flights, then performing the price-cost calculation across all of its flights on the relevant routes may have helped it to disguise losses it was incurring on the added flights alone. Second, by using AVC rather than AAC, the court was not taking any product-specific fixed costs into account. Thus, the AVC test may have been comparing higher revenues and lower costs than the AAC test, which naturally works to the disadvantage of the plaintiff.

### 3.5 *Lessons From the Airlines Cases*

There are a few observations that can be made based on this review of the airlines cases. First, different jurisdictions remain divided about which cost measure to use. There is sometimes no clear standard of choice even within a jurisdiction, as illustrated by the different tests considered in the U.S. cases *AMR* and *Spirit Airlines*.

Second, casting a complaint in terms of “predatory capacity expansion” rather than predatory pricing does not change the basic framework of analysis. Courts still apply price-costs tests as in a predatory pricing case. Emphasizing the capacity expanding aspect of the defendant’s strategy may, however, help to focus the court’s attention on the incremental segment of output that is allegedly losing money. In other words, characterising the incumbent’s behaviour as predatory capacity expansion encourages the use of the AAC test. That test helps to prevent predators from hiding their predatory conduct in the route-wide averages measured in AVC and ATC, which take into account the more profitable segment of output that existed before the allegedly unprofitable capacity expansion. There is no reason this approach could not, or should not, be used in predation cases in other industries.

Third, the AAC test seems conceptually sound, but a consensus has not been reached on what costs are avoidable and what costs are not. That much is clear from a comparison of *AMR* and *Air Canada*. Similarly, there does not appear to be a common view yet on whether beyond contribution revenues should be considered.

Finally, some jurisdictions still allow the meeting competition defence in predation cases, while others have seen through it and refuse to apply it.

#### **4. Other Forms of Non-price Predation**

##### **4.1 Introduction**

There is quite a large variety of conduct that could be labelled “non-price predation,” including bundling, tying, refusals to deal, refusals to license intellectual property, predatory innovation, pre-emptive investments, etc. Covering all of those subjects comprehensively in a note that also strives to provide a thorough background on predatory pricing is not practicable. Instead, this paper has singled out predatory capacity-building because that conduct figured prominently in the airlines cases. In that context, the analysis turned out to be much the same as it is for predatory pricing. To provide a sense of the nature of other types of non-price predation conduct, a few additional subjects are discussed briefly here. It is suggested, though, that non-price predation should be addressed in a future roundtable if the subject generates sufficient interest.

##### **4.2 Raising Rivals’ Costs**

Raising rivals’ costs (“RRC”) is a powerful form of non-price predation, but it did not receive much attention in economics literature until the early 1980s. A predator employing an RRC strategy attempts to disadvantage its competitors by increasing their costs. Sometimes the predator will have to increase its own costs in order to execute this strategy, but not always. The strategy will be profitable if the predator succeeds in raising the market price by more than it raises its own average total cost (assuming a steady level of output).<sup>120</sup>

RRC is usually a more appealing strategy than predatory pricing because RRC can inflict damage on a competitor without necessarily requiring that the incumbent incur losses itself. Furthermore, the recoupment phase occurs at roughly the same time the RRC strategy is put into effect, rather than at some uncertain point in the future. For these reasons, some commentators have stated that “the RRC analyses . . . make clear that cost-raising and exclusionary strategies should be the predominant antitrust concern about a dominant firm’s behaviour.”<sup>121</sup> On the other hand, RRC is not always an available option, whereas anyone can at least attempt a predatory pricing strategy.

Like predatory pricing, RRC is not necessarily harmful from an consumer welfare standpoint. It harms competition only if it enables the predator to charge a supra-competitive price. But unlike predatory pricing, RRC does not lend itself to intuitively obvious methods for detecting competitive harm, such as

price-cost and recoupment tests. Some competition authorities have specific guidelines that cover conduct involving raising rivals' costs. Canada's Competition Bureau, for example, has given notice that it will view an act by a dominant firm as an abuse if that act raises rivals' costs or reduces rivals' revenues for a predatory, exclusionary, or disciplinary purpose.<sup>122</sup> There is, however, no specific process in the Canadian guidelines for ascertaining whether there has been (or will likely be) any harmful competitive effects from the dominant firm's RRC strategy. Instead, there are many examples of RRC strategies that would be viewed as anti-competitive acts. Unless and until there is a consensus among economists on a general test for detecting harmful RRC strategies, Canada's approach seems advisable.

The Chicago School view of RRC has a familiar, sceptical ring to it. Frank Easterbrook has recommended that "for the foreseeable future we leave raising rivals' costs to the academy."<sup>123</sup> For now, it remains to be seen whether the post-Chicago academics will counter with a basis for greater concern.

### 4.3 *Exploiting Information Asymmetry*

Sometimes the incumbent in a market has an informational advantage over potential entrants due to its greater experience and established contacts with suppliers and customers. This advantage flows in two directions, *i.e.*, the incumbent might not only have better access to market information, but it might also be viewed as a more reliable source of information than newcomers are. This creates the potential for incumbents to create fear, uncertainty and doubt in the minds of others – including potential entrants, customers, and investors or creditors – regarding the feasibility of profitable entry. For example, an incumbent might send misleading signals about market demand and its own costs to deter competitors or make it harder for them to raise capital.<sup>124</sup> In addition, an incumbent might spread doubt among customers about an entrant's viability or quality.

In other instances, dominant firms might make misleading product announcements designed to make customers think that they, too, will soon introduce a new type or version of a product that a rival is about to bring to the market. That may have the effect of causing customers to wait for the incumbent's product rather than take a chance on a lesser-known entrant's product. Economists have demonstrated how such announcements can damage competition and reduce welfare.<sup>125</sup>

Product announcements were challenged in several older cases that collectively illustrate the challenges that an agency would face in trying to develop guidelines in this area. In some cases, the plaintiff complained that an announcement violated antitrust laws because it was made too far in advance of the actual release of the new product.<sup>126</sup> In others, plaintiffs complained because the announcements were not made far enough in advance of the product release.<sup>127</sup> The courts were being asked, in effect, to define the permissible time period in which companies may announce their new products. Drawing a parallel to predatory pricing analysis, a court would somehow have to decide whether the timing of the announcement would have differed if the defendant had believed there was no possibility of harming competition by making the announcement at that time (or at all).

Unfortunately, firms choose the timing of their product announcements for all sorts of plausible reasons, some of which may be competitive and some of which may not. Furthermore, some of the reasons will push the firm to announce earlier, and some will influence the firm in the opposite direction. For example, it is possible that, by announcing a product early, an incumbent intends to damage an entrant by encouraging buyers to wait until the incumbent's new model is released. At the same time, the incumbent may simply wish to alert companies who produce complementary goods far enough in advance for them to develop new products that work with the incumbent's product. Or the incumbent may wish to keep its new product a secret for as long as possible because it wants to produce and sell all the complementary goods itself. Such conflicting possibilities have led some scholars to give up on a rule and conclude that *any* timing of a product announcement should be presumed lawful.<sup>128</sup>

## **5. Conclusion**

Current economic theory, if not actual corporate behaviour, leaves little reason to believe any longer that predation rarely or never occurs. It is a serious threat to competition and consumer welfare that warrants scrutiny from competition agencies and courts, albeit very cautious scrutiny. Even though scholars have advanced the discourse over the past several years, they have yet to devise a generally applicable, simple set of rules that distinguishes harmful predation from legitimate competition. Unless agencies proceed quite carefully when considering possibly predatory conduct, therefore, they may inadvertently discourage welfare-enhancing competitive behaviour.

This paper has sought to clarify the basics of the ongoing debate on predation, to describe recent trends in enforcement approaches around the world, and to make recommendations as to what presently seem to be the most sensible ways to test for predation under the premise that competition laws are intended to promote and protect consumer welfare.

## NOTES

1. See Janusz Ordover & Robert Willig, "An Economic Definition of Predation: Pricing and Product Innovation," 91 *Yale Law Journal* 8, 9 (1981) ("although a practice may cause a rival's exit, it is predatory only if the practice would not be profitable without the additional monopoly power resulting from that exit"). Causing a rival to exit is not essential for predation to work, however. If the predatory episode simply beats a competitor into a more submissive position in which it follows the predator's pricing, the latter firm can still achieve its goals. In fact, this outcome may be preferable to forcing the competitor to exit because in that situation, the competitor's assets might be sold at a bargain price, enabling the purchaser to enter the market with a lower cost structure that would cause even more trouble for the incumbent.
2. For a good introduction to this debate, see Phillip Areeda & Donald Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 *Harvard Law Review* 697 (1975); F.M. Scherer, "Predatory Pricing and the Sherman Act: A Comment," 89 *Harvard Law Review* 869 (1976); and Douglas Greer, "A Critique of Areeda and Turner's Standard for Predatory Practices," 24 *Antitrust Bulletin* 223 (Summer 1979).
3. Frank Easterbrook, "Predatory Strategies and Counterstrategies," 48 *University of Chicago Law Review* 263 (1981) ("There is no sufficient reason for antitrust law or the courts to take predation seriously").
4. See William Baumol, "Predation and the Logic of the Average Variable Cost Test," 39 *Journal of Law and Economics* 49, 52-53 (1996).
5. Phillip Areeda & Donald Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," 88 *Harvard Law Review* 697 (1975).
6. The reason for this divergence is that MC is an incremental measure, whereas AVC is an average. As output increases, diminishing marginal returns to the factors of production raise the cost of producing each additional unit of output. MC eventually crosses the minimum of the AVC curve and thereafter begins to pull AVC upward. AVC, however, cannot catch up to the more rapidly rising MC in the short run.
7. For a review of criticisms of the Areeda-Turner test, see James Hurwitz & William Kovacic, "Judicial Analysis of Predation: The Emerging Trends," 35 *Vanderbilt Law Review* 63-157 (1982); Joseph Brodley & George Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards," 66 *Cornell Law Review* 738 (1981).
8. See Section 2.2.4 below.
9. Paul Joskow & Alvin Klevorick, "A Framework for Analyzing Predatory Pricing Policy," 89 *Yale Law Journal* 213 (1979).
10. William Baumol, "Predation and the Logic of the Average Variable Cost Test," 39 *Journal of Law and Economics* 49 (1996) at 59; see also Phedon Nicolaides & Roel Polmans, "Competition in EC Telecommunications: Cross-Subsidisation, Access and Predatory Pricing," 22 *World Competition Law and Economics Review* 21, 33 (1999).
11. Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2d ed. 2002), vol. 3, para. 735 ("The problem with all such strategies is not that we doubt

their existence or even their anticompetitive consequences. Rather, identifying them in the particular case without chilling aggressive, competitive pricing is far beyond the capacity of any antitrust tribunal.”).

12. William Baumol, “Predation and the Logic of the Average Variable Cost Test,” 39 *Journal of Law and Economics* 49 (1996); the AAC test was approved by the Canadian Competition Tribunal in *Commissioner of Competition v. Air Canada* (2003), 26 C.P.R. (4th) 476, [2003] C.C.T.D. No. 9 (Competition Tribunal), in accordance with airline-specific legislation; the AAC test was also given very careful consideration by an appellate court in *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003). The AAC test appeared in the literature on predatory pricing at least as early as 1981, in Janusz Ordover & Robert Willig, “An Economic Definition of Predation: Pricing and Product Innovation,” 91 *Yale Law Journal* 8, 17-18 (1981).
13. Firms engaging in predatory pricing strategies need to increase output for two main reasons. First, their lower pricing will stimulate overall market demand. Second, the predator must absorb the extra demand that was previously being supplied by its prey. *See* Section 2.2.2e) below.
14. Derek Ridyard, “Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis,” 23 *European Competition Law Review* 286, 295 (2002).
15. William Baumol, “Predation and the Logic of the Average Variable Cost Test,” 39 *Journal of Law and Economics* 49 (1996) at 62.
16. Aaron Edlin, “Stopping Above-Cost Predatory Pricing,” 111 *Yale Law Journal* 941 (2002).
17. Einer Elhauge, “Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory,” 112 *Yale Law Journal* 681 (2003).
18. *See* Geoff Edwards, “The Perennial Problem of Predatory Pricing,” 30 *Australian Business Law Review* 170 (2002), 188 & note 92.
19. *See id.* at 188 note 93.
20. *MCI Communications v. AT&T*, 708 F.2d 1081, 1114 (7th Cir. 1983) (emphasis in original); *see also* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2d ed. 2002), vol. 3, para. 736c2 (“As a practical matter, the price that actually maximizes a defendant’s profits in the circumstances will seldom be knowable.”).
21. *But see Compagnie Maritime Belge*, C-395/96 P, para. 97 (stating that “the mere fact that the aim of price competition was to drive a competitor from the market cannot render legitimate competition unlawful” but holding that it was unlawful for a defendant to reduce price to a level above its own costs but below those of a targeted entrant).
22. Paul Joskow & Alvin Klevorick, “A Framework for Analyzing Predatory Pricing Policy,” 89 *Yale Law Journal* 213 (1979).
23. The recoupment test is not without its critics, either, and some of them argue that forecasting whether a predator is likely to be able to recoup its losses is at least as difficult as selecting and measuring the most appropriate costs for use in a price-cost test. *See* M.L. Denger & J.A. Herfert, “Predatory Pricing Claims After Brooke Group,” 62 *Antitrust Law Journal* 541 (1994). However, even the critics do not suggest abandoning the recoupment test; they simply advocate conducting a price-cost test first.
24. An exception must be noted, however. Some nations also rely on “resale-below-cost” laws (which do not necessarily have market power thresholds) to punish what is considered to be predatory pricing. *See* Section 2.4.

25. In some countries, such as the U.S., it is sufficient that there be a wilful *acquisition* of market power as a result of anti-competitive conduct, or that there be an *attempt* to acquire market power with a dangerous probability of success. This is a desirable trait in a competition statute intended to cover predatory conduct because predators are not necessarily dominant when they begin their predatory campaign, but they will acquire a dominant position along the way if the strategy is successful. There is an anomaly in this respect in some other jurisdictions' laws, which require that the defendant already be dominant at the time of the predatory conduct. Some commentators have noted the importance of this difference. *See* Speech delivered by Philip Lowe, Thirtieth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, 23 October 2003, pp. 2-3 (commenting on Article 82); Geoff Edwards, "The Perennial Problem of Predatory Pricing," 30 *Australian Business Law Review* 170 (2002), 196, 197, 199 (arguing that, for this reason, s. 46 of Australia's Trade Practices Act 1974 is "ill-suited to address predatory pricing conduct").
26. This effect is caused by the price elasticity of demand. *See* Section 2.2.2d).
27. There is no clearly established consensus on the definition of entry barriers. Some regard them as costs necessarily incurred by new entrants that incumbents did not have to bear when they entered. Others view entry barriers as anything that permits incumbents to charge above-normal prices without attracting entry.
28. This term refers to the percentage change in quantity demanded caused by a 1% change in price. Highly elastic demand, for instance, would mean that a 1% drop in price would cause, say, a 10% increase in the quantity demanded. Inelastic demand, on the other hand, would mean that the same drop in price would cause, say, only a 0.5% increase in the quantity demanded.
29. This remains true even if the acquirer makes a failing firm defence. The agency will naturally examine why the target firm is failing, and if it is failing because of the acquirer's predatory strategy, then the acquirer will still face the agency's scrutiny –with respect to both the acquisition and the predatory pricing.
30. D.M. Kreps & R. Wilson, "Reputation and Imperfect Information," 27 *Journal of Economic Theory* 253 (1982); P. Milgrom & J. Roberts, "Predation, Reputation and Entry Deterrence," 27 *Journal of Economic Theory* 280 (1982); Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, "Predatory Pricing: Strategic Theory and Legal Policy," 88 *Georgetown Law Journal* 2239 (2000).
31. Bolton, et al. (2000).
32. The concept of reputational effects was at least treated respectfully, in dictum, in one U.S. case. *See Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1196 (3d Cir. 1995) (finding that reputational effects are applicable in "a limited number of special situations" and that the plaintiff had not alleged any such special circumstances).
33. *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989) (Easterbrook, J.); *see also* Richard Posner, *Antitrust Law: An Economic Perspective* 190 (1976) ("Especially misleading here is the inveterate tendency of sales executives to brag to their superiors about their competitive prowess, often using metaphors of coercion that are compelling evidence of predatory intent to the naïve").
34. Furthermore, if a defendant makes a showing that its seemingly predatory behaviour should be excused because of a legitimate business justification, then predatory intent evidence should be allowed to give plaintiffs an opportunity to refute that showing. *See* Section 2.2.4.
35. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.) (noting that under an intent-based predation test, firms might refrain from describing the motives and consequences of their actions, thereby thwarting the test).
36. William Baumol, "Predation and the Logic of the Average Variable Cost Test," 39 *Journal of Law and Economics* 49 (1996) at 54.

37. A recent example of a product introduction LBJ (technically, a service introduction in this case) was described in a 29 April 2004 press release from the U.K. Office of Fair Trading. A bus company began service in a new geographic area and was accused of predatory pricing. Although the company's prices "were low enough in comparison to its costs to raise questions about predation," the OFT found that the company had not infringed the Competition Act because compelling evidence showed that the company was merely attempting to establish a "more secure commercial basis" in the new area and that it neither intended to, nor believed it could, drive a competitor out of business. Thus the OFT concluded that the conduct in question was legitimate competition, and that consumers had benefited from a period of low prices without any weakening of competition. See "First Edinburgh Buses Not Predatory," [www.of.gov.uk/News/Press+releases/2004/75-04.htm](http://www.of.gov.uk/News/Press+releases/2004/75-04.htm).
38. A network effects market is one in which the value of a good or service to a potential customer depends on the number of customers who already use that good or service. One consequence of a network effect is that the purchase of a good by one person benefits others who own the good – a common example is purchasing a telephone. By doing so, a person makes other telephones more useful.
39. Kenneth Elzinga & David Mills, "Predatory Pricing and Strategic Theory," 89 *Georgetown Law Journal* 2475, 2485 (2001).
40. For an overview and explanation of the theory and literature, see Adriaan ten Kate & Gunnar Niels, "Below Cost Pricing in the Presence of Network Externalities," in Einar Hope, ed., *The Pros and Cons of Low Prices*, Konkurrensverket/Swedish Competition Authority (2003), available at [www.kkv.se/bestall/pdf/rap\\_pros\\_and\\_cons\\_low\\_prices.pdf](http://www.kkv.se/bestall/pdf/rap_pros_and_cons_low_prices.pdf), 97-129; see also Joseph Farrell & Michael Katz, "Competition or Predation? Schumpeterian Rivalry in Network Markets," University of California, Berkeley, Economics Dept. Working Paper No. E01-306 (2001), available at <http://repositories.cdlib.org/iber/econ/E01-306/>.
41. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). Interestingly, Microsoft's recoupment came from preserving its monopoly in a different product market, not from ultimately raising its price in the browser market. Microsoft knew that if it allowed Netscape to remain a popular browser, Netscape would have been a threat to Microsoft's operating system monopoly.
42. Adriaan ten Kate & Gunnar Niels, "Below Cost Pricing in the Presence of Network Externalities," in Einar Hope, ed., *The Pros and Cons of Low Prices*, Konkurrensverket/Swedish Competition Authority (2003), available at [www.kkv.se/bestall/pdf/rap\\_pros\\_and\\_cons\\_low\\_prices.pdf](http://www.kkv.se/bestall/pdf/rap_pros_and_cons_low_prices.pdf), 97, 99-100, 111-116.
43. *Id.* at 111-112.
44. *Id.* at 111-119; see also Derek Ridyard, "Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis," 23 *European Competition Law Review* 286, 299 note 47 (2002).
45. Geoff Edwards, "The Perennial Problem of Predatory Pricing," 30 *Australian Business Law Review* 170 (2002), 184. For a more thorough review of the complexities of distinguishing predatory pricing from systems pricing and loss leading in multi-product firms, see Andrew Eckert & Douglas S. West, "Testing for Predation by a Multiproduct Retailer," in Einar Hope, ed., *The Pros and Cons of Low Prices*, Konkurrensverket/Swedish Competition Authority (2003), pp. 39-69, available at [www.kkv.se/bestall/pdf/rap\\_pros\\_and\\_cons\\_low\\_prices.pdf](http://www.kkv.se/bestall/pdf/rap_pros_and_cons_low_prices.pdf), 50-55.
46. 15 U.S.C. § 13(b).
47. *ILC Peripherals v. IBM*, 458 F. Supp. 423, 433 (N.D. Cal. 1978), *affirmed*, *Memorex v. IBM*, 636 F.2d 1188 (9th Cir. 1980); see also *Richter Concrete v. Hilltop Concrete*, 691 F.2d 818, 826 (6th Cir. 1982) ("it is not anticompetitive for a company to reduce its prices to meet lower prices already being charged by competitors").

48. *United States v. AMR Corp.*, 335 F.3d 1109, 1121 n.15 (10th Cir. 2003).
49. *Compagnie Maritime Belge Transports v. Commission*, Opinion of Advocate General, para. 342, C-395-96O & C-396/96P [1998].
50. *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, Case No. 1001/1/1/01, paras. 342-343 [15 January 2002].
51. 83 C.P.R. (3d) 51, [1998] O.J. No. 4007 (Q.L.).
52. See the discussion of the *Germania* decision in Section 3.3.
53. *AKZO Chemie BV v Commission*, Case No. C-62/86 [1991] ECR I-3359; [1993] 5 C.M.L.R. 215, ECJ.
54. *Tetra Pak International v Commission (Tetra Pak II)*, C-333/948 [1996] ECR I-5951, para. 41 (“prices below average variable costs must always be considered abusive”).
55. Opinion of Advocate General Fennelly, *Compagnie Maritime Belge Transports v Commission*, C-395-96O & C-396/96P [1998], para. 127; *see also Aberdeen Journals v Office of Fair Trading*, [2003] CAT 11, para. 357 (despite the apparently peremptory wording of . . . *AKZO* . . . and *Tetra Pak II* . . . , we do not exclude the possibility that, exceptionally, a dominant firm may be able to rebut the presumption of abuse”).
56. European Commission, “Commission’s Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector,” [1998] O.J. 98/C 265/02, paras. 110-116, available at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/ojc265-98en.html>.
57. That measure was used in *Deutsche Post AG*, in which the Commission found that Deutsche Post had infringed Article 82 by pricing parcel services below cost. 2001/354/EC, 5 May 2001, O.J. L125/27. Because *Deutsche Post* is a fidelity rebates case and that topic was covered in a previous roundtable, it is not discussed here. *See* OECD, “Roundtable on Loyalty and Fidelity Discounts and Rebates,” DAF/COMP(2002)21.
58. *Tetra Pak II*, C-333/94 P [1996] ECR I-5951, para. 44.
59. *Compagnie Maritime Belge Transports v. Commission*, Opinion of Advocate General, paras. 111-139, C-395-96O & C-396/96P [1998].
60. Einer Elhauge, “Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory,” 112 *Yale Law Journal* 681 (2003).
61. Speech delivered by Philip Lowe, Thirtieth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, 23 October 2003, pp. 6-7.
62. *Id.* at 6; *Wanadoo*, COMP/38.233 (16 July 2003), appealed to the European Court of First Instance, T-340/03 (pending).
63. Judgment of 1 February 2000, case 2000:2, *Statens Järnvägar v Konkurrensverket and BK Tåg AB*. *See also* T. Petterson and S.P. Lindeborg, “Comments on a Swedish Case on Predatory Pricing – Particularly on Recoupment,” 3 *E.C.L.R.* 75 (2001).
64. Decision 04-D-17, 11 May 2004, paras. 68, 71.

65. See, e.g., E.P. Mastromanolis, "Predatory Pricing Strategies in the European Union: A Case for Legal Reform," 4 European Competition Law Review 211 (1998); Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (2000).
66. Case No. CA98/14/2002, *Predation by Aberdeen Journals Limited* (16 September 2002) (Decision of the Director General of Fair Trading) (hereafter, "*Aberdeen Journals*"), affirmed by Competition Appeal Tribunal (23 June 2003) (see OFT press release, 23 June 2003, "OFT Competition Ruling Upheld," available at [www.oft.gov.uk/news/press+releases/2003/pn+84-03.htm](http://www.oft.gov.uk/news/press+releases/2003/pn+84-03.htm)).
67. *Aberdeen Journals*, paras. 145-149.
68. *Aberdeen Journals*, Table in para. 181 (entry entitled "Review of Aberdeen Independent by Mr. Ezzat").
69. Speech by John Vickers, Chairman of the Office of Fair Trading, "Abuse of Market Power," 31st Conference of the European Association for Research in Industrial Economics, Berlin (3 September 2004), p. 10, available at [www.oft.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf](http://www.oft.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf).
70. *Id.* at 23.
71. Privy Council Appeal No. 6 of 2004, 14 July 2004, [2004] UKPC 37.
72. *Carter Holt Harvey*, paras. 11-20, 42-43.
73. At the time the events in *Carter Holt Harvey* took place, Section 36(1) provided that "No person who has a dominant position in a market shall use that position for the purpose of a) Restricting the entry of any person into that or any other market; or b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or c) Eliminating any person from that or any other market." Section 36 has since been amended, for the purpose of harmonisation with Australian law, to prohibit taking advantage of market power.
74. *Carter Holt Harvey*, paras. 53, 60.
75. *Id.*, para. 21.
76. *Id.*, para. 68. This is an interesting conclusion. Ordinarily, one would expect that when a firm can be characterised as "vulnerable," when lower-cost entry has already occurred, and when the court has found that even if the new entrant were eliminated, another entrant probably would have appeared within a short time to take its place, then the firm would not be considered dominant.
77. *Id.*
78. *Id.*, paras. 16-20.
79. See note 25 above.
80. *Boral*, Judgment of Justice McHugh.
81. *Id.* ("S46 is ill drawn to deal with claims of predatory pricing under these conditions.")
82. 509 U.S. 209, 222, 224 (1993).
83. 509 U.S. at 223.

84. *Id.*
85. *Id.*
86. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).
87. *Brooke Group*, 509 U.S. at 224 (emphasis in original).
88. *See D&S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982).
89. *See United States v. AMR Corp.*, 335 F.3d 1109, 1114 (10th Cir. 2003) (citing Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, "Predatory Pricing: Strategic Theory and Legal Policy," 88 Georgetown Law Journal 2239 (2000)).
90. Derek Ridyard, "Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis," 23 European Competition Law Review 286, 295 (2002).
91. *See* G. Niels & A. ten Kate, "Predatory Pricing Standards: Is There a Growing International Consensus?" 45 Antitrust Bulletin 787 (2000).
92. Act Against Restraints of Competition, Section 20(IV)(2).
93. Art. L. 442-2-442-4.
94. Irish Competition Authority, "Response to the Competition and Merger Review Group Report on the 1987 Groceries Order," Discussion Paper No. 10 (2000), available at [www.tca.ie/discpap.html](http://www.tca.ie/discpap.html). The same position is taken in Patrick Walsh & Ciara Whelan, "A Rationale for Repealing the 1987 Groceries Order," 30 Economic and Social Review 71 (1999).
95. One of the matters, *Australian Competition and Consumer Commission v. Qantas*, involved allegations that Qantas had misused its market power on a certain route after Virgin Blue Airlines had entered. This case is not discussed here because the ACCC ended its enforcement action after determining that, during the time since the action began, the airlines market had changed and competition had been enhanced. *See* ACCC Press Release, "Qantas Airlines Matter Discontinued," 21 November 2003, available at [www.accc.gov.au/content/index.phtml/itemId/402657/fromItemId/378016](http://www.accc.gov.au/content/index.phtml/itemId/402657/fromItemId/378016)
96. 335 F.3d 1109 (10th Cir. 2003).
97. *United States v. AMR Corp.*, 140 F. Supp.2d 1141, 1152-53 (D. Kan. 2001).
98. *AMR*, 335 F.3d at 1112.
99. *See* Brief for Appellant United States of America, 11 January 2002, available at <http://www.usdoj.gov/atr/cases/f9800/9814.htm>
100. *AMR Corp.*, 140 F. Supp.2d at 1199, 1202.
101. *AMR Corp.*, 335 F.3d at 1115. For an economist's view of why the same analysis ought to apply to both predatory pricing and predatory capacity expansion, see Aaron Edlin & Joseph Farrell, "The American Airlines Case: A Chance to Clarify Predation Policy," in John Kwoka and Lawrence White, eds., *The Antitrust Revolution* (2002), available at [http://works.bepress.com/aaron\\_edlin/26/](http://works.bepress.com/aaron_edlin/26/), 21-22.

102. See Greg Werden, "The American Airlines Decision: Not with a Bang but a Whimper" (September 2003), U.S. Department of Justice Antitrust Division Working Paper No. EAG 03-8, available at <http://ssrn.com/abstract=446262>, 8.
103. *AMR Corp.*, 335 F.3d at 1119-20.
104. *AMR Corp.*, 335 F.3d at 1021 n.15.
105. Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service (the "Airline Regulations"), paras. 1(a) and (b); see *Commissioner of Competition v. Air Canada* (2003), 26 C.P.R. (4th) 476, [2003] C.C.T.D. No. 9 (Competition Tribunal), para. 21.
106. Section 79 concerns abuse of a dominant position.
107. Because some aspects of this case are still pending, the discussion here will be limited to a neutral summary of the Tribunal's decision.
108. *Air Canada*, paras. 155-165
109. *Air Canada*, para. 76.
110. Note that this is not a question of profit maximisation. It is simply a question of whether, by cancelling a flight, the defendant could have shifted the resources made idle by that cancellation to an activity that earned *any* positive amount of profit (without necessarily earning the maximum profit possible).
111. This approach is supported by Aaron Edlin & Joseph Farrell, "The American Airlines Case: A Chance to Clarify Predation Policy," in John Kwoka and Lawrence White, eds., *The Antitrust Revolution* (2002), available at [http://works.bepress.com/aaron\\_edlin/26/](http://works.bepress.com/aaron_edlin/26/), p. 9 n.10, and by William Morrison, "Dimensions of Predatory Pricing in Air Travel Markets," 10 *Journal of Air Transport Management* 87, 91 (2004).
112. *Air Canada*, para. 35.
113. *Air Canada*, para. 337.
114. Beyond contributions were taken into account by both parties in *AMR*.
115. Air Canada's failure of the AAC test, however, has not yet resulted in a finding that Air Canada had abused a dominant position. Other elements, including dominance and a practice of anti-competitive acts, would have to be established at the Phase Two hearing.
116. Federal Cartel Office, decision of 18 February 2002, case B-9-144/01; FCO Press Release, "Higher Regional Court Düsseldorf Provisionally Confirms the Prohibition of Lufthansa's Abusive Pricing Strategy," 10 April 2002, available at [www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002\\_04\\_10.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002_04_10.shtml).
117. After the FCO issued its decision, several other LCCs entered the market for a number of domestic routes in Germany, causing fares to decline. That led Lufthansa to implement a new fare system for *all* of its domestic flights, not just for those routes in which it is not dominant. This development suggests that Lufthansa's fare reduction on the Germania route in question may have been due to legitimate competition, not a predatory strategy. The FCO appears to have reached the same conclusion, because in September 2003 it set its decision aside and settled the matter with Lufthansa while part of it was still pending before the Düsseldorf Court of Appeals. See Ulrich Quack & Rüdiger Schütt, "Lufthansa/Germania: German Federal Cartel Office Takes Tough Approach," ABA Section of Antitrust Law Spring Meeting Course Materials, 31 March 2004, p. 962.

118. Morrison has argued that this approach is likely to be inaccurate, arbitrary and difficult to administer. William Morrison, "Dimensions of Predatory Pricing in Air Travel Markets," 10 *Journal of Air Transport Management* 87, 92 (2004) ("using a demand-based valuation of the [incumbent's] additional services requires that the competition authority is able to uncover the distribution of consumer preferences over the particular bundle of services offered . . . Serious errors in this calculation could occur[.]").
119. *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, No. 00-71535 (March 31, 2003, E.D. Mich.).
120. *See, e.g.*, Steven Salop & David Scheffman, "Raising Rivals' Costs," 73 *American Economic Review* 267 (1983).
121. David Scheffman & Richard Higgins, "20 Years of Raising Rivals' Costs: History, Assessment, and Future," *George Mason Law Review* (forthcoming), available at [www.ftc.gov/be/RRCGMU.pdf](http://www.ftc.gov/be/RRCGMU.pdf), at p. 7.
122. Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions," Section 4, July 2001, available at <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02215e.html>.
123. Frank Easterbrook, "When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?" 2003 *Columbia Business Law Review*, 345-358 (2003).
124. Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, "Predatory Pricing: Strategic Theory and Legal Policy," 88 *Georgetown Law Journal* 2239 (2000).
125. *See, e.g.*, Joseph Farrell & Garth Saloner, "Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation," 76 *American Economic Review* 940 (1986).
126. *E.g.*, Plaintiff's Complaint in *United States v. IBM*, No. 69-200 (S.D.N.Y, filed 12 January 1969), paras. 20-21.
127. *Berkey Photo, Inc. v. Eastman Kodak Corp.*, 603 F.2d 263 (2d Cir. 1979); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 436 (N.D. Cal. 1978).
128. Janusz Ordover & Robert Willig, "An Economic Definition of Predation: Pricing and Product Innovation," 91 *Yale Law Journal* 8, 53 (1981).



## NOTE DE RÉFÉRENCE

### 1. Introduction

Les pratiques d'éviction sont l'un des thèmes les plus fréquemment évoqués par le droit et l'économie de la concurrence. Ces questions ont fait l'objet d'une attention croissante au fil des ans, non seulement en raison de certaines affaires très médiatisées, mais aussi de plusieurs débats intéressants, tant pour les chercheurs que pour les praticiens, sur des problèmes théoriques soulevés par les pratiques d'éviction. Malgré tout ce qui a été écrit sur le sujet, certains problèmes fondamentaux ne sont pas encore réglés. Dans les différents pays, des avis contradictoires des plus divers subsistent sur la façon d'identifier et de cerner les comportements d'éviction. Même dans certaines juridictions, les différents tribunaux et les autorités de la concurrence n'ont pas arrêté de position claire sur le sujet. Cette note traite des questions que les autorités de la concurrence vont généralement devoir examiner lorsqu'elles s'efforceront d'établir une distinction entre les pratiques d'éviction préjudiciables à la concurrence et les comportements simplement agressifs, mais bénins, voire bénéfiques à la concurrence. Elle compare également les avantages et les inconvénients de plusieurs modes d'analyse actuellement utilisés.

Plusieurs sortes de comportements commerciaux peuvent être considérés comme des pratiques d'éviction potentielles, mais ils relèvent généralement de deux grandes catégories : les prix d'éviction et l'éviction hors prix. Lorsqu'une entreprise pratique une stratégie d'éviction par les prix, elle commercialise temporairement ses biens ou services à des prix déraisonnablement faibles pour atteindre un objectif à long terme. Plus précisément, elle sacrifie ses bénéfices pendant une période donnée, car elle pense qu'en agissant ainsi, elle évincera ses concurrents du marché, les mettra au pas ou les dissuadera de venir s'y implanter. Il n'est raisonnable pour l'entreprise d'appliquer une telle politique que si elle espère acquérir ou conserver ainsi une certaine puissance sur le marché. Par conséquent, on peut généralement admettre que les prix sont dits d'éviction lorsqu'ils ne peuvent être rentables si la concurrence n'est pas éliminée ou, à tout le moins, freinée.<sup>1</sup> Dès lors qu'il a conquis ou réussi à conserver une puissance sur le marché, le prédateur espère non seulement récupérer les pertes qu'il a subies durant la période d'éviction, mais également augmenter ses bénéfices, à l'issue de cette période, en pratiquant des prix supérieurs à ceux de ces concurrents. Par conséquent, en cas de réussite d'une stratégie s'appuyant sur des prix d'éviction, les consommateurs ne pourront à terme que pâtir de la disparition de la concurrence qui en résultera, même s'ils bénéficient dans un premier temps de prix déraisonnablement faibles.

Les points les plus controversés, à cet égard, sont de savoir 1) quel est le meilleur indicateur de coût à utiliser pour les tests de la relation prix-coûts, 2) s'il convient d'utiliser un test de récupération des pertes, 3) si et quand la preuve du caractère intentionnel de la pratique est pertinente, et 4) si l'on admet l'argument de l'alignement des prix sur ceux de la concurrence. Cette note traite de chacun de ces sujets et présente des recommandations fondées sur des publications de chercheurs et la jurisprudence récente.

L'éviction hors prix implique généralement la réalisation d'investissements excessifs ayant pour seul objet et pour effet probable d'affaiblir ou d'éliminer les concurrents. Des investissements à des fins d'éviction peuvent être par exemple réalisés pour augmenter des capacités, différencier les produits ou faire de la publicité. De plus, les entreprises peuvent adopter des stratégies visant à alourdir les coûts de leurs concurrents. Les cas d'éviction par les prix étant plus courants que les cas d'éviction hors prix, cette note s'attachera particulièrement à la première de ces deux catégories. Il y a eu cependant, ces dernières années, pléthore d'actions en justice intentées à l'encontre de compagnies aériennes mettant non seulement

en cause l'application de prix d'éviction, mais également des pratiques d'éviction au moyen d'une augmentation des capacités et de la différenciation des produits. Pris dans leur ensemble, ces procès constituent un excellent laboratoire pour étudier les comportements d'éviction. En effet, la décision du Comité d'organiser une table ronde sur les pratiques d'éviction a été principalement motivée par certaines affaires impliquant des compagnies aériennes. L'une des sections de la présente note est donc entièrement consacrée à ce sujet.

Cette note aborde principalement les points suivants :

- On dispose de plusieurs tests d'évaluation des prix par rapport aux coûts (tests de la relation prix-coûts) pour aider à identifier les prix d'éviction. Si le test d'Areeda-Turner (s'appuyant sur les coûts variables moyens) a toujours été le test de la relation prix-coûts le plus largement accepté, le test fondé sur les coûts évitables moyens semble être de plus en plus privilégié. Ce test permet de ne s'intéresser qu'à la part de la production de l'entreprise censée obéir à une volonté « d'éviction ». Il peut également prendre en compte les coûts fixes, lorsqu'ils sont spécifiquement associés à l'extension des capacités inhérente à une campagne d'éviction.
- Certains commentateurs recommandent de prendre des mesures contre les entreprises établies qui abaissent leur prix en réaction à l'arrivée de nouveaux concurrents, même lorsque leurs prix ne sont alors nullement inférieurs à leurs coûts. On a pu constater cette démarche dans au moins une décision de justice importante. D'autres commentateurs critiquent vivement ce raisonnement, en précisant qu'au mieux, ces mesures n'ont pas un impact avéré sur le bien-être des consommateurs et qu'elles favorisent l'implantation sur le marché de concurrents inefficients. Il paraît donc préférable de tolérer les stratégies de prix-limite plutôt que d'encourager des hausses de prix et accueillir des entrants inefficients.
- La récupération des pertes est un aspect controversé de l'étude des prix d'éviction. Selon l'objectif des pouvoirs publics sous-tendant le droit de la concurrence, l'analyse de la récupération des pertes peut être essentielle pour déterminer les cas d'éviction. Elle permet de cerner les pratiques d'éviction susceptibles de nuire à la concurrence (plutôt qu'aux concurrents), et de préserver par là-même le bien-être des consommateurs. Elle peut également épargner aux autorités et aux tribunaux les difficultés parfois inhérentes à la réalisation de tests de la relation prix-coûts. Si, en dehors du bien-être des consommateurs, d'autres objectifs importants sont visés, l'analyse de la récupération des pertes peut être cependant moins pertinente.
- La probabilité d'une récupération ultérieure des coûts n'est pas établie du simple fait qu'une entreprise est considérée comme dominante. Plusieurs autres facteurs doivent être pris en compte, comme sa faculté à augmenter ses capacités, sa solidité financière relative et les effets de réputation.
- La question de savoir s'il est pertinent d'établir le caractère intentionnel du comportement d'éviction prête également à controverse. Il existe une différence entre le fait d'établir la preuve de l'intention générale d'éliminer un concurrent et celui de démontrer que l'entreprise applique une stratégie spécifique et minutieuse d'absorption des pertes à court terme visant à éliminer la concurrence en vue de dégager à long terme des bénéfices supra-concurrentiels. La première catégorie de preuve n'est pas particulièrement significative, car pour les entreprises, vouloir vaincre leurs concurrents d'une manière ou d'une autre est une banalité. La deuxième catégorie de preuve est plus utile car elle démontre, à tout le moins, que le prédateur présumé était convaincu de pouvoir mener à bien sa stratégie. Néanmoins, il peut être préférable de ne recourir à ce type de preuve que pour réfuter les tentatives des contrevenants présumés d'avancer des arguments commerciaux légitimes afin de justifier leur politique de prix inférieurs aux coûts, et

plus intéressant de démontrer l'intention de l'entreprise en question pour établir l'infraction au premier chef.

- Le simple fait, pour une entreprise, de pratiquer des prix inférieurs à ses coûts ne signifie pas nécessairement que son initiative fasse tort à la concurrence. Dans certains cas, non seulement ces pratiques tarifaires sont inoffensives, mais elles favorisent en fait aussi la concurrence. Les autorités doivent examiner de très près les arguments que les prédateurs présumés utilisent pour justifier leur politique de prix.
- L'argument de « l'alignement sur les prix de la concurrence » est une source de désaccord entre les juridictions. Les entreprises mises en cause qui utilisent cet argument soutiennent qu'elles ne peuvent être sanctionnées pour avoir simplement aligné un prix donné sur celui d'un concurrent, sans avoir pratiqué de prix inférieurs aux coûts et qu'elles ont le droit de se défendre contre les entreprises pratiquant des prix moins élevés que les leurs, même si cela suppose pour elles de vendre à perte. Le rapport de la relation prix-coûts de l'entreprise mise en cause est bien plus significatif que celui existant entre ses prix et ceux d'une autre entreprise. Un prix ne peut être considéré comme un prix d'éviction du seul fait qu'il est inférieur à celui d'un concurrent. De même, il ne peut être considéré comme n'étant pas un prix d'éviction du seul fait qu'il n'est pas inférieur à celui d'un concurrent. L'alignement sur les prix des concurrents peut cependant produire un effet d'éviction dans certain cas, lorsqu'il existe par exemple des différences de qualité entre les produits concernés.
- Outre les règles de portée générale visant à lutter contre les abus de position dominante dont ils disposent, certains pays appliquent des lois spécifiques aux ventes à perte, sanctionnant les distributeurs dont les prix sont inférieurs aux coûts qu'ils encourent. Le cas échéant, il est plus facile de réunir les éléments de preuve nécessaires que de collecter les preuves attestant d'une situation traditionnelle d'abus de position dominante. Ces lois semblent, par voie de conséquence, couvrir des comportements favorables à la concurrence et ont pour effet de maintenir des prix supérieurs en vue de protéger des concurrents plus modestes, sans doute moins efficaces.
- Une comparaison des différents procès ayant eu lieu dans le secteur du transport aérien montre combien les diverses juridictions sont divisées en ce qui concerne leur analyse des cas d'éviction. Il ressort également que le dispositif fondamental utilisé dans les cas d'éviction par les prix peut également s'appliquer aux pratiques d'éviction au moyen d'une augmentation des capacités.

## 2. Prix d'éviction

### 2.1 *La notion de prix d'éviction*

De manière générale, on entend par prix d'éviction des prix si faibles qu'ils ne peuvent être considérés comme raisonnables que s'ils ont pour effet, à terme, d'éliminer ou de pénaliser la concurrence, permettant au prédateur d'atteindre ou de préserver une certaine puissance sur le marché. Ainsi, dans un scénario classique d'éviction par les prix, une entreprise déjà implantée en situation de monopole réagit à l'irruption d'un nouveau concurrent en abaissant ses prix à un niveau contraignant ce dernier à vendre à perte. Dans la plupart des définitions, une politique de prix d'éviction obligera l'entreprise déjà implantée à vendre également à perte. En maintenant des prix faibles pendant un certain temps, le prédateur souhaite pénaliser le nouveau venu au point de lui faire quitter le marché. Dès lors, le prédateur relève ses prix pour les porter au niveau de maximisation des bénéfices monopolistiques et engrange des bénéfices plus que suffisants pour compenser le manque à gagner encouru durant la phase de prédation.

Il existe de nombreuses variantes de ce scénario classique. Le prédateur ne doit pas nécessairement être en position de monopole ni même occuper une position dominante, par exemple. Il peut s'agir, en fait, d'une entreprise oligopolistique. De plus, l'application de prix d'éviction peut ne pas tant viser à éliminer un concurrent existant, mais à empêcher que des concurrents potentiels ne prennent pied sur le marché. Par ailleurs, il existe de nombreuses sortes de baisses de prix – calculées habituellement par rapport aux coûts supportés par le prédateur – qui peuvent ou non être considérées comme des pratiques d'éviction, en fonction de circonstances propres à chaque situation et de la juridiction dans laquelle elles se produisent.

Une bonne partie des études théoriques sur les prix d'éviction ont été menées durant les années 70, lorsque les universitaires ont ouvert, et pour longtemps, le débat sur la meilleure façon de les identifier.<sup>2</sup> Dans les années 80, la popularité croissante des études économiques de « l'école de Chicago » a largement étouffé la discussion car les universitaires de cette école considéraient que les prix d'éviction étaient si rares et si irrationnels que cela ne valait pas la peine de s'y intéresser outre mesure.<sup>3</sup> Cette opinion a prédominé jusqu'à ce que des universitaires de « l'école post-Chicago » relancent l'idée que la fixation de prix d'éviction n'était ni si déraisonnable ni si rare que ce que l'on supposait auparavant et les autorités de la concurrence se sont alors mises à engager davantage de poursuites à l'encontre de ces pratiques.

Que l'on considère ou non l'éviction par les prix comme un phénomène rare, il n'en reste pas moins que, si une entreprise applique avec succès une telle politique, cela va nuire à la concurrence. Superficiellement pourtant, il peut sembler paradoxal de devoir recourir au droit de la concurrence pour attaquer des stratégies tarifaires au motif que les prix pratiqués ne sont pas assez élevés. Après tout, en théorie, la philosophie sous-jacente au droit de la concurrence veut qu'il ait pour objet de favoriser la concurrence, censée renforcer le bien-être des consommateurs, en veillant à ce que les prix restent à un niveau plus bas qu'ils ne le seraient si les marchés étaient plus concentrés, collusoires ou restrictifs. De fait, aux yeux de la plupart des consommateurs, il est généralement admis que les prix ne sont jamais trop bas. Il est vrai que même l'éviction par les prix renforce à court terme le bien-être des consommateurs, car cette stratégie a pour corollaire, dans un premier temps, l'application de prix d'une faiblesse inhabituelle. L'éviction, cependant, est un processus dynamique et lorsqu'elle atteint son objectif, les hausses de prix qui en résultent sont préjudiciables à la fois aux consommateurs et à l'efficacité de répartition à long terme. Si les entreprises en place avaient le droit de vendre à perte en vue de pratiquer des prix inférieurs à ceux de leurs concurrents et de les éliminer, alors les avantages résultant du libre jeu de la concurrence ne pourraient se faire pleinement sentir.

L'une des principales difficultés pour les autorités de tutelle provient de ce que l'application de prix d'éviction est assimilable à une pratique concurrentielle légitime. Il peut donc être extrêmement difficile de distinguer l'une de l'autre. Une baisse de prix pratiquée en réaction à l'arrivée de nouveaux concurrents ou à la menace de cette arrivée fait précisément partie des pratiques que l'on pourrait normalement attendre d'une entreprise établie, réalisant des bénéfices supérieurs au niveau concurrentiel. Au fil du temps, plusieurs tests différents ont été conçus pour aider les autorités de tutelle et les tribunaux à faire la distinction entre comportements d'éviction et rugosité de la concurrence. Les principaux tests utilisés sont présentés dans la section ci-après

## **2.2. Tests utilisés pour détecter les prix d'éviction**

### **2.2.1 Tests d'évaluation des prix par rapport aux coûts**

Les tests d'évaluation du rapport prix-coûts (tests de la relation prix-coûts) visent à déterminer si une entreprise subit des pertes qui ne peuvent être considérées comme raisonnables que dans le cadre d'une stratégie de prix d'éviction. En comparant les informations objectives concernant les prix pratiqués et les coûts encourus, ces tests ne règlent pas la question plus subjective de savoir si l'entreprise a intentionnellement suivi une stratégie de prix d'éviction, mais ils fournissent des données permettant

d'établir si elle applique ou non une telle stratégie. Cette objectivité est un aspect essentiel car il est plus significatif, d'un point de vue économique, de savoir *comment* une entreprise déjà implantée s'en prend à ses concurrents que de savoir si elle a agi *intentionnellement*.

Par exemple, si une entreprise contraint un concurrent à quitter le marché en pratiquant des prix tels que celui-ci est obligé de vendre à perte pour s'aligner, il peut alors être vrai que l'entreprise en question a délibérément envoyé un signal pour décourager les entrants potentiels, voire qu'elle a agi ainsi intentionnellement pour atteindre ou préserver une position dominante. Si cette entreprise est plus efficiente que ne l'était le concurrent, cependant, et qu'elle a donc pu atteindre ses objectifs en pratiquant simplement des prix inférieurs à ceux du concurrent tout en continuant à couvrir ses coûts, alors la situation qui en résulte, décrite ci-dessus, procède pleinement d'un comportement concurrentiel normal. En revanche, si l'entreprise pratique des prix inférieurs à ses propres coûts, il y a alors distorsion du processus concurrentiel et l'entreprise en question peut avoir exclu du marché un concurrent plus efficient.

Quelles caractéristiques faut-il donc retenir pour pratiquer un test de la relation prix-coûts ? Idéalement, les coûts de référence doivent être fixés de telle sorte que l'entreprise ne puisse appliquer des prix supérieurs et éliminer ou dissuader, dans le même temps, ses concurrents et ses concurrents potentiels, ces derniers étant au moins aussi efficaces.<sup>4</sup> Il convient de s'assurer parallèlement que les coûts de référence retenus ne sont pas trop élevés. Dans ce contexte, on entend par « trop élevés », toute règle qui contraindrait les entreprises à élever leur prix au-delà du seuil de compétitivité pour ne pas enfreindre la loi. Dans ce cas, les consommateurs, dont la loi est censée promouvoir le bien-être, pourraient avoir à payer des prix plus élevés que nécessaire, dans la mesure où les textes législatifs protégeraient de la concurrence des entreprises moins efficaces. De plus, les entreprises les plus efficaces récolteraient des bénéfices supra-concurrentiels.

La plupart des juridictions ont recours à l'un ou l'autre de ces tests d'évaluation de la relation prix-coûts lorsqu'elles examinent des affaires d'éviction par les prix. Le consensus s'arrête cependant généralement là, car diverses juridictions considèrent que d'autres catégories de coûts permettent de mieux détecter les pratiques de prix d'éviction. De plus, certaines d'entre elles associent plusieurs catégories de coûts tandis que d'autres n'ont pas réussi à déterminer encore quel est le meilleur indicateur de coûts à utiliser.

#### a) Indicateurs de coûts

On évoque souvent les catégories suivantes susceptibles de servir de coûts de référence :

- le coût marginal (« CM ») correspond au coût de la dernière unité produite,
- les coûts variables moyens (« CVM ») représentent l'évolution du CM, en moyenne, sur une période de production donnée. Les CVM sont calculés en identifiant les coûts variables en fonction de la production, en les additionnant les uns aux autres et en divisant la somme par le nombre total d'unités produites,
- les coûts évitables moyens (« CEM ») sont la somme de tous les coûts qu'une entreprise peut éviter en renonçant à une certaine quantité de production, divisée par le nombre total des unités non produites. Ils prennent en compte les coûts variables et les coûts fixes spécifiques récupérables qui peuvent être imputés à une période de production donnée,
- le coût total moyen (« CTM ») est calculé en divisant le total des coûts de l'entreprise – variables et fixes, y compris les coûts communs — par le nombre total d'unités produites. Les coûts communs sont des coûts fixes permettant de financer un certain nombre d'activités ou de

gammes de produits. Ainsi, le salaire du réceptionniste de l'entreprise est considéré comme un coût commun. Il s'agit d'une fonction indispensable, mais aucune partie du salaire ne provient d'un produit spécifique.

b) Le test d'Areeda-Turner

Dans un article paru en 1975 qui a suscité un grand intérêt pour l'éviction par les prix, Areeda et Turner ont introduit ce qui est désormais le test le plus connu pour identifier cette pratique.<sup>5</sup> Selon eux, un prix inférieur au coût marginal à court terme est abusif et tous les prix supérieurs à ce montant ne le sont pas. Leur raisonnement est simple : dans l'état théorique de concurrence parfaite, les mécanismes de marché contraindraient les entreprises à vendre leurs produits au coût marginal. Par conséquent, dès lors qu'un prix est égal ou supérieur à ce coût, il ne peut être réputé trop faible car il s'agit du niveau de prix qui prévaudrait dans la forme la plus concurrentielle de structure du marché. De plus, tant que les prix pratiqués par une entreprise déjà implantée ne sont pas supérieurs à ce coût, ils ne peuvent exclure un concurrent qui soit au moins aussi efficient que l'entreprise déjà implantée.

Les auteurs avaient bien conscience cependant que les données concernant le CM n'étaient pas faciles à collecter. Le coût marginal est davantage un outil théorique à l'usage des économistes qu'une réalité mesurable et empirique. C'est pourquoi Areeda et Turner ont recommandé d'utiliser les CVM à titre de substitut.

La plupart des critiques à l'encontre du test d'Areeda-Turner se fondent sur deux arguments : 1) le coût marginal à court terme n'est pas un bon critère car, même si la plupart des prix inférieurs à ce coût sont abusifs, certains prix qui lui sont supérieurs sont également abusifs ; 2) en supposant que le coût marginal à court terme est un bon critère, le recours aux coûts variables moyens en constitue un piètre substitut car ils tendent à devenir inférieurs au CM (et donc à le sous-estimer) à des niveaux de production supérieurs, ce qui tend à aboutir à des valeurs négatives erronées lors des tests visant à établir l'existence d'une pratique d'éviction.<sup>6,7</sup> Une autre critique majeure est que la règle des CVM favorise les entreprises mises en cause ayant des coûts fixes élevés et des coûts variables faibles, comme les entreprises de transport ou les entreprises informatiques. Dans ces secteurs, il est relativement facile de maintenir des prix faibles mais supérieurs aux CVM. Par conséquent, l'utilisation du test des CVM pourrait permettre aux entreprises établies d'empêcher pendant très longtemps les entrants de récupérer leurs coûts financiers (fixes), ce qui aurait là encore un effet dissuasif.

Malgré ces critiques, la règle d'Areeda-Turner a sans doute eu une influence plus déterminante sur le règlement des différends en matière de prix d'éviction à l'échelle mondiale que tout autre test d'évaluation de la relation prix-coûts. Pour de nombreux tribunaux et autorités, ce que cette règle perd en précision est compensé par sa relative simplicité d'utilisation. De plus, elle n'est pas dénuée de grandes qualités. Des prix maintenus durablement sous les CVM indiquent que l'entreprise ne récupère même pas tous ses coûts variables, donc encore moins ses coûts fixes. Habituellement, lorsqu'une entreprise enregistre de telles pertes dans la durée, elle doit fermer ses portes car la poursuite de son activité occasionnerait un déficit encore plus important que le fait de se retirer. Une entreprise maintenant son activité dans ces circonstances pourrait donc bien être un prédateur (à moins de pouvoir justifier légitimement ce comportement).<sup>8</sup>

c) Le test du coût total moyen

L'un des inconvénients lié à l'utilisation des CVM, lors d'un test de la relation prix-coûts, c'est qu'ils ne permettent pas de détecter certaines formes de prix inférieurs aux coûts. Ce type de test peut non seulement sous-estimer le coût marginal, mais il ne tient pas compte non plus des prix supérieurs aux CVM

tout en étant inférieurs au CTM. Lorsqu'une entreprise établit ses prix par rapport à cette fourchette de coûts, elle couvre certes ses coûts variables, mais non l'ensemble de ses coûts fixes. Par conséquent, une entreprise peut ne pas facturer assez cher pour couvrir des postes de coûts comme la location, les frais financiers et les amortissements. Des prix fixés dans cette fourchette n'occasionneront pas autant de pertes chez un concurrent de même efficacité que le feraient des prix inférieurs aux CVM, mais maintenir des prix inférieurs au CTM pendant une longue durée peut néanmoins nuire financièrement au prédateur comme à son (ses) concurrent(s).

Certaines juridictions, comme l'Union européenne, ont donc intégré la règle du CTM à leurs analyses de prix d'éviction. Généralement, le test s'inscrit dans un cadre qui ressemble à celui présenté à l'origine par Joskow et Klevorick.<sup>9</sup> Ces auteurs préconisent plutôt d'utiliser une approche combinant les CVM et le CTM en vertu de laquelle des prix inférieurs aux CVM sont toujours considérés comme abusifs tandis que les prix supérieurs aux CVM, mais inférieurs au CTM sont considérés comme abusifs si l'entreprise en cause ne peut fournir de justification raisonnable pour les prix qu'elle a fixés.

Le test du CTM n'est pas non plus dépourvu d'inconvénients. Alors que le CTM peut sembler facile à mesurer de prime abord, son mode de calcul se révèle difficile, si difficile en fait, que certains économistes ont soutenu qu'il était impossible de calculer exactement le CTM correspondant à un bien vendu par une entreprise commercialisant plusieurs produits. Fondamentalement, le problème vient de ce que, lorsqu'une entreprise fabrique plusieurs produits, attribuer les coûts communs à un produit unique relève de l'arbitraire. Comme l'a observé William Baumol,

. . . . Hors des ouvrages théoriques, il n'existe probablement aucune entreprise ne produisant qu'un seul produit, et les entreprises fabriquant plusieurs produits supportent des coûts fixes imputables, de manière commune, à la production d'au moins deux de leurs produits. Il n'existe cependant aucune manière justifiable économiquement de répartir ces coûts entre les différents produits fabriqués par l'entreprise. Il est bien connu que toutes les méthodes d'imputation des coûts fixes communs sont arbitraires.

Devant les tribunaux et les autorités de tutelle, les CTM (coûts entièrement alloués) sont toujours manipulés de manière à fournir toutes les réponses souhaitées par la partie qui y recourt. De plus, comme je l'ai démontré ailleurs, on peut, dans une large mesure, aisément manipuler ces chiffres « bricolés » sur les coûts. Par conséquent, même si cela peut sembler évident aux économistes, il convient de préciser encore et encore, pour les personnes qui sont directement parties prenantes à l'application du droit de la concurrence, [qu']il ne faut tenir aucun compte de toute conclusion établissant qu'un prix donné est un prix d'éviction sur la foi du calcul du coût total moyen.<sup>10</sup>

On peut être tenté de résoudre tous les problèmes d'allocation des coûts en affectant aux différents produits de l'entreprise des fractions de coûts communs exprimées en pourcentage du chiffre d'affaires global que celle-ci tire de chaque produit. Le problème de cette solution simple est qu'il sera parfois évident, en ordre de grandeur, que l'un des produits utilise davantage qu'un autre une source de coûts communs, alors que la façon dont les deux produits peuvent être comparés, de manière précise, n'est pas claire. Autrement dit, il est possible de déterminer quel produit est le plus coûteux, mais non de calculer le montant que représentent ces coûts. Il peut donc sembler relativement évident qu'un produit générant un chiffre d'affaires assez faible utilise davantage une ressource commune donnée qu'un produit générant un chiffre d'affaires élevé, sans qu'il soit possible de calculer cette différence d'une quelconque manière. Cela peut être le cas pour le poste de réceptionniste par exemple. Si le coût commun est néanmoins attribué en fonction du chiffre d'affaires généré, il y aura une erreur manifeste d'imputation, même si elle n'est pas quantifiable.

Un autre inconvénient du test du CTM est que l'application de prix inférieurs au CTM sur une certaine période peut constituer une réponse raisonnable à l'arrivée de nouveaux concurrents, même si cela n'entraîne pas d'élimination de la concurrence. Ainsi, après l'arrivée d'une nouvelle entreprise pratiquant des prix peu élevés, une entreprise déjà établie peut enregistrer un tel recul de la demande que l'établissement de ses prix au coût marginal lui permet de couvrir ses coûts variables, mais pas l'ensemble de ses coûts fixes. Tant que ces coûts restent fixes, il est raisonnable pour l'entreprise de couvrir au moins une partie d'entre eux si elle le peut. En revanche, si elle maintenait ses prix à leur niveau antérieur à l'arrivée du nouveau concurrent, l'entreprise subirait une baisse encore plus forte de la demande, qui serait d'une telle ampleur qu'elle ne pourrait même pas couvrir ses coûts variables. La possibilité que des prix inférieurs au CTM ne soient pas des prix d'éviction ne signifie pas que le cas ne se présente jamais, mais cela a conduit certains théoriciens de renom à conclure que cette pratique devrait être autorisée, car il est difficile de faire la distinction entre les deux situations.<sup>11</sup>

#### d) L'analyse des coûts évitables moyens

L'utilisation des CEM dans le cadre d'un test de la relation prix-coûts s'est développée ces dernières années.<sup>12</sup> L'analyse sur la base des CEM est en réalité une variante du test d'Areeda-Turner. Dans l'analyse des CEM, les prix sont comparés à la moyenne des coûts variables et des coûts fixes spécifiques, récupérables sur une période de production donnée. L'objectif est de déterminer combien une entreprise économiserait en renonçant à une partie de sa production.

L'un des avantages des CEM par rapport aux CVM est qu'ils fournissent une meilleure estimation du coût réel supporté par l'entreprise pour fabriquer les produits vendus à des prix considérés comme abusivement bas. Lorsqu'une entreprise augmente sa production dans le cadre d'une campagne d'éviction<sup>13</sup>, elle peut avoir à supporter davantage de coûts que ceux variant avec chaque unité produite vendue, calculés au moyen de l'analyse des CVM. Parfois, un prédateur assumera des coûts fixes importants lorsqu'il augmente ses capacités pour absorber la demande supplémentaire. Ainsi, un boulanger peut avoir besoin de s'acheter un autre four ou un opérateur de circuits touristiques de s'acheter un autre bus. Ce type de dépenses augmente par tranche et non progressivement à chaque gâteau ou billet de car vendu. On peut donc également considérer qu'en incorporant les coûts fixes spécifiques, l'analyse des CEM bat en brèche la critique qui veut que les entreprises des secteurs à coûts fixes élevés passent trop aisément le test d'Areeda-Turner.

Autre cas de figure, un prédateur peut réaffecter une consommation intermédiaire à coût fixe liée à une de ses autres gammes de produits vers celle sur laquelle porte sa campagne d'éviction. La notion de coûts évitables intègre aussi cette possibilité, ce qui est judicieux lorsque cette source de coûts aurait pu être utilisée rentablement à son poste d'origine.

Un autre avantage du test d'Areeda-Turner est sa souplesse. Il peut être utilisé pour analyser différents aspects de la politique de prix d'une entreprise. Il peut ainsi servir à examiner la politique de prix appliquée à la fabrication globale d'un produit. En ce cas, le chiffre d'affaires total provenant de la commercialisation de ce produit doit être comparé aux coûts que l'entreprise économiserait si elle retirait complètement du marché le produit en question. Le test des CEM permet également d'analyser les prix pratiqués pour une catégorie donnée de clients, le chiffre d'affaires représenté par les ventes réalisées uniquement auprès de ces clients étant alors comparé aux coûts que l'entreprise aurait économisés en ne vendant pas ses produits aux clients en question.<sup>14</sup>

Ce que l'on peut considérer exactement comme un coût évitable dépend aussi, en partie, de la période considérée. De manière générale, plus la période est longue, plus le coût total et les coûts évitables seront élevés, du fait que de plus en plus de coûts irrécupérables deviennent évitables avec le temps. Par exemple, un contrat peut arriver à expiration ou l'entreprise peut trouver un acheteur pour une pièce mécanique

inhabituelle. Il est évident que plus la période considérée s'allonge, plus il devient difficile de passer le test des CEM. Logiquement, la période à prendre en compte est en fait celle au cours de laquelle les prix réputés d'éviction ont été pratiqués.<sup>15</sup> Plus la campagne d'éviction par les prix considérée dure longtemps, plus le test des CEM devient difficile à passer.

e) Prix supérieurs aux coûts

Une question qui a suscité un grand débat est de savoir si des prix peuvent être considérés comme des prix d'éviction lorsque le prédateur présumé n'applique pas de prix inférieurs à ses coûts, mais qu'il ne parvient pourtant pas à maximiser ses bénéfices à court terme. Le problème est essentiellement de savoir si la politique de prix-limite est illégale. En utilisant cette stratégie, une entreprise établie fixe ses prix pour qu'ils soient rentables, mais sous le seuil de maximisation des bénéfices à court terme, optant pour un volume de production correspondant qui laisse juste trop peu de demande disponible pour qu'il soit rentable pour les concurrents d'accéder au marché (*dans le sens où* le nouveau venu ne pourrait pas couvrir son CTM aux prix en vigueur). En sacrifiant une part de ses bénéfices, l'entreprise établie barre l'accès aux entrants, tout en étant en mesure de dégager en partie des bénéfices supra-concurrentiels. Cette stratégie nuit au bien-être des consommateurs dans le cas où les entrants seraient devenus au moins aussi efficaces que l'entreprise établie s'ils avaient pu prendre pied sur le marché, y acquérir de l'expérience et cumuler des volumes pour pouvoir ensuite réduire leurs coûts d'exploitation.

Pour réparer le préjudice causé par les stratégies de prix-limite, Aaron Edlin a proposé que les entreprises établies en situation de monopole ne puissent plus réagir à la menace de nouveaux arrivants en abaissant nettement leurs prix ou en améliorant considérablement leurs produits avant que les entrants aient pu devenir viables ou même que l'entreprise en situation de monopole ait perdu sa position dominante.<sup>16</sup> En réponse à cela, Einer Elhauge a soutenu qu'il n'existe aucune règle applicable pour stopper les pratiques d'éviction fondées sur des prix supérieurs aux coûts, et que, même dans le cas contraire, ces règles ne pourraient avoir pour effet de renforcer la concurrence.<sup>17</sup>

Einer Elhauge présente une meilleure argumentation, car la règle d'Edlin favorise l'entrée de nouveaux venus non efficaces, contraignant les entreprises établies dont les coûts sont faibles à prendre des mesures en conséquence pour un résultat incertain. Il peut être difficile, pour les autorités de la concurrence (ou qui que ce soit) de prévoir exactement si les entrants pourraient par la suite être plus efficaces et viables. De plus, il n'est pas sûr que les consommateurs soient mieux lotis avec une entreprise établie qui serait contrainte de maintenir ses prix élevés à court terme pour favoriser l'accès de concurrents potentiellement inefficaces à long terme, susceptibles d'être éliminés en tout état de cause, qu'avec une entreprise établie pratiquant des prix plus faibles à court terme et barrant l'accès à tout concurrent qui ne puisse ni immédiatement ni rapidement devenir aussi efficace qu'elle.

Autrement dit, il est difficile de prédire s'il serait socialement préférable de bénéficier de prix-limite sur les biens produits par une entreprise établie et efficace ou de prix inférieurs sur les biens produits par des entreprises inefficaces. De fait, il n'est même pas sûr qu'il soit préférable pour le bien-être collectif de renoncer à des prix *de monopole* appliqués par une entreprise établie et efficace au profit de prix inférieurs fixés par des producteurs inefficaces.<sup>18</sup>

De surcroît, en faisant qu'il devient bien moins intéressant d'atteindre une position dominante, la règle d'Edlin atténuerait quelque peu ce qui incite, en tout premier lieu, les entreprises à se livrer activement concurrence. À terme, elle pourrait nuire bien davantage au jeu de la concurrence, à l'innovation et au bien-être des consommateurs que les stratégies de prix-limite.<sup>19</sup>

Un problème important en ce qui concerne les tests de maximisation des bénéfices vient de ce qu'il est très difficile d'établir si une entreprise applique des prix correspondant à son niveau de

maximisation des bénéfices à court terme. Comme l'a observé un tribunal, un test de maximisation des bénéfices « exigerait une connaissance très vaste des caractéristiques de la *demande* – ce qui ajouterait à sa complexité et au caractère incertain de son résultat ». <sup>20</sup> Au contraire, dans l'optique du bien-être des consommateurs, il est parfaitement clair que l'application de prix-limite est préférable à la fixation de prix de type monopolistique. Eu égard aux incertitudes évoquées ci-dessus, il semble donc plus judicieux d'autoriser l'application de prix-limite que de contraindre les entreprises en position de monopole à réduire encore le bien-être des consommateurs en maximisant leurs bénéfices. Par conséquent, à condition que les prix de l'entreprise déjà implantée restent supérieurs au CTM, il est généralement permis d'appliquer un prix inférieur au point de maximisation des bénéfices à court terme, même si les motivations, ce faisant, sont purement malveillantes. <sup>21</sup>

### 2.2.2 *Récupération des pertes*

Contrairement aux tests de la relation prix-coûts, le test de la récupération des pertes n'est pas utilisé pour déterminer s'il y a effectivement éviction par les prix. Cette analyse présume plutôt que la stratégie d'éviction par les prix est effectivement à l'œuvre et évalue ses probabilités de réussite au vu des caractéristiques du marché pertinent, du prédateur et de sa ou de ses cibles. Plus précisément, le test de récupération des pertes vise à déterminer si une campagne d'éviction par les prix menée par une entreprise aura pour effet probable d'éliminer ou de dissuader la concurrence et s'il est probable que le prédateur dégage, par la suite, suffisamment de bénéfices supra-concurrentiels pour récupérer les pertes qu'il a encourues durant la période d'attaque. <sup>22</sup>

Le test de récupération des pertes se fonde sur le principe selon lequel le droit de la concurrence a pour objet de promouvoir le bien-être des consommateurs. Si le droit de la concurrence considère que d'autres paramètres, comme la protection des petits concurrents ou la nécessité en soi de minimiser la concentration du marché, sont des objectifs ou des facteurs de politique générale contribuant à produire d'autres types (non économiques) de bien-être pour le consommateur, le critère de la récupération des pertes est moins important. Toutefois, en tant que moyen permettant aux autorités de la concurrence et aux tribunaux de s'assurer qu'ils ciblent bien un comportement susceptible de nuire au bien-être des consommateurs et qu'ils ne portent pas, par inadvertance, atteinte à ce principe, la récupération des pertes est un critère assez utile.

On peut préciser cette question en considérant comme acquis que la récupération des pertes liées à des pratiques d'éviction est nécessairement préjudiciable au bien-être des consommateurs. Ces pertes ne peuvent être récupérées que par l'établissement et le maintien de prix supérieurs à ceux qui auraient été appliqués si la campagne d'éviction n'avait pas éliminé ou dissuadé la concurrence. Or, l'application de prix supra-concurrentiels nuit en soi aux consommateurs. Par conséquent, si le test démontre que la probabilité de récupération des pertes est faible ou nulle, l'application de prix d'éviction est une pratique non seulement déraisonnable, mais également peu susceptible de porter atteinte au bien-être des consommateurs. En effet, dans ce cas, une campagne d'éviction par les prix stimule au contraire le bien-être des consommateurs durant toute sa durée, et induit un risque faible, voire nul, de porter atteinte à ce bien-être à long terme. Dans la logique du test, lorsque la récupération des pertes n'est pas plausible, la meilleure solution pour l'autorité de tutelle (et pour les tribunaux) consiste donc à n'engager aucune poursuite, même si une entreprise pratique des prix inférieurs à ses coûts.

Autrement dit, des prix d'éviction présumés ne peuvent faire du tort à la concurrence que s'ils contraignent les concurrents à quitter le marché, qu'ils les dissuadent d'y entrer ou qu'ils les obligent à s'aligner sur les prix fixés. Que la faiblesse des prix gêne les autres concurrents ou que cela puisse leur nuire ne constitue pas un argument suffisant pour interdire les réductions de prix car tout comportement concurrentiel dérange en soi les concurrents et leur « porte préjudice » d'une manière ou d'une autre. Le

test de récupération des pertes permet de déterminer quels sont les prix qui entravent non seulement les concurrents, mais aussi la concurrence en soi.

Le test de récupération des pertes est destiné à servir d'enquête de premier niveau. S'il fait ressortir que les comportements présumés d'éviction par les prix ne sont pas de nature à éliminer ou à dissuader les concurrents, ou que la récupération des pertes n'est pas plausible en dernier recours, ce test permet alors aux autorités de la concurrence et aux tribunaux de rejeter ces allégations, en s'abstenant d'avoir à effectuer des tests de la relation prix-coûts. C'est relativement utile car le processus permettant d'établir l'existence de prix d'éviction en s'appuyant sur le rapport entre les prix en question et certains indicateurs de coûts est souvent assez ardu.<sup>23</sup> Si l'analyse fait néanmoins apparaître que la récupération des pertes est probable, il convient alors de lui associer un test de la relation prix-coûts pour établir que le prédateur mis en cause pratique effectivement des prix d'éviction.

Avant d'examiner les divers paramètres à prendre en compte dans le cadre d'un test de récupération des pertes, il importe de noter que la notion de récupération des pertes varie en fonction de la nature de la cible de la campagne d'éviction, autrement dit un concurrent existant, un nouveau venu ou un concurrent potentiel. Dans le premier cas, la cible est un concurrent dont l'influence a conduit le prédateur à baisser ses prix. Après que la campagne d'éviction aura éliminé ou discipliné le comportement tarifaire du concurrent, le prédateur relèvera ses prix pour les ramener au niveau qu'ils occupaient avant l'attaque. Ce faisant, il récupérera ultérieurement les pertes engagées lors de la période d'éviction, voire dégagera des bénéfices plus importants. Tout bien considéré, le prédateur n'aurait aucune raison de lancer une offensive aussi risquée s'il n'avait pas la perspective de dégager, après la réussite de son action, des bénéfices supra-concurrentiels.

Dans le cas d'une campagne d'éviction contre un nouveau venu ou un concurrent potentiel, le prédateur abaisse ses prix à un niveau tel que l'implantation sur le marché semble ne pas pouvoir être viable, de sorte que l'entrant fraîchement arrivé renonce à y prendre pied ou que le concurrent potentiel est dissuadé d'y entrer. Si et quand cette stratégie réussit, le prédateur relèvera ses prix pour les ramener à leur niveau d'avant la campagne. Selon toute probabilité, il ne tentera pas de les relever au-delà de ce niveau, car il aurait déjà pris une telle mesure avant l'apparition du nouveau concurrent si elle avait été rentable. En ce cas, la récupération des pertes n'est donc pas liée à la capacité de l'entreprise à dégager des bénéfices hors du commun, mais à la restauration d'une position qui lui assure un niveau de bénéfices supra-concurrentiel.

Le test de récupération des pertes prend en compte divers paramètres rendant probable la réussite d'une stratégie d'éviction par les prix. Cela étant, tous ces paramètres n'ont pas besoin d'être réunis que cette réussite soit assurée.

a) Position dominante ou puissance sur le marché

Même dans les juridictions n'utilisant pas le test de récupération des pertes, cet aspect sera probablement pris en compte ne serait-ce que dans la mesure où le droit de la concurrence de la plupart des pays membres comporte des conditions en matière de position dominante ou de puissance sur le marché qui doivent être satisfaites pour qu'un comportement unilatéral puisse être considéré comme illicite.<sup>24</sup> Cette note n'a pas pour objet d'étudier les diverses variantes de ces conditions. Ce qui importe, selon notre point de vue, c'est que les entreprises mises en cause dans la plupart des États membres doivent occuper une position dominante ou détenir une puissance sur le marché (des situations collectivement désignées ci-après sous le terme de « position dominante »), ou du moins, être en passe de l'acquérir,<sup>25</sup> dans la mesure où cette position accroît la probabilité de récupération des pertes.

Exercer une position dominante augmente la probabilité de récupération des pertes pour deux raisons. La première est liée au fait que l'éviction par les prix implique à la fois une réduction des prix et une augmentation de la production. Les réductions de prix, à elles seules, ne sont pas suffisantes, car l'objectif final visé par le prédateur est d'enlever des parts de marché aux concurrents. Si le prédateur ne peut pas accroître suffisamment sa production pour couvrir la part jusque là vendue par ses concurrents, la demande du marché pour les produits vendus au prix d'éviction dépassera ce que le prédateur est capable de livrer. De plus, même si le prédateur est le seul producteur sur le marché et qu'il applique des prix d'éviction pour dissuader de nouveaux concurrents d'entrer sur le marché, cette réduction de ses tarifs stimulera une demande additionnelle qu'il devra également satisfaire.<sup>26</sup> Si le prédateur ne peut produire suffisamment pour faire face à cette nouvelle demande ni à la demande qui était auparavant couverte par les concurrents en place, les concurrents existants et potentiels pourront alors non seulement vendre leurs produits mais le faire à des prix supérieurs à ceux fixés par le prédateur, ce qui est, précisément, ce que ce dernier veut absolument éviter.

Pour faire face à cette augmentation nécessaire de sa production, le prédateur doit donc disposer de surcapacités. C'est là qu'il est utile d'occuper une position dominante. Les surcapacités nécessaires pour mener une campagne d'éviction contre des concurrents existants sont inversement proportionnelles à la part de marché détenue par le prédateur, étant entendu que les entreprises dominantes détiennent généralement d'importantes parts de marché. Autrement dit, un prédateur détenant une grosse part de marché a besoin de surcapacités moins importantes que celui dont la part de marché est faible. Ainsi, un prédateur détenant une part de marché de 80 % n'aura besoin d'augmenter que modérément ses capacités pour ravir à ses concurrents des pans entiers de leur marché.

Au contraire, une entreprise ne détenant que 25 % du marché et affrontant simultanément trois concurrents de même taille que lui aura bien plus de difficulté à mener à bien une stratégie d'éviction. Mis à part les effets d'élasticité de la demande, même si l'entreprise en question doublait sa production, elle ne serait capable de conquérir que 25 % de la part de marché globale cumulée de ses trois concurrents. La part ainsi conquise proviendrait sans doute des trois entreprises en question, selon une répartition proportionnelle, et non d'une seule d'entre elles. Par conséquent, à moins que ce petit prédateur ne puisse augmenter considérablement ses capacités pour satisfaire toute la demande couverte jusque là par eux, son pouvoir d'agression aura été dilué.

Supposons que l'un des concurrents soit si faible que le petit prédateur réussisse à l'éliminer du marché, le problème de répartition des parts de marché se pose alors de nouveau. La part de marché de l'entreprise éliminée ne reviendra probablement pas intégralement au prédateur, mais elle se répartira probablement entre les trois concurrents encore en lice.

La seconde raison pour laquelle les entreprises dominantes sont davantage en mesure de récupérer les pertes liées à des pratiques d'éviction, c'est qu'elles opèrent, par définition, sur des marchés protégés par des barrières à l'entrée. Comme on le voit dans la section suivante, les barrières à l'entrée sont essentielles pour la récupération des pertes.

#### b) Barrières à l'entrée et au retour sur le marché

Les barrières à l'entrée et au retour sur le marché font partie de l'analyse de la position dominante et seront donc évidemment prises en compte dans toutes les affaires portant sur des prix d'éviction. Ces barrières sont essentielles pour que le prédateur puisse espérer récupérer les pertes liées à sa stratégie d'éviction. Une fois qu'il a évincé ses concurrents en place ou dissuadé un concurrent potentiel, le prédateur doit augmenter ses prix pour réaliser des bénéfices supra-concurrentiels, justifiant les pertes subies. Généralement, ces bénéfices attirent les entrants qui tentent de faire baisser les prix pour les amener au niveau concurrentiel normal. Sur un marché ayant d'importantes barrières à l'entrée cependant, le

prédateur se trouve protégé du risque d'entrée et peut donc augmenter ses prix sans avoir trop à se préoccuper de la concurrence.<sup>27</sup>

Les barrières au retour sur le marché sont également importantes. S'il est aisé et peu coûteux pour un concurrent vaincu de se ressaisir et de relancer son activité quelques mois plus tard, au moment où le prédateur présumé aura relevé ses prix, ce dernier disposera probablement de peu de temps pour récupérer ses pertes. Il existe donc des barrières au retour sur le marché, par exemple, dès lors qu'il est difficile et onéreux pour une entreprise ayant quitté le marché de réparer les dommages causés à sa réputation au moment où elle a renoncé. Dans d'autres cas, il peut être difficile pour certaines entreprises de réembaucher les salariés spécialisés qui ont perdu leur emploi lorsque l'entreprise a cessé son activité ou de faire appel à de nouvelles recrues pour les remplacer.

En ce qui concerne les barrières à l'entrée et au retour sur le marché liées à des pratiques d'éviction par les prix, les autorités de la concurrence doivent faire attention non seulement à la probabilité de l'entrée mais au temps qu'il faudra pour ce faire. Si l'entrée est probable mais qu'elle nécessitera plusieurs années, par exemple, la mise en œuvre d'une stratégie d'éviction par les prix peut toujours se révéler rentable.

À cet égard, on est en droit de penser qu'il n'est pas très important d'effectuer ou non un test séparé de récupération des pertes, dans la mesure où la plupart des textes du droit de la concurrence contiennent déjà des dispositions particulières relatives à la position dominante, qui incitent également à examiner les barrières à l'entrée et au retour sur le marché. Ce n'est toutefois pas exact, car l'existence d'une position dominante ou de barrières à l'entrée à elles seules ne suffit pas à établir la probabilité de récupération des pertes. D'autres paramètres concernant les aspects structurels ou comportementaux du marché et de ses participants doivent également être examinés.

#### c) Solidité financière relative

L'éviction par les prix est une guerre financière visant à éliminer les concurrents. Pour la gagner, le prédateur ne doit pas seulement être financièrement solide en général, il doit être, en particulier, plus solide que ses concurrents. Plus ses réserves de trésorerie sont importantes et moins l'accès au capital est onéreux pour lui par rapport à ses concurrents, plus il sera susceptible de survivre et de remporter sa campagne d'éviction. En revanche, si son bilan est faible, sa trésorerie médiocre, s'il est soumis à des conditions de crédit relativement onéreuses et si ses concurrents ont la volonté (et les moyens) d'investir davantage de ressources financières que lui dans une guerre des prix, les chances de réussite du prédateur sont moins bonnes. En fait, il ne peut réussir dans ces conditions sauf si ses autres coûts sont inférieurs à ceux de ses concurrents, condition qui l'aurait sans doute conduit, en premier lieu, à s'abstenir de lancer une offensive d'éviction.

L'un des aspects les plus intéressants des pratiques d'éviction par les prix, c'est que plus l'entreprise est près d'éliminer ses concurrents, plus il devient onéreux d'y parvenir. Cela s'explique par le fait qu'au regard de l'un ou l'autre des indicateurs de coûts, le prédateur perd de l'argent sur chaque unité de production qu'il vend. Plus il prend de parts de marché à ses concurrents vaincus, plus le nombre d'unités vendues sur lesquelles il subit des pertes, tend à augmenter. Le prédateur doit donc posséder la puissance financière nécessaire pour se maintenir et la volonté nécessaire de financer toutes ses pertes et de livrer bataille jusqu'au bout.

#### d) Faible élasticité de la demande par rapport au prix<sup>28</sup>

Cet aspect n'est pas crucial, mais il rend plus probable la réussite d'une politique de prix d'éviction pour deux raisons. La première, c'est qu'il réduit le volume de surcapacités nécessaires requises lors de la campagne d'éviction. En ce sens, c'est un avantage similaire à la position dominante ou à la puissance sur

le marché, mais en l'occurrence, le problème est davantage de savoir si le prédateur peut absorber la demande supplémentaire stimulée par les réductions de prix qu'il a engagées que de savoir si l'entreprise peut pourvoir à la demande auparavant couverte par les concurrents. Plus l'élasticité de la demande par rapport au prix est faible, moins le prédateur aura besoin d'utiliser de surcapacités pour satisfaire le nouveau marché généré par les prix d'éviction.

Deuxièmement, une faible élasticité de la demande par rapport au prix facilite également la récupération des pertes car la demande aura tendance à diminuer plus faiblement lorsque l'entreprise relèvera ses prix sur le marché. En cas de forte élasticité, au contraire, même si le prédateur réussissait à ramener ses prix à un niveau monopolistique, il pourrait perdre une demande telle, que l'ampleur de ses bénéfices pourrait ne pas lui suffire à couvrir ses pertes.

e) Surcapacités

Pour des raisons déjà mentionnées, la possession de surcapacités est pratiquement une condition indispensable pour le prédateur. Il doit être capable de couvrir l'ensemble de la nouvelle demande créée par la baisse de ses prix et, quand il s'attaque à des concurrents existants, il doit également être capable d'absorber leurs ventes. S'il échoue sur ces deux fronts, la demande dépassera sa production et il devra augmenter ses prix, ce qui relâchera la pression sur ses concurrents et leur permettra de survivre définitivement ou, du moins, plus longtemps.

Il faut noter en particulier que les entreprises dominantes ne disposent pas nécessairement de surcapacités. Si elles n'ont guère de surcapacités ou aucune, et ne peuvent en acquérir rapidement, l'éviction par les prix devient peu plausible. Il n'est donc pas exact que les tests de récupération des pertes reposent essentiellement sur les normes de position dominante prévues par la plupart des textes législatifs sur la concurrence.

L'une des solutions pour un prédateur disposant de surcapacités limitées peut être d'acquérir les actifs de ses concurrents, si concurrents il y a. Mais plus le prédateur est dominant, plus cette stratégie risque de se heurter aux procédures d'examen des fusions de l'autorité de tutelle. La campagne d'éviction par les prix suscitera alors une attention non souhaitée, quand bien même la fusion proprement dite aurait été autorisée à d'autres égards.<sup>29</sup> L'acquisition des actifs d'un concurrent n'est donc pas toujours une option intéressante.

f) Évolution des parts de marché

L'évolution des parts de marché est un élément important des tests de récupération des pertes. Si les parts de marché n'ont pas changé durant la période d'éviction présumée, ou si le prédateur présumé a, en fait, perdu des parts de marchés durant cette période, il semble alors impossible qu'il puisse récupérer ses pertes (et, dans l'hypothèse où l'éviction présumée se poursuivrait, la récupération des pertes serait, du moins, peu probable). D'un autre côté, si, par exemple, la part de marché du prédateur présumé a reculé et que celle de son concurrent a augmenté avant ladite période d'éviction et que cette évolution s'est inversée au cours de la période considérée, alors la récupération des pertes serait plausible.

g) Fidélité à la marque

Ce facteur n'est pas essentiel, mais il accroît la plausibilité de la récupération des pertes. Plus l'entreprise établie bénéficie d'une forte fidélité à sa marque, moins la campagne d'éviction lui sera coûteuse. Ce phénomène est dû au fait que le prédateur, pour prendre des parts de marchés à ses concurrents, n'aura pas besoin de baisser autant ses prix que si les consommateurs n'étaient pas aussi fidèles à sa marque.

## h) Efficience relative

Plus l'entreprise établie est efficace par rapport à ses concurrents, moins il lui sera coûteux (et donc plus il lui sera facile) de mener une campagne d'éviction. À l'inverse, moins elle est efficace par rapport à ses concurrents, plus il lui sera coûteux de mener une campagne d'éviction. On peut se demander si une entreprise déjà implantée pourrait même avoir intérêt à adopter une stratégie d'éviction par les prix si elle n'est que relativement efficace par rapport à ses concurrents. Cela étant, l'information dont elle dispose n'est souvent pas parfaite. L'entreprise établie peut même ne pas savoir qu'elle possède un avantage en termes d'efficacité. De plus, si elle a hâte de se débarrasser de ses concurrents, elle peut vouloir accélérer le processus de harcèlement à leur rencontre. Pourtant, posséder un avantage de cette nature se révèle souvent suffisant à long terme pour vaincre le concurrent sans avoir besoin de vendre à perte. Paradoxalement, il est donc plus facile pour une entreprise établie ayant le moins besoin de recourir à une stratégie d'éviction par les prix, de se donner les moyens d'une telle campagne et de la mener à bien que cela ne l'est pour une entreprise établie menacée de se voir éliminer par un concurrent plus efficace. De fait, plus l'entreprise établie « a besoin » d'évincer ses concurrents, moins elle est susceptible d'y parvenir (toutes choses égales par ailleurs), car il lui faudra pratiquer des prix de plus en plus inférieurs à ses coûts pour éliminer son ou ses concurrent(s) plus efficace(s).

## i) Effets de réputation

Pour une entreprise, acquérir la réputation d'être prête à absorber ses pertes pendant un certain temps en vue d'éliminer ses concurrents et de dissuader des entrants potentiels peut considérablement renforcer la probabilité de récupération des pertes. Premièrement, la réputation de prédateur peut avoir des effets durables sur le marché sur lequel celui-ci mène son attaque. Si la stratégie d'éviction d'une entreprise lui permet d'éliminer les concurrents et que les entrants potentiels sur ce marché pensent le prédateur capable de recourir à nouveau à cette même stratégie, ils se montreront moins enclins à accéder au marché. Par conséquent, le prédateur peut gagner plusieurs batailles pour l'avenir en n'en livrant qu'une seule dans le présent, lorsqu'il parvient à vaincre un concurrent. Sa capacité à réaliser des bénéfices supra-concurrentiels peut être dans l'avenir plus forte encore qu'elle ne l'aurait été sans l'avantage que lui procure sa réputation. Cela ne signifie pas que les effets de réputation rendent la récupération des pertes plausibles dans tous les cas d'éviction par les prix. Associée à d'autres facteurs cependant, une réputation convaincante de prédateur rend la récupération des pertes plus probable.<sup>30</sup>

De plus, bénéficier d'une réputation de prédateur peut se révéler encore plus utile pour une entreprise qui intervient sur plusieurs marchés. Dans ce cas, les effets de notoriété acquis sur un marché font tâche d'huile sur les autres marchés où l'entreprise opère. Le prédateur pourra alors récolter les fruits de sa stratégie d'éviction par les prix sur plusieurs marchés tout en ne supportant les coûts correspondants que sur un seul d'entre eux. Il s'agit là d'un concept théorique relativement important car cela signifie que la récupération adéquate des pertes ne doit pas se produire nécessairement sur le marché où la campagne d'éviction a eu lieu. Les pertes peuvent ne jamais être récupérées sur le marché où elles ont été encourues, et pourtant, dans la mesure où les effets de réputation se font sentir sur plusieurs marchés à la fois, cette stratégie peut être parfaitement censée. Soulignons toutefois que la réussite de ce scénario est subordonnée à la condition que l'entreprise établie n'encoure *pas* davantage de pertes sur ses autres marchés dans le cadre de ses pratiques d'éviction, car elle aurait alors besoin de les couvrir là aussi.

Les effets de réputation ne sont pas faciles à quantifier, mais ils peuvent, du moins, être pris en considération sous l'angle qualitatif. Ils sont, de fait, abondamment décrits dans les travaux récents de l'école post-Chicago qui ont contribué à relancer l'idée, peu rassurante, que l'éviction par les prix pouvait être une stratégie raisonnable.<sup>31</sup> À ce jour cependant, les tribunaux ont largement ignoré ou rejeté les théories fondées sur ces effets.<sup>32</sup> Ce n'est sans doute pas très surprenant puisque ces effets, tels que la théorie nous les décrits, sont difficiles à mesurer quantitativement. Même qualitativement, si les plaignants

étaient autorisés à dénombrer tous les marchés sur lesquels l'entreprise mise en cause est établie comme autant de sources de récupération des pertes, il semble que seule une entreprise très peu préparée pourrait échouer à ce test.

j) Discrimination par les prix

Si l'entreprise en place peut ne faire profiter de prix d'éviction que les consommateurs envisageant sérieusement d'acheter un produit concurrent donné au lieu d'appliquer cette stratégie à toute sa production, alors le coût de cette mesure sera réduit, ce qui non seulement la rend plus facile à financer, mais aussi abaisse le point d'équilibre du processus de récupération des pertes.

k) Subventions croisées

Si une entreprise peut récupérer sur un autre marché où elle réalise des bénéfices supra-concurrentiels les pertes liées à une stratégie d'éviction subies sur un marché donné, elle accroît alors ses chances de maintenir ses prix d'éviction suffisamment longtemps pour éliminer et dissuader ses concurrents.

### 2.2.3 *Caractère intentionnel des pratiques d'éviction*

Un aspect controversé de l'examen des affaires d'éviction par les prix est la valeur des preuves indiquant que l'entreprise mise en cause a fait montre d'une intention d'évincer ses concurrents. Certaines juridictions, comme l'Union européenne, tiennent expressément compte, dans leurs examens, du caractère intentionnel de ces pratiques (ainsi que des tests de la relation prix-coûts), tandis que d'autres, comme les États-Unis, sont plus sceptiques quant au fait que l'intention atteste de pratiques d'éviction réelles ou soit susceptible de nuire à la concurrence. Les partisans de l'utilisation des preuves d'intention dans les affaires d'éviction par les prix soutiennent généralement leur position en arguant que les dirigeants d'entreprises sont mieux placés que les pouvoirs publics ou les juges pour déterminer si une stratégie d'éviction par les prix peut aboutir à l'élimination de la concurrence et être ou non rentable à terme. Ces dirigeants étant des acteurs expérimentés et raisonnables du marché, toute preuve établissant qu'ils ont eu l'intention de mener une campagne d'éviction ou de nuire à un concurrent est plus fiable que les supputations formulées par des personnes extérieures au marché évaluant si la récupération des pertes est probable.

Pour leur part, les adversaires de cette argumentation réfutent généralement l'idée de devoir s'appuyer, pour établir la preuve de l'intention, sur les termes peu amènes utilisés dans des mémos ou des plans de développement, car on peut difficilement les différencier des fanfaronnades et surenchères inoffensives auxquelles se livre traditionnellement une entreprise dans le cadre d'une saine concurrence sans état d'âme :

Les entreprises « ont l'intention » de réussir toutes les affaires qu'elles peuvent réaliser, d'écraser leurs adversaires si elles le peuvent... Les dirigeants qui s'efforcent le plus de réduire leurs prix feront le plus de tort à leurs concurrents et ils ne verront rien de mal à cela... Presque toutes les preuves reposant sur « l'intention » dénotent à la fois la volonté de réussir, motivée par l'appât du gain, et la jubilation de voir un concurrent en mauvaise posture. Les entreprises n'ont pas à aimer leurs concurrents, elles n'ont pas à les féliciter de leurs succès, le désir d'anéantir l'adversaire est dans la logique même de la concurrence, elle en est d'ailleurs souvent le principe moteur... Se fonder sur l'argument de l'intention ne permet pas de faire la différence entre concurrence d'une part et volonté de monopolisation d'autre part et incite les jurés à pénaliser les cas de concurrence exacerbée.<sup>33</sup>

Une explication possible de la discorde autour du recours à l'argument du caractère intentionnel des pratiques d'éviction par les prix vient de ce que certaines juridictions font appel à des jurés pour trancher

des affaires relevant du droit de la concurrence et d'autres non. Comme le suggèrent les propos du juge Easterbrook cités ci-dessus, les jurés risquent davantage que les juges d'être induits en erreur par cet argument. On peut donc s'attendre à ce que le recours à ce type de preuve soit désavoué aux États-Unis où les jurés sont appelés à se prononcer dans certaines affaires et soit largement admis dans l'Union européenne où les jurys n'interviennent pas dans ces affaires.

Même lorsque le jugement revient à un jury, et malgré la critique formulée ci-dessus, lorsque la preuve existe qu'il y a eu l'intention spécifique de lancer une campagne de prix d'éviction, par opposition à une simple intention malveillante générale à l'égard des concurrents, cette preuve mérite probablement d'être prise en considération, car elle démontre que le contrevenant présumé misait, à tout le moins, sur la réussite de sa stratégie.<sup>34</sup> Il est admis, toutefois, qu'il faut ne faut pas s'en tenir là. Autrement dit, il ne faut pas se contenter d'établir l'intention d'éviction et l'application de prix inférieurs aux coûts.

En définitive, la question qui se pose aux tribunaux et aux autorités de la concurrence dans les affaires relevant du droit de la concurrence est de savoir s'ils doivent ou non intervenir. Si les pouvoirs publics visent, comme il se doit, à faire cesser et à sanctionner toutes les tentatives menées par les entreprises dominantes de recourir à des pratiques d'éviction par les prix, il est alors censé de poursuivre toutes les entreprises dominantes échouant au test de la relation prix-coûts auquel elles sont soumises ainsi qu'à un test évaluant leurs intentions sans présumer plus avant des probabilités de réussite de la stratégie d'éviction. Si les pouvoirs publics ont, comme il se doit, pour objectif de promouvoir le bien-être des consommateurs en protégeant la concurrence, ils ont besoin d'autres assurances que les seules revendications de bonne foi de l'entreprise mise en cause qui essuie des pertes. Autrement dit, ils doivent recourir à un test de récupération des pertes.

Premièrement, les dirigeants d'entreprise sont loin d'être sans défaut. Il n'est pas rare que leurs plans de développement échouent. Comme nous le verrons plus loin dans la section consacrée à l'affaire *Aberdeen Journals*, les entreprises peuvent être convaincues de pouvoir l'emporter sur un concurrent en pratiquant des prix d'éviction et pourtant se fourvoyer complètement. L'entreprise recourant à cette pratique peut avoir mal apprécié les conditions de marché, sous-estimé la résistance ou l'obstination farouche de son ou ses concurrents ou encore sa propre capacité à endurer une guerre des prix. Après tout, l'éviction par les prix ne serait pas considérée comme une stratégie si risquée si elle était facile à mettre en œuvre.

Deuxièmement, si la présence d'une intention d'éviction est un élément de l'examen, l'absence de preuve de ce type pourrait laisser penser que l'entreprise mise en cause devrait être disculpée. Cela pourrait avoir des conséquences indésirables pour la concurrence et le bien-être des consommateurs, car une entreprise bien conseillée pourrait réussir sa campagne d'éviction, en se gardant de laisser toute trace écrite de son action.<sup>35</sup>

Troisièmement, attribuer les responsabilités en se fondant sur des évaluations de la relation prix-coûts et la preuve d'une intention d'éviction favorise les recours privés (lorsque des recours de cette nature sont autorisés). On peut se demander si encourager les concurrents vaincus, persuadés d'avoir été malmenés, mais incapables de démontrer l'impact sur la concurrence, à engager des poursuites, sert les objectifs légitimes des pouvoirs publics.

En toute hypothèse, si une autorité recherche la preuve qu'un contrevenant présumé a eu l'intention d'appliquer des pratiques d'éviction par les prix, elle souhaitera examiner les aspects suivants :

- *Les réductions de prix en deçà des coûts dirigées contre un concurrent, par opposition à des variations générales de prix.* Par exemple, si une entreprise est implantée sur plusieurs marchés géographiques mais ne baisse ses prix que sur le seul de ses marchés où elle doit affronter des

concurrents, cette pratique relève à tout le moins d'une intention d'éviction. En revanche, si elle baisse ses prix sur tous ses marchés géographiques, ses motivations paraissent plus inoffensives, et pourraient être liées au fait que ses coûts ont diminué et qu'elle adapte légitimement ses prix à cette nouvelle donne pour maximiser ses bénéfices.

- *Tentatives de rachat d'une entreprise visée.* Si le contrevenant présumé a tenté, par le passé, de racheter une entreprise qu'il a ciblée ou s'il tente de le faire alors même qu'il est présumé pratiquer une éviction par les prix, cet élément peut établir le caractère intentionnel de ses pratiques. Ayant échoué à se débarrasser de son concurrent par le biais d'une opération de fusion, le contrevenant présumé peut alors recourir à des pratiques d'éviction par les prix. Il peut également tenter d'affaiblir l'entreprise visée par de telles pratiques pour faire baisser le coût d'acquisition qu'il devra payer.
- *Un historique des prix faisant ressortir des variations inhabituelles assimilables à des pratiques d'éviction.* Le moment, la durée et l'étendue des baisses appliquées par l'entreprise déjà implantée peuvent permettre d'établir le caractère intentionnel de l'éviction. La constante à rechercher dans la politique de prix de l'entreprise en question est une réduction de ses tarifs qui aurait duré (ou dure) suffisamment longtemps pour éliminer ou dissuader la concurrence et, sauf si la campagne d'éviction est encore en cours, une hausse ramenant les prix à un niveau équivalent ou supérieur à ce qu'ils étaient auparavant (dans le cas de pratiques d'éviction visant à éliminer un concurrent en place). Cela dit, l'historique des prix peut révéler que l'entreprise opère dans un secteur cyclique et que les prix d'éviction présumés attestent simplement que le cycle est parvenu à son point le plus bas. Dans certains secteurs d'activité par exemple, les prix sont fixés de manière saisonnière.
- *Preuve directe de l'intention.* De toute évidence, si l'on produit, dans le cadre de l'enquête, des documents ou des dépositions indiquant que des cadres et des dirigeants de l'entreprise ont appliqué, à dessein, des prix d'éviction, ces éléments sont utiles pour établir l'intention d'éviction.

#### 2.2.4 Justifications commerciales légitimes

Cet aspect est lié, dans une certaine mesure, à l'argument de l'intention, mais les justifications commerciales légitimes sont utilisées pour disculper les entreprises mises en cause, non pour les condamner. On peut parler de justifications commerciales légitimes lorsque des pratiques qui ne passeraient pas, par ailleurs, les tests destinés à détecter une stratégie d'éviction par les prix peuvent être excusées en raison de circonstances particulières qui les rendent raisonnables. Quel que soit le test utilisé, l'examen de l'affaire serait incomplet s'il ne prenait pas en compte toutes les justifications commerciales légitimes plausibles, car il existe des raisons valables, voire favorisant la concurrence, qui conduisent parfois les entreprises à vendre à perte. « [Il] est difficile d'imaginer qu'une entreprise n'ait jamais jugé commode, voire nécessaire, de vendre à [] perte, pour des raisons allant du lancement d'un produit à la commercialisation, en dernier recours, de produits périssables ou susceptibles d'obsolescence. »<sup>36</sup>

Généralement, il revient au contrevenant présumé d'établir la preuve des justifications commerciales légitimes qu'il avance. Pour se justifier, l'entreprise mise en cause devra démontrer qu'elle vend à perte pour des raisons légitimes, n'obéissant à aucune volonté d'éviction. Elle doit pouvoir apporter la preuve qu'elle aurait fixé des prix identiques, même si sa politique n'avait pas nuit à la concurrence. Plus particulièrement, l'entreprise devra démontrer, soit que les circonstances l'ont contrainte à vendre à perte, soit que ses prix s'inscrivaient dans le cadre de pratiques commerciales usuelles impliquant une brève période de ventes à perte. De plus, si l'entreprise parvient à soutenir cette démonstration, même ceux qui critiquent l'utilisation de l'argument du caractère intentionnel de l'éviction conviendront qu'une autorité de

tutelle doit pouvoir utiliser tous les éléments de preuve dont elle dispose pour réfuter les justifications formulées.

Toutes sortes de circonstances peuvent constituer des justifications commerciales légitimes. La liste qui suit n'en est qu'une illustration, et n'est en aucun cas exhaustive.

a) Lancement de nouveaux produits

La vente à perte temporaire n'est parfois rien de plus qu'une tentative raisonnable de pénétrer un nouveau marché ou de créer une nouvelle marque. Pourvu que les prix ne restent pas inférieurs aux coûts pendant une période suffisamment longue pour nuire à la concurrence et que le recours à des prix promotionnels ne soit pas une pratique régulière, cette politique tarifaire est rationnelle même si elle ne permet pas d'optimiser les bénéfices à court terme.<sup>37</sup> De la part d'une entreprise déjà dominante sur un marché, les ventes à perte « promotionnelles » ne peuvent toutefois être autorisées.

Le recours aux prix promotionnels est notamment susceptible d'avoir lieu sur les marchés à effets de réseau,<sup>38</sup> sur lesquels le nouvel entrant doit compenser, vis-à-vis de ses clients, le fait qu'il ne dispose pas encore de réseau solide ou rémunérer ses clients pour qu'ils l'aident à mettre un réseau sur pied.<sup>39</sup> Les investissements de départ réalisés par l'entreprise pour conquérir des clients sont récupérés à long terme lorsque sa part de marché est devenue plus importante. Malheureusement, il sera souvent difficile de faire la différence entre le recours inoffensif à des prix promotionnels inférieurs aux coûts, nécessaire pour assurer la viabilité de l'entreprise, et les prix d'éviction tirant tout le marché à la baisse et éliminant des concurrents plus efficaces. En fait, l'une des thèses les plus récentes de la recherche économique qui a contribué à battre en brèche le scepticisme de l'école de Chicago sur la réalité des prix d'éviction concerne précisément les effets de réseau.

Comme on le voit, l'application de prix inférieurs aux coûts à des fins d'éviction peut être considérée comme une stratégie parfaitement rationnelle et rentable sur les marchés à effets de réseau, que l'entreprise pratiquant ces prix soit déjà en situation de monopole et s'efforce de repousser l'assaut de nouveaux entrants ou bien qu'elle cherche à se créer un monopole en s'efforçant d'éliminer son ou ses concurrents.<sup>40</sup> L'exemple le plus célèbre à cet égard est celui de la guerre des moteurs de recherche lancée par Microsoft contre Netscape, au cours de laquelle Microsoft distribuait gratuitement son produit (entre autres tactiques) pour éliminer Netscape.<sup>41</sup> Il n'est donc pas surprenant – et à dire vrai, cela s'inscrit même dans la logique qui veut que certaines politiques de prix promotionnelles puissent être autorisées – que, selon la recherche théorique, les stratégies de ventes à perte sur les marchés à effets de réseaux puissent parfois favoriser le bien-être des consommateurs et non lui nuire.

Il ressort, par dessus tout, qu'il est nécessaire, sur ces marchés, de vendre à perte pour atteindre la taille critique. En fait, cette politique peut être le seul moyen pour l'entreprise d'assurer sa survie dans ce qui s'avère être une situation où le vainqueur rafle toute la mise.<sup>42</sup> Certains modèles montrent que les entreprises opérant sur des marchés à effets de réseau pratiqueront des prix inférieurs à leurs coûts même si elles n'ont ni concurrents en place ni concurrents potentiels.<sup>43</sup> En ce sens, leurs pratiques ne peuvent être dites d'éviction, car on ne peut affirmer qu'elles ne sont rationnelles que dans la mesure où elles visent à éliminer la concurrence. Si les autorités de la concurrence devaient engager des poursuites contre ce type de pratiques, elles risqueraient d'entraver le développement des réseaux et pénaliseraient les consommateurs. De plus, même dans le cas où le marché se développe, si les effets de réseaux sont importants, il est probable qu'une seule entreprise finira de toute façon par l'emporter. En prenant en compte tous ces facteurs, Adriaan ten Kate et Gunnar Niels concluent que l'option la plus judicieuse est de laisser cette forme extrême de concurrence déterminer par elle-même qui survivra à l'arrivée.<sup>44</sup>

b) Prix d'appel

Parfois, une entreprise peut vendre à perte un ou plusieurs de ses produits pour inciter les consommateurs à acheter d'autres produits à plus fortes marges qu'elle commercialise. On parle alors de prix d'appel. Ainsi, une épicerie peut faire de la publicité pour vendre du jus d'orange à un prix inférieur à ses coûts, en misant sur le fait que les clients ainsi attirés dans la boutique y achèteront d'autres produits à plus fortes marges. Les prix d'appel sont une pratique autorisée tant qu'ils ne servent pas à anéantir un concurrent établi (ou potentiel) commercialisant uniquement le produit que l'entreprise dominante vend à ce prix et que la concurrence du marché ne s'en trouve pas réduite.

c) Prix de complémentarité

Cette stratégie peut être une manière pratique d'augmenter le chiffre d'affaires et le bénéfice global lorsqu'il existe des demandes complémentaires pour deux ou plusieurs produits fabriqués par l'entreprise. Les imprimantes PC sont ainsi souvent vendues à prix relativement réduits lorsque les fabricants commercialisent aussi les cartouches d'encre qui vont avec et que les marges réalisées sur ces cartouches sont bien plus élevées. Cette tactique, appelée, prix de complémentarité, est une forme de discrimination par les prix permettant au fabricant de dégager un chiffre d'affaires plus important auprès des clients qui utilisent davantage que les autres ses imprimantes et sont donc prêts à payer plus cher leurs cartouches. Les effets de la discrimination par les prix sur le bien-être des consommateurs sont indéterminés. Un prix inférieur aux coûts appliqué à l'un des composants d'un système peut relever d'une structure de prix concurrentielle. Comme pour les prix d'appel, ce type de pratique peut être autorisé si un contrevenant présumé peut démontrer qu'il n'applique pas cette politique pour anéantir un concurrent commercialisant uniquement le produit que l'entreprise mise en cause vend à un prix inférieur au coût, et donc pour éliminer la concurrence. En tout état de cause, il est généralement facile de distinguer les prix de complémentarité des prix d'éviction, car une authentique stratégie de ce type doit se poursuivre aussi longtemps que les produits concernés se trouvent sur le marché. En revanche, une stratégie de prix d'éviction implique le plus souvent une période manifeste de réduction du prix d'un unique composant du système, suivie d'une augmentation de ce prix qui est ramené au niveau de récupération des pertes.<sup>45</sup>

d) Obsolescence des stocks

Il peut être parfois nécessaire de vendre à perte pour évacuer tous les produits relativement anciens et faire de la place pour de nouveaux stocks. En règle générale, cette pratique n'est pas répréhensible.

e) Crises sectorielles

Des baisses relativement soudaines de la demande peuvent créer des surcapacités susceptibles de conduire les entreprises à vendre à perte, même sans obéir à une volonté d'éviction. C'est le cas lorsque un secteur est « malade ». Les entreprises établies sur ces marchés décident de maintenir leur activité et d'absorber leurs pertes pendant un certain temps. Ce faisant, elle ne mise pas sur le fait qu'une période suivra où elles pourront pratiquer des prix de monopole, elles s'efforcent simplement de survivre dans l'espoir d'un redémarrage de la demande dans l'avenir. Au bout d'un certain temps, si la demande ne repart pas, certaines entreprises abandonnent le marché dans le but de réduire leurs pertes, ce qui entraîne un ajustement des capacités du secteur à la demande. La vente à perte pratiquée au sein d'un secteur malade ne correspond sans doute pas à une pratique d'éviction, mais s'inscrit dans le processus normal de correction du marché.

## f) Secteurs cycliques

Dans certains secteurs, la demande est cyclique et les entreprises doivent vendre à perte durant des périodes d'infléchissement, pour préserver leurs relations avec les clients, éviter la faillite et ne pas avoir à supporter des coûts de redémarrage ou d'entreposage.

## g) Ajustement à l'arrivée de nouveaux concurrents

L'arrivée massive de nouveaux concurrents peut réduire rapidement la part de marché de chaque entreprise établie, créant ainsi des surcapacités et suscitant les mêmes conditions qu'une crise sectorielle.

## h) Courbes d'apprentissage

Si la pente de la courbe d'apprentissage des intervenants d'un secteur s'accroît fortement, une entreprise peut décider de pratiquer des prix inférieurs aux coûts qu'elle subit sur le moment pour s'efforcer de vendre davantage d'unités et donc d'atténuer plus rapidement la pente de la courbe d'apprentissage. Cette pratique favorise en fait la concurrence lorsque l'existence d'une courbe d'apprentissage est évidente et que les prix ne sont pas maintenus à un niveau inférieur aux coûts assez longtemps pour nuire à la concurrence. Si de nouvelles entreprises implantées dans ces secteurs ne sont pas autorisées à pratiquer des prix inférieurs à leurs coûts initiaux, elles ne pourront jamais rester compétitives assez longtemps pour réduire leurs coûts et être viables.

## i) Argument de l'alignement sur les prix de la concurrence

La question de savoir si l'on peut excuser une entreprise dominante pratiquant des prix inférieurs à ses coûts, mais dont les prix sont équivalents à ceux d'un concurrent, et non en deçà, constitue un autre aspect controversé du débat sur les prix d'éviction. L'argument de l'alignement des prix sur ceux de la concurrence a été élaboré en droit américain dans le cadre d'affaires de discrimination par les prix relevant de la loi Robinson-Patman,<sup>46</sup> mais il a également été appliqué dans le cadre d'affaires d'éviction par les prix relevant de la loi Sherman. Aux États-Unis, les tribunaux ont décidé qu'« [une] entreprise ne peut être accusée de pratiquer des prix d'éviction, quels que soient ses coûts, lorsqu'elle réduit ses prix de manière à les aligner sur ceux, moins élevés, déjà fixés par ses concurrents » et que « contraindre une entreprise à maintenir des prix non concurrentiels seraient une interprétation contraire au sens des lois antitrust ».<sup>47</sup> Dernièrement, un autre tribunal américain a, au contraire, récusé l'idée que les entreprises mises en cause au titre de la loi Sherman puissent invoquer l'argument de l'alignement de leur prix sur ceux de la concurrence, suscitant un conflit entre les tribunaux de circuits.<sup>48</sup>

En Europe, la Commission et les tribunaux communautaires n'ont pas particulièrement exprimé d'avis sur le recours à l'argument de l'alignement sur la concurrence dans les affaires de prix d'éviction. La Cour de Justice européenne a déclaré, de manière plus générale, que si une entreprise dominante est attaquée, elle peut prendre des mesures raisonnables et proportionnées pour défendre ses intérêts commerciaux<sup>49</sup>. Au Royaume-Uni toutefois, M. Bellamy a récusé cet argument dans un jugement du tribunal d'appel de la commission de la concurrence, en concluant que les entreprises dominantes avaient la responsabilité particulière de ne pas réduire la concurrence et de ne protéger leurs intérêts commerciaux que par des moyens « raisonnables et proportionnés ».<sup>50</sup>

Au Canada, cet argument semble être accepté. Dans l'affaire *Boehringer Ingelheim contre Bristol-Meyers Squibb*, le tribunal a décidé que le fait de pratiquer des prix inférieurs aux coûts mais s'alignant simplement sur ceux d'un concurrent, et non en deçà, ne constituait pas une pratique d'éviction.<sup>51</sup>

D'un point de vue économique, les décisions de justice acceptant l'argument de l'alignement tarifaire ne semblent pas convenablement motivées. Pour déterminer si des prix d'éviction sont en cause, la

question du rapport avec les prix des concurrents ne se pose pas. Il faut se demander, au contraire, si un prix est inférieur aux coûts subis par le contrevenant présumé, que ce prix s'aligne « simplement » ou ne s'aligne pas sur celui d'un concurrent.

Supposons qu'un entrant soit plus efficace que l'entreprise établie et vende par conséquent ses produits à des prix inférieurs. Que se passe-t-il si l'entrant escompte poursuivre cette politique pour maintenir la demande dont il a besoin afin de continuer à opérer avec efficacité ? Autrement dit, supposons que l'entrant ne puisse atteindre son niveau minimum d'efficacité s'il ne parvient pas à capter la demande de l'entreprise établie durant la période où cette dernière pratique des prix suffisamment élevés pour couvrir ses coûts (supérieurs). Si l'entreprise établie a le droit de réagir en baissant ses prix à un niveau inférieur à ses coûts pour s'aligner sur ceux de l'entrant, celui-ci ne pourra pas alors réaliser le volume de ventes minimum dont il a besoin et qu'il aurait pu atteindre si l'entreprise établie n'avait pas vendu ses produits à perte. La collectivité ne peut que pâtir de ce que le concurrent le plus efficace soit contraint de quitter le marché.

1. Un autre inconvénient logique de l'argument de l'alignement sur les prix de la concurrence, c'est qu'il ne peut prendre en compte les différences de qualité et de réputation existantes. Par conséquent, même dans le cas où une entreprise établie ne fait qu'aligner ses prix sur ceux d'un nouveau concurrent, elle va en fait bien au-delà d'un « simple » ajustement tarifaire concurrentiel si ses produits sont de meilleure qualité ou sont plus fiables aux yeux des clients que ceux vendus par le nouveau concurrent encore inconnu. Il serait en effet difficile pour un tribunal de prendre en compte de telles nuances. Lorsque les tribunaux tentent de le faire, leurs décisions semblent relever de l'arbitraire.<sup>52</sup>

### **2.3 *Approches de la pratique des prix d'éviction dans quelques pays membres***

#### **2.3.1 *Union européenne***

L'approche actuelle vis-à-vis de la pratique de prix d'éviction dans l'UE est un mélange de tests de la relation prix-coûts et d'un test d'intention, fondée sur l'interdiction prescrite par l'article 82 d'un abus de position dominante. L'approche a été définie en premier lieu par la Cour de justice européenne (« CJE ») dans le cadre du jugement concernant *AKZO*.<sup>53</sup> Dans cette affaire, la CJE a maintenu que les prix inférieurs aux coûts variables moyens (CVM) sont réputés illégaux, les prix supérieurs aux CVM mais inférieurs au coût total moyen (CTM) sont illégaux lorsqu'ils s'accompagnent de l'intention d'éliminer un concurrent et les prix supérieurs au CTM sont par conséquent légaux.

Le principe qui découle de la décision concernant l'affaire *AKZO* est que les prix inférieurs aux coûts variables moyens sont toujours illégaux, ce qui ne donne pas l'occasion à un contrevenant présumé de proposer des justifications commerciales légitimes. La décision de 1996 concernant *Tetra Pak II* confirme cette interprétation.<sup>54</sup> Selon des décisions ultérieures, cependant, la présomption dans le cas *AKZO* est réfutable « en montrant que cette tarification ne s'inscrivait pas dans un projet d'éliminer son concurrent ».<sup>55</sup>

La Commission européenne a affiné l'approche *AKZO* en publiant une note d'information spéciale concernant le mode d'évaluation des coûts qu'elle utilisera dans certains secteurs.<sup>56</sup> La note d'information explique que le dispositif dans le cadre de l'affaire *AKZO* est peut-être trop indulgent pour les secteurs de « réseaux », comme les télécommunications, pour lesquels la tarification aux coûts variables moyens peut encore constituer des prix d'éviction étant donné le niveau relativement élevé des coûts fixes communs à plusieurs lignes de produits. La note d'information précise que la Commission utilisera par conséquent à la place un indicateur de coût marginal moyen (comparable au coût évitable moyen, en incluant cependant les coûts communs).<sup>57</sup>

Dans le cadre de l'UE, il n'est pas actuellement requis de vérifier la récupération des pertes. Dans le cas de *Tetra Pak II*, la CJE a décidé qu'il n'est pas nécessaire de prouver que le contrevenant présumé a ne serait-ce qu'une « possibilité réaliste » de couvrir ses pertes, sans parler de la vraisemblance d'une telle supposition. Selon cette décision, « une pratique de prix d'éviction doit pouvoir être sanctionnée dès qu'il y a risque d'élimination des concurrents. »<sup>58</sup> Ce raisonnement contraste avec la logique qui sous-tend le test de la récupération des pertes et ce contraste peut refléter différents points de vue sur l'objet du droit de la concurrence. Comme il a été dit plus haut, le test de la récupération des pertes repose sur le présupposé que l'objet premier du droit de la concurrence est de promouvoir le bien-être des consommateurs. De ce point de vue, l'élimination d'un concurrent qui pourrait résulter de la conduite unilatérale d'une entreprise n'a pas d'incidence, tant qu'elle n'entraîne pas de préjudice économique pour les consommateurs. La déclaration de la CJE, au contraire, traduit une inquiétude face au sort des concurrents qui risquent de pâtir de la tarification inférieure aux coûts pratiquée par une entreprise en position dominante, que le bien-être des consommateurs soit affecté ou non par l'élimination de ces concurrents.

Cette même préoccupation pour les concurrents se constate dans la décision de 1998 dans l'affaire de la *Compagnie maritime belge*. Dans ce cas, les éléments d'*AKZO* n'étaient pas réunis car le contrevenant présumé ne pratiquait pas des prix inférieurs au coût total moyen. Néanmoins, la CJE a déclaré qu'aux termes de l'article 82, il était abusif pour une entreprise en position dominante d'adopter une stratégie consistant à réagir à une entrée sur le marché en réduisant ses prix, que les prix restent ou non supérieurs aux coûts, lorsque 1) les réductions de prix se produisaient de façon réactive et sélective ; (2) les prix réduits correspondaient aux prix des nouveaux arrivants sur le marché ; (3) les baisses de prix réduisaient les bénéfices du contrevenant présumé par rapport à leur niveau aux prix antérieurs ; et (4) l'objectif du contrevenant présumé était d'éliminer les nouveaux arrivants sur le marché.<sup>59</sup>

On notera que la Cour a reconnu, dans l'affaire de la *Compagnie maritime belge*, le risque qu'en condamnant une tarification supérieure aux coûts, on abrite des concurrents inefficaces du plein impact d'une concurrence légitime. La Cour a cependant considéré qu'il y avait abus en l'occurrence car les réductions sélectives des prix étaient destinées à éliminer un nouvel arrivant et par conséquent à éliminer la concurrence.

De toute évidence, la CJE a été fortement influencée par l'intention du contrevenant présumé d'éliminer la concurrence. La difficulté concernant cette affaire était que toute entreprise rationnelle cherche à éliminer la concurrence. Toute entreprise aimerait ne pas avoir de concurrents existants et de concurrents potentiels pour pouvoir acquérir une position dominante et bénéficier de profits de monopole. Il n'y a pas de préjudice avéré dans la simple intention d'éliminer un concurrent. L'important, c'est la façon dont s'y prend l'entreprise pour y parvenir. Le fait-elle en menaçant le bien-être des consommateurs à long terme ou pas ?

Einer Elhauge a critiqué le cas de la *Compagnie maritime belge* sur quatre plans. Premièrement, il est mal avisé de s'attaquer aux réductions de prix supérieurs aux coûts car cela peut aboutir à des résultats négatifs à long terme (la survie d'entreprises relativement inefficaces) et à une perte garantie à court terme (la perte des prix réduits du contrevenant présumé). Dans la majorité des cas, vouloir limiter de telles réductions de prix peut favoriser une augmentation des prix et menacer le bien-être des consommateurs.

Deuxièmement, limiter les réductions sélectives de prix *supérieurs aux coûts* va souvent pénaliser un comportement efficient en terme de fixation des prix. Dans de nombreux marchés, les entreprises en place ne peuvent maximiser les bénéfices et la production qu'en facturant davantage aux consommateurs qui accordent une plus grande valeur au produit, en leur faisant donc supporter une part plus importante des coûts communs. Sur ces marchés, les rabais sélectifs accordés aux clients sur la marge augmenteront la production et le bien-être. Troisièmement, limiter les réductions de prix supérieurs aux coûts réduira les pressions sur les concurrents et les nouveaux arrivants potentiels qui les incitent à être plus efficaces, ce

qui entraînera une hausse des coûts et une détérioration de la qualité pour la collectivité. Enfin, ces effets négatifs seront aggravés par des difficultés de mise en œuvre qui découlent inévitablement d'une tentative de réglementer les entreprises en termes de détermination des prix, de production et de réaction face aux nouveaux arrivants.<sup>60</sup>

La politique en Europe face à l'application de prix d'éviction est à un tournant de son évolution. La Commission examine actuellement sa politique sur l'abus de position dominante – y compris la pratique de prix d'éviction – pour déterminer comment sa politique peut devenir plus efficace.<sup>61</sup> En attendant, le Tribunal de première instance devrait rendre une décision dans l'affaire de pratique de prix d'éviction *Wanadoo*, dans laquelle la Commission est allée jusqu'à « enquêter sur [] la possibilité de récupération des pertes, sans utiliser ce facteur comme un élément fondamental dans la décision finale. »<sup>62</sup> En outre, on commence à observer une analyse de la récupération des pertes dans les décisions des États membres. Dans l'affaire de *State Railways*, le Tribunal de commerce suédois a exploré la probabilité de récupération des pertes.<sup>63</sup> Très récemment, dans l'affaire de droit privé *AOL contre Wanadoo*, le Conseil de la concurrence en France a rejeté la requête du plaignant concernant les prix d'éviction, soulignant que, même si le contrevenant présumé semblait facturer des prix inférieurs aux coûts, il perdait régulièrement des parts de marché tandis que plusieurs nouveaux entrants en avaient gagné, ce qui témoignait de l'existence d'un marché concurrentiel.<sup>64</sup>

Certains commentateurs ont avancé que la récupération des pertes devrait faire partie de l'analyse des pratiques de prix d'éviction dont se servent la Commission et les tribunaux européens.<sup>65</sup> Leurs arguments prendront du poids si les plaignants étant à titre privé commencent à porter devant les tribunaux nationaux en Europe davantage d'affaires de prix d'éviction. Aux États-Unis, où la grande majorité des requêtes relatives aux prix d'éviction sont présentées par des plaignants étant à titre privé, une des fonctions du test de la récupération des pertes est d'éliminer les requêtes fantaisistes et abusives. En Europe, tant que c'est la Commission qui soulève la plupart des affaires de pratique de prix d'éviction, ce problème n'est pas préoccupant. Si cela évolue, néanmoins, l'argument en faveur d'un test de la récupération des pertes prendra une grande importance.

### 2.3.2 Royaume Uni

Le Royaume Uni est doté de sa propre loi sur la concurrence, le Competition Act 1998, mais l'analyse juridique des prix d'éviction au Royaume Uni tient compte des précédents établis par la CJE dans les affaires *AKZO* et *Tetra Pak II*. Les éléments de l'analyse au Royaume Uni sont donc les mêmes que ceux qu'utilise l'UE. La décision concernant l'affaire *Aberdeen Journals* est à cet égard éloquent.<sup>66</sup> Dans cette affaire, l'éditeur d'un magazine hebdomadaire (« *Independent* ») s'est plaint auprès de l'Office of Fair Trading (OFT) qu'un autre éditeur, *Aberdeen Journals*, vendait de l'espace publicitaire dans son magazine hebdomadaire gratuit à des prix inférieurs aux coûts. L'OFT a ouvert une enquête pour déterminer si *Aberdeen Journals* avait abusé d'une position dominante.

Le Director General of Fair Trading (« DGFT ») a conclu qu'*Aberdeen Journals* occupait effectivement une position dominante sur le marché en question. Pour parvenir à cette conclusion, le DGFT a effectué une évaluation des barrières à l'entrée sur le marché de la presse. Il a pris en compte les conséquences en termes de réputation sur une multitude de marchés en reconnaissant qu'une entreprise en place pouvait créer des barrières à l'entrée sur plusieurs de ses marchés en se créant sur l'un d'eux une réputation d'entreprise pratiquant des prix d'éviction. L'éditeur présumé contrevenant était notamment présent sur plusieurs marchés géographiques.<sup>67</sup> L'évaluation par le DGFT de la position dominante n'a pas été formulée en termes de vérification de la récupération des pertes, mais on pouvait facilement considérer qu'elle allait dans ce sens. La puissance sur le marché, les barrières à l'entrée et les effets de réputation constituent autant de facteurs qui ont des répercussions sur la récupération des pertes. Ils ne représentent

pas, cependant, les seules considérations qui devraient intervenir dans une analyse complète de la récupération des pertes.

Ensuite, le DGFT a décidé qu'Aberdeen Journals avait maintenu ses prix en dessous du coût total moyen, et parfois des coûts variables moyens, à quelques exceptions près, pendant 45 mois. Il a en outre constaté que le contrevenant présumé avait intentionnellement fixé des prix inférieurs au coût total moyen en vue d'éliminer l'*Independent*. Aberdeen Journals n'a pas pu présenter de justification objective, de sorte que le DGFT a décidé que l'éditeur avait abusé de sa position dominante et il lui a donc imposé une amende.

Il convient de se demander ce qui se serait passé si l'affaire avait donné lieu à une vérification de la récupération des pertes. Aurait-il été justifié que le contrevenant présumé occupe une position dominante, qu'il y ait eu des obstacles considérables à l'entrée et qu'il soit apparu que le contrevenant présumé puisse bénéficier sur de multiples marchés de la réputation d'entreprise appliquant des prix d'éviction acquise sur un seul marché ? Le fait le plus troublant, du point de vue de la récupération des pertes, est qu'après environ quatre années de tarification en dessous des coûts, l'éditeur visé continuait d'exercer ses activités et n'avait donné aucun signe de vouloir y renoncer.<sup>68</sup> Les consommateurs d'espaces publicitaires ont donc bénéficié d'une assez longue période de faiblesse des prix, qui n'a provoqué aucun préjudice apparent ou qui n'a représenté aucun risque de préjudice à leur bien-être à long terme.

Cela étant, la conclusion que le contrevenant présumé ait pu acquérir sur de multiples marchés la solide réputation de vouloir lutter contre l'arrivée de nouveaux concurrents signifie que des analyses plus approfondies auraient pu résoudre ce problème. Le débat dans le cadre de la décision sur les effets de réputation en est cependant resté là, ce qui était fondé dans la mesure où l'analyse portait sur la position dominante et non sur la récupération des pertes. Si l'on avait toutefois pu démontrer que des bénéfices supra-concurrentiels auraient sans doute été obtenus sur d'autres marchés par suite des pratiques d'éviction d'Aberdeen Journals à l'encontre de l'*Independent*, et que ces bénéfices auraient été suffisamment importants pour compenser les pertes du contrevenant présumé, le test de la récupération des pertes aurait alors été réussi. Mais comme cette possibilité n'a jamais été prouvée ni réfutée, on ne peut savoir aussi clairement que cela pourrait l'être si les consommateurs ont été aidés par la décision dans l'affaire de *Aberdeen Journals* ou s'ils en ont subi les conséquences.

Au Royaume-Uni, comme au niveau de l'UE, la politique vis-à-vis des prix d'éviction semble parvenue à un tournant important de son évolution. Dans une récente allocution, John Vickers, Président de l'OFT, a déclaré dans le cadre de l'examen d'un modèle théorique dans lequel une interdiction des réductions sélectives des prix aurait eu des effets ambigus sur le bien-être et les consommateurs, qu'une « règle à l'encontre des réductions sélectives des prix pourrait souvent se révéler préjudiciable pour les consommateurs sur des marchés contestés et parfois pour les consommateurs dans leur ensemble ». <sup>69</sup> Le Président Vickers a aussi relevé que la loi relative à l'abus de puissance sur le marché en Europe « pouvait désormais évoluer dans l'une ou l'autre de deux grandes directions, soit sur la forme soit quant à ses effets économiques » et il a plaidé pour la seconde approche. <sup>70</sup>

### 2.3.3 Nouvelle-Zélande

En matière de prix d'éviction, la décision la plus récente prise par la plus haute instance judiciaire parmi toutes les nations porte sur une affaire présentée en Nouvelle-Zélande. L'affaire *Carter Holt Harvey Building Products Group Limited contre Commerce Commission* est particulièrement intéressante, aux fins du présent document, parce qu'elle montre que a) le test de la récupération des pertes est en train d'acquiescer une dynamique internationale et que b) il en va sans doute de même de l'argument de l'alignement sur la concurrence. <sup>71</sup> L'affaire découle d'une guerre des prix dans le secteur de l'isolation en Nouvelle-Zélande. Le contrevenant présumé était un grand fabricant de produits en fibre de bois. Sa filiale,

INZCO, avait réagi à l'entrée de New Wool Products (NWP), fabricant d'un produit supérieur à base de laine en mettant sur le marché son propre produit à base de laine. Le prix du nouveau produit d'INZCO était cependant plus élevé que celui de NWP et INZCO a continué de perdre des parts de marché. En fin de compte INZCO a réduit ses prix de 50 %, ce qui les a ramenés en dessous de ses coûts variables moyens. Les ventes du produit de NWP ont alors fortement baissé et cette entreprise a porté plainte auprès de la Commission du Commerce.<sup>72</sup> La Commission a intenté un procès accusant la stratégie de prix d'éviction du contrevenant présumé d'être contraire à l'article 36 du Commerce Act de 1986.<sup>73</sup>

Le Conseil privé n'a soulevé aucune objection aux conclusions du tribunal de première instance selon lesquelles le contrevenant présumé était en position dominante et avait appliqué sa réduction de prix en vue d'empêcher ou de dissuader NWP de lui faire concurrence, ou de l'éliminer. Le Conseil a aussi accepté les conclusions du tribunal de première instance selon lesquelles INZCO fixait des prix inférieurs à ses coûts variables moyens. Il a néanmoins estimé que cela ne suffisait pas à conclure que la conduite d'INZCO était contraire au Commerce Act. Il doit y avoir des preuves que le contrevenant présumé a d'une façon ou d'une autre *usé* de sa position dominante à des fins prohibées et *user* – dans le contexte d'une affaire de prix d'éviction – signifie réduire ses prix « en vue de » récupérer ses pertes en relevant ses prix sans craindre de perdre sa part de marché.<sup>74</sup>

Le Conseil privé a décidé qu'il n'y avait pas de preuve que les tarifs fixés par INZCO étaient appliqués en vue de pouvoir facturer à l'avenir des prix supra-concurrentiels. Son raisonnement prend à partir de là un tour surprenant. Auparavant, dans sa décision, le Conseil avait observé qu'à la lumière d'autres faits établis, même si la stratégie de prix d'éviction du contrevenant présumé avait permis d'éliminer NWP, un autre produit à base de laine analogue à celui de NWP aurait probablement été introduit sous peu.<sup>75</sup> Ce fait aurait pu jouer un rôle plus important dans la décision parce qu'il semble montrer que les obstacles à l'entrée étaient faibles et que la récupération des pertes était donc peu plausible.

Toutefois, mettant l'accent ailleurs, le Conseil a élaboré pour INZCO l'équivalent de l'argument de défense de l'alignement sur la concurrence. Le Conseil a en effet conclu que les prix pratiqués par le contrevenant présumé « constituaient une réaction à la concurrence dans un segment du marché qu'il dominait, mais sur lequel il s'était tout de même révélé vulnérable. »<sup>76</sup> La décision poursuit, « le niveau des prix avait été fixé par NWP, et personne ne pouvait vendre un produit comparable à [celui de NWP] à un prix supérieur tout en restant concurrentiel. S'il n'avait pas proposé un produit comparable... INZCO risquait de perdre sa part de marché [...] »<sup>77</sup> Auparavant, la décision indique que « [l]a réaction évidente, sur un marché véritablement concurrentiel, aurait été de ramener le prix [du produit de INZCO] à un niveau compétitif. »

Sur un marché véritablement concurrentiel, INZCO aurait fini par être remplacé par NWP, entreprise plus efficiente, ou alors INZCO aurait dû améliorer sa propre efficience. En conséquence, bien que cela ait pu constituer une réaction évidente, il ne semble pas certain que ramener un prix en dessous des coûts variables moyens et le maintenir pour contrer un rival plus efficient, doive être considéré comme légal – sauf s'il n'y a aucune chance de récupération des pertes. L'un des aspects perturbant de la décision dans l'affaire *Carter Holt Harvey* tient au fait que, même si en l'occurrence un test de récupération des pertes est estimé nécessaire, il n'est jamais vraiment question des perspectives de récupération des pertes du contrevenant présumé. Au lieu de cela, le Conseil privé décide que, comme le contrevenant présumé a abaissé son prix pour faire face à la concurrence d'un nouveau venu à bas coûts, et comme ledit contrevenant aurait continué à perdre des parts de marché s'il n'avait pas agi ainsi, ses initiatives visaient simplement à préserver sa part de marché et étaient donc licites.

Il convient de souligner que les prix inférieurs aux coûts variables moyens du contrevenant présumé avaient été adoptés depuis sept mois, lorsque la direction avait eu vent de l'enquête de la Commission et

avait modifié ses tarifs. On notera en outre que NWP avait cessé sa production pendant que les prix réduits d'INZCO étaient en vigueur.<sup>78</sup> En conséquence, il ne ressort pas clairement de cette partie de la décision qu'INZCO n'aurait pas fini par relever ses prix à leur niveau antérieur à l'entrée de son concurrent, reconquis sa part initiale du marché et récupéré par là-même ses pertes.

En tout état de cause, cette décision indique parfaitement clairement qu'un test de la récupération des pertes est nécessaire en droit néo-zélandais dans les affaires de prix d'éviction. De ce point de vue, l'approche de la Nouvelle-Zélande est désormais cohérente avec celle de l'Australie.

#### 2.3.4 *Australie*

L'Australie est un autre pays dont la plus haute instance juridique a récemment rendu publique une décision sur les prix d'éviction. En fait, il s'agit du premier jugement de la Haute cour sur une accusation de pratiques de prix d'éviction. Dans l'affaire *Boral Besser Masonry Ltd contre Australian Competition and Consumer Commission*, la Haute cour a décidé que le test de la récupération des pertes était obligatoire. En outre, cette décision met en évidence l'anomalie évoquée précédemment<sup>79</sup>. En effet, le droit de la concurrence n'est parfois pas bien équipé pour piéger les prédateurs qui ne sont pas en position dominante au moment où elles lancent leur campagne de prix d'éviction, mais qui l'acquiert plus tard au moyen de ces pratiques. Ces législations ne semblent en fait être efficaces que lorsque le prédateur passe pour être capable de mettre en œuvre avec succès une stratégie d'application de prix d'éviction car il était au départ dans une position dominante.

Dans l'affaire *Boral*, on a accusé le contrevenant présumé d'enfreindre l'article 46 du Trade Practices Act 1974 [Loi sur les pratiques commerciales de 1974] en fixant les prix de ses produits de maçonnerie en béton en deçà du coût évitable de production pendant 30 mois pour éliminer le nouvel arrivant, C&M. L'Australian Competition and Consumer Commission [ACCC] a plaidé à un stade avancé que Boral avait reconnu que la capacité de son rival à financer une guerre des prix en empruntant sur les marchés financiers ne correspondait pas à sa propre capacité à le faire, et que Boral souhaitait acquérir la réputation d'appliquer des prix d'éviction pour dissuader à l'avenir des concurrents d'accéder au marché.

L'affaire a porté sur la capacité de Boral à récupérer ses pertes liées à sa pratique de prix d'éviction une fois que C&M aurait été éliminé. Le tribunal de première instance a déterminé que Boral n'avait pas la puissance de marché nécessaire pour les récupérer car les obstacles structurels à l'entrée sur le marché en question étaient trop restreints. En appel, la Cour fédérale réunie en séance plénière a accepté l'argument qu'il n'était pas nécessaire de faire la preuve d'une récupération des pertes aux termes de l'article 46. Il suffit, a décidé ce tribunal, de montrer qu'un contrevenant présumé avait la possibilité de fixer un prix en deçà des coûts évitables pendant une période prolongée et d'éliminer un concurrent, indépendamment de l'impossibilité ou non pour l'entreprise d'augmenter les prix suffisamment pour récupérer les pertes. La Haute cour a cassé cette décision :

Une entreprise ne détient pas un « pouvoir de marché substantiel » (*substantial market power*) si elle n'a pas le pouvoir de récupérer l'intégralité ou une partie substantielle des pertes occasionnées par une réduction des prix en facturant par la suite des prix supra-concurrentiels. Si elle ne parvient pas à augmenter les prix à des niveaux supra-concurrentiels après avoir dissuadé ... les concurrents ou leur avoir fait du tort en réduisant ses prix, la conclusion est incontournable : elle n'avait pas un pouvoir de marché substantiel au moment où elle a procédé à la réduction des prix.<sup>80</sup>

On aurait aimé voir l'expression « ou par la suite » à la fin de cette citation, ce qui aurait indiqué que l'article 46 peut couvrir la conduite d'un prédateur qui *acquiert* un pouvoir de marché substantiel en *conséquence* de ses pratiques de prix d'éviction. Cela n'a pas été possible, cependant, parce que l'article 46

se fonde sur le fait que la société qui est le contrevenant présumé a déjà un pouvoir de marché substantiel au moment de la conduite en question. Justice McHugh était parfaitement conscient de ce problème mais, tant que la loi n'est pas changée, même la Haute cour ne peut le résoudre.<sup>81</sup>

### 2.3.5 États-Unis

Les États-Unis font partie des juridictions qui n'ont pas encore décidé quelle évaluation du coût est la meilleure pour recourir à des tests de la relation prix-coûts, du moins pas au niveau de la Cour suprême. Dans l'affaire *Brooke Group Ltd. contre Brown & Williamson Tobacco Corp.*, la Cour a refusé d'adopter une évaluation spécifique du coût et a décidé à la place qu'un plaignant « doit prouver que les prix contestés sont inférieurs à une évaluation convenable des coûts du concurrent. » En outre, la Cour a établi la condition qu'un plaignant dans le cadre d'une affaire de prix d'éviction doit prouver qu'il existe une dangereuse probabilité que le contrevenant présumé récupère « son investissement dans des prix inférieurs aux coûts. »<sup>82</sup>

Implicitement, en approuvant le concept général d'un recours aux tests de la relation prix-coûts, la Cour rejette l'idée que l'on puisse jamais considérer que des prix supérieurs aux coûts constituent des prix d'éviction. Du point de vue de la Cour, l'application de prix d'éviction nécessite une facturation à des prix inférieurs aux coûts du contrevenant présumé, non pas parce que des prix égaux ou supérieurs aux coûts garantiraient nécessairement une absence de prix anticoncurrentiels, mais parce que cette norme préserve intégralement le rôle essentiel de la réduction des prix en tant que moyen légitime de concurrence. En d'autres termes, la Cour a fait un compromis, sachant que sa décision permettrait de laisser impunie une conduite que l'on aurait pu qualifier de « pratique de prix d'éviction », mais décidant qu'il importait de faire en sorte que la législation antitrust elle-même ne paralyse pas un comportement concurrentiel raisonnable.

Interdire des réductions de prix qui aboutissent à facturer des prix supérieurs aux coûts revient pour les consommateurs à échanger un avantage actuel clair contre des avantages futurs incertains, et il vaut mieux encourager un rapprochement des prix de leurs niveaux concurrentiels et efficaces, au risque qu'ils s'en approchent encore plus. Certes, on peut utiliser le même argument pour défendre des prix inférieurs aux coûts, et la Cour l'a d'ailleurs reconnu, du moins à court terme, « la faiblesse des prix présente un avantage pour les consommateurs, indépendamment de la manière dont ces prix ont été fixés. »<sup>83</sup> Mais la Cour a aussi établi la distinction que, contrairement à une facturation inférieure aux coûts, des prix faibles mais supérieurs aux coûts peuvent exclure un concurrent simplement en raison de « la structure de coûts inférieure du contrevenant présumé et représentent par conséquent une concurrence par le mérite. »<sup>84</sup> Enfin, tenter de détecter une facturation supérieure aux coûts de nature anticoncurrentielle peut être « au-delà des possibilités pratiques qu'a un tribunal de le contrôler, sans prendre des risques intolérables de paralyser la réduction légitime des prix. »<sup>85</sup>

En ce qui concerne la récupération des pertes, *Brooke Group* s'est fondé sur la décision antérieure concernant *Matsushita*, qui a imposé la condition de récupération des pertes aux plaignants dans des affaires de prix d'éviction parce que « le succès de toute campagne de prix d'éviction dépend du maintien d'un pouvoir de monopole suffisamment longtemps pour que le prédateur récupère ses pertes et enregistre des gains supplémentaires. »<sup>86</sup> Reprenant cet aspect, la Cour a en outre expliqué pourquoi elle tenait à une preuve du caractère probable d'une récupération des pertes :

La récupération des pertes est le but ultime d'un programme illicite d'application de prix d'éviction ; c'est le moyen qui permet à un prédateur de bénéficier de ses pratiques. Sans elle, la facturation de prix d'éviction génère une diminution des prix agrégés sur le marché et le bien-être des consommateurs s'en trouve amélioré... L'échec de l'application de prix d'éviction est généralement une

aubaine pour les consommateurs.

Les lourdes pertes qui peuvent être infligées à la cible par le fait de fixer des prix inférieurs aux coûts n'a pas d'importance pour les lois antitrust si la concurrence n'en souffre pas : il va de soi que les lois antitrust ont été adoptées pour protéger la *concurrence*, et non les *concurrents* [...]<sup>87</sup>

La rareté de telles affaires de prix d'éviction ayant abouti à une condamnation aux États-Unis, en dépit d'un nombre relativement élevé de plaintes déposées dans ce pays, donne à penser que les tests actuels y sont trop exigeants. Non seulement les plaignants ont du mal à faire valoir le test de la récupération des pertes, mais ils doivent aussi se débattre avec le test Areeda-Turner. Bien que ce dernier ait influencé pratiquement toutes les affaires de prix d'éviction aux États-Unis depuis que les auteurs ont écrit leur article en 1975, sept années se sont écoulées avant qu'un plaignant ne parvienne à faire accepter à un tribunal que le test confirmait son point de vue.<sup>88</sup> En outre, depuis la décision de 1993 dans l'affaire *Brooke Group*, aucune plainte pour pratiques de prix d'éviction n'a abouti à une condamnation. Cela s'explique, en grande partie, par l'influence de l'école de Chicago. Or, étant donné que des spécialistes de l'école post-Chicago commencent à être au moins évoqués dans les décisions récentes, les plaignants peuvent espérer voir leur chance tourner.<sup>89</sup>

### 2.3.6 Une approche pragmatique de l'application de prix d'éviction fondée sur la promotion du bien-être des consommateurs

Compte tenu des théories, de la documentation et de la jurisprudence évoquées plus haut, on peut formuler certaines suggestions pour l'analyse d'affaires de prix d'éviction.

- *Recourir au coût évitable moyen dans les tests de la relation prix-coûts.* Comme on l'admet déjà dans une large mesure, il faut procéder à un test de la relation prix-coûts. Son but est de déterminer si un contrevenant présumé applique des prix qui pourraient lui permettre d'exclure un concurrent tout aussi efficient ou bien plus efficient. Le coût évitable moyen est la référence privilégiée concernant les pratiques de prix d'éviction pour la plupart des économistes aujourd'hui.<sup>90</sup> Pour cette raison, ainsi que pour d'autres évoquées précédemment, c'est également l'indicateur que recommande le présent document.
- *Recourir au test de la récupération des pertes.* À la lumière de la décision dans l'affaire *Boral* en Australie, le jugement dans l'affaire *Carter Holt Harvey* en Nouvelle Zélande, la législation américaine établie et des signes antérieurs que la récupération des pertes pourrait faire partie de l'analyse de la Commission européenne, une tendance internationale semble déjà se dégager en faveur d'un test de la récupération des pertes. En fait, la tendance semble être sensiblement plus affirmée à l'heure actuelle qu'en 2000, lorsque les chercheurs ont commencé à la remarquer.<sup>91</sup> Pour des raisons déjà mentionnées, le présent document recommande aussi l'utilisation de ce test.
- *Prendre en considération des justifications commerciales légitimes.* Il doit être possible pour un contrevenant présumé qui ne franchit pas les tests de la relation prix-coûts et de la récupération des pertes d'éviter une condamnation s'il peut établir qu'il se trouvait dans des circonstances particulières qui justifiaient sa tarification. Une justification proposée ne peut être légitime que si l'entreprise avait appliqué les mêmes prix alors qu'une telle pratique n'aurait pas fait de tort à la concurrence. L'entreprise doit donc montrer, soit que les circonstances l'ont obligée à facturer des prix inférieurs aux coûts, soit que ses prix s'inscrivaient dans le cadre de pratiques commerciales normales n'impliquant qu'une brève période de pertes. Si les autorités de la concurrence ont des preuves contraires montrant que l'intention du contrevenant présumé était en fait d'appliquer des prix d'éviction, elles doivent les utiliser pour réfuter l'argumentation du contrevenant présumé.

- *Ne pas admettre l'argument de défense d'un « alignement sur la concurrence ».* L'argument d'un alignement sur la concurrence ne tient pas d'un point de vue économique, pas plus qu'on ne peut l'appliquer en pratique sans se montrer arbitraire. Il ne doit pas être autorisé. L'enquête de l'autorité doit en revanche se concentrer sur la relation entre les prix et les coûts du contrevenant présumé.

#### 2.4 *Lois sur la distribution à perte*

Après avoir passé en revue les théories élémentaires et plusieurs lois sur l'application de prix d'éviction, il convient de s'intéresser aux lois spécialisées sur la fixation de prix de détail en deçà des coûts qu'appliquent certains pays. Ces lois ne remplacent pas, mais coexistent avec, le droit de la concurrence plus général régissant l'abus de position dominante. Les lois concernant la distribution à perte ne requièrent pas nécessairement des éléments de preuve (en dehors d'un prix de détail inférieur aux prix de gros globaux versés par le détaillant), comme la preuve d'une position dominante ou d'une intention de pratiquer des prix d'éviction, même si certaines le font. La Loi contre les restrictions de la concurrence (« LCRC ») en Allemagne, par exemple, interdit à une entreprise dotée d'une « puissance sur le marché supérieure à celle de concurrents de petite ou moyenne taille, de proposer pas seulement de façon occasionnelle des biens ou des services à un prix inférieur au prix coûtant, à moins qu'elle n'ait une justification objective. »<sup>92</sup> Cette mesure présente au moins des caractéristiques communes avec l'analyse de certains systèmes d'application de prix d'éviction, étant donné qu'elle prend en compte la relation entre le prix et les coûts, la puissance sur le marché du contrevenant présumé et ses éventuelles justifications. Dans sa mise en œuvre, cependant, la LCRC est même plus stricte que les normes sévères concernant les prix d'éviction utilisées dans les cas relevant de l'article 82.

En décembre 2002, la Cour suprême allemande a conclu que le détaillant Wal-Mart avait enfreint la LCRC en fixant le prix de certains articles alimentaires en deçà de leur coût à l'achat. Wal-Mart était engagé dans une guerre des prix contre deux grands concurrents. Finalement, Wal-Mart a baissé son prix du sucre en deçà de son coût d'achat. Il a aussi maintenu au même niveau les prix du lait malgré une hausse brutale qui a fait monter les coûts au-delà de ces prix.

Tout d'abord, la Cour suprême a estimé qu'aux termes de la LCRC, les effets préjudiciables sur la concurrence n'avaient pas d'importance. La Loi requiert seulement que le contrevenant présumé ait une puissance sur le marché « supérieure », qu'il vende à perte et qu'il n'ait pas de justification objective. La Cour a ensuite établi que Wal-Mart avait la puissance de marché supérieure requise par la LCRC. Une puissance de marché supérieure par rapport à des petits et moyens concurrents est, cependant, très différente d'une position dominante. La LCRC ne cherche pas à savoir si un contrevenant présumé a une puissance de marché supérieure à celle de gros concurrents établis. Or Wal-Mart était confronté à deux d'entre eux. Ce dernier fait suffirait probablement en soi à éviter à Wal-Mart de passer pour occuper une position dominante et placerait ses pratiques de détermination des prix à l'abri de l'article 82.

Concluant que Wal-Mart vendait effectivement à perte et qu'il n'existait pas de justifications objectives, la Cour a maintenu une décision antérieure ordonnant à Wal-Mart de relever ses prix pour éviter d'exclure du marché des magasins plus petits.

On peut difficilement rationaliser cette décision en invoquant le bien-être des consommateurs, étant donné qu'il n'a pas été conclu que la *concurrence* avait subi un préjudice ou pouvait en subir. La Cour a très clairement fondé sa décision sur la conclusion que le comportement de Wal-Mart aurait pu faire du tort à des concurrents plus petits. L'objectif de la LCRC semble donc être de protéger les petits concurrents des effets de la fixation de prix en deçà des coûts, même si le préjudice aux petits concurrents n'entraîne pas

nécessairement un préjudice pour la concurrence, et même si la politique de prix inférieurs aux coûts était donc favorable aux consommateurs.

Le titre IV du Code français de la concurrence prévoit des contrôles plus rigoureux que la LCRC vis-à-vis des prix de détail inférieurs aux coûts. Le titre IV, qui s'intitule « De la transparence, des pratiques restrictives de concurrence et d'autres pratiques prohibées », porte sur ces questions. Comme la loi allemande, toutefois, elle ressemble davantage à une loi sur les pratiques équitables car elle vise à protéger les petits concurrents contre des pratiques qui ne nuisent pas nécessairement à la concurrence. Une disposition impose des sanctions en cas de fixation de prix de détail inférieurs aux coûts d'achat, qui sont définis comme le prix de facturation majoré des taxes et frais de transport.<sup>93</sup> Il n'est pas nécessaire de démontrer l'existence d'une puissance supérieure sur le marché, d'une position dominante, d'une quelconque probabilité d'exclusion ou d'un quelconque impact sur la concurrence. Il existe des exceptions pour les changements de saison, de style ou l'évolution des prix en amont. Certains revendeurs sont autorisés à aligner leurs prix sur ceux d'un autre distributeur de la même zone, mais seulement si les prix de l'autre distributeur sont légaux. En outre, les prix peuvent être réduits pour les produits alimentaires qui sont sur le point d'être périmés, mais le prix plus bas ne doit pas faire l'objet d'une publicité à l'extérieur du magasin. Là encore, on peut difficilement justifier cette loi selon des critères de bien-être des consommateurs, car elle empêche les consommateurs de profiter de certains prix bas alors même que ces prix n'auraient pas fait de tort à la concurrence.

Un autre exemple réside dans le Restrictive Practices (Groceries) Order de 1987, ordonnance irlandaise qui interdit de vendre au détail des produits alimentaires à des prix inférieurs aux prix de facturation nets payés pour ces marchandises. Comme la loi comparable en France, cette ordonnance ne tient compte en aucune manière des conditions relatives à la structure du marché ou des conséquences pour la concurrence. La Competition Authority, l'autorité irlandaise de la concurrence, s'est prononcée en faveur de l'abrogation de cette ordonnance, au motif qu'elle interdit un comportement légitime de ventes promotionnelles à perte et qu'elle permet aux distributeurs en amont d'imposer des prix minimums en aval. À l'heure où nous écrivons ces lignes, l'ordonnance est encore en vigueur.<sup>94</sup>

### **3. Les pratiques d'éviction du marché dans le secteur du transport aérien**

Cinq affaires différentes concernant les pratiques de prix d'éviction de compagnies aériennes se sont produites dans le monde en 2002 et en 2003.<sup>95</sup> Chacune d'elles portait sur des accusations très semblables de comportement d'éviction : une société établie, confrontée à un entrant proposant de faibles tarifs, baissaient ses propres tarifs et augmentait sa capacité en vue d'éliminer ou de mettre au pas le nouvel arrivant. Or, ces affaires se sont conclues très différemment. C'est ce qui confère aux cas de 2003 concernant les transporteurs aériens une assez grande utilité pour l'étude des implications des différentes approches vis-à-vis des pratiques d'éviction.

#### **3.1 L'affaire American Airlines**

Dans l'affaire *États-Unis contre AMR Corp.*, le gouvernement a accusé American Airlines (« AA ») d'enfreindre le Sherman Act en développant ses capacités sur des destinations sur lesquelles des compagnies aériennes à faibles coûts s'étaient introduites, de sorte que les coûts différentiels occasionnés par cette expansion n'étaient pas couverts par les recettes différentielles générées par cette même expansion. Le non-lieu en faveur d'AA a été confirmé en appel au motif que le gouvernement n'avait pas présenté d'indicateurs valables des coûts différentiels et que AA n'avait pas fixé des prix inférieurs à ses coûts variables moyens pour l'ensemble de ses destinations.<sup>96</sup> L'affaire a son importance dans la mesure où la cour a) a traité une plainte contre des pratiques d'expansion de capacité en vue d'évincer un concurrent exactement de la même manière qu'une plainte contre l'application de prix d'éviction ; b) était prête à examiner de nouvelles théories sur les coûts à utiliser dans les tests de la relation prix-coûts, tout en

concluant que ces coûts n'étaient pas calculés correctement dans le cadre de cette affaire ; et c) a refusé d'appliquer l'argument de défense de l'alignement sur la concurrence.

AA a transporté environ 70 % des passagers sur des vols intérieurs à Dallas/Fort Worth International Airport (« DFW »), une de ses principales plaques tournantes. Les compagnies aériennes à faibles coûts, qui ont généralement des coûts inférieurs à ceux des grands transporteurs aériens, ont commencé des incursions sur certaines destinations au départ ou à destination de DFW en pratiquant des tarifs inférieurs à AA. Au début, AA a réagi face à ces entrants en alignant ses tarifs sur un nombre limité de places. Néanmoins, lorsqu'elle a commencé à sentir que les compagnies aériennes à faibles coûts pourraient obtenir suffisamment de clients pour constituer leur propre plaque tournante à DFW, AA a ciblé la destination de ces compagnies, ajoutant plus de places à des tarifs similaires en faisant intervenir plus d'avions – et, dans certains cas, des avions plus gros – qui assuraient auparavant d'autres vols dans le système d'AA. Le directeur général d'AA savait que cette stratégie « pèserait certainement très lourdement sur la rentabilité à court terme d'AA [...] Si vous n'arrivez pas à les éliminer, cela n'a alors aucun sens de diminuer la rentabilité. »<sup>97</sup>

En continuant d'appliquer sa stratégie d'expansion des capacités sur certaines destinations, AA n'a pas tenu compte de ses propres modèles de planification, qui avaient révélé antérieurement qu'un tel projet ne serait pas rentable. Dans chaque cas, comme il a été prouvé, les compagnies aériennes à faibles coûts concurrentes n'ont pas pu s'implanter, ont choisi de déménager leurs activités ou ont cessé toute activité. Une fois que le concurrent ne représentait plus une menace, AA est revenue à son ancienne stratégie en réduisant la capacité et en relevant ses tarifs jusqu'à ce qu'ils soient comparables à leurs anciens niveaux.<sup>98</sup>

L'argument du gouvernement se fondait surtout sur l'effet d'exclusion de l'expansion de capacité d'AA, plutôt que sur la fixation de ses prix en soi. Essentiellement, ce qui a été supposé étouffer la concurrence n'était pas seulement que AA ait aligné ses tarifs sur ceux des entrants, mais qu'elle ait inondé le marché de places disponibles à ces tarifs. Face à tant d'offre excédentaire sur les destinations concernées, les compagnies aériennes à faibles coûts ont perdu du volume et n'ont donc pas pu survivre.

En outre, si le gouvernement a considéré que ce déferlement était illégal, c'est qu'il a coûté davantage qu'il n'a généré de recettes et qu'il n'était logique que dans la mesure où AA pensait que cela lui servirait à éliminer la concurrence et donc de récupérer ses pertes. Cette récupération des pertes était plausible car AA espérait bénéficier de la réputation d'une entreprise qui pratique des prix d'éviction non seulement sur les trajets où elle avait ajouté de la capacité excédentaire, mais aussi sur ceux où sa réputation d'entreprise appliquant une politique d'éviction dissuaderait la concurrence.

La description par le gouvernement du projet déficitaire d'AA était conçue de façon à décourager l'application du test d'Areeda-Turner, selon lequel le total des variables (et aucun des coûts fixes) aurait été comparé au total des recettes concernant l'ensemble de l'offre de places sur les liaisons en question. Le gouvernement souhaitait en revanche que la cour compare les coûts et les recettes associés uniquement à la capacité supplémentaire qu'AA avait ajoutée sur ces destinations dans le cadre de sa stratégie d'application présumée de prix d'éviction. En d'autres termes, le gouvernement souhaitait utiliser le test du coût évitable.<sup>99</sup>

Le tribunal de district n'était pas prêt à prendre une mesure inhabituelle et il a donc décidé d'appliquer le test d'Areeda-Turner sur l'intégralité des activités d'AA sur les trajets concernés. En fonction de ce test, il a conclu que le comportement d'AA était légal et il lui a accordé un non-lieu.<sup>100</sup>

La cour d'appel n'a pas été réceptive à la tentative du gouvernement de concentrer l'attention sur l'illégalité de l'expansion de capacités d'AA, et non sur ses réductions de prix. Elle a déclaré que « les prix et la production constituaient les deux côtés de la même médaille » et que « ces actions doivent être

analysées en fonction de leurs répercussions sur les prix et les coûts. Par conséquent,... le gouvernement doit respecter les normes de preuve applicables aux affaires de prix d'éviction établies dans l'affaire *Brooke Group*. »<sup>101</sup> Néanmoins, la cour a ouvert une nouvelle voie pour le gouvernement en affirmant que les coûts variables moyens n'étaient pas le seul indicateur convenable dans tous les cas. Elle a ensuite fait porté son attention sur quatre indicateurs des coûts différentiels proposés par le gouvernement sans critiquer le concept général d'utilisation d'un indicateur des coûts différentiels. Cela tendait à montrer – sans l'exprimer purement et simplement – que la cour considérait comme acceptable le principe de n'examiner que la gamme de production sur laquelle portait les accusations de pratiques d'éviction.

À ce stade, la situation a commencé à mal tourner pour le plaignant, le tribunal ayant trouvé des défauts à chacun des quatre indicateurs de coûts différentiels proposés. Chacun d'eux se fondait sur des données du propre système comptable d'AA. Pour résumer, deux des tests utilisaient des comptes de coûts de revient qui ramenait 97 à 99 % des coûts totaux d'AA au niveau des vols individuels. Ils ont été rejetés en invoquant qu'ils incluaient certains coûts qui n'auraient pas été évitables même si AA avait abandonné totalement cette destination. Les deux autres tests utilisaient des comptes de coûts de revient en ne ramenant que 72 % des coûts totaux d'AA au niveau des vols. L'un a été rejeté parce qu'il équivalait à un test de maximisation des bénéfices à court terme, l'autre a été rejeté parce qu'il comprenait quatre coûts communs variables imputés arbitrairement que la cour d'appel a apparemment mis elle-même en évidence, sans l'aide du contrevenant présumé ni du tribunal de première instance.<sup>102</sup>

De toute évidence, cela ne changeait rien pour la cour d'appel qu'AA se soit fondée sur des indicateurs de coûts de son propre système pour prendre des décisions stratégiques. Ce qui comptait, pour la cour, c'était uniquement de savoir si les indicateurs de coûts proposés par le gouvernement reflétaient correctement le coût évitable moyen.<sup>103</sup> Concluant que ce n'était le cas d'aucun d'eux, elle s'est fondée sur la preuve incontestée que les prix d'AA n'ont jamais été inférieurs aux coûts variables moyens et elle a donc confirmé la décision de non-lieu prise par le tribunal de première instance.

Le gouvernement a eu une autre bonne nouvelle. Le tribunal de district avait décidé que, même si AA avait fixé des prix inférieurs à ses coûts, il aurait tout de même accordé un non-lieu étant donné qu'AA s'était contentée d'aligner ses prix sur ceux de ses concurrents et qu'elle ne les avait pas fixés en deçà. La cour d'appel a rejeté cette décision, décidant plutôt que l'argument de défense de l'alignement sur la concurrence est inacceptable dans le cadre d'une plainte pour monopolisation.<sup>104</sup>

Intuitivement, la conclusion de l'affaire *AMR* semble erronée du point de vue de l'exécution. *AMR* avait une part d'environ 70 % du marché correspondant. Elle a perdu de l'argent en adoptant un plan qui n'avait aucune chance d'être rentable à moins qu'il ne finisse par éliminer des entrants, et il les a éliminés, même s'ils étaient plus efficaces qu'*AMR*. Enfin, *AMR* a augmenté ses prix et réduit ses capacités après l'exclusion de ses concurrents. Pourtant, en définitive, comme *AMR*, en appliquant cette politique, n'a jamais fixé des prix inférieurs à ses coûts variables moyens globaux, elle a pu l'emporter. Ce cas illustre la difficulté à obtenir gain de cause dans une affaire de prix d'éviction aux États-Unis de nos jours.

Pour l'aspect positif, *AMR* montre qu'au moins une cour d'appel aux États-Unis est prête à envisager d'adopter un nouveau point de vue sur l'analyse des cas d'éviction. La cour a reconnu que « les recherches récentes » ont montré que la pratique de prix d'éviction peut présenter des avantages, « surtout dans le contexte de multiples marchés où les pratiques d'éviction peuvent survenir sur un marché et où la récupération des pertes peut se produire rapidement dans d'autres marchés ». De plus, l'attention soignée portée par la cour au test du coût évitable moyen donne à penser qu'elle aurait pu valider la plainte du gouvernement s'il n'y avait pas eu un problème anormal concernant les données sur les coûts.

L'affaire suivante ne présentait pas ce problème.

### 3.2 *L'affaire Air Canada*

Le Canada a adopté une approche législative d'une précision inhabituelle concernant la pratique de prix d'éviction dans le secteur du transport aérien. Un règlement spécial (le « Règlement relatif aux compagnies aériennes ») a été adopté en 2000 pour éviter qu'Air Canada n'abuse de sa puissance sur le marché lorsqu'elle est devenue, de loin, la première compagnie aérienne nationale avec son acquisition de Canadian Airlines. La nouvelle réglementation interdisait à une compagnie aérienne d'exercer ses activités ou d'augmenter ses capacités à des tarifs qui ne couvrent pas le coût évitable de cette offre de service.<sup>105</sup>

Dans l'affaire *Commissaire de la concurrence c. Air Canada*, une requête a été présentée auprès du Tribunal de la concurrence canadien pour décider si Air Canada avait enfreint le règlement relatif aux compagnies aériennes et l'article 79 de la Loi sur la concurrence en adoptant pratiquement la même attitude que dans l'affaire *AMR*.<sup>106</sup> Air Canada a été accusé d'avoir réagi à l'entrée de deux compagnies aériennes à faible coûts sur certaines destinations par une stratégie mixte consistant à aligner ses tarifs sur ceux des entrants et à augmenter sa capacité de sorte qu'elle ne couvre pas le coût évitable des activités liées aux destinations concernées. Le Tribunal a scindé les poursuites en deux phases et n'a donc jusqu'à présent rendu son jugement que sur la question de savoir si Air Canada avait échoué au test des CEM pour deux destinations choisies par sondage.<sup>107</sup>

Tout d'abord, le Tribunal a déclaré que le différentiel de production qu'il fallait examiner dans le test du coût évitable est un vol aller individuel, et non toute une destination.<sup>108</sup> Il s'agit de la même approche que préconisait le plaignant dans l'affaire *AMR*.

Le Tribunal a aussi déclaré que les coûts évitables se composaient des coûts variables et des charges fixes spécifiques au produit qui ne sont pas irrécupérables, qui peuvent être évitées en cessant la production concernée ou en abandonnant le service en question.<sup>109</sup> En identifiant quels sont les coûts évitables, le problème des possibilités de redéploiement s'est posé. Fondamentalement, la question est de savoir si le fait qu'une ressource aurait pu être redéployée de façon rentable pour un autre vol après l'annulation d'un vol donné rend évitable tout coût associé à cette ressource. Par exemple, si l'avion, les pilotes et l'équipage d'un vol annulé peuvent être réorientés de façon rentable vers d'autres vols (y compris ceux qui viennent d'être programmés), leurs salaires sont-ils alors évitables?<sup>110</sup> Après avoir conclu qu'Air Canada a de nombreuses occasions de redéployer ses ressources de façon rentable, le Tribunal a répondu à cette question par l'affirmative.<sup>111</sup>

Le gouvernement a considéré que tous les coûts d'Air Canada, à l'exception de ceux qui peuvent être qualifiés de frais indirects, sont évitables sur une période de trois mois. Il a aussi estimé que les recettes dites « contributions supplémentaires » ou « de transfert » [contribution des passagers d'un vol à la rentabilité des correspondances sur Air Canada] ne devraient pas être prises en compte pour calculer les recettes d'Air Canada aux fins de les comparer avec les coûts évitables.<sup>112</sup> Au lieu de cela, de l'avis du gouvernement, ce revenu pourrait être pris en compte dans une analyse ultérieure des justifications commerciales légitimes. Le tribunal a admis les deux positions, tout en ramenant le délai à un mois.<sup>113</sup> En acceptant d'inclure tous les coûts hors frais indirects, le Tribunal semble avoir décidé d'une approche différente de celle de la cour ayant traité l'affaire *AMR*, qui a rejeté les tests proposés par le plaignant parce qu'ils comportaient des coûts communs imputés arbitrairement.

Les contributions supplémentaires sont un moyen de prendre en compte la demande complémentaire existant dans les plaques tournantes utilisées par les grandes compagnies aériennes. Un passager peut acheter un billet, par exemple, qui le transporte de A à C en passant par la plate-forme B, où il prend un autre avion. Il n'a payé qu'un seul trajet, mais il y a deux destinations durant son voyage. Le vol de A à la plate-forme B est un moyen pour le transporteur aérien de consolider le trafic et de proposer un service vers C. Autrement dit, si la société n'était pas en mesure de proposer un vol de A à B, elle n'aurait peut-

être jamais pu attirer un passager se rendant vers C car il n'y aurait peut-être pas assez de volume pour que la société justifie des vols directs de A à C. Par conséquent, on attribue au vol de A à B un indicateur de bénéfice notionnel du vol de B à C (et vice-versa).<sup>114</sup>

En définitive, le Tribunal a conclu qu'Air Canada avait exercé ses activités ou augmenté ses capacités à des tarifs qui ne couvraient pas les coûts évitables sur deux destinations.<sup>115</sup> Il sera intéressant de voir si les tribunaux canadiens acceptent de plus en plus l'indicateur des coûts évitables dans les affaires d'éviction survenant dans d'autres secteurs également.

### 3.3 L'affaire *Germania*

Pour ce cas, l'analyse était totalement différente de celles utilisées dans les affaires *AMR* et *Air Canada*, et montre une attitude plus militante à la fois de l'autorité de la concurrence et des tribunaux. La décision à l'issue de l'affaire *Germania* reflète une volonté rare d'imposer aux entreprises établies de faire de la place aux nouveaux venus et de dicter avec précision les conditions de cet accueil.

Lorsque *Germania Fluggesellschaft mbH* (« *Germania* ») s'est introduite sur une des destinations de Lufthansa en proposant un tarif aller bien inférieur de 99 euros, Lufthansa a réagi par une offre de vol en classe économique à 100 euros, qu'elle a fini par porter à 105 euros. Contrairement à *American Airlines* et *Air Canada*, Lufthansa n'a pas accru sa capacité. Après avoir examiné une plainte de *Germania*, l'Office fédéral des ententes (« *Bundeskartellamt* ») a conclu que Lufthansa avait abusé de sa position dominante car son vol en classe économique ne couvrait pas le coût total moyen. Ultérieurement, la Cour d'appel de Düsseldorf a confirmé le jugement.<sup>116</sup>

Pour calculer le CTM de Lufthansa, l'Office fédéral a inclus les recettes prévisibles comme composante des coûts. Cette démarche est intéressante dans la mesure où les recettes prévisibles ont été calculées en se fondant sur la théorie que l'offre d'un tarif réduit entraînait des pertes pour Lufthansa car certains passagers qui auraient acheté le vol à un prix supérieur préféreraient désormais le vol économique. Ce concept est assez différent des occasions prévisibles prise en compte dans la décision concernant *Air Canada*, qui portaient sur la perspective de déployer de façon plus rentable des ressources sur d'autres trajets. Selon l'approche adoptée dans l'affaire *Germania*, Lufthansa a été sanctionnée pour ne pas avoir facturé tout ce que le marché était en mesure d'assumer. En outre, cette méthode semble entraîner une double comptabilisation à l'encontre du contrevenant présumé. En effet, non seulement les recettes ont été réduites lorsque les clients qui auraient payé le plein tarif pour leur vol ont acheté leur billet aux tarifs économiques, mais l'Office fédéral a aussi relevé à due concurrence son approximation du coût du contrevenant.

L'Office a conclu que *Germania* devait capter un certain nombre de passagers de Lufthansa pour survivre. Il a en outre conclu que le tarif presque correspondant de Lufthansa, associé à la qualité supérieure des services (sous forme de miles cumulés pour les passagers voyageant fréquemment par cette compagnie aérienne, de journaux gratuits, de plus grande fréquence des vols, de réputation, etc.), empêchait *Germania* de le faire. Autrement dit, même si son tarif était légèrement supérieur, Lufthansa continuait en fait à vendre moins cher que le nouvel entrant.

L'Office a alors appliqué des mesures correctrices pour s'assurer que *Germania* soit en mesure de livrer concurrence. Des valeurs monétaires ont été attribuées à chacun des services différenciés de Lufthansa, fondées sur la valeur de ces services telle que la percevaient les consommateurs et non pas sur leurs coûts effectifs. Finalement, l'Office a décidé que, pour être comparable à l'offre de Lufthansa, le vol de *Germania* devait coûter 35 euros de moins. Il a donc ordonné à Lufthansa d'appliquer des tarifs en les majorant d'au moins 35 euros par rapport à ceux de *Germania*, jusqu'à un maximum de 134 euros aller et retour, pendant deux ans.

En appel, Lufthansa s'est fortement appuyée sur l'argument de l'alignement sur la concurrence et la Cour d'appel de Düsseldorf a convenu qu'il s'applique dans les cas d'abus de position dominante. Elle a néanmoins décidé qu'en l'occurrence, bien que les tarifs de Lufthansa aient été en termes nominaux supérieurs à ceux de Germania, ce mode de défense ne pouvait être invoqué. Le tribunal est convenu avec l'Office fédéral que lorsque ses services différenciés étaient pris en compte, Lufthansa avait en fait vendu ses vols à des tarifs inférieurs à ceux de Germania. La Cour d'appel a aussi approuvé le principe correcteur consistant à quantifier la meilleure qualité des services proposés par Lufthansa, mais elle n'était pas d'accord avec le calcul de l'Office fédéral. Elle a donc ramené cet écart de 35 euros à 30,5 euros.<sup>117</sup>

Cette décision tend à montrer que l'Office fédéral et la Cour d'appel ont appliqué une politique fondée sur le principe qu'il vaut toujours mieux avoir un grand nombre de concurrents pour la concurrence, indépendamment des moyens mis en œuvre pour garantir leur survie. En utilisant l'indicateur de coût le plus agressif de tous (CTM) dans son test de la relation prix-coûts, en comptabilisant les baisses de tarifs comme des coûts d'opportunité et en attribuant des valeurs aux services différenciés,<sup>118</sup> l'analyse dans l'affaire *Germania* ne laisse guère d'autre choix aux sociétés établies que d'accueillir les entrants, qu'ils soient plus efficaces ou non. En outre, le fait d'indexer les mesures correctrices sur le prix d'entrée de Germania, sans chercher à savoir si cette compagnie aurait pu l'abaisser de manière rentable (tout en couvrant ses coûts) pourrait nuire au bien-être des consommateurs. D'autres compagnies aériennes à faibles coûts, ayant cette analyse en tête, pourraient s'introduire sur d'autres destinations à des prix bien au-dessus de leurs propres coûts, mais inférieurs à ceux de Lufthansa, dans l'espoir d'être aussi protégées pareillement de la concurrence de Lufthansa.

### 3.4 L'affaire Spirit Airlines

Cette décision est intéressante dans la mesure où elle a utilisé le test des CVM plus classique plutôt que le test des CEM, et qu'elle a refusé d'autoriser l'argument de défense de l'alignement sur la concurrence. Comme dans le cas des accusations dans les affaires *AMR* et *Air Canada*, Spirit Airlines a poursuivi en justice Northwest Airlines, lui reprochant une expansion de sa capacité et une tarification à des fins d'éviction sur deux destinations faisant intervenir la plate-forme de Northwest à Detroit.<sup>119</sup> Spirit, compagnie aérienne à faibles coûts, avait commencé à proposer des vols sur les deux destinations à des prix inférieurs à ceux de Northwest. Cette compagnie a réagi en augmentant sa capacité et en proposant des billets à des prix correspondant aux tarifs bas de Spirit pour un certain nombre de places. Ensuite, Spirit s'est retiré de ces destinations, et Northwest a alors réduit sa capacité et a relevé ses prix.

Un des arguments de défense invoqués par Northwest est celui de l'alignement sur la concurrence. Le tribunal l'a totalement rejeté en déclarant qu'il reviendrait à autoriser un prédateur à fixer des prix inférieurs à ses propres coûts pour s'aligner sur un concurrent, même si le concurrent était plus efficace et établissait ses tarifs à un niveau, pour lui, rentable. Autoriser ce moyen de défense équivaldrait donc, a raisonné le tribunal, à autoriser exactement le type de comportement d'éviction que la loi entend prévenir. En outre, contrairement au cas de *Germania*, le tribunal jugeant l'affaire *Spirit Airlines* n'avait aucune confiance dans sa capacité de décider si Northwest avait effectivement ou non « aligné » ses prix sur ceux de Spirit, compte tenu de la différenciation des services proposés par les deux transporteurs.

Le tribunal a néanmoins accordé un non-lieu à Northwest. Estimant que les CVM étaient l'indicateur de coût le plus approprié, il a conclu qu'il n'y avait eu qu'un seul mois pendant lequel le contrevenant présumé n'avait pas passé le test – même sans prendre en compte les recettes des « contributions supplémentaires ». Cette analyse n'est cependant pas vraiment satisfaisante.

En adoptant le test des CVM, le tribunal a considérablement réduit les chances de réussite du plaignant par rapport à ce qu'elles auraient été avec le test des CEM. Premièrement, le tribunal comparait les recettes et les coûts pour l'ensemble d'une destination de Northwest, plutôt que simplement la

différence entre les chiffres correspondant aux vols que Northwest avait ajoutés. Si Northwest avait relativement plus de sièges inoccupés sur les vols récemment ajoutés, un calcul de la relation prix-coûts appliqué à tous ses vols sur les destinations concernées lui aurait permis de dissimuler les pertes qu'elles occasionnaient sur les seuls vols ajoutés. Deuxièmement, en utilisant les CVM plutôt que les CEM, le tribunal n'a pris en compte aucun coût fixe spécifique au produit. Le test des CVM a donc peut-être comparé des recettes plus élevés et des coûts plus bas que le test des CEM, ce qui est évidemment désavantageux pour le plaignant.

### **3.5 Leçons à tirer des affaires des transporteurs aériens**

Quelques constatations ressortent de cet examen des affaires concernant les transporteurs aériens. Premièrement, plusieurs juridictions restent divisées sur l'indicateur de coût à utiliser. Il n'existe parfois pas de norme claire permettant de choisir au sein d'une juridiction, comme le montrent les différents tests examinés dans les affaires américaines *AMR* et *Spirit Airlines*.

Deuxièmement, déposer une plainte pour « expansion de capacité dans le cadre de mesures d'éviction » plutôt que pour la pratique de prix d'éviction ne modifie pas fondamentalement la grille d'analyse. Les tribunaux n'en appliquent pas moins les tests de la relation prix-coûts, comme dans les affaires de prix d'éviction. La mise en avant de cet aspect d'expansion de la capacité dans la stratégie du contrevenant présumé peut cependant contribuer à faire porter l'attention du tribunal sur le segment différentiel de la production qui est accusé de perdre de l'argent. Autrement dit, si l'on qualifie le comportement de l'entreprise établie d'expansion de capacité à des fins d'éviction, on encourage le recours aux CEM. Ce test contribue à empêcher les prédateurs de dissimuler ce comportement dans les moyennes sur l'ensemble d'une destination mesurées dans les CVM et les CTM, qui prennent en compte le segment le plus rentable de la production avant l'expansion de capacité non rentable présumée. Il n'y a aucune raison que cette approche ne puisse pas, ou ne doive pas servir dans des affaires d'éviction qui concernent d'autres secteurs.

Troisièmement, le test des CEM semble valable d'un point de vue conceptuel, mais il n'y a pas de consensus sur les coûts qui sont évitables et ceux qui ne le sont pas. C'est au moins ce que l'on peut conclure d'une comparaison entre les affaires *AMR* et *Air Canada*. De même, les avis ne semblent pas encore unanimes sur la nécessité ou non de prendre en compte les recettes des « contributions supplémentaires ».

Enfin, certaines juridictions autorisent encore l'argument de défense de l'alignement sur la concurrence dans des cas d'éviction, tandis que d'autres n'en ont pas tenu compte et refuse de l'appliquer.

## **4. Autres formes d'éviction hors prix**

### **4.1 Introduction**

Il existe une grande variété de comportement que l'on pourrait qualifier d'« éviction hors prix », y compris les offres groupées, les pratiques de subordination de vente, les refus de vente, les refus d'accorder une licence de propriété intellectuelle, l'innovation à des fins d'éviction, les investissements avec droits préférentiels de souscription, etc. Il est impossible de couvrir de façon exhaustive l'ensemble de ces sujets dans un rapport qui s'efforce par ailleurs de brosser un tableau complet des pratiques d'application de prix d'éviction. Le présent document a en revanche isolé le renforcement des capacités d'éviction car ce comportement était largement présent dans les affaires concernant les transporteurs aériens. Dans ce contexte, l'analyse s'est révélée assez proche de celle des prix d'éviction. Pour donner une idée de la nature d'autres types de comportement d'éviction hors prix, quelques aspects complémentaires sont

brèvement exposés ci-après. On proposera, cependant, que les pratiques d'éviction hors prix fassent l'objet d'une future table ronde si le sujet suscite suffisamment d'intérêt.

#### **4.2 *Alourdissement des coûts des concurrents***

L'alourdissement des coûts des concurrents (« ACC ») est une forme puissante d'éviction hors prix, mais il n'a guère été traité dans les ouvrages économiques jusqu'au début des années 80. Un prédateur appliquant une stratégie d'ACC tente de désavantager ses concurrents en relevant leurs coûts. Parfois, le prédateur devra augmenter ses propres coûts pour mettre en œuvre sa stratégie, mais pas toujours. La stratégie sera rentable si le prédateur réussit à faire grimper le prix sur le marché au-delà de l'augmentation de son propre coût moyen total (à production identique).<sup>120</sup>

L'ACC est habituellement une stratégie plus intéressante que l'éviction par les prix parce qu'elle inflige des dégâts à un concurrent sans induire nécessairement des pertes pour l'entreprise établie. De plus, la phase de récupération des pertes se produit à peu près au même moment que la mise en œuvre de la stratégie d'ACC, plutôt qu'à un moment futur. Pour ces raisons, certains commentateurs ont déclaré que « les analyses de l'ACC... font ressortir clairement que les stratégies d'alourdissement des coûts à effet d'exclusion devrait constituer la principale préoccupation dans le domaine de la réglementation de la concurrence pour ce qui est du comportement d'une entreprise en position dominante. »<sup>121</sup> En revanche, il n'est pas toujours possible de recourir à l'ACC, tandis que tout le monde peut au moins essayer d'appliquer une stratégie de prix d'éviction.

Comme les prix d'éviction, l'ACC n'est pas forcément dommageable sur le plan du bien-être des consommateurs. Il ne nuit à la concurrence que s'il permet au prédateur de facturer un prix supra-concurrentiel. Mais contrairement à l'application de prix d'éviction, l'ACC ne se prête pas à des méthodes intuitivement évidentes pour déceler le préjudice porté à la concurrence, comme les tests de relation prix-coûts et de récupération des pertes. Certaines autorités de la concurrence ont des instructions spéciales qui couvrent les comportements d'alourdissement des coûts des concurrents. Le Bureau de la concurrence du Canada, par exemple, a annoncé qu'il considérerait un acte d'une entreprise dominante comme un abus si cet acte alourdit les coûts des concurrents ou réduit leurs recettes à des fins d'éviction, d'exclusion ou de mise au pas.<sup>122</sup> Les instructions canadiennes ne prévoient cependant pas de processus spécifique pour déterminer si la stratégie d'ACC de l'entreprise en position dominante produit (ou a de grandes chances de produire) des effets concurrentiels préjudiciables. En revanche, de nombreux exemples de stratégies d'ACC pourraient être considérées comme des actes anticoncurrentiels. À moins que, et jusqu'à ce que, les économistes s'entendent sur un test général pour détecter les stratégies dommageables d'ACC, l'approche du Canada semble judicieuse.

Le point de vue de l'école de Chicago sur l'ACC a des résonances sceptiques familières. Frank Easterbrook a recommandé que « dans un proche avenir, nous laissons l'alourdissement des coûts des concurrents aux chercheurs. »<sup>123</sup> Reste à voir, pour l'heure, si les chercheurs de l'école post-Chicago vont répliquer avec des éléments justifiant de plus grandes craintes.

#### **4.3 *Exploitation de l'asymétrie de l'information***

Parfois, l'entreprise établie sur un marché dispose d'un avantage en termes d'informations par rapport aux entrants potentiels, étant donné sa plus grande expérience et ses contacts avec les fournisseurs et les clients. Cet avantage est bidirectionnel, autrement dit, l'entreprise établie n'a pas seulement plus de facilité d'accès aux informations du marché, mais elle apparaît aussi comme une source plus fiable d'informations que les nouveaux venus. Cela donne aux entreprises établies le pouvoir de faire naître la peur, l'incertitude et le doute dans l'esprit des autres – y compris les entrants potentiels, les clients, les investisseurs ou les créanciers – quant à la faisabilité d'une entrée rentable. Une société établie peut par exemple envoyer des

signaux trompeurs sur la demande du marché et ses propres coûts pour dissuader les concurrents ou leur compliquer la levée de capitaux.<sup>124</sup> En outre, une entreprise établie risque de propager le doute parmi les clients concernant la viabilité ou la qualité du nouveau venu.

Dans d'autres cas, les entreprises en position dominante peuvent communiquer des informations trompeuses concernant des produits afin de faire croire aux clients qu'elles introduiront, elles aussi, un nouveau type ou une nouvelle version du produit qu'un concurrent est sur le point de lancer sur le marché. Les clients risquent ainsi d'attendre le produit de la société établie au lieu de prendre le risque d'essayer un produit moins connu d'un entrant. Les économistes ont démontré l'impact négatif de telles annonces sur la concurrence et sur le bien-être.<sup>125</sup>

Des annonces de produits ont été mises en cause dans plusieurs affaires anciennes qui illustrent collectivement les défis que devrait relever un organisme s'efforçant de mettre au point des lignes directrices dans ce domaine. Dans certains cas, le plaignant avait contesté le fait qu'une annonce avait enfreint le droit de la concurrence, car elle était effectuée trop en avance sur le lancement effectif du nouveau produit.<sup>126</sup> Dans d'autres, les plaignants contestaient que les annonces ne soient pas effectuées suffisamment de temps avant la mise sur le marché du produit.<sup>127</sup> On demandait en fait aux tribunaux de définir la période durant laquelle les entreprises peuvent annoncer leurs nouveaux produits. Si l'on établit un parallèle avec l'analyse des prix d'éviction, il faudrait qu'un tribunal décide d'une manière ou d'une autre si le moment de l'annonce aurait été différé si le contrevenant présumé était convaincu qu'il était impossible de nuire à la concurrence en effectuant l'annonce à ce moment-là (ou par le simple fait de procéder à cette annonce).

Malheureusement, les entreprises choisissent le moment de leurs annonces de produits pour toutes sortes de raisons plausibles, dont certaines peuvent être concurrentielles et d'autres pas. En outre, certaines raisons inciteront l'entreprise à faire son annonce plus tôt, tandis que d'autres influenceront l'entreprise pour faire tout le contraire. Il se peut, par exemple, qu'en annonçant un produit tôt, une entreprise établie cherche à nuire à un entrant en encourageant les acheteurs à attendre la sortie d'un de ses nouveaux modèles. Il se peut aussi que l'entreprise établie ait simplement l'intention d'avertir les entreprises qui produisent des biens complémentaires suffisamment à l'avance pour qu'elles mettent au point de nouveaux produits qui fonctionnent avec son propre produit. L'entreprise établie souhaite peut-être aussi que son nouveau produit reste secret aussi longtemps que possible, car elle veut produire et vendre elle-même tous les produits complémentaires. Ces solutions contradictoires ont parfois amené certains chercheurs à renoncer à toute règle et à conclure que *n'importe quel* moment pour l'annonce d'un produit doit être présumé légal.<sup>128</sup>

## 5. Conclusion

Compte tenu de la théorie économique actuelle, sinon du comportement des entreprises effectivement observé, il n'y a plus guère de raison de croire à la rareté ou à l'inexistence des pratiques d'éviction. Elles constituent une dangereuse menace pour la concurrence et le bien-être des consommateurs qui nécessite une surveillance, voire une surveillance étroite, des autorités de la concurrence et des tribunaux. Même si les chercheurs ont fait progresser le débat ces dernières années, ils doivent encore définir un ensemble de règles simples, applicables, qui établissent une distinction entre la concurrence légitime et dommageable. Par conséquent, à moins que les autorités de la concurrence ne fassent preuve de prudence lorsqu'elles examinent un éventuel comportement d'éviction, elles risquent de décourager par inadvertance un comportement concurrentiel favorisant le bien-être.

Le présent document s'est efforcé de clarifier les aspects fondamentaux du débat en cours sur l'éviction, de décrire les tendances récentes en termes d'approche concrète dans le monde et d'énoncer des recommandations sur les méthodes qui semblent actuellement les plus fondées pour tester les pratiques

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d'éviction en partant du principe que le droit de la concurrence est destiné à promouvoir et à protéger le bien-être des consommateurs.

## NOTES

1. *Voir* Janusz Ordover & Robert Willig, « An Economic Definition of Predation: Pricing and Product Innovation, » 91 Yale Law Journal 8, 9 (1981) (« même si une pratique peut entraîner l'exclusion du concurrent, elle n'est dite d'éviction que si elle ne peut être profitable sans conférer un pouvoir de monopole supplémentaire résultant de cette exclusion »). Provoquer l'exclusion d'un concurrent n'est cependant pas essentiel à la réussite de la campagne d'éviction. Si la phase d'éviction renforce la position de soumission du concurrent, le contraignant à suivre les prix pratiqués par le prédateur, l'entreprise prédatrice peut également parvenir à ses fins. En fait, ce résultat peut être préférable à l'exclusion du concurrent par la contrainte car, dans ce cas, les actifs du concurrent peuvent être cédés à moindre prix, ce qui permet à l'acquéreur de s'implanter sur le marché en supportant des frais structurels moins élevés, posant ainsi encore plus de problèmes à l'entreprise déjà implantée.
2. Pour une bonne introduction à ce débat, voir Phillip Areeda et Donald Turner, « Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, » 88 Harvard Law Review 697 (1975), F.M. Scherer, « Predatory Pricing and the Sherman Act: A Comment, » 89 Harvard Law Review 869 (1976) et Douglas Greer, « A Critique of Areeda and Turner's Standard for Predatory Practices, » 24 Antitrust Bulletin 223 (été 1979).
3. Frank Easterbrook, « Predatory Strategies and Counterstrategies, » 48 University of Chicago Law Review 263 (1981) (« Il n'existe aucune raison permettant de justifier que le droit de la concurrence ou les tribunaux prennent les pratiques d'éviction trop au sérieux »).
4. *Voir* William Baumol, « Predation and the Logic of the Average Variable Cost Test, » 39 Journal of Law and Economics 49, 52-53 (1996).
5. Phillip Areeda et Donald Turner, « Predatory Pricing and Related Practices under Section 2 of the Sherman Act, » 88 Harvard Law Review 697 (1975).
6. L'une des raisons de cette divergence vient précisément du fait qu'il s'agit d'un coût marginal tandis que les CVM représentent une moyenne. À mesure que la production augmente, les rendements marginaux décroissant par rapport aux facteurs de production augmentent d'autant le coût de production de chaque unité supplémentaire produite. La courbe du CM croise par la suite la courbe des CVM à son point minimum, puis commence à pousser les CVM à la hausse. Les CVM cependant ne rattrapent jamais le CM qui augmente plus rapidement à court terme.
7. Pour un tour d'horizon des critiques du test d'Areeda-Turner, voir James Hurwitz et William Kovacic, « Judicial Analysis of Predation: The Emerging Trends, » 35 Vanderbilt Law Review 63-157 (1982), Joseph Brodley et George Hay, « Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards, » 66 Cornell Law Review 738 (1981).
8. *Voir* section 2.2.4 ci-dessous.
9. Paul Joskow et Alvin Klevorick, « A Framework for Analyzing Predatory Pricing Policy, » 89 Yale Law Journal 213 (1979).
10. William Baumol, « Predation and the Logic of the Average Variable Cost Test, » 39 Journal of Law and Economics 49 (1996) p. 59 ; *voir aussi* Phedon Nicolaidis et Roel Polmans, « Competition in EC

Telecommunications: Cross-Subsidisation, Access and Predatory Pricing, » 22 World Competition Law and Economics Review 21, 33 (1999).

11. Phillip Areeda et Herbert Hovenkamp, « Antitrust Law: An Analysis of Antitrust Principles and Their Application » (2e éd. 2002), vol. 3, para. 735 (« Le problème de toutes ces stratégies n'est pas que nous doutons de leur existence ni même de leurs effets anticoncurrentiels, mais tient plutôt au fait que pouvoir identifier un cas particulier sans pénaliser les politiques de prix agressives et concurrentielles va bien au-delà des compétences d'un quelconque tribunal de la concurrence. »).
12. William Baumol, « Predation and the Logic of the Average Variable Cost Test, » 39 Journal of Law and Economics 49 (1996) ; le test des CEM a été approuvé par le tribunal canadien de la concurrence dans l'arrêt *Commissaire de la Concurrence contre Air Canada* (2003), 26 C.P.R. (4e) 476, [2003] C.C.T.D. n°9 (Tribunal de la Concurrence), conformément aux lois spécifiques au transport aérien ; le test des CEM a été également très soigneusement pris en compte par une cour d'appel dans l'affaire *États-Unis contre AMR Corp.*, 335 F.3d 1109 (10e Cir. 2003). Il est évoqué dans les ouvrages traitant des prix d'éviction et, depuis 1981 au moins, dans l'ouvrage de Janusz Ordover et Robert Willig, « An Economic Definition of Predation: Pricing and Product Innovation, » 91 Yale Law Journal 8, 17-18 (1981).
13. Les entreprises adoptant des stratégies d'éviction par les prix doivent alors augmenter leur production, pour deux raisons principales. Premièrement, la baisse de leurs prix va stimuler la demande globale du marché et, deuxièmement, le prédateur doit absorber cette demande excédentaire qui était auparavant satisfaite par sa proie. *Voir* section 2.2.2. e) ci-dessous.
14. Derek Ridyard, « Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis, » 23 European Competition Law Review 286, 295 (2002).
15. William Baumol, « Predation and the Logic of the Average Variable Cost Test, » 39 Journal of Law and Economics 49 (1996), p. 62.
16. Aaron Edlin, « Stopping Above-Cost Predatory Pricing, » 111 Yale Law Journal 941 (2002).
17. Einer Elhauge, « Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory, » 112 Yale Law Journal 681 (2003).
18. *Voir* Geoff Edwards, « The Perennial Problem of Predatory Pricing, » 30 Australian Business Law Review 170 (2002), p. 188 et note 92.
19. *Id.* p. 188, note 93.
20. *MCI Communications contre AT&T*, 708 F.2d 1081, 1114 (7e Cir. 1983) (souligné dans l'original) ; *voir aussi* Phillip Areeda et Herbert Hovenkamp, « Antitrust Law: An Analysis of Antitrust Principles and Their Application (2d ed. 2002), vol. 3, para. 736c2 » (« En pratique, il sera rare de pouvoir déterminer le prix auquel l'entreprise mise en cause maximise effectivement ses bénéfices. »).
21. *Mais voir* *Compagnie maritime belge*, C-395/96 P, § 97 (affirmant que « le simple fait que la concurrence sur les prix vise à évincer un concurrent du marché ne rend pas illicite la concurrence légale » mais soutenant qu'il était illégal pour une entreprise mise en cause d'abaisser ses prix pour qu'ils soient supérieurs à ses propres coûts, mais inférieurs à ceux d'un entrant ciblé).
22. Paul Joskow et Alvin Klevorick, « A Framework for Analyzing Predatory Pricing Policy, » 89 Yale Law Journal 213 (1979).
23. Le test de récupération des pertes n'est pas non plus exempt de toute critique et certains avancent qu'il est aussi difficile de prévoir si un prédateur pourra récupérer ses pertes que de choisir et de mesurer les coûts les plus judicieux pour évaluer la relation prix-coûts. *Voir* M.L. Denger et J.A. Herfert, « Predatory Pricing

Claims After Brooke Group, » 62 Antitrust Law Journal 541 (1994). Cependant, même ceux qui critiquent le test de récupération des pertes n'en préconisent pas l'abandon, ils recommandent simplement de pratiquer d'abord un test d'évaluation de la relation prix-coûts.

24. Une exception doit être notée, cependant. Certains pays ont également recours à des lois sur les « ventes à pertes » (qui ne contiennent pas nécessairement de dispositions concernant les seuils de puissance sur le marché) pour sanctionner ce qui est considéré comme des pratiques d'éviction par les prix. *Voir* Section 2.4.
25. Dans certains pays comme les États-Unis, il suffit que l'*acquisition* délibérée d'une puissance sur le marché résulte d'un comportement anticoncurrentiel ou que la *tentative* d'acquérir une puissance sur le marché ait de fortes chances de réussir. Il s'agit d'une approche souhaitable que les règlements sur la concurrence destinés à couvrir les comportements d'éviction devraient reprendre car les prédateurs ne se trouvent pas nécessairement en position dominante au début de leur campagne d'éviction, mais en acquerront une, à un moment donné, si leur stratégie réussit. Il existe une anomalie à cet égard dans les textes législatifs de certaines juridictions, qui exigent que l'entreprise mise en cause soit déjà dominante au moment où elle exerce son comportement d'éviction. Certains commentateurs ont relevé l'importance de cette différence. *Voir* le discours prononcé par Philip Lowe, lors de la 30e conférence sur le droit et la politique de la concurrence internationale au Fordham Corporate Law Institute, le 23 octobre 2003, pp. 2-3 (commentant l'article 82) ; Geoff Edwards, « The Perennial Problem of Predatory Pricing, » 30 Australian Business Law Review 170 (2002), 196, 197, 199 (avançant que, pour cette raison, l'article 46 de la loi australienne sur les pratiques commerciales de 1974 [Trade Practices Act 1974] est « inapproprié pour couvrir les pratiques de prix d'éviction »).
26. Cet effet résulte de l'élasticité de la demande par rapport au prix. *Voir* section 2.2.2d).
27. La définition de la notion de barrières ne fait pas l'objet d'un véritable consensus. Certains considèrent ces barrières comme les coûts nécessaires engagés par les entrants et que les entreprises déjà implantées n'ont pas eu à supporter au moment où elles se sont implantées. D'autres entendent par là tous les obstacles permettant aux entreprises déjà implantées de relever leurs prix au-dessus du niveau concurrentiel sans susciter l'entrée de nouveaux concurrents.
28. Ce terme renvoie à la variation en pourcentage de la quantité demandée induite par une variation de 1% du prix. Lorsque l'élasticité de la demande est forte, une baisse de 1% des prix, par exemple, induit, en toute hypothèse, une hausse de 10 % de la quantité demandée. Une demande dépourvue d'élasticité, en revanche, fait qu'avec une baisse comparable, la hausse de la demande ne serait, en toute hypothèse, que de 0,5 %.
29. Cela reste vrai même si l'acquéreur utilise l'argument de l'entreprise défaillante. L'autorité de tutelle examinera naturellement pourquoi l'entreprise ciblée est défaillante et, si sa défaillance résulte de la stratégie d'éviction menée par le prédateur, l'acquéreur sera alors soumis à un contrôle attentif de l'autorité en question – portant à la fois sur l'opération d'acquisition et sur le recours aux prix d'éviction.
30. D.M. Kreps et R. Wilson, « Reputation and Imperfect Information, » 27 Journal of Economic Theory 253 (1982) ; P. Milgrom et J. Roberts, « Predation, Reputation and Entry Deterrence, » 27 Journal of Economic Theory 280 (1982) ; Patrick Bolton, Joseph F. Brodley et Michael H. Riordan, « Predatory Pricing: Strategic Theory and Legal Policy, » 88 Georgetown Law Journal 2239 (2000).
31. Bolton, et al. (2000).
32. La notion d'effets de réputation a déjà été traitée très sérieusement, *in dictum*, dans un procès qui s'est tenu aux États-Unis. *Voir Advo, Inc. contre Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1196 (3d Cir. 1995) (concluant que la notion d'effets de réputation est applicable « dans un nombre limité de circonstances spéciales » et que le plaignant n'avait invoqué aucune de ces circonstances spéciales).

33. *A. A. Poultry Farms, Inc. contre Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7e Cir. 1989) (Easterbrook, J.) ; voir également Richard Posner, *Antitrust Law: An Economic Perspective* 190 (1976) (« La propension invétérée des directeurs commerciaux à se vanter des succès remportés sur les concurrents auprès de leurs supérieurs, en utilisant souvent des métaphores coercitives, représente souvent pour les esprits naïfs la preuve irréfutable d'une intention d'éviction »).
34. De plus, si l'entreprise mise en cause démontre que sa stratégie d'éviction présumée doit être excusée en raison d'une justification commerciale légitime, les plaignants doivent alors pouvoir produire la preuve du caractère intentionnel de cette stratégie pour réfuter cette démonstration. Voir section 2.2.4.
35. Voir *Barry Wright Corp. contre ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.) (qui indique que les entreprises soumises à un test évaluant l'intentionnalité de leur pratique peuvent rechigner à exposer les motivations et les conséquences de leurs actes et donc gêner le bon déroulement du test).
36. William Baumol, « Predation and the Logic of the Average Variable Cost Test, » 39 *Journal of Law and Economics* 49 (1996), p. 54.
37. Un exemple récent de justifications commerciales légitimes liées au lancement de nouveaux produits (techniquement en l'occurrence, le lancement d'un nouveau service) a été exposé le 29 avril 2004 dans un communiqué de presse de l'Office of Fair Trading (OFT) britannique. Un autocariste assurant une nouvelle desserte géographique a été accusé de pratiquer des prix d'éviction. Même si les prix de l'entreprise « étaient suffisamment faibles par rapport à ses coûts pour donner à penser qu'il pouvait peut-être s'agir de prix d'éviction », l'OFT a conclu qu'elle ne contrevenait pas au droit de la concurrence car une preuve irréfutable avait permis d'établir que l'entreprise cherchait juste à se constituer « une assise commerciale plus sûre » dans la nouvelle zone desservie et qu'elle n'avait pas l'intention de contraindre un concurrent à cesser son activité et ne pensait pas être en mesure de le faire. L'OFT a donc conclu que la pratique en question relevait de la concurrence loyale et que les clients bénéficieraient d'une période de réduction de prix, ne s'accompagnant pas d'un affaiblissement de la concurrence. Voir « First Edinburgh Buses Not Predatory, » [www.offt.gov.uk/News/Press+releases/2004/75-04.htm](http://www.offt.gov.uk/News/Press+releases/2004/75-04.htm).
38. Un marché à effets de réseau est un marché sur lequel la valeur du bien ou du service pour un client potentiel dépend du nombre de clients utilisant déjà ce bien ou ce service. L'une des caractéristiques d'un effet de réseau est que l'achat du bien par une personne bénéficie aux autres personnes possédant déjà ce bien – l'exemple courant est l'achat d'un téléphone. Par cet achat, chaque client accroît l'utilité des autres téléphones.
39. Kenneth Elzinga et David Mills, « Predatory Pricing and Strategic Theory, » 89 *Georgetown Law Journal* 2475, 2485 (2001).
40. Pour avoir un aperçu et une explication de la théorie et des publications des chercheurs, voir Adriaan ten Kate et Gunnar Niels, « Below Cost Pricing in the Presence of Network Externalities, » éd. Einar Hope, *The Pros and Cons of Low Prices*, Konkurrensverket/Swedish Competition Authority (2003), disponible sur le site Internet [www.kkv.se/bestall/pdf/rap\\_pros\\_and\\_cons\\_low\\_prices.pdf](http://www.kkv.se/bestall/pdf/rap_pros_and_cons_low_prices.pdf), 97-129 ; voir aussi Joseph Farrell et Michael Katz, « Competition or Predation? Schumpeterian Rivalry in Network Markets, » Université de Californie, Berkeley, Département des sciences économiques. Document de travail E01-306 (2001), disponible sur le site Internet : <http://repositories.cdlib.org/iber/econ/E01-306/>.
41. *États-Unis contre Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). Il est intéressant de noter que Microsoft a pu récupérer ses pertes en préservant la situation de monopole d'un autre de ses produits et non en relevant le prix de son moteur de recherche. Microsoft savait que si elle ne faisait rien pour entamer la popularité du moteur de recherche de Netscape, Netscape aurait pu mettre en péril la position de monopole du système d'exploitation de Microsoft.
42. Adriaan ten Kate et Gunnar Niels, « Below Cost Pricing in the Presence of Network Externalities, » éd. Einar Hope, *The Pros and Cons of Low Prices*, Konkurrensverket/Swedish Competition Authority (2003),

- disponible sur le site Internet [www.kkv.se/bestall/pdf/rap\\_pros\\_and\\_cons\\_low\\_prices.pdf](http://www.kkv.se/bestall/pdf/rap_pros_and_cons_low_prices.pdf), 97, 99-100, 111-116.
43. *Id.* pp. 111-112.
44. *Id.* pp. 111-119 ; voir aussi Derek Ridyard, « Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis, » 23 European Competition Law Review 286, 299, note 47 (2002).
45. Geoff Edwards, « The Perennial Problem of Predatory Pricing, » 30 Australian Business Law Review 170 (2002), 184. Pour une analyse plus précise de la difficulté de faire une différence entre les prix d'éviction d'une part et les prix de complémentarité et les prix d'appel d'autre part pratiqués par les entreprises commercialisant plusieurs produits, voir Andrew Eckert et Douglas S. West, « Testing for Predation by a Multiproduct Retailer, », édition Einar Hope, The Pros and Cons of Low Prices, Konkurrensverket/Swedish Competition Authority (2003), pp. 39-69, disponible sur le site Internet [www.kkv.se/bestall/pdf/rap\\_pros\\_and\\_cons\\_low\\_prices.pdf](http://www.kkv.se/bestall/pdf/rap_pros_and_cons_low_prices.pdf), 50-55.
46. 15 U.S.C., alinéa 13(b).
47. *ILC Peripherals contre IBM*, 458 F. Supp. 423, 433 (N.D. Cal. 1978), *affirmed*, *Memorex contre IBM*, 636 F.2d 1188 (9e Cir. 1980) ; voir aussi *Richter Concrete contre Hilltop Concrete*, 691 F.2d 818, 826 (6e Cir. 1982) (« une entreprise réduisant ses prix pour s'aligner sur ceux, déjà inférieurs, de ses concurrents n'est pas une pratique anticoncurrentielle »).
48. *États-Unis contre AMR Corp.*, 335 F.3d 1109, 1121 n.15 (10e Cir. 2003).
49. *Compagnie maritime belge transports contre Commission des Communautés européennes*, conclusions de l'avocat général, paragraphe 342, C-395-96O & C-396/96P [1998].
50. *Napp Pharmaceutical Holdings Ltd contre The Director of Fair Tradin*, affaire 1001/1/1/01, §§ 342-343 [15 janvier 2002].
51. 83 C.P.R. (3e) 51, [1998] J.O. n° 4007 (Q.L.).
52. Voir la section 3.3 consacrée aux conclusions de l'affaire *Germania*.
53. *AKZO Chemie BV contre Commission*, cas n° C-62/86 [1991] ECR I-3359 ; [1993] 5 C.M.L.R. 215, CJE.
54. *Tetra Pak International contre Commission (Tetra Pak II)*, C-333/948 [1996] ECR I-5951, § 41 (« les prix inférieurs à la moyenne des coûts variables doivent toujours être considérés comme abusifs »).
55. Opinion de l'avocat général Fennelly, *Compagnie maritime belge transports contre Commission*, C-395-96O & C-396/96P [1998], § 127 ; voir aussi *Aberdeen Journals v Office of Fair Trading*, [2003] CAT 11, § 357 (« despite the apparently peremptory wording of . . . AKZO . . . and Tetra Pak II . . ., we do not exclude the possibility that, exceptionally, a dominant firm may be able to rebut the presumption of abuse » [en dépit de la formulation en apparence péremptoire de ... AKZO... et Tetra Pak II..., nous n'excluons pas la possibilité qu'exceptionnellement, une entreprise dominante puisse être en mesure de réfuter la présomption d'abus]).
56. Commission européenne, « Communication de la Commission relative à l'application des règles de concurrence aux accords d'accès dans le secteur des télécommunications », [1998] J.O. 98/C 265/02, §§ 110-116, disponible en anglais sur le site Internet <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/ojc265-98en.html/>.

57. Cette mesure a été adoptée dans le cadre de l'affaire *Deutsche Post AG*, pour laquelle la Commission a conclu que Deutsche Post avait enfreint l'article 82 en facturant des services de transport de colis à des prix inférieurs aux coûts. 2001/354/CE, 5 mai 2001, J.O. L125/27. Comme l'affaire *Deutsche Post* constitue un cas d'octroi de rabais pour fidéliser le client et que ce sujet a été couvert lors d'une table ronde précédente, il n'est pas traité ici. Voir OCDE, « Roundtable on Loyalty and Fidelity Discounts and Rebates », DAF/COMP(2002)21 [en anglais uniquement].
58. *Tetra Pak II*, C-333/94 P [1996] ECR I-5951, § 44.
59. *Compagnie maritime belge transports contre Commission*, Opinion de l'avocat général, §§ 111-139, C-395-96O & C-396/96P [1998].
60. Einer Elhauge, « Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory », 112 Yale Law Journal 681 (2003).
61. Discours tenu par Philip Lowe, Thirtieth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, 23 octobre 2003, pp. 6-7.
62. *Id.* page 6 ; *Wanadoo*, COMP/38.233 (16 juillet 2003), a fait appel auprès du Tribunal européen de Première instance, T-340/03 (en cours).
63. Décision du 1er février 2000, affaire 2000:2, *Statens Järnvägar v Konkurrensverket and BK Tåg AB*. Voir aussi T. Petterson and S.P. Lindeborg, « Comments on a Swedish Case on Predatory Pricing – Particularly on Recoupment, » 3 E.C.L.R. 75 (2001).
64. Décision 04-D-17, 11 mai 2004, §§ 68, 71.
65. Voir, par exemple, E.P. Mastromanolis, « Predatory Pricing Strategies in the European Union : A Case for Legal Reform » 4 European Competition Law Review 211 (1998) ; Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (2000).
66. Affaire n° CA98/14/2002, *Predation by Aberdeen Journals Limited* (16 septembre 2002) (Décision du Director General of Fair Trading) (ci-après, « *Aberdeen Journals* »), conclue par le Competition Appeal Tribunal (23 juin 2003) (voir le communiqué de presse de l'Office of Fair Trading, 23 juin 2003, « OFT Competition Ruling Upheld » disponible sur le site internet [www.offt.gov.uk/news/press+releases/2003/pn+84-03.htm](http://www.offt.gov.uk/news/press+releases/2003/pn+84-03.htm)).
67. *Aberdeen Journals*, §§ 145-149.
68. *Aberdeen Journals*, tableau au § 181 (entrée intitulée « Review of Aberdeen Independent by Mr. Ezzat »).
69. Allocution de John Vickers, Président de l'Office of Fair Trading, « Abuse of Market Power », 31st Conference of the European Association for Research in Industrial Economics, Berlin (3 septembre 2004), p. 10, disponible sur le site Internet [www.offt.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf](http://www.offt.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf).
70. *Id.* page 23.
71. Conseil privé, Appel n°6 de 2004, 14 juillet 2004, [2004] UKPC 37.
72. *Carter Holt Harvey*, §§ 11-20, 42-43.
73. Au moment où les événements de l'affaire *Carter Holt Harvey* ont eu lieu, l'article 36(1) prévoyait que « aucune personne occupant une position dominante sur un marché n'utilisera de cette position en vue a) de limiter l'entrée d'une quelconque personne sur ce marché ou sur un quelconque autre marché ; ou

b) d'empêcher ou de dissuader une quelconque personne de se livrer à une conduite concurrentielle sur ce marché ou sur un quelconque autre marché ; ou c) d'éliminer une quelconque personne de ce marché ou d'un quelconque autre marché. » L'article 36 a été amendé depuis, en vue de son harmonisation avec la loi australienne, pour interdire de tirer avantage d'une position de puissance sur le marché.

74. *Carter Holt Harvey*, §§ 53, 60.

75. *Id.*, § 21.

76. *Id.*, § 68. Il s'agit d'une conclusion intéressante. D'habitude, lorsqu'une entreprise peut être considérée comme « vulnérable », lorsqu'une entrée sur le marché à des coûts inférieurs s'est déjà produite et que le tribunal a conclu que, même si le nouvel arrivant était éliminé, un autre entrant aurait probablement fait son apparition en peu de temps pour le remplacer, on s'attend à ce que cette entreprise ne soit pas considérée comme étant en position dominante.

77. *Id.*

78. *Id.*, §§ 16-20.

79. *Voir* note 25 plus haut.

80. *Boral*, jugement rendu par Justice McHugh.

81. *Id.* (« l'article 46 est mal conçu pour traiter des plaintes de pratiques de prix d'éviction dans ces conditions. »)

82. 509 U.S. 209, 222, 224 (1993).

83. 509 U.S. page 223.

84. *Id.*

85. *Id.*

86. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

87. *Brooke Group*, 509 U.S. page 224 (souligné dans l'original).

88. *Voir D&S Redi-Mix contre Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982).

89. *Voir United States contre AMR Corp.*, 335 F.3d 1109, 1114 (10th Cir. 2003) (citation de Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, « Predatory Pricing: Strategic Theory and Legal Policy, » 88 *Georgetown Law Journal* 2239 (2000)).

90. Derek Ridyard, « Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis, » 23 *European Competition Law Review* 286, 295 (2002).

91. *Voir* G. Niels & A. ten Kate, « Predatory Pricing Standards: Is There a Growing International Consensus? » 45 *Antitrust Bulletin* 787 (2000).

92. Loi contre les restrictions de la concurrence, article 20(IV)(2).

93. Art. L. 442-2-442-4.

94. Irish Competition Authority, « Response to the Competition and Merger Review Group Report on the 1987 Groceries Order, » Discussion Paper n° 10 (2000), disponible sur le site Internet [www.tca.ie/discpap.html/](http://www.tca.ie/discpap.html/). La même position est adoptée dans Patrick Walsh & Ciara Whelan, « A Rationale for Repealing the 1987 Groceries Order, » 30 Economic and Social Review 71 (1999).
95. Dans une de ces affaires, *Australian Competition and Consumer Commission contre Qantas*, on accusait Qantas d'avoir abusé de sa puissance sur le marché sur une certaine destination après l'arrivée de Virgin Blue Airlines. Ce cas n'a pas été examiné car l'ACCC a mis fin à sa mesure d'exécution après avoir établi que, pendant la période écoulée depuis l'application de la mesure, le marché des compagnies aériennes avait changé et que la concurrence s'était renforcée. Voir le Communiqué de presse de l'ACCC, « Qantas Airlines Matter Discontinued, » 21 novembre 2003, disponible sur le site Internet [www.accc.gov.au/content/index.phtml/itemId/402657/fromItemId/378016/](http://www.accc.gov.au/content/index.phtml/itemId/402657/fromItemId/378016/)
96. 335 F.3d 1109 (10e Cir. 2003).
97. *États-Unis contre AMR Corp.*, 140 F. Supp.2d 1141, 1152-53 (D. Kan. 2001).
98. *AMR*, 335 F.3d, page 1112.
99. Voir Brief for Appellant United States of America, 11 janvier 2002, disponible sur le site Internet <http://www.usdoj.gov/atr/cases/f9800/9814.htm>
100. *AMR Corp.*, 140 F. Supp.2d page 1199, 1202.
101. *AMR Corp.*, 335 F.3d page 1115. Pour le point de vue d'un économiste sur la nécessité d'appliquer la même analyse à la pratique de prix d'éviction et à l'expansion des capacités à des fins d'éviction, voir Aaron Edlin & Joseph Farrell, « The American Airlines Case: A Chance to Clarify Predation Policy, » in John Kwoka et Lawrence White, eds., *The Antitrust Revolution* (2002), disponible sur le site Internet [http://works.bepress.com/aaron\\_edlin/26/](http://works.bepress.com/aaron_edlin/26/), 21-22.
102. Voir Greg Werden, « The American Airlines Decision: Not with a Bang but a Whimper » (septembre 2003), U.S. Department of Justice Antitrust Division Working Paper n° EAG 03-8, disponible sur le site Internet <http://ssrn.com/abstract=446262>, 8.
103. *AMR Corp.*, 335 F.3d page 1119-20.
104. *AMR Corp.*, 335 F.3d page 1021 n.15.
105. Règlement sur les agissements anticoncurrentiels des exploitants de service intérieur (le « Règlement relatif aux compagnies aériennes »), §§ 1(a) et (b); voir *Commissaire de la concurrence contre Air Canada* (2003), 26 C.P.R. (4th) 476, [2003] C.C.T.D. No. 9 (Tribunal de la concurrence), § 21.
106. L'article 79 porte sur l'abus de position dominante.
107. Comme certains aspects de cette affaire sont encore en instance de jugement, la discussion ici se limitera à un résumé neutre de la décision du Tribunal.
108. *Air Canada*, §§ 155-165
109. *Air Canada*, § 76.
110. Il convient de noter qu'il ne s'agit pas d'une question de maximisation des bénéfices. C'est une simple question de savoir si, en annulant un vol, le contrevenant présumé pourrait avoir transféré les ressources

libérées par cette annulation vers une activité qui rapporte un *quelconque* montant positif ou bénéfice (sans nécessairement rapporter le maximum de bénéfices possible).

111. Cette approche est soutenue par Aaron. Edlin & Joseph Farrell, « The American Airlines Case: A Chance to Clarify Predation Policy, » in John Kwoka et Lawrence White, eds., *The Antitrust Revolution* (2002), disponible sur le site Internet [http://works.bepress.com/aaron\\_edlin/26/](http://works.bepress.com/aaron_edlin/26/), p. 9 n.10, et par William Morrison, « Dimensions of Predatory Pricing in Air Travel Markets, » 10 *Journal of Air Transport Management* 87, 91 (2004).
112. *Air Canada*, § 35.
113. *Air Canada*, § 337.
114. Les contributions supplémentaires ont été prises en compte par les deux parties dans l'affaire *AMR*.
115. Le fait qu'Air Canada n'ait pas passé avec succès le test du coût évitable moyen n'a cependant pas encore abouti à la conclusion qu'Air Canada avait abusé d'une position dominante. Pour cela, il faudrait que d'autres éléments, dont la position dominante et l'application de mesures anticoncurrentielles, soient établis durant la séance de la Phase 2.
116. Office fédéral des ententes, décision du 18 février 2002, affaire B-9-144/01 ; Communiqué de presse de l'OFE, « Higher Regional Court Düsseldorf Provisionally Confirms the Prohibition of Lufthansa's Abusive Pricing Strategy, » 10 avril 2002, disponible sur le site Internet [www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002\\_04\\_10.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002_04_10.shtml).
117. Lorsque l'Office fédéral des ententes a annoncé sa décision, plusieurs autres compagnies aériennes à faibles coûts ont fait leur entrée sur le marché pour un certain nombre de vols intérieurs en Allemagne, ce qui a provoqué une baisse des tarifs. Cela a conduit Lufthansa à mettre en place un nouveau système tarifaire pour *tous* ses vols intérieurs, et pas seulement pour les vols où elle n'occupe pas une position dominante. Cette évolution donne à penser que la réduction de tarifs de Lufthansa sur la destination en question de Germania peut s'expliquer par une concurrence légitime, et non par une stratégie d'éviction. L'Office fédéral semble être parvenu à la même conclusion car, en septembre 2003, il a renoncé à sa décision et a réglé la question avec Lufthansa, alors qu'une partie de l'affaire était encore en instance de jugement devant la Cour d'appel de Düsseldorf. *Voir* Ulrich Quack & Rüdiger Schütt, « Lufthansa/Germania: German Federal Cartel Office Takes Tough Approach, » ABA Section of Antitrust Law Spring Meeting Course Materials, 31 mars 2004, p. 962.
118. Selon Morrison, cette approche risque d'être imprécise, arbitraire et difficile à administrer. William Morrison, « Dimensions of Predatory Pricing in Air Travel Markets, » 10 *Journal of Air Transport Management* 87, 92 (2004) (« using a demand-based valuation of the [incumbent's] additional services requires that the competition authority is able to uncover the distribution of consumer preferences over the particular bundle of services offered . . . Serious errors in this calculation could occur[.] » [le recours à une valorisation fondée sur la demande de services complémentaires [de la société établie] suppose que l'autorité de la concurrence soit en mesure de découvrir la répartition des préférences du consommateur en fonction d'un ensemble de services spécifique proposé... De graves erreurs peuvent survenir lors de ce calcul]).
119. *Spirit Airlines, Inc. c. Northwest Airlines, Inc.*, n° 00-71535 (31 mars 2003, E.D. Mich.).
120. *Voir, par exemple*, Steven Salop & David Scheffman, « Raising Rivals' Costs, » 73 *American Economic Review* 267 (1983).
121. David Scheffman & Richard Higgins, « 20 Years of Raising Rivals' Costs: History, Assessment, and Future, » *George Mason Law Review* (à paraître), disponible sur le site Internet [www.ftc.gov/be/RRCGMU.pdf](http://www.ftc.gov/be/RRCGMU.pdf) p. 7.

122. Bureau de la concurrence, « Lignes directrices pour l'application de la loi : l'application des dispositions sur l'abus de position dominante », section 4, juillet 2001, disponible sur le site Internet <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02215e.html/>.
123. Frank Easterbrook, « When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct? » 2003 *Columbia Business Law Review*, 345-358 (2003).
124. Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, « Predatory Pricing: Strategic Theory and Legal Policy, » 88 *Georgetown Law Journal* 2239 (2000).
125. *Voir, par exemple*, Joseph Farrell & Garth Saloner, « Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation, » 76 *American Economic Review* 940 (1986).
126. *Par exemple*, Plaintiff's Complaint in *United States c. IBM*, n° 69-200 (S.D.N.Y, enregistré le 12 janvier 1969), §§ 20-21.
127. *Berkey Photo, Inc. c. Eastman Kodak Corp.*, 603 F.2d 263 (2d Cir. 1979) ; *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 436 (N.D. Cal. 1978).
128. Janusz Ordover & Robert Willig, « An Economic Definition of Predation: Pricing and Product Innovation, » 91 *Yale Law Journal* 8, 53 (1981).

## CANADA

### 1. Canada and its Approach Towards Predatory Pricing

The concept of predatory pricing is best illustrated by a dominant firm in a market setting its prices so low, over a long enough period of time, that it may eliminate one or more of its competitors and/or deter rivals and new entrants from competing aggressively in the market. Following this, the predator then has the ability to raise prices significantly in an attempt, in the now less-competitive market it had created, to recover the costs incurred (*i.e.*, losses or forgone profits) during the period of predation.

The *Competition Act*<sup>1</sup> contains both criminal (subsection 50(1)(c)<sup>2</sup>) and non-criminal (or “civil”) abuse of dominance (sections 78 and 79) provisions which deal with anti-competitive low pricing. Given this dual regime, the Commissioner of Competition (“Commissioner”) will adopt an enforcement approach that is appropriate to the particular facts of each case. Where predatory pricing behaviour is used in conjunction with other types of anti-competitive acts, or where a more effective remedy can be obtained from the Competition Tribunal to correct the anti-competitive effects of the practices at issue in a particular case, the Commissioner will generally choose to proceed civilly rather than under the higher criminal burden of proof standard.<sup>3</sup> There is a third tranche in Canada’s competition laws to address sector specific allegations of predatory conduct in domestic airline services. Parliament added two airline-specific clauses to the abuse of dominance provisions of Section 79 of the *Competition Act* in 2000. The Air Canada case, particularly the concept of avoidable costs, is addressed in Part IV of this paper.

### 2. Criminal Predatory Pricing

Under subsection 50(1)(c), it is a criminal offence for a person or business to engage in predatory pricing subject to a penalty of a term of imprisonment of up to two years upon conviction<sup>4</sup>. The statute sets out a number of elements which must be satisfied for an offence to have been committed. The alleged predator must be shown to be engaged in a policy of:

- selling products at unreasonably low prices; and
- having the effect, tendency or design of substantially lessening competition or eliminating a competitor.

From an enforcement standpoint, all elements must be met and no case can proceed without each element being satisfied. However, the threshold issue in a predatory pricing complaint is whether the pricing policy of the alleged predator is likely to have an anti-competitive effect or tendency or is designed to have that effect.

In 1992, the Competition Bureau (“Bureau”) released its Predatory Pricing Enforcement Guidelines.<sup>5</sup> The Guidelines set out a two-stage analysis of predatory pricing complaints. In the first stage, the Bureau examines a number of market power indicators. Only if the Bureau is satisfied that the alleged predator is likely to have market power would it move on to the second stage of the analysis of examining the relationship between price and costs. The underlying analytic approach to the Guidelines is to distinguish predatory pricing from otherwise vigorous and desirable price competition.

## **2.1 Market Power Criteria (First Stage)**

The Bureau evaluates possible predatory pricing cases through a two stage process. In the first stage, the Bureau analyzes the predator's market power. As indicated above, by its very nature, price predation presumes that the alleged predator possesses sufficient market power to unilaterally impose price levels on the market long enough to harm its rivals financially, and then recoup losses incurred in that process.

To start, the market itself needs to be defined. This is done both with respect to the product(s) and to the geographical area(s) being contested (i.e. relevant market) and involves identifying all actual and potential sources of competition that may constrain the exercise of market power by the alleged predator. During this preliminary stage of an examination, the Bureau generally uses the market share of the alleged predator as an initial indicator of market power. It is unlikely that an alleged predator with a market share of less than 35 percent would have the ability to unilaterally affect industry pricing.

In the context of a predatory pricing complaint, it is necessary to determine whether or not the alleged predator appears to have the power to recoup its initial losses by raising prices to above-normal levels once its target/rival has been substantially weakened or driven from the market. This determination depends, to a considerable extent, on an assessment of the conditions surrounding effective entry to the industry, including potential for re-entry by any rivals forced out by the alleged predatory pricing behaviour, or expansion by existing firms.<sup>6</sup> Essentially, in this phase of the examination, the Bureau tries to determine whether or not attempted recoupment by the alleged predator, through price increases following the exit of a rival or rivals, would, within two years, invite entry into the industry on a sufficient scale to ensure that price increases could not be sustained.

If a number of factors combine to suggest that entry to the industry would be less likely or more difficult, this would strengthen the Bureau's concern that the pricing behaviour of the alleged predator could have the potential to cause harmful long-term anti-competitive effects in the market. Of course, whether or not the Bureau should consider the matter further will depend on the second stage analysis which determines if the alleged predator's prices reflect inherent cost advantages or are below its costs.

## **2.2 Price-Cost Relationship and Possible Business Justifications for the Below Cost Pricing Policy (Second Stage)**

If the Bureau concludes that an alleged predator likely has market power, the Commissioner then in the second stage addresses the question of whether the alleged predators' prices are "unreasonable" starting with an examination of the extent to which prices are below the cost of supplying the product. To do this, the Bureau determines whether the firm charging the price was able to cover its costs of supplying the product(s) in question. The rationale for this cost-based test is that it is reasonable to expect that a business will operate with a view of covering its costs, unless it has other legitimate business justifications to do so. When conducting this test, the Predatory Pricing Enforcement Guidelines recognizes that average variable and average total cost are the appropriate standards for determining predation in criminal cases.

Average variable cost includes all costs that vary with the levels of output. Economic theory indicates that when prices for a durable product fall below average variable cost, a profit maximizing firm would be better off ceasing production as each marginal unit of production sold increases losses and does not make any contribution to covering fixed costs. Consequently, the Predatory Pricing Enforcement Guidelines state that prices below average variable costs are *prima facie* unreasonable.

Average total cost is the sum of average variable cost and average fixed costs (i.e. costs associated with investment in real plant and machinery, and any other fixed assets which do not vary with output produced). Hence the Guidelines refer to prices below average total costs but above average variable costs

as prices in the “grey range”. The reasonableness of a price set between average total cost and average variable cost will depend on the surrounding circumstances. For instance, a price in the ‘grey range’ may be reasonable in situations of declining demand or substantial excess capacity and unreasonable if the evidence supports proof that the alleged predator was ignoring opportunity to raise prices in the face of increased demand, or was using pricing intentionally for anti-competitive purpose.

The price-cost analysis for alleged predatory pricing will depend on the availability of price and cost data, the time period of the alleged predation, the need to take account of random variations or fluctuations in demand, and the standard amount of time taken by a firm’s management to assess business performance and implement any required change.

Selling at prices that are above cost can never be unreasonable and does not offend the predatory pricing provisions of the *Competition Act* (*R. v Hoffman La-Roche Ltd*).<sup>7</sup> Below cost pricing is also not *per se* illegal in Canada. In the *Consumers Glass* case<sup>8</sup>, the court articulated the concept of a reasonable business justification for below cost pricing to address situations such as selling off perishable inventory or dealing with chronic excess capacity. While in *Boehringer Ingelheim Canada Inc. v. Bristol-Myers Squibb Canada Inc. et al.*<sup>9</sup>, the court held that selling below cost to meet a competitor’s price was not unreasonable.

Subsection 50(1)(c) requires a “policy” of selling at below cost prices. Determination of whether a company has engaged in a “policy” is fact-specific. To constitute such a policy, it must be shown to be intentional and non-transitory in nature. Thus, a particular price or prices applied for a brief period are unlikely to be considered to constitute a “policy”<sup>10</sup>.

In addition to the finding of unreasonably low prices and a policy of selling, the policy must have at least one of the following effects or designs: the effect or tendency of substantially lessening competition; the effect or tendency of eliminating a competitor; be designed to substantially lessen competition; or be designed to eliminate a competitor. The meaning of “substantially lessening competition” is established in case law. In essence, the question to be decided is whether unreasonably low pricing policy engaged by an alleged predator preserves or adds to its market power.

### **3. Predatory Pricing in the Context of Abuse of Dominant Position**

The Bureau may also address predatory pricing under sections 78 and 79, the abuse of dominance provisions of the *Competition Act*. This is a civil provision that seeks to address abusive behaviour by a dominant firm, or a collectively dominant group of firms, in a market that engage in a practice of anti-competitive acts which are likely to prevent or lessen competition substantially. Section 79 authorizes the Commissioner to apply to the Competition Tribunal, a specialized body composed of judges and lay members, for remedies that are reasonable and necessary to overcome the anti-competitive effects of activity which meets the elements of section 79.<sup>11</sup> The application of section 79 to predatory pricing is addressed more specifically in section 4.3 of the Bureau’s *Enforcement Guidelines on the Abuse of Dominance Provisions*.<sup>12</sup>

The Bureau has incorporated, and the Competition Tribunal has considered, allegations of predatory conduct in two abuse cases: *NutraSweet* and *Teledirect*.

In *NutraSweet*<sup>13</sup>, the Competition Tribunal dismissed the Commissioner’s allegation that the NutraSweet Company was selling at prices below “acquisition cost” which is identified as an anti-competitive act in paragraph 78(i). The Tribunal held that the Commissioner did not present a consistent or coherent case as to the proper measurement of cost, and then went on to endorse pricing below average variable cost, as an appropriate standard for determining predation.

The other case where the Competition Tribunal addressed predatory conduct was *Teledirect* where the Tribunal rejected the argument that *Teledirect*'s responses to entry initiatives were predatory. In the judgement, the Tribunal expressed concerns about drawing proper distinctions between pro and anti-competitive pricing behaviour and expressed concerns about the law being used to discourage aggressive competition. In both cases, the Tribunal concluded that evidence of probable recoupment is an essential element to support an allegation of predation.<sup>14</sup>

#### **4. Air Canada Case - Avoidable Cost Test**

##### **4.1 Overview of Airlines Industry and Legislation in Canada**

In 1999, the Competition Bureau was notified of Air Canada's proposed acquisition of Canadian Airlines (Canada's largest and second largest airlines respectively). At the time of the proposed merger, the combined Air Canada-Canadian Airlines share of domestic passengers was 80 percent, with earned domestic passengers revenues of nearly 90 percent.<sup>15</sup> The merger was allowed because Canadian Airlines was determined to be a failing firm and on the strength of undertakings which Air Canada entered into to mitigate the anti-competitive effects of the merger. The list of undertakings included: surrendering certain slots, gates, loading bridges and counters; delaying launching an Eastern discount carrier; offering Canadian Regional Airlines for sale; allowing other Canadian carriers to participate in its Aeroplan program; basing its domestic travel agent commission overrides on volume rather than market share; and entering into interline and joint fare agreements with other Canadian air carriers.<sup>16</sup>

To address the resulting market concentration in the domestic airlines sector, Parliament added two airline-specific clauses to the abuse of dominance provisions of Section 78 of the *Competition Act* in 2000. Subsection 78(2)(a) of the *Competition Act* authorises the Governor in Council to establish airline-specific conduct regulations. Subsection 78(1)(k) of the *Competition Act* proscribed a specific "anti-competitive" act: denial, by a person operating a domestic service, of access on reasonable commercial terms to essential facilities or services, or refusal to supply them.<sup>17</sup> The "essential" facilities or services, as defined in subsection 55(1) of the *Transportation Act*, are further described in *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service, SOR/2000-324* ss. 2(1) and (2) ("*Airline Regulations*"). Subsection 2(2) of the *Airline Regulations* defines essential facilities and services to include take-off and landing slots, interline arrangements, loading bridges, airport gates and related facilities, maintenance services, and baggage handling.

The Airline Regulations describe categories of anti-competitive acts, including operating or increasing capacity on a route at fares that do not cover the avoidable cost of providing the service or using an affiliated carrier, in a similar manner (*Airline Regulations* s.1 (a), (b), and (c)). Other categories of anti-competitive acts include pre-empting slots or facilities to withhold them from the market, and using commissions, incentives, loyalty programs, or scheduling or infrastructure changes to discipline or eliminate a competitor or to prevent entry (*Airline Regulations*, sec.1 (d) to (h)).<sup>18</sup>

##### **4.2 Judicial History**

On March 5, 2001, the Commissioner filed a notice of application pursuant to section 79 of the *Competition Act* and the Airline Regulations, alleging abuse of dominant position by Air Canada. The application stated, *inter alia*, that, between the period of April 1, 2000 and March 5, 2001, Air Canada responded to the entry of two low-priced carriers (WestJet Airlines Ltd. ("WestJet") and CanJet Airlines ("CanJet")) on seven central and Atlantic Canada routes by increasing its capacity and/or decreasing its fares, in a manner that did not cover the avoidable cost of operating the flights on such affected routes, in violation of paragraphs 1(a) and 1(b) of the *Airline Regulations*.

At the request of both the Commissioner and Air Canada, the Competition Tribunal divided the proceeding into two phases. The first phase would involve the Tribunal consideration of specific questions related to the application of the avoidable cost test, namely:

- a) What is the appropriate unit or units of capacity to examine?;
- b) What categories of costs are avoidable and when do they become avoidable?;
- c) What is the appropriate time period or periods to examine?; and
- d) What, if any, recognition should be given to “beyond contribution”<sup>19</sup>?

Following determination of these questions the Tribunal would proceed with examination of two sample routes that the Commissioner and Air Canada had submitted for review in applying the avoidable cost test. The second phase would address the larger issue of whether Air Canada had violated the abuse of dominance provision of the *Competition Act*.<sup>20</sup>

#### **4.3 Positions of the Parties on Avoidable Cost Test**

The Commissioner’s position on the specific questions related to the application of the avoidable cost test was as follows: (a) the appropriate unit of capacity is the schedule flight; (b) all of Air Canada’s costs, with the exception of those properly characterized as overhead, are avoidable within a period of approximately three months; (c) three months is the appropriate time period to apply in assessing whether Air Canada has engaged in anti-competitive act; and (d) so called “beyond contribution” should not be included in the calculation to determine whether Air Canada has operated flights on a route below avoidable costs. The Commissioner accepted that in the appropriate case, network benefits could constitute a legitimate business justification for operating a flight below avoidable costs.

Air Canada’s position as to the Phase I questions was the following: (a) the appropriate unit of capacity is a route and it is only when problems or issues arise on the route level that specific flights may be examined; (b) Air Canada’s position with respect to avoidable costs categories would exclude certain variable costs and would treat aircraft costs as entirely unavoidable; (c) Air Canada would have the test apply for the period of alleged predation, with adjustment for seasonality; and (d) Air Canada would include "beyond contribution" by adding it to the route revenue in the avoidable cost calculation.

The Tribunal noted in its decision that the Commissioner and Air Canada introduced expert economic evidence that the avoidable cost test was an appropriate method to use to identify anti-competitive conduct in the airline industry. Hence, even in the absence of the *Airline Regulations*, operating capacity below avoidable cost could be found to constitute an anti-competitive act.

#### **4.4 Competition Tribunal Ruling**

The hearing before the Tribunal commenced in November 2002 and concluded in March 2003. The Tribunal issued its reasons and findings on the Phase I questions on July 22, 2003. With regard to the agreement of the parties on the avoidable cost, the Tribunal defined avoidable costs as all costs that can be avoided by not producing the good or service in question (the avoidable cost of offering a service will consist, in general, of the variable costs and the product-specific fixed costs that are not sunk). The Tribunal applied an hypothetical flight cancellation and identified three possible ways in which the cost of providing services may be avoided:

- outright - the cost would not be incurred if the schedule flight were not provided;
- redeployment - the cost can be redeployed to another use, i.e. passenger recapture; and

- disposal - the cost is avoided through sales of capital assets or cancellation of leases or subleases.

The Tribunal identified a scheduled flight (a numbered departure scheduled at approximately the same time of day on some regular periodic basis) to be the appropriate unit of capacity to examine in applying the avoidable cost test. In its view, the existence of legitimate business consideration for operating a scheduled flight below its avoidable cost was not a consideration under the *Airline Regulations*. The appropriate time period to examine when applying the avoidable cost test was determined to be the three-month period. Referring to the *Airline Regulations*, the Tribunal ruled out a “grace period” provision during which the carrier may operate below avoidable cost while it is collecting and assessing information or otherwise implementing changes.

However, the Tribunal pointed out that the Commissioner has the discretion not to file an application when the Bureau determines that the only reason for fares below avoidable costs is seasonality. The Tribunal accepted that the total actual revenues, rather than individual and cargo fares, is the proper basis for conducting the avoidable cost test. The Tribunal further accepted that there was no proper basis for including “beyond contribution” in applying the avoidable cost test. Nevertheless, in the Tribunal’s view, beyond contribution should be considered a legitimate business reason for operating a scheduled flight below avoidable cost when the issues of recapture and displacement (during Phase II determination of anti-competitive acts).

The Tribunal defined avoidable cost test and concluded that in the period from April 1, 2000 to March 5, 2001 (the date of the application), Air Canada operated or increased capacity on certain routes at fares that did not cover the avoidable cost of providing the service on the two examined sample routes.

The Tribunal noted, however, that even if Air Canada failed the avoidable cost test under Phase I examinations, it did not lead to a conclusion that Air Canada has engaged in an abuse of dominant position under section 79 of the Act, adding that under that provision a practice of anti-competitive acts, among other elements, must be demonstrated. As noted, a determination of whether Air Canada had engaged in an abuse of dominant position within the meaning of the *Competition Act* must await the outcome of a second phase of the hearing, which would examine whether Air Canada was dominant on the routes in question, whether its below cost operations constituted a “practice of anti-competitive acts,” and whether the result was a substantial prevention or lessening of competition.<sup>21</sup> Because Air Canada filed for protection from bankruptcy in April 2003, the Tribunal stayed its Phase I decision and the appeal period associated with it until Air Canada emerges from bankruptcy protection. Phase II is likewise being held in abeyance.<sup>22</sup>

#### **4.5 Recent Clarification of Enforcement Approach in the Airline Industry**

On September 23, 2004, the Commissioner of Competition sent a letter to major Canadian airlines setting out the approach the Bureau will be taking in its future enforcement of the *Competition Act* in the airline sector<sup>23</sup>. The Commissioner indicated that due to developments and information obtained from various industry stakeholders, the Bureau will adopt the following policy in enforcing the predatory pricing and abuse of dominance provisions of the Act:

1. The Bureau has and will continue to act responsibly in enforcing the *Competition Act* in regard to any air carrier including Air Canada;
2. The Commissioner has an obligation to examine any complaint that may be filed. The Bureau is aware that circumstances in the airline industry in Canada, and around the world, have changed since the 2000-2001 time frame and any future complaint will be considered in the context of the circumstances which exist at the time of the complaint.

3. In regard to the Competition Tribunal's "Reasons and Findings" in Phase I, dated July 22, 2003 (the "Phase I Decision"), the Bureau believes that the principles established by the Tribunal regarding application of the avoidable cost test will be relevant for future cases which may arise in similar circumstances.
4. As the Tribunal made very clear in its Phase I decision, the avoidable cost test is only one part of an abuse of dominance analysis under section 79 of the *Competition Act*. In considering enforcement action, the Bureau will assess whether the person complained about has the necessary dominant position, whether in its response to competition it has operated capacity below its avoidable costs, whether such operation is part of a 'practice of anti-competitive acts', and whether the conduct is likely to result in a substantial lessening or prevention of competition. In regard to the question of a practice of anti-competitive acts, the Commissioner has recognized, and the Tribunal has accepted in its Phase I decision, that there could be certain circumstances where there can be legitimate business reasons for operating a flight below avoidable cost.
5. The purpose of the *Airline Regulations* made under the *Competition Act* is to distinguish certain predatory actions from vigorous competition. The purpose of the avoidable cost test set out in the Regulations is to focus on actions taken by a dominant domestic carrier against competitors, not to focus on the carrier's usual seasonal or operational practices. In the Bureau's view, the application of the avoidable cost test is only triggered by a significant response by a dominant carrier to competition or new entry.
6. In general, actions taken by a dominant carrier against competitors which could attract enforcement action include reducing fares to undercut competitors, adding significant capacity, failing to remove capacity in accordance with its seasonal or other usual practices, or substantially increasing the number of tickets offered at fares which match the lowest fares of a competitor.
7. The Commissioner recognizes the benefits of price competition for consumers. As a general principle, where a dominant carrier's response to competition consists only of reducing fares to levels which match, but do not undercut those of a competitor ("fare matching"), the Bureau will not take enforcement action.
8. However, if such fare reductions were accompanied by a significant increase in capacity or a significant increase in the number of seats offered at the lowest price, this "safe harbour" would not apply. In such cases, the Bureau would then consider all of the elements of abuse of dominance as noted in paragraph four.
9. Where a dominant carrier responds to entry or competition by doing something more than fare matching, the Bureau will then consider all of the elements of abuse of dominance, not just the avoidable cost test, in deciding whether to take enforcement action, and in deciding what action to take.

## **5. Conclusion**

The significance of the Tribunal ruling is that it introduced a stricter test of avoidable cost, as opposed to average variable cost, to assess predatory pricing in airline cases. This may also have particular significance for application to industries that are similar to airlines in that they have high fixed and low variable costs.

DAF/COMP(2005)14

## DENMARK

In this submission the Danish Competition Authority (hereafter the Authority) briefly summarises experience from Danish case law on predatory pricing. Danish predation cases are described in detail at the end of the submission.

### 1. Predatory pricing

#### 1.1 *Plausibility*

The Authority is of the opinion that predatory pricing in some cases is a plausible strategy for dominant enterprises. Predatory pricing case law is relatively modest in Denmark (five cases since 2002). In neither of the cases was plausibility explicitly considered neither in the authority's argumentation nor by the enterprise under investigation.

According to Danish jurisprudence, only enterprises that hold a dominant position on the market under investigation or an adjacent market (enabling the enterprise to leverage market power) can engage in predatory pricing. Excess capacity is not considered a prerequisite for predatory pricing as dominant enterprises may resort to predation to maintain market share or high capacity usage. Reputational effects have only been considered in one Danish case. The possible existence of reputational effects makes the possibilities for recoupment difficult to prove and so far, recoupment has not been considered in Danish case law.

#### 1.2 *The Appropriate Measure of Costs*

In two Danish cases prices below average variable costs were considered sufficient proof of predatory pricing. In both cases the appropriate definition of variable and fixed costs was of key importance. As a general rule, all costs that *can be* varied within the duration of a possible abuse were considered variable irrespective of whether there was a direct connection between actual variations in production volume and costs. The philosophy was that if these costs were not covered, the enterprise would have been better off not producing at all. In one of the cases, opportunity costs were considered part of the variable costs as an enterprise has no incentive to incur an opportunity cost by choosing not to use production assets on more profitable activities on other markets when possible. As opportunity costs are difficult to estimate the Authority chose a rather conservative approach setting the estimate deliberately low.

In one case, prices marginally below average total costs were not considered sufficient proof of predatory pricing.

All the Danish cases on predatory pricing have involved industries with high fixed costs and low marginal costs (newspapers, telecommunication, postal services, and harbour towage). The particular cost structure was not a problem in either of the cases, as either rather long timeframes were considered (increasing the proportion of adjustable costs) or opportunity costs were included thereby raising the threshold for acceptable pricing.

### **1.3 Above-Cost prices**

In the view of the Authority, it is very difficult to prove that prices are predatory if prices exceed average total costs, even when coupled with predatory intent.

In a case in the postal sector currently pending at the Authority, the Authority is currently investigating whether prices are above average incremental costs in order to assess whether prices are predatory. Although the Deutsche Post decision presents a specific appropriate cost measure for multi-product operator with a universal service obligation (USO), this Commission decision does not, in the view of the Authority, rule out that one may take the second AKZO-test into account,<sup>24</sup> i.e.  $P < ATC$ . Consequently, the risk of predatory intent would in the view of the Authority be relevant as regards pricing in the interval ( $AIC < P < ATC$ ). However, according to Community case law, in order to deem prices predatory based on an assumption of predatory intent, a competition authority needs to be able to provide tangible proof thereof. Only if such proof exists - for instance as a result of a dawn-raid - the Authority would enter into an in-depth assessment of this question.

### **1.4 Price Histories**

Price histories have only been used to illustrate changes in supplier behaviour and thereby to corroborate suspicions of predatory pricing.

### **1.5 Reasonable Justifications**

Even dominant enterprises are allowed to meet competition by lowering prices. So far, prices below costs have not been considered predatory if the dominant enterprise did not undercut prices offered by other suppliers. This can be difficult to assess for the Authority particularly on less transparent markets.

## **2. Non-Price Predation**

### **2.1 Raising Rival's Costs**

Danish experience is scarce in this field. Only in one case have policies allegedly aimed at raising rivals' costs in conjunction with low end-user prices been brought before the Authority but as the question was covered by other legislation the Authority did not investigate the matter.

### **2.2 Building Excess Capacity**

Considerations of this nature have not been relevant in Danish cases.

### **2.3 Abuse of Informational Asymmetry**

In former monopoly areas such as telecommunications, postal services, and electricity the incumbent would often have an informational advantage over potential entrants due to its greater experience in the sector and the established contacts with suppliers and customers. In the view of the Authority customers often view the incumbent as a more reliable source of information than new suppliers in the market. This situation can be used by the incumbent to create uncertainty and doubt for instance about the quality of the newcomers services in the minds of end-customers. Misleading product/service pre-announcements could in these markets often have the effect that customers would wait for the incumbent's product/service rather than to take a chance with a lesser known entrant's service. There have been no cases on abuse of informational asymmetry in Denmark.

### **3. General Questions**

#### **3.1 Experience**

As experience is limited a clear pattern in predatory behaviour in Danish jurisprudence cannot be determined.

#### **3.2 Statutory efficiency**

So far, the Authority has not encountered cases where statutes were insufficient to address potential predatory pricing.

### **4. Danish case law**

In this section, five Danish cases on predatory pricing or price squeeze are presented. For each case, the issues and questions raised in the Secretariat's invitation to the round table are sought addressed.

#### **4.1 *The MetroXpress/Urban cases (Decisions of 29 May 2002 and 24 September 2003)*<sup>25</sup>**

##### **4.1.1 *Case background***

In September 2001 the international "free newspaper" publishing company, MetroXpress International SA (owned by the Swedish Kinnevik group), launched a free daily newspaper named "MetroXpress" through a subsidiary, Danish company (MetroXpress Denmark A/S). The free paper was distributed in buses, train stations and on the street throughout the greater metropolitan area of Copenhagen, Denmark. Up until then there were no free newspapers available in Denmark with a comparable geographic reach. The paper was financed solely through advertising revenues.

Three weeks later, a major, national newspaper publisher, Berlingske Officin A/S, launched a rival free newspaper dubbed "Urban". Urban was in all aspects (save colour) identical to MetroXpress, and was distributed in similar ways in the same geographic area.

Shortly thereafter, MetroXpress complained to the Authority that Urban was dumping prices on advertising in an effort to force MetroXpress to withdraw from the market. MetroXpress alleged that Urban was employing prices below any measure of cost and that Urban was targeting MetroXpress' existing customers specifically.

In May 2002, the Authority found that Berlingske Officin A/S had been abusing its dominant position in the market for daily (including free) newspapers in the greater metropolitan area by using prices below average variable cost in Urban. Berlingske Officin A/S was ordered to cease this practice. The order lasted for one year.

When the order expired in May 2003, MetroXpress complained again that prices in Urban were set unreasonably low, and the Authority initiated investigations anew. During investigations Berlingske Officin A/S offered to commit to maintaining prices at a level high enough to ensure that those costs, which the Authority deemed to be variable, would be covered. In September 2003, the Authority accordingly found that although there was still a risk of predatory pricing, the remedy suggested by Berlingske Officin A/S sufficiently negated this risk under present market conditions.

#### 4.1.2 *Plausibility*

Berlingske Officin held a strong position in the Danish newspaper market vis-à-vis the newcomer MetroXpress. Not only was Berlingske Officin dominant measured in terms of revenue, but it also held a strong advantage due to its numerous other publications in the market and related markets, its previous long-term involvement, and its considerable vertical integration and cooperation with other Danish newspaper publishers – all of which could also add to give Berlingske Officin a strong reputational advantage.

Of particular importance to evaluating the plausibility of the predation claim was the fact that the launch of Urban and its use of very low advertising prices seemed clearly to be an aggressive countermove undertaken by Berlingske Officin, because MetroXpress cut into the advertising revenues of Berlingske Officin's regular newspapers.

An evaluation of excess capacity was not relevant to these cases

The Authority did not employ a “recoupment” test as part of the investigation. In fact, a “reverse recoupment” test was employed as part of the argument that there was a risk of predation: the Authority argued that since Berlingske Officin had lost millions in the initial launch of Urban, and since it could not argue how it would ever be able to recoup this loss *without* excluding MetroXpress from the market (i.e. under the given market conditions), this served to strengthen the claim of predation.

#### 4.1.3 *The Appropriate Measure of Cost*

In both cases, the advertising price in Urban was compared with the *average variable cost* of producing a unit (one millimetre) of advertising space.

In the second case in particular, there was considerable dissent over which costs were actually variable. The Authority maintained that a cost is variable if within the relevant time horizon the cost varies – or it *can be varied* – when quantities (advertising sales/space) vary. The relevant time horizon was deemed by the Authority to be at least one year, since Urban had been using low prices for at least such a period of time. This entailed that many costs, that could at first glance be thought fixed, were deemed variable, e.g. costs of promotion and distribution.

As a remedy, Berlingske Officin committed to ensuring that prices in Urban were at least high enough to cover average variable costs, as defined by the Authority. The Authority found that this commitment negated the risk of predatory pricing. The Authority did not consider prices above average variable cost, but below average *total* cost, to be a problem in this case.

#### 4.1.4 *Price Histories*

Urban's price history played a role in the first case in particular. Urban was launched shortly after MetroXpress, and it was evident that Urban was using prices markedly lower than both MetroXpress and than those used previously by Berlingske Officin in its other papers in the same market. This strengthened suspicions that Berlingske Officin was trying to drive MetroXpress from the market through low prices in Urban.

#### 4.1.5 *Reasonable Justifications*

The Authority did not find that Urban had any particular reasonable justifications for using below-variable cost pricing. Urban was a newly launched newspaper and it could be argued that low prices were necessary to attract new customers. But the Authority placed weight upon the fact that Urban was an

imitation of a previously launched paper, MetroXpress, and that MetroXpress did not have trouble attracting customers using considerably higher prices.

However, one of the greatest problems the Authority encountered in dealing with these cases was determining the pertinence of the alleged predator's claim that low prices were reasonably justified when used in order to "meet competition". In the first case, the meeting competition defence was not so relevant since Urban was launched as an aggressive countermove to MetroXpress, and since Urban's prices were so clearly lower than MetroXpress'. But in the second case, in which MetroXpress alleged that although Urban's prices were now higher they were still predatory, the meeting competition defence had to be given further consideration. Urban claimed that the fact that its prices were below average variable cost was simply because MetroXpress was using similarly low prices, which Urban was forced to match. But because most price offers to customers were typically given secretly and not in writing, Urban could not prove this.

#### 4.1.6 *Statutory Effectiveness*

Due to the successful intervention of the Authority, MetroXpress was not expelled from the market. This was accomplished without resorting to price regulation. Today the Authority no longer monitors the market closely. Urban and MetroXpress compete on equal terms, and MetroXpress has passed break-even and its business activities seem sustainable.

Investigation initiated by the Authority of possible predatory pricing on the market for harbour towage (Decision of 27 November 2002)<sup>26</sup>

#### Case background

In February 2002 the Authority initiated an investigation of the shipping company A/S Em. Z. Svitzer for predatory pricing on the market for harbour towage in Denmark. The authority's initiative followed persistent rumours that Svitzer had eliminated a smaller competitor by offering rates close to zero. The allegations were one reason why no new operators established themselves on the market even though rates are even very high in some areas of Denmark. It was therefore a key concern that the authority's investigation eventually was made public regardless of the outcome to convince likely entrants that potential problems had been addressed.

Contacts with buyers of harbour services and shipping agents helped the authority identify one harbour (Kalundborg) where predation was likely to have taken place and another where predation allegedly took place at the time of the investigation (Aabenraa).

In and around Kalundborg Harbour two large buyers of harbour towage reside: an oil refinery and a power plant. The entrant (Nordane Shipping) entered a contract with the oil refinery. The oil refinery was to buy harbour towage from Nordane Shipping exclusively in return for significantly lower rates than Svitzer offered according to their price list.

Servicing the oil refinery demanded up to three tugboats with at least one boat equipped with fire fighting equipment. Even though the oil refinery was the largest single buyer of harbour towage in Kalundborg, Nordane Shipping needed additional income to cover the costs of its operations. In order to be able to fulfil the contract with the refinery, Nordane's tugboats needed to stay close to Kalundborg harbour. Nordane's possibilities to achieve revenues from other harbours were therefore limited. Nordane's ability to stay in the market thus depended critically on price levels for towage of the remaining ships (i.e. ships not covered by the contract with the oil refinery) that called at Kalundborg.

Shortly after Nordane started operating at Kalundborg in the summer of 1998 Svitzer started discounting its rates. Initially discounts were limited, but around September 1998 rates fell dramatically. Rates remained very low until around April 1999 when Svitzer agreed to take over Nordane's harbour towage operations.

The Authority's analysis showed that Svitzer had set rates below average variable costs for a significant proportion of the deployments of its tugboats. Only in the cases of ships that required four tugboats to enter the harbour, which Nordane did not have the capacity to serve, did Svitzer not offer significant discounts.

At Aabenraa harbour, rates were well above variable costs. The Authority therefore did not find prices to be predatory.

Svitzer offered to admit to having infringed the Competition Act. The Authority laid down the following rules of conduct for how far Svitzer could lower rates when facing an entrant without infringing the Competition Act:

1. Svitzer's rates shall at all times cover variable costs (as defined below) except if an entrant continuously offers rates below this level. Svitzer is then allowed to match the entrant's rates but shall notify the Authority within given timeframe.
2. Svitzer shall report all rates charged in 2003 to the Authority electronically allowing the authority to monitor the market.

#### Plausibility

Plausibility was not raised as an issue in the evaluation of the case. As Svitzer had offered services at rates below variable costs the Authority deemed that it was up to Svitzer to prove that its actions were not part of a strategy to drive Nordane out of the market.

An evaluation of excess capacity was included in the discussion of how to define variable and fixed costs, cf. the section on the appropriate measure of costs.

#### The appropriate measure of cost

A key issue in the case was how to define variable costs. As the abuse took place over approximately six months the Authority found that this was the appropriate timeframe for the evaluation of variable and fixed costs. Costs for overtime payment, fuel and lubrication oil are directly attributable to delivery of services these were indisputably variable. Moreover, considering the timeframe, costs for ships chartered on short term contracts were also considered variable.

For the first time in Danish jurisprudence, profits foregone by not reallocating production assets to more profitable activities (opportunity costs) were also considered as part of variable costs. The market for harbour towage is particular in the sense that production assets (tugboats) are very mobile. Within a relatively short period of time, tugboats can be allocated to other markets with better profitability. If a dominant supplier chooses not to respond to lower capacity usage by reallocating part of its capacity to more profitable markets, the dominant supplier wilfully forgoes the extra earnings it could have obtained by reallocating the assets. Considering the timeframe, the Authority deemed that Svitzer actually did have a chance to reallocate part of its capacity to other markets. A conservative estimate for the loss incurred by Svitzer from not reallocating capacity to more profitable market was therefore included in the calculation of the average variable costs.

## Price histories

Price history was used to illustrate the changes in Svitzer's market behaviour when the entrant started operating.

## Reasonable justifications

The Authority did not find that Svitzer had any reasonable justifications for using below-variable cost pricing. Svitzer argued that it only had responded to price reductions initiated by Nordane. Considering Svitzer's size as well as its affiliation to one of the world's biggest shipping companies, A.P. Møller, the Authority found it highly unlikely that an entrant should have initiated a war of attrition that it could be certain to lose.

## Statutory effectiveness

Variable costs only constitute a relatively small part of total costs as standby times in Denmark are generally high (i.e. excess capacity is inherently high). This implies that prices can fall considerably and still remain above average variable costs. Entrants may therefore encounter significant losses before the Authority can intervene.

Investigation into possible predatory pricing on the market for DSL services (Decision 29 January 2003)<sup>27</sup>

## Case background

In December 2001 the Authority received a complaint from the two most significant entrants on the Danish market for DSL services alleging that the incumbent, TDC, marketed end-user products at prices below costs. The entrants alleged that TDC's aggressive pricing was forcing them out of the market.

At the end of 2000 market shares on DSL products were distributed evenly between three suppliers. In 2001 prices fell up to 24 %, the number of customers soared from approx. 25,000 to 150,000, and TDC's market share went from 37 % to 73 %.

The Authority initiated an investigation of TDC. Preliminary balance sheets for TDC's DSL business confirmed that TDC so far was losing money on its DSL services. Balance sheets were burdened though by significant customer acquisition and start-up costs that TDC wrote off immediately instead of writing them off evenly over the expected duration of the customer relationship. TDC's accounts therefore underestimated the actual profitability of TDC's DSL business.

The Authority asked TDC to draw up a calculation of expected customer profitability taking into account the current price level and all expected expenses directly attributable to the average customer as well as fully allocated common costs. Network access costs were to be calculated based on the prices TDC charged its competitors for access to its network. Profitability was to be calculated for an expected customer relationship duration of three and five years respectively.

Taking promotional offers into account the Authority found that TDC had marketed DSL services at prices insignificantly below average total costs for altogether 15 weeks (promotional sale) for an average customer relationship duration of five years. For an average customer relationship duration of three years list prices covered cost by a narrow margin. During the 15 weeks of promotional sale net prices were below average total costs but exceeded average variable costs by a comfortable margin. On this background, the Authority found that TDC had not engaged in predatory pricing or margin squeeze.

The Authority's decision was brought before the Competition Appeals Tribunal. The complainants alleged that the Authority's decision was wrong and that the Authority also should have investigated whether TDC's access prices reflected underlying network costs, instead of basing its decision on access prices regulated by the national IT- and Telecom Agency. The Competition Appeals Tribunal upheld the Authority's decision.

#### Plausibility

Plausibility was considered at the beginning of the investigation. The Authority considered it highly likely that TDC would attempt to pre-empt the market when market growth rates were high. But as the investigating lead to an acquittal of TDC plausibility was irrelevant in this case.

#### *The Appropriate Measure of Cost*

In this investigation, network costs were calculated on the basis of TDC's prices for wholesale access products (bit stream access). Bit stream access allows entrants to enter the market without investing in networks at all. In this case, the cost structure for an entrant is therefore no different than in most other sectors. The Authority therefore relied on the AKZO test in this case.

#### Above-Cost Prices

During the appeals case, the complainants claimed that even though TDC's prices might cover TDC's average total costs margins were still insufficient to allow entrants a sufficient return on capital. The claim was rejected by the Competition Appeals Tribunal.

#### Raising rivals' costs

During the investigation, the complainants alleged that TDC used particularly cumbersome procedures when handling entrants' requests for network access and charged entrants fees unjustified by costs. Both issues concern obligations imposed on TDC pursuant to sector specific regulation administered by the National IT- and Telecom Agency. As investigations by the National IT- and Telecom Agency did not reveal foul play the Authority did not investigate these issues further.

#### Statutory effectiveness

Later market development has brought increased competition and higher download speeds at lower prices. Contrary to when the Authority's investigation was carried out it is now entrants that push down prices and gain market share. The Authority sees this as a sign that the decision not to intervene against TDC was correct and that the competition act was sufficient to address the problem.

Investigation into possible predatory pricing/margin squeeze on the market for telephony services to business users (Decision of 28 April 2004)<sup>28</sup>

#### Case background

In 2002, the fixed line operator Song Networks (hereafter Song) filed a complaint simultaneously to the National IT- and Telecom Agency and the Authority alleging that:

- mobile termination rates were excessive;
- mobile operators had colluded to keep mobile termination rates artificially high;

- two mobile operators cross-subsidised their retail fixed line business with revenues from mobile termination;
- TDC employed discriminatory discounts in its mobile service provision agreements.

Service providers pay far less for on-net calls than fixed line operators pay for mobile termination. The National IT- and Telecom Agency therefore initially approached the case as a case of discrimination between pricing of on-net calls and mobile call termination. After about a year's investigation the National IT- and Telecom Agency reached the conclusion that their legislation did not provide basis for intervention. The Authority then took up the case.

As part of the new regulatory framework for regulation of markets for electronic communication the National IT- and Telecom Agency shall analyse the market for mobile termination and determine whether regulatory intervention (e.g. against high prices) is necessary. Because excessive pricing usually is difficult to prove relying on competition jurisprudence the Authority chose not to investigate possible excessive pricing of mobile termination and wait for the National IT- and Telecom Agency's analysis.

The Authority investigated the alleged cross subsidisation and discriminatory practices in depth. Two operators were under suspicion for cross-subsidising their retail fixed line business; SONOFON and TDC.

Cross-subsidising a division is only prohibited for dominant providers. Both TDC and SONOFON held dominant positions on some of the underlying wholesale markets which implied a risk of margin squeeze. SONOFON was dominant on the market for call termination in its own network. TDC was dominant on the market for call termination in its own network and the market for wholesale mobile service provision.

An operator's capability to leverage market power from an upstream market to a downstream market depends on the operator's influence on overall cost on the downstream market. If the input provided by the dominant operator only constitutes a negligible part of retail providers' total costs the wholesale provider is unlikely to be able to exercise margin squeeze. The Authority found that costs for termination of calls in SONOFON's network did not constitute a sufficient proportion of retailers' average costs to permit SONOFON to exercise margin squeeze. The opposite applied to TDC.

TDC sold some calls at retail prices below variable cost and others above costs. All in all the product was profitable at retail level considering the wholesale prices TDC offered third parties for access to its network. But TDC's choice to price some calls below costs entailed an additional risk compared to the market in general as call patterns were likely to change. If the proportion of calls yielding a negative contribution margin increased, profitability would be eroded.

Consequently, the Authority investigated previous developments in calling patterns. Experience from other operators than TDC showed that the proportion of fixed line to mobile calls had increased considerably over the past years. Calculations of the overall profitability's sensitivity to changes in calling patterns were made. On this background the Authority found that TDC's overall profitability was insufficient to cover both operating costs and investment risk and that TDC thus was guilty of margin squeeze.

TDC was also dominant provider of wholesale mobile service provision in Denmark. Service providers were granted progressive discounts depending on the revenue they generate. Song alleged that these discounts did not reflect underlying costs to the detriment of small service providers. The Authority's analysis confirmed the allegations that the use of progressive discounts increased customer loyalty and lead

to undue discrimination against service providers with relatively modest revenue. TDC was ordered to change its prices to reflect underlying costs.

TDC has brought the case before the Competition Appeals Tribunal.

#### Plausibility

Margin squeeze was considered a likely weapon in an increasingly competitive market as TDC can endure low margins at retail level for a longer period of time because of TDC's profits at wholesale level. The Authority did not employ a "recoupment" test as part of the investigation but TDC could be certain to recoup potential retail losses because of the enterprise's presence at wholesale level.

#### Reasonable justifications

TDC claimed that its prices only reflected the competitive situation on the market. But the Authority's investigation showed that TDC's prices in many cases were lower than the competing operators' prices. The Authority therefore rejected that TDC's prices were justifiable under a meeting the competition defence.

#### Raising Rivals' Costs

The discriminating use of discounts for mobile service providers was taken into account when evaluating whether TDC was guilty of margin squeeze.

## NOTES

1. <http://laws.justice.gc.ca/en/C-34/>
2. Subsection 50(1)(c) states: "Everyone engaged in a business who ... (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect ... is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."
3. The Competition Bureau is currently studying a proposal for reforming the pricing provision of the *Competition Act*. Specifically, the proposal being examined includes the pricing provisions being repealed and that discriminatory or predatory behaviours be made reviewable matters under the existing abuse of dominant position.
4. Under the *Criminal Code of Canada*, a fine may be imposed in addition to or in lieu of imprisonment.
5. The Guidelines can be found at <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01139e.html>.
6. The assessment of the conditions of entry emphasizes an examination of whether entry is likely to be delayed or hindered by the presence of absolute cost differences or the need to make investments that are not likely to be recovered if entry is unsuccessful (known as "sunk cost" investments).
7. *R. v Hoffman La-Roche Ltd* 125 D.L.R. (3rd), 1982. Ontario C.A. 607-651.
8. *R. V. Consumers Glass Co.* (1981), 33 O.R. (2d) 228
9. *Boehringer Ingelheim Canada Inc. v. Bristol-Myers Squibb Canada Inc. et al* 83 C.P.R. (3rd), 1999, Ontario Court, General Division 51-72.
10. In *R. V. Producers Dairy Ltd.* (1966), C.P.R. (2d)265 the accused was acquitted on the grounds that two days of low pricing activity was insufficient to establish a policy of predatory pricing.
11. Section 79 provides that the Competition Tribunal may make behavioural and structural orders against a respondent firm(s) to overcome the effects of the practice of anti-competitive acts. Under section 79, the Tribunal does not have the power to impose administrative monetary penalties in non-airline cases or order imprisonment. However, section 66 provides criminal penalties for failing to comply with a Tribunal order. In addition, amendments to the *Competition Act* which came into force on June 21, 2002, provides the Competition Tribunal with the power to issue interim orders prior to litigation to prevent irreparable harm to a person as well as impose monetary penalties up to a maximum of \$15 million against an airline carrier where the Competition Tribunal has found that a dominant carrier has abused its dominant market position.
12. <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02209e.html>
13. *Director of Investigation and Research v. The NutraSweet Company* CT 89.
14. *Director of Investigation and Research v. Tele-Direct Publications Inc.* CT 94/03. The judgement specifically endorses recoupment as an essential element of predation. "The essence of an allegation of predatory pricing is that the firm foregoes short-run revenues by cutting prices, driving out rivals, and thus providing itself with an opportunity to recoup more than its short-term losses through higher profits earned in the longer term in the absence of competition." (p. 293) Also see *Director of Investigation and Research v. The NutraSweet Company* CT 89/2pps 73- 78.
15. More recent statistics show low cost carriers such as WestJet, CanJet, and Jetsgo gaining market share. Current estimates are that Air Canada's market share is approximately 57% based on capacity.

16. In early August 2004, Air Canada made an application to the Minister of Transport pursuant to section 56.2(7) of the *Canada Transportation Act* to have the Undertakings it provided to the Commissioner of Competition in December 1999 rescinded on the basis that the Undertakings were no longer necessary or appropriate given the changes in the industry. The Undertakings were subsequently rescinded by Order in Council on August 17, 2004.
17. Section 79(3.1) of the *Competition Act* states, “Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the *Canadian Transportation Act*, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than \$15 million.”
18. In July 1991, the Bureau released its “Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*)” (<http://strategis.ic.gc.ca/pics/ct/aod.pdf>). The Guidelines indicate that when conducting the price-cost comparisons, the Bureau will include in its measure all costs that are avoidable. Subsequent to this, in November 2002, the Bureau released the “Interpretation Bulletin: The Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*) as Applied to the Canadian Grocery Sector” (<http://strategis.ic.gc.ca/pics/ct/ct02465e.pdf>). This Bulletin also states that the avoidable cost test will be used when assessing predatory practices in the grocery sector.
19. Beyond contribution is an attempt to measure the importance to the initial flight leg of carrying connecting or through passengers from a city to other destinations within the network.
20. The balance of the application will address the following issues: (i) the question of whether Air Canada engaged in anti-competitive acts on the other five routes as stated in the Commissioner’s application, by increasing its capacity and/or decreasing its fares in a manner that did not cover the avoidable cost of operating the flights on the “affected routes”, contrary to paragraphs 1(a) and 1(b) of the *Airline Regulations*, (ii) whether Air Canada controlled the market as defined pursuant to paragraph 79(1)(a) of the Act, and (iii) whether the practice of anti-competitive acts is likely to result in a substantial prevention or lessening of competition as per paragraph 79(1)(c).
21. Recoupment is subsumed in the notion of the need to find a substantial prevention or lessening of competition.
22. Air Canada emerged from bankruptcy protection on September 30, 2004.
23. <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02952e.html>
24. Judgement from the European Court of Justice, *AKZO Chemie vs. Commission*, C-62/86, Saml. 1999-I, 3359.
25. Case No. 3/1120-0100-404 and 3/1120-0204-0139 respectively.
26. Case no. 3/1120-0204-0069.
27. Case No. 3/1120-0100-0478.
28. Case No. 3/1120-0100-0557.

## GERMANY

### 1. Predatory Pricing

#### 1.1 Introduction

Before dealing with the more detailed questions as set out in the scoping paper, this submission starts with a brief explanation of the legal framework governing predatory pricing in Germany. Also an introduction into the recent Lufthansa case is provided. This case will be used in the following sections to explain and illustrate the different concepts.

##### 1.1.1 Legal framework

In Germany, predatory pricing is prohibited in accordance with Article 82 EC-Treaty and Sections 19 and 20 of the Act against Restraints of Competition (ARC). The legal concepts under the EC-Treaty and the ARC are quite similar. However, the provisions of the ARC go in some aspects beyond the scope of Article 82 EC-Treaty.

The ban on predatory pricing under Article 82 EC-Treaty applies only to dominant undertakings. When analysing whether an undertaking enjoys a dominant market position, a lot of different aspects of the market structure must be taken into account, e.g. market shares, the extent of market entry barriers, financial resources of the market participants and counterbalancing market power. The European Court of Justice (ECJ) has established a per-se rule which sets out the conditions under which a pricing behaviour is deemed to be abusive. Prices below average variable costs (AVC) are regarded as abusive. Prices above average variable costs and below average total costs (ATC) are regarded as abusive if they are determined as part of a plan for eliminating a competitor.

Under Sections 19 and 20 ARC, the ban on predatory pricing applies not only to dominant undertakings, but also to undertakings with considerable market power below the dominance threshold. The case-law on Sections 19 and 20 ARC has not established a per-se rule similar to the case law of the ECJ. Hindering other competitors as such is not sufficient to establish predatory pricing. Instead, the decisive criterion is whether there is an “objective justification” for the pricing behaviour. Under the established case-law of the German Federal Court of Justice (FCJ), the justification criterion requires a comprehensive weighing up of the respective interests of the alleged predator and the customers and competitors. A priority ranking of the different interests is established that applies the goal of the ARC (which is to ensure freedom of competition) as a standard, with a special focus on market entry possibilities and protection of competitive market structures. A lot of different aspects need to be evaluated in the weighing up of interests, i.e. the level of (below-cost) pricing, predatory intent, means employed by the alleged predator, structural aspects of the market, degree of market power, the alteration of market entry barriers, the extent of market effects, price history, recoupment plausibility, etc. All factors of this open-ended list are considered together when determining whether the hindrance is regarded as objectively justified or not. This legal framework allows a highly differentiated approach towards predatory pricing.

### *1.1.2 Lufthansa case*

On 11 November 2001, the low cost carrier Germania Fluggesellschaft mbH (Germania) started operating scheduled flights between Frankfurt and Berlin with a price of 99 Euro for a flexible economy class one-way ticket. Before Germania's market entry, Deutsche Lufthansa AG (Lufthansa) was the only airline operating scheduled flights on this city pair. On 9 November 2001 Lufthansa lowered its flexible round trip ticket from 485 Euro to 200 Euro and replaced this offer on 1 January 2002 by a flexible one-way ticket priced at 105 Euro. According to the investigations of the Bundeskartellamt, the Lufthansa offer was below its own average total costs as calculated in Lufthansa's own profitability evaluation for the Frankfurt-Berlin city pair. After deducting passenger fees and value-added tax, the lowered Lufthansa offer was equivalent to a net price of roughly 62,24 Euro. At the same time, the Lufthansa average total cost was about 94,55 Euro per passenger. The Lufthansa offer included several extra features which were not included in the Germania offer, such as higher flight frequency, better on-board service, frequent flyer program and others. The Bundeskartellamt concluded that these features had an equivalent value of at least 35 Euro to the passenger, so that Lufthansa - by meeting Germania's nominal prices - had in fact undercut Germania's offer. In February 2002, the Bundeskartellamt prohibited Lufthansa from demanding a price for flexible one-way tickets on the Frankfurt-Berlin route which was less than 35 Euro above Germania's prices. This obligation was imposed only for a two-year period and was valid only if Germania did not raise its prices above 99 Euro. In an interim decision in March 2002, the Düsseldorf Higher Regional Court confirmed the decision of the Bundeskartellamt. The court only lowered the price distance from 35 Euro to 30,50 Euro. Details of the Bundeskartellamt's decision in this case can be found in the recently translated English version, which is now published as an annex to this submission.

### *1.2 Plausibility*

After decades of animated academic discussions, the conditions which must be fulfilled in order to consider a predatory pricing claim plausible, can be derived from the state-of-the-art economic theory as follows:

- It is only a rational strategy for the predator to engage in a predatory pricing conduct, if the (discounted) costs of the "price war" are expected to be lower than the (discounted) costs of not engaging in a "price war".
- Predatory pricing will hardly ever be rational in fully contestable markets (no/low entry barriers, no/low sunk costs, no/low economies of scale and scope or network effects). Conversely, the rationality of predatory pricing increases with the extent of market entry barriers and economies of scale and scope or network effects.
- The rationality of predatory pricing increases with the ability of the predator to differentiate prices for individual customers or customer segments, because this ability will lower the costs of predation.
- The extent of informational asymmetries plays a crucial role in making predatory pricing viable and/or rational. Predatory pricing will only lead to a market exit if the capital provider of the targeted competitor is at some point of time not willing to finance the losses of the "price war"-period.
- The predator may try to build up a reputation of behaving as a fierce predator. Reputational effects play a greater role for predators which are active in a number of similar markets.

- The predator may want to send wrong signals about the demand and cost characteristics of the market concerned. Signalling effects play a greater role in markets where (potential) entrants have only little experience as regards demand, cost structure and other market characteristics.

All these market aspects need to be taken into account in order to evaluate whether a predatory pricing strategy is plausible because the predator is expected to “recoup” the losses. “Recoupment” needs to be defined in a broad way. A common misunderstanding is that predators will recoup the temporary losses in the *same market* through the *non-competitive prices* which they will charge after the “price war”. However, “recoupment” may simply occur through preventing continuous future market share losses or through deterring others from future market entry. Also, recoupment may occur in other (similar) markets in which the predator is active because the predator may deter market entrants in those markets as well. More generally speaking, it might be rational for the predator to engage in costly predation even if total profit is negative, because the alternative to predation might be something worse than a zero baseline.

Under Article 82 EC-Treaty, there is no recoupment test requirement in order to establish predatory pricing. It is sufficient to prove market dominance in conjunction with pricing below AVC or the predatory intent and pricing below ATC. However, by using the market dominance test, typically there are several aspects of a wider recoupment test covered as well. For example, market dominance will hardly ever be found without significant entry barriers. Similarly, a recoupment test is not an indispensable element in an evaluation according to Sections 19 and 20 ARC. However, the Bundeskartellamt has in its practise investigated whether predatory pricing / recoupment was plausible under the specific circumstances of the case.

In the Lufthansa case, there were several factors which made predatory pricing a potentially rational strategy for Lufthansa, thus predatory pricing and recoupment were plausible:

- The scarcity of slots in conjunction with the “grandfathering” allocation of slots creates an administrative entry barrier for airlines, this is especially true for the Frankfurt airport. Under the grandfathering allocation scheme, the airlines which have in the past used the slots may continue to do so, newcomers must wait for slots to be de-blocked by other airlines.
- For a given flight frequency, the average cost per passenger decreases with every additional passenger (so-called “economies of density”). This made on the one hand predatory pricing less costly for Lufthansa and on the other hand more costly for Germania. Also, it is quite easy for airlines to differentiate prices – it is no problem to limit the price cuts to a single city pair or even to limit the price cuts to certain time slots. Again, this makes predatory pricing less costly. Lufthansa offered the lowered flexible fare only on the Frankfurt-Berlin route and not on the other domestic German city pairs. Like Germania’s offer, the new Lufthansa fare aimed predominantly at business travellers.
- Lufthansa had in the past already successfully lowered prices on routes on which other competitors had entered and subsequently raised prices when competitors had left the market. Such a strategy could be observed on the London-Munich route (competitor Go-fly) as well as on the Munich-Frankfurt route (competitor Deutsche BA). Recoupment was therefore highly plausible for the Frankfurt-Berlin route as well. It was expected that Lufthansa would raise its prices to previous levels as soon as Germania exited the market. Analysis of the airline industry suggests that recoupment may also occur through charging high rates on hub routes (so-called “hub premiums”).

- Reputational effects were another factor which added to the rationality of predatory pricing. Lufthansa could expect to deter market entry on other routes, not only on the Frankfurt-Berlin route. Therefore a market exit of Germania would have paid off on other routes as well.

### **1.3 *The Appropriate Measure of Cost***

In the above-mentioned case-law of the ECJ both AVC and ATC were taken into account when evaluating pricing behaviour under Article 82 EC-Treaty. In the Lufthansa case the Bundeskartellamt and the Düsseldorf Higher Regional Court applied ATC as a yardstick.

The discussion of whether marginal cost (MC), AVC (as a substitute for MC) or ATC is the more viable cost measure is often a rather academic question. Which cost measure is the ‘right’ measure will depend highly on the industry under review. Also, it is difficult to determine which costs are to be considered as ‘variable’ and which as ‘fixed’ because this depends mostly on the time frame which is chosen for reference: In a short-term evaluation (e.g. one day), typically all costs will be fixed. Conversely, in a long-term evaluation (e.g. ten years), all costs will be variable and thus AVC will equal ATC. MC or AVC is typically a meaningless cost measure in network industries because nearly all costs are fixed and MC/AVC will be close to zero. The German Regulatory Authority for Telecommunications and Posts (RegTP), for example, has adopted a long-term cost measure, i.e. ATC, for access (interconnection) price regulation. When evaluating whether retail prices are predatory, the RegTP uses the access (interconnection) prices plus a 25% marketing and sales markup for the predation test. In other words, the cost measure consists of average total infrastructure costs plus 25%. Another important problem in cost measuring is cost-accounting in multi-product firms. Overhead expenses such as general and administrative costs typically create significant leeway in cost-allocation.

In the Lufthansa case, both the Bundeskartellamt and the Higher Regional Court rejected MC/AVC as an appropriate cost measure for the airline industry and used ATC as the relevant yardstick. In the airline industry the MC for one additional passenger is close to zero as long as the plane is not fully booked. However if fully booked, the hypothetical next passenger will require an additional plane on the given route and therefore will have an extremely high MC. Another aspect is that flight prices are highly differentiated according to the ticket restrictions / booking classes. The profitability calculation for a certain route will therefore always be a mixed calculation where the differentiated prices need to cover the costs on average. Under the circumstances of the airline industry, ATC is a much more meaningful cost measure than MC/AVC.

### **1.4 *Above-Cost Prices***

Prices above ATC should generally not be considered as predatory as such. However, if an abusive intent as well as a predatory effect can be proved, such pricing might still be regarded as abusive practice under special circumstances.

There are also other pricing practices outside ‘predatory’ (below-cost) pricing which are deemed as abusive. Those cases where above-cost prices can constitute an abusive practice include price differentiation without objective justification (so-called “price discrimination”) or the so-called “margin squeeze”.

### **1.5 *Price Histories***

The timing and extent of price cuts and increases is a very useful diagnostic tool for identifying either predatory pricing or excessive pricing. The main problem of this diagnostic tool is that price variations may not only be caused by an abusive intent. Price fluctuations may often simply be a reaction to cost or

demand fluctuations. Authorities need to look for a pattern where the timing and scope of the price variation coincides with the timing and pricing of announced, attempted or completed market entries. If price cuts are very significant and demand / cost fluctuations can be ruled out as reason for the price cuts, the price cuts indicate that either a) the former price level was “too high” or b) the new price is “too low”.

In the Lufthansa case, the price history was an important indication for the abusive intent. Lufthansa lowered its prices by roughly 59% only two days before Germania entered the market. Such a massive price reduction could not be explained by cost or demand fluctuations but could only be explained as a reaction to Germania’s market entry.

## **1.6 Reasonable Justifications**

As mentioned above, “objective justification” is the most important criterion when evaluating a pricing behaviour within the meaning of Sections 19 and 20 ARC. This criterion includes aspects such as level of (below-cost) pricing, predatory intent, means employed by the alleged predator, structural aspects of the market, degree of market power, the alteration of market entry barriers, the extent of market effects, price history, recoupment plausibility, etc. All factors of this open-ended list are considered together when determining whether the hindrance will be regarded as objectively justified or not. Similarly, when evaluating the pricing behaviour according to Article 82 EC-Treaty, there are several possibilities to justify below-cost pricing. A frequently encountered justification is the “meeting competition defence”. Under this defence the incumbent may lower its price to the price level of the entrant in order to prevent market share losses.

Economic theory also suggests that there are some other situations where below-cost pricing may be rational without any predatory intent or predatory effect: One example is introduction phases of new products (e.g. customers might initially have little knowledge about the product, or the customer’s willingness to pay may depend on the quantity of other users due to network effects). Another example is complementary goods where below-cost pricing of an “entry” product might be paid off by subsequent purchase of complementary products or services (e.g. printers & ink/toner, razors & blades, mobile phones & phone calls).

In the Lufthansa case there was no objective justification for the pricing behaviour. The different aspects to be evaluated in the weighing up of interests did not allow for a different conclusion.

Loss leader strategies in the retail sector are no objective justification for a predatory pricing behaviour. The ARC contains a special provision that prohibits such strategies. Section 20 (4) ARC states: “Undertakings with superior market power in relation to small- and medium-sized competitors shall not use their market power directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers goods or services not merely occasionally below its cost price (German: “Einstandspreis”), unless there is an objective justification for this.” In this context, important criteria for assessing the objective justification are the degree of the restrictive effect and whether the sales price below costs is coupled with an abusive intent.

## **2. Non-Price Predation**

### **2.1 Raising Rivals’ Costs**

The most important case category for “raising rivals’ costs” is the so-called “margin squeeze”. It typically occurs in situations where undertakings need access to the essential facilities of a competitor and both, the facility owner and the facility user, compete in a market which hinges on these essential facilities. Where the facility owner prices its retail product not sufficiently above the access price to competitors, a

margin squeeze may occur. Typically, a margin squeeze can much more easily be detected than 'normal' predatory pricing.

A recent case example of the Bundeskartellamt for "raising rivals' costs" are the proceedings against the amount of fees charged by Deutsche Telekom (DT) for subscriber data. Data of telephone subscribers contain basically the name, address and telephone number of a subscriber. Especially for business subscribers such as larger companies with many extensions, these data can be quite complex. The data are needed to operate directory assistance call centres or to issue printed directories. They are therefore a preliminary product which enables companies to compete with DT in directory services. Section 12 of the Telecommunications Act (TA) requires that all German telecom operators have to provide their subscriber data to other directory providers and may charge the cost of the efficient rendering of this service to directory providers. The Bundeskartellamt opined that charges above the efficient cost level also constituted an infringement of the prohibition of abusive practices under the ARC. In August 2003, Deutsche Telekom agreed with retrospective effect from January 2003 to base its calculation of costs for providing subscriber data merely on annual costs amounting to a total of 49 million Euro, as opposed to the former cost base of 90 million Euro. The new basis of calculation led to a considerable reduction of costs for purchasers and therefore eliminated a significant obstacle for competitors.

## **2.2 *Building Excess Capacity***

Predatory pricing and predatory capacity adding will often go hand in hand. The simple reason for this phenomenon is that under 'normal' demand conditions, lower prices will increase the demand quantity and similarly, higher capacity will often lead to lower prices. This interrelationship suggests that basically predatory capacity adding can be assessed in a very similar way as predatory pricing. Excess capacity building is most obvious where assets are purchased for the sole purpose of preventing competitors from using those assets. Such behaviour may not only violate the prohibition of abusive practices but can also constitute an illegal merger or an illegal cartel agreement according to Article 81 EC-Treaty or Section 1 ARC.

A Bundeskartellamt case example in 'excess capacity building' is the proposed acquisition of Malik Baustoffe GmbH & Co. KG (Malik) by Heidelberger Zement AG (Heidelberger) in 1988. Heidelberger is the largest cement supplier in Germany. Malik was inter alia active in importing cement from Yugoslavia, Hungary and Romania. Heidelberger wanted to purchase the assets of Malik not in order to use this additional cement capacity but rather to prevent competitors from using the assets for supplies to the German markets. The Bundeskartellamt opined that the sole purpose of the acquisition was to block actual and potential competition stemming from those cement imports. Under the special circumstances of this case the transaction was viewed at the same time as an anticompetitive shutdown agreement which included a premium for the owner of Malik to abstain from competition. It would also have strengthened the dominant position which Heidelberger held on southern German markets. The Bundeskartellamt prohibited the acquisition in July 1988 on grounds of merger control as well as on grounds of Section 1 ARC.

## **2.3 *Abuse of Informational Asymmetry***

Fooling customers through misleading information is in Germany mainly covered by the provisions of the Unfair Competition Law (UCL); such behaviour is therefore mainly subject to direct consumer protection provisions rather than antitrust provisions. The UCL does not only apply to undertakings with market power but to all undertakings. Where undertakings with a dominant market position or considerable market power violate the UCL by using misleading information and where this behaviour has a restrictive effect on competition, it will typically at the same time violate Article 82 EC-Treaty or Sections 19, 20 ARC.

### **3. General Questions**

#### **3.1 *Experience***

Other practices with a restrictive effect on competition, such as tying/bundling or fidelity discounts play a greater role than predatory pricing in the enforcement practice of the Bundeskartellamt and the German civil courts. This might not only be due to the fact that predatory pricing strategies are rarely applied but also because predatory pricing is harder to identify when compared to other abusive practices. German enforcement has also exercised self-restraint in intervening against prices which are allegedly too low or too high because such interventions may impose quite heavy restraints on the freedom of action of undertakings.

#### **3.2 *Statutory effectiveness***

Article 82 EC-Treaty and Sections 19, 20 ARC create a satisfactory level of protection against predatory pricing and other predatory conduct. These norms allow enough flexibility in order to address all different kinds of predatory conduct. With regard to the procedural statutes, the Bundeskartellamt has the most important investigation powers such as compulsory information requests and on-site searches. However, the procedural powers need to be extended. According to the EC Council regulation 1/2003 as well as to the current amendment to the ARC, the Bundeskartellamt's powers in ordering interim measures, accepting commitments, international cooperation, sector investigations, non-suspensive effect of appeals and other aspects will be extended. The Bundeskartellamt welcomes these amendments but regrets that the government's draft of the ARC amendment does not provide for immediate enforceability of all decisions in abuse proceedings under Sections 19, 20 and 21 ARC. In proceedings against predatory foreclosure, the immediate enforceability of cease-and-desist orders is typically needed in order to prevent the market exit of the targeted competitor.

**ANNEX: DECISION OF THE BUNDESKARTELLAMT OF 18 FEBRUARY 2002  
IN THE ADMINISTRATIVE PROCEEDINGS AGAINST DEUTSCHE LUFTHANSA AG  
(ENGLISH TRANSLATION)**

**BUNDESKARTELLAMT**

9th Decision Division  
B 9 – 144/01

**FOR PUBLICATION**

**DECISION**

In the administrative proceedings

against

Deutsche Lufthansa AG, Cologne

- party concerned -

Authorised representative  
Rechtsanwälte Wilmer, Cutler & Pickering, Quack  
Friedrichstrasse 95  
10117 Berlin

on account of the abuse of a dominant position under Section 19 of the ARC, the 9<sup>th</sup> Decision Division of the Bundeskartellamt decided the following on 18 February 2002:

1. Under Section 32 of the ARC, in conjunction with Section 19 (1), (4) sentence 1 no. 1 of the ARC Deutsche Lufthansa AG, Cologne (Lufthansa) is prohibited from demanding a price (including passenger charges) for a one-way ticket per passenger on the Frankfurt-Berlin/Tegel route (in both directions) which is not at least 35 € above that of its competitor Germania Fluggesellschaft mbH,

Berlin (Germania) on this route (one way, including passenger charges). So far as Lufthansa and/or Germania offer a ticket for an outward and return flight (RT), half of the RT price is to be taken as the price for a one-way journey.

If Germania raises its price for a one-way ticket including passenger charges from currently 99 € Lufthansa will nonetheless not have to demand a price which is higher than 134 € (one-way, including passenger charges). Lufthansa's obligation to demand higher prices than Germania on the said route is no longer applicable if and so long as Germania demands a price (one-way, including passenger charges) of 134 € or more.

2. The obligation under 1. does not apply to Lufthansa prices which are subject to restrictions such as the absence of a re-booking possibility and/or a minimum stay (at least 2 days or Sunday rule) and/or the restriction of flights to weekends.
3. This decision is valid for a period of 2 years from its issuance (Section 36 (2) 1 of the German Law on Administrative Proceedings, "Verwaltungsverfahrensgesetz, VwVfG").
4. The Bundeskastellamt reserves the right to revoke this decision (Section 36 (2) 3 of the VwVfG).
5. The immediate enforcement of this decision is ordered in compliance with Section 65 (1) and (2) of the ARC, in conjunction with Section 64 (1) 2 of the ARC.
6. A fee will be set separately.

### **R e a s o n s :**

#### **A.**

1. According to a petition filed by Germania, this airline started operating scheduled flights between Frankfurt and Berlin-Tegel, which were initially offered at 99.00 € for a one-way, flexible economy ticket, without substantial restrictions (including passenger charges).
2. An outward and return flight was to cost 198 €. Lufthansa reacted to this offer by introducing new cheap tariffs to supplement its fully-flexible RT tariffs (round trip, outward and return journey) in the economy class on the Berlin-Frankfurt route of then 485 €. On 9 November 2001 Lufthansa in turn submitted its two one-way tariffs on the Berlin-Frankfurt route (88 €) and Frankfurt-Berlin route (66 €) to the Federal Office of Freight Transport in Cologne (TGL) (tariff group for air traffic), which, with charges added, amounted to a total price of 200 € or 100 € for a one-way journey.

On 1 January 2002 Lufthansa replaced its tariffs averaging 100 € per journey with a new tariff (M-Fly-OW, i.e. Economy Flight One-Way). Accordingly a Berlin to Frankfurt flight now costs 105.11 € (including passenger charges) and a Frankfurt to Berlin flight 105.31 €.

Currently an outward and return flight with Lufthansa at 210.42 € is only obtainable by booking an outward and return flight separately and not as a RT ticket. Both tariffs can be booked without the typical restrictions with which flexible business and economy tariffs are differentiated from budget tariffs, which specially serve to achieve effective capacity utilization. Such restrictions are:

- advanced booking period,

- Minimum stay or Sunday rule (a Sunday between outward and return journey) or restriction of budget flights to Saturdays/Sundays
- no rebooking possibility (see annex p. 321).

Instead Lufthansa has placed only marginal restrictions on these tariffs, making them suitable for business travellers as well:

- Outward and return flights can only be booked separately,
- the cost of unused tickets cannot be reimbursed,
- Rebookings are only possible up to departure of the booked flight,
- A charge of 22 € is made for each rebooking (see annex, p. 293).

These restrictions were imposed by Lufthansa based on the price conditions set by Germania. Germania applies the same restrictions, but in addition a RT ticket (outward and return journey together) is also bookable. Neither the necessary booking of two one-way flights instead of an outward and return flight in Lufthansa's case nor the other conditions specified make the flights offered by both providers unsuitable for business travellers. By its own account Germania's own product is also targeted at business travellers (see annex p. 308) which account for almost three-quarters of all air passengers on this route. The fact that the cost of unused tickets is not reimbursed only insignificantly affects business travellers on account of the rebooking possibilities. So far as business travellers consider the necessity to rebook, they will compare the newly introduced M-Fly-OW-Tariff with Lufthansa's normal, fully flexible Economy Tariff (currently: 439 € + 49.42 € passenger charges = 488.42 € as RT Tariff, meaning one-way a round half = 244 €) and weigh the rebooking charge of 22 € against the price advantage. Compared with this price of 244 € the price advantage of the M-Fly-OW-Tariff of 105 € currently amounts to at least 139 € for a one-way route. Only someone who rebooks a flight at least seven times before departure flies cheaper with the normal, fully-flexible Economy Ticket than with the M-Fly-OW-Tariff.

The argument presented by Lufthansa that the new M-Fly-OW-tariffs are not fully-flexible and thus only have at the most a marginal affect on the market for German domestic flights for time-sensitive business travellers (see annex p. 299) is therefore incorrect. The choice of the normal Economy Tariff instead of M-Fly-OW tariff would only be cheaper in the case of completely atypical flight travel patterns; the M-Fly-OW tariff is normally flexible enough for every business traveller to book. To get a price saving of at least 139 € the business traveller only has to

- wait for a few "mouse clicks" until the return as well as the one-way ticket is issued
- if the deadline is exceeded have the ticket rebooked before departure against a charge of 22 €,
- in the worst case book a new ticket for an average of 105.21 €.

As he does not get a RT ticket anyhow he still saves around 34 €, even if a rebooking is not possible during the time available, if he simply lets the ticket expire and has a new one issued.

In announcing the new 100 € tariffs, ([News-Service@Lufthansa.com](mailto:News-Service@Lufthansa.com) annex p. 8, Lufthansa also explicitly advertised them for use by business travellers flying economy class. "Anyone combining two one-way tickets can now fly to and from Berlin or Frankfurt for only DM 379.14 (193.86 Euros) without any time limits and with the usual Lufthansa board service, cheaper than ever. The new tariff, which is only available on Lufthansa direct flights between Berlin and Frankfurt, is not bound to any advance booking periods or minimum stay condition. Rebookings are possible against a charge of 22 €. The passenger also receives the usual bonus miles available under the Lufthansa Miles and More frequent flyer programme. On the Berlin – Frankfurt route (and in the other direction) Lufthansa operates 14 flights in each direction on work days, at almost hourly intervals and 12 frequencies between Frankfurt and Berlin on Saturdays and Sundays (annex p. 8)".

It is clear from this that the 100 € tariff like Lufthansa's M-Fly-OW-tariff introduced later was introduced especially for business travellers, who are also targeted by Germania. "The usual mileage bonuses" are also an indication of this because many business travellers do not pay for the flights themselves and are therefore more interested in collecting miles than in lower flight prices.

Lufthansa argues that the new M-Fly-OW tariffs are also conducive to "capacity and yield management" (see annex, p. 99). Effective capacity management by winning additional passengers who would not have flown at normal tariffs, normally requires restrictions such as advanced booking periods, minimum stay conditions and the absence of rebooking facilities. This merely prevents a shift in demand from the higher to lower tariff classes, such as in the case of Lufthansa's budget tariffs but not in the case of the M-Fly-OW-tariff (see annex, p. 321; this only lists tariffs for the Frankfurt-Berlin route (without passenger charges), which amount to 13.11 € or 36.31 €, together 49.42 €.

2. On 12 November 2001, as a result of Lufthansa's price reduction to 100 € for a flight between Berlin and Frankfurt, Germania reduced its original tariff of 99 € to 55 € (including passenger charges). The principle reason for this was that at a price difference of only 1 € there was no more incentive for customers to fly with Germania instead of Lufthansa. Here the advantages which Lufthansa offer its customers in the form of additional services such as onboard service, the use of its lounges, mileage bonuses for its Miles & More frequent flyer programme as well as 14 flight frequencies on workdays compared with 4 flight pairs daily with Germania are too great. However, according to the cost and revenue accounting figures which it submitted to the Decision Division (in this respect to be treated as business secrets) Germania did not achieve the break-even point with the reduced tariff. This is the reason why it raised the price back to 99 € at the beginning of 2002. At the same time Germania submitted to the Decision Division figures on its seat load factor and the profitability of these flights before and after the price rise. Accordingly in December 2001 an average of (...) passengers a week booked a flight with Germania. After the increase from 55 € to 99 € it was only [...] passengers a week (level as of 14.01.02). This signifies a 39 per cent fall (see Germania's letter of 17.01.2002, excerpts from the attached annexes, excluding business secrets, pages 207 – 210 of the annex). If January 15 and 16, 2002 are included in the comparison, the fall in sales amounts to an average of ( ) passengers per week (fall of 37 per cent). Lufthansa's booking figures rose in the first three calendar weeks from(...) to (...) (see annex, p. 346), i.e. in comparison to those of Germania Lufthansa's booking figures remained largely constant in January 2002 compared with December 2001.

Germania announced that for economic reasons it would not be able to continue operations on this route in the long term if Lufthansa were to continue with massive price reductions (p. 207 f.)

As of 1.1.2002, at the same time that Germania raised its prices, Lufthansa also raised its prices to 105.11 € (Berlin-Frankfurt) and 105.31 € (Frankfurt-Berlin) and is thus on average 6.21 € (12.15 DM) per return flight above Germania's price of 99 €.

3. The introduction of a new tariff, which in terms of conditions practically corresponded with the normal, full-flexible Economy Tariff for an outward and return flight between Berlin and Frankfurt, represents a price reduction from previously 485 € to 200 € (including passenger charges), i.e. of 58.7 %. For rebookings Lufthansa, like Germania, demands a 22 € fee, although it normally rebooks flexible tickets free of charge. As an exception to its other tariffs on German domestic routes in the case of the M-Fly-OW ticket the passenger fee is included in the calculation of the travel agencies' commission.
4. As a reaction to Germania's entry to the market Lufthansa offers the new M-Fly-OW-Tariff of initially 100 €, now 105.21 € for a one-way flight only on the Frankfurt-Berlin route. This flight price is not available on all other German domestic routes. On a comparable route like Berlin-Munich, e.g. where it stands in competition with Deutsche BA, Lufthansa still demands 441 € for a RT flight in the Economy Class (including charges, see Lufthansa-InfoFlyway of 13.11.01, see annex, pages 18 – 21) i.e. more than double the new tariff on the Frankfurt-Berlin route. On 1 January 2002 Lufthansa carried out an

overall price increase in Economy Class tariffs (Frankfurt-Berlin RT Economy Class: from 435 to 439 € excl. passenger charges, see annex, page 321).

5. By introducing a M-Fly-OW-Tariff of initially 100 € Lufthansa not only adjusted to Germania's price levels but practically undercut Germania's price of 99 €. The Lufthansa price contains services which Germania does not offer on this route:
  - a) Lufthansa customers receive onboard catering. In its statement of 3 February 2002 Lufthansa quoted catering costs of (...) € for its passengers flying economy class. In order to examine the effects on competition of the M-Fly-OW-Tariff consideration needs to be taken of the booking patterns of customers, because the decisive factor for the survival of the new competitive alternative is whether sufficient passengers are prepared to book Germania (instead of Lufthansa). Additional services included in the Lufthansa tariff such as the Frequent Flyer Programme and the higher number of flight connections offered therefore have to be evaluated from the perspective of the passengers and not, as Lufthansa claims, according to the additional costs for these services. Consequently attention should not be focused on catering costs in terms of profitability analysis but on the pecuniary benefit of catering services from the perspective of the passenger. To the knowledge of the Decision Division passengers in the economy class receive a drink and newspapers/magazines. If one assumes that business travellers are also prepared to purchase these themselves at the airport before they board a Germania aircraft, at least 2 € for a drink and 1 € for a newspaper should be calculated for this.
  - b) Lufthansa customers participating in the Miles and More frequent flier programme receive a bonus of 1000 miles for every German domestic flight in the economy class. For every flight at the new tariff of 100 € Lufthansa awarded "at least 500 miles" (see annex, pages 13, 30). Apparently Lufthansa's mileage bonuses exceed this for flights at 105 €. The Decision Division assumes a mileage bonus of 500 miles for a one-way flight at M-Fly-OW-tariff and a mileage requirement of 20,000 miles for a domestic RT flight to the value of 488 €. This award is granted after a maximum of 40 flights at M-Fly-OW-Tariff. The monetary reward in return for the passenger thus amounts to around 12 € per flight.

It is not the actual costs per mileage bonus ensuing to Lufthansa which are important because the passenger simply compares Lufthansa's offer and the services rendered or pecuniary benefits, which influence his willingness to pay. Lufthansa's costs of providing these services do not influence his decision (see short report by Prof. Dr. Herbert Baum, Institute of Transport Economics, Cologne University: *Der monetäre Wert von Angebotsunterschieden im Luftverkehr – Das Beispiel Deutsche Lufthansa – Germania* (The Monetary Value of Differences in Offer in Air Traffic – The Deutsche Lufthansa – Germania example), February 2002, annex, p. 282 ff, 286).
  - c) Lufthansa offers 14 outward and return flights per day (frequencies) on the Frankfurt-Berlin route on workdays, Germania only 4. The fact that DLH offers three times as many flights is another strong incentive for business travellers and also leisure travellers to fly with DLH and not Germania. This is the result of a study comparing the main selection criteria of business and leisure travellers (maximal number of points: 10):

<b>Criterion</b>	<b>Leisure travellers</b>	<b>Business travellers</b>
price	3.9	2.1
Convenient flight schedules	3.2	4.5
Frequent flyer programme	1.5	2.0
Standing of airline	1.5	1.5

(P. Ostowski, T.V.O'Brien, Predicting Customer Loyalty for Airline Passengers. Dept of Marketing, Northern Illinois University, 1991).

A study of the British Consumers' Association comes to the conclusion that "...the most important factor influencing carrier choice is the schedule offered by an airline. For the business traveller the ability to miss one flight and book onto the next is an important one. This allows for meeting overruns and schedule changes while allowing a full-fare ticket to be altered without additional cost. However, this power can only be exercised if there are a significant number of flights in any one day by the chosen airline. This skews the choice of the business traveller toward the airline with the most dense and regular service. This makes the job of the new entrant an even more difficult one".

(Consumers' Association, London: Airline competition – a long haul for the consumer, 1997, p.10, see p. 254 ff. of annex).

This study also includes the result of a questionnaire among 5250 business travellers worldwide about the importance of factors in the choice of an airline (p. 258 of annex). Out of 10 possible points the following were awarded:

<b>Factor</b>	<b>Points Index</b>
Flight schedule	8.27
Safety	8.03
Punctuality	7.22
Comfort, leg room	6.84
Efficient check-in	6.79
Frequent flyer programme	6.59
Cabin staff	6.38
Free choice of seat	6.33
Cheapest price available	5.54
Use of lounge	5.45
On-board meals/drinks	5.28

As a charter airline offering scheduled flights for the first time, Germana took second place to Lufthansa in fulfilling at least five of the 11 most important selection criteria of business travellers (flight schedule/frequency, comfort and leg room, frequent flyer programme, lounges and catering). It was considered to be of equal standard in the case of four criteria (safety, punctuality, choice of seat, check-in). According to the study the only competition parameters left for it to attract passengers in competition with Lufthansa are its cabin staff and its low flight price. In the scale of preferences of business travellers (see above table) both rank at the lower end of the index scale anyway. If Lufthansa also takes away its price advantage Germana has no chance of competing for business travellers in the long term.

A questionnaire conducted among corporate travel agencies and travel agencies by the US Department of Justice, DoJ as part of an examination of the alliance agreements between Delta Airlines/Swissair/Sabena/Austrian Airlines has shown that "(those guidelines) require a difference in

fare ... before the one-stop alternative is preferred, with many corporations requiring up to 25 % or more. This is not surprising given the value of employees' time, especially those that are dispatched to Europe ... " (Docket OST 95 618, annex folder, annex 3).

Lufthansa flights take off from Berlin or Frankfurt between 7.25 h and 20.00 h at almost hourly intervals. Out of [...] mio. Lufthansa domestic flight passengers [...] mio., i.e. [...] % booked fully flexible tariffs in the last business year 2000/01 and can therefore be categorized as time-sensitive business travellers. Business travellers will also take Lufthansa's high frequency density into consideration as a factor in their choice of airline if this is a domestic flight. In the case of flights taking off at hourly intervals a time-saving of at least one hour can generally be gained by choosing Lufthansa instead of Germania. If one were now to take the price of a German domestic flight of 485 € (Lufthansa Frankfurt – Berlin RT Economy class) and calculate in a surcharge of 25 per cent, which business travellers are prepared to pay for time flexibility, one could, with a time-saving of an hour on a one-way route, estimate a surcharge of up to 60 € as a basis, which business travellers are prepared to pay for more time flexibility on German domestic flights. Even based on a price of 210 € for an outward and return flight (current M-Fly-OW-Tariff) Lufthansa's price would still have to be 52.50 € above Germania's price to compensate for time-saving advantages as a result of greater frequency intensity. How Lufthansa itself evaluates the benefits of its time saving for business travellers is clear from the introduction of a minimum stay regulation for its BRTFLEX Economy-Tariff of 520 DM on 1 February 2000 (renamed BRT1M, subject to two days minimum stay). As a consequence this tariff could no longer be used by business travellers which have to depart and return the same day. They had to opt for the HFLEX tariff for 850 DM, which meant a price rise of 330 DM (168 €).

Prof Dr Baum comes to a comparable result in his brief report on the monetary value of differences in offer between Lufthansa and Germania. From the advantage of 14 outward and return flights (frequencies) per working day in the case of Lufthansa compared with 4 frequencies in the case of Germania he calculates a time-saving for Lufthansa passengers of on average 1 hour 5 minutes and evaluates this advantage at 25 € per one-way flight (p.282 ff., 284 f. of the annex).

d) In addition Lufthansa has further advantages:

- Frequent fliers with status miles can use Lufthansa lounges at both airports.
- Through its subsidiary Start Lufthansa has excellent access to travel agencies. In addition it is significantly involved in the Amadeus reservation system (Annex, p. 317). In terms of bookability of its flight offer Lufthansa is superior to competitors with limited sales opportunities such as Germania. This is shown, for example, by Germania's total lack of any significant distribution channel such as L'Tur (Annex, p. 211 to 246).
- Frankfurt airport is Lufthansa's hub. In 2000 [...] per cent of Lufthansa's paying customers on the Frankfurt – Berlin route were transit passengers. For Airlines such as Germania, which only carry O&D passengers (origin: Frankfurt, destination: Berlin) it is therefore more difficult to reach profitable utilisation rates on this route than for Lufthansa which operates this route as part of its network.
- Lufthansa has an extensive network of German, European and international flight connections which has been further extended through its membership in the Star Alliance. Before Germania's market entry, Deutsche BA was Lufthansa's only competitor in the German domestic air traffic market. All other airlines of any significance either cooperate with Lufthansa or have meanwhile become Lufthansa affiliates, as in the case of Eurowings.
- In terms of reputation among business travellers Lufthansa enjoys an enormous advantage over Germania which so far has only offered charter flights.

- Lufthansa's aircraft seats offer more comfort and legroom.
- Lufthansa has established customer relations with companies over several decades: Almost 90 per cent of the German top 100 companies and almost half of all Western European top 500 companies use the business travel management services of the Lufthansa subsidiary AirPlus. In addition Lufthansa has tied business travellers from many companies through so-called "company promotion models" ("*Firmenfördermodelle*", cf. excerpts from Lufthansa Corporate Flyway, annex folder, Annex 6).

Considering these together with Lufthansa's other advantages (catering, frequent flier programme, frequency density), Lufthansa's flight price must exceed that of Germania considerably in order to represent a comparable offer in terms of price-performance ratio. Despite all the problems which arise in trying to express Lufthansa's additional services in monetary terms, and allowing for an appropriate security margin, the Decision Division is convinced that a minimum price difference of € 35 is necessary.

6. Irrespective of the (open) question whether, on balance, Lufthansa made profits or losses on the Berlin-Frankfurt route in 2001, its new budget tariff of € 105 does not cover its average costs per paying customer.
  - a) A single flight between Frankfurt and Berlin (both directions – vv) at an average price of € 105.21 after deduction of passenger fees amounting to an average sum of € 24.71 (Annex, page 293) yields an income of € 80.50 (DM 157.44) for Lufthansa. The commission fee amounting to [...] per cent is calculated by Lufthansa on the basis of the flight price including passenger fees; it amounts to € [...] (DM [...]). After deduction of 16 % VAT (€ [...] or DM [...]) Lufthansa's remaining proceeds per flight and paying customer amount to € [...] (DM [...]).
  - b) Lufthansa's so-called "route results calculation" ("*Streckenergebnisrechnung*", SER) for 2000 (Annex, page 100-103, the most recent SER for 2001 is not yet available) shows total costs of DM [...] (line „Vollkosten onb“, Annex, page 102). Of these, DM [...] were accounted for by variable costs (sum of lines "BAK TTL" and "FAK TTL", Annex, page 102). After deduction of passenger fees (line "Fluggastgebühren": DM [...] million) for 2000 on this route with [...] paying passengers (line "Zg. TTL credited", Annex, page 100) the average costs per paying customer are DM [...] (€ [...]). In its route results calculation Lufthansa itself states its direct costs per paying customer as DM [...] (line "dir kst/Zg", Annex, page 103).

In 2000 these average figures were based on a seat load factor of [...] %. An increase of this load factor by 1 % requires a passenger increase by [...] paying customers/year and, ceteris paribus, results in a reduction of the average costs per paying customer by € [...] (DM [...]).

Lufthansa's normal, flexible economy tariff is calculated in such a way that it "subsidises" Lufthansa's budget tariffs which, due to their restrictive conditions, serve to improve utilisation by attracting leisure travellers. To these customers particularly the price is relevant which therefore has to be kept at a low level. Without the M-Fly-OW tariff the majority of business travellers using it would use the normal economy tariff. This is another reason why, in view of the price difference vis-à-vis the normal economy tariff, the M-Fly-OW tariff cannot cover the average costs per paying customer. After all, the normal, flexible economy and business tariffs are the main source of revenue for every airline with flexible yield management, just as for Lufthansa.

7. By letter of 16 November 2001 the Decision Division gave Lufthansa an opportunity to either comment on the abuse accusation or discontinue the abuse. By letter of 21 January 2002 it informed Lufthansa of its intention to prohibit the conduct objected to (Annex, p. 75 ff, 149 ff). By letters of 23 November 2001, 3 February 2002 and 15 February 2002 Lufthansa commented on this (Annex, p. 98 ff, 292 ff,

343 ff). On 23 January 2002 a meeting with Lufthansa took place at the Bundeskartellamt during which measures to stop the abuse of a dominant position alleged by the Bundeskartellamt were discussed (Annex, p. 192 ff). The Decision Division rejected a settlement proposed by Lufthansa since in its view this would not have removed the alleged abuse (Annex, page 205 f.)

By facsimile of 30 January 2002 Lufthansa declared its agreement to a decision without oral hearing (Section 56 (3) ARC) (Annex, p. 225).

## B.

By charging flight tariffs which are not at least € 35 above the price charged by Germania at comparable conditions, Lufthansa abuses its dominant position on the Berlin-Frankfurt route by restricting Germania's opportunity to compete, thus substantially affecting competition in the market concerned without any objective justification (Section 19 (1), (4) sentence 1 no.1 ARC).

1. Flights between Frankfurt and Berlin constitute a separate product market. Time-sensitive business travellers in any case, which are mainly affected by Lufthansa's conduct in question, cannot substitute air transport by other means of transport such as car or rail (cf. Federal Court of Justice, decision of 22 July 1999, WuW/E DE/R 375, 376 "Flugpreisspaltung" (flight price discrimination)). Even if rail transport were taken into account, the market volume, which most recently amounted to [...] paying passengers (Lufthansa being the sole supplier), would merely increase by clearly less than 100,000 passengers who, according to information provided by DB AG on 17 January 2001, used first-class "Sprinter" train services between Berlin and Frankfurt (number of passengers travelling in second class: clearly less than 300,000; the exact numbers are DB AG's business secrets, cf. folder "business secrets" which cannot be made available to Lufthansa). Since Germania currently conveys not more than 10 per cent of all passengers using flights between Frankfurt and Berlin, Lufthansa's overall market share - with a market volume increased to [...] million and a share of flight passengers of merely [...] % - is still [...] %. In view of its superior resources in comparison to Germania, Lufthansa is still dominant on this flight route today within the meaning of Section 19 (2) no. 1 of the ARC. In terms of passengers conveyed, Lufthansa's 2000 share in the overall German domestic air traffic market was about [...] % . Lufthansa is thus dominant also from this point of view (Bundeskartellamt decision of 19 September 2001, WuW/E DE-V 483 "Lufthansa/Eurowings").
2. In the Decision Division's view, Lufthansa's reaction to Germania's market entry on the Frankfurt-Berlin route, i.e. the introduction of the € 100 tariff and the M-Fly-OW tariff, constitutes a cut-price predatory behaviour. This cut price is intended and suitable to impede Germania's opportunities to compete and to force it from this route.
  - a) The term 'predatory behaviour' refers to aggressive market behaviour (e.g. price dumping, capacity increase, supply extension) by dominant companies for the purpose of eliminating or disciplining competitors or deterring them from entering into the market.

Predatory competition as a rule requires market dominance associated with great financial strength. For the dominant company it is a rational strategy to squeeze new entrants out of the market, discipline existing competitors or deter third companies from entering the market (immediately or in future). Generally predatory pricing occurs where companies temporarily forgo possible gains or accept losses which are subsequently (over)compensated once the new entrant has left the market (recoupment, price reversal rule). The main problem in establishing whether a predatory strategy exists is to draw the line between normal, admissible competitive behaviour (meeting the competition) and inadmissible exertion of market power or abuse of a dominant position.

In view of the positive effects of market entries on competition and consumers the US Antitrust Division, for example, is careful to ensure that market entries are not prevented by anti-competitive behaviour on the part of the market leader. Predation is particularly likely to occur in the air traffic sector (cf.: Predation in the Airline Industry. Remarks by Roger W. Fones, Chief Transportation, Energy, and Agricultural Section, Antitrust Division, U.S. Department of Justice, Before the American Bar Association, Forum on Air and Space Law, Seattle, Washington, June 2, 1997, p. 1, 27).<sup>1</sup>

Recently, mainly low-cost carriers offering no-frills services have been the victims of predatory competition, particularly when, as new entrants, they threatened to eliminate so-called hub premiums, i.e. advantages accruing to the dominant company by operating a network (hub and spoke system). Since flight customers have so far mainly profited from the liberalisation of air traffic through the emergence of such low-cost suppliers, there is a substantial competitive interest in such airlines successfully entering the market.

- b) Predatory competition is covered by Section 19 (4) no. 1 of the ARC. Cut prices and low price strategies pursued by dominant companies are readily suitable for impeding third companies' opportunities to compete (cf. Langen/Schultz, KartR (9<sup>th</sup> ed.) Section 19, para. 147). In fact, against the background of high barriers to entry, such strategies can be successfully pursued by financially strong companies (cf. Möschel in Immenga/ Mestmäcker, 3<sup>rd</sup> ed., para. 122 on Section 19 of the ARC). However Section 19 of the ARC does not prohibit any kind of mixed calculation or price competition which may also result in losses incurred by dominant companies (Langen/Schult, loc. cit.). Since Section 19 of the ARC is meant to limit the scope of action of dominant companies if this cannot be ensured any more due to a lack of competitors (as is the case with Lufthansa on the Frankfurt- Berlin route) or lack of effective competition, only an overall appraisal of the conduct in question can reveal whether an abuse within the meaning of Section 19 of the ARC is the case. Here it should be noted that, in principle, the purpose of abuse control under competition law is to protect competition rather than individual suppliers. This, however, does not exclude the possibility that under certain circumstances the protection of both may coincide.
- c) Lufthansa's tariff of € 100 or € 105.21 impedes Germania's opportunities to compete while Germania's market entry has challenged Lufthansa's monopoly position on the Frankfurt-Berlin route. Lufthansa's reaction is seriously threatening Germania's chances to permanently hold its ground on this route. The setting of a flight price of € 105.21 combined with the additional advantages this tariff offers to flight passengers means that Germania's prices are undercut by at least € 35 and that possible losses are accepted. With a flight price of € 105.21 and after deduction of VAT, fees and commission, Lufthansa yields € [...] or DM [...]. Its total costs per paying customer, however, amount to DM [...] (€ [...]), i.e. this price falls well short of the average costs per paying customer (see above, part A, item 6). 6.) In the competition for business travellers Lufthansa uses a frequent flyer programme while Germania has nothing to counter this incentive effect with. In addition Lufthansa introduced the € 100 or € 105.21 tariffs only and specifically on this route and even adapted its tariff conditions to those of Germania, thus deviating from its own system (introduction of a rebooking fee of € 22: no reimbursement for unused tickets). As a low-cost carrier which so far has not offered any regular scheduled flight services or additional services and which has only a third of the frequencies and no frequent flyer programme, Germania can only survive in the market through lower prices (on the function of price as key marketing instrument in the electricity sector cf.: Munich Higher Regional Court, decision of 22 November 2001 – Kart 1/00 – "Stadtwerke Bad Tölz GmbH ./ LkartB Bayern", UA p. 26 f.).

With its flight price of € 105.21 Lufthansa is purposely creating an additional barrier for Germania and other newcomers intending to take up air services on German domestic routes. The only rational explanation for this pricing strategy is that it is an attempt to force Germania from this route and to recoup resulting losses at a later stage by discontinuing this price tariff and resorting to previous

ones. Furthermore and at the same time Lufthansa's strategy is sending a signal to other market participants deterring them from entering the market. New airlines - if they decide to enter the market at all – must expect such a price reaction on the part of Lufthansa and will thus have to calculate considerably higher launching costs or losses.

3. Such conduct by a dominant company is aimed at and suitable for squeezing competitors out of the market.
  - a) The impairment of Germania's opportunities to compete has considerable effects on competition in the market for scheduled flights between Berlin and Frankfurt. After Eurowings' retreat, Lufthansa again held a monopoly position in this market. If it continues its price strategy, Germania is likely to disappear from this route as well. If an established monopolist successfully prevents follow-up competition from a newcomer, this constitutes a substantial impediment of competition in the entire market concerned (cf. also Langen/Schultz, Section 19, para. 135 f.).
  - b) With a price of € 105.21 for a one-way ticket and after deduction of VAT, fees and commissions Lufthansa merely yields € [...] or DM [...] and thus substantially undercuts its average total costs of DM [...] per paying customer. This indicates (incidentally also according to European law) an abuse of its dominant position if this price is part of an overall strategy aimed at eliminating competitors (cf. ECJ, 03.07.1991 „AKZO/Kommission“, Slg. 1991 I, 3359, 3455 para. 71 f.; ECJ, 14.11.1996 „Tetra Pak/Kommission“, Slg. 1996 I, 5987; Langen/Dirksen, Art. 82 EC, para. 181 f.). The Decision Division believes that Lufthansa is pursuing such a strategy. Since, as a rule, the inner motive of the acting person cannot be proven in legally relevant terms, a sufficient criterion for assuming a predatory intention must be that the measure chosen is in principle suitable to result in a predatory effect and that the objective circumstances compel the conclusion that this measure is specifically aimed against the competitor which is to be squeezed out of the market. These preconditions are fulfilled in the present case:
    - Lufthansa introduced the new one-way tariffs only on the route which the new entrant Germania included in its flight schedule. In addition its conditions are aimed at the same passengers (business travellers).
    - Lufthansa's price reduction to the level of the tariff originally calculated by Germania (and claimed by Germania to be cost covering), i.e. € 99, while continuing to offer the same on-board service as before as well as bonus miles, de facto constitutes a substantial undercutting of Germania's flight price. By offering this tariff Lufthansa accepts substantial losses, based on the average costs per paying customer. Moreover the reduction of the normal economy tariff does not serve to improve the load factor by acquiring additional customers as part of yield management because this is already achieved through a number of budget tariffs with restrictive conditions. As the new budget tariff is offered on terms which are also suitable for business travellers – such as the fully flexible economy tariff which is still available – it does not serve the purpose of controlling the load factor or improving revenue. It is to be expected that at least some of the flight passengers who previously booked the normal (full) economy tariff will now choose the new tariff, which will worsen the revenue situation.
    - Lufthansa's introduction of the new budget price is a well-aimed reaction to the competitive initiative taken by Germania. Not only the timing but also the scope of this reaction is clear evidence of this as it is limited to the Berlin-Frankfurt route while the existing tariff structure is maintained on all other domestic routes.

- By nominally adopting a competitive price or by exceeding it only slightly a competitor can also be forced from the market. Being an airline not known for offering scheduled flight services Germania can only win customers via its prices. Even though it cannot be ruled out that the low price also attracts new customers who would not have bought tickets at the tariffs offered so far, it has to be realistically assumed that Germania, in order to obtain an economically viable seat load factor, basically has to win customers who have so far flown with Lufthansa. By offering a price only slightly deviating in nominal terms, also price-conscious customers are deterred from changing. In this respect it is irrelevant whether (nominally) adopting the competitive price alone results in predation. Lufthansa's offer, with the additional services it includes, de facto clearly undercuts the competitive offer. It is therefore very unlikely that Germania will be able on a permanent basis to lure customers away from Lufthansa to the extent required for sustainable cost recovery. Without this prospect of cost recovery a competitor is unlikely to survive in the market after the launch phase.

Germania's booking figures, which after the reintroduction of the original price of € 99 dropped by almost 40 per cent (Annex, p. 207-210, 333-342), confirm the likelihood of a predatory effect at almost equal prices.

- In addition, by its own account, Lufthansa provides a relatively small contingency for the € 100 or € 105 tariff (Lufthansa's brief of 15 February 2002, Annex, p. 346). Even though, in view of Germania's clearly smaller seat capacity, this contingency amounting to just under [...] per cent of Lufthansa's capacity on this route is suitable to appreciably reduce Germania's capacity utilisation rate, Lufthansa could still increase the predatory effect anytime by extending the contingency. It would then, however, have to accept a further decrease in proceeds.
- Lufthansa used the same massive price reduction strategy after the budget airline Go-fly had started operating on the London/Stansted – Munich route and after Ryanair's start on the London/Stansted – Frankfurt and Hamburg routes (Proceedings by the EU Commission: Ref: IV/37829 and IV/37998). On these routes Lufthansa also reacted to the entry of the low-cost carriers by reducing its flight prices, combined with capacity extensions, and by adapting its flight schedules to those of its competitors. On 29 October 1998 Go-fly announced that it would start operating budget flights between London/Stansted and Munich (3 daily flights; lowest price for an outward and return flight: GBP 58). Shortly afterwards Lufthansa applied for slots for three daily flights on this route and started operating its own flights one week after Go-fly had made its announcement and two days before Go-fly actually started its flight operations. Lufthansa's lowest flight price was GBP 55. When Go-fly subsequently introduced a special tariff of GBP 38, Lufthansa reacted with a promotion ticket priced GBP 40 (without restricting the number of seats offered at this tariff). Only when Go-fly returned to its original tariff of GBP 58, Lufthansa again charged at least GBP 55 per flight. For its winter flight schedule Lufthansa reduced its lowest tariff to GBP 29 after Go-fly had lowered its price to GBP 28. After Go-fly had discontinued its flights to Munich in March 2000 due to serious losses, Lufthansa raised its regular flight price for the promotion ticket from GBP 55 to GBP 129.
- On the Munich-Frankfurt route Lufthansa deliberately reduced its prices in the business and economy class after the entry of Deutsche BA on 26 February 1998. When Deutsche BA exited the market on 11 March 1998 Lufthansa raised its prices again step by step on a continual basis.

- The price charged by Lufthansa is also clearly below the level which is analogous to the competitive price for German domestic flights which has developed on routes flown by Lufthansa in competition with the only remaining competitor, Deutsche BA. The price for servicing the Berlin – Munich route can be considered in comparison since it roughly corresponds to the Berlin – Frankfurt route in terms of distance. On this route Lufthansa charges € 441 for an economy-class return ticket (Annex, p. 18 f.) which clearly more than doubles its new (cut) price on the Berlin – Frankfurt route.
- c) There is no objective justification for Deutsche Lufthansa's low price strategy. In the process of weighing up the interests of the participating companies Lufthansa and Germania, the objective of the law, i.e. to ensure freedom of competition, is of major importance (Langen/Schultz, loc.cit., marginal note 138 ff.). By means of its pricing strategy Lufthansa pursues the aim of not losing any customers to Germania as well as preventing an elimination of its monopoly position and the permanent establishment of a new supplier on this route. Germania's interest is to use free capacities by providing a new domestic German flight connection and to create a new offer in the lower price segment on a route which has so far been structured monopolistically and where low prices have so far only been available as "(super-) budget tariffs" under very restrictive conditions. Neither Lufthansa's entrepreneurial goal to maintain its unique position in the market nor the special significance of this route for its Frankfurt hub outweigh a new supplier's interest in taking up a new flight service. Long-term protection of competitive structures means that in the case of market dominance there are still opportunities for a revival of competition and the markets continue to be open to new entries. Lufthansa's present low price strategy not only jeopardises Germania's further existence on the Frankfurt-Berlin route, but also, through its deterrent effect on third parties, the general prospects for additional competition emerging on domestic German routes. In an overall appraisal of all circumstances and taking into account the ARC's objective of ensuring freedom of competition, the weighing up of interests which has to be undertaken turns out to be to the disadvantage of Lufthansa.
4. A minimum price interval in the amount of € 35 is established in para. 1 of the operative provisions within the framework of exercising due discretion. This is a proportionate measure particularly since it is based on a cautious evaluation of the monetary value of the differences between the two airlines' flight offers. It is to be expected that if this minimum price interval is observed the predatory effect will drop to an uncritical level corresponding to the normal competitive pressure. At the same time paragraph 1 sentences 3 and 4 of the operative provisions ensure that despite the price interval requirement Germania will not have a protective wall enabling it to raise its flight price on this route without any competitive pressure after the decision has come into effect. Since according to its own statement Germania can reach the break-even point in competition at a price of € 99, the competitive interest in a minimum interval lessens with increasing prices charged by Germania. The volume of each price increase reduces the distance between Germania's price and Lufthansa's price for flights under the same conditions because Lufthansa's price for a flight under the same conditions does not have to exceed € 134. In view of Lufthansa's abuse through hindrance the decision is thus both necessary and appropriate.

### C.

1. In accordance with Section 36 (2) 1 of the VwVfG (German law on administrative proceedings) the provision's period of validity is limited to 2 years. This is due to the fact that on the one hand competition on the Frankfurt-Berlin/Tegel air traffic route can only be protected by providing the currently sole competitor Germania with the possibility to establish itself in the market permanently and effectively by means of the minimum price interval requirement. On the other hand, however, once the

new competitor has established itself in the market and the predatory effect has thus increasingly been weakened, there will be no need to maintain the price interval requirement any longer.

It has to be noted that since November 2001 Germania has been active as a “newcomer” on the route mentioned above which had previously been flown exclusively by Lufthansa. From the statement of reasons for the Decision Division’s decision in the merger control proceedings B 9 – 62100-U-147/00 (WuW/E DE-V 483 Lufthansa/Eurowings) it has already been known to Lufthansa as a former participating party that in the view of the Decision Division a “newcomer” to the domestic German air traffic market will only be provided with the possibility to establish itself in the market effectively and permanently in circumstances such as in the present case if protection of competition over several years is stipulated and enforced. The Decision Division bases this assumption on information provided by the German Aerospace Centre (DLR), Cologne, which had compiled the relevant data on behalf of the Decision Division within the context of an expert opinion regarding the B 9 – 62100-U-147/00 proceedings mentioned above. Lufthansa has been informed of this expert opinion in the course of the proceedings mentioned above so that a further explanation is not necessary. It is particularly significant in this context that also in the opinion of the DLR protection of competition limited to several years is necessary in cases such as the present one in order to be able to effectively protect competition in the domestic German air traffic market. The Decision Division follows this view.

Conversely, however, the requirement of limited protection of competition means it would be disproportionate to oblige Lufthansa to observe the stipulated price interval requirement for an unlimited period of time. It is to be expected that after a certain period of time Germania will have established itself on the route in question by building up customer loyalty, gaining recognition, making operational procedures more efficient and optimising other competition factors so that protection against predatory competition which is to be achieved by means of the present decision will no longer be necessary, at least not in this form. Against this background and at least from the present point of view an unlimited obligation imposed on Lufthansa to observe a price interval would not be necessary and would therefore have been a disproportionate measure to the disadvantage of Lufthansa. Thus the time limit within the meaning of Section 36 (2) 1 of the VwVfG is a means to moderate the effects of the imposed price interval obligation to the advantage of Lufthansa and thus fulfils the requirements of proportionality and lawfulness of the decision.

As to the length of a time limit, the DLR’s opinion mentioned above generally assumes a three-year period of protection. In the above B 9 – 62100-U-147/00 proceedings the Decision Division also started from this assumption. In the present case it has to be taken into account, however, that Germania has already been active on this route for about four months and therefore already possesses a certain market share. Furthermore Germania has already been able to influence certain competition factors to its advantage although it still has to be considered a “newcomer”. A time limit of two years thus appears to be appropriate against the background of a comparatively long-lasting commitment by Lufthansa to observe the price interval requirement.

2. With regard to the reservation of withdrawal within the meaning of Section 36 (2) no. 3 of the VwVfG it has to be stated first of all that on the whole the present decision not only results in an immediate negative effect to the disadvantage of Lufthansa, but also at least indirectly in a positive effect to the advantage of Germania. If Lufthansa observes the stipulated price interval this will noticeably improve Germania’s competitive situation as compared to the time before the decision was issued. In competing with Lufthansa on this route Germania is no longer exposed to the overpowering price pressure exerted by Lufthansa so far. The present decision is thus an administrative act with third-party effect or double effect (cf. e.g. Kopp/Ramsauer, *Kommentar zum VwVfG*, 7<sup>th</sup> edition, Munich, 2000, Section 49 VwVfG, marginal note 1, Section 48 VwVfG, marginal note 68 ff., 72).

Due to the fast and profound changes which, as experience has shown, can occur in the air traffic market it cannot generally be excluded at this point that it could become necessary in the future to withdraw this decision. However, a withdrawal of a decision - also of a favourable one - can only be considered under certain preconditions which are conclusively listed in Section 49 (2) of the VwVfG (thus also in Kopp/Ramsauer, loc.cit., Section 49 of the VwVfG, marginal note 26). Although these preconditions include subsequent changes of the facts which are relevant for the decision (Section 49 (2) sentence 1 no. 3 of the VwVfG) the possibility to withdraw a decision is subject to the restrictive precondition that without the withdrawal public interest would actually be at risk (cf. Kopp/Ramsauer, loc.cit., Section 49 of the VwVfG, marginal note 48). At the moment it cannot be assessed with any certainty whether a sufficiently concrete risk to public interest can be established in each case in which the Decision Division perceives an objective necessity for withdrawal of the decision in question, possibly also in order to regulate the matter differently by means of a new decision. Therefore, at least theoretically it cannot be excluded that market conditions can change profoundly at short notice on the Berlin/Tegel – Frankfurt route or in the entire domestic German air traffic market so that the restriction of Lufthansa's scope of action here imposed would no longer be adequate. If in this case the Decision Division were only able to resort to the reason for withdrawal under Section 49 (2) sentence 1 no.3 of the VwVfG there would be the threat of a delay due to a possible legal dispute with Germania as indirect beneficiary of the decision about the factual preconditions of this reason for withdrawal. The sole possibility of resorting to Section 49 (2) sentence 1 no.3 of the VwVfG for a withdrawal of the decision therefore appears to be too narrow for reasons of proportionality vis-à-vis Lufthansa.

Section 36 (2) of the VwVfG provides the Decision Division with the possibility to issue a reservation of withdrawal in the case of a discretionary decision, such as the one under Section 32 of the ARC in the present case. As a rule a reservation of withdrawal is definitely admissible in such cases. The Decision Division considers the reservation of withdrawal in the present case to be necessary in exercising due discretion, not solely in order to meet the requirements of competition – and also Lufthansa's requirements – for an adequate and fast reaction by the Decision Division in the case of changed circumstances (also circumstances of the type described above under Section 49 (2) sentence 1 no. 3 of the VwVfG) without having to resort to Section 49 (2) sentence 1 no. 3 of the VwVfG. In addition to this the Decision Division assumes that the reservation of withdrawal will turn out to be favourable for Lufthansa above all as the withdrawal of the decision, which would easily be possible due to the reservation, would involve the elimination of the price interval requirement. Lufthansa would thus be treated more favourably than without an express reservation of withdrawal by the Decision Division. The effects of the decision which Lufthansa considers to be unfavourable will thus be reduced. On the other hand, against the background that a legal and administrative practice to the disadvantage of Germania does not (yet) exist, it seems to be proportionate and reasonable if a withdrawal of the decision, which is at least indirectly favourable, is reserved. In this context the Decision Division is also fully aware that the reservation of withdrawal also includes the possibility of a partial withdrawal of the decision, e.g. of the stipulated time limit (cf. e.g. Kopp/Ramsauer, loc.cit., Section 36 no. 23 f. of the VwVfG) and that this constitutes a negative effect of the reservation of withdrawal to the disadvantage of Lufthansa. However, against the background of the above considerations this appears to be reasonable and proportionate, particularly because in an overall appraisal the reservation's favourable effect to the advantage of Lufthansa outweighs its negative effect.

3. Finally it should be noted that a combination of various ancillary provisions within the meaning of Section 36 (2) of the VwVfG – such as a time limit and a reservation of withdrawal – are definitely admissible within the context of a decision provided that these are unopposed as in the present case (cf. Kopp/Ramsauer, loc.cit., Section 36 of the VwVfG, marginal note 11).

#### D.

The order of immediate enforcement of this decision is admissible in compliance with Section 65 (1) and (2) of the ARC, in conjunction with Section 64 (1) 2 of the ARC. The order of immediate enforcement of the decision is required by the public interest. This public interest exceeds the interest which justifies the order as such. This is the result of weighing up the aspects in favour of immediate enforcement against Lufthansa's interests.

In weighing up the interests of the parties concerned the Decision Division firstly takes into account that it is to be concluded from the wording of Section 65(3) sentence 1 no. 3 of the ARC that the Act provides the competition authority with greater scope in the area of competition law to order immediate enforcement than is provided by Section 80(2) no. 4 of the Rules of the Administrative Courts ("Verwaltungsgerichtsordnung", VWGO). As Section 65(3) sentence 1 no. 3 of the ARC states the party concerned (in this case Lufthansa) must accept disadvantages arising from an order of immediate enforcement required by the public interest to such an extent where the order "would result ... in undue hardship" (cf. e.g. Kollmorgen in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, volume 1, 9<sup>th</sup> edition, Neuwied, 2001, Section 65 ARC, marginal note 4).

Secondly, the Decision Division is aware that this process of weighing up interests is not guided by a general principle stating that in the area of competition law the public interest in maintaining competition always overrides the interests of the companies concerned (opinion shared by Kollmorgen in Langen/Bunte, loc.cit., Article 65 ARC, marginal note 7). In weighing up the interests of the parties concerned it must in fact be noted that in accordance with the wording of the Act the suspensive effect is the rule in cases covered by Section 65(1) whereas immediate enforcement is the exception (cf. the references to case-law by Schmidt in Immenga/Mestmäcker, Kommentar zum GWB, 3rd edition, Munich, 2001, Section 65 ARC, marginal note 7). The assumption of an overriding public interest thus involves strict requirements. A particular public interest is required which is directed at the future; immediate enforcement must be the specific object of this public interest and it must be of considerable importance (cf. the references to case-law by Schmidt in Immenga/Mestmäcker, loc.cit., Section 65 ARC, marginal note 6). In particular there must be reasons which justify an enforcement of the order prior to final legal review (opinion shared by Kollmorgen in Langen/Bunte, loc.cit., Section 65 ARC, marginal note 5 with further references to case-law).

In this context it is acknowledged that a public interest which is aimed at maintaining competitive structures can justify an order of immediate enforcement. According to the relevant case-law an order of immediate enforcement can generally be justified by threats to a "sound" market structure within the meaning of the ARC (cf. the references to case-law by Kollmorgen in Langen/Bunte, loc.cit., Section 65 ARC, marginal note 5). The Bundeskartellamt's task, pursuant to the ARC, to keep markets open can thus override a company's interest in pursuing its market strategies (cf. Schmidt in Immenga/Mestmäcker, loc.cit., Section 65 ARC, marginal note 7).

Against this background the public interest in immediate enforcement of the decision in the present case arises from the importance of this measure for the workings of the economy. The order to immediately enforce the decision is necessary in order to effectively enforce the public interest in maintaining the newly developed competition. As stated above, Germaniia's booking figures have considerably dropped since Lufthansa started its abusive pricing practices. For this reason Germaniia is incurring economic losses due to maintaining flight operations which are currently not cost-effective. These are not typical start-up losses which can generally arise when a newcomer enters a certain market, but permanent ones which are due to Lufthansa's abusive conduct. The fact that Germaniia has so far been able to stay in the market in spite of the small price difference is because it continues to operate in view of the present proceedings and in the expectation that Lufthansa will be prohibited from continuing its

abusive conduct by a decision which will be immediately enforceable. According to the Decision Division's investigations Germania will thus only be able to sustain its loss-making market presence for a short period. There is therefore not only the acute and definite danger of Germania being forced for economic reasons to withdraw from the relevant market very soon – or in any case long before a final court decision will be issued on the merits of the case - if Lufthansa maintains its price which the Decision Division considers to be abusive. In view of Germania's losses incurred by Lufthansa's abusive conduct one must rather assume with certainty that Germania will very soon withdraw from the route in question if the present decision cannot be enforced immediately.

The threat of Germania being squeezed out of the Frankfurt – Berlin/Tegel route can thus only be countered if Lufthansa's current abusive pricing strategy is immediately prohibited, i.e. before an appeal which Lufthansa can be expected to file is granted suspensive effect. Only an immediate enforcement of the decision can enable Germania, which is currently the only competitor on the relevant route in this case, to continue operations without having to accept considerable losses, and thus to continue its operations on a long-term basis at all. Only in this way can existing competition be protected in the public interest. Moreover, against this background the order of immediate enforcement cannot be avoided by advising Germania that damages could be claimed against Lufthansa subsequently, i.e. that the concrete damage caused by Lufthansa could possibly be compensated for economically. Such a measure could merely safeguard the economic interests of a company affected, but not maintain and protect existing competition as such. However, it is not the primary task of the Decision Division to favour individual competitors, but to effectively protect existing competition, even if this ultimately involves protecting the only existing competitor.

Furthermore it has to be considered that it would not easily be possible for Germania to re-enter the market after a withdrawal. As a precondition Germania would require the provision of sufficient and suitable slots. In view of the well-known congestion at Frankfurt/Main Airport this is very doubtful. Germania is currently able to use slots which have become temporarily available due to the general decline in air traffic (particularly on the transatlantic route as a reaction to the events of 11 September 2001), but to which their previous owners are still entitled in view of future requirements according to the so-called grandfather rule. In addition Germania (or other new operators) can use slots at Frankfurt/Main Airport which Lufthansa has to give up in fulfilment of a condition imposed in the Bundeskartellamt's clearance decision in the Lufthansa/Eurowings case (*loc.cit.*). Once these slots have been allocated to third parties after Germania's exit (even if only temporary) a new start-up of a flight connection from and to Frankfurt/Main is almost impossible.

However the order of immediate enforcement is necessary for another reason. Were Lufthansa's expected appeal to be granted suspensive effect, this would result, as already emphasized, in Germania being excluded from the Frankfurt – Berlin/Tegel route for economic reasons at least until a final decision had been made in the main issue by the court. Apart from the effects on Lufthansa's only current competitor as already illustrated this would also have a considerable deterrent effect on its other potential competitors, not only on the Frankfurt-Berlin/Tegel route but on all other German domestic routes where Lufthansa is still dominant. In this case this would give rise, justifiably, to the impression among these competitors that Germania's exclusion from this route as a result of the suspensive effect of the appeal is evidence that Lufthansa, at least for the time being, can successfully keep any other unwelcome rival from every other domestic German route. In other words further potential competitors of Lufthansa will not even attempt a market entry on other routes or even on the relevant route in this case if Lufthansa succeeds, ultimately by making use of the suspensive effect of its appeal, in excluding Germania from the market and consequently from competition, at least for an interim period until a legally binding court ruling is effected. As a result the emergence of further competition on the busiest domestic air route in Germany would be blocked for years. Irrespective of Germania's concrete exclusion from the market this would also have a general effect on competition,

a situation which the ARC aims to prevent by protecting competition in general, which in itself justifies the order of immediate enforcement.

In addition in weighing up the interests concerned the decision division also took into consideration the requirements of Section 65 (3) ARC which can lead to restoration of the suspensive effect of the appeal. Here the presumed outcome of the appeal proceedings should be taken into account (cf Schmidt in Immenga/Mestmäcker, loc. cit., Section 65 ARC, marginal note 7). As there are no serious doubts in this case as to the legality of the appealed decision, this did not stand in the way of the order of immediate enforcement. In particular, however, in the case at hand no undue hardship is to be expected for Lufthansa which is demanded by prevailing public interests (cf. Section 65 (3) sentence 1 (3) ARC). Lufthansa is neither generally prohibited from for operating services on the route concerned nor is its price structure in any way fundamentally regulated. The decision is ultimately merely directed against one of a total of eleven tariffs offered on this route by Lufthansa. Furthermore the decision only restricts Lufthansa on this and no other route. In this particular case the decision's only ultimate purpose is to ensure that Lufthansa may not squeeze Germania out of the relevant market until conclusive judicial clarification of the legality of this decision. It is intended to prevent Lufthansa from creating a *fait accompli* prior to final judicial clarification and causing irreparable damage to competition in domestic German air traffic. Against this background the assumption of undue, unjustified hardship to Lufthansa's detriment can be ruled out in the case at hand.

Finally the guarantee of legal recourse laid down in Art. 19 (4) of the Basic Law, which also incorporates the guarantee of effective legal protection, does not stand in the way of the order of immediate enforcement in general (cf references to case law by Kollmorgen in Lange/Bunte, loc. cit. Section 75 ARC, marginal note 7) and in this specific case. Although the judicial control of administrative decisions prior to their enforcement is the rule and the order of immediate enforcement the exception, the order of immediate enforcement demanded by public interest cannot be dispensed with for the reasons mentioned above. In conclusion the order of immediate enforcement is thereby legitimate.

### **Instruction of rights of appeal**

This decision may be appealed against. It should be filed with the Bundeskartellamt, Kaiser-Friedrich-Straße 16, 53113 Bonn within one month upon service of the decision. However, receipt of the appeal by the appellate court, the Düsseldorf Higher Regional Court, within the time limit shall be sufficient.

The appeal shall include a statement of reasons. The time limit for filing the statement of reasons is one month. It shall begin upon the filing of the appeal and may, upon application, be extended by the presiding judge of the appellate court. The statement of reasons must state the extent to which the decision is being appealed and its modification or revocation sought and indicate the facts and evidence on which the appeal is based.

The appeal and the statement of reasons for the appeal shall be signed by a lawyer admitted to practise before a German court.

The appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal.

Dr. Ruppelt

Schulze

Wagner

1. Fones, p.21:...the structure of the airline industry is conducive to successful predation strategies...).

## JAPAN

### 2. Introduction

Predatory conduct can be divided into two types, predatory pricing and non-price predatory conduct. In applying the Antimonopoly Act of Japan, a typical example of predatory pricing is “unjust low price sales”, one of the unfair trade practices as stipulated in Section 19 of the Antimonopoly Act. A typical non-price predatory conduct is “interference with a competitor’s transaction”, one of the unfair trade practices.

Both cases may come under “private monopolization,” as stipulated in Section 3 of the Antimonopoly Act when conducts fall under “restricting competition substantially in any particular field of trade,” which is a severer requirement than unfair trade practices. Administrative action necessary to eliminate conduct of violation will be ordered against a predatory conduct which falls under “private monopolization”. Criminal penalties may also be imposed.

When a conduct designated by the JFTC impedes fair competition, if not to the extent of substantial restriction of competition, the conduct will be subject to an elimination measure as an unfair trade practice.

In the following, the Fair Trade Commission’s approach to predatory conduct under the Antimonopoly Act and examples of such conduct are described from the perspective of private monopolization and unfair trade practices.

### 2. Approach to Predatory Acts under the Antimonopoly Act

#### 2.1 *Private Monopolization*

The Antimonopoly Act prohibits entrepreneurs, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, from excluding or controlling the business activities of other entrepreneurs, thereby substantially restricting, contrary to the public interest, competition in any particular field of trade (Section 2, paragraph 5, and Section 3 of the Antimonopoly Act) through “private monopolization.” “Substantially restricting competition” means “bringing about a state in which competition itself has significantly decreased, and a situation has been created in which a specific entrepreneur or group of entrepreneurs can control the market by determining price, quality, volume and various other conditions with some latitude at its or their own volition.” The conduct of “exclusion” is that which makes other entrepreneurs’ activities difficult to continue or discourages new entry; it is not a state itself of being excluded but some artificial conduct that brings about such a state. Typical means of hindering a rival entrepreneur’s activities include selling below cost, regional discriminatory pricing, and dealing on exclusive terms which inhibit raw material suppliers, distributors and the like from dealing with competitors. In case of private monopolization, an administrative action necessary to eliminate conduct of violation will be ordered. Furthermore, criminal penalties may be imposed.

#### 2.2 *Unfair Trade Practices*

Section 19 of the Antimonopoly Act prohibits conduct likely to adversely affect fair competition as “unfair trade practices,”<sup>1</sup> and the Fair Trade Commission (hereinafter the “JFTC”) is able to order administrative measures required against any conduct in violation of this Section. Concretely, conduct

leading to the exclusion of rival entrepreneurs by unfair means (hereinafter “predatory conduct”) include the following:

### *2.2.1 Unjust low price sales*

Predatory pricing that tends to cause difficulties to the business activities of other entrepreneurs, by continuously supplying a commodity or service at a price which is excessively below cost incurred in the said supply without proper justification, or otherwise by unjustly supplying a commodity or service at a low price, comes under “unjust low price sales” in paragraph 6 of “general designations” of “Unfair Trade Practices.” For an entrepreneur to acquire customers by working to reduce costs and selling at lower prices than other entrepreneurs is considered proper competition and does not fall foul of competition law; however, to deprive customers of other entrepreneurs by pricing in disregard to profitability is not normal competitive behaviour.

Regarding unjust low price sales, in November 1984 the JFTC published “The Approach of the Antimonopoly Act to Unjust Low Price Sales (Guidelines Concerning Unfair Price Cutting).” The publication clearly states the objective of regulating unjust low price sales and provides application guidelines for those cases falling under unjust low price sales.

Three requirements have to be met for conduct to be judged unjust low price sales, i.e., (1) supplying commodities or services at markedly lower prices than the cost of supply; (2) continuing such supply; and (3) tending to cause difficulties to the business activities of other entrepreneurs. The prices in (1) mean those far lower than the gross cost of sales. In normal retail trade, these are generally prices that are lower than purchase prices. Regarding (2), if the conduct is done for a short period or as a single conduct, it will have less influence on competition, generally those conducts that continue considerably long period fall under unjust low price sales. so the conduct must continue for a considerably long period in order to meet the requirement.

As mentioned above, continuous selling below the purchase price is a typical case of unjust low price sales. In view of the characteristics of commodities or the purpose and effect of unjust low price sales, selling at slightly above the purchase price or a single conduct of unjust low price sales could be regarded as a problem. This is because some cases that do not meet the requirements of (1) and (2) may still be likely to impede fair competition.

The result of a conduct falling under (3) is required. This requirement does not mean that retailers who handle commodities subjected to unjust low price sales find that their business has caused difficulties as a result; the intent is to include cases where such a result is likely to arise in consideration of the various circumstances.

Any conduct that meets the above requirements is prohibited in principle as an unjust low price sale. Nevertheless, if there is proper justification objectively, the conduct does not fall under unjust low price sales. A good example is selling commodities at marked-down prices, such as perishable food which could deteriorate quickly.

Regarding the distribution of liquors and gasoline, for which licensing regulations are gradually being eased, the JFTC has clearly stated the viewpoint of the Antimonopoly Act through the following publications in order to maintain fair competition in the markets after deregulation: “Approach to Unjust Low Price Sales and Discriminative Pricing in the Distribution of Liquors” (November 2000), “Clarification of the View on Unfair Low Price Sales of Liquors” (April 2001), and “Approach to Unjust Low Price Sales and Discriminative Pricing in the Distribution of Gasoline, etc.” (December 2001).

### 2.2.2 *Interference with Competitors' Transactions*

Some non-price “predatory conduct” can fall under “unfair trade practices.” For instance, among unfair trade practices, interfering with the purchase prices of competing retailers to increase costs and unreasonably hindering parallel importing may come under “interference with a competitor’s transaction.” Regardless of whether such interference is done by preventing a contract from being signed, inducing non-fulfilment of a contract or any other way, a conduct that unreasonably interferes with a competitor’s transactions may be subject to regulation under the Antimonopoly Act.

## 3. **Major Cases of Predatory Acts under the Antimonopoly Act**

### 3.1 *Private Monopolization*

#### 3.1.1 *1998 (Decision) No. 2, the Case against the Hokkaido Shimbun Press Co., Ltd.*

Hokkaido Shimbun Press Co., Ltd. substantially restricted competition in the field of general daily newspaper publishing in the Hakodate area by preventing the entry of Hakodate Shimbun-sha Co., Ltd. (hereinafter “Hakoshinsha”) and excluding its activities by a series of such conduct as:

- i. filing applications for trademark registrations of newspaper title lettering considered to be used by Hakoshinsha;
- ii. influencing news agencies to prevent them from signing news distribution contracts with Hakoshinsha; and
- iii. hindering the advertising canvassing activities of Hakoshinsha by setting much lower advertising rates for small and medium size businesses, which were the targets of Hakoshinsha’s advertising canvassing.

In this case, the conduct of i), ii) and iii), among others, led to much higher entry costs for Hakoshinsha and excluded its activities.

#### 3.2 *1998 (Recommendation) No. 3, the Case against Paramount Bed Co., Ltd.*

For medical beds ordered by the Tokyo Metropolitan Government Bureau of Finance through designated competitive bidding, Paramount Bed Co. substantially restricted competition in the trade field of its beds by:

- i. arranging tenders such that only the company’s beds could be supplied, in order to exclude competitors, and
- ii. instructing bid prices to distributors who would participate in tenders and controlling the distributors’ activities.

In this case, the conduct of i) greatly increased the costs for the distributors and excluded their activities.

#### C. *2004 (Recommendation) No. 26, the Case against Yusen Broad Networks Co., Ltd. and Nihon Network Vision Co., Ltd.*

Since August 2003, Yusen Broad Networks Co., Ltd. and Nihon Network Vision Co., Ltd. (hereinafter “the two companies”) focused on poaching customers from Can System Co., Ltd., their only major competitor, by successively running campaigns and the like. For example, during the campaign period, a monthly listener’s fee of less than 3,675 Japanese yen, or no monthly listener’s fee for more than

three months including the month in which a tuner was installed, was offered only to customers of Can System on condition of switching contracts<sup>2</sup>.

By such conduct, the two companies conspired to substantially restrict competition in the trade field of music broadcast for service establishments<sup>3</sup> in Japan. In this case, as a result of poaching customers from Can System by such conduct, the two companies excluded Can System's activities.

### **3.3 *Unfair Trade Practices***

#### **3.3.1 *Unjust low price sales***

The Case against Yamada Denki Co., Ltd. (November 22, 2003, Warning)

In seven stores mainly in the Kanto district, Yamada Denki Co., Ltd. continuously sold colour television sets, personal computers and refrigerators at prices markedly lower than the cost of supplying the commodities, that is, the amount after deducting a cash value equivalent to the number of points issued to each consumer upon purchasing an article from the selling price of the article was substantially lower than the purchase price, thereby causing difficulties to the activities of electric home appliance retailers located nearby.

#### **3.3.2 *Impediment of Transactions***

2004 (Recommendation) No. 1, the Case against Tokyu Parking Systems Co., Ltd.

In supplying parts to be used exclusively for the maintenance of mechanical parking devices manufactured by Tokyu Car Corp. to other independent maintenance contractors who maintained the parking devices, Tokyu Parking Systems Co., Ltd. unjustly interfered with maintenance service transactions between the independent maintenance contractors and the proprietary company, the owner of the devices and the like by:

- i. delaying shipments although the company had enough parts in stock to ship without delay; and
- ii. without proper reason, selling at markedly higher prices than those for the parking device management contractor, the owner and the like with whom the company itself or Tokyu Car Corp. had maintenance contracts, or selling a minimum quantity the company could order from a parts manufacturer when newly commissioning the manufacturer as the unit.

In this case, hindering the supply of parts needed by the rival company substantially increased its costs, thus excluding its activities.

## **4. Conclusion**

In "unjust low price sales" cases, which are typical instances of predatory pricing among predatory conduct, the JFTC receives and appropriately handles various complaints. As for those cases that are deemed to substantially restrict competition, the JFTC takes actions against "private monopolization" as required.

In the field of public services into which competition has been introduced by deregulation, and in fields where technical standards have been established due to external network reasons, existing entrepreneurs tend to exclude other entrepreneurs' activities or new entry by using the essential facilities they possess. Such conduct need to be dealt with promptly and efficiently. The JFTC is addressing such conduct by strictly implementing the provisions of the Antimonopoly Act now in force.

Predatory conduct tending to cause difficulties to the business activities of other entrepreneurs and new entry, or those that impede fair competition are violations of the Antimonopoly Act. The Antimonopoly Act must be strictly enforced, particularly against malicious predatory conduct such as substantially restricting

## NOTES

1. As for unfair trade practices, of the acts listed in the subparagraphs of Paragraph 9, Section 2, the Antimonopoly Act stipulates that unfair trade practices include (1) acts tending to impede fair competition and (2) acts designated as such by the Fair Trade Commission. In accordance with this, the JFTC has prescribed “unfair trade practices” applicable to all activities (general designations) and a certain number of special designations applicable only to specific activities, and applies the Law accordingly.

The subparagraphs of Paragraph 9, Section 2, stipulate six modes of acts: 1/ unjustly discriminating against other entrepreneurs; 2/ dealing at unjust prices; 3/ unjustly inducing or coercing customers of competitors to deal with oneself; 4/ dealing with another party on such terms as will restrict unjustly the business activities of the said party; 5/ dealing with another party by unjust use of one’s bargaining position; and 6/ unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which one is a shareholder or an officer, and his other transacting party, or in case said entrepreneur is a company, unjustly inducing, instigating or coercing a shareholder or an officer of said company to act against the interest of said company.

2. A replacement subscription contract on music broadcast to be concluded with a customer who has previously signed a subscription contract with another entrepreneur.
3. Commercial establishments such as stores and lodging facilities.

## KOREA

### 1. Korea's Regulation Concerned

The Monopoly Regulation and Fair Trade Act stipulates any activity unduly excludes competitors as one type of unfair trade practices. Under its provisions, undue discount sales and undue high-price purchase are specified as exclusion of competitors. Between these two types, most legal cases so far have been dealt with the case of undue discount sales. This can be translated that the law enforcement to date has been focused on regulation against such behaviour.

Undue discount sales under the MRFTA are largely classified into that on the maintenance sales and that on the other types of transaction. Undue discount sales on the maintenance sales are handled with per se illegal as far as there is no appropriate reason. Other undue sales activities, such as one-time discount sales are reviewed in accordance with the rule of reason. In the past, the undue discount sales had been classified into that on the maintenance sales and that on the long-term transactions. However, with growing frequency of one-time discount sales, the scope of application has been expanded even though such behaviour is not carried out on a continuous basis (Amendment in April 1994).

However, when the market dominant business sells any goods and services at unduly discounted price, it is regulated as abusive behaviour of market dominant position, rather than applying provisions related to unfair trade practices. In other words, undue discount sales of market dominant business are regulated under Article 3-2 (Prohibition Against Abuse of Market Dominant Positions) of the MRFTA, while that done by other businesses are applied with Article 23 (Prohibition on Unfair Business Practices). However, under the MRFTA, undue discount sales of market dominant business shall be more strictly controlled.

#### Provisions related to Predatory Pricing

Type	Provisions	Articles
Undue discount sales on maintenance sales by general businesses	Activities, which are likely to exclude competitors by continuously providing goods and services at much lower prices than their costs, without any justifiable reason.	Article 23 of the MRFTA
Undue discount sales on other transactions by general businesses	Activities, which are likely to exclude competitors by providing goods and services at unreasonably low prices.	Article 23 of the MRFTA
Undue discount sales of market dominant business	Activities, which are likely to exclude their competitors by providing goods and services at lower prices than ordinary prices.	Article 3-2 of the MRFTA

## **2. Predatory Pricing**

### **2.1 *Plausibility***

Predatory pricing claim can be considered plausible by reviewing the discount sales period, whether it is discount sales or not, whether there is any concern to exclude competitors, and any justifiable reason. Among these things, general conditions for predatory pricing will be first explained here.

First, the discount sales period means the period during which certain businesses repeatedly sell goods and services at unreasonably lower prices for a certain period of time. Or at least, there should be any probability of such behaviour for a while. It doesn't mean that the discount sales should be done on a daily basis. Even though it is done in a short period, if repeated, it can be regarded as predatory pricing. In addition, although not done continuously, when the businesses reduce the prices so much that their competitors see any damage, it can be seen as predatory pricing as well.

Second, competitors in this context refer to those under the competitive relations as well as any potential competitors estimated to enter the market concerned. Any possibility of excluding competitor is acknowledged when there lie any abstract risks to trigger such exclusion. In other words, to review whether there is such concern, businesses do not need to, in effect, exclude their competitors. In addition, in the relationship with trading partners, dominant position is not considered while market share and capital base are taken into account to determine any possibility to exclude competitors.

Market definition in undue discount sales does not cover the overall business activities of competitors affected by discount sales. Rather, it is confined to business activities related to goods and services sold at such unreasonably low prices.

### **2.2 *Appropriate Measure of Cost***

#### **2.2.1 *General Conditions***

The MRFTA stipulates the criteria for discount sales depending on the types of undue discount sales. Discount sales on the maintenance sales are stipulated as "the much lower price than the cost for the supply of goods or services concerned". There are various views on the definition of "the cost for the supply": total sales cost (=manufacturing cost + sales cost + general operating cost), or total cost (=total sales cost + non-operating expenses such as interest on a loan). In the past deliberation and judgment, manufacturing cost, purchasing cost, total sales cost and market sales cost were applied while, these days, total cost is accepted as more proper criteria. In the judicial precedent, total cost was set as criteria to determine whether the price concerned is low or not.

In comparing price versus cost based on total costs, there are also different views over the criteria of "much lower price". In the KFTC's deliberation and judgments, price down by 9% from purchasing cost, 35% from manufacturing cost, 5% from total sales cost, and 35% from market sales price is regarded as "much lower price". However, in the academic circle, "much lower price" is claimed to be the price lower than the cost, coming up with various views.

In case of undue discount sales in other transactions, it is stipulated as "low price". Therefore, it is hard to set the specific criteria. However, the condition that the price should be lower than the cost is required.

### 2.2.2 *In case of the network industry and the industry with zero marginal cost*

In case of industries which has zero marginal cost, such as the network industry and the software industry, early market entry serves as a critical element for running the business while additional costs for further production are far less. In these industries, it is not easy to set the total costs in the same way as the manufacturing industry. Not only that, but also it might not be appropriate to apply the same method to this kind of industries.

Taking a closer look at the past deliberation and judgment, company 'A' participated in the purchasing bidding of Geographic Information System (GIS) offered by the Korea Electric Power Corporation (KEPCO) (10 units, estimated price: 1,560 million won (about 1.4 million dollars)) with 1 won (about 1 cent) of bidding price, thereby gaining the contract. In this case, the KFTC admitted that the price is much lower than domestic market price as well as the price suggested by other companies participating in the bidding. On the other hand, company 'A' reasoned that such price was suggested because it got GIS software at 1 won from the U.S. copyright holder. However, the KFTC did not accept it as a normal price.

### 2.3 *Measures against Above-Cost Prices*

The MRFTA stipulates that the KFTC controls abuse of market dominant positions when market dominant business is concerned to exclude its competitors by providing its goods and services at "lower prices than ordinary transaction price". In this case, the ordinary transaction price means market average price. Therefore, the price lower than the market price but above the total cost can be legally applied. For this reason, if the business concerned is a market dominant business, setting the price above the total costs can be claimed plausible for predatory pricing.

Moreover, the legal application to "the Limit Pricing Strategy" is possible with the same theory. The limit pricing strategy restrains the entry of any potential competitor by setting the price higher than the average costs but lower than that at the maximum level of short-term profit. However, the KFTC has not applied the competition law in such cases.

### 2.4 *Reasonable Justification*

Whether there is any justifiable reason or not is determined by comprehensively considering various situations, such as purpose of the discount sales, the extent of discount price, any possibility of its repetition, characteristics and market situations of goods and services concerned, market status, and its impact on competitors. In the deliberation and judgment, rising market share is regarded as one factor for undue practice.

Even though there is any discount sales, following cases are acknowledged as justifiable ones: 1) discount sales of less fresh fish and vegetables, sales of products for the changes of their marketability, such as discount sales of seasonal goods and broken products; 2) special discount sales for new product in its market entry; 3) clearance sale; and 4) year-end bargain sale.

In addition, urgent discount sales in response to competitor's undue discount sales cannot be regarded as unlawful activity. That is because if it is interpreted as legal violation, competition itself will become impossible, thereby raising concerns over the exclusion from the market. However, in case of aggressive dumping, the business concerned should be held responsible for the legal violation for its undue discount sales.

## **2.5 Possibility of Recoupment**

Under the current MRFTA, the thing that the business doing undue discount sales gains its profits outweighing the loss from discount sales afterward is not the precondition to meet the violation.

Regarding this matter, in the deliberation and judgment in the past, the KFTC has focused its consideration on the possibility of excluding petty business and merchants from the market rather than that of recoupment when market share of the business concerned is up from 18% to 30% with discount sales.

In addition, in the case of company 'A' mentioned above, the KFTC considered whether the company has possibility to continuously exclude its existing and new competitors through lock-in effect after gaining the contract in the system software business's bidding. However, the competition authority did not review whether the business has enough capability to recoup the loss arising from low-price bidding.

## **2.6 Major Enforcement Experience**

Since the enforcement of the MRFTA in 1981, the KFTC has imposed corrective measures above warning against 27 cases for undue discount sales. What is noteworthy is that most cases were recognized for their possibility of excluding competitors for low-price contract in the bidding.

Toothpaste manufacturer 'B' came up with the product at one won (about 1 cent), whose average market price is 210 won (about 18 cents), in the toothpaste purchasing bidding offered by the Ministry of Defence, thereby offering 3.3 million products at one won. Company 'B' had exclusively provided the product to the Ministry of Defence. However, as the contract has been changed to free competition-based contract, it proposed with unrealistically low price and tried to maintain its supply in the long term in order to impede any entry of potential competitors. The KFTC viewed this case as undue discount sales, taking corrective measure.

However, even the bidding is contracted with one won (about 1 cent), there was also the case being unsuspecting as follows: 1) if the market concerned does not exist but is likely to exist in the future (e.g. low-resolution camera for satellite); and 2) as the bidding concerned is just for technology transfer so that there is not any concern of excluding competitors, such as ensuring any dominant position in the market.

Recently, in the bidding related to establishing the system, there are many cases which software developers are contracted with extremely low price. Companies seem to participate in the bidding even with unprofitable prices, in order to preoccupy the market without keeping its developed technology idle. Even though the KFTC has continuously carried out law enforcement against such behaviour, it is not easily eradicated in the market.

## **3. Non-Price Predation**

By prohibiting any unfair business practices, such as coercive trade, conditional transaction, obstruction of business activities and others, and the abuse of market dominant position pursuant to the MRFTA, the KFTC can take action against non-price predatory strategy. Among them, undue high-price purchase is stipulated specifically as one type of excluding competitors. It is the activity which is likely to exclude competitors by unduly purchasing goods and services at much higher prices than general transaction price.

It can be the case to exclude competitors by purchasing essential materials at much more expensive price than usual. This will make competitors face difficulties to get raw materials, or have no other way but to buy them at high prices.

Whether a certain practice is undue high-price purchase or not is determined by comprehensively considering the market status or capital base of business concerned, importance of related goods and services in manufacturing and sales activities of competitors, and the extent of additional costs and possibility to get products and raw materials from other alternative suppliers at home and abroad. Following cases can be considered as undue high-price purchase: 1) supply and demand of products are difficult, and no alternative goods exist; 2) business ensuring powerful status can compensate its loss from other sources; and 3) By purchasing all the necessary goods and services at unreasonably high prices, obstruct the entry of other businesses. However, in inevitable cases, such as the time when business is preparing for the situation of shortage and ensuring stable production of products, such practice can be acknowledged.

DAF/COMP(2005)14

## MEXICO

### 1. Introduction

Predatory pricing is the practice of fixing low prices with the sole intention of driving rivals out of the market or deterring the entry of new ones. The benefits to the predator of this practice become evident only in the long term, when it can raise prices. Predation benefits consumer in the short run, but hinders competition and increases prices over the long term, which deteriorates consumer welfare.

Predatory foreclosure is considered to be a relatively rare monopolistic practice. According to the US Supreme Court's decision in *Matsushita*, "Predatory pricing schemes are rarely tried, and even more rarely successful".<sup>1</sup> Nevertheless the number of alleged predatory instances brought before competition authorities is not trivial. According to Niels and Ten Kate,<sup>2</sup> for example, the adoption by the Canadian competition authority of a two-tier strategy to assess the likelihood of predation that follows Joskow and Klevorick's recommendation,<sup>3</sup> resulted in a significant reduction in the number of cases that actually passed the first stage of analysis: 11 out of 398 complaints.

Over the course of its eleven years, the Mexican competition authority has also seen more predation allegations dismissed than turned into actual cases where substantive evidence existed to support a predatory price allegation. In fact, only one such case exists where a clear intent to predate through prices was undertaken: Warner Lambert v. Federal Competition Commission (FCC or the Commission). This case, described in more detail here, was recently dismissed by the Supreme Court (November 25<sup>th</sup>, 2003) on grounds that the articles in the Federal Law of Economic Competition (FLEC) and its code of rules that prohibit the practice are unconstitutional.

Part of the reason for a lack of final determinations about predatory behaviour has to do with the high risks of finding either false positives (mistaking competitive behaviour for predatory behaviour) or false negatives (mistaking predation for competitive behaviour). A set of rules that is too inclusive may mistake cases of actual competition for predation,<sup>4</sup> a situation that is stated in *Brooke*: "Unsuccessful predation is in general a boon to consumers" and the costs of an erroneous finding in liability are high, "because cutting prices in order to increase business, often is the very essence of competition".<sup>5</sup> However, the absence of regulation against predatory pricing may cause more market power or easier organisation for collusion. In fact, both the academic literature as well as the competition authorities have recognised that predatory foreclosure and predatory pricing in particular poses a threat to economic welfare.

### 2. Requirements to find Predatory Behaviour

In reviewing allegations involving predatory conduct the Mexican competition authority reviews most, if not all, of the following items:

- (a) Market power: whether the predator has the ability to control prices
- (b) Future market power: a measure of the investment undertaken by the predator, or the possibility for recoupment, which implies a review of potential entry barriers and market shares but for the entrant or the competitive behaviour that the predator is trying to suppress
- (c) For predatory pricing, price cost comparisons under different scenarios

- (d) Evidence of intent that is generally applicable over the whole market or can be narrowed down to a particular segment or brand.
- (e) Potential efficiencies that may explain the alleged predatory practice

### **2.1 Market power**

There is general consensus regarding the need to find market power prior to reviewing allegations of predation since an incumbent with no market power will find it very difficult to make predation a useful strategy. Market power is particularly useful in cases of non-price predation where it can be used to raise rivals' costs, when they have control over the suppliers' prices. Mexico is one among several OECD member countries that explicitly considers market power for predation.

In Mexico, the Regulations of the FLEC consider predatory pricing cases to be relative monopolistic practices (Article 7), thus subject to a rule of reason treatment as defined by Articles 11, 12 and 13 of the FLEC. Relative monopolistic practices are those acts, contracts, agreements or combinations, whose aim or effect is to improperly displace other agents from the market, substantially hinder their access, or that establishes exclusive advantages in favour of one or several entities or individuals.

The rule of reason by which these acts are analysed consists in the correct definition of the relevant market, which contemplates the examination of substitutes, distribution costs, and access to goods in alternative supply sources; as well as showing that the alleged predator has substantial power in the relevant market, and that there are market conditions that give the agent substantial market power.<sup>6</sup> Thus prior to undertaking a price-cost test or ascertaining the possibility of recoupment, predatory practices require that the market be defined and that substantial market power be wielded by the predator prior to undertaking the analysis of the actual practice.

### **2.2 Future market power and recoupment**

The US Supreme Court's *Brooke* decision emphasised the need to show the possibility of recoupment as part of a predatory strategy. Stating that for a firm to recoup, prices must rise above a competitive level, enough to compensate the amounts spent on predation, "including the time value of the money invested in it". In addition, recoupment requires an estimate of the cost of the alleged predation, an analysis of the scheme alleged by the plaintiff and the structure and conditions of the relevant market.

However, in practice and without taking into account a strategic element underlying predation, such as a reputation effect, or the ability to deter future entry, alleging a possibility of recoupment is difficult. If one were to account for this possibility through measurement, for example, the necessary assumptions involved in its calculation and the information required to undertake this analysis would make it even harder to prove.<sup>7</sup>

Neither the law nor the rulings of the law explicitly require the FCC to incorporate the possibility of recoupment as one of the elements needed to determine predatory behaviour. The Plenum, however, has considered whether it is likely for the predator to recoup in its resolution of cases as will be evident in the description of the cases brought before the Commission and discussed in section 3.

### **2.3 Predatory pricing and the appropriate cost measure**

In Mexico, article 7 index I of the Rulings of the FLEC establishes the appropriate measure of cost for cases involving predatory pricing allegations:

*“Practices included in Article 10, Section VII of the Law<sup>8</sup> are deemed to include the following, without excluding others:*

*I. Systematic sales of goods or services at prices below their total average cost or their occasional sale below the variable average cost;”*

Prices below average total cost are regarded as potentially predatory because the Rulings take into account the possibility that average variable costs can underestimate marginal costs for a firm experiencing increasing returns to scale. Any price below an average total cost measure should undergo a rule of reason analysis according to the law.

#### **2.4 Non-price predation**

Non-price predation is sometimes a much more effective way of predating, because it represents no significant increase in costs, and most of the time it is even harder to prove than predatory pricing, since it does not show evident changes in the firm’s behaviour. Non-price predation is considered under article 7 of the code of rulings of the FLEC, fractions II (exclusivity and loyalty discounts), III (cross-subsidization), IV (discrimination in price or conditions of sale), and V (raising rivals’ costs):

*“II. The granting of discounts by producers or suppliers to purchasers with the requirement of exclusivity in the distribution or marketing of the products or services, when such cannot be justified in terms of efficiency;*

*III. The persistent use of profits that an economic agent obtains from the sale of a good or service for financing losses on another good or service;*

*IV. The establishment of different prices or conditions of sale for different purchasers situated in equality of conditions, or*

*V. The action of one or several economic agents, the object or effect of which is or may be, directly or indirectly, to increase costs for their competitors, or to impede their productive process or reduce demand.”*

#### **2.5 Efficiency considerations**

The law also considers potential efficiencies when determining whether relative monopolistic practices are harmful to the competitive process and market access. Article 6 of the Rulings of the FLEC states:

*“Economic agents may accredit before the Commission whether the gains in efficiency deriving from a relative monopoly practice have a favourable influence on the process of competition and free participation in the market, which must be taken into consideration in the evaluation of the conduct referred to in Article 10 of the Law.*

*Such gains in efficiency are deemed to include the following, among others:*

*I. The obtaining of savings in resources which permit the accused/ alleged violator, on a permanent basis, to produce the same quantity of the good at a lower cost, or a greater quantity at the same cost;*

*II. The obtaining of lower costs if two or more goods or services are produced jointly than when separately;*

*III. The significant reduction of administrative costs;*

*IV. Transfer of production technology, or knowledge of the market, and*

*V. Lowering of production or marketing costs derived from the expansion of an infrastructure or distribution network.”*

For predatory pricing cases these justifications are especially important since price reductions by an incumbent may be the result of competition with a lower price of a rival who started a price war; a means of minimizing losses from unexpected problems such as excess capacity, product obsolescence, and reduction of demand; a way of keeping market channels working so that they maintain the existing options to reassume or expand production when market conditions improve; a vehicle to induce the development of more efficient technologies through learning-by-doing; a way of promoting new products; or a means of extending a network base when there are network economies to be gained.

### **3. Predatory pricing cases brought before the FCC**

Only a small number of cases involving predatory pricing have been brought before the Commission, and the majority of them have been dismissed. This section discusses three cases. The first and second cases were dismissed by the FCC because it did not find evidence of predation. The third, the Warner Lambert case, spans more than 8 years and was finally resolved before the Supreme Court last year. In addition to providing an example of how the Commission undertakes an analysis of predation, it illustrates some of the legal hurdles the FCC faces when enforcing the law.

#### **3.1 *Independent Pharmacies Civil Association***<sup>9</sup>

The case was brought in by the Civil Association of Independent Pharmacies in the city of Cuernavaca (Pharmacies). They alleged that large commercial chains in their geographic area were selling products below their acquisition costs using permanent and temporary discounts. The relevant market was defined as the retail distribution of pharmaceutical products in the city of Cuernavaca due to high transaction costs for consumers to access other markets. The FCC considered that predatory pricing behaviour would only be consistent if recoupment in the relevant market were possible, that is, if consumers in the city of Cuernavaca did not have access to other sources of supply and were forced in the present and future to acquire these products at monopoly prices. However, in assessing market power, the FCC did not find actual or potential entry barriers.

The practice of using permanent and temporary volume discounts to predate in prices was not accredited. Permanent discounts varied from distributor to distributor, depending on the bargaining power and reputation of purchaser firms. Temporary discounts were promoted by pharmaceutical labs, not by distributors and consisted on giving products for free depending on the merchandise purchased. Both discounts schemes favoured larger pharmacy chains. In addition, larger pharmacies had lower operational margins than smaller pharmacies and a faster movement of inventories that, together with the discounts, allowed them to sell at lower prices and still make a profit.

The Plenum resolved that the allegation was without grounds, and no elements were found to prove the existence of predatory practices.

#### **3.2 *Predatory pricing in inter-city bus services***<sup>10</sup>

*Autobuses del Centro Grupo AMEC, S.A. de C.V. (AMEC)* filed a complaint against *Autobuses Unidos* for offering up to 50 percent promotional discounts in its Puebla-Tehuacán bus service, and increasing its fares in the Puebla-Mexico City route. The relevant market was defined as the provision of passengers ground transportation in the Puebla-Tehuacán route and identified five different classes and mixes of services.

The Commission took into account the absence of legal, technical and economic barriers in the market, as well as the intense competition in the sector that had resulted from deregulation of the sector. It also found that *Autobuses Unidos* had no market power in the Puebla–Tehuacán route in any segment, given the large number of market participants, the low level of concentration in the market, and the existence of alternative routes between those cities.

Based on the foregoing facts, the Commission concluded that the possible existence of fares below total average cost and cross-subsidies, could not pose a risk for competition in this case. The Plenum resolved that the allegation was without grounds.

### 3.3 *Warner Lambert*

The case involved an important chewing gum and candy firm: Grupo Warner Lambert, SA de CV (Warner Lambert), previously known as Chiclets Adams, SA de CV. On June 1994, Chiclets Canel's SA de CV (Canel's) a competitor in the chewing gum market, accused Warner Lambert before the FCC for predating against Canel's by pricing its Clarks four-piece chewing gum below its costs. At the time, the Commission had not drafted the Regulations of the FLEC so the alleged conduct was considered a violation to article 10 index VII of the FLEC.

In 1996 the FCC resolved<sup>11</sup> that the evidence and elements provided during the procedure were insufficient to determine the existence of relative monopolistic practices but it reserved the right to open an ex officio investigation in the future. It also cautioned Warner Lambert against carrying out any conduct that could unlawfully displace its competitors.

In its resolution, based on accounting procedures followed by Canel's and Warner Lambert, the FCC adopted the following criteria to analyse predatory pricing:

- i) Historical cost would be considered instead of standard costs;
- ii) Indirect costs would be prorated based on the product's participation in the cost of sales rather than in total sales since "the value of total sales tends to hide...predatory practices". An exception would be made for sales and distribution costs.

The purpose of this criteria was to avoid skewing costs or concealing the conduct under investigation, specially through the use of cross subsidization.

#### 3.3.1 *Ex Officio Investigation*

On April 26th 1996 the FCC opened an ex-officio investigation of Warner Lambert to further explore the chewing gum market, with the purpose of uncovering alleged predatory pricing between May 1994 and April 1996, aimed at improperly displacing of Canel's product through launching of Warner Lambert's new "Clarks" product. The geographical dimension for the relevant market was defined as the national territory. Based on consumer preferences and the degree of substitution with other products (most notably candy), the FCC determined the product space for the relevant was chewing gum. The Commission described two different packages: bars and small four-piece sets. It determined that marketing techniques had led to the division of the market into two segments: a "formal" and an "informal" segment. The first involved chewing gum distributed through small stores, the second involved product distributed through street vendors in the informal sector.

The Commission further elaborated on the distinction between different markets and different market segments by noting that a market is formed by several segments and sub-segments, and that products in the different segments have similar physical characteristics or uses. Clarks was marketed in the informal segment whereas "Chiclets-4", another Warner Lambert four-piece set, was marketed in the formal

segment. It determined that differences in the sales and competitive strategy between products in each segment were not necessarily indicative of the existence of two separate markets.

The Commission also analysed whether barriers to entry existed in each of the segments.<sup>12</sup> In the formal sector, Chiclets-4 already had an important presence within the chewing gum market, thus competitors needed to invest considerable resources in order to position their product. In the informal segment, consumers tended to make impulse purchases, which meant that price, and not brand, was important. The Commission determined that the selling of a product below cost in the informal segment acted as a barrier to entry, and that any firm considering entry into this market segment would require a large investment to finance and survive predation. The analysis of barriers to entry also involved an analysis of import tariff barriers, which were deemed to be significant especially following the devaluation of the peso in 1994, and institutional barriers, such as patents, licenses and permits, that were not considered binding for this case.

The Commission confirmed that Warner Lambert had substantial power in the chewing gum market, where its share in net sales was above 50% and between five and seven times the share of its competitors. Warner Lambert also had the ability to differentiate prices between brand names and between market segments, noting as an example the significant price disparity between Warner Lambert's Chiclets-4, and Clarks products.

It was also found that Warner Lambert had incurred losses throughout most of the investigation period because its price had been persistently below its average total cost. Furthermore, Canel's market share losses between 1993 and 1994 were very similar to the Warner Lambert's growing share of a market that was relatively stable in size. This indicated that consumers of Canel's-4 had switched to Warner Lambert's product as a result of Clarks's artificially low price. As a result, the Commission imposed a fine on Warner Lambert and enjoined it to stop predatory pricing in its Clarks product.

### 3.3.2 *Appeals on the investigation*

On February 16th 1998, Warner Lambert filed a reconsideration appeal before the FCC in order to change the resolution of its ex officio investigation. The FCC reviewed the case and determined that all of Warner Lambert's allegations and injuries were without grounds, and confirmed its resolution of the ex officio investigation.

On May 23rd, 1996 Warner Lambert filed an *amparo*<sup>13</sup> action before a federal district court, claiming that acts of the FCC injured its constitutional rights, such as:

- the future and inevitable application, as well as the expedition referendum, promulgation and publication of a number of articles in the FLEC and its Rulings (RFLEC);<sup>14</sup>
- that the agreement to open an ex officio investigation by the FCC, as well the agreement that required it to produce financial and accounting information were illegal and caused it injury.

After analysing the *amparo* action, the district judge determined that it was contrary to law and resolved on July 31<sup>st</sup>, 1996 to dismiss the case. Warner Lambert subsequently appealed the district judge's resolution. The appeals process for any decision undertaken by a District Judge in matters of constitutional controversy and constitutionality of laws requires the review by the Supreme Court. Consequently, the case was brought before the Supreme Court, which analysed Warner Lambert revision appeal.

On November 25<sup>th</sup>, 2003 the Supreme Court determined that all claims of injuries, legal irregularities and unconstitutionality of the FLEC and RFLEC articles contained in Warner Lambert's *amparo* were

dismissed and declared contrary to law, except for one: Article 10 index VII. It was the Supreme Court's decision that this article and index did not establish with precision the legal framework under which the administrative authority (the FCC) could enforce the law and impose a sanction to an economic agent that was carrying out a relative monopolistic practice. Index VII established a very general criterion to determine if a relative monopolistic practice was contrary to the law by stating that "in general, all the actions that unduly damage or impair the process of competition" and failed to establish the specifics necessary to determine the type of violation or illegal conduct that merited the sanctions specified in the legislation.

This article was found to be contrary to a fundamental right of legal certainty and lawfulness, established under article 16 in the Constitution, which states that for any violation of a law, the conduct causing the violation must be established by the law and that the authority enforcing it cannot determine the violation on its own judgment.<sup>15</sup> Because under Mexican law the luck of the principal follows the accessory, Article 7 of the Regulations of the FLEC, which establishes predatory pricing and crossed subsidies as a violation to the FLEC, was also unconstitutional.

Mexican Law establishes that a Supreme Court interpretation of law creates a thesis of Jurisprudence and that 5 theses with the same criteria create obligatory Jurisprudence. There have been two Supreme Court Jurisprudence theses with the same criteria so far.

#### **4. Non-price predation cases brought before the FCC**

This section describes three cases involving non-price predatory claims. The first two involve the passenger ground transportation services, in one case the complaint involved a federal authority. The third case is a more detailed exposition of an allegation of market foreclosure through exclusivity contracts. As was the case with Warner Lambert, the parties involved in the antitrust violation used the *amparo* action to elude enforcement of the FLEC and RFLEC, in particular, those articles relating to predatory practices.

##### **4.1 *Foreclosing access in passenger and tourist transportation services***<sup>16</sup>

The case involved a complaint alleging predatory foreclosure by an association of more than 50 travel agencies in the state of Quintana Roo against the airport's administration authority, Airports and Auxiliary Services (ASA), in Cancun. The complaining parties argued that ASA had established differentiated access rates for providers of passenger transportation services and tourist transportation in all airports based on sectoral regulations.

To provide transportation services, both types of providers required access to the airport boarding area and rental of parking spaces within the airport's facilities. The Commission determined that ASA had substantial market power because: there were no substitutes for the services it provided in the International Airport of Cancun; it was the only authority in charge of administering these facilities; hence, it was able to fix access prices and conditions. Based on this evidence, the Commission concluded that ASA was allegedly charging unjustified discriminatory access rates in the International Airport of Cancun.

In response to the Commission imputations, ASA proved that passenger and tourist transport services were indeed two separate markets and, accordingly, it charged two distinct tariffs. Based on the new evidence, the Commission determined that both services had different attributes and operative costs. Passenger transportation services were offered on an ongoing, permanent basis at the airport, which required that suppliers maintain ticket sales in the airport, permanent waiting for users and for parking. On the other hand, tourist transportation services only required access to the general parking space for individual pick up, and did not require a lease for specific parking areas nor sales offices in the airport. Therefore access rates for providers of passenger transport were lower than those for tourist transportation

services. Moreover, ASA provided additional evidence that suppliers of these services charged different prices to final users based on their different operative costs.

The FCC resolved ASA did not grant discriminatory treatment to providers of transportation services in the International Airport of Cancun, Quintana Roo and closed the file.

#### **4.2 *Raising rivals' costs for soft drinks in returnable bottles***<sup>17</sup>

The complaint was brought by a soft drinks company, Embotelladora Pitic, SA de CV (Pitic) against Bebidas Purificadas, SA de CV (Bebidas). The alleged practice involved hiding and destroying their returnable bottles and, as a result, raising their costs because of the need to replace them.

The Commission defined the relevant market as the marketing and/or distributing soft drinks in returnable bottles within the localities they serve in the state of Sonora. It found that exchanging bottles was a common practice undertaken by firms in the relevant market and that Pitic had not provided enough elements to prove that Bebidas had destroyed or looted Pitic's bottles or that it refused to exchange them. Furthermore, the Commission determined that since both firms had similar market shares, damage from hoarding bottles would be similar for each firm and therefore such a practice would have a balanced effect. That is, if both firms behaved in the same manner, and one of them picked up more empty bottles than the other, this would be the result of a change in consumers preference and not an anticompetitive practice.

The FCC considered that if a firm decided to hoard empty bottles it would have to confront storage and destruction costs as well as its competitor's response. Therefore, the alleged practice was more harmful to the firm committing it than to its intended recipient. It resolved that the allegation was without grounds and closed the file.

#### **4.3 *Exclusivity contracts in the distribution and sales of carbonated beverages***

On February 2000, Pepsi-Cola Company and its subsidiaries (PCM) filed a complaint before the FCC against The Coca-Cola Company, the Coca-Cola Export Corporation (TCCEC) and 89 bottling subsidiaries, including Embotelladora Argos (Argos)<sup>18</sup> for alleged relative monopolistic practices in violation of article 10, sections IV (exclusivity) and VII of the FLEC, and article 7, sections I (predatory pricing), II (exclusive dealings and loyalty discounts), III (cross-subsidisation), IV (discrimination in sales conditions) & V (raising rivals' costs) of its Regulations (RFLEC). Although the practice affected the Mexican market of soft drinks, the plaintiff did not supply enough information to support the alleged violations to article 7, sections I and III or the RFLEC.

On March 2000, the FCC initiated the investigation of several Mexican subsidiary bottlers, including Argos for alleged relative monopolistic practices in violation of article 10, sections IV and VII of the FLEC, and article 7, sections II & V of the RFLEC. In addition, the FCC directed soft-drink bottlers to discontinue their exclusivity contracts and barred the company from continuing some of its sales and marketing practices in Mexico, but TCCEC and its bottlers refused to comply and obtained temporary court injunctions. The judiciary granted an *amparo* and protected Argos against: article 10, section VII, of the FLEC; against the warning, issued by the Federal Competition Commission, in which it ordered Argos and its subsidiaries to refrain from signing exclusivity agreements or renewing those already in existence; and against the fine that would be imposed if Argos failed to comply with the order. Nonetheless, the FCC continued the proceeding.

In Mexico soft drink production is made up of franchisers and bottlers. The Coca-Cola Company is a franchise company, which owns the brand names, trademarks and images. TCCEC is the head of the group and is in charge of: granting licenses for exclusive distribution to bottlers; producing soft drink formulas of

concentrates for sales to bottlers; and designing & implementing marketing and advertising plans. In turn, bottlers use the concentrates to manufacture, package, and distribute the final product through available retail channels, including supermarkets, convenience stores, vending machines and fountain-based vendors within a geographic area assigned by TCCEC under an exclusive distribution license. In addition, bottlers collaborate with the franchiser in designing the marketing and advertising plans and in subscribing exclusive contracts with retailers.

Exclusive contracts with retailers exist in three forms: First between bottlers and retailers, characterized by the benefits they grant to retailers. Under this contract retailers are obliged to display only products of the Coca-Cola brand and to participate in advertising campaigns. The contracts prohibit the retailer from selling and advertising products from competitive vendors. In return, bottlers pay for exclusivity rights, for contracts with other firms that the retailer must revoke, grant discounts on products of The Coca-Cola brands, pay for the electricity consumed to transmit the advertising spots in the retailers' facilities and for joint advertising. Bottlers also provide vending machines to display Coca-Cola products exclusively and agree to pay additional commissions per box and to provide products equivalent to 50% of the bills rendered. In case of non-compliance, the bottler can revoke the contract without responsibilities. On the other hand, the retailer must return to the bottler the proportional payments corresponding to the non-complied part of the exclusivity period contracted. The contract can last for a predetermined period of time or until the retailer reaches a specific sales amount of Coca-Cola products.

The second category of contracts corresponds to exclusivity contracts subscribed between soda companies with restaurants and other food shops. The latter are obligated to display, preferably or exclusively, Coca-Cola products, to allow, preferably or exclusively, the installation and labelling of the brand's advertising, and to sell and advertise exclusively Coca-Cola products in special events. Restaurants and food shops benefit from payments in cash, discounts on products for special events, a supply of the syrup (bag in box), refrigerators, tables and chairs, and uniforms for their employees, and are provided with paint and label facilities or vehicles. In case of non-compliance, the bottler would claim reimbursement of the payments made and non provided benefits and damages. Bottlers may refuse to renegotiate the contract until the retailer reaches the promised amount of sales. The contract can last one year or more, or until the retailer sells a specific amount of Coca-Cola products.

The third category of contracts corresponds to loan and restitution contracts, through which bottlers provide the shelves, refrigerators, coolers and other equipment for the exclusive display of the Coca-Cola products. The retailer is only obligated to provide a space within its shop but is allowed to sell competing products.

The FCC only investigated the first two categories of exclusivity contracts because it appeared that the soft drink companies seemed to be: (a) selling their products subject to the condition of not using or acquiring, marketing or providing goods or services produced, processed or distributed or sold by a third party (in violation of FLEC Article 10, section IV); (b) granting discounts to retailers conditioned on the exclusive distribution or commercialisation of Coca-Cola products and other actions tending to reduce demand faced by its competitors (FLEC Article 10, section VII and RFLEC article 7, section II); and (c) increasing costs for their competitors, thus impeding their productive process or reducing their demand (FLEC Article 10, section VII and RFLEC article 7, section V).

The relevant market was defined as carbonated drinks in the national territory. The product dimension included soft drinks, mineral and carbonated water and other carbonated drinks. It was determined that this market had a high degree of vertical integration, because it included inputs supplied and went up to the sale of final products. Carbonated drink distribution faces high costs, therefore, bottlers are located in different regions in order to cover the national territory. Since licenses for bottlers, and therefore for distribution, are

granted by the franchiser to serve exclusive territories over the nation, exclusivity contracts are nationwide.<sup>19</sup>

The FCC determined the following. TCCEC and its subsidiaries had substantial market power in the market with share in sales at 72.1% in 1999; PCM was the second largest competitor with a market share of 18% and the remaining share was supplied by other competitors. The two main distribution channels for carbonated drinks were the grocery shops and supermarkets, and hotels, restaurants and similar establishments. Competitors were able to develop their own distribution channels in almost all localities in the country but had few possibilities to build distribution networks able to compete with Coca-Cola's. Advertising and brand positioning were important barriers to entry in addition to retail space restrictions caused by the contracts investigated.

Subscribing exclusivity contracts was a common practice in the relevant market. PCM provided a 1999 study performed by an independent consultant, which reported that out of a sample of 1,929 establishments in five localities where PCM distributed its products, the 33.18% had exclusivity contracts with Coca-Cola, 6.59% with PCM, and the remaining 60.21% were selling products of both brands. The report highlighted that most of these exclusivity contracts were verbal.

TCCEC and its subsidiaries presented a defence alleging efficiency gains. It argued that the expenses incurred in providing equipments and incentives to retailers were efficient because they helped maintain and expand their sales. The FCC dismissed this defence because it did not provide proof that exclusivity was needed to provide incentives to establishments which could also be provided through load and return contracts. Moreover, the defendants recognized that if they were to suspend their exclusivity contracts, this would put their competitors in an advantageous position. Therefore the contrary was true, through exclusivity contracts TCCEC and its bottlers were effectively deterring competitors from the relevant market and taking advantage of their market power. While PCM also used exclusivity deals, the ruling did not apply to it because it does not have dominant market power.

On February 2002, the FCC resolved that TCCEC and its subsidiaries were responsible for carrying out relative monopolistic practices that violated article 10, sections IV and VII of the FLEC, and article 7, sections II & V of the RFLEC. In addition, the FCC ordered them to cease their exclusivity contracts, and to abstain from participating in any agreement, programme or commercial strategy granting discounts, prizes or promotions tied to promises to sell; it did not impose a fine on the company or its bottlers. However, the decision of the FCC was subject to several *amparos* by Argos and other bottling subsidiaries. The judiciary granted the *amparo* to Argos against the sanction corresponding to violations to article 10, section VII, of the FLEC and article 7, sections II & V of the RFLEC on the grounds of unconstitutionality of the law.

## **5. Concluding remarks**

In order to avoid risks of finding false positives, the Regulations of the Federal Law of Economic Competition characterise predation as a relative monopolistic practice, which is subject to a rule of reason analysis. This requires finding that the predator has substantial market power in the relevant market prior to the evaluation of the actual practice. It also requires that the competition authority weigh potential efficiency considerations when making its final determination. Although different from Joskow and Klevorick's two-tiered approach, these requirements have allowed the FCC to filter cases that, while valid in the sense that the practice harms the competitor, can be dismissed on the grounds that they are not harmful to the competitive process.

The Warner Lambert case illustrates how the Commission applies its cost-based test to evaluate whether predatory pricing actually takes place. The Commission's Plenum provided clear guidelines on the

types of costs that it considered would hide predatory practices (indirect costs prorated based on total sales). It also discusses elements of analysis that the Commission considers important in evaluating whether a predatory practice harms competition: defining the relevant market; analysing whether market segments exist and establishing a distinction between segments and markets; detecting and analysing barriers to entry, and determining whether these make it likely for recoupment to take place; and establishing whether the predator had substantial market power.

At present, the enforcement of the provision relating to predatory pricing or non-price behaviour has a weak legal basis based on the Supreme Court's determination that article 10 index VII of the FLEC and article 7 of its Code of Rulings are unconstitutional. To reinforce the prevention and sanction of predatory practices it is necessary to amend the FLEC, so that it defines unlawful predatory practices.

## 6. References

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## NOTES

1. Matsushita Electric Industrial Co., Ltd, et al v. Zenith Radio Corp. et al. Certiorari to the United States Court of Appeals for the Third Circuit No. 83-2004. Argued November 12, 1985—decided March 26, 1986.
2. Niels, G. and, A. Ten Kate, “Predatory Pricing Standards: is there a growing international consensus?” *The Antitrust Bulletin*, Fall 2000.
3. Joskow, P. and A.K. Klevorick, “A framework for Analyzing Predatory Pricing Policy”, 89, *Yale Law Journal*, 213 (1979)
4. OECD, Predatory Pricing, 1989, <http://www.oecd.org/dataoecd/7/54/2375661.pdf>
5. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
6. These conditions are provided in article 13 of the FLEC which reads: “The following should be evaluated in order to determine if an economic agent has substantial power in the relevant market:
  - I. Its market share and whether it can unilaterally set prices or restrict the supply in the relevant market without the competitive agents being able to act or to potentially counteract that power;
  - II. The entry barriers and the elements that may alter those barriers and also other competitors' offer;
  - III. The competitors existence and power;
  - IV. The possibility the economic agent and its competitors have to access input sources;
  - V. Its recent performance; and
  - VI. All other criteria established in the Regulations of this Law.”
7. See, for example, Elzinga, Kenneth and David Mills “Testing for predation: Is recoupment feasible?”, *Antitrust Bulletin*, Winter 1989.
8. Article 10 and index VII of the FLEC read as follows:  
 “Subject to verification of articles 11, 12 and 13 of this Law, relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favour of one or several entities or individuals, in the following cases: ...”  
 “VII. In general, all the actions that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services.”
9. DE-04-97/IO-01-97.
10. DE-17-1997.
11. On February 8th the FCC issued a decision that was appealed. On June 6th 1996 it issued a second resolution in terms that were similar to the original.

12. The Plenum of the Commission determined that the existence of barriers was a necessary condition for predatory pricing to take place in its June 6th, 2002 resolution.
13. An *amparo* is a proceeding established in Articles 103 and 107 of the Mexican Constitution to provide all persons with protection against unconstitutional acts by the government. It is available to any party who can raise a claim that he is being subjected to an unconstitutional law or that his due process rights are being infringed. Due process, in this context, is not limited to procedural issues but can attack the merits of an agency's decision because the definition of due process in Article 16 of the Mexican Constitution requires that agency orders articulate the "legal basis and justification for the action taken".
14. These included:
  - FLEC Article 10, section VII: establishing that all conducts that may hinder competition in the production, commercialisation or distribution of goods and services will be sanctioned under this law.
  - FLEC Article 11: establishing the necessary conditions required to violate article 10 (substantial market power in the relevant market)
  - FLEC Article 12: establishing the criteria to determine the relevant market.
  - FLEC Article 13: determining when an economic agent has substantial market power in the relevant market.
  - FLEC Article 24, Index III: empowering the FCC to resolve cases under its jurisdiction and impose administrative sanctions.
  - FLEC Article 30: conferring to the FCC the ability to start procedures ex officio or at the request of an interested party.
  - FLEC Article 33: establishing the time, terms and basis used to carry out a procedure before the FCC (notification, how to present evidence)
  - RFLEC Article 7: Establishes conducts that violate article 10 index VII of the FLEC: predatory pricing, crossed subsidies, establishment of different prices or conditions of sale for different purchasers situated in equality of conditions, discounts offered by the producer to the consumers that are not justified in efficiencies, and acts leading to raising rivals cost.
  - RFLEC Article 24, Index VIII: Establishes that any person can file a complaint before the FCC when it deems it is suffering an injury by the conduct carried out by the economic agent accused.
  - RFLEC Article 25: Establishes that once a complaint is filed, the FCC may dismiss the claim or open an investigation.
  - RFLEC Article 28: Establishes that once an ex officio investigation is opened or a complaint is filed before the FCC, and if the Commission deems that such conduct hinders competition, it can develop a single proceeding or initiate another proceeding if it considers it necessary.
15. The relevant passage in the Constitution reads: "Article 16. No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken..."
16. DE-11-97/IO-45-97.
17. DE-06-1993

18. Argos is one of the three leading bottlers for The Coca-Cola Company in Mexico.
19. For the same reason, the franchiser manages the licenses per country and international trade for the relevant products is not allowed.



## NEW ZEALAND

### *THE LAW OF PREDATORY CONDUCT IN NEW ZEALAND*

#### **Introduction**

In New Zealand, the Commerce Act 1986 is the central piece of competition legislation.<sup>1</sup> Broadly, two legislative provisions are relevant to predation. The first is s 36, which prohibits abuses of market power and applies to unilateral action. The other is s 27 which prohibits contracts, arrangements or understandings that substantially lessen competition.

#### **Section 36**

Section 36 is set out in full in Annex One. The key part is s 36(2) which reads: “A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of:

10. restricting the entry of a person into that or any other market; or
11. preventing or deterring a person from engaging in competitive conduct in that or any other market; or
12. eliminating a person from that or any other market.”

This prohibition applies to a wide range of conduct, including exclusive dealing, price discrimination, and refusals to deal.

There are three conditions for a plausible predation claim. For a breach of s 36, the following elements must be present:

- the firm in question must have a substantial degree of power in the market;
- the firm must have taken advantage of that power;
- the firm must have taken advantage of its market power for one of the proscribed anti-competitive purposes under s 36.

The following discussion contains references to Australian case law, since s 36 was substantially amended in 2001 to make the language of s 36 the same as the equivalent Australian provision, s 46 of the Trade Practices Act 1974. New Zealand courts have signalled a willingness to consider Australian case law when addressing issues under s 36.

#### ***Other relevant provisions***

It is also worth noting s 36A, which extends the application of s 36 by prohibiting parties with a substantial degree of power in a market in either Australia or New Zealand, or in both countries, from

taking advantage of that position for one of the proscribed anti-competitive purposes in a market in New Zealand.

Under s 45, s 36 does not apply to any contract, arrangement or understanding insofar as it contains a provision authorising an act that would otherwise be prohibited by reason of the existence of a statutory intellectual property right (for example, the assignment of rights owned under copyright). Section 45 has never been discussed in case law, but it is thought that the enforcement of a statutory intellectual property right would not normally give rise to a substantial lessening of competition because of the narrowly defined nature of such rights.

### **Section 27**

This section prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a relevant market. It reads:

- “(1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.”<sup>2</sup>

Section 27 applies to horizontal and vertical arrangements, and those between competitors and non-competitors. It is aimed at specific provisions of contracts, arrangements or understandings rather than conduct, firms, or the arrangements themselves. In many cases, predatory conduct is unilateral and s 27 will not apply, but whenever more than one party is involved, it may apply depending on the particular facts.

It is therefore within the framework and language of ss 27 and 36 that the issue of predatory conduct arises in New Zealand. The remainder of this paper discusses the treatment of predatory pricing and non-price predation under New Zealand laws.

### **Predatory Pricing**

New Zealand competition law, like other jurisdictions, generally recognises that predatory pricing is the practice of driving competitors out of the market or generally deterring competition by setting very low prices, sometimes selling below the firm's incremental costs of production. Once the predator has successfully driven out its existing competitors and deterred the entry of new firms, it can raise prices and earn higher profits. It is this second stage which transforms what would normally be an indicator of healthy competition - lower prices - into a scheme aimed at reducing competition and thereby damaging consumer welfare.

The elements of s 36 are discussed below.

### **Substantial degree of market power**

Section 36 begins by requiring a person to have a “substantial degree of market power”.

“Substantial” is defined in s 2(1A) of the Commerce Act as being “real or of substance”, but this definition does not apply to s 36. Instead, cases have interpreted it as meaning “large”, “weighty”, and “considerable”. Australian cases such as *Eastern Express v General Newspapers*<sup>3</sup> have found that if a firm

has market power, it can behave independently of competition, and competitive forces, in the relevant market.

A primary consideration when assessing market power is the extent to which there are barriers to entry into the relevant market; the higher barriers to entry are, the more likely a firm is to have market power.

Other relevant factors include:

1. The ability of the firm to raise prices above the minimum cost that an efficient firm would incur in producing the product, without losing customers to competitors;
2. The extent to which the conduct is constrained by the actions of competitors or potential competitors;
3. Reputational effects. This may create a strategic barrier to entry where an incumbent firm gains a reputation as being predatory, that deters other firms from entering for fear they will be driven out. In *Air New Zealand v Commerce Commission*,<sup>4</sup> the court overturned an earlier finding by the Commission that the anticipated response of Air New Zealand & Qantas to entry or threatened entry, constituted a barrier to entry. The High Court said that as a general rule, the anticipated response of incumbents to the threat of additional competition should be regarded as a normal part of the competitive process;<sup>5</sup>
4. Financial strength may also be an indicator of a substantial degree of market power. Case law under the old “dominant position” threshold says that financial strength was not necessarily indicative of a dominant position. Williams J in the High Court in *Carter Holt Harvey*<sup>6</sup> said that financial strength may or may not be the result of dominance. More recently, the Privy Council agreed with Australian precedent which found that financial strength was not the same as market power. Instead, market power is more concerned with the ability to raise prices without fear of competitive reprisals;<sup>7</sup> and
5. Market share. This is relevant to determining market power, but it is not determinative. There are instances where a firm with a substantial market share could be constrained by other forces and not have a substantial degree of power in the market.

Another indicator of a substantial degree of market power is the ability of the firm, having reduced prices to a point where a competitor might have been deterred from competing or eliminated from the market, to raise prices again to recoup some or all of the loss it incurred in pricing at such a low level. McHugh J in *Boral v ACCC* said that if the firm cannot successfully raise prices to supra-competitive levels after deterring or damaging competition by price cutting, then the irresistible conclusion is that it did not have substantial market power at the time it engaged in the price cutting.<sup>8</sup> The importance of recoupment is discussed further below as it relates to “taking advantage of” substantial market power.

In the New Zealand competition regime, the firm must possess a substantial degree of market power before any alleged anticompetitive action can breach s 36. Section 36 does therefore not cover instances where a firm might undertake a course of predatory conduct in order to attempt to gain a substantial degree of market power. However, the more market power a firm has, the more likely that it will be able to successfully engage in predatory pricing. A participant in a highly competitive market is unlikely to have the ability to successfully eliminate a competitor by pricing below cost.<sup>9</sup>

It is important to note that the Commerce Act does not prohibit a firm from having a substantial degree of market power, nor from earning monopoly profits. A substantial degree of market power could

have been obtained through legislation, or through highly desirable behaviour, such as utilising sound judgment, skill, foresight and innovation to become more efficient than rivals. The prohibition is on the use of that power for an anticompetitive purpose.

### **Taking advantage of market power**

The second element of s 36 concerns the connection between the market power and the alleged predatory pricing. It is necessary that the alleged predatory pricing by the firm with a substantial degree of market power, be attributable to that power. A recent decision of the Privy Council serves to clarify the New Zealand position on this point. The decision was made under the law in 1994, so encompassed the old “use of a dominant position” test. However, the use of language in the majority’s decision equates “use” with “take advantage of” because of the reliance on Australian authority, since Australia has the same “take advantage of” test as New Zealand.

In *Carter Holt Harvey v Commerce Commission*,<sup>10</sup> the Privy Council reaffirmed the need to establish a connection between the “use” and the “market power”. This is done through the application of a counterfactual test. The majority of the Privy Council developed this test in its 2001 decision in *Telecom v Clear*<sup>11</sup> where it said: “It cannot be said that a firm in a dominant market position “uses” that position under s 36 if it merely acts in a way which a firm not in a dominant position, but otherwise in the same circumstances, would have acted.” In other words, if a firm without a substantial degree of market power would have undertaken that course of action as a matter of commercial judgment, it would ordinarily follow that a dominant firm engaging in the same conduct is not taking advantage of its power.

Therefore, the law in respect of the connection issue is the same as it was prior to the 2001 amendments. A predatory pricing action under s 36 will only be successful if the plaintiff can establish that the firm could only act in that way because of its substantial market power. If a firm without substantial market power could have taken that course of action, a s 36 action is likely to be difficult to substantiate.

To “take advantage of” a substantial degree of market power imports no requirement of hostility. It is a neutral concept. It is nevertheless necessary for the party seeking to establish a contravention of s 36 to establish one of the requisite purposes. This is discussed further below.

### **Recoupment**

The case law in New Zealand is that an ability to recoup losses is a requirement of a successful predatory pricing claim under s 36. In *Carter Holt Harvey*, the majority of the Privy Council explained that the harm from predatory pricing only comes about if there is a reasonable prospect of recoupment. Consumers only stand to gain from lower prices if they are not followed by the charging of monopoly prices. Low prices are generally an indicator of healthy price competition, not predatory pricing. In addition, predatory pricing would be unlikely to occur at all without the prospect of recouping losses, because a profit-sacrificing predation strategy (whether price is below cost or not) makes no business sense and is not rational behaviour for a profit-maximising firm. The Privy Council said, citing *Boral v ACCC*:<sup>12</sup>

There must... be a causal connection between the dominant position and the conduct which is alleged to have breached s 36. That will not be so unless the conduct has given the dominant firm some advantage that it would not have had in the absence of its dominance. It is the ability to recoup losses because its price-cutting has removed competition and allows it to charge supra-competitive prices that harms consumers. Treating recoupment as a fundamental element in determining a claim of predatory pricing provides a simple means of applying the section without affecting the object of protecting consumer interests.

Recoupment is therefore a necessary element of a s 36 predatory pricing action. If there is no ability or intention of recouping the losses incurred by pricing at such a low level, then the firm is not taking advantage of its power in the market.

### ***Reasonable justification***

There has been some debate in New Zealand as to whether a legitimate business justification can be offered to negate the “take advantage of” part of s 36, or the purpose requirement. New Zealand does not have a legitimate business justification defence, but a firm only takes advantage of its market power if it does something it would not do without that degree of market power. If a firm with market power prices below cost for legitimate reasons, it is trying to increase its efficiency. It is acting just as it would in a competitive market, and therefore has not taken advantage of its market power.<sup>13</sup> Thus, a legitimate business defence is built into s 36 by this interpretation of the “use” test.

Heerey J in *Boral*,<sup>14</sup> cited in the Privy Council decision in *Carter Holt Harvey*, said that “if the impugned conduct has a business rationale, that is a factor pointing against any finding that conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power.” Thus, a legitimate business rationale for conduct that may appear anti-competitive is a factor which points against a finding that the conduct constitutes a taking advantage of market power.

To refute a claim that its conduct was motivated by one of the anticompetitive purposes, a firm is likely to try to convince the court that it had a legitimate commercial justification for its actions. For example, in the Australian case *Queensland Wire*, it was held that a refusal to sell to a particular customer was for an anticompetitive purpose, and this was supported by the fact that BHP did not offer a legitimate reason for its conduct.<sup>15</sup> It may depend on the circumstances as to whether a legitimate business reason for the conduct best refutes the alleged anticompetitive purpose, or the alleged “taking advantage of” the market power. Either or both claims may be challenged by the existence of a legitimate business rationale.

If business reasons are suggested as a justification for the conduct, it is still up to the court to determine whether the reasons are objectively valid in the circumstances of the case. A legitimate business justification negates this element of s 36; there is no statutory defence to s 36 on the basis of such a justification.

### ***Cost-price relationship***

Another issue which has been discussed in the New Zealand academic literature is the measure of cost to which prices should be compared for the purpose of determining whether they are predatory. Price cutting is predatory if it has the purpose of harming competition. In New Zealand, no cases seriously discuss the issue of whether below-cost pricing is necessary for predatory pricing (and therefore the purpose of harming competition under s 36). There have been two cases that only briefly mention the issue. In *Carter Holt Harvey*, the firm in question was pricing below cost. In *Port Nelson*, it was found that it was not necessary to choose between the average fully allocated, opportunity, avoidable or incremental cost approaches because any one of them led to a conclusion that prices were substantially below cost on those facts.<sup>16</sup>

In *Carter Holt*, there were references made to prices being 30-40% below average variable cost<sup>17</sup> and references to prices being 17-28% below the cost of production.<sup>18</sup> However, there was no reference to the conventional Areeda-Turner test for predatory pricing on appeal in the Privy Council. The court instead focussed on recoupment as being the key factor in identifying cases of predatory pricing. In the Australian

case *Boral v ACCC*, it was said that a dominant firm uses its position of dominance when it engages in price-cutting with a view to recouping its losses without loss of market share by raising prices without fear of reprisals afterwards. This statement may imply that pricing below cost is a necessary element of s 36, because if there is no loss then recoupment cannot occur. An earlier Australian case, *Victorian Egg Marketing Board*,<sup>19</sup> suggested that when one can infer the requisite purpose from other evidence, then price cutting may be regarded as predatory, notwithstanding that it is not marginal or average variable cost and does not result in a loss being incurred. In terms of below cost pricing, the position in New Zealand is that it is the degree to which a firm can raise prices after the exit or deterrence of a competitor that is most important, not the measure of costs.

Likewise, the courts have not discussed the importance of price histories, the patterns to look for, or the timing and extent of price cuts, though timing and extent has been taken as being an indicator of the purpose of the action.<sup>20</sup> It has been acknowledged in New Zealand literature that there are many legitimate reasons for pricing below cost. Examples include where a firm prices below cost to induce customers to try a new product, or to boost profits in a complementary product.

### ***Access pricing***

Section 36 is often used in cases of access pricing, that is, where there is a dispute over access by a new entrant to a network owned by an incumbent monopolist.

In *Telecom v Clear*, Clear had set up as a competitor to Telecom in the telecommunications market. To be able to connect calls from one area to another in New Zealand, Clear had to connect its network to the Public Service Telecommunications Network owned by Telecom. It was a fundamental requirement of anyone offering telecommunications services in any part of the system that its customers should be connected to all other telephone users in New Zealand. The issue was as to the terms of which that interconnection was to be made; this had been left to the market to decide. Telecom argued that it was entitled to charge Clear an access levy to its network on the grounds that it was entitled to a contribution to the general common cost of Telecom's network. Clear argued there should be no access levy and that the charges demanded by Telecom were a breach of s 36 since they raised Clear's costs.

Telecom's consultant economists considered that a business would not be using its dominant market position under s 36 if it offered its services to a competitor at the same price as it would in a fully competitive market, that is, at marginal cost. However, it was considered that in an industry like telecommunications, where there are significant economies of scale and scope, marginal costs were not the correct measure. This is because they do not take account of major fixed costs. The correct measure is that of the perfectly contestable market. Prices should therefore vary between products and customers; at least cover marginal or average incremental costs; and also cover Telecom's opportunity cost. This approach would allow Telecom to charge Clear the average incremental cost of supply of access to the network, less costs saved by Telecom by Clear handling the calls.<sup>21</sup>

The Privy Council noted that the case was particularly difficult because Telecom was both Clear's competitor and a supplier of an essential service to Clear. It was concluded that charging according to the principles espoused by Telecom's economists was appropriate, and demonstrated what would be charged by a hypothetical supplier in a perfectly contestable market. Therefore, Telecom was not using its dominant position to extract such terms.<sup>22</sup>

### ***Anti-competitive purpose***

To successfully establish predatory pricing (or any other anticompetitive practice under s 36), an anticompetitive purpose must be established. The element of s 36 clarifies that it is not the effect of the

firm's conduct that is important, but the purpose for which it is carried out. These purposes are set out in s 36(2) as:

- Restricting the entry of any person into that or any other market;
- Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
- Eliminating any person from that or any other market.

Under s 36B, the existence of one of the purposes in ss 36 or 36A may be inferred from the conduct of any relevant person or from any other relevant circumstances. Notably, it is the purpose of the action and not its effect that is relevant.<sup>23</sup> Section 2(5)(b) deems a person to have acted for a particular purpose if that purpose was a substantial purpose, and the person acted for that particular purpose, or for purposes that included that purpose. Section 2A states that substantial means "real or of substance". Therefore, the requisite purpose needs to be substantial, and needs to be one of the purposes for which the action was carried out, but it need not be the only purpose.<sup>24</sup> "Purpose" under s 36 implies object or aim, and intention to do an act knowing that it will have anticompetitive consequences by itself is not enough. There must also be an intention to bring about those consequences.<sup>25</sup>

New Zealand case law disagrees on whether the purpose should be ascertained subjectively or objectively, but it was noted in *Clear Communications v Telecom* that proof of purpose will often depend on inferences drawn from actions and circumstances plus internal memoranda and correspondence. The High Court warned that "protestations of inner thoughts which do not reconcile with objective likelihoods are unlikely to carry much weight. In many cases ...both objective and subjective standards are met."<sup>26</sup> *Commerce Commission v Port Nelson*<sup>27</sup> reaffirmed that the distinction between an objective and subjective test for purpose is generally unimportant in practice.

In predatory pricing cases, inferences of anticompetitive purpose might be drawn from whether the price cuts are temporary (just long enough to ensure a competitor leaves the market), the level of the price cut (on the assumption that normally it would not be rational behaviour for the price to be equal or less than cost), and the ability to recoup losses (on the assumption that it would not normally be rational behaviour to deliberately make losses that there was no chance of recouping).<sup>28</sup>

### **Non-Price Predation**

Non-price predation rests on the observation that dominant firms are well-placed to adopt strategic moves designed to induce competitors and prospective entrants to make choices that are more favourable to the dominant firm than they otherwise would.<sup>29</sup> Given the absence of case law on non-price predation, much of this section draws from New Zealand academic commentary.

The foremost example of non-price predation is raising rivals' costs. Forms of raising rivals' costs include exclusive dealing arrangements, lobbying legislatures or regulatory agencies to create regulations that disadvantage rivals, commencing research and development or advertising wars, and adopting incompatible technologies.<sup>30</sup> As with predatory pricing, non-price predation will only be illegal if the elements of ss 27 or 36 are met. For example, a strategy to raise rivals' costs will not be successful if barriers to entry are low. If barriers were low, then supra-competitive prices would attract entry and force the market price back down. Therefore, the market power element of s 36 would not be established.

Assuming the first element of s 36 could be established, there are a number of examples of non-price predation which could amount to taking advantage of market power. For example, raising rivals' costs.

## **Raising rivals' costs**

Unlike predatory pricing, which focuses on lowering rivals' revenues, raising rivals' costs ("RRC") aims to increase the costs of competitors. This is a form of strategic behaviour whereby the predator raises a rival's costs in order to force the rival to decrease their output. The decrease in the rivals' supply will decrease market supply and thus raise the market price. However, the predator will raise the victim's costs above the market price and make its business unprofitable. Once market price is decreased and costs are raised, the predator can either keep its output constant and enjoy the higher price; expand its output to make up for the rival's decreased output and enjoy greater market share at the original market price; or produce somewhere in between these two levels.<sup>31</sup>

This strategy can be profitable for the predator from the moment it is implemented. As there is no issue of later recovering any losses, it can be a successful strategy even if the predator does not eliminate its rival from the market. It is possible for a firm to raise rivals' costs, increase its output relative to rivals (as their profit-maximising output falls), thereby allowing the firm to gain more market power. This gives it the ability to raise its prices.

New Zealand courts, which require recoupment, may not be open to such an argument. Under New Zealand competition law, courts must be careful in imposing liability for RRC because not all conduct that raises rivals' costs is anticompetitive. An example is where one firm develops some new technology that allows them to produce an innovative product. Other firms' costs will be increased as they struggle to develop a similar product. However, this is not non-price predation which could amount to taking advantage of market power. Similar examples include gaining control of a key input, or acquiring exclusive commitments from suppliers.<sup>32</sup>

- ***Control of a key input***

One example of where a firm might adopt this strategy is in an industry like telecommunications, where one firm might control supply of a key input for its competitors.<sup>33</sup> The controlling firm can raise rivals' costs by increasing the price of that input. Preventing or reducing competitors' access to the input may be an abuse of market power and fall foul of s 36.

- ***Exclusive dealing arrangements***

In *Fisher & Paykel v Commerce Commission*,<sup>34</sup> the Commission brought proceedings against Fisher & Paykel in respect of an exclusive contractual provision that the retailers selling its products would not stock or sell the whitegoods of any other distributor. Initially, Fisher & Paykel had applied to the Commission for authorisation of this practice, but was declined on the basis that it breached s 27 and there were no countervailing public benefits. A majority of the Commission considered that although it was difficult to quantify, the exclusive dealing arrangement significantly raised rivals' costs of distribution.

On appeal, the High Court accepted that the arrangement could breach s 27 if it raised Fisher & Paykel's rivals' costs. Because the arrangement foreclosed a significant number of distributors, the Commission found that it increased rival suppliers' costs because they were confined to operating through the remaining suppliers, or had to develop their own outlets. However, the High Court concluded that because barriers to entry were low, and retail space had not been foreclosed since the agreements between Fisher & Paykel and its retailers could be terminated without penalty on 90 days' notice, it did not raise their rivals' costs. There was ultimately no breach of s 27. This approach is supported by the Privy Council *Carter Holt*, where the majority would examine whether the party instituting the exclusive arrangement could raise prices.

- ***Abuses of legal rights***

Raising rivals' costs may manifest through the abuse of legal rights. An example is where a firm with substantial market power brings litigation in order to establish a litigious reputation, divert managerial attention away from business planning, or to tarnish a competitor's reputation. The issue of distinguishing between a legitimate exercise of legal rights, and abuses of rights for anticompetitive purposes, was discussed in *Electricity Corp v Geotherm*.<sup>35</sup> The Court of Appeal said that in order to establish a breach of s 36 (under the "use of a dominant position" threshold), more than a reasonable use of legal rights was required. It was said that an action brought could be an abuse of legal rights where the plaintiffs have been given legal advice not to proceed because the action had no legal basis. This may present issues as to whether a subjective or objective assessment of the anti-competitive purpose is taken.<sup>36</sup>

- ***Other predatory behaviour***

While not neatly divided into categories, New Zealand has had experience with cases of non-price predation. These examples are discussed below. The New Zealand experience is that s 36 is a difficult section to apply in practice to predatory conduct, and therefore a number of "predatory" cases have instead been argued under s 27. Examples of such cases follow.

*Magic Millions*<sup>37</sup>

Wrightson's was a well-established firm dealing in bloodstock, and had held the national yearling sales (of thoroughbred horses) annually for over 60 years by the time this case was heard. These sales were traditionally held over the third weekend in January. In 1989, Magic Millions, a new competitor, planned to hold their inaugural sale at the same time as Wrightson's. The parties managed to reach a settlement whereby their sales were held on different days. However, a direct clash arose again with the 1990 dates. Tipping J in the High Court found that Wrightsons were aware of Magic Million's proposed 1990 dates when they announced their own dates for 1990. It was held that Wrightsons had a dominant position in the market for the sale of thoroughbred yearlings by auction, and used that dominant position to try to eliminate Magic Millions from the market, or prevent or deter them from engaging in competition with Wrightsons. Section 36 was therefore breached.

*Ophthalmological Society*

In order to address a substantial waiting list for cataract surgery in Southland, the government provided extra funding to Southland Health to allow extra cataract operations to take place. Southland Health entered into negotiations with two reputable Australian surgeons with a view to bringing them to New Zealand to help clear the backlog. The Australian surgeons were willing to provide the operations at nearly half the fee of some New Zealand surgeons. However, this was met with vehement opposition from the sole Southland ophthalmologist, and other members of the Ophthalmological Society.

The Commerce Commission brought a successful action against the ophthalmologists under s 27.<sup>38</sup> The High Court found that there was an arrangement between various ophthalmologists with the purpose and effect of hindering or preventing the entry of surgeons from outside Southland into the relevant market, who did not have the approval or without the consent of the sole eye surgeon in Southland. The ophthalmologists had acted to oppose and obstruct the entry of Australian ophthalmologists to perform routine cataract surgery.

*Port Nelson*

*Port Nelson*<sup>39</sup> is an example of a case involving price and non-price predation that was decided under both ss 27 and 36. Port Nelson provided various services and facilities for ships using the port at Nelson

including wharves, tugs, pilots and stevedoring. When faced with new competitors - independent pilots setting up their own businesses providing pilotage services - Port Nelson adopted a predatory strategy. It refused to hire tugs to ships which did not use pilots employed by Port Nelson; it offered a 5% discount to port users who bought the whole range of their services; and reduced its minimum pilotage charge for small vessels to below the cost of provision. The High Court found that the discount and the \$100 minimum charge did not breach s 36 because a non-dominant firm in similar circumstances would have acted likewise, and as such the “use” of a dominant position was not made out under the Privy Council approach. They did however breach s 27.

Though s 27 requires concerted rather than unilateral action, Port Nelson had breached s 27 on the basis of a unilateral anti-competitive purpose. This runs against the view that s 27 requires some kind of concerted action or collusion before a breach of s 27 can be established.<sup>40</sup> This analysis of predatory conduct has not been adopted in any subsequent decisions.

The tug tie, meanwhile, was found to be a breach of s 36, constituting a use of the dominant position for the purpose of preventing, deterring, or eliminating other pilots from competing with Port Nelson. This was a course of action undertaken by a dominant firm as a central part of a strategy to kill prospective competition in pilotage, and deter others.<sup>41</sup>

#### **Comment: overall statutory effectiveness**

Like other jurisdictions, New Zealand has found the application of competition law to predation difficult. However, it can be argued that s 36 now applies to more cases of predation since its amendment in 2001. The threshold was changed from one of “dominant position” in a market to the current “market power” threshold. The new threshold is lower and therefore allows a wider range of activities to come under s 36 scrutiny. To mitigate against this broader application of s 36, courts have emphasised that s 36 must be interpreted to provide certainty to those firms with substantial market power as to what they can legitimately do. Firms with market power are entitled to compete with their competitors as much as other firms.<sup>42</sup>

The law under s 36 as it relates to predatory pricing has been clarified by the recent decision in *Carter Holt Harvey*, as discussed above. The Ministry of Economic Development is currently examining the law on this point. The *Carter Holt Harvey* decision, while offering welcome clarity, may present some difficulties. One is that it reaffirms the application of a strict counterfactual test. It has the potential to narrow the scope of s 36, which could be contrary to the policy behind the 2001 amendments.

It should be noted that the Privy Council decision contained a strong dissent by two judges towards both the application of the test, and the construction of hypothetical scenarios in general. The minority said that the test was flawed because it is not clear what the attributes of the firm in the counterfactual scenario are. For example, the minority considered that it was arguable that attributes that make the firm dominant, for example in INZCO’s case a strong distribution network, should not be present in the counterfactual. However, the majority had said that it was only the actual market power that should be removed from the hypothetical firm. The minority criticised this, saying that it was artificial to imagine a firm that has no market power and yet retains the attributes that give it the market power. Thus, the minority indicated that the counterfactual test was of very limited use. The minority also reiterated that the counterfactual test is a judicially constructed tool, not one demanded by statute. Overall they considered that the construction of a hypothetical firm in the *Carter Holt Harvey* case to be “highly unreal”.<sup>43</sup>

## NOTES

1. There is other sector-specific legislation in competition law, such as the Telecommunications Act 2001. However these other pieces of legislation are not relevant to a discussion of predation.
2. See Annex One for the full text of s 27.
3. *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43.
4. *Air New Zealand & Anor v Commerce Commission* (High Court, Auckland, 17 September 2004) Rodney Hansen J and Kerrin Vautier CMG.
5. However, in an earlier case *Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731, 757 it was accepted that an incumbent's response could be treated as a barrier to entry. The court in *Air New Zealand* found that the *Wrightson* case had exceptional facts and did not espouse a generally applicable rule.
6. *Commerce Commission v Carter Holt Harvey* (2000) 9 TCLR 535, judgment of Williams J cited in *Carter Holt Harvey v Commerce Commission* (Decision PC6/2004 of the Privy Council of 14 July 2004, Unreported).
7. *Commerce Commission v Carter Holt Harvey*, above, para 57.
8. *Boral Besser Masonry v ACCC* (2003) HCA 5, para 278 McHugh J.
9. David Coull "Predatory Conduct under the Commerce Act 1986" [1998] VUWLR 31.
10. *Carter Holt Harvey Building Products Ltd v Commerce Commission* (Decision PC6/2004 of the Privy Council of 14 July 2004, Unreported).
11. *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385, 402.
12. *Carter Holt Harvey Building Products Ltd v Commerce Commission* (Decision PC6/2004 of the Privy Council of 14 July 2004, Unreported) para 67.
13. Paul Scott "Is a Dominant Firm's Below Cost Pricing Always a Breach of Section 36 of the Commerce Act?" (2004) 21 NZULR 106, 129.
14. *Boral Besser Masonry v ACCC* [2003] HCA 5
15. *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1989) 167 CLR 177, 193 Mason CJ and Wilson J.
16. *Commerce Commission v Port Nelson* (1995) 6 TCLR 406, 535.
17. *Commerce Commission v Carter Holt Harvey Building Products Ltd* (2000) 9 TCLR 535 (HC), para 43.
18. *Carter Holt Harvey Building Products Ltd v Commerce Commission* (Decision PC6/2004 of the Privy Council of 14 July 2004, Unreported) para 16.
19. *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) ATPR 17,783.
20. *Commerce Commission v Carter Holt Harvey Building Products Ltd* (2000) 9 TCLR 535 (HC), supplementary judgment of Professor Lattimore, paras 57-60.

21. *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995]1 NZLR 385, 395.
22. *Telecom v Clear*, above, 408-9.
23. *Apple Fields Ltd v NZ Apple and Pear Marketing Board* (1993) 7 PRNZ 184, 189.
24. *Union Shipping v NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC).
25. *Union Shipping*, above, 707.
26. *Clear Communications Ltd v Telecom Corp of NZ Ltd* (1992) 5 TCLR 166, 198.
27. *Commerce Commission v Port Nelson* (1995) 6 TCLR 406 (HC), affirmed on appeal in (1996) 7 TCLR 217 (CA).
28. *Gault on Commercial Law* CA36.13 Inference by conduct.
29. Thomas Sharpe “Predation” (1987) ECLR 8(1) 53, 58.
30. Steven Salop and David Scheffman “Cost-Raising Strategies” (1987) 36 Journal of Industrial Economics 19.
31. Paul Scott “Raising Rivals’ Costs” Paper presented at the Fourth Annual Workshop of the Competition Law & Policy Institute of New Zealand (Rotorua, August 1993).
32. Scott, above.
33. TelstraClear Ltd *Submission: Residential Resale Application – Public Version*, 7 March 2003 available at [http://www.comcom.govt.nz/telecommunications/accdet/TCL\\_subdecinv.PDF](http://www.comcom.govt.nz/telecommunications/accdet/TCL_subdecinv.PDF) (last accessed 2 September 2003) 8-11.
34. *Fisher & Paykel v Commerce Commission* [1990] 2 NZLR 731 (HC).
35. *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641 (CA).
36. *Gault on Commercial Law* CA 36.26 Abuses of legal rights.
37. *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 (HC).
38. *Commerce Commission v Ophthalmological Society of New Zealand* (2004) 10 TCLR 994.
39. *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 (HC) and *Port Nelson Ltd v Commerce Commission* (1996) 7 TCLR 217 (CA). The decision of the High Court was affirmed on appeal.
40. Ian Eagles “Of Ports, Pilots and Predation” (1996) ECLR 17(8) 462, 466.
41. *Commerce Commission v Port Nelson* (1995) 6 TCLR 406, 557 (HC) McGechan J.
42. See for example *Telecom Corporation of NZ Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 and *Carter Holt Harvey*, above.
43. *Carter Holt Harvey v Commerce Commission* (Decision PC6/2004 of the Privy Council of 14 July 2004, Unreported), para 78, Lord Scott of Foscote and Baroness Hale of Richmond.

***ANNEX ONE: LEGISLATION*****Section 36 – Taking advantage of market power**

- (1) Nothing in this section applies to any practice or conduct to which this part applies that has been authorised under part 5.
- (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of –
  - A. RESTRICTING THE ENTRY OF A PERSON INTO THAT OR ANY OTHER market; or
  - B. Preventing or deterring a person from engaging in competitive conduct in that or any other market; or
  - C. Eliminating a person from that or any other market.
- (3) For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of section 45(2), in new Zealand.
- (4) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.

**Section 27 – Contracts, arrangements or understandings substantially lessening competition prohibited**

- (1) No person shall enter in a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this act.
- (4) No provision of a contract, whether made before or after the commencement of this act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

**Section 36A – Taking advantage of market power in trans-Tasman markets**

- (1) Nothing in this section applies to any practice or conduct to which this part applies that has been authorised under part 5.

- (2) A person must not, for any of the purposes specified in subsection (3), take advantage of the person's substantial degree of power (if any) –
  - A. In a market; or
  - B. In a market in Australia; or
  - C. In a market in New Zealand and Australia.
- (3) The purposes are as follows:
  - A. Restricting the entry of a person into a market that is not a market exclusively for services;
  - B. Preventing or deterring a person from engaging in competitive conduct in a market that is not a market exclusively for services;
  - C. Eliminating a person from a market that is not a market exclusively for services.
- (4) For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce –
  - A. A statutory intellectual property right, within the meaning of section 45(2), in New Zealand;
  - B. A statutory intellectual property right in Australia.
- (5) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.

**Section 36b – purposes may be inferred**

The existence of any of the purposes specified in section 36 or section 36a, as the case may be, may be inferred from the conduct of any relevant person or from any other relevant circumstances.

**Section 45 – exceptions in relation to intellectual property rights**

- (1) Nothing in this part of this act, except sections 36, 36a, 37 and 38 of this act, applies –
  - A. To the entering into of a contract or arrangement or arriving at an understanding in so far as it contains a provision authorising any act that would otherwise be prohibited by reason of the existence of a statutory intellectual property right; or
  - B. To any act done to give effect to a provision of a contract, arrangement, or understanding referred to in paragraph (a) of this subsection.
- (2) For the purposes of subsection (1) of this section, a statutory intellectual property right means a right, privilege, or entitlement that is conferred, or acknowledged as valid, by or under –
  - A. The patents act 1953; or
  - B. The designs act 1953; or

- C. The trade marks act 1953; or
  - D. The copyright act 1994; or
  - E. The plant variety rights act 1987; or
  - F. The layout designs act 1994.
- (3) For the purposes of subsection (2) of this section,
- A. A person who has applied for a patent in accordance with the patents act 1953 and filed the complete specification in relation to the application shall, until the application is determined, be deemed to have been granted to the patent to which the application relates:
  - B. A person who has made an application for the registration of a design in accordance with section 7 of the designs act 1953 shall, until the application is determined, be deemed to be the registered proprietor of the design:
  - C. A person who has made an application in accordance with section 26 of the trade marks act 1953 for registration of a trade mark shall, until the application is determined, be deemed to be the registered proprietor of the trade mark:
  - D. A person who has made an application in accordance with section 5 of the plant variety rights act 1987 shall, until the application is determined, be deemed to have been granted the plant variety rights to which the application relates.



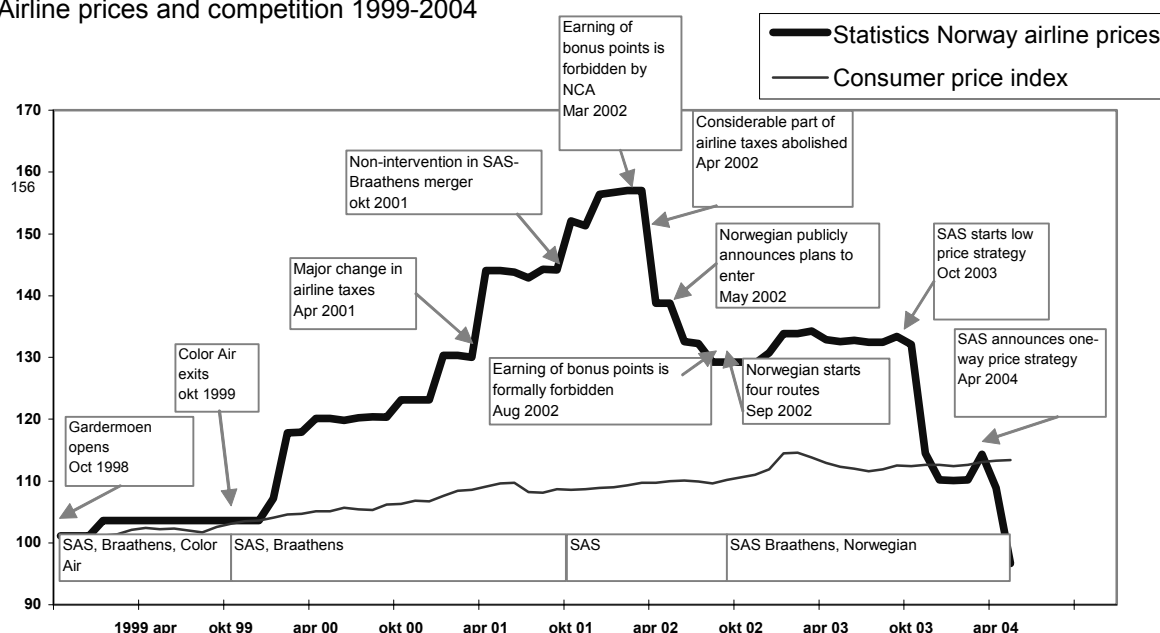
## NORWAY

### 1. Introduction

The Norwegian Competition Authority (NCA) has been monitoring the airline industry closely for several years. For the time being, the NCA is investigating SAS Braathens under suspicion of predation.

The airline industry in Norway has experienced considerable changes during the last five years. The below figure describes major developments in the domestic air travel market in the period from October 1998 to May 2004.

Airline prices and competition 1999-2004



After the opening of a new main airport (Gardermoen) in October 1998, there were no substantial capacity restraints related to airport services in Norway. As the new airport opened, there was a strong increase of capacity in the domestic aviation markets. Firstly, the two main carriers – SAS and Braathens – increased their capacity. Secondly, *Colour Air* entered the market. One year later, however, in October 1999, *Colour Air* had to cease its operation. As is clear from looking at the graph, there were moderate increases in fares in this period.

In the following period – from October 1999 to October 2001 – there was a duopoly. Eventually Braathens, the smaller company of the two, could not bear the costs connected to the earlier increase in capacity. In October 2001 the NCA cleared SAS' acquisition of Braathens – after accepting SAS' failing firm defence. This led to a period of monopoly, which lasted until *Norwegian Air Shuttle* entered the market in September 2002. *Norwegian Air Shuttle* has since expanded its operation domestically and internationally.

During the period of monopoly there was a sharp increase in fares. The prices reached their peak in March 2002. In 2,5 years, the average fare had increased by 56%.

Prior to *Norwegian Air Shuttle* entering the market, the NCA had found SAS' frequent flyer program, Eurobonus, to constitute an entry barrier and concluded that it was anti-competitive. The appeal body upheld the NCA's decision in June 2002, and the ban on domestic frequent flyer point collection became effective from 1 August 2002.

SAS responded to the entry of *Norwegian Air Shuttle* by a slight decrease in prices from January 2003 – followed by a significant decrease in October 2003. Capacity has been held at roughly the same level. A further decrease in prices was launched from May 2004. This took domestic air fares to a record low level.

To further secure competition in the airline market, the NCA intervened against certain aspects of SAS's corporate discount agreements. From April 2004 SAS could no longer have clauses of exclusivity. Furthermore they had to state explicitly in the agreements that the customers were free to buy air travel services from other companies. Rebates that increase more than proportionately with volume were also forbidden.

## **2. The NCA's actions regarding predation**

The NCA has closely monitored the behaviour of SAS regarding price and capacity. Since April 2003, SAS has provided the NCA with route specific data on a monthly basis. These include relatively detailed cost and income figures, point-to-point passenger flows and discounts given to corporate customers.

In November 2003 the NCA hired two consultants (Frode Steen and Lars Sørsgard, both professors at the Norwegian School of Economics and Business Administration) to do a study on predation in the Norwegian airline industry. Seeing the need to refine the Akzo standard for the purpose of application to the airline industry, they develop a customized approach focusing on incremental cost and incremental revenue (see below). Based on econometric analyses covering the period from January 1996 till December 2003, they concluded that there was no hard evidence that predation had taken place in that period. One important aspect, however, was that SAS had reduced prices towards the end of the period.

SAS immediately assigned experts to study the case at hand. RBB Economics, a London based consulting firm, presented an analysis and concluded that SAS had not been engaged in predatory behaviour in the period. They based their method on the AKZO-standard<sup>1</sup> as developed within the EC Competition Law.

When SAS reduced their fares with effect from May 2004, this put the NCA further on the alert. The NCA has now organised a task force that will work exclusively on this problem with assistance of newly appointed Chief Economist Lars Sørsgard. On 22 June 2004, the NCA carried out a dawn raid at SAS' headquarters in Norway. The authority is still in the process of examining the impounded material.

## **3. Methodology – the predation tests**

In the sequel, two ways of testing for predation in the airline industry are discussed.

### **3.1 The AKZO-test**

The rationale behind this test is that, in most cases, prices below marginal costs cannot be profitable except as a strategy to squeeze one or more competitors out of the market. The AKZO standard is based on the Areeda-Turner test, where average variable costs (AVC) is used as a proxy for marginal costs. To get a correct estimate of average cost, one must decide on the relevant *unit of production* and relevant *time*

*period*. Both Steen and Sjørgard and RBB Economics agree that in the air travel market the time period should be at least one season. This is so because airlines determine their flight schedule twice a year, once for the summer and once for the winter season.

In the NCA's view, the route is the relevant level of production. The capacity is adjusted by offering a higher or lower number of flights. Typically an entrant will choose to access the more profitable routes. In terms of capacity, the incumbent's response will typically be to adjust the number of flights, rather than to exit the route completely.

A further challenge in calculating AVC in the airline industry is to decide which costs are variable and which are fixed, given the production level and time period in question.

Airlines make extensive use of price discrimination. Through yield management systems airlines seek to maximize revenue. Hence, there is not one fare that gives the right picture of marginal revenue. Average price (AP) is a more relevant measure of revenue.

One can divide the cost elements into avoidable and non-avoidable costs. An important exercise in any predation case is to decide which costs are avoidable and which are not.

*Avoidable:*

- Fuel cost, maintenance and overhaul, charges (both airport and enroute fees), meals, sales, distribution, central marketing and station handling.
- Costs related to *flight equipment*, both leased and owned planes, are avoidable. The opportunity cost of an airplane is certainly not zero – it can be used on other routes, leased to other airlines, or sold.
- Costs of *pilots* and *cabin crew* are avoidable. For the time being SAS is effectuating a cost reduction programme called Turnaround 2005. This involves a reduction of 6000 man years annually. There will also be a natural turnover in a large company like SAS. Furthermore, through the EEA agreement it is possible to rent personnel to other airlines. This shows that SAS can adjust the number of employees in a number of ways.

*Non-avoidable:*

- Overhead and support, administration of station handling

When AP is below AVC, there is a strong presumption for predatory pricing. When AP is above ATC, this clears the alleged airline of suspicion. When AP is between AVC and ATC, evidence of predatory intention will be decisive.

One problem with the AKZO test is that AVC can be significantly smaller than the marginal cost at high levels of output. Consequently this method increases the chance of finding the airline under scrutiny not guilty, when in fact it does sacrifice profit the margin, for the sole purpose of reducing the number of competitors.

### **3.2 Incremental cost and revenue**

An alternative way of determining predation is to look at incremental costs and revenues. This means that one considers the last unit(s) of production and their impact on revenues and costs. This has also been

done in the Deutsche Post<sup>2</sup> and the American Airlines<sup>3</sup> cases. The method applied by Sørsgard and Steen is cut along these lines.

If, for example, an incumbent airline responds to entry on a route by adding three daily flights, the test would be whether the incremental cost of these extra flights is covered by the incremental revenue they generate.

By looking at an increase in the number of flights one should differentiate between the revenue and costs attributable to this increase (the increment) and to the existing number of flights, respectively. This leads to new measures of costs and revenues called average incremental costs (AIC) and average incremental revenue (AIR). Sørsgard explains in detail how one should calculate these measures.

It can be shown that AIC most likely will be higher than or equal to AVC (from the AKZO-test) and that AIR most likely will be lower than or equal to AP. This is so because the additional flights “cannibalise” on the existing flights. Not all the occupants of additional flights will be new travellers – some of them will have converted from the (previously) existing flights. Moreover, to attract new travellers, the airline will typically have to lower its fares. Thus, not only will the new travellers pay a lower average fares than the original travellers – even the latter will have an opportunity to obtain cheaper tickets. Hence, the incremental revenue generated by the new flights (AIR) will typically be lower than AP.

As for the costs, one has to look at the costs relative to the number of passengers. If the cabin factor after the increase in the number of flights is the same as before, the costs per passenger will not be altered; AIC is equal to AVC. But if the cabin factor drops – which is the most likely outcome – this implies that the ratio of additional costs to new passengers will be higher than the ratio of average costs to total number of passengers, i. e. AIC is higher than AVC.

Both the cost and revenue calculations imply that this test is “stricter” than the AKZO-test.

#### *Network externalities*

For a network airline like SAS, one of their advantages is to provide one ticket for a travel consisting of two or more legs. This generates positive network externalities. By closing a route, the carrier will not only lose the income from this route, but also income that these travellers generate on other routes.

When assessing network externalities in predation case, flight would be the relevant unit of production. A network airline will most probably not close a route when faced with a new competitor; rather it will reduce the number of flights to cover its costs (to meet competition and avoid being accused of predatory behaviour). Thus the relevant choice is whether to expand, maintain or withdraw capacity, rather than to exit the route.

### **3.3 Contestable markets and recoupment**

The markets for air transportation are generally not as contestable as they may seem. Even though the fixed costs are not exclusionary (the airlines can, e. g., easily move their aircraft between routes), the incumbent’s possible response in terms of immediate changes in capacity and/or fares makes it risky to enter even an apparently profitable market. This same flexibility also allows for easy recoupment of losses after having forced a competitor to exit.

The European Court of justice has not adopted a requirement of recoupment under article 82. The possibility to recoup the losses incurred will, however, be of importance when the court is to establish an intention to eliminate the competitor. The NCA believes that the possibility for recoupment will strengthen an accusation of predation, even when AP is lower than AVC.

#### **4. Concluding remarks**

The AKZO standard set by the European Commission is the most feasible method to discern predatory behaviour from healthy competition. This has legal support from the European Commission and has been employed in several cases elsewhere as well.

The “incremental” approach can produce more accurate tests and appears particularly relevant in the airline industry.

**NOTES**

1. Case C-62/86, Akzo Chemie BV v. The Commission
2. Case COMP/35.141 – Deutsche Post AG
3. US v. AMR Corporation, American Airlines Inc and AMR Eagle Holding Corporation

## SWITZERLAND

### 1. Introduction

In recent years, the Swiss competition authorities received a growing number of complaints about different predatory behaviours of market participants. These include complaints about predatory pricing, product launch, advertisement, and “price squeeze” in different industries.

Such predatory practices may fall under the application of the Swiss competition law (Act on Cartels; Acart). Article 7 (1) Acart states that “*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...*”.

The act addresses predatory pricing explicitly. According to art. 7 (2) d) Acart, “*the undercutting of prices or other conditions directed against a specific competitor*” may constitute an unlawful practice. However, predatory pricing is only unlawful if adopted by a firm in a dominant position.

In practice, it is not easy to distinguish between predatory behaviour and fierce but healthy competition. In the following, some relevant cases and the criteria that were used are presented.

### 2. Relevant Cases

#### 2.1 *Alleged Predatory Launch of a Newspaper*

In February 2002, a regional news corporation filed a complaint to the Swiss competition authorities concerning a predatory launch of a newspaper.<sup>1</sup> It accused a competitor of trying to drive it out of the market by launching a new regional newspaper.

In particular, the competitor distributed free issues and sold subscriptions and advertisements at very low prices. A preliminary investigation by the Swiss competition authorities revealed that the competitor indeed expected considerable losses in the initial phase of the new newspaper.

However, it turned out that it is not unusual that the launch of a newspaper involves significant initial losses. In contrary, it seems that in the majority of cases, market entries of newspapers lead to losses in the first years. The competition authority concluded that the mere fact that the competitor expected losses in the initial phase of market entry is not per se an indicator for predation. Rather, dumping prices and the distribution of free issues are customary in entries into newspaper markets. Moreover, in spite of the large initial losses the competition authorities concluded that the new newspaper could be financially viable in the long run without charging excessive prices.

The reason for the need to incur losses at the beginning is that newspapers can be characterized as “two-sided platforms”. On the one side, there are the readers of the newspaper. They generally benefit from high numbers of advertisements in the sense that they reduce the price of the newspaper. The other side consists of firms who place advertisements in the newspaper. The higher the number of readers of the newspaper, the higher the value of an advertisement. Therefore, in order to be successful, a newspaper

must attract a sufficient number of advertisements and readers at the same time. In order to attain the critical size, it may be rational to distribute a newspaper for free in an initial phase of market entry.

Finally, the preliminary investigation revealed that even if the incumbent newspaper was driven out of the market, the new newspaper would not be able to increase its prices above the competitive level in the long run, due to remaining competitive forces. Moreover, there were no indications that the media group was launching the newspaper in order to deter potential competitors in other markets from entering (signalling-effect). Therefore, the investigation was closed.

## **2.2 *Alleged Predatory Cross-subsidies in the Market for Radio and TV***

Another preliminary investigation opened in 2002 analyzed alleged predatory cross-subsidies of a newspaper company.<sup>2</sup> The newspaper was accused of driving a radio and TV station out of the market by excessively advertise its own radio and TV station without charging market prices.

The authorities concluded that the newspaper company probably had a dominant position in the market for newspaper. However, the alleged abuse concerned the market for advertisement. According to the competition authorities, in this well defined case this market also includes other media, such as billboard advertising, direct and event marketing, etc. It was therefore questionable whether the newspaper company would be able to leverage its dominant position into the market for advertisement.

Even if it could, however, the authorities did not find an abusive behaviour. The behaviour of the newspaper company was consistent with short run profit maximization. From a business perspective, it seems reasonable to use existent advertisement space for its own subsidiaries if it cannot be sold otherwise. Moreover, if such advertisements are sold to subsidiaries at prices which at least cover the incremental cost to leaving blank space, there is no cross-subsidization. It turned out that these prices considerably lie below the market price.

## **2.3 *“Price Squeeze” in the Market for Telecommunications Services***

In February 2004, the Swiss competition authorities opened an other preliminary investigation to analyze a possible “price squeeze” of the incumbent telecommunications operator.<sup>3</sup> A “prize squeeze” occurs if a vertically integrated firm with a dominant position in the upstream segment sets downstream retail prices so low compared to wholesale prices that a similarly efficient downstream competitor cannot viably exist in the market.<sup>4</sup>

Based on the preliminary investigation, the Swiss competition authorities concluded that the price differences between wholesale and retail prices were considerable. Therefore, it seemed plausible that an efficient competitor would be able to survive. However, in the preliminary investigation, the authorities renounced to compare the price difference with the downstream costs of an efficient competitor. Nevertheless, the authorities concluded that there were no indications for a price squeeze.

Currently, a possible price squeeze is object of an other investigation into the telecommunications sector.

## **2.4 *Alleged Predatory Pricing in the Credit Card Market***

In July 2003, the competition authorities received a complaint by a Swiss financial institution concerning predatory pricing by another financial institution in the market for credit card acquiring.<sup>5</sup> Credit card acquirers conclude contracts with merchants on the acceptance of credit cards. The plaintiff accused its competitor of systematically setting below-cost prices in order to monopolize the market and demanded the order of provisional remedies against the rival.

Even though it could not be excluded that the defendant has a dominant position in credit card acquiring, the competition authorities rejected the request for provisional remedies on the grounds that the prices charged were not likely to be predatory. In particular, the defendant's prices were not below average cost. Moreover, the defendant's prices were even above the plaintiff's average costs so that it was not plausible that the plaintiff would be driven out of the market. Therefore, the authorities concluded that predation was not sufficiently plausible in order to impose provisional remedies. Nevertheless, the competition authorities opened a preliminary investigation to examine the pricing more thoroughly.

## 2.5 *Criteria applied to Predation*

Based on the relevant legal texts and the case law, in Switzerland the following criteria seem to be relevant for the assessment of predatory behaviour:

### A. *Market dominance*

The first step consists of analyzing whether the firm has a dominant position. The dominant position must not necessarily refer to the market in which the abuse takes place.

### B. *Predation*

- Behaviour is systematic

The firm applies its strategy over a certain duration. E.g., selective rebates are not sufficient to qualify as a predatory behaviour.

- Behaviour is directed against one or several weaker actual or potential competitors

The dominant firm must dispose of the necessary resources in order to drive its competitors out of the market (deep pocket). However, the competitor must be weaker altogether, not only in the market in which predatory behaviour is observed.

- Behaviour does not maximize short-run profits

Below-cost prices may temporarily be compatible with short-run profit maximization, e.g. in case of special promotions, sale of perishable products which otherwise could not be sold etc. Therefore, prices below average or variable cost may be an indication of predatory conduct, but not a per se proof. On the other hand, prices above average cost may also under certain circumstances be predatory.

- Prices can be increased in the second stage

By increasing prices above the competitive level once the rival is forced out of the market, the dominant firm is able to recoup the losses incurred in the first stage. Consumer end up paying higher prices and having less choice. However, low prices may also be used as a signal to potential market entrants in other relevant markets. Therefore, the losses must not necessarily be covered in the same relevant market.

- Behaviour is not customary in a particular trade

Losses in the initial phase of a product launch may be a common in certain industries, e.g. in two-sided platform markets.

### **3. Conclusions**

In recent years, the number of complaints about predatory behaviour has been increasing. So far, however, the Swiss competition authorities did not take a formal decision referring to predatory conduct. If it is not possible to distinguish properly between predation and fierce competition, there is a danger that firms try to abuse competition policy to hinder particularly aggressive competitors.

## NOTES

1. See „Espace Media Groupe / Berner Zeitung AG / Solothurner Zeitung“, RPW 2003/1, pp. 62 ff.
2. See „Radio- und TV-Markt St. Gallen“, RPW 2002/3, pp. 431 ff.
3. See „Produktbündel ‚Talk & Surf‘“, RPW 2004/2, pp. 357 ff.
4. Such a behavior may not necessarily involve the sacrifice of short-term profits in order to monopolize a market.
5. Cornèr Banca SA / Telekurs AG“, not yet published.

DAF/COMP(2005)14

## TURKEY

### 1. General Framework

Due to certain motives, undertakings may tend to apply predatory prices. Regardless of whether legal or illegal, in order to be reasonable, predatory pricing requires presence of certain conditions. First of all, as it aims at driving the rivals out of the market and augmenting the prices to a level well above the competitive price, access to the market must be difficult or must require a significant cost. Otherwise, the enterprise would bear losses stemming from the practise but would never achieve an occasion to increase its prices because of the consecutive newcomers. Therefore, predatory pricing is supposed to be unreasonable in cases the importation of the relevant product or access to the market being relatively easier. "Beer" may be a typical example for the product markets, in which enterprises may tend to drive competitors out of the market, as importation of a relatively cheap product will increase its price significantly and entrance to the market and access to the final consumer require a high amount of investment. Daily newspaper market, as well, may constitute another typical example. Importation of a daily newspaper is almost unreasonable because of the "linguistic barrier" as well as the economic life of the relevant product.

*Interaction between International Trade and Predatory Pricing:* In cases where international trade of the relevant product is possible and feasible, theoretically, predatory pricing can not exist. Competitors operating in the trade partners can wait till the relevant enterprise gives an end to the predatory pricing and then access to the market. Domestic competitors, too, can survive as they can supply their products in foreign commerce.

*Collective predatory pricing; price fixing, or concerted practise:* Even though cartels are usually established to keep the prices artificially above the competitive prices, the parties to a cartel may also tend to act together to another end, namely to drive a particular competitor out of the market. In that kind of behaviour, price-fixing is concerned, rather than a predatory pricing. When the same behaviour is valid but a price-fixing agreement does not exist, the practise may be called "concerted practise". Turkish Competition Authority handled a similar case. Leading liquid-gas marketing enterprises have engaged in a price fixing agreement against a local liquid gas company. As the scope and the marketing capacity of the local enterprise were very limited, the below-cost supply agreement was valid in one particular city. The significant price difference between neighbouring cities constituted an evident for the price-fixing agreement.

*On Nature of the Predatory Pricing:* To our opinion, two abuses, in exact names "predatory pricing" and "use of the economic power acquired at a certain market in order to possess a dominant position at another one" must be assessed separately. We firmly believe that the competition agencies must attach further importance to latter type of behaviour, as the enterprise practising that type of an abuse, finances its short-term losses more easily and consequently the consumers indirectly pay for the illegal practise.

The situation is much more complicated when services sector -in general-; the transportation sector -in particular- is concerned. Transportation sector is the typical example for the operations where the fixed costs occupy a significant portion of the total costs. Enterprise A can augment its prices to the same level as its costs but then the loss may get higher as the demand will be less. Hence, the enterprise A can claim that the low price is justified by this market structure. Another problematic sector is newspaper market.

Below-cost pricing, in this particular sector, can be justified as it increases the commercial advertising revenue.

## 2. Experience in Turkey

Article 6 of Turkish Competition Act bans abuse of dominant position. Paragraph (a) of the above-mentioned Article cites to "preventing, directly or indirectly, other enterprises in its area of commercial activities or practices, which aim to impede the activities of the competitors in the market". Therefore, the undertakings that hold a dominance in the relevant market can be accused of predatory pricing. The case law is similar to that of the European Community. The prices have to be below the average variable cost to be identified as "predatory".

***TDI Case:*** One of the most interesting cases that the Turkish Competition Authority has dealt with was in the maritime transportation sector. In this particular case, state-owned company **Maritime Enterprises of Turkey** (TDI) was accused for charging excessive prices at a certain domestic line, where it is the monopoly, and fixing the prices significantly below the prices at another domestic line, where competitors exist. The facts that the Competition Authority examined in this particular case:

*Does TDI possess a dominant position?* Article 6 of the Competition Act identifies and bans the abuse of dominant position and paragraph (a) of the relevant Article involves the predatory pricing practise. "Use of the economic power acquired at a certain market in order to possess a dominant position at another one", is, too, mentioned within the Article 6 (paragraph (d)). Therefore, the first examination is assessing whether the accused company or companies hold a dominant position.

*How can TDI finance its losses?* Operating at another line as a natural monopoly, TDI can easily finance its losses at the relevant geographical market by fixing the prices higher than competitive level at the former. Instead of another geographical market (a line in this case), the company concerned might have a dominant or monopoly position at any other product market. A third way to finance the losses stemming from predatory pricing may be called as "loss leading profit". The Office of Fair Trading of the United Kingdom made some researches in the field and concluded that this behaviour is common, especially in the retailing sector. The remedies that a competition agency might propose vary depending upon the way of financment of the loss. If the relevant enterprise holds a monopoly position at any other geographic or product market, then this market can also be examined. In cases where the enterprise holds a natural monopoly position, the competition agency may request the firm to distinguish the accounts of two operations. So called "Structural Separation" Remedy, however, is not requested by Turkish competition Authority so far.

*Does TDI have sufficient capacity to meet the aggregate demand?* This is, to our view, an important criterion, as the price policy could not be identified as "predatory" otherwise. As long as the supply capacity of an enterprise remains less than the aggregate demand, the possible consequence of the practise is a reduction at the enterprise's revenues. The competitors, under this situation, survive thanks o the gap between the aggregate demand and the supply capacity of the predator enterprise. Therefore, a below-cost pricing policy of n enterprise, which can not cover the aggregate demand, will not easily be identified as a "predatory pricing".

*At which point is the price level located?* In some cases, the prices may be fixed below the average total costs but above the average variable costs. As in the EU, in Turkey, too, this price policy is not assessed under the title of "predatory pricing". In this particular case, the reporters needed to deal with another question. Prices of the TDI might be below its average variable cost, but this might be stemming from the fact that the cost structure of TDI is quite different than its competitors. Relatively older ferries of TDI are claimed to consume more oil besides the fact that the workers of TDI are evidently paid higher

salaries than that working at rival private companies. This phenomenon will be discussed at an imaginary case.

There still exist certain questions about predatory pricing. Is a case where a dominant firm fixes its prices below its operation costs necessarily a predatory pricing?

COST-----PRICE (Enterprise A)		COST-----PRICE (Enterprise B)	
100	80	80	75

At this imaginary case, a dominant enterprise (A) fixes its price below the cost and forces its competitor to do the same. However, A can claim that this practise is a normal conduct in the flow of trade as it has to compete despite its relatively higher costs.

*Duration of the practise:* Launching a new product in the market, promoting the reputation or market share of a particular product may require a special pricing policy, hence may justify a below-cost pricing. However, in order the justification to be acceptable; the practise must be in conformity with the justifying aim. In cases where the below-cost pricing lasts for longer than 6 months, than the suspect of predatory pricing overweighs the justification.

*Does TDI claim a reasonable justification?* Given that the price policy is one of the most important decisions that the enterprises are supposed to determine by themselves, the interruption of a competition agency should be possible in very limited cases. The claims of the TDI to justify the price policy are assessed carefully.

**The Coca-Cola Company Case:** A very comprehensive case, dealt with by the TCA is the Coca-Cola Company Case. Coca-Cola is accused in this particular case of practising predatory pricing at carbonated soft beverage market. Coca-Cola and Pepsi hold a collective dominant position in non-alcoholic beverage market in Turkey in general, the dominance being more characteristic when cola drinks are concerned. Both companies also hold brands in the carbonated soft beverage market within their economic unities; however, their positions in this latter market is relatively weaker when compared to their market positions in the cola drinks market. Sensun, the brand held by the Coca-Cola Company, fixes relatively lower prices for its products. Within the Prosecution Report, besides the above-mentioned analyses (how do accused firm(s) finance the losses; whether the prices are below the average variable costs; if affirmative, the duration, dominant position test) exists also another analyse in regards with the brand reputation and consumer fidelity.

Within the analyses, the "short term average variable cost" is identified as the composition of the inputs, package, variable production and variable marketing and distribution costs items; "short term average total cost", as variable average cost plus fixed costs fixed marketing and distribution costs, general administrative costs and finance items. The reporters detected that the price of Sensun products has remained below the short-term average total cost during 33 months within last 36 months; but remained below the average variable cost during one month, only. The conclusion in this regard was that "the outlet sales prices remained well below the average total cost and close to the average variable total cost.

The Prosecution Report involved certain scenarios, assuming that the alleged predatory price practitioner has fixed the prices below costs; a) in order to drive the competitors out of the market; b) to acquire the local small sized rival companies and become a monopoly; c) because of its relatively weaker situation in the relevant product market. The reporters of the case have suggested the Competition Board to request the Coca-Cola Company to present the Board periodically its cost/revenue analyses, however the Competition Board rejected this and did not request the Company to do so.

The Competition Board has concluded that the above the average variable cost prices are not practised with an intention of driving the rivals out of market. The Competition Board gives this Decision on 23 January 2003 and the Prosecution Report is publicised on the Official Gazette.

### **Conclusion**

Predatory foreclosure covers a larger area than predatory pricing does. Excess capacity can serve the leading example among predatory foreclosure behaviour. Claims in this field are assessed case by case. Turkish Competition Case Law involves more cases -in number- relevant with predatory pricing. First step is usually identifying the commercial behaviour exactly. The practise may be a predatory pricing or abusing the advantages of the dominance in a certain market in order to gain a competitive advantage in another (or some others), according to the sources for financing the losses stemming from the predatory pricing. The action may be executed by one single undertaking holding a dominant position or by a few of them in case of a collective dominance.

## UNITED KINGDOM

### Introduction

This paper represents the OFT's views in response to the OECD's questions relating to how members analyse conduct that could be deemed predatory.

#### 1. What is the appropriate measure of cost for assessing predatory pricing?

Competition policy should be cautious in condemning low pricing. It is always important to look at all the evidence in the round, and mechanical application of price-cost tests may lead to error.

While economics can not yet provide a universally optimal cost measure to help assess predatory pricing, average variable cost (AVC) is often a sensible practical benchmark – see, for example, *Akzo*, an EC case.

Pricing below AVC by a dominant firm is not necessarily predatory (see below) but is normally so. It entails short-run losses, which suggests anti-competitive intent, and it excludes as-efficient rivals.

Pricing above AVC but below average total cost (ATC) is not normally predatory but should be condemned where sufficient other evidence points to anti-competitive intent and/or potential anti-consumer effect.

In theory, there are circumstances in which marginal cost (MC) or average avoidable cost (AAC) might be a more appropriate benchmark than AVC, but they might be less measurable.

Judgments sometimes have to be made about the timescale over which costs are variable (or avoidable). One approach is to adopt the [duration, or expected duration, of the predatory pricing] as the appropriate timescale.

Whether the opportunity cost of lost profit on other business resulting from the low pricing should come into the assessment of predatory pricing is an interesting question raised by the US *American Airlines* case. The symmetrical question (see below) is whether extra profit gained on other business as a result of the low pricing is a defence to allegations of predation.

Since the UK Competition Act came into force in 2000, the OFT has found predatory pricing in two cases – *Napp* and *Aberdeen Journals*. In both, pricing was below AVC and internal documentary evidence supported the cost-based evidence of predatory conduct.<sup>1</sup>

#### 3. Can pricing ever be predatory when prices lie above costs?

As just mentioned, pricing above AVC but below ATC can sometimes, but not normally, be predatory. While pricing above ATC could not be “predatory”, could it nevertheless be anti-competitive? Usually not, but in some circumstances *selective* price cuts could be unlawfully anti-competitive – *Compagnie Maritime Belge* is an EC case in point.

In addition, *conditional* pricing – e.g. conditional on exclusivity or loyalty – can in some circumstances be unlawful. As with predatory pricing, economics and our enforcement experience suggest that, in loyalty discount cases, there needs to be an economic assessment both of the potential for exclusion (and consequent consumer harm), and of possible justifications of the pricing in terms of efficiency and consumer benefit.

#### **4. Should the assessment of predation require a recoupment test?**

EC law (as per *Tetra Pak II*) and US law (as per *Brooke Group*) differ on this, but perhaps not as much as appears at first sight.

It would be wrong to require a showing of recoupment in the same market, for predatory pricing can be anti-competitive and anti-consumer by deterring competition in other markets in which the dominant firm operates.

A high burden of proof of actual or very probable recoupment would make policy too lax. But disregard of recoupment issues would risk wrongly condemning some pro-competitive and pro-consumer pricing as predatory. Looking at all the evidence in the round would seem to imply giving some attention to recoupment possibilities whether or not they must be shown as a matter of law.

Arguably, dominance (which must be established for there to be abuse in EC law) implies ability to recoup. Even if this is so, it is probably advisable, in many instances, to assess recoupment potential as a cross-check on whether dominance has been properly shown.

#### **5. What reasonable justifications might there be for pricing below cost?**

Legitimate commercial reasons which may, depending on the circumstances, represent reasonable justifications for pricing below an appropriate measure of cost include the following:

- loss leading, where a supplier cuts the price of a single product in order to increase sales of other products;
- short-run promotions, where there is selling below cost for a limited period, e.g. where a new product is introduced to a market;
- network effects: if the addition of more customers to a network adds to the demand for services from existing customers, it can be beneficial for a company to sell part of the service to customers at below cost to encourage network expansion;
- economies of scale and learning: in some cases a company may introduce a new product to the market at a short-run loss-making price in order to build up a large enough customer base to allow it to achieve and benefit from economies of scale;
- unanticipated shocks: in some markets demand and/or costs can be volatile and difficult to anticipate; short-run profit volatility can result;
- option value: if market re-entry would involve sunk costs, a firm might stay in a slack market incurring losses, in the hope that demand turns up.

Justifications put forward by defendants should nevertheless be treated with healthy scepticism, as the example of the OFT's *Napp* case in the attached annex illustrates.

## NOTES

1. The Competition Appeal Tribunal (CAT), in upholding the OFT's infringement finding in *Aberdeen Journals*, confirmed that, in its view, whether a certain pricing practice by a dominant firm should be regarded as abusive was a matter to be looked at in the round (see paragraphs 350-358 of its judgment, available at <http://www.catribunal.org.uk/>).

## *ANNEX I*

### **Edited extracts from speech on “Abuse of Market Power” by OFT Chairman John Vickers at the EARIE conference in Berlin on 3 September 2004<sup>1</sup>**

#### **Introduction**

This note first considers some recent cases involving predatory pricing, selective price cuts, and discounts and rebates. It then discusses possible underlying principles for distinguishing abusive from pro-competitive conduct – the as-efficient competitor test and the consumer harm test.

#### **Predatory pricing**

Competition spurs firms to offer customers good deals, and competition law should not readily condemn the offering of deals to customers that are alleged to be too good. Economic analysis has however demonstrated that predatory pricing – low pricing that is profit-maximising only because of its exclusionary effect – is certainly not an empty box, especially where reputation and financial effects are important. In this spirit a US Court of Appeals recently said that, while it approached the question of predation “with caution, we do not do so with the incredulity that once prevailed”.<sup>2</sup>

Competition law is unconcerned with low pricing by non-dominant firms. For dominant firms the standard approach is to examine pricing in relation to measures of cost. Thus in the case known as *Tetra Pak II*, the ECJ, confirming the approach in the earlier *AKZO* case, held that:

“First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate a competitor can be shown.”<sup>3</sup>

The ECJ went on to say that, in the circumstances of the case, it was not necessary to prove in addition that Tetra Pak had a realistic chance of recouping its losses. That contrasts with US law. In 1993 the Supreme Court in *Brooke Group* held that predatory pricing violates the Sherman Act only if there is a dangerous probability that the predator will recoup its losses.<sup>4</sup> Arguably, however, dominance – without which there can be no abuse in European law – implies ability to recoup.

As to the first part of the ECJ standard, while pricing below AVC by a dominant firm is normally abusive, the presumption of abuse can, exceptionally, be rebutted. An interesting, but unsuccessful, attempt to rebut a finding of abuse was made in a recent UK case. (UK law mirrors EC law.) The OFT found in 2001 that Napp Pharmaceutical Holdings had abused its dominant position in the supply of sustained relief morphine tablets and capsules by a combination of below-cost pricing in the hospital segment of the market and excessive pricing in the community segment. Napp sought to justify its below-cost pricing on the grounds that hospital sales led on to profitable community sales, and so were not loss-making. But this was a circular argument inasmuch as the high margins on community sales depended on the exclusionary low pricing to hospitals. For this and other reasons, Napp’s appeal against the OFT’s decision failed.

Pricing above the dominant firm's AVC but below its ATC was discussed by the Competition Appeal Tribunal in another recent UK case – *Aberdeen Journals* (though the OFT found abuse in that case on the basis of pricing below AVC). For example, the CAT said that such pricing “is likely to be abusive when undertaken in anticipation of competitive entry or in order to undercut a new entrant”, and that, with prices below ATC including a proportionate share of general overheads, “sooner or later an equally efficient competitor will be forced out of the market”.<sup>5</sup>

The appropriate definition (and of course measurement) of cost can be controversial. In 1999 the US Department of Justice (DoJ) brought a case against American Airlines saying that it had reacted – by price cuts and capacity expansion – in an unlawfully predatory way to entry by rivals on routes connecting to its Dallas hub. The DoJ argued that capacity expansion by AA in response to entry was unlawful in that it increased AA's revenues – taking into account revenue lost on pre-existing AA capacity – by less than it increased costs. Put another way, the claim was that price was below cost, where cost includes the opportunity cost of profit loss on existing capacity caused by the capacity expansion. The courts did not accept this approach to cost.

### **Selective price cuts**

Above-cost price cuts were at issue in the case of *Compagnie Maritime Belge*, on which the ECJ gave judgment in 2000.<sup>6</sup> The enterprise, which had a near-monopoly position on certain shipping routes between Europe and West Africa, had selectively cut prices to match those of its competitor, though not demonstrably to below total average cost. The Court saw the risk that condemning such pricing could give inefficient rivals a safe haven from the full rigours of competition, but in the circumstances at hand judged that there was abuse (albeit not abuse under the heading of predation) because the selective price cuts were aimed at eliminating competition while allowing continuing higher prices for uncontested services.

Economic theory shows that a rule against *selective* price cuts by dominant firms in response to competition would have mixed effects on social welfare. A rule condemning selective price cuts even if no price is reduced below variable cost, and even if the dominant firm merely meets competition and does not engage in profit “sacrifice”, could be good for competitors and consumers but costly in terms of productive efficiency. Though consumers can benefit from a ban on selective price cuts, this is not a general result. Indeed a rule against selective price cuts could often be bad for consumers in contested markets, and sometimes detrimental to consumers overall.

### **Discounts and rebates**

One of the most topical issues regarding abuse of dominance is that of discounts and rebates. In September 2003 the European Court of First Instance upheld a Commission decision finding abusive the system of quantity rebates operated by the tyre manufacturer Michelin to its dealers in France. Michelin's quantity rebates, it was held, were “loyalty-inducing”, so tended to prevent dealers from being able to select their suppliers freely, and sought to prevent dealers from getting supplies from competing manufacturers. The rebates were therefore found to have a foreclosure effect. The Court said that this need not be an actual effect – to find abuse it is sufficient to show that the dominant firm's conduct “tends to restrict competition or, in other words, is capable of having that effect”.<sup>7</sup>

In December the Court likewise upheld a European Commission decision against British Airways for its performance reward systems for UK travel agents.<sup>8</sup> It was held that these encouraged the agents to sell BA tickets in preference to those of other airlines, and restricted the agents' freedom of choice to the detriment of other airlines. Neither Michelin nor BA was found to have given an adequate economic justification for its rebate/discount scheme, for example in terms of cost savings.

The issue of discounts and rebates also arose in the recent US case of *LePage's*. *LePage's* sued 3M for monopolizing the market for transparent tape by its policy of giving discounts and rebates to retailer customers on the basis of sales targets and the range of 3M products that they stocked – so-called “bundled rebates”. In a judgment last year the Court of Appeals upheld a lower court verdict against 3M.<sup>9</sup>

These cases about discounts and rebates, on both sides of the Atlantic, illustrate sharply a fundamental dilemma for the competition law treatment of abuse of market power. A firm with market power that offers discount or rebate schemes to dealers is likely to sell more, and its rivals less, than in the absence of the incentives. But that is equally true of low pricing generally.

Superficially, then, discounts and rebates can appear at once anti-competitive and pro-competitive. So can various other forms of commercial behaviour by firms with market power. Only by going beneath the surface to underlying economic principles can the clash of superficial appearances be resolved sensibly. But what are, or should be, the underlying principles by reference to which conduct that distorts and harms competition can be distinguished from normal competition on the merits?

### **The as-efficient competitor test**

One way to approach this question is to ask whose exclusion should be prevented by the law against exclusionary practices by dominant firms? The answer cannot sensibly be rivals in general. A natural answer is in terms of rivals that are no less efficient than the dominant firm. When competition is effective, more efficient firms gain at the expense of less efficient firms, so the “as-efficient” competitor test appears to accord with protecting competition as distinct from competitors.

Clearly there are circumstances, however, in which the entry of less-efficient rivals can improve social welfare because the gain in allocative efficiency through lower prices can outweigh the loss in productive efficiency through higher costs. Sometimes, therefore, rules preventing above-cost price cuts could improve social welfare despite being more restrictive of dominant firm conduct than the as-efficient competitor test would imply. But such rules could well have adverse welfare effects in other circumstances. As well as promoting the entry of less efficient firms, they could keep prices up, and there is a case for saying that it is best for competition law generally not to restrict above-cost price cuts.<sup>10</sup>

This disciplining principle has a clear logic but the breadth of its application is open to debate. For example, should it apply to all *selective* above-cost price cuts? And should it extend to all *conditional* price reductions – e.g. discounts conditional on exclusive dealing?

In economic terms there is a dilemma. Given the apparently ambiguous welfare effects, there is little basis in economic theory for a rule that *always* permitted above-cost price discrimination by dominant firms in response to competition. Yet the natural and mostly desirable response to competition by dominant firms will often involve (above-cost) price discrimination. This suggests that hostility to this *form* of response to competition would be wrong, but that in limited economic circumstances the evidence as a whole might justify a finding of abuse (even when the price cuts are unconditional). Which circumstances is a matter in need of more economic analysis.

One factor is the undue denial of scale economies to rivals – a form of raising rivals’ costs. This issue arises most sharply as regards (above-cost) price reductions *conditional* on the buyer not dealing with rivals. For example, by exclusive dealing in the presence of scale economies it is theoretically possible for a dominant incumbent profitably to exclude from the market a rival whose cost curve is nowhere higher than its own.<sup>11</sup> Each customer would individually do better to accept than reject an exclusive contract with the dominant firm at a price just below the unit cost (at small scale) of the rival even if that price is substantially above the unit cost of the (large-scale) dominant firm. It would be in the collective interest of

the customers to deal with the rival at a large scale but none will do so individually because of the diseconomies of its small scale.

The dominant firm can thereby exploit to its advantage, but to the detriment of customers and efficiency, the co-ordination problem of the customers – a strategy of divide-and-rule. It is not obvious which way the as-efficient competitor principle points in this case, for the rival is by assumption as-efficient overall but is less-efficient at supplying each individual customer because of its lack of scale economies. Be that as it may, this is an example of how inefficient exclusion *can* be profitable for a dominant firm. But this theory is not applicable unless, on the facts, the proportion of the market foreclosed would significantly affect scale economies. And it should be remembered that exclusive dealing can in some circumstances have beneficial effects (e.g. overcoming free-rider problems in the provision of retailer services).

Less restrictive than exclusive dealing conditions, but still possibly foreclosing in effect, are price terms conditional on such factors as the proportion of purchases made from the dominant firm, purchases relative to previous-period purchases, and retrospective rebates based on amount purchased. In the language of EC case law, these are loyalty rebates or at least can be “loyalty-inducing”. Again there are some conditions in which such pricing practices – even if above the costs of the dominant firm – could exclude as-efficient rivals. But the *form* of the pricing practices does not by itself reveal whether or not those conditions hold; analysis of the surrounding economic circumstances (e.g. scale economies and extent of foreclosure) is needed for that. In an economics-based approach, possible benefits of the practices, depending on the facts, should also be weighed in the scales. As well as cost-saving justifications for discount schemes, it can be both natural and desirable for dominant firms to offer their customers incremental prices lower than average prices, which discount schemes can help achieve.

Article 81 of the EC Treaty, which deals with anti-competitive agreements, contains a framework for the assessment of possible efficiency benefits, but Article 82 does not do so explicitly. The principle of “objective justification” is however well-established in the case law, and its scope may develop over time. It will be interesting also to see whether the as-efficient competitor principle gains more extensive recognition as the case law evolves.

### **The consumer harm test**

An alternative answer to the basic question posed at the start of the previous section is that the law against exclusionary practices by dominant firms should prevent the exclusion of rivals whose presence enhances consumer welfare. (Whether “consumer welfare” here means consumer surplus or social welfare more generally – i.e. including profit – is a large question that occurs in a range of competition policy settings but is beyond the scope of this note.)

Stated in terms of a necessary condition, the question in short is whether there is no exclusion without exploitation.<sup>12</sup> The affirmative response might be put as follows. Market power is the ability to raise price and restrict output. To count as exclusionary, conduct must be reasonably capable of maintaining or strengthening market power. On this view, conduct would not be deemed to be exclusionary unless shown to have the effect of raising price and restricting output.<sup>13</sup>

This standard of anti-consumer effect, stated as a necessary condition for a finding of unlawful exclusion, would place a more or less strict limiting principle on antitrust intervention against firms with market power, and a strong discipline against the pitfalls of *competitor*-protection. The strictness of the limiting principle depends in part on the standard of proof needed to establish the anti-competitive effects of higher prices or lower output. Must those effects be actual or probable? Or is it enough for the conduct in question to have the tendency, a reasonable capability, or merely a possibility of causing them?

Beyond the issue of the standard of proof of anti-consumer effect is the conceptual issue of whether the notion of harm to competition should extend beyond effect to process. The more that only demonstrable (and so presumably short-term) outcomes are allowed to weigh in the scales of “effect”, the stronger is the case for including “process” harms. If, however, a reasonable exploitation story – not necessarily reliant on clear and present exploitation – could meet the standard, then the case for additionally including “process” harms would be less strong. In the limit, the idea that there could be harms to the competitive process, justifying competition policy intervention, that are not even capable of harming consumers is unattractive. Competition to serve the needs of the general public of consumers – not some abstract notion of competition for its own sake – is the point of competition policy.

[Full text of speech with references is available at [www.offt.gov.uk](http://www.offt.gov.uk)]

## NOTES

1. The speech was given by John Vickers in his personal capacity and the views expressed here are not necessarily those of the OFT.
2. *United States v AMR Corporation*, 335 F.3d 1109 (10th Cir.) (2003).
3. Case C-333/94P *Tetra Pak International SA v Commission* [1996] ECR I-5951, para 41.
4. *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 U.S. 209 (1993).
5. *Aberdeen Journals Limited v OFT* [2003] CAT 11, paras 352 and 370.
6. Case C-395/96P *Compagnie Maritime Belge SA v Commission* [2000] ECR I-1365.
7. Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission*, judgment of 30 September 2003, para 239.
8. Case T-219/99 *British Airways plc v Commission*, judgment of 17 December 2003. BA has appealed the CFI's judgment to the ECJ (pending case C-95/04).
9. *LePage's Inc v 3M Co.*, 234 F.3d 141 (3rd Cir.) (2003).
10. See Elhauge (2003a) for an extensive analysis.
11. See Rasmusen et al (1991). A thorough survey of the modern economic theory of foreclosure is given by Rey and Tirole (2003).
12. The consumer harm test could in principle be cast as a sufficient rather than necessary condition, so that conduct was held to be exclusionary if it was likely (say) to lead to consumer harm. But this by itself seems dangerously open-ended.
13. On a broad interpretation, "output restriction" could embrace issues of quality and even innovation, not just quantity.

DAF/COMP(2005)14

## UNITED STATES

### 1. Types of Predatory Foreclosure

For the purpose of this discussion, we will define predatory foreclosure as a unilateral act in which one firm seeks to impose costs on its rivals with the aim of reducing competition. The instruments chosen by a firm to accomplish this may or may not involve its own price. A wide class of predatory foreclosure strategies involves acts that lose money, in some relevant sense, in the short term. The classical example of this is, of course, predatory pricing, which involves setting price below marginal cost, at least conceptually. The presumed goal of doing so is to induce rivals to exit, making the market less competitive and allowing the “predator” to more than recoup the short-term losses associated with its predatory conduct.

To prove a predatory pricing claim, the plaintiff must be able to show that the defendant firm has priced below a good estimate of marginal cost. In addition, a predatory pricing claim must pass the recoupment test. The need for a recoupment test may not be self-evident, yet it serves as a valuable safeguard against confusing aggressive, pro-consumer competition with anticompetitive conduct. The recoupment test demands, in effect, that the plaintiff demonstrate that predation is plausibly a rational strategy. In particular, if the plaintiff cannot demonstrate that the short-term losses associated with its actions will be recouped by supracompetitive pricing in the long run, we are left with several unanswered questions, none of which bode well for the plaintiff. Among these questions are the following: Does the plaintiff’s theory imply that the defendant firm is irrational, losing money in the short run for no apparent long run gain? Is the measure of cost presented by the plaintiff flawed? Is the plaintiff’s theory of the case itself incorrect? For these reasons, predation claims in the U.S. are disciplined by the recoupment test.

That said, classical predatory pricing theory, which involves below-cost pricing by the predator, has come in for a great deal of criticism. Three of the more fundamental criticisms are (1) it may be hard to define the appropriate measure of cost; (2) even apparently below-cost pricing can at times have efficiency justifications (as with penetration, or promotional pricing) and (3) there must exist long run entry barriers that will make recoupment possible.

Apart from acts of predatory foreclosure that involve short run losses, there may exist strategies that are exclusionary, that reduce competition, but do not involve short run losses. Recently, competition authorities have been focusing their attention on types of foreclosure that are likely to be less costly methods of foreclosure than predatory pricing, which may be termed “cheap exclusion.” Examples of “cheap exclusion” include abuse of government processes, abusive litigation, and possible misuse of standard setting processes by one firm in ways that make rivals less able to compete.

In this discussion, we will cover both predatory foreclosure related to pricing and what have been called “cheap” foreclosure activities.

### 2. Predation at the Margin

One fairly recent case involving predatory foreclosure was a determined effort by the Department of Justice (DOJ) in *Unites States v. American Airlines*. In this case, the Division argued that certain actions undertaken by American Airlines involved incremental short run losses. To make such conduct rational,

the Division further investigated whether these incremental losses could be recouped in the long run. As we will see, the American Airlines conduct at issue did not involve losing money on a market-wide basis, but rather on its incremental additions to capacity. In that sense, it can be distinguished from a textbook predatory pricing case. Nonetheless, the main elements of the case are useful illustrations of how such a case might proceed.

In the mid-1990's, American Airlines ("AA") had a large hub at the Dallas-Fort Worth, Texas airport ("DFW") and, the Division contended, substantial power to set rates on at least 30 city-pair routes. Competition from so-called low-cost carriers ("LCCs") began to surface. LCCs can pose a competitive threat to dominant carriers, such as AA at DFW, because they have significantly lower operating costs than the major airlines. For example, when ValueJet created a mini-hub in Atlanta, Georgia, Delta Airlines lost \$282 million in annual revenue from its Atlanta hub. Delta's experience in Atlanta so worried AA that it created an internal Task Force to develop a strategy to make LCCs unprofitable at DFW. The Task Force concluded that any such strategy would be very expensive in terms of AA's short-term profitability because it would include adding capacity to significantly reduce the amount of traffic an LCC could capture. Nonetheless, because AA had determined that a successful LCC hub at DFW would jeopardize at least \$252 million of AA's annual DFW revenues, AA went ahead and added significant extra capacity on routes threatened by nascent LCC competitors.

The Division's investigation concluded that, in five separate episodes, AA added excess capacity in order to drive a competing LCC off the route. AA overrode its own capacity planning models and added at least 3 - and in some cases as many as 5 - seats for each additional passenger that AA gained on these routes. And in each case, after the LCC exited the route, AA reduced capacity and increased its prices. Using AA's accounting system data, the DOJ staff was able to determine that the cost of the additional capacity exceeded the revenues generated by that capacity, demonstrating a money-losing sacrifice indicative of predation.

In developing its theory of the case, the staff was faced with the Court's decision in *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). *Brooke Group* holds that in a predatory pricing case the plaintiff must show that the defendant priced below an "appropriate" measure of cost and also has a dangerous probability of recouping its predation losses. These prerequisites presented two major challenges. First, how does one show price below cost, at least for the marginal unit of capacity? Typically, this analysis employs marginal cost and, because marginal cost is so difficult to compute, usually its proxy - Average Variable Cost ("AVC"). In this case, it was undisputed that AA's route-wide performance on the five routes at issue was profitable, *i.e.* that price exceeded route-wide AVC in each instance. But because the addition of capacity was AA's mechanism for predatory foreclosure, the Division argued for an incremental analysis. In particular, did the cost of the capacity additions exceed the revenues generated by that added capacity?

The second *Brooke Group* challenge was demonstrating AA's likelihood of recouping these incremental losses. The Division argued less that AA's "investment" in predatory foreclosure was profitable on the individual routes subject to the predatory acts, and more that it was designed to deter future entry on numerous other, "out-of-market" routes. Part of the payoff, that is, would be from deterring formation of an LCC-hub that would threaten as much as \$250 million of AA's annual DFW revenues. Significantly, most of the recoupment would have come from markets other than the ones in which the acts of predatory foreclosure took place.

The district court, unfortunately, refused to accept the incremental analysis of AA's capacity additions and concluded that route-wide AVC was the only "appropriate" measure of cost. It held also that each of the Division's four alternative cost tests (each of which were based on AA's accounting data) was unreliable for one or another reason, including that none measured actual incremental costs. Finally, the

court rejected the government's out-of-market recoupment theory and held instead that recoupment must be shown on each individual predation route.

The Division appealed and argued that predation is conduct that makes no business or economic sense except for its ability to exclude competition. It explained that adding costly, largely unfilled capacity was the mechanism AA used for stealing passengers from the target LCCs and that AA expected this strategy to prove successful. Moreover, AA knew that this process would be very costly in the short run, but that the losses on the five routes where foreclosure occurred (which were quantified at \$41 million) were acceptable because AA was protecting \$250 million in annual revenue.

Although the court of appeals affirmed the district court, it did not disagree with DOJ's theory. It agreed with the DOJ's broad position that although courts should continue to approach predation cases with caution, they should not treat them with the incredulity that once existed. In making this proclamation the court relied on recent literature that explains predatory pricing can make sense in a multi-market scenario. The court also rejected outright the district court's holding that route-wide AVC is the only appropriate cost measure, because in certain circumstance a market-wide approach could mask a particular predatory scheme (as we had argued it did in the AA case). The court also recited uncritically the Division's incremental cost test and then proceeded to consider whether each of the proposed cost tests were valid as a matter of law. Ultimately, it affirmed the district court on the narrow ground that all of our cost tests were factually flawed because they relied on cost allocations and, therefore, were not "precise" in computing AA's "actual" cost of adding the challenged capacity.

Significantly, the court did not address the Division's recoupment theory at all. The court easily could have affirmed if it agreed with the district court's in-market only theory. The fact that it did not do so, in conjunction with the court's own statement that a multi-market scenario of predatory foreclosure can make sense, appeared to signal acceptance of the Division's theory of recoupment.

In sum, in addition to the court of appeals express rejection of market-wide AVC as an exclusive measure of cost, the Antitrust Division believes that the court of appeals' decision is a precedent from which to argue, at least through inference, that incremental cost analysis is a correct measure in appropriate foreclosure cases (although a solid basis for accurate and reliable cost computation will likely be required), and that multi-market recoupment is a viable legal theory.

### **3. Cheap Exclusion**

Another type of predatory foreclosure has been called "cheap exclusion." This often involves some form of misuse of regulatory or legal processes. The Federal Trade Commission (FTC), in particular, has focused on such activities over the past few years. These activities are likely to be fairly easy to distinguish from procompetitive ones. The FTC has looked for cases where predatory foreclosure activities are (1) cheap, (2) effective in yielding durable market power, and (3) unlikely to generate plausible, cognizable efficiencies.

Many anticompetitive activities of this type occur in one of the following settings, although the list is by no means exhaustive: (1) Abuse of governmental processes – such as lying to obtain a patent; incumbents taking advantage of laws that require potential entrants to obtain government permits by such tactics as filing objections to applications; or acting through regulatory boards that are dominated by incumbents; (2) Abusive litigation – where dominant firms file lawsuits for the sake of exclusion rather than on the merits; (3) Opportunistic abuse of a standard setting process – such as by strategic falsification of representations regarding patents held and applied for to groups setting standards for evolving technology goods. This is not to say that a dominant firm commits an antitrust offence every time it seeks a patent, invokes a franchising law, files a lawsuit against a rival, participates in a standard setting

organization, or inflicts monetary harm on a rival. These behaviours violate the antitrust laws where and only where they lead to or maintain durable market power and reflect inefficient (such as opportunistic or fraudulent) conduct, rather than competition on the merits.

A cheap exclusionary strategy that causes a firm to gain or to maintain market power can be especially pernicious where it makes the resulting market power durable. If, for example, incumbents are able to restrict entry into a regulated industry merely by filing objections to applications by potential entrants, this can be virtually costless, but highly effective. Moreover, it can be much cheaper for incumbents to object than for entrants to surmount the objection, and the mere fact of the objection creates a very powerful barrier to entry. Also, if a standards setting organization is powerful and is respected, its standard may define a relevant market, so that a firm that is able to manipulate the process may gain market power at small direct cost to itself. This is especially true given the potentially large costs of changing a standard once an industry is locked into it.

#### **4. Additional Comments**

Under the category of predatory foreclosure, other activities deserve mention. One of them is what might be called “predatory excess capacity.” Obviously, many factors determine the amount of capacity that a firm chooses to construct, and most are consistent with the promotion of efficiency. These factors include projected demand growth and technological change. Capacity investment can, however, in certain limited circumstances, facilitate monopolization. As a practical matter, an enforcement agency is going to have a very tough time disentangling these effects, particularly in view of the possibility that what looks like excess capacity once it has been built may simply have been the result of honest errors in forecasting demand, rather than a device to threaten low-prices to deter entry (or threaten credibly to punish rivals for deviating from a high-price strategy).

Entry to discipline attempted predation might be dissuaded by informational asymmetries possessed by an incumbent due to its greater experience in the market. Such asymmetries can create uncertainty in the minds of potential entrants, helping to deter entry. Indeed, something like this is the basis for the famous Milgrum-Roberts limit-pricing model. As the basis for enforcement, however, we are sceptical. Why couldn't the entrant reduce the informational asymmetry by hiring employees away from the incumbent? Why couldn't it commission studies of the market and technology? Isn't there usually more than one incumbent to make this even easier?

#### **5. Conclusion**

Predatory foreclosure covers a variety of practices designed to make a market less competitive by handicapping rivals. Historically, predatory pricing has been the practice most studied under this heading. Although predatory pricing is certainly significant, it is also of interest to study “cheaper” forms of foreclosure. These strategies involve conduct that may cost the predator less, or nothing at all, while at the same time reducing the amount of competition faced by the firm engaging in these practices. None of this is to say that such practices are being widely used to reduce competition, or that there are no risks of incurring costs from falsely concluding in a particular case that a problem exists when the conduct in question is actually benign. It does, however, argue in favour of competition authorities devoting attention to such practices and intervening when the evidence clearly warrants doing so.

## EUROPEAN COMMISSION

### ISSUES FOR A BALANCED AND PRACTICAL ENFORCEMENT POLICY<sup>1</sup>

#### 1. Introduction

Article 82 prohibits the abuse of a dominant position and predatory pricing is considered a possible abuse. For the purposes of Article 82 predatory pricing can be defined as the practice where a dominant company temporarily lowers its price and thereby deliberately incurs losses or foregoes profits in the short run so as to enable it to eliminate or discipline one or more rivals or to prevent entry by one or more potential rivals.

Predatory pricing is in practice often difficult to distinguish from normal price competition. The lowering of prices, the directly visible part of predation, is also an essential element of competition. By lowering its price and/or improving the quality of its products a company competes on the market. This is competition that benefits consumers and that a competition authority wants to defend and protect. Pricing is not predatory only because a company is lowering its price.

Pricing is also not predatory just because the lower price means incurring losses or foregoing profits in the short run. An investment in temporarily lower prices may for instance be required to enter a market or to make more customers familiar with the product.

The predatory nature of temporarily charging lower prices to all or certain customers is found in the predator making a sacrifice by deliberately incurring short run losses with the intention to eliminate or discipline rivals or prevent their entry. The company will make this sacrifice when it considers that it is likely to be able to recoup the losses or lost profits at a later stage after its actions have had the exclusionary effect.<sup>2</sup> The exclusion should thus allow the predator to return to, maintain or obtain high prices afterwards. Although consumers may have benefited from the lower predatory prices in the short term, in the longer term they will be worse off due to weakened competition resulting in higher prices, reduced quality and less choice.

Such exclusionary strategy can normally only be effective and profitable if a company has already significant market power on the market in question. In a competitive market with many competitors the exclusion of some of them will in general not lead to a sufficient weakening of competition so as to allow the predator to recoup the 'investment'. Also in a market with only a few but strong competitors such an exclusionary strategy is unlikely to succeed. Predatory pricing is a risky strategy because the self-inflicted losses may not be regained if the predator makes a mistake about market conditions, for instance, if the prey is more resilient than expected, if mainly competitors benefit from the exclusion or if entry or re-entry occurs at a later stage. In other words, predation can be said to be to a certain extent self-detering. In order for predation to be successful the exclusion should be instrumental in maintaining or creating the predator's dominant position and thereby allow the predator to return to or obtain high prices afterwards.

Such an exclusionary strategy can normally only be effectively applied if only one company has significant market power on the market in question. Companies that are collectively dominant are less likely to be able to predate because it may be difficult for the dominant companies to distinguish predation

against an outside competitor from price competition between the collective dominant companies and because they usually lack a (legal) mechanism to share the financial burden of the predatory action.

Predatory pricing is a concern not because it harms competitors but because and to the extent that it harms competition. In that connection it is said that only the exclusion of efficient competitors should be prevented. The exclusion of clearly less efficient competitors should in general not be considered a competition problem. The purpose of Article 82 is not to protect other companies from dominant companies' genuine competition based on factors such as higher quality, novel combination of products, better performance, opportune innovation or higher efficiency, but to ensure that these other companies are also able to enter the market and compete therein on the merits, without facing competition conditions which would have been distorted or impaired by the dominant company.

Predation of actual competitors may work not only through elimination of these competitors from the market but also through disciplining these competitors. One of the risks for the dominant company of eliminating a competitor is that its assets may be sold at a low price and stay in the market, creating a new low cost entrant. A dominant company may therefore prefer disciplining the competitor without eliminating it, that is making the competitor stop competing vigorously and to have the latter follow the pricing of the dominant company.

## **2. Assessment**

In general predatory pricing will only be dealt with as an abuse under Article 82 if the dominant company applies it to protect or strengthen its dominant position. Usually it will do so by applying predatory pricing in the market where it has a dominant position. It could also do so by applying predatory pricing in another, for instance adjacent market, if it has the effect of protecting or strengthening its dominance in the dominated market.<sup>3</sup> Predatory pricing by a dominant company in an unrelated market where it is not dominant and where the predation will only have effects in this unrelated market will normally not be an abuse under Article 82.<sup>4</sup> The exception is the Commission's policy in sectors where activities are protected by legal monopoly and where the prevention of cross subsidisation is relevant (see below point 31).

Under most market conditions a dominant company is unlikely to have to price below average total cost and make a loss. Its market share, the importance of its product on the market, the entry barriers, competitive constraints being absent or weak and its resulting power over the price usually enable the dominant company to price well above average total cost and thus to avoid making losses. If therefore a dominant company reacts to entry or to competition from a smaller company in the market by lowering its price and making a loss, in general or on certain specific sales, there may be good reasons for a competition authority to look into such behaviour.

In its assessment the competition authority may use certain cost benchmarks, below which there is more reason to assume predation may take place and/or below which no additional proof may need to be brought by the authority because predation can be presumed.

The following are often mentioned as possible cost benchmarks: marginal cost (MC), average variable cost (AVC), average avoidable cost (AAC), long-run average incremental cost (LAIC) and average total cost (ATC). Marginal cost is the cost of producing the last unit of output. Average variable cost is the average of the costs that vary directly with the output of the company. Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a particular amount of (extra) output. Long-run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. Average total cost is the average of all the variable and fixed costs, including common costs.

In case of multi-product companies it may be difficult to calculate ATC because of certain common costs, which are fixed costs that are necessary for the production of more than one product and where it is difficult to allocate these costs to the different products. It could be discussed whether it is justified to allocate common costs in proportion to the turnover achieved by the different products or whether another rule would be preferable. Whereas ATC takes or tries to take account of all variable and fixed costs, LAIC takes account of only the product-specific variable and fixed costs. The LAIC will thus usually fall below ATC because it does not take into account (non-attributable) common costs. The LAIC will usually be above AAC because LAIC takes into account all product-specific fixed costs, including product-specific fixed costs made before the period of predatory pricing, whereas AAC only takes product specific fixed costs into account that are made in order to predate. The AAC will be higher than AVC to the extent that the company does make product specific fixed costs to predate, otherwise AAC and AVC are the same by taking into account the variable costs only. Finally, MC, because it concerns the additional cost made to produce one extra unit of output and does not concern an average, can be lower or higher than all the other cost benchmarks, depending on the actual output and capacity constraints of the company in question.

To use a cost benchmark one needs to decide on the relevant time period over which to measure the costs. This is important because what is a fixed cost in the short run may become a variable cost in the longer run. In the long run all factors of production become variable as the production process, the plant and machines will be replaced.

The relevant period over which to measure the costs will usually be the time period in which the alleged predatory pricing has taken place or, if still continuing, is expected to take place. Only in certain, exceptional, cases a different period of time may be appropriate. For instance, in particular liberalised sectors the Commission has used LAIC, which by definition looks at costs in the long run.

### **2.1 Pricing below average avoidable cost**

In general the appropriate cost benchmark is the one that most accurately justifies the presumption that pricing below that benchmark can be expected to be predatory. The relevant question in that context is whether the dominant company, by charging a lower price for all or a particular part of its output over the relevant time period, incurred or incurs losses that could have been avoided by not producing that (particular part of its) output. If such avoidable losses are incurred, the pricing can be presumed to be predatory. At the same time the benchmark must be practical enough to be implemented.

In theory, the MC benchmark does answer the question for each individual unit of output separately; a price below MC means that the production and sale of that unit led to an immediate loss that could have been avoided by not producing that unit. However, not only is the per unit approach cumbersome, in most cases there will be no data available to calculate MC.

The AAC benchmark may seem the appropriate and practical answer to the question about avoidable losses. If a dominant company charges a price below AAC this means that the price it is charging for (that particular part of) its output is not covering the costs that could have been avoided by not producing that (particular part of its) output. Often the AAC benchmark will be the same as the AVC benchmark as in many cases only variable costs can be avoided. However, if the dominant company, for instance, had to expand capacity in order to be able to predate, then also the fixed or sunk investments made for this extra capacity will have to be taken into account and will filter into the AAC benchmark. In the latter case AAC will, for good reasons, exceed AVC.

If the price charged by the dominant company is below AAC this means that the dominant company incurred a loss that it could have avoided. It is, at least in the short run, not minimising its losses. This is often considered sufficient to presume that the dominant company made this sacrifice in order to exclude

the targeted competitor. This should however be a rebuttable presumption; there may be exceptional circumstances under which a price below AAC is justified (see below under objective justification). This presumption is reflected in the case law. In AKZO the ECJ held: “A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss...”.<sup>5</sup>

The presumption that below AAC the pricing of a dominant company can be assessed as predatory implies that once the authority has established that the price charged was below AAC it does not need to further justify its decision with elements concerning the actual or likely exclusion of the prey, the predatory intent of the dominant company, the possibility of the dominant company to set off its losses with profits earned on other sales, its possibility to recoup the losses in the future through (a return to) high prices and other elements that could be used to strengthen its case. In such a case it would be up to the dominant company to show that it can objectively justify its pricing (see below point 36 seq.).

## **2.2 Pricing above average avoidable cost but below average total cost**

Where in general a dominant company may have no reason to price below average avoidable cost as it does not maximise profits in the short term, it may have some reason to price above average avoidable cost but below average total cost. For instance in case of a serious fall in demand the short run profit maximising price may temporarily fall below average total cost. Pricing below average total cost will not entail losses by the mere production of that (particular part of its) output. While the sales do not cover total costs, they still allow coverage of all variable costs and a part of the fixed costs. It is for this reason that it is usually considered that above average avoidable cost predation can not be presumed. Extra elements of proof are required to substantiate a prohibition decision. This has also been expressed by the ECJ in the AKZO case: “Moreover, prices below average total costs ... but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them”.<sup>6</sup>

It will need to be shown on the basis of objective factors that the pricing of the dominant company has a predatory intent, that it objectively speaking is part of a strategy or plan to predate. This can be shown with the help of various elements, which individually or together may prove such a strategy. The following elements may in particular be important in this respect: direct evidence of intent, evidence that the pricing only makes commercial sense as part of a predatory strategy, the actual or likely exclusion of the prey, whether certain customers are selectively targeted or whether it concerns a general price decrease, whether the dominant company actually incurred specific costs in order for instance to expand capacity, the scale, duration and continuity of the low pricing, the concurrent application of other exclusionary practices, the possibility of the dominant company to off-set its losses with profits earned on other sales and its possibility to recoup the losses in the future through (a return to) high prices.

## **2.3 Direct evidence of a predatory strategy**

Direct evidence of a predatory strategy can consist of documents from the dominant company, such as a detailed plan demonstrating the use of predatory prices to exclude a rival, or evidence of concrete threats of predatory action. Such evidence needs to be clear cut about the predatory strategy and for instance indicate the specific steps the dominant company is taking and not just concern company internal general talk that the dominant company “will crush the competition”.<sup>7</sup>

In case of such direct evidence the authority may consider that it does not need to show that also other elements point towards predation. It may assume that the dominant company, as it has devised a clear

strategy to predate, also has the means to predate and that its pricing behaviour does or will eliminate or discipline the rival in question and thereby have a negative effect on (the growth of) competition in the market.

#### 2.4 *Indirect evidence of a predatory strategy*

In case there is no direct evidence of a predatory strategy predation may still be inferred from indirect evidence of a strategy to predate. In arguing such a case the following elements will in particular be of relevance: does the pricing behaviour only make commercial sense as part of a predatory strategy or are there also other reasonable explanations, is there an actual or likely exclusionary effect, the scale, duration and continuity of the low pricing, does the dominant company actually incur specific costs in order for instance to expand capacity which enables it to react to entry, are certain customers selectively targeted or does it concern a general price decrease, is there concurrent application of other exclusionary practices, does the dominant company have the possibility to off-set its losses with profits earned on other sales and does it have the possibility to recoup the losses in the future through (a return to) high prices. The relevance of the different elements for individual cases may not always be the same and it does not seem possible to define in *abstracto* and in advance what is exactly required in an individual case to show a predatory strategy with such indirect evidence. However the following can be said on the importance of the various elements.

If the pricing behaviour only makes commercial sense as part of a predatory strategy and there are no other reasonable explanations, such will normally suffice to show a strategy to predate, certainly if also other exclusionary practices are applied by the dominant company. However, if there are other reasonable and convincing explanations which show that the dominant company is applying low prices in an effort to minimise short run losses which result from objective factors such as an unforeseen drop in demand, then the low prices are normally not assessed as predatory.

It will be important to investigate to what extent an exclusionary effect is likely in view of the scale, duration and continuity of the low pricing. If the dominant company with its low prices selectively targets specific customers and in particular when these customers are the actual customers of one or more particular rivals in the market, this may be an important part of the evidence of a predatory strategy. Such prices can be designed to damage a competitor's viability and to foreclose the market while limiting the losses incurred by the dominant company to those arising from the targeted sales.<sup>8</sup> The same holds in case the low prices are selectively targeted at those customers that might switch to a potential entrant in case entry is imminent. Such evidence may be considered stronger if also other exclusionary practices can be shown.

The fact that the dominant company can off-set its losses with profits earned on other sales can normally not be proof on its own of predatory pricing. It can only show that the dominant company is actually capable of financing the losses with the profits made on other sales in the same period. Similarly, if the dominant company can not off-set its losses with profits earned in the same period on other sales, this is not sufficient to disprove predation. While ability to directly finance the losses incurred may be relevant, it is more important to investigate the incentive to predate and whether the losses can be recouped.

The issue of recoupment concerns the question whether the negative effect on (the growth of) competition in the market makes the sacrifice of the temporarily incurred losses a good 'investment' from the dominant company's perspective. Is it reasonable to assume that the predation and its exclusionary effect will allow the dominant company to have higher prices in the future than it otherwise would have had and can it thus recoup its losses? This does not require that the dominant company will be able to increase its prices above the level persisting in the market before the predation. For recoupment it is sufficient that the predation avoids or delays a decline in prices that would otherwise occur as a result of

the increased competition that would have come from the companies that are now eliminated, disciplined or whose entry is prevented. It may often be impossible to exactly quantify the likely price and profit effects.<sup>9</sup> It may in general be sufficient to show the likelihood of recoupment by investigating the entry barriers to the market, the (strengthened) position of the company and foreseeable changes to the future structure of the market. In case dominance is established this normally means that entry barriers are sufficiently high to presume the possibility to recoup.<sup>10</sup>

## 2.5 *Pricing below long-run average incremental costs*

Competition authorities may want to use other cost benchmarks than the ones dealt with above. For instance, in certain sectors the decisional practice of the Commission has chosen to use LAIC as the benchmark. As explained above, in case of multi-product companies it may be difficult to calculate ATC because of certain common costs. There may thus be a good practical reason in such cases to use the LAIC benchmark instead of the ATC benchmark. However, in these cases there were additional reasons why the LAIC benchmark did not just replace the ATC benchmark but replaced the AAC benchmark, that is was used as the benchmark below which predation is presumed.

Firstly, it has been presumed that pricing below LAIC is predatory in cases concerning activities protected by a legal monopoly. In such cases the Commission considers that a company dominant in the protected market should not be allowed to use the profits made in that market to establish itself or defend its position in another, often related, market which is open to competition. In order to prevent such cross-subsidisation the decisional practice requires the dominant company to cover with its pricing in the free market at least all the variable and fixed costs it makes in order to be active on that market, in other words to price above LAIC.<sup>11</sup> In these cases pricing below LAIC is considered an abuse under Article 82 not only if the dominant company is also dominant in the free market but also if it is not dominant in that market and the predation will only have effects in that market (see point 9 above).

Secondly, a competition authority may presume that pricing below LAIC is predatory in cases concerning liberalised sectors. It can be considered that in case of network industries, with very high fixed costs and very low variable costs, the use of an AVC or AAC benchmark would not reflect the specific economic realities of these industries. For instance, the Commission in its policy towards the telecom sector expressed that “In order to trade a service or group of services profitably, an operator must adopt a pricing strategy whereby its total additional costs in providing that service or group of services are covered by the additional revenues earned as a result of the provision of that service or group of services. Where a dominant operator sets a price for a particular product or service which is below its average total costs of providing that service, the operator should justify this price in commercial terms: a dominant operator which would benefit from such a pricing policy only if one or more of its competitors was weakened would be committing an abuse.”<sup>12</sup>

This raises the question whether the use of the LAIC benchmark as the benchmark below which predation should in principle be presumed and requiring the dominant company to objectively justify its behaviour, should be limited to specific sectors where liberalisation issues are relevant. Should such a strong presumption only apply to highly dominant companies that used to be regulated monopolists? If so, which are these sectors and how long should this rule by exception apply? Or should it be used more in general in industries with very high fixed costs and very low variable costs? If so, what are very high and very low costs? The use of each specific benchmark will have an influence on the balance and risk of “type I errors” (erroneously clearing predation) and “type II errors” (erroneously finding predation). Using the LAIC benchmark may lead to over-enforcement and more “type II errors” while using the AAC benchmark in such industries may lead to under-enforcement and more “type I errors”.

## 2.6 *Pricing above average total cost*

Price cuts where the resulting price remains above average total costs are in general not considered to be predatory because such pricing can usually only exclude clearly less efficient competitors. Companies that are equally or more efficient will, if challenged by the dominant company, be able to follow such price cuts and the ensuing price competition would normally be characterised as competition on the merit. Where it can be established that the price also after the price cut remains above average total cost, such pricing will therefore not be assessed by a competition authority as predatory unless exceptional circumstances occur.

An example of such an exceptional situation where price cuts above average total costs could be deemed predatory is where a single dominant company operates in a market where economies of scale are very important and entrants necessarily will have to operate for an initial period at a significant cost disadvantage because entry can practically only take place below the minimum efficient scale. In such a situation the dominant company could prevent entry or eliminate entrants by pricing below the average total cost of the entrant while staying above its own average total cost. For such pricing to be assessed as predatory it probably has to be shown that the incumbent dominant company has a clear strategy to exclude, that the entrant will only temporarily be less efficient because of its scale, that the market now or in the near future is big enough to sustain more than one company of minimum efficient scale and that entry is being prevented because of the disincentive to enter resulting from the price cuts.

## 2.7 *Objective justifications*

In a case where predatory pricing behaviour is likely to be found, the dominant company may argue that, while the price was below the relevant cost benchmark and in spite of the other elements investigated, it can objectively justify its pricing behaviour.

A first objective justification could be that although the price is below the relevant cost benchmark, for clear-cut reasons the dominant company's pricing behaviour should not be considered predatory pricing because there is no possibility that it could have an exclusionary effect on rivals. This may for instance be the case where the low price is part of a one-off temporary promotion campaign to introduce a new (version of a) product and where the duration and extent of the campaign are such that exclusionary effects are excluded. Another example may be where certain longer term supply contracts with fixed prices have become loss making due to unforeseen and significant increases in input prices and where the dominant company is obliged to honour the supply obligations.

A second objective justification could be that although the price is below the relevant cost benchmark and although there is a likely exclusionary effect, the dominant company is actually minimising its losses in the short run. Such objective justification is, for the reasons explained above, unlikely for pricing below the AAC benchmark, although in exceptional cases there may even be a reason which could justify temporary prices below AAC. This could for instance be the case where there is an issue of re-start up costs. Above the AAC benchmark the company may show that its low price is actually a short run loss minimising response to changed conditions in the market, such as resulting from a dramatic fall in demand leading to excess capacity. This could also be the case where there is a need to sell off perishable inventory or phased out or obsolete products or where the costs of storage have become prohibitive.<sup>13</sup>

A change in market conditions could also be provoked by entry by a rival. In case the rival is asking a price lower than the ATC of the dominant company, the dominant company may invoke the need to meet competition as an objective justification, to the extent that this is the response that minimises its short run losses. A dominant company can not use the meeting competition argument to justify responding to entry

with a predatory price where it incurs deliberate losses to prevent, frustrate or slow down entry by a rival that is most likely more efficient.

This may seem a rather narrow objective justification for situations of meeting competition, but it actually may be a rather wide justification. Often the situation may be that an entrant with its low pricing takes away customers from the dominant company and that the latter is reacting by also lowering its price. In such a case the reaction to meet competition may very well be the short run loss minimising reaction, if the alternative for the dominant company would be to actually produce and sell less. Given that the fixed costs will not change in the short run and alternative possibilities to sell may not be available, a price that covers the average avoidable costs and a part of the fixed costs may be loss minimising, also if it eliminates the entrant. As in general the entrant will need to be able to offer a better price in order to convince customers to switch supplier, such elimination may also not be unlikely.

This may be thought of as the right policy: it can be argued that pricing above AAC to meet competition is part of the competitive process that a competition authority should protect. That lowering a price to meet competition should be considered justified if the dominant company is not deliberately incurring extra losses (no sacrifice), even if it leads to exclusion. However, this may also be thought of as too lenient a policy. It could effectively lead to the elimination of a more efficient entrant, especially when the gap between AAC and ATC is wide. Such a rule may lead to non-enforcement between AAC and ATC, as it may be relatively simple for a dominant company to argue that the alternative of not producing would result in more losses. It has been argued in the literature that the dominant company should therefore not be allowed to react disproportionate, or should only be allowed to react with a price below ATC once it has lost its dominance (after entry has been successful) or should be forced to continue the lower prices for at least 1 or 2 years or make them more widely available to also its other customers.

The latter suggestions have generally been discarded as unworkable or too interventionist, but this does not discard the need to discuss the conditions under which meeting competition can be an objective justification. Is it sufficient that the dominant company shows that it is meeting competition to keep what are or usually would be its own customers and that the low price is better than not selling at all, or should it also show that it had no better options, i.e. there were no other customers it could address or demand it could open up with less aggressive pricing? In other words, to what extent should it be shown that lowering the price below ATC was indispensable? Should the dominant company show that it limited the pricing below ATC to a minimum duration and scaled back or redirected capacity as soon as commercially possible?

More in general this raises the question what to do with price cuts that do not concern a sacrifice in terms of extra short run losses, but that nonetheless eliminate equally or more efficient competitors which, if their entry or expansion was not impaired, would make the market more competitive and its outcome more attractive to consumers. As there are no deliberately incurred losses and (possibly) no clear intent to eliminate this can normally not be addressed under the heading of predation. But should such harm to the competition process and consumer interests not be avoided nonetheless? To what extent can and should a competition authority limit a dominant company to react to new competition? Is it practical to say that the dominant company is only allowed to meet but not beat the below cost price offered by the new entrant?

### **3. Conclusion**

As mentioned in the invitation letter to this Roundtable, predation is among the most frequently discussed topics in competition law and economics and it has attracted a great deal of attention over the years, both in terms of high-profile cases and in terms of debates on the theoretical issues. From the above it is clear that there are still a number of questions that will need to be tackled before arriving at a balanced and practical policy approach towards predation. This may not be surprising as identifying predation

concerns the distinction between sharp and positive price competition and abusive conduct, where the same price, depending on the circumstances of the case, may fall in either category.

## NOTES

1. This paper does not give an overview of EC competition policy but merely reflects on some of the issues concerning predatory pricing in the context of applying Article 82 of the EC Treaty. This paper should not be read as guiding future Commission practice and should not be read as a proposal for future policy, but as a starting point for discussion on what could form a balanced and practical policy towards predation.
2. Throughout this text exclusionary effect is used as the short form for the effect of eliminating or disciplining rivals or preventing their entry.
3. Such was for instance the situation in the AKZO case, where AKZO was considered to predate in the flour additives market in order to protect its dominance in the organic peroxides market (case 62/86, AKZO Chemie BV v Commission, 1991).
4. The Court followed the Commission to prohibit predatory pricing that took place and had its effect only in a non-dominated market in the Tetra Pak II case (case T-83/91, Tetra Pak v Commission, 1994). The case can however be considered exceptional because the markets of aseptic and non-aseptic cartons were strongly linked and the Court and Commission considered that due to the quasi monopolistic position of Tetra Pak on the aseptic markets and its leading position on the closely associated non-aseptic markets it enjoyed a quasi dominant position also on the latter markets.
5. AKZO v Commission par. 71. In this case the Court actually referred to the AVC benchmark, stating that prices below AVC must be regarded abusive. However, as explained above, in most cases the AVC benchmark will coincide with the AAC benchmark.
6. AKZO v Commission, par. 72.
7. For instance in the AKZO case, the Court agreed with the Commission that there was clear evidence of AKZO threatening ECS in two meetings with below cost pricing if it did not withdraw from the organic peroxides market. In addition there was a detailed plan, with figures, describing the measures that AKZO would put into effect if ECS would not withdraw from the market.
8. Judgment of the Court of Justice in AKZO v Commission, pars 81, 114 and 115.
9. One particular problem with quantifying recoupment is that predation may be applied by the dominant company not just to exclude an identified rival but also in order to build up an aggressive reputation with effect further into the future and on other markets.
10. This was confirmed by the Court in Tetra Pak II, where the Court stated that proof of actual recoupment is not required.
11. See the Commission decision in the case Deutsche Post AG (Commission Decision 2001/354/EC of 20.3.2001, OJ L 125 of 5.5.2001, p. 27).
12. Notice on the Application of Competition Rules to Access Agreements, point 112, OJ C 265, 22.8.1998, p.2-28.
13. Sometimes a certain pricing behaviour may be objectively justified for more than one reason. For instance, the need to sell off perishable inventory or phased out or obsolete products at a loss making price may just

as well be covered by the first objective justification. In such cases it may also have to be taken into account that certain costs that would under normal circumstances be considered variable costs may have become fixed costs at the time of sale.



## CHINESE TAIPEI

### 1. Introduction

This submission presents Chinese Taipei's approaches to dealing with predation vis-à-vis competition.

In Chinese Taipei's Fair Trade Act, competition is described as any conduct on the part of enterprises within the same market which contests trading counterparts by offering more favourable pricing, quantity, quality, services and/or any other conditions. Anti-competitive practices, by contrast, distort market function as well as the rational allocation of resources and shall be prevented or corrected by effective enforcement. In that competition underpins the core function of market mechanism, it shall indeed be protected and promoted by the competition authority, the Fair Trade Commission (FTC).

The FTC regards predation as a form of misuse of monopolistic power. Like any other form of misuse of monopolistic power, predatory pricing, it must be kept in mind, is -- at best-- not so easy to determine or detect. To explain, there are no clear-cut differences in appearance between legitimate pricing competition and predatory pricing.

In issuing its *Regulatory Notes on the Telecommunications Industries under the Fair Trade Act*, the FTC determines pricing to be predatory when "a monopolistic enterprise sets its price at a level much lower than cost, at the price of sacrificing short-term profit to drive competitors from the market or block their entry into it, thereby enabling it to gain excessive profits in the long-term."

The FTC firmly takes the stand that to claim predatory pricing, all of the following conditions must be met:

- a) the enterprise in question is a monopoly or has certain market power in the relevant market (the market share of the enterprise must be above 50%);
- b) the price in question is much lower than cost (different measures of cost may be applied in different types of cases);
- c) the enterprise in question is capable of hindering or excluding competitors operating with the same efficiency; and
- d) a significant entry barrier exists, which enables the enterprise in question to compensate for its previous loss by raising price above the competitive level in pursuit of earning excessive profits after having forced competitors out of the market.

## **2. Predatory Pricing**

### **2.1 Plausibility**

Whether or not an enterprise in question is a monopoly or has a 50% market share in the relevant market is the prerequisite for the FTC to take a deep look at a potentially predatory pricing case. Against this, as a basic policy, an enterprise without monopolistic status or without a 50% market share which initiates price competition is not deemed as predatory in the first place.

#### *Reputational Effects*

Predatory pricing can be regarded as an “investment” by a monopolistic enterprise whose goal is to maintain its competitive edge. Through predatory pricing, the predator conveys a strong signal putting potential competitors on guard not to enter the market. If the reputational effects can be effectively produced and lead potential entrants to believe that severe predatory pricing will occur, then this, in turn, will weaken their intentions to enter the market. In this case, predatory pricing is considered to be at work.

If the predator is a monopolistic enterprise in multi-markets and is faced with new entrants in one of its markets, it might attempt to use predatory pricing or cross-subsidization between markets to exclude competitors and send a warning to potential entrants into other markets. What such predatory pricing can result in is the spill-over effect, which of course protects the predator’s monopoly in its multi-markets. In evaluating the reputational effects produced by predatory pricing strategies, the FTC principally takes 5 factors into consideration: whether the predator is a monopoly in multi-markets, the nature of the relations between those markets, the frequency and scale of predatory pricing, the sunk-cost of market entry, and the degree of information availability.

#### *2.1.1 Recoupment Test*

Among other considerations, the FTC makes its decision on a predatory pricing case on the basis of the recoupment test. To establish the presence of predation is dependent upon whether a predator is able to raise price above the competitive level to recoup its previous loss once it has excluded competitors from the market. If the predator is not able to raise its prices on account of low entry barriers that make it unable to prevent competitors from easily returning to or entering the market, or if there is a price cap regulation in the relevant market, then predatory pricing can do little harm to competition and is, obviously, beneficial to consumers. The FTC is required to prove the predator is able to compensate for its previous loss via raising price after excluding competitors from the market, but it does not have to prove the predator has actually recovered its loss.

## **2.2 The Appropriate Measure of Cost.**

In general, the FTC takes Areeda-Turner’s Average Variable Cost Test (the AVC test) to measure costs when examining predatory pricing cases. The AVC is close to the concept of marginal cost and consists of the usual criteria for examining static economic efficiency. From the FTC’s perspective, the AVC is the shutdown point for rational enterprises. Simply put, any pricing lower than the AVC could reasonably be taken as an indicator of anti-competitive conduct.

In sectors characterized by significant economy of scale or economy of scope, the fixed cost or common cost of a monopoly comprises a significant proportion of the total cost, which substantially minimizes the effectiveness of the AVC. The FTC, therefore, needs other instruments with which to measure cost in such a case. To cite one example, in the telecommunications sector, the FTC uses long-run incremental cost (the LRIC) to determine whether any pricing in question is predatory.

Difficulties encountered by the FTC when using the LRIC to evaluate a predatory pricing case in the telecommunications sector center around the facts that:

1. most telecommunications operators use fully allocated cost (the FAC) rather than the LRIC except in interconnection services; and
2. even though the LRIC of specific telecommunications services can be obtained, the incremental cost per unit of telecommunications services approximates zero before the services reach the limit of network capacity. This means that almost all prices of telecommunications services are higher than the LRIC and cannot be deemed as predatory.

### 2.2.1 *Chunghwa Telecom Case*

In 1999, all private mobile phone operators filed a complaint with the FTC, alleging the 3<sup>rd</sup> Tariff Adjustment Program of the state-owned monopoly Chunghwa Telecommunications Co., which was approved by the Directorate General of Telecommunications (the DGT) under the Ministry of Transportation and Communications, were engaging in predatory pricing, cross-subsidization, and undue fidelity discounts.

According to the Program, the adjustments to the mobile phone rates were as follows: (1) general preferential rate plan: monthly charges: NT\$600, connection charges during regular hours: NT\$0.10 per second, connection charges during discount hours: NT\$0.05 per second; (2) local preferential rate plan: monthly charges: NT\$420, connection charges during regular hours: NT\$0.08 per second, connection charges during discount hours: NT\$0.05 per second; (3) economical preferential rate plan: monthly charges: NT\$200, connection charges during regular hours: NT\$0.15 per second, connection charges during discount hours: NT\$0.08 per second; (4) discount plan for long-time customers and large accounts: 20 to 40% off their monthly charges; (5) preferential plan for subscriber-to-subscriber connections: NT\$0.05 per second.

The private operators argued that the rates under the “general preferential rate plan” were 9% lower than the prevailing rates of the private operators, while the rates under the “economical preferential rate plan” were 30% lower than those of the private operators. The complainants alleged that Chunghwa Telecom was using predatory pricing and cross-subsidization to offer discounts to customers, thereby restraining competition and competing unfairly.

In reviewing whether Chunghwa Telecom’s pricing programs were predatory, the FTC took the following into consideration:

- a) The FTC took the FAC as the indirect indicator to examine whether the price in question was lower than the LRIC. The FAC includes the direct cost of providing a specific service as well as operation fees and the allocation of other common costs. In most cases, therefore, if the price of a specific telecommunications service is higher than the FAC, then it is reasonable to believe that the said price could not be lower than the LRIC.
- b) In the said case, the FACs of the Chunghwa Telecom to provide mobile phone services were: NT\$ 2.3674/min for on-net services, NT\$ 4.895/min for off-net services, NT\$ 3.366/min for fixed-to-mobile services. Contrast this with the retail prices of the said services: NT\$ 3~4.8/min for on-net services, and NT\$ 6~9/min for off-net or fixed-to-mobile services. All of these retail prices were obviously higher than the fully allocated costs (the FACs).
- c) In addition to examining whether the prices of the telecommunications services were lower than the LRIC, the FTC further reviewed whether there were cross-subsidies among various

telecommunications services -- for example, any long-term financial deficit within certain telecommunications services, or any unreasonable trading conditions among internal branches of Chunghwa. The FTC in the said case did not discover any anti-competitive cross-subsidy between Chunghwa Telecom's mobile phone branch and its other branches whatsoever.

- d) Last but not least, the FTC examined the relationship between tariff adjustments and the profits of Chunghwa Telecom. In analyzing predatory pricing, the FTC considered the impact of an enterprise's reduction in price on its profits. As a general rule, if an enterprise's profits do not significantly decrease on account of the lower price, then it may reasonably claim that the lower price induces stronger demand which, subsequently, increases income and, therefore, makes up for the loss from the decrease in price. This practice is deemed as ordinary pricing competition as opposed to predatory pricing. In the said case, the tariff adjustment program contributed NT\$ 3 billion to Chunghwa Telecom and was not regarded as predatory pricing by the FTC.

### **2.3 *Above-Cost Prices***

There was once a case in which a new entrant to the telecommunications sector complained that the incumbent was misusing its market power to set its prices above its own costs, while still keeping its prices lower than the new entrant's in an effort to unduly squeeze the profits of the new entrant. The FTC did not consider this case as predatory, however, on the grounds that one of the factors constituting predatory pricing is that the pricing strategy must be harmful to or must force out competitors with the same or better efficiency, i.e. those with the same or lower cost. If the incumbent is not allowed to set its price just slightly above its cost, yet set them still lower than its rivals', inefficient competitors may be attracted to enter the market. This does protect competitors rather than competition, but more importantly, neither is it in the consumers' interests nor does it meet allocation efficiency.

In contestable markets where entry barriers are low and potential competitors are always at hand, the FTC will not take limit-pricing strategies as predatory. The incumbent deliberately deploys limit-pricing strategies to set the price at the sub-optimal level so as to have potential competitors believe the post-entry market is unprofitable, thus likely making them abandon any intentions to enter that market. Limit-pricing strategies should be seen as ordinary pricing competition strategies used by an incumbent when faced with the threat posed by potential new entrants.

In non-contestable markets where entry barriers are the product of regulations, technologies, or economic factors and where the incumbent tends to systematically use low price to hinder new entrants, the sector regulator can use price-cap regulation to determine the lower limit of the incumbent's price and, hence, prevent predatory pricing. To illustrate this, one of the purposes of using a price-cap to regulate the tariff of Chinese Taipei's fixed line telecommunications operators is to prevent an incumbent from significantly lowering its prices in an attempt to create an obstacle for new entrants.

### **2.4 *Price Histories***

We have little experience in this area.

### **2.5 *Reasonable Justifications.***

In Chinese Taipei, loss leader strategies are commonly used by hypermarkets. Hypermarkets often set the prices of certain daily goods, e.g. tissue paper, rice, etc., well below costs with the aim of attracting consumers to enter their stores to purchase those goods and, at the same time, other products much more profitable to the stores. The purpose of this strategy is to increase overall sales volume rather than exclude competitors. This strategy, for the most part, cannot produce a strong enough effect to exclude horizontal competitors. The FTC never takes loss leader strategies as being predatory.

### 3. Non-Price Predation

#### 3.1 *Raising Rivals' Costs.*

Vertical price squeezing is the most common non-price predation the FTC has encountered. In determining a vertical price squeeze case, the FTC takes the following conditions into account:

1. Whether the enterprise in question is vertically integrated and has a certain market power in an upstream market. If the enterprise only operates in an upstream market and is able to maintain excessive pricing, then this constitutes an issue of monopolistic pricing rather than one of vertical price squeezing.
2. Whether the product or services provided by the vertically integrated enterprise is essential input for competitors in a downstream market and cannot be obtained elsewhere under reasonable commercial conditions or reproduced by other technologies in the short-term.
3. Whether the enterprise's pricing of that essential input can force downstream competitors with the same efficiency to withdraw from the market.

Take, as an example, the telecommunications market where the FTC deploys the imputation test to examine vertical price squeezing. Suppose that company A is a vertically integrated telecommunications enterprise and provides wholesale services, such as leasing unbundled local loops as well as retail services, like providing local call and ADSL services; also suppose that it is the only supplier in the wholesale market, while there are many competitors in the retail market. Company A provides the wholesale services to itself and other downstream competitors at the unit price  $w$  with a retail price  $p$  and cost  $c$ . Can its wholesale price exclude other downstream competitors with the same efficiency. If the wholesale price made by company A is higher than the figure gained by subtracting the retail cost from the retail price, namely  $w > p - c$ , the downstream competitors will likely have to retreat from the market since they have little opportunity for profit because of such a wholesale price. Here, such action may constitute vertical price squeezing. On the other hand, if the wholesale price made by company A is not higher than the figure gained by subtracting the retail cost from the retail price, namely,  $w \leq p - c$ , it cannot be deemed as vertical price squeezing.

#### 3.2 *Building Excess Capacity.*

Enterprises may have excess capacity for various reasons. If, for example, capacity cannot be fine-tuned to be kept in line with changes in demand or in the economic cycle, then excess capacity may result. For tactical purposes, enterprises may invest in excess capacity to release a message to potential entrants that the incumbent is able to increase production at comparatively lower costs and to exclude newcomers; to be sure, this would adversely affect potential entrants' expectations concerning the post-entry market. In deciding whether excess capacity building is predatory, factors that must be considered include whether the incumbent has an on-going advantage in terms of cost, whether the growth in demand is slow, whether the building of excess capacity occurred right before new entrants had access to the market, and whether investment in excess capacity is sunk cost, etc. Until now, there has been no excess capacity case that the FTC decided was predatory.

#### 3.3 *Abuse of Informational Asymmetry.*

We have little experience in this area.

## **4. General Questions**

### **4.1 Experience.**

Most of the cases pertaining to potentially predatory strategies that the FTC has received have been predatory pricing cases, but to date, none of these have been deemed as being predatory. From the stance of the enterprises in question, i.e. monopolistic enterprises which have at least a 50% market share, predatory pricing strategies can heavily affect profits. As the market share of an incumbent and that of a new entrant are greatly different, the impact of lowering price strategies is also asymmetric. Compared with that of a new entrant, a monopolistic enterprise suffers a higher loss when deploying predatory strategies. If predatory pricing cannot produce effective reputational effects to convey a commitment to hinder potential competitors from entering the market, then it follows that the strategies cannot be considered successful. In practice, merger and acquisition would be a better method than predatory pricing when it comes to eliminating or decreasing competition.

Vertical price squeezing would be an effective tool for blocking competition. Raising the price of essential input only affects the predator's perceived marginal cost, but this will, nevertheless, increase the new entrant's actual marginal cost, squeeze its profit margin and decrease its competitiveness in the market.

### **4.1 Statutory effectiveness**

The FTC takes predatory pricing and other forms of predation as a misuse of monopolistic power. In the Fair Trade Act, a monopolistic enterprise is prohibited from acting in the following ways:

- a) directly or indirectly preventing any other enterprises from competing by unfair means;
- b) improperly setting, maintaining or changing the price for goods or the remuneration for services.
- c) forcing a trading counterpart to give preferential treatment without justification; and
- d) otherwise abusing its market power.

In accordance with the Fair Trade Act, the FTC prohibits predators from: 1) engaging in excessive pricing to seek monopoly rent, and from 2) deploying predatory pricing by sacrificing short-term interests with a view either to hindering the access of potential competitors to a market or to driving existing competitors out of the market, and thereby, in the long-term, obtain monopolistic interests.

The FTC believes the coverage of the relevant provisions in the Fair Trade Act is wide enough to discover and prevent the misuse of monopolistic power, including such practices as predatory pricing and other forms of predatory conduct. In practice, to effectively enforce the provisions to detect and prevent predatory conduct requires sufficient economic data as well as elaborate economic analysis, and this is never an easy task, to say the least.

## SUMMARY OF THE DISCUSSION

The Chairman opened the roundtable by asking John Vickers of the UK delegation to discuss portions of his recent paper on abuse of dominance and to present his views on the appropriate tests for predation.

### 1. Presentation by John Vickers of the UK Delegation

Mr. Vickers began by pointing out that over the last five to ten years, the law and policy toward anticompetitive agreements in Europe has shifted from form-based approaches to more economics-based approaches. The European Commission is now reviewing the area of abuse of dominance and again one of the fundamental questions is the extent to which the Commission's approach should be form-based or economics-based. There is wide agreement that the underlying principles or standards should be clearer, too. At the heart of this review are fundamental issues such as how to define competition on the merits, undistorted competition, and harm to competition. Although the underlying standards cannot be debated in the abstract, there is also a danger that merely discussing different candidate abuses without thinking about underlying principles would invite inconsistency and incoherence. Mr. Vickers therefore recommended that the competition policy community strive toward equilibrium between underlying principles and goals on the one hand and approaches to different types of abuses on the other. His paper examines, among other things, below cost pricing abuses and seeks to link them to the debates on underlying standards.

One of those standards is the sacrifice test, sometimes called the "but for" test, which holds that conduct by a dominant firm is unlawful if it makes no business sense but for its exclusionary effect. The essence of conduct that fails this test is some sacrifice of profit by the dominant firm in the short run in exchange for the longer run "gain" of lessened competition. The test seems to distinguish between deliberately exclusionary pricing on the one hand and responding to competition in a perfectly healthy way on the other. So it has at least some superficial appeal, Mr. Vickers said.

He added, however, that the test is unsatisfactory because it does not deliver a substantive standard. Making "no business sense but for the exclusionary effects" is too vague and subjective. Furthermore, the test leaves some difficult practical issues unresolved, such as what the alternative behaviour (as opposed to the sacrifice) might be. In addition, although it has been proposed that sacrifice should be a necessary condition for a finding of illegality, some conduct may entail no short run profit sacrifice yet still be exclusionary. "Cheap exclusion" falls into this category. Therefore, profit sacrifice might be a useful principle for looking at some aspects of abuse, but it is not promising in terms of providing a general foundation for what constitutes exclusionary behaviour.

The second broad test is the "as efficient competitor" test, which asks whether a dominant firm's conduct would be likely to exclude rivals that are as efficient as the dominant firm itself. Some of the cost benchmarks used in the case law on predatory pricing are related to the as efficient competitor test. This test has some merit, too. It guards against the danger of protecting competitors rather than competition because under competitive conditions the market should be served by the most efficient firms. Some argue that the test is too lax because consumers can be harmed in many ways, not only by the exclusion of competitors as efficient as the dominant firm. And there are difficult questions about the scale of operation at which one should assess firms' costs. If new entrants are small and have not yet worked their way down the marginal cost curve, then they may be less efficient than a dominant firm in the short run, but if they were able to survive longer they might eventually be equally or more efficient rivals.

The third general standard holds that conduct is not unlawful unless there is a tendency for it to cause consumer harm. In terms of predatory pricing, this is the issue of recoupment. But should it be necessary to make a showing of consumer harm to find abuse, and if so, what standard should apply: actual harm, a dangerous probability of harm, or a mere capability of causing harm? Should agencies sometimes take cases even when there is no prospect of consumer harm? If so, what would be the grounds for doing so?

Mr. Vickers cautioned that it is best to be cautious when intervening against alleged predatory pricing conduct. Given that the conduct involves low prices for consumers, government intervention could be counterproductive for consumers, efficiency and the general economy. Finally, he noted that the case law on recoupment in Europe seems to be starkly different from that in the US because there appears to be no need to show it in European cases. In any case, Mr. Vickers said, it is good practice for agencies to think very hard about the recoupment issue both as a cross check on whether a dominant position really exists and to be sure that by taking action, the agency would really be protecting consumers.

## **2. Protecting competitors or protecting competition?**

The Chairman steered the discussion from theory to practice, beginning with Japan. He noted that Japan can fight predatory practices under either section 3 of the Anti Monopoly Act, which prohibits practices “restricting competition substantially in any particular field of trade,” or section 19, which prohibits unfair trade practices. To apply article 19, three requirements must be met: charging prices lower than the cost of supply, continuing such pricing, and tending to cause difficulties to the business activities of other entrepreneurs. The Chairman asked whether this approach is consistent with the EU approach, which views predatory pricing as a concern not because it harms competitors, but because it harms competition.

A delegate from Japan said that The Antimonopoly Act aims to promote free and fair trade. Therefore, the JFTC’s approach to predatory pricing is to protect competition. In light of the third criterion under section 19, it might seem that law enforcement against predatory pricing in Japan protects competitors rather than competition itself. However, the three criteria are considered in their totality. In other words, the third condition – whether the competitors are facing difficulties in continuing business – is meant to test whether market competition was injured by something other than the predator’s efficiency.

The JFTC can also restrict predatory pricing as a private monopoly violation of article 3. Under that article, the JFTC needs to prove that conduct substantially impedes the functioning of the relevant market as a whole. In contrast, in the case of unfair trade practices, this condition would not be considered. The delegate said that it has been difficult to pursue most of the predatory pricing cases as private monopolization so far.

The Chairman next addressed Switzerland’s contribution, which notes that it is not easy to distinguish between predatory behaviour and fierce but healthy competition. According to Article 7(1) of the Act Against Cartels, practices of dominant enterprises are unlawful when such enterprises, through the abuse of their position, prevent other businesses from entering or competing. More precisely, Article 7(2)(d) states that “the undercutting of prices or other conditions directed against a specific competitor” may constitute an unlawful practice. The Swiss contribution presents several cases, including one involving the allegedly predatory launch of a newspaper. The contribution states that “even if the investigation revealed that the incumbent newspaper was driven out of the market, the new newspaper would not be able to increase its price above the competitive level in the long run due to remaining competitive forces.” The Chairman asked how that statement fits with the wording of article 7(2), which seems to indicate that undercutting a specific competitor can be unlawful?

A delegate from Switzerland explained that there are two provisions in Swiss law that address predatory pricing. One is in the Cartel Act and concerns dominant positions, while the other one is in the Act on Unfair Competition. The latter provision is controversial and essentially makes it unlawful to offer low prices in order to deceive customers, such as when a firm lures people onto its premises with very low prices for one segment but it charges normal or high prices in other segments. In the Swiss Competition authorities' practice, the Cartel Act provision is more important.

The delegate said that the case involved newspapers that normally operate in distinct regions. There are also sub-regions, in which a newspaper may issue separate editions. In this case, an incumbent newspaper in one sub-region argued that a regional newspaper should not be allowed to launch a sub-regional edition and experience losses in doing so. The competition authorities used the recoupment test in the fashion recommended by Mr. Vickers, *i.e.*, as a cross check for dominance. They found that in the regional markets, there was adequate competition and even if the outcome of the launch in question turned out to be that the complaining competitor was driven out, that would not mean that the alleged predator is dominant. In fact, it would have no ability to raise prices above the competitive level. So the agency reasoned that since there was no possibility of recoupment, then there was no dominance in the first place.

### **3. Which measure of cost is appropriate to assess predatory pricing?**

The Chairman turned to the cost measures used in analysing predatory pricing, noting that there are widely different practices among jurisdictions in this area. He remarked that the Norwegian contribution presents data concerning the airline industry in Norway and discusses two possible cost benchmarks: the avoidable cost test and an incremental cost and revenue test. He invited the Norwegian delegation to discuss these two approaches.

A delegate from Norway described the Norwegian aviation markets. There was a period of monopoly by SAS beginning in October 2001. The Norwegian Competition Authority's prohibition of SAS's frequent flier program on domestic routes led to immediate entry on the four major routes by the airline "Norwegian." Since then, Norwegian has expanded into a total of 12 domestic routes. The NCA is currently concerned that SAS may be following a predation strategy and is reviewing evidence.

Norwegian is the more efficient company. When it entered, it quickly gained a share of about 20 percent on major routes. SAS maintained its capacity at the pre-entry level but eventually cut prices substantially. This raised the question of whether they were engaged in a price or capacity predation strategy. The NCA does not have a clear incremental range of output in mind, unlike the American Airlines case. The question is whether the NCA can nevertheless apply the incremental cost and revenue test discussed in that case. Professor Lars Sjørgard, now the NCA's Chief Economist, has pointed out that applying a price cost test over an entire route risks being too lenient.

Applying the avoidable cost test at the route level, one averages out costs and revenues on all the flights on that route. Whether particular flights are losing money is not analysed by the test. One point of view is that this is an appropriate test as long as one is dealing with pure price predation. However, if one is dealing with capacity predation, one could argue that applying the avoidable cost test on a route level is too easy for defendants. If there is a clearly relevant increment in capacity, one can look at incremental costs and revenues related only to that range of capacity.

One could say that average incremental revenue (AIR) is the average price paid by passengers on the specific flights in the isolated range of output. However, due to two effects, this overestimates AIR. First, there is a cannibalization effect. Some of the passengers on the excess flights would have taken other flights on the route, so they are not genuinely new passengers and thus should not be included when calculating AIR. Second, there is a price effect. To fill up the excess flights, prices on the route have to be

lowered. The income loss on the non-excessive flights should therefore be subtracted to produce a good estimate.

This leads to the following questions and conclusion. Can maintaining capacity at the pre-entry level be regarded as capacity predation? If so, would it be meaningful to apply an incremental cost/revenue test related to the excess capacity only? When analysing capacity predation, a price/cost test based on the whole route may be too lenient.

The Chairmen then addressed Mexico's legal framework for analysing predatory pricing. Article 7 index 1 of the Rulings of the Federal Law of Economic Competition (FLEC) establishes that systematic sales of goods or services at prices below their average total cost (ATC) or occasional sales below the average variable cost (AVC) are the proper benchmarks. Mexico's contribution states that the Rulings takes into account the possibility that AVC can underestimate marginal cost and that any price below ATC should undergo a rule of reason analysis according to the law. The contribution also presents a case concerning Warner Lambert in the informal market for chewing gum.

A delegate from Mexico explained that the regulations of the FLEC characterise predation as a relative monopolistic practice that is subject to rule of reason analysis. There must be a finding that the predator has substantial market power in the relevant market prior to evaluation of the actual practice. In addition, the competition authority must weigh efficiency considerations when making its final determination. These requirements have allowed the FCC to dismiss cases involving conduct that may harm competitors but is not harmful to the competitive process itself.

The delegate further explained that, at present, the FCC is not actively prosecuting predatory practices because the legal provisions relating to those practices have a weak legal basis. The FCC was investigating predation based on Article 10 index 7 of the FLEC, which defines all the actions that unduly damage competition as relative monopolistic practices in general. However, the Supreme Court determined in several cases that the provision is unconstitutional because it fails to establish the specifics necessary to determine the type of violation that merits the sanction in the legislation. It is therefore necessary to amend the FLEC.

The *Warner Lambert* case, which the FCC began investigating in 1996, concerned whether Warner Lambert launched its Clark's product in a manner designed to improperly displace Canel's, a competitor. The relevant market was chewing gum in the national territory. Warner Lambert was marketing Clark's through street vendors and Chiclets-4 in small stores. The FCC found that selling a product below cost acted as a barrier to entry, so that any entrant would require a large investment to survive predation. The FCC confirmed that Warner Lambert had substantial power in the chewing gum market where its share in net sales was above 50 percent and between five and seven times the share of its competitors. Warner Lambert also had the ability to differentiate prices between brand names and market segments, noting as an example the significant price disparity between Warner Lambert's Chiclets-4 and Clarks products.

The FCC also found that Warner Lambert had incurred losses throughout most of the investigation period because its price was persistently below its ATC. Furthermore, Canel's market share losses between 1993 and 1994 were very similar in size to Warner Lambert's share increases in a market that was relatively stable in size. This indicated that some Canel's customers had switched to Warner Lambert's product as a result of Clarks' artificially low price. As a result, the Commission imposed a fine on Warner Lambert and enjoined it from pricing its Clarks product in a predatory fashion.

The Chairman noted that the German contribution states that in the *Lufthansa/Germania* case, both the Bundeskartellamt and the Higher Regional Court rejected marginal cost and AVC as cost measures for

the airline industry and used ATC instead. He asked the German delegation to explain what the case was about and why ATC was the relevant cost.

A delegate from Germany began by noting that Lufthansa was the only carrier operating scheduled flights between Frankfurt and Berlin until November 2001. A roundtrip ticket cost about 485€, but by 1 January 2002 Lufthansa was charging only 105€ for a one-way ticket. The reason for this dramatic price cut, which occurred only on the Frankfurt-Berlin route, was that the low cost carrier Germania entered this market with a one-way fare of 99€. According to the investigation, Lufthansa's offer was below its ATC as calculated in Lufthansa's own profitability evaluation. Net of passenger fees and value-added tax, the Lufthansa offer was equivalent to a price of roughly 62€. Lufthansa's ATC was about 95€ per passenger.

Furthermore, Lufthansa's offer included several features that were not included in Germania's, such as higher flight frequency and better service. The Bundeskartellamt concluded that these extras had an equivalent value of at least 35€ per passenger and therefore that Lufthansa had undercut Germania's offer. To resolve the case, the Bundeskartellamt prohibited Lufthansa from charging a price less than 35€ above Germania's price for two years. The Higher Regional Court affirmed, but lowered the price differential from 35€ to 30.50€.

The German delegate stated that the appropriate cost measurement in predatory pricing cases differs from industry to industry. In network industries, for example, marginal costs will be close to zero because nearly all costs are fixed. In addition, it is difficult to differentiate which costs are variable and which are fixed. In the long term costs tend to be variable, but in the short term they may be fixed. Another problem is cost accounting in multi-product firms. Overhead expenses typically create great difficulties in allocation. In the airline industry, the marginal cost for one additional passenger is close to zero as long as the plane is not fully booked. If the plane is fully booked, however, an additional passenger might create extremely high marginal costs because an additional airplane is required. Another aspect is that flight prices are highly differentiated. The profitability calculation for a certain route will therefore always be a mixed calculation; differentiated prices need to cover the costs on average. Under these circumstances, the ATC is a much more meaningful cost measure than MC or AVC.

The delegate added that *Lufthansa* is somewhat similar to the *Wal-Mart* case. That was a resale-below-cost case handled by the Bundeskartellamt and confirmed in principle by the German Federal Supreme Court. The rationale behind the case was the same as in *Lufthansa*: to prevent the incumbent from squeezing competitors out of the market with the result of more concentration, which would ultimately have caused higher prices and lower quality. As in *Lufthansa*, it was appropriate to take a middle term prospective to evaluate the incumbent's pricing. Short term benefits like lower prices for consumers can quickly become long term disadvantages, which are more difficult to cure.

#### **4. Are prices below AVC always predatory? Are prices below cost but above a competitor's cost predatory? Can a price above a firm's own cost be predatory?**

The Chairman remarked that several contributions suggest that prices below AVC are not necessarily predatory. There is a greater diversity of views, however, on whether prices above cost, particularly ATC, can be considered predatory. The contribution from New Zealand states that price cutting is predatory if it has the purpose of harming competition, and that no New Zealand cases seriously discuss whether pricing must be below-cost to be deemed predatory. The Chairman invited the New Zealand delegation to discuss how it assesses predatory pricing.

A New Zealand delegate explained that the Commerce Act does not refer directly to predatory pricing. Section 27 prohibits arrangements that have the purpose or effect of substantially lessening competition, whereas section 36 prohibits use of market power for the purpose of deterring a competitor. The approach to predatory pricing depends on which section is relevant to the particular case at issue.

Cases involving predatory pricing usually involve allegations that a party abused its market power. To establish the necessary causal link between substantial market power and conduct under New Zealand law, it is necessary to compare two scenarios: the actual scenario, in which a party has substantial market power, and a hypothetical scenario, in which it does not have market power but is otherwise similarly positioned. The key question is whether the conduct would have occurred in the more competitive scenario.

In New Zealand, the delegate continued, the most important issue is to establish the link between the predatory pricing conduct and the use of substantial market power. Dominant firms must be allowed to compete. The problem with accepting the proposition that predatory pricing is established by some measure such as pricing below AVC is that it fails to establish, by itself, the use of market power, as it does not distinguish for example between a non-dominant party with financial strength and a dominant party with equal financial strength.

The Privy Council recently stated that the line between legitimate competition and anti-competitive conduct is not crossed simply by lowering prices. It is crossed when a firm with substantial market power takes advantage of its ability to raise prices without losing market share. Cutting prices becomes unlawful only when a firm with substantial market power is shown to have cut prices with a view to recoupment. It is the ability to recoup, not the ability to cut prices, that harms consumers. In New Zealand, therefore, pricing below cost is a relevant factor but is not of primary importance.

Finally, the New Zealand delegate noted that there has been considerable discussion and some criticism regarding *Carter Holt Harvey*. The contentious issue is whether a legitimate business justification can negate taking advantage of market power under section 36. The CHH case had the effect of building a legitimate business defence into section 36. There is already a debate about whether section 36 is robust enough, so this has now become a policy issue for the government.

The Chairman then highlighted Korea's contribution, which explains that it is possible for prices above ATC to be deemed predatory in that jurisdiction. The Monopoly Regulation and Fair Trade Act stipulates that any activity that unduly excludes competitors can constitute an abuse of dominance prohibited under article 3-2. The contribution states that the KFTC controls abuse of dominant positions when dominant businesses exclude competitors by selling below the "ordinary transaction price." That means that even setting a price above total costs could still be considered predatory. The Chairman asked the Korean delegation to elaborate on its law and enforcement policy.

A delegate from Korea said that the MRFTA distinguishes undue discount sales by general businesses from undue discount sales by dominant firms. Discount sales by general businesses are governed by Article 23 of the prohibition on Unfair Trade Practices, which requires prices that are much lower than their costs. Court cases recognize the relevant cost as total cost, which means the sum of total sales costs and non-operating expenses, such as interest on a loan. But undue discount sales by dominant businesses are governed by Article 3 of the MRFTA, which merely requires prices lower than ordinary prices. This condition is much stricter because dominant businesses have a higher probability of monopolising markets and harming competition. The KFTC, however, has not had any cases in which it applied the MRFTA to the above-cost prices.

The delegate noted that, for dominant firms, the MRFTA captures limit pricing strategies because limit prices are lower than ordinary prices. He stated his view that both predatory pricing and limit pricing should be controlled by the competition laws, or else those practices should both be abandoned by the laws. Even if limit pricing is prohibited, incumbents are still able to win customers through non-price competition.

The Chairman observed that, in contrast to the situation in Korea, Chinese Taipei has had a case in which an entrant complained that the incumbent was engaging in predation while keeping its price above its costs. He invited the delegation from Chinese Taipei to discuss the reasons why it rejected that complaint.

A delegate from Chinese Taipei said that the FTC considers pricing to be predatory when a monopolistic firm sets its price at a level much lower than cost, so that it is sacrificing short term profit to drive competitors from the market or block their entry, thereby enabling it to gain excessive profits in the long-term. All four of the following conditions must be met:

- 1) the firm is a monopoly or has market power in the relevant market (the market share of the enterprise must be above 50 percent);
- 2) its price is much lower than its cost (different measures of cost may be applied in different types of cases);
- 3) the firm is capable of hindering or excluding competitors that operate with the same efficiency; and
- 4) a significant entry barrier exists, which enables the firm to compensate for its initial losses by raising price above the competitive level after competitors are forced out of the market.

Answering the Chairman's question, the delegate stated that the FTC did not pursue the incumbent that set its price above its own costs, while still keeping its prices lower than the entrant's, in view of the requirement that the pricing strategy hinder or exclude equally efficient competitors, *i.e.*, those with the same or lower cost. If the incumbent is not allowed to set its price slightly above its cost but still lower than its rival's, inefficient competitors may be attracted to the market. That would protect inefficient competitors rather than competition, a result that would promote neither consumers' interest nor allocative efficiency.

The Chairman turned to Turkey's contribution, which discusses a case involving a state owned enterprise that may have priced below its AVC but equal to or above the cost of its competitors. He asked whether, if that were the case, this pricing practice would be considered predatory.

A delegate from Turkey answered that the incumbent in that case, Turkish Maritime Enterprises (TDI), has much higher costs than its rivals because of the impact that a very effective trade union has on labour costs. TDI operates ferries on several lines. It has a monopolistic position on one line and therefore charges extremely high rates. On another line, however, TDI's prices are close to its rival's price but approximately 50 percent lower than its own average cost. The Turkish Competition Authority recommended prosecuting TDI, and although this suggestion was refused by the Competition Board, the Council of State later rejected the Competition Board's decision. The most important issues in the case are, first, whether to accuse a firm that charges prices that are lower than its costs even if rivals are not forced to exit. The second issue is the legality of using economic power in one geographic or product market to obtain a dominant position in another market where competition exists.

#### **5. Should the "meeting competition" defence be recognised? Should limit pricing be tolerated?**

The Chairman noted that the contributions reveal varying opinions on the question of whether a meeting competition defence should be allowed. Denmark's contribution, for example, states that "even dominant enterprises are allowed to meet competition by lowering prices. So far, prices below costs have not been considered predatory if the dominant enterprise did not undercut prices offered by other suppliers." The Chairman asked the Danish delegation whether there could be a possibility of exclusion if

a well established firm systematically matched the price of a new competitor trying to establish itself in the market.

A delegate from Denmark replied that the Danish Competition Authority has applied the meeting competition defence because it is required to follow European practice, and various European court rulings have upheld that defence. In some instances, dominant firms have been permitted to price below AVC to meet the price of competitors. Such prices must be defensive, however, meaning that they are targeted at the dominant firm's existing customers. This defence should be applied cautiously because it could be abused. For example, it could give a dominant firm a reputation that it would always meet any entrant's price, which could have a significant deterrent effect. On the other hand, one should not tie the hands of the dominant firm to an extent that impedes the competitive process.

The Chairman compared Denmark's acceptance of the meeting competition defence with Chinese Taipei's tolerance of limit pricing strategies. The latter's contribution states that "limit-pricing strategies should be seen as ordinary pricing competition strategies used by an incumbent when faced with the threat posed by potential new entrants." The Chairman asked the delegation from Chinese Taipei to describe how far it goes in allowing limit pricing strategies.

A delegate from Chinese Taipei said that in contestable markets, even if the incumbent uses limit-pricing to set its price at a level that makes potential competitors believe the post-entry market would be unprofitable (thus making them abandon any plan to enter that market), those strategies will be treated as ordinary competitive strategies that incumbents use when facing a challenge from new entrants, and will therefore not be deemed predatory. As long as potential competitors can enter or re-enter the market if the incumbent raises its price, thereby preventing the incumbent from recovering any losses it incurred and from earning excessive profits, the pricing strategy cannot be successful so it will not be considered predatory.

## **6. In which market should predation be observed?**

The Chairman next addressed the subject of predation by a dominant firm in a market in which it is not dominant. He focused on the EU's contribution, which states that predatory pricing by a dominant firm in an unrelated market where it is not dominant and where the predation will have effects only in that unrelated market will not normally be an abuse under Article 82. An exception is the Commission's policy in sectors where activities are protected by legal monopolies and where the prevention of cross subsidisation is relevant. The Chairman asked the EU delegation to clarify why a dominant firm could not cross-subsidise its activities in a market in which it is not dominant precisely to acquire such a position in that market and why, if the firm could do that, the practice would not be considered predatory. He also requested an explanation of why the Commission makes an exception for firms protected by legal monopolies.

An EU delegate first reminded the Committee of the principle that dominance itself is not illegal. On the contrary, dominance is sometimes a natural result of competition on the basis of performance. He also mentioned that the Commission does not apply its unilateral conduct statute to protect competitors from competition. Both dominant firms and ordinary competitors are allowed to compete. In general, the Commission would be very hesitant to pursue a company that used its deep pockets to fund aggressive conduct in a totally unrelated market. However, there are a number of court rulings finding that if a company used its market power in market A to extend that power to market B, then that can be an abuse. The Commission applies those rulings where market B is closely related to market A because in that situation, the conduct usually has an impact on market A, as well (by strengthening the company's dominant position in that market). In *Tetrapak*, for example, which related to aseptic and non-aseptic packaging, the court found that the two markets were closely related. The abuse found in the non-aseptic

market was also likely to strengthen Tetrapak's position in the aseptic market, where it was clearly dominant.

Another scenario mentioned by the EU delegate involves a state monopoly or an incumbent in a recently liberalized market who has control of an infrastructure and leverages its monopoly power into a new area. Again, the goal is to distinguish these cases from situations where a company acquires dominance from performance on the merits. A state-sanctioned monopoly has a guaranteed revenue stream that it can use to cross-subsidise its activities in neighbouring markets and thereby acquire dominance based not on the merits, but on the fact that it is a state monopoly in a different market.

## **7. Is there a need for a recoupment test to establish predation?**

The Chairman then steered the discussion toward another test for predation – the recoupment test. He remarked that the US contribution states that “to prove a predatory pricing claim, the plaintiff must be able to show that the defendant firm has priced below a good estimate of marginal cost. In addition, a predatory pricing claim must pass the recoupment test. The need for a recoupment test may not be self-evident, yet it serves as a valuable safeguard against confusing aggressive pro-consumer competition with anticompetitive conduct.” The Chairman asked the US delegation to explain how this can be done and why it constitutes a safeguard against confusing pro-consumer competition with anti-competitive conduct.

The US delegate said understanding the commercial and legal history in markets may be more important than trying to find precisely the correct terms and formulations for various cost measures. Different conditions exist in different countries, so the cost measure that is appropriate to use in one jurisdiction may differ from what is appropriate to use in another jurisdiction. The US's main point regarding recoupment is that it is a fundamental consideration for any agency that is seriously examining the consumer welfare effects of predatory pricing. A likelihood of recoupment means that the predator is probably going to be able to sustain a price increase and an output decrease.

The delegate noted that the elements of the American recoupment test are not all presently reflected in the dominance test used by the European Commission. Regardless of the nominal heading that the factors are considered under, however, the purpose of all of them is to establish a confident expectation that consumer welfare will decline via a sustainable price increase or output decrease.

Another US delegate added that in competitive industries there are many legitimate reasons why firms sometimes price below cost, such as promotional pricing and loss leaders that draw people into the stores. There is a more recent recognition that in network effects industries, subsidising membership actually leads to more competition between networks and thus enhances social welfare. Therefore, anti-competitive behaviour should not be presumed based solely on an observation of below cost pricing. To conclude that below cost pricing is anti-competitive, an agency should have evidence that such pricing is part of a long run strategy to incur initial losses via predation that will lead to a comparable increase in profits in the long run due to the exclusion of competition. If recoupment cannot be shown to be likely, then either there is some other explanation for the below cost pricing, costs are not being measured correctly, or the situation is being misunderstood. The delegate deferred the answer to the Chairman's question about how to carry out the recoupment test, noting that it is case-specific and that it would come up again during the discussion of *American Airlines*.

The Chairman noted that the EU's contribution seems to take a different view of recoupment. It states that “if the price charged by the dominant company is below AAC (Average Avoidable Cost) this means the dominant company incurred a loss that it could have avoided. . . . [T]his is often considered sufficient to presume that the dominant company made this sacrifice in order to exclude the targeted competitor. . . . The presumption that below AAC the pricing of a dominant company can be assessed as predatory implies

that once the authority has established that the price charged was below AAC it does not need to further justify its decision[.] In such a case it would be up to the dominant company to show that it can objectively justify its pricing.” The Chairman asked the EU delegation to expand on its statement in light of the US’s points.

A delegate from the EU replied that in fact he likes the recoupment test because it is a way to prove that what looks good for consumers at first may, over time, be extremely bad in the long term. At the same time, the EU already has a threshold requirement to prove dominance, which necessarily involves a consideration of entry barriers. Ordinarily, where there is a truly dominant firm that prices below its AVC, then it is appropriate to reverse the burden of proof so that it is up to the company to provide a justification for its below-cost prices.

The Chairman asked the Danish delegation to explain its contribution’s statement that “the possible existence of reputational effects makes the possibilities for recoupment difficult to prove and so far, recoupment has not been considered in Danish case law.” He also asked whether the delegation thinks that recoupment tests are generally useless, and if so, to identify circumstances where that would be the case.

A delegate from Denmark first made a point about costs: whether a cost should be called fixed or variable depends on the relevant time horizon. If it is long enough, then everything is variable. The appropriate time horizon is the period during which the alleged conduct occurred. With respect to recoupment, even though the Danish Competition Authority has not applied a formal recoupment test, in reality it has given consideration to reputation, deterrence, barriers to entry, price elasticity of demand and other factors that are taken into account when considering recoupment. The bottom line is and should be a consumer surplus test. It might be a good idea to think about whether the recoupment test should be formalized in European legislation, since the test is already being considered in practice.

## **8. Must recoupment occur in the same market where predation occurs?**

The Chairman then addressed whether recoupment should have to take place in the market where predation occurred for a violation to occur. The US contribution states: “American Airlines’ investment in predatory foreclosure was . . . designed to deter future entry on numerous other ‘out of market’ routes. [S]ignificantly most of the recoupment would have come from markets other than the ones in which the acts of predatory foreclosure took place.” The Chairman asked the US delegation to explain why it took that position and why the lower court rejected it.

A US delegate responded that American Airlines’ documents suggested that its behaviour was motivated not only by the expectation of affecting the routes on which it expanded capacity, but by the desire to deter entry on other routes, as well. DOJ staff determined that even if lower cost carriers exited the five or six routes at issue, that alone would not have generated enough profit to cover the cost of the capacity that was shifted to those routes. Therefore, out-of-market recoupment seems to have been part of American’s plan. However, the lower court essentially rejected the notion of incremental capacity as a device for predatory foreclosure. The judge appeared to want to make the case fit into a textbook notion of predatory pricing in which price is lower than cost on a market-wide basis. It is arguable that at the appellate level, the Department’s position (based on incremental additions of capacity as the device for foreclosure and out-of-market recoupment) was not rejected by the court of appeals. Therefore, the same type of argument is potentially available for future cases.

The Chairman noted that the UK submission seems to support the DOJ’s position because it states that “it would be wrong to require a showing of recoupment in the same market, for predatory pricing can be anti-competitive and anti-consumer by deterring competition in other markets in which the dominant firm operates.” He invited the UK delegation to expand on its statement.

A delegate from the UK stated that part of the economic theory of predatory behaviour concerns predation for the purpose of establishing a reputation for aggressively responding to entry. In one case, *Aberdeen Journals*, OFT did not make an issue of recoupment in its court filings because EU precedent does not require it, but there was nevertheless good evidence in support of recoupment by way of acquiring a predatory reputation.

Another UK case was *Napp*, which involved a combination of drug pricing far below any measure of cost in the hospital segment of the market and extraordinarily high drug pricing in the wider community. That created virtually simultaneous recoupment because the hospital sector was a gateway to the wider market where profits were higher.

## 9. The *Air Canada* case

The Chairman commented that a number of contributions discuss airline cases. One interesting case arose in Canada, whose Competition Act has both criminal and non-criminal abuse of dominance provisions that cover anti-competitive low pricing. In addition, there is a specific component in Canada's competition laws to address allegations of predatory conduct in domestic airline services. He asked why such specific legislation was necessary, and whether the *Air Canada* case could have been dealt with under the criminal provisions.

A Canadian delegate replied that the airlines-specific legislation was necessary because of a 1999 merger that gave *Air Canada* a domestic market share of 90 percent after it acquired a failing firm. The legislation addressed the Competition Bureau's concerns about the merger by proscribing a long list of anti-competitive acts, including operating or increasing capacity on a route for which prices do not cover avoidable costs.

The government's case against *Air Canada* involved allegations that the airline had abused a dominant position by responding to the entry of two new low cost carriers on certain routes by increasing capacity or decreasing fares such that *Air Canada* was not covering its avoidable costs. Phase 1 of the legal proceedings concerned questions about the avoidable cost test. Phase 2 would then address whether *Air Canada* actually violated the abuse of dominance provision. The Competition Tribunal decided in Phase 1 that almost all airline costs are avoidable. Ultimately, *Air Canada* failed the avoidable cost test. In the meantime, however, *Air Canada* filed for bankruptcy so Phase 1 was stayed and phase 2 is in abeyance. The delegate also said that bringing the case under the criminal provisions would not have worked well because the criminal standard of proof, *i.e.*, "beyond a reasonable doubt," is so high.

## 10. Non-price predation

The Chairman then delved more deeply into the topic of excess capacity expansion, noting that Germany's contribution includes a case involving that conduct in the cement industry. He asked the German delegation to present the case.

The delegate from Germany first added to the information he gave earlier regarding the Wal-Mart case. He said that in fact a recoupment test was used in that case. The defendants had reduced the prices for several food items, especially basic products like sugar and milk. This price-cutting would have led to a more concentrated market if small and medium size competitors were squeezed out. The amount of money that an average household spends on those low-priced products is less than one per cent of the total amount it spends each month. Therefore the Bundeskartellamt reasoned that if the market became concentrated, then the discounts might not only have the eventual effect of raising prices for the previously discounted products, but also for the other three thousand items in the stores. Thus it would have been easy to recoup the losses from selling below cost.

With respect to the cement case, the delegate said that predatory pricing and predatory capacity expansion often go hand in hand because higher capacities often result in lower prices. Therefore predatory capacity expansion can be assessed like predatory pricing, and this is most obvious in cases where capacity is excessively added only for the purpose of preventing competitors from using the assets. The Bundeskartellamt dealt with such a case in the proposed acquisition of Malik Baustoffe by Heidelberger Zement. Heidelberger is the largest cement player in Germany. Malik was importing cement from other countries. Heidelberger wanted to purchase the assets of Malik not in order to use this additional capacity but rather to prevent competitors from using it. Thus the sole purpose of the acquisition was to block actual and potential competition. It would also have strengthened the dominant position which Heidelberger held in southern German markets. The Bundeskartellamt prohibited the acquisition in July 1988 on grounds of merger control as well as on grounds of Section 1 ARC.

The Chairman returned to the US contribution, which presents a number of non-price “cheap exclusion” cases. He asked the US delegation to provide more details about the various types of cheap exclusionary practices and how competition agencies can assess them.

An American delegate noted that in *American Airlines*, the company’s chief executive officer had remarked that predatory pricing is very expensive. Most firms would prefer a cheaper way to exclude competitors, so predatory pricing is really a last resort rather than a first resort. The delegate said that some forms of cheap exclusionary conduct are efficiency enhancing, as well, like exclusive dealing. But the Federal Trade Commission has focused on conduct in which there is no plausible efficiency enhancing defence. For example, the FTC brought a case against Unocal, a petroleum firm in California. Unocal participated in setting regulatory standards for gasoline in California. The FTC alleged that Unocal claimed that certain relevant intellectual property had been put into the public domain and, in reliance on that claim, California incorporated the technology into its regulations. Afterward, however, Unocal revealed that it had patents covering that technology and proceeded to obtain royalties from other firms who had to comply with the regulations. Lying is extremely cheap conduct, and it does not appear to have an efficiency justification.

The delegate noted that the FTC has brought many cases of that kind. She recommended that since cheap exclusion costs so much less than predatory pricing, it is a good idea for agencies to go looking for such cases because there are probably many of them waiting to be discovered.

The Chairman then invited Mexico to discuss its case against Coca Cola regarding exclusivity contracts in the soft drink market.

A delegate from Mexico explained that the Federal Competition Commission investigated exclusivity contracts because it appeared that Coca-Cola was selling its product on the condition of not using or marketing goods produced, processed, distributed or sold by a third party. Coca-Cola also granted discounts to retailers conditioned on the exclusive distribution or commercialization of Coca-Cola products.

The relevant market was defined as carbonated drinks in the national territory. The FCC determined that Coca-Cola had substantial market power with a share above 70 percent; Pepsi Cola was the second largest competitor with a share of 18 percent. The two main distribution channels for carbonated drinks were grocery shops and supermarkets, hotels, restaurants and similar establishments. Advertising and brand positioning were important barriers to entry in addition to retail space restriction caused by the contracts under investigation.

The FCC found that Coca-Cola’s exclusive contracts were deterring entry into the relevant market. Pepsi-Cola also used exclusive contracts, but it lacked substantial market power. Therefore, the FCC

decided that Coca-Cola was responsible for carrying out relative monopolistic practices that violated article 10. The FTC ordered Coca-Cola to stop participating in any agreement, program or commercial strategy granting discounts, prizes or promotions tied to promises to sell Coca Cola products exclusively.

The Chairman then asked the New Zealand delegation to present a similar case, *Fischer & Paykel vs Commerce Commission*.

A delegate from New Zealand said that Fisher & Paykel (F&P) was a manufacturer of whiteware products (*i.e.*, major household appliances). It had an 80 percent share of the retail market. 55 percent of whiteware retailers stocked F&P products and accounted for 75 percent of all retail whiteware sales. F&P used exclusive dealing contracts to prohibit the retailers from stocking its rivals' products. F&P applied to the Commerce Commission for authorisation for these arrangements.

The Commission had to consider two issues. The first was whether the contracts had the effect of substantially lessening competition in the market for the distribution and sale to retailers of whiteware goods in New Zealand. The second was whether the efficiency benefits outweighed any anti-competitive detriments.

A majority of the Commission found that there was a substantial lessening of competition arising from the arrangements that was not outweighed by benefits. It also concluded that F&P had significant market power and that a large fraction of the retail market was foreclosed. Furthermore, the arrangements had deterred significant entry or expansion in the retail market and caused competitors' costs to increase as they were forced to open new retail outlets. In contrast, the minority found no substantial lessening of competition because the contracts did not exclude rivals from the market altogether, but only from some outlets. Moreover, entry was not difficult because retail space could easily be obtained and there were no significant sunk costs. The minority concluded that the contracts increased distribution efficiencies and prevented rivals from free-riding on F&P's reputation.

On appeal, the High Court identified recent trends in US case law favouring a finding that vertical restraints were pro-competitive in all but exceptional cases. The High Court also found low barriers to entry and identified efficiencies flowing from the arrangement. Consequently, it upheld the minority's decision.

The Chairman then opened the floor for general discussion.

A delegate from France commented that when considering foreclosure – whether through pricing or other means – it is important to move towards a broader approach where economic efficiency gains would be taken into account. He added that in the ongoing debate in France on retail pricing in large stores, three elements should be kept in mind:

4. if we move toward an analysis that takes efficiency gains into account, this should not affect the predictability of enforcement measures. What is striking in the debate in France is that businesses are requesting not only that the pricing rules be eased, but that they be clarified. In fact, they would rather see more predictability in the rules than very strong deregulation. So there should be a checklist that is applied predictably. The delegate added that courts also expect clear, predictable rules, as it is hard for them to understand why they should punish pricing practices that are beneficial to consumers;
5. the efficiency gains should be accurately measured, notably as regards consumers;
6. the efficiency gains should be assessed within a relevant timeframe because although they may be beneficial to consumers in the short run, they may be less so in the longer run.

A delegate from Spain remarked that the Spanish competition authority has had several predatory prices cases, but most of them have been rejected. A recent one had to do with the market for cigars, which was formerly controlled by a state owned monopoly. The former SOE reduced its prices, thereby excluding a competitor, and then raised its prices after the competitor was expelled. It was a clear cut case of predatory pricing and recoupment, and the company was sanctioned by the Tribunal.

The delegate also made three points. First, having a dominant position is a requisite for concluding that there is predation, and it is irrelevant whether this dominant position has been acquired through market competition or through legal barriers to entry. Second, it is much easier to bring a case in which recoupment has already occurred than it is to prove future recoupment. Of course, if one must wait for actual recoupment then it may be too late because the competitors have already been driven out of the market. Third, it can be very difficult to identify the relevant cost to compare with prices. It is especially difficult when there are selective rebates or tying and bundling strategies.

## COMPTE RENDU DE LA DISCUSSION

Le président ouvre la table ronde en demandant à John Vickers, de la délégation du Royaume-Uni, de présenter des éléments de sa récente communication sur les abus de position dominante et d'exposer son point de vue sur les critères à appliquer pour déterminer l'existence de pratiques d'éviction.

### 1. Intervention de John Vickers, membre de la délégation britannique

M. Vickers commence par souligner qu'au cours des cinq à dix dernières années, le droit et les politiques publiques concernant les accords anticoncurrentiels en Europe ont évolué, et qu'ils se fondent désormais davantage sur des critères économiques que sur des critères de forme. La Commission européenne réexamine actuellement le problème des abus de position dominante et, là encore, une des questions fondamentales qui se pose est de savoir dans quelle mesure l'approche de la Commission devrait reposer sur des critères de forme ou des critères économiques. Par ailleurs, on s'accorde largement à reconnaître que les principes ou normes fondamentaux devraient également être plus clairs. Au cœur de ce réexamen figurent des questions essentielles telles que celle de la définition de la concurrence fondée sur les mérites, de la concurrence non faussée et des atteintes à la concurrence. Il est certes impossible de débattre de ces normes fondamentales dans l'abstrait, mais se contenter d'examiner différents cas de pratiques abusives sans se pencher sur les principes sous-jacents, c'est laisser la porte ouverte aux contradictions et à l'incohérence. M. Vickers recommande par conséquent à l'ensemble des responsables de la politique de la concurrence de s'efforcer de trouver un juste équilibre entre les principes et objectifs fondamentaux, d'une part, et le traitement des différents types de comportements abusifs, d'autre part. Dans sa communication, il examine, entre autres, les pratiques de vente à des prix inférieurs aux coûts et s'efforce de les relier aux débats sur les normes fondamentales.

Une de ces normes réside dans le critère du sacrifice, parfois désigné sous le nom de critère « hormis », selon lequel le comportement d'une entreprise dominante est illicite s'il n'a aucune justification économique hormis ses effets d'éviction. La caractéristique essentielle d'un comportement remplissant ce critère réside dans le sacrifice de bénéfices à court terme par l'entreprise dominante en contrepartie des « gains » retirés à plus long terme d'une concurrence réduite. Ce critère semble faire la distinction entre la fixation délibérée de prix d'éviction, d'une part, et une réaction parfaitement saine à la concurrence, d'autre part. Il semble donc intéressant, au moins à première vue, souligne M. Vickers.

Il ajoute cependant que ce critère est insatisfaisant parce qu'il n'offre pas une norme de fond. Le fait de n'avoir « aucune justification économique hormis des effets d'éviction » est trop vague et subjectif. En outre, ce critère laisse sans réponse certaines questions pratiques délicates, telles que la forme que pourrait prendre le comportement inverse du sacrifice. En outre, bien qu'il ait été proposé que ce sacrifice soit une condition nécessaire pour conclure à l'illégalité du comportement mis en cause, certaines pratiques peuvent n'impliquer aucun renoncement à des bénéfices à court terme, tout en ayant des effets d'éviction. L'« éviction à bon compte » entre dans cette catégorie. Le sacrifice de bénéfices peut donc constituer un critère utile pour examiner certains aspects des atteintes à la concurrence, mais il n'est guère prometteur en termes de règle générale d'identification des comportements d'éviction.

Le deuxième critère couramment employé est celui du « concurrent aussi efficace », qui consiste à déterminer si le comportement d'une entreprise dominante évincerait probablement des concurrents aussi efficaces que ladite entreprise. Certains des coûts utilisés comme références dans la jurisprudence relative

aux prix d'éviction sont liés à ce critère du concurrent aussi efficient. Celui-ci présente également certains avantages. Il permet de se prémunir contre le risque de protéger les concurrents au lieu de préserver la concurrence ; il est en effet normal, sur un marché concurrentiel, que la demande soit satisfaite par les entreprises les plus efficientes. Certains considèrent que ce critère est trop imprécis, car les préjudices causés aux consommateurs peuvent avoir des causes multiples, qui ne se limitent pas à l'éviction de concurrents aussi efficientes que l'entreprise dominante. En outre, la détermination du périmètre d'activité auquel il convient d'évaluer les coûts des entreprises soulève des questions épineuses. Si les nouveaux entrants sont de petite taille et n'ont pas encore atteint le point bas de la courbe des coûts marginaux, il est possible qu'ils soient moins efficientes que l'entreprise dominante à court terme. Néanmoins, s'ils pouvaient survivre plus longtemps, il deviendraient peut-être au bout du compte des concurrents aussi efficientes, voire davantage.

Selon le troisième critère couramment utilisé, un comportement n'est illicite que s'il tend à porter préjudice aux consommateurs. En termes de prix d'éviction, il s'agit de la question de la compensation des pertes. Néanmoins, faut-il nécessairement démontrer l'existence d'un préjudice subi par les consommateurs pour conclure à un comportement abusif, et si oui, quelle est la norme de référence à appliquer : préjudice effectif, sérieux risque de préjudice, ou simple capacité de nuire ? Les organismes compétents devraient-ils parfois engager des actions même en l'absence de perspectives de préjudices causés aux consommateurs ? Si oui, sur quels motifs se fonderaient de telles actions ?

M. Vickers souligne qu'il est préférable de faire preuve de prudence en matière d'intervention contre les pratiques présumées de prix d'éviction. Dans la mesure où ce type de pratique se traduit par des prix bas pour les consommateurs, une intervention des pouvoirs publics risque d'être préjudiciable aux consommateurs, à l'efficacité et à l'économie dans son ensemble. Enfin, il fait observer que la jurisprudence relative à la compensation des pertes en Europe semble radicalement différente de celle des États-Unis, puisqu'il ne paraît pas nécessaire d'en démontrer l'existence dans les affaires européennes. Quoiqu'il en soit, indique M. Vickers, il est souhaitable que les organismes compétents accordent une grande attention à cette question de compensation des pertes, à la fois pour contrôler par recoupement qu'il existe effectivement une situation de position dominante, et pour s'assurer qu'une intervention de leur part contribuerait réellement à la protection des consommateurs.

## **2. Protéger les concurrents ou préserver la concurrence ?**

Le président oriente les débats de la théorie vers la pratique, en commençant par le Japon. Il souligne que les autorités de ce pays peuvent lutter contre les pratiques d'éviction soit en vertu de l'article 3 de la loi antimonopole, qui interdit les pratiques « limitant sensiblement la concurrence dans quelque domaine d'activité que ce soit », soit en vertu de son article 19, qui prohibe les pratiques commerciales déloyales. L'application de l'article 19 suppose que trois conditions soient remplies : la facturation de prix inférieurs aux coûts de revient, la pratique persistante de tels prix, et une tendance à mettre en difficulté d'autres entrepreneurs dans leurs activités commerciales. Le président demande si cette approche correspond à celle de l'Union européenne (UE), qui considère les prix d'éviction comme problématiques non pas parce qu'ils sont préjudiciables aux consommateurs, mais parce qu'ils portent atteinte à la concurrence.

Un délégué du Japon indique que la loi antimonopole vise à promouvoir la liberté et l'équité du commerce. L'approche de la *Fair Trade Commission* (FTC, Commission de la concurrence) japonaise en matière de prix d'éviction consiste donc à préserver la concurrence. Au vu du troisième critère prévu par l'article 19, il pourrait sembler que les dispositions juridiques visant les prix d'éviction au Japon protègent les concurrents et non la concurrence en tant que telle. Ces trois critères sont toutefois examinés globalement. Autrement dit, la troisième condition – le fait que les concurrents aient des difficultés à poursuivre leurs activités – doit permettre de déterminer si la concurrence sur le marché a été mise à mal par un autre élément que l'efficacité de l'entreprise prédatrice.

La FTC peut également restreindre la pratique de prix d'éviction en tant que violation par un monopole privé de l'article 3 de la loi antimonopole. En vertu de cet article, la FTC doit prouver que le comportement mis en cause entrave sensiblement le fonctionnement du marché considéré dans son ensemble. Par contre, ce critère ne s'applique pas en cas de pratiques commerciales déloyales. Le délégué ajoute que jusqu'à présent, dans la plupart des cas de prix d'éviction, il s'est révélé difficile de poursuivre les auteurs présumés pour monopolisation privée.

Le président aborde ensuite la contribution de la Suisse, qui souligne qu'il n'est pas aisé de faire la distinction entre un comportement d'éviction et une concurrence âpre mais saine. Selon l'article 7(1) de la loi fédérale sur les cartels et autres restrictions à la concurrence (loi sur les cartels), les pratiques d'entreprises ayant une position dominante sont réputées illicites lorsque celles-ci abusent de leur position et entravent ainsi l'accès d'autres entreprises à la concurrence ou son exercice. Plus précisément, l'article 7(2)(d) indique qu'est réputée illicite « la sous enchère en matière de prix ou d'autres conditions commerciales, dirigée contre un concurrent déterminé ». La contribution de la Suisse présente plusieurs affaires, dont l'une porte sur le lancement d'un journal contesté en justice en tant qu'opération prédatrice. Selon la contribution, « l'enquête préalable a révélé que même si le journal en place était évincé du marché, le nouveau journal ne pourrait pas relever son prix au-dessus du niveau de concurrence à long terme, en raison des forces concurrentielles restantes ». Le président se demande comment concilier cette affirmation avec les termes de l'article 7(2), qui semblent indiquer qu'une sous enchère visant un concurrent déterminé peut être illicite ?

Un des délégués de la Suisse explique que deux textes de loi nationaux traitent des prix d'éviction. Il s'agit de la loi sur les cartels, qui concerne les positions dominantes, et de la loi fédérale contre la concurrence déloyale. Les dispositions de cette dernière sont sujettes à controverse et prévoient, en substance, qu'il est illicite d'offrir des prix bas pour tromper la clientèle, comme peut le faire une entreprise qui attire les consommateurs dans ses locaux en pratiquant des prix très faibles sur un segment donné, et des tarifs normaux ou élevés sur d'autres segments. En pratique, la Loi sur les cartels joue un rôle plus important dans les activités des autorités suisses de la concurrence.

Le délégué précise que l'affaire concernait des journaux opérant normalement dans des régions distinctes. Il existe également des subdivisions locales de ces régions, dans lesquelles un journal peut publier des éditions différentes. En l'espèce, un journal en place dans une subdivision locale faisait valoir qu'un journal régional ne devait pas être autorisé à lancer une édition locale à perte. Les autorités de la concurrence ont appliqué le critère de compensation des pertes de la manière recommandée par M. Vickers, c'est-à-dire pour contrôler par recoupement qu'il y avait effectivement position dominante. Elles sont parvenues à la conclusion que la concurrence était satisfaisante sur les marchés régionaux, et que même si le lancement en question débouchait sur l'élimination du plaignant, cela n'impliquerait pas que le prédateur présumé se trouvait en position dominante. En fait, celui-ci ne serait aucunement en mesure de fixer ses prix au-dessus du niveau de concurrence. L'organisme saisi de l'affaire a donc estimé qu'en l'absence de possibilité ultérieure de compensation des pertes, la position de la partie mise en cause ne pouvait être considérée comme dominante.

### **3. Quelle mesure de coûts convient-il d'utiliser pour analyser les pratiques de prix d'éviction ?**

Le président passe ensuite aux mesures de coûts utilisées pour analyser les pratiques de prix d'éviction, en faisant observer que les méthodes varient considérablement suivant les juridictions dans ce domaine. Il souligne que la contribution de la Norvège présente des données relatives au transport aérien dans ce pays, et qu'elle examine deux types possibles de critères de coûts : celui des coûts évitables et celui des coûts et recettes différentiels. Il invite la délégation norvégienne à évoquer ces deux approches.

Un délégué de la Norvège décrit le marché du transport aérien dans son pays. La compagnie SAS s'y est trouvée en situation de monopole à partir d'octobre 2001. L'interdiction par l'Autorité norvégienne de la concurrence du programme de fidélisation de la clientèle de SAS sur les lignes intérieures s'est traduite par l'entrée immédiate de la compagnie Norwegian sur les quatre principales lignes. Norwegian a ensuite continué à se développer et dessert à l'heure actuelle 12 lignes intérieures au total. L'Autorité norvégienne de la concurrence craint aujourd'hui que SAS ne mette en œuvre une stratégie d'éviction et examine les éléments du dossier.

Norwegian est la compagnie la plus efficiente. Après son entrée en lice, elle a rapidement acquis une part de marché de 20 % environ sur les principales lignes. SAS a maintenu ses capacités à leur niveau antérieur à l'arrivée de son concurrent, mais a fini par réduire sensiblement ses prix. Cela soulevait la question de savoir si SAS était engagée dans une stratégie d'éviction par les prix ou par les capacités. L'Autorité norvégienne de la concurrence ne s'est pas focalisée sur un intervalle précis de production supplémentaire, contrairement aux autorités américaines dans l'affaire *American Airlines*. La question est de savoir si l'Autorité norvégienne de la concurrence peut malgré tout appliquer le critère des coûts et recettes différentiels examiné dans cette affaire. Le professeur Lars Sørgard, qui est aujourd'hui économiste en chef à l'Autorité norvégienne de la concurrence, a souligné que l'application d'un critère de rapport entre coûts et prix sur une ligne entière risquait d'avantager la partie mise en cause.

Pour appliquer le critère des coûts évitables au niveau d'une ligne, on calcule la moyenne des coûts et des recettes de tous les vols correspondant à cette ligne. Ce critère ne permet pas de déterminer si tel ou tel vol est déficitaire. D'un certain point de vue, ce critère est adéquat tant que l'on a affaire à une pratique d'éviction reposant uniquement sur les prix. Par contre, en cas de comportement prédateur fondé sur les capacités, on peut considérer que l'application du critère des coûts évitables au niveau d'une ligne est avantageuse pour la partie mise en cause. S'il existe un supplément de capacités clairement identifiable, on peut examiner les coûts et les recettes différentiels liés à ce seul intervalle de capacités.

On pourrait considérer que la recette différentielle moyenne est le prix moyen payé par les passagers sur des vols donnés dans l'intervalle de production identifié. Néanmoins, cela conduit à surestimer la recette différentielle moyenne pour deux raisons. La première tient à un effet de cannibalisation. Certains des passagers empruntant les vols supplémentaires auraient pris d'autres vols sur la même ligne, si bien qu'il ne s'agit pas véritablement de nouveaux passagers et qu'ils ne devraient donc pas être pris en compte dans le calcul de la recette différentielle moyenne. La seconde réside dans un effet de prix. Pour remplir les vols supplémentaires, la compagnie doit abaisser ses tarifs sur la ligne considérée. Il conviendrait donc de soustraire la perte de recettes sur les vols non supplémentaires afin d'obtenir une bonne estimation.

Cet exemple soulève par conséquent deux questions. Le maintien des capacités au niveau antérieur à l'entrée du nouvel acteur peut-il être considéré comme un comportement d'éviction par les capacités ? Si oui, serait-il judicieux d'appliquer un critère de coûts et de recettes différentiels uniquement aux capacités supplémentaires ? Par ailleurs, on peut tirer de cette affaire la conclusion suivante : pour analyser un comportement présumé d'éviction par les capacités, l'application d'un critère de rapport entre coûts et prix sur une ligne entière risque d'avantager la partie mise en cause.

Le président aborde ensuite le cadre juridique mexicain en matière d'analyse des prix d'éviction. Aux termes de l'article 7-1 des règlements d'application de la loi fédérale sur la concurrence économique (LFCE), la vente systématique de biens ou services à des prix inférieurs à leur coût total moyen ou leur vente occasionnelle au-dessous de leur coût variable moyen constituent les critères à appliquer. La contribution mexicaine indique que ces règlements prennent en compte la possibilité que le coût variable moyen corresponde à une sous-estimation du coût marginal, et que tout prix inférieur au coût total moyen doit être analysé selon une règle de raison, conformément à la loi. La contribution présente également une affaire relative à l'entreprise Warner Lambert sur le marché informel du chewing gum.

Un délégué du Mexique explique que selon les règlements d'application de la LFCE, les comportements prédateurs constituent des pratiques monopolistiques relatives, devant être analysées selon une règle de raison. Les autorités doivent être parvenues à la conclusion que l'entreprise prédatrice dispose d'un pouvoir de marché substantiel sur le marché considéré avant d'évaluer la pratique visée en tant que telle. En outre, la Commission fédérale de la concurrence (CFC) doit tenir compte de considérations d'efficacité pour prendre sa décision finale. Ces conditions ont permis à la CFC de classer des affaires relatives à des comportements pouvant être préjudiciables à des concurrents mais ne portant pas atteinte à la concurrence elle-même.

Le délégué ajoute qu'à l'heure actuelle, la CFC ne s'emploie pas activement à poursuivre les auteurs présumés de pratiques d'éviction, car les fondements juridiques des actions engagées contre ces pratiques sont fragiles. La CFC enquêtait précédemment sur les comportements prédateurs en s'appuyant sur l'article 10-7 de la LFCE, selon lequel toutes les actions qui affectent indûment la concurrence constituent de manière générale des pratiques monopolistiques relatives. Or, la Cour suprême a jugé dans plusieurs affaires que ces dispositions étaient inconstitutionnelles, dans la mesure où elles ne précisent pas les conditions devant être remplies pour déterminer à quel type de violation doivent s'appliquer les sanctions prévues par la loi. Il est donc nécessaire de modifier la LFCE.

Dans l'affaire *Warner Lambert*, sur laquelle la CFC avait commencé à enquêter en 1996, il s'agissait de déterminer si cette entreprise avait lancé son produit Clarks de manière à évincer abusivement un concurrent, Canel's. Le marché à prendre en considération était celui du chewing gum sur le territoire national. Warner Lambert commercialisait ses paquets de chewing gum Clarks par l'intermédiaire de vendeurs ambulants, et un article similaire, Chiclets-4, dans des petits commerces. La CFC a estimé que la vente d'un produit à un prix inférieur à son coût constituait une barrière à l'entrée, dans la mesure où tout entrant serait contraint à des investissements considérables pour survivre à cette stratégie d'éviction. La CFC a confirmé que Warner Lambert détenait un pouvoir substantiel sur le marché du chewing gum, puisque en termes de chiffre d'affaires net, sa part de marché excédait 50 % et était cinq à sept fois supérieure à celle de ses concurrents. En outre, Warner Lambert était en mesure de différencier ses tarifs suivant les marques et les segments de marché, ainsi que l'illustre l'écart de prix important constaté entre les articles Chiclets-4 et Clarks.

La CFC a également établi que Warner Lambert avait enregistré des pertes pendant la plus grande partie de la période couverte par l'enquête, parce que son prix était demeuré inférieur à son coût total moyen. Qui plus est, les pertes de part de marché subies par Canel's entre 1993 et 1994 étaient d'une ampleur très similaire à celle de la progression enregistrée par Warner Lambert sur un marché dont la taille était relativement stable. Cela indiquait que certains des clients de Canel's s'étaient tournés vers le produit de Warner Lambert en raison du prix artificiellement bas auquel étaient vendus les chewing gums Clarks. En conséquence, la Commission a infligé une amende à Warner Lambert et lui a enjoint de cesser de pratiquer des prix d'éviction dans le cadre de la vente de son produit Clarks.

Le président met en avant la contribution allemande, qui indique que dans l'affaire *Lufthansa/Germania*, tant le *Bundeskartellamt* (Office fédéral des ententes) que l'*Oberlandesgericht* (tribunal régional supérieur) ont écarté le coût marginal et le coût variable moyen en tant qu'instruments de mesure des coûts dans le transport aérien, pour utiliser en lieu et place le coût total moyen. Il demande à la délégation allemande d'exposer les tenants et les aboutissants de l'affaire, et d'expliquer pourquoi le coût total moyen était la mesure la plus pertinente.

Un des délégués allemands commence par souligner que Lufthansa était le seul transporteur à assurer des vols réguliers entre Francfort et Berlin jusqu'en novembre 2001. Alors qu'un billet aller-retour coûtait précédemment environ 485 euros, au 1<sup>er</sup> janvier 2002, le tarif d'un aller simple vendu par Lufthansa n'était plus que de 105 euros. Cette baisse de prix spectaculaire, limitée à la ligne Francfort-Berlin, tenait à

l'entrée sur le marché du transporteur à bas coûts Germania, qui proposait l'aller simple à 99 euros. D'après les résultats de l'enquête menée, l'offre de Lufthansa était inférieure à son coût total moyen, tel que calculé dans le cadre de ses propres évaluations de rentabilité. Déduction faite des redevances passagers et de la taxe sur la valeur ajoutée (TVA), l'offre de Lufthansa équivalait à un prix de 62 euros environ, alors que son coût moyen total s'établissait aux alentours de 95 euros par passager.

En outre, l'offre de Lufthansa présentait plusieurs caractéristiques absentes de celle de Germania, telles qu'une fréquence de vol plus élevée et un meilleur service. Le *Bundeskartellamt* a estimé que ces compléments représentaient une valeur minimum de 35 euros par passager, et que Lufthansa avait par conséquent fait de la sous enchère par rapport à l'offre de Germania. Pour trancher le différend, le *Bundeskartellamt* a interdit à Lufthansa de pratiquer des tarifs n'excédant pas d'au moins 35 euros les prix proposés par Germania, pendant deux ans. L'*Oberlandesgericht* a confirmé cette décision, mais ramené l'écart de prix de 35 euros à 30.50 euros.

Le délégué allemand déclare que la mesure de coût qu'il convient d'utiliser dans les affaires de prix d'éviction diffère suivant les branches d'activité. Dans les industries de réseau, par exemple, les coûts marginaux sont proches de zéro car la quasi-totalité des coûts sont fixes. En outre, il est difficile de faire la distinction entre coûts variables et coûts fixes. Les coûts tendent à être variables à long terme, mais ils peuvent être fixes à court terme. La ventilation des coûts dans les entreprises commercialisant plusieurs produits pose également problème. La répartition des frais généraux soulève le plus souvent des difficultés considérables. Dans le transport aérien, le coût marginal correspondant à un passager supplémentaire est quasiment nul tant que toutes les places de l'avion ne sont pas réservées. Par contre, lorsque c'est le cas, un passager supplémentaire peut représenter des coûts marginaux extrêmement élevés, dans la mesure où il faut recourir à un avion supplémentaire. Par ailleurs, les prix des vols sont très disparates. Le calcul de la rentabilité d'une ligne donnée revêt donc toujours un caractère composite, puisque des prix différenciés doivent couvrir des coûts moyens. Dans ces circonstances, le coût total moyen est une mesure des coûts beaucoup plus pertinente que le coût marginal ou le coût variable moyen.

Le délégué ajoute que le dossier *Lufthansa* est un peu similaire à l'affaire *Wal-Mart*. Il s'agit d'une affaire de revente à un prix inférieur au coût de revient, dans laquelle la décision rendue par le *Bundeskartellamt* a été confirmée sur le principe par la *Bundesgerichtshof* (Cour fédérale de justice). Le motif de cette décision était le même que dans l'affaire *Lufthansa* : empêcher l'entreprise en place d'évincer des concurrents du marché, ce qui aurait renforcé sa concentration et provoqué à terme une hausse des prix et une baisse de la qualité. Comme dans le dossier *Lufthansa*, il convenait d'adopter une perspective à moyen terme pour évaluer les tarifs pratiqués par l'entreprise en place. Des bénéfiques à court terme tels qu'une diminution des prix pour les consommateurs peuvent rapidement se transformer en désavantages à long terme, auquel il est plus difficile de remédier.

**4. Des prix inférieurs au coût variable moyen revêtent-ils toujours un caractère prédateur ? Peut-on considérer qu'une entreprise pratiquant des prix inférieurs à ses propres coûts mais supérieurs à ceux d'un concurrent a un comportement prédateur ? Un prix supérieur aux propres coûts d'une entreprise peut-il être assimilé à un prix d'éviction ?**

Le président fait observer que plusieurs contributions tendent à indiquer que des prix inférieurs au coût variable moyen ne revêtent pas nécessairement un caractère prédateur. Les avis sont nettement plus partagés, toutefois, sur la question de savoir si des prix supérieurs aux coûts, en particulier au coût total moyen, peuvent être considérés comme des prix d'éviction. Selon la contribution de la Nouvelle-Zélande, une baisse des prix est un comportement prédateur si elle a pour objectif de porter atteinte à la concurrence, et aucune affaire néo-zélandaise n'a donné lieu à un examen approfondi de la question de savoir si des prix doivent être inférieurs aux coûts pour être considérés comme prédateurs. Le président invite la délégation de la Nouvelle-Zélande à présenter la manière dont elle évalue les pratiques de prix d'éviction.

Un des délégués néo-zélandais explique que la Loi sur le commerce ne fait pas directement référence aux prix d'éviction. L'article 27 prohibe les dispositions qui ont pour but ou pour effet de réduire substantiellement la concurrence, tandis que l'article 36 interdit à quiconque de mettre à profit son pouvoir de marché pour faire obstacle à un concurrent. L'approche adoptée en matière de prix d'éviction dépend de l'article de la Loi sur le commerce qui s'applique dans l'affaire considérée.

Dans les affaires de prix d'éviction, la partie mise en cause est généralement accusée d'avoir abusé de son pouvoir de marché. Pour établir le lien de causalité nécessaire entre pouvoir de marché substantiel et comportement tombant sous le coup de la loi néo-zélandaise, il faut mettre en regard deux scénarios : le scénario correspondant à la réalité, dans lequel une partie détient un pouvoir de marché substantiel, et un scénario hypothétique, dans lequel elle ne dispose pas de ce pouvoir mais se trouve dans une situation similaire à tous autres égards. La question essentielle est de savoir si la partie mise en cause aurait adopté le même comportement dans le scénario plus concurrentiel.

En Nouvelle-Zélande, poursuit le délégué, le point le plus important est d'établir le lien entre la pratique de prix d'éviction et l'exploitation d'un pouvoir de marché substantiel. Les entreprises dominantes doivent pouvoir entrer en concurrence avec les autres. Le problème d'une méthode consistant à déterminer l'existence de prix d'éviction à partir d'une mesure quelconque, telle qu'un prix inférieur au coût variable moyen, c'est qu'elle ne permet pas en soi d'établir s'il est fait usage d'un pouvoir de marché, puisqu'une telle méthode ne fait pas la distinction, par exemple, entre une partie non dominante disposant d'importantes ressources financières et une partie dominante ayant des ressources financières équivalentes.

Le *Privy Council* (Conseil privé) a récemment jugé que le franchissement de la frontière entre concurrence légitime et comportements anticoncurrentiels ne pouvait se réduire à une baisse de prix. Cette ligne est franchie lorsqu'une entreprise détenant un pouvoir de marché substantiel tire avantage de sa capacité à augmenter ses tarifs sans perdre de part de marché. Une réduction des prix ne devient illicite que s'il est démontré qu'une entreprise disposant d'un pouvoir de marché substantiel a procédé à cette baisse en projetant de compenser ses pertes ultérieurement. C'est cette capacité de compenser ses pertes, et non de réduire ses prix, qui porte préjudice aux consommateurs. En Nouvelle-Zélande, la fixation de prix inférieurs aux coûts est donc un facteur pertinent, mais il ne revêt pas une importance primordiale.

Enfin, le délégué néo-zélandais fait observer que l'affaire *Carter Holt Harvey* a suscité des débats nourris et un certain nombre de critiques. La question controversée est de savoir si une entreprise ayant mis à profit son pouvoir de marché au sens de l'article 36 peut arguer d'un motif commercial légitime pour justifier son comportement. L'affaire *Carter Holt Harvey* a eu pour effet d'ouvrir une brèche en ce sens dans l'article 36. La question de savoir si les dispositions de cet article sont suffisamment solides fait déjà débat, si bien que le problème se pose maintenant au gouvernement en termes de choix politique.

Le président met ensuite en avant la contribution de la Corée, qui explique que des prix supérieurs au coût total moyen peuvent être considérés comme des prix d'éviction dans cette juridiction. La Loi sur la réglementation des monopoles et la concurrence dispose que toute activité évinçant indûment des concurrents peut constituer un abus de position dominante interdit par l'article 3-2. Selon la contribution de la Corée, la *Korea Fair Trade Commission* (KFTC, Commission coréenne de la concurrence) exerce son action de contrôle des abus de position dominante lorsqu'une entreprise dominante évince des concurrents en pratiquant des prix inférieurs au « prix de transaction ordinaire ». Cela implique que même la fixation d'un prix supérieur au coûts totaux pourrait être considérée comme un comportement prédateur. Le président demande à la délégation de la Corée de donner davantage de précisions sur sa législation et la manière dont elle est appliquée.

Un délégué coréen indique que la Loi sur la réglementation des monopoles et la concurrence établit une distinction entre les ventes avec remise abusive des entreprises ordinaires et celles des entreprises

dominantes. Les ventes avec remise des entreprises ordinaires sont régies par l'article 23 de la Loi sur la réglementation des monopoles et la concurrence, qui interdit les pratiques commerciales déloyales et caractérise les abus par des prix nettement inférieurs aux coûts. Selon la jurisprudence, la mesure de coût à employer est le coût total, c'est-à-dire la somme des frais de vente totaux et des dépenses hors exploitation, tels que les intérêts sur emprunts. Par contre, les ventes avec remise abusive des entreprises dominantes tombent sous le coup de l'article 3 de la Loi sur la réglementation des monopoles et la concurrence, qui exige simplement que les prix pratiqués soient inférieurs aux prix ordinaires. Cette condition est beaucoup plus stricte, car les entreprises dominantes sont plus susceptibles de monopoliser les marchés et de porter atteinte à la concurrence. La KFTC n'a cependant jamais appliqué les dispositions de la Loi sur la réglementation des monopoles et la concurrence dans des circonstances où les prix étaient supérieurs aux coûts.

Le délégué souligne que pour les entreprises dominantes, la Loi sur la réglementation des monopoles et la concurrence est axée sur les stratégies de prix-limites parce que ceux-ci sont inférieurs aux prix ordinaires. Il ajoute que, de son point de vue, tant les prix d'éviction que les prix-limites devraient tomber sous le coup du droit de la concurrence, ou bien ces deux types de pratiques devraient être exclus de son champ d'application. Même si les prix-limites sont interdits, les entreprises en place peuvent toujours gagner des clients en faisant jouer la concurrence hors prix.

Le président relève qu'à la différence de la Corée, le Taipei chinois a connu une affaire dans laquelle un entrant affirmait que l'entreprise en place se comportait de manière prédatrice tout en maintenant ses prix au-dessus de ses coûts. Il invite la délégation du Taipei chinois à exposer les raisons pour lesquelles la plainte de cet entrant a été rejetée.

Un délégué du Taipei chinois indique que la *Fair Trade Commission* (FTC, Commission de la concurrence) considère qu'une entreprise monopolistique pratique des prix d'éviction lorsqu'elle fixe ses prix à un niveau nettement inférieur à ses coûts, de sorte qu'elle sacrifie ses bénéfices à court terme pour évincer des concurrents du marché ou les empêcher d'y entrer, de manière à pouvoir réaliser des gains excessifs à long terme. Chacune des quatre conditions suivantes doit être remplie :

- 1) l'entreprise est un monopole ou détient un pouvoir de marché sur le marché considéré (la part de marché de l'entreprise doit être supérieure à 50 %) ;
- 2) son prix est nettement inférieur à ses coûts (les mesures de coûts utilisées peuvent différer suivant les affaires) ;
- 3) l'entreprise est en mesure d'entraver ou d'évincer des concurrents aussi efficaces qu'elle ; et
- 4) il existe une barrière à l'entrée importante, qui permet à l'entreprise de compenser ses pertes initiales en fixant son prix au-dessus du niveau de concurrence une fois ses concurrents éliminés du marché.

Répondant à la question du président, le délégué déclare que la FTC n'a pas poursuivi l'entreprise en place qui avait fixé ses prix à un niveau supérieur à ses propres coûts, tout en les maintenant en dessous de ceux de l'entrant, sur la base du critère selon lequel la stratégie de prix mise en œuvre doit entraver ou évincer des concurrents aussi efficaces, c'est-à-dire ayant des coûts inférieurs ou égaux. En effet, si l'entreprise en place n'est pas autorisée à fixer ses prix à un niveau légèrement supérieur à ses propres coûts mais inférieur à ceux de son rival, il se peut que des concurrents inefficaces soient attirés sur le marché considéré. Un tel dispositif protégerait donc des concurrents inefficaces au lieu de préserver la concurrence, ce qui ne serait bénéfique ni pour les consommateurs, ni pour l'efficacité allocative.

Le président passe à la contribution de la Turquie, qui fait référence à une affaire dans laquelle une entreprise publique aurait pratiqué des prix inférieurs à son coût variable moyen mais supérieurs ou égaux

aux coûts de ses concurrents. Il demande si une telle pratique tarifaire serait considérée comme prédatrice si elle était avérée.

Un délégué de la Turquie répond qu'en l'espèce, l'entreprise en place, Turkish Maritime Enterprises (TDI), a des coûts nettement plus élevés que ses concurrents en raison des répercussions sur ses coûts de main-d'œuvre de l'action d'un syndicat très efficace. TDI dessert plusieurs lignes de ferries. Elle se trouve en situation de monopole sur une de ces lignes, ce qui lui permet d'y pratiquer des prix extrêmement élevés. Néanmoins, sur une autre ligne, les tarifs de TDI sont proches de ceux proposés par son concurrent, mais inférieurs d'environ 50 % à son propre coût moyen. L'Autorité de la concurrence turque a recommandé de poursuivre TDI, puis le Conseil de la concurrence a rejeté cette recommandation, mais sa décision a été annulée par le Conseil d'État. Cette affaire soulève deux questions essentielles. La première est de savoir s'il faut poursuivre une entreprise pratiquant des prix inférieurs à ses coûts même si ses concurrents ne sont pas contraints à sortir du marché considéré. La seconde est de savoir s'il est licite pour une entreprise d'exploiter son pouvoir économique dans une zone géographique ou sur un marché de produits donné pour acquérir une position dominante sur un autre marché, où la concurrence joue.

**5. La nécessité de « faire face à la concurrence » devrait-elle considérée comme un moyen de défense valable ? La pratique de prix-limites devrait-elle être tolérée ?**

Le président fait observer que les contributions font apparaître des positions diverses sur la question de savoir si la nécessité de faire face à la concurrence devrait être considérée comme un moyen de défense valable. Ainsi, on peut lire dans la contribution du Danemark que « même les entreprises dominantes sont autorisées à faire face à la concurrence en abaissant leurs prix. Jusqu'ici, les prix inférieurs aux coûts n'ont pas été considérés comme des prix d'éviction si l'entreprise dominante ne faisait pas de la sous enchère par rapport aux prix offerts par d'autres fournisseurs. » Le président demande à la délégation danoise si une entreprise bien établie pourrait être considérée comme prédatrice si elle alignait systématiquement ses prix sur ceux d'un nouveau concurrent tentant de s'implanter sur le marché considéré.

Un délégué du Danemark répond que l'autorité de la concurrence danoise accepte l'argument de la nécessité de faire face à la concurrence parce qu'elle est tenue de suivre les pratiques européennes, et que divers tribunaux européens ont jugé ce moyen de défense recevable. Dans certains cas, des entreprises dominantes ont été autorisées à fixer leurs prix à un niveau inférieur à leur coût variable moyen pour s'adapter aux tarifs pratiqués par leurs concurrents. Une telle politique de prix doit cependant être défensive, ce qui signifie qu'ils doivent être ciblés sur les clients existants de l'entreprise dominante. Une attitude prudente s'impose à l'égard de ce moyen de défense, qui pourrait être invoqué de manière abusive. Ainsi, il pourrait donner à une entreprise dominante la réputation de s'adapter systématiquement aux prix des entrants, ce qui pourrait avoir un effet dissuasif significatif. D'un autre côté, il ne faut pas lier les mains à l'entreprise dominante au point d'entraver le processus concurrentiel.

Le président compare la reconnaissance par le Danemark de la nécessité de faire face à la concurrence comme moyen de défense avec la tolérance du Taipei chinois à l'égard des stratégies de prix-limites. Selon la contribution de ce dernier, « les stratégies de prix-limites devraient être considérées comme des stratégies concurrentielles de tarification ordinaires mises en œuvre par une entreprise en place confrontée à la menace que représentent de nouveaux entrants potentiels ». Le président demande à la délégation du Taipei chinois d'indiquer jusqu'à quel point les stratégies de prix-limites sont tolérées.

Un délégué du Taipei chinois indique que sur les marchés contestables, même si l'entreprise en place pratique des prix-limites d'un niveau tel que ses concurrents potentiels pensent que leurs activités ne seraient pas rentables une fois entrés sur le marché (ce qui les amène à écarter l'idée d'y prendre pied), ces stratégies seront traitées comme des stratégies concurrentielles ordinaires utilisées par les entreprises en place pour faire face à de nouveaux entrants, et ne seront donc pas considérées comme des comportements

prédateurs. Tant que les concurrents potentiels peuvent entrer ou reprendre pied sur le marché si l'entreprise en place augmente ses prix, ce qui empêche celle-ci de compenser les pertes qu'elle aurait subies et de réaliser des bénéfices excessifs, la stratégie tarifaire ne peut porter ses fruits et ne sera donc pas considérée comme prédatrice.

## 6. Sur quel marché faut-il évaluer les comportements d'éviction ?

Le président aborde ensuite le sujet du comportement d'éviction adopté par une entreprise dominante sur un marché où elle n'occupe pas une position dominante. Il se penche sur la contribution de la Commission européenne, selon laquelle des prix d'éviction pratiqués par une entreprise dominante sur un marché distinct du marché dominé, où elle n'est pas en position dominante et auquel se limiteront les effets de son comportement prédateur, ne constitueront normalement pas une infraction à l'article 82 du Traité instituant la Communauté européenne (traité CE). Font exception à cette règle les orientations de la Commission dans les secteurs où des activités sont protégées par des monopoles légaux et où il convient d'empêcher les subventions croisées. Le président demande à la délégation de la Commission européenne de préciser pourquoi une entreprise dominante ne pourrait pas procéder au subventionnement croisé de ses activités sur un marché où elle n'est pas en position dominante précisément dans le but d'y acquérir une telle position, et pourquoi, si l'entreprise peut le faire, une telle pratique ne sera pas considérée comme prédatrice. Il demande également des éclaircissements sur l'exception faite par la Commission pour les entreprises protégées par des monopoles de droit.

Un délégué de la Commission européenne rappelle tout d'abord au Comité le principe selon lequel une position dominante n'a rien d'illégal en soi. Au contraire, une position dominante est parfois le résultat naturel d'une concurrence fondée sur les performances. Il ajoute que la Commission n'applique pas ses règles de comportement unilatéral pour protéger les entreprises concurrentes de la concurrence. Le jeu de la concurrence est ouvert aussi bien aux entreprises dominantes qu'aux autres. De manière générale, la Commission hésitera fortement à poursuivre une entreprise utilisant son « trésor de guerre » pour financer un comportement agressif sur un marché totalement distinct du marché dominé. Néanmoins, il a été estimé dans un certain nombre de décisions de justice que l'exploitation par une entreprise de son pouvoir de marché sur un marché A pour étendre ce pouvoir au marché B pouvait constituer une pratique abusive. La Commission applique cette jurisprudence dans les cas où le marché B est étroitement lié au marché A, car dans ce type de situation, le comportement visé a généralement un impact sur le marché A également (dans la mesure où il renforce la position dominante de l'entreprise sur ce marché). Dans l'affaire *Tetra Pak*, par exemple, qui concernait le secteur du conditionnement aseptique et celui du conditionnement non aseptique des liquides alimentaires, le tribunal a estimé que les deux marchés étaient unis par des liens de connexité étroits. En outre, le comportement abusif mis en évidence sur le marché non aseptique était susceptible de renforcer la position de Tetra Pak sur le marché aseptique, où cette entreprise occupait une position clairement dominante.

Le délégué de la Commission européenne évoque un autre scénario, dans lequel un monopole d'État ou une entreprise en place sur un marché récemment libéralisé contrôle une infrastructure et exploite son pouvoir monopolistique pour s'imposer dans un autre secteur. Là encore, l'objectif est de distinguer ce type d'affaires des situations dans lesquelles une entreprise acquiert une position dominante dans le cadre d'une concurrence sur les mérites. Un monopole sanctionné par l'État bénéficie d'un flux de recettes garanti qui peut contribuer au subventionnement croisé de ses activités sur des marchés voisins, et lui permettre d'acquérir ainsi une position dominante dont le fondement ne résidera pas dans ses mérites, mais dans son statut de monopole d'État sur un autre marché.

## 7. Est-il nécessaire d'appliquer un critère de compensation des pertes pour établir l'existence d'un comportement d'éviction ?

Le président oriente ensuite les débats vers un autre critère de comportement prédateur : celui de la compensation des pertes. Il souligne que selon la contribution des États-Unis, « pour prouver ses allégations de prix d'éviction, le plaignant doit pouvoir démontrer que l'entreprise mise en cause a fixé ses prix en dessous d'une bonne estimation du coût marginal. En outre, des pratiques présumées de prix d'éviction doivent remplir le critère de la compensation des pertes. La nécessité de ce critère ne va pas forcément de soi, mais il constitue un utile garde-fou contre toute confusion entre concurrence vigoureuse favorable aux consommateurs et comportements anticoncurrentiels ». Le président demande à la délégation des États-Unis d'expliquer comment fonctionne un tel mécanisme, et pourquoi il constitue un garde-fou contre toute confusion entre concurrence favorable aux consommateurs et comportements anticoncurrentiels.

Selon le délégué des États-Unis, il est peut-être plus important de comprendre l'histoire commerciale et juridique des marchés que de tenter de déterminer précisément les termes et les formules à employer pour calculer diverses mesures de coûts. Les conditions qui prévalent diffèrent suivant les pays, si bien que la mesure de coût qu'il convient d'utiliser dans une juridiction peut différer de celle requise dans une autre. Le point essentiel pour les États-Unis en ce qui concerne le critère de compensation des pertes, c'est qu'il constitue une considération fondamentale pour tout organisme examinant sérieusement les effets des prix d'éviction sur le bien-être des consommateurs. Une compensation probable des pertes signifie que le prédateur va sans doute pouvoir faire durablement augmenter les prix et baisser la production.

Le délégué fait observer que les caractéristiques du critère américain de compensation des pertes ne correspondent pour l'heure pas du tout au critère de position dominante utilisé par la Commission européenne. Néanmoins, indépendamment de la dénomination des facteurs pris en compte, leur but est toujours d'établir s'il y a tout lieu de penser que le bien-être des consommateurs sera affaibli par une hausse des prix ou une baisse de la production de caractère durable.

Un autre délégué des États-Unis ajoute que dans les secteurs concurrentiels, il existe de nombreux motifs légitimes pour lesquels les entreprises pratiquent parfois des prix inférieurs aux coûts, tels qu'une tarification promotionnelle ou une stratégie de prix d'appel destinée à attirer les clients dans les magasins. Il a été plus récemment établi que dans les secteurs caractérisés par des effets de réseau, les subventions accordées aux membres entraînent en fait un renforcement de la concurrence entre réseaux et contribuent du même coup à l'amélioration du bien-être social. Les comportements anticoncurrentiels ne doivent donc pas être évalués à la seule aune de la pratique de prix inférieurs aux coûts. Pour pouvoir conclure que la fixation de prix inférieurs aux coûts est anticoncurrentielle, l'organisme compétent doit détenir la preuve que cette tarification s'inscrit dans le cadre d'une stratégie à long terme consistant à enregistrer d'abord des pertes liées à la pratique de prix d'éviction, qui débouchera sur une hausse comparable des bénéfices sur le long terme, grâce à l'éviction de la concurrence. S'il est impossible de démontrer que ces pertes seront probablement compensées, cela signifie que la fixation de prix inférieurs aux coûts a une autre explication, que les coûts ne sont pas mesurés correctement, ou que la situation est mal interprétée. Le délégué indique qu'il répondra ultérieurement à la question du président sur les modalités d'application du critère de compensation des pertes, en soulignant qu'elles dépendent des caractéristiques de chaque affaire et que ce point sera de nouveau abordé lors de l'examen du dossier *American Airlines*.

Le président relève que dans sa contribution, la Commission européenne semble avoir un point de vue différent sur la compensation des pertes. Elle y indique en effet que « si le prix pratiqué par l'entreprise dominante est inférieur au coût évitable moyen, cela signifie que l'entreprise dominante a subi une perte qu'elle aurait pu éviter. [...] Cet élément est souvent considéré comme suffisant pour présumer que l'entreprise dominante a fait ce sacrifice pour évincer le concurrent visé. [...] La présomption selon

laquelle la fixation par une entreprise dominante d'un prix inférieur au coût évitable moyen peut être considérée comme une pratique d'éviction implique qu'une fois que l'autorité compétente a établi que le prix appliqué était inférieur au coût évitable moyen, elle n'a pas à justifier davantage sa décision [...]. Dans ce cas de figure, il revient à l'entreprise dominante de montrer qu'elle peut objectivement justifier sa tarification. » Le président demande à la délégation de la Commission européenne de développer cette analyse à la lumière des éléments mis en avant par les États-Unis.

Un délégué de la Commission répond qu'en fait, il apprécie le critère de la compensation des pertes parce qu'il permet de démontrer que ce qui semble positif pour les consommateurs à première vue peut, avec le temps, s'avérer extrêmement négatif sur le long terme. Par ailleurs, l'Union européenne (UE) applique déjà un critère de seuil pour prouver l'existence d'une position dominante, qui passe nécessairement par l'examen des barrières à l'entrée. En règle générale, lorsqu'une entreprise véritablement dominante pratique des prix inférieurs à son coût variable moyen, il convient de renverser la charge de la preuve de sorte qu'il revienne à l'entreprise de justifier le niveau de ses prix.

Le président demande à la délégation danoise d'expliquer le passage de sa contribution selon lequel « compte tenu de l'existence potentielle d'effets de réputation, les possibilités de compensation des pertes sont difficiles à prouver et, jusqu'ici, la question de la compensation des pertes n'a pas été prise en considération dans la jurisprudence danoise ». Il demande également à la délégation si elle considère les critères de compensation des pertes comme inutiles en règle générale, et si oui, de décrire des circonstances dans lesquelles cela serait le cas.

Un délégué danois commence par une observation concernant les coûts : le fait qu'un coût soit qualifié de fixe ou de variable dépend de l'horizon temporel à considérer. S'il est suffisamment lointain, tout est variable. L'horizon temporel adéquat correspond à la période au cours de laquelle le comportement présumé a eu lieu. Pour ce qui est de la compensation des pertes, même si l'autorité de la concurrence danoise n'applique pas de critère formel en la matière, elle prend de fait en considération la réputation, la dissuasion, les barrières à l'entrée, l'élasticité de la demande par rapport au prix ainsi que d'autres facteurs qui sont pris en compte lors de l'examen du critère de compensation des pertes. En définitive, le critère essentiel est et doit être celui du surplus des consommateurs. Il serait peut-être judicieux de se demander si le critère de compensation des pertes devrait être entériné par la législation européenne, puisqu'il est déjà examiné en pratique.

## **8. La compensation des pertes doit-elle avoir lieu sur le même marché que celui du comportement d'éviction ?**

Le président aborde ensuite la question de savoir si la compensation des pertes devrait nécessairement avoir lieu sur le marché du comportement d'éviction pour qu'il y ait violation. Selon la contribution des États-Unis : « Les investissements réalisés par [American Airlines] en matière de fermeture du marché étaient [...] destinés à empêcher toute entrée future sur de nombreuses autres lignes "hors marché". [...] Il est notable que la compensation des pertes aurait essentiellement eu pour origine d'autres marchés que ceux sur lesquels les actes de fermeture du marché ont eu lieu. » Le président demande à la délégation des États-Unis d'expliquer pourquoi cette position avait été adoptée et pourquoi elle a été rejetée par la juridiction inférieure saisie de l'affaire.

Un délégué américain répond que les documents d'American Airlines laissaient à penser que son comportement était motivé non seulement par la perspective d'affecter les lignes sur lesquelles la compagnie renforçait ses capacités, mais aussi par le désir d'empêcher l'entrée de concurrents sur d'autres lignes. Des fonctionnaires du ministère de la Justice ont établi que même si des transporteurs à bas coûts avaient quitté les cinq ou six lignes en jeu, cela n'aurait pas suffi à la réalisation des bénéfices nécessaires pour couvrir les coûts des capacités qui avaient été affectées à ces lignes. En conséquence, la compensation

des pertes en dehors du marché disputé semble avoir fait partie du plan adopté par American Airlines. Néanmoins, la juridiction inférieure a essentiellement rejeté l'idée que des capacités supplémentaires puissent constituer un instrument de fermeture du marché. Le juge a semblé vouloir plaquer sur la réalité des faits la définition théorique des prix d'éviction, selon laquelle les prix sont inférieurs aux coûts sur l'ensemble du marché. On peut considérer qu'en appel, la position du ministère (faisant valoir que les ajouts de capacités constituaient l'instrument de fermeture du marché et que la compensation des pertes aurait lieu en dehors du marché disputé) n'a pas été rejetée par la cour. Le même type d'argument est donc susceptible d'être exploité dans le cadre de futures affaires.

Le président note que la contribution du Royaume-Uni semble conforter le point de vue du ministère américain de la Justice, dans la mesure où elle indique qu'il « serait erroné d'exiger la démonstration du fait que la compensation des pertes a lieu sur le même marché, car la pratique de prix d'éviction peut porter préjudice à la concurrence et aux consommateurs en faisant obstacle à la concurrence sur d'autres marchés où l'entreprise dominante est présente ». Il invite la délégation britannique à développer cette analyse.

Un délégué du Royaume-Uni déclare qu'un pan de la théorie économique relative aux comportements prédateurs a trait aux pratiques destinées à établir une réputation de réaction agressive à l'entrée de nouveaux concurrents. Dans l'affaire *Aberdeen Journals*, l'*Office of Fair Trading* (OFT, Bureau de la concurrence) n'a pas mis en avant l'argument de la compensation des pertes dans le cadre de la procédure d'appel parce que la jurisprudence communautaire ne l'exige pas, mais il existait des éléments solides indiquant que les pertes subies pouvaient être compensées *via* l'acquisition d'une réputation de prédateur.

L'affaire *Napp* offre un autre exemple de prix d'éviction au Royaume-Uni. L'entreprise mise en cause vendait ses médicaments à des prix nettement inférieurs à toute mesure de coûts sur le segment hospitalier du marché, tout en pratiquant des tarifs extraordinairement élevés sur le reste du marché. Cela se traduisait par une compensation des pertes quasiment simultanée, dans la mesure où le secteur hospitalier constituait une voie d'accès au reste du marché, où les bénéfices étaient plus élevés.

## 9. L'affaire *Air Canada*

Le président souligne qu'un certain nombre de contributions font référence à des affaires relatives au transport aérien. Un cas intéressant concerne le Canada, dont la Loi sur la concurrence contient à la fois des dispositions sanctionnant les abus de position dominante de nature criminelle et non criminelle, relatives à la pratique de prix bas anticoncurrentiels. En outre, il existe dans le droit canadien de la concurrence des dispositions spécifiques concernant les allégations de comportement prédateur dans les services aériens intérieurs. Le président demande pourquoi ces dispositions spécifiques étaient nécessaires, et si l'affaire *Air Canada* aurait pu être traitée en application des dispositions criminelles pertinentes.

Un délégué canadien répond que les dispositions spécifiques au transport aérien se sont révélées nécessaires du fait d'une fusion intervenue en 1999, qui avait permis à *Air Canada* de porter à 90 % sa part du marché intérieur après l'acquisition d'une entreprise défaillante. Répondant aux préoccupations du Bureau de la concurrence concernant cette fusion, les dispositions législatives adoptées interdisent une longue liste d'agissements anticoncurrentiels, notamment l'exploitation ou l'augmentation « de la capacité sur une ou plusieurs routes à des prix qui ne couvrent pas les coûts évitables de prestation du service en cause ».

L'action engagée par les pouvoirs publics contre *Air Canada* reposait notamment sur des allégations selon lesquelles la compagnie avait abusé de sa position dominante, dans la mesure où elle avait réagi à l'entrée de deux nouveaux transporteurs à bas coûts sur certaines lignes en augmentant sa capacité ou en réduisant ses tarifs de telle sorte qu'elle ne couvrait pas ses coûts évitables. La première phase de la procédure judiciaire portait sur des questions relatives au critère des coûts évitables. Dans le cadre de la

seconde, il s'agirait de déterminer si Air Canada avait effectivement enfreint les dispositions relatives aux abus de position dominante. Le Tribunal de la concurrence a estimé au cours de la première phase que la quasi-totalité des coûts des compagnies aériennes étaient évitables. Au bout du compte, il a été établi qu'Air Canada ne remplissait pas le critère des coûts évitables. Dans l'intervalle, la compagnie avait toutefois engagé une procédure de restructuration, si bien que la phase 1 a été suspendue, et que la phase 2 n'a pas encore débuté. Le délégué ajoute qu'une action engagée en vertu des dispositions criminelles pertinentes aurait eu du mal à aboutir, compte tenu du degré d'exigence de la norme de preuve appliquée en matière criminelle (à savoir « hors de tout doute raisonnable »).

## 10. L'éviction hors prix

Le président revient maintenant de manière plus approfondie sur le sujet de la création de capacités supplémentaires, en relevant que la contribution allemande mentionne un cas de comportement de ce type dans l'industrie du ciment. Il demande à la délégation allemande de présenter cette affaire.

Un délégué de l'Allemagne commence par compléter les informations communiquées précédemment concernant l'affaire *Wal-Mart*. Il indique qu'en fait, un critère de compensation des pertes a été appliqué dans ce dossier. La partie mise en cause avait réduit les prix de plusieurs produits alimentaires, notamment de produits de base comme le sucre et le lait. Cette baisse de prix aurait débouché sur une concentration accrue du marché si les petites et moyennes entreprises concurrentes en avaient été évincées. L'argent consacré par un ménage moyen à ces produits peu coûteux représente moins de 1 % du montant total de ses dépenses mensuelles. En conséquence, le *Bundeskartellamt* a considéré qu'en cas de concentration du marché, ces baisses de tarifs pourraient non seulement entraîner au bout du compte un renchérissement des produits précédemment vendus à bas prix, mais aussi des 3 000 autres articles commercialisés dans les magasins Wal-Mart. Ainsi, il aurait été facile de compenser les pertes liées aux ventes effectuées à des prix inférieurs aux coûts.

S'agissant de l'affaire relative à l'industrie du ciment, le délégué indique que l'éviction par les prix et l'éviction par renforcement des capacités vont souvent de pair, car des capacités accrues se traduisent fréquemment par des prix plus bas. L'éviction par renforcement des capacités peut donc être évaluée de la même manière que l'éviction par les prix, ce qui est particulièrement évident dans les affaires où les capacités sont accrues dans le seul but d'empêcher des concurrents d'utiliser les actifs visés. Le *Bundeskartellamt* s'est trouvé saisi d'une affaire de ce type, qui concernait le projet d'acquisition de Malik Baustoffe par la société Heidelberg Zement. Cette dernière est le principal acteur de l'industrie du ciment en Allemagne. Malik Baustoffe importait du ciment d'autres pays. Heidelberg Zement voulait racheter les actifs de Malik Baustoffe non pas pour utiliser ces capacités supplémentaires, mais pour empêcher ses concurrents de les exploiter. Le seul but de cette acquisition était donc de faire obstacle à la concurrence effective et potentielle. Elle aurait également renforcé la position dominante occupée par Heidelberg Zement sur les marchés du sud de l'Allemagne. Le *Bundeskartellamt* a interdit ce rachat en juillet 1988 en invoquant des motifs de contrôle des fusions, ainsi que l'article 1 de la Loi contre les restrictions à la concurrence.

Le président revient sur la contribution des États-Unis, qui présente un certain nombre de cas d'éviction hors prix, dite « éviction à bon compte ». Il demande à la délégation américaine de fournir davantage de précisions sur les divers types de pratiques d'éviction à bon compte, et sur la manière dont les autorités de la concurrence peuvent les évaluer.

Une déléguée des États-Unis souligne que dans l'affaire *American Airlines*, le président-directeur général avait fait remarquer que la pratique de prix d'éviction était très coûteuse. La plupart des entreprises préfèrent utiliser un moyen moins onéreux d'évincer leurs concurrents, si bien que les prix d'éviction constituent vraiment un dernier recours et non un instrument de prédilection. La déléguée indique que

certaines formes de comportement prédateur à bon compte sont également source de gains d'efficacité, comme les accords d'exclusivité. La *Federal Trade Commission* (FTC, Commission fédérale du commerce) s'est toutefois focalisée sur les comportements pour lesquels des gains d'efficacité plausibles ne pouvaient être invoqués comme moyen de défense. Ainsi, la FTC a engagé une procédure contre Unocal, une entreprise pétrolière de Californie ayant participé à l'élaboration de normes réglementaires relatives à l'essence dans cet État. La FTC a accusé Unocal d'avoir affirmé que certains éléments de propriété intellectuelle concernés par ces normes étaient tombés dans le domaine public, de sorte que, se fondant sur ces affirmations, les autorités californiennes avaient intégré la technologie visée dans leur réglementation. Or, Unocal a révélé par la suite qu'elle détenait des brevets relatifs à cette technologie et réclamé des redevances d'exploitation aux autres entreprises qui devaient se conformer à la réglementation adoptée. Le mensonge est une attitude extrêmement peu coûteuse, et elle ne semble avoir aucune justification en termes d'efficacité.

La déléguée souligne que la FTC a engagé de nombreuses procédures de ce type. Elle estime que, puisque l'éviction à bon compte est beaucoup moins coûteuse que l'éviction par les prix, il serait judicieux que les organismes compétents s'efforcent de mettre au jour les comportements de ce type demeurés occultes, qui sont probablement nombreux.

Le président invite ensuite la délégation mexicaine à évoquer la procédure engagée contre Coca Cola à propos de ses contrats d'exclusivité sur le marché des boissons non alcoolisées.

Un délégué du Mexique explique que la Commission fédérale de la concurrence (CFC) a ouvert une enquête sur les contrats d'exclusivité conclus par Coca Cola, car il semblait que le groupe vendait ses produits à condition que le cocontractant n'utilise pas ni ne commercialise des biens produits, traités, distribués ou vendus par une tierce partie. Coca Cola accordait par ailleurs aux détaillants des remises subordonnées à la distribution ou à la commercialisation exclusive des produits Coca Cola.

Il a été estimé que le marché à prendre en considération était celui des boissons gazeuses sur le territoire national. La CFC a établi que Coca Cola détenait un pouvoir de marché substantiel puisque sa part de marché était supérieure à 70 % ; Pepsi Cola arrivait en deuxième position, avec une part de marché de 18 %. Les deux principaux canaux de distribution des boissons gazeuses étaient les épiceries et les supermarchés, d'une part, les hôtels, restaurants et établissements similaires, d'autre part. La publicité et le positionnement de la marque constituaient des barrières importantes à l'entrée, s'ajoutant aux restrictions relatives aux espaces de vente au détail qui résultaient des contrats examinés dans le cadre de l'enquête.

La CFC est parvenue à la conclusion que les contrats d'exclusivité de Coca Cola faisaient obstacle à l'entrée de nouveaux concurrents sur le marché considéré. La société Pepsi Cola recourait également à des contrats d'exclusivité, mais elle ne détenait pas un pouvoir de marché substantiel. En conséquence, la CFC a jugé que Coca Cola s'était rendue responsable de pratiques monopolistiques relatives contraires à l'article 10 de la Loi fédérale sur la concurrence économique (LFCE). La CFC a enjoint à Coca Cola de cesser d'être partie prenante à tout accord, programme ou stratégie commerciale accordant des remises, des prix ou des promotions liés à l'engagement de vendre exclusivement des produits Coca Cola.

Le président demande ensuite à la délégation néo-zélandaise de présenter une affaire similaire, dans laquelle l'entreprise *Fischer & Paykel* était opposée à la *Commerce Commission* (Commission du commerce).

Un délégué de la Nouvelle-Zélande indique que Fisher & Paykel (F&P) était un fabricant de produits blancs (appareils électroménagers) qui détenait 80 % du marché de détail. Cinquante-cinq pour cent des détaillants de produits blancs avaient en stock des produits F&P et représentaient 75 % de l'ensemble des ventes au détail de produits blancs. F&P recourait à des contrats d'exclusivité pour interdire aux détaillants

de stocker les produits de ses concurrents. F&P a sollicité l'approbation de ces accords par la *Commerce Commission*.

La Commission a dû examiner deux questions. La première était de savoir si les contrats avaient pour effet de réduire substantiellement la concurrence sur le marché de la distribution et de la vente aux détaillants de produits blancs en Nouvelle-Zélande. La seconde était de savoir si les gains d'efficacité résultant de ces contrats l'emportaient sur leurs éventuels effets anticoncurrentiels.

Une majorité des membres de la Commission est parvenue à la conclusion que ces accords entraînaient une réduction substantielle la concurrence qui n'était pas contrebalancée par les gains en découlant. Elle a également estimé que F&P détenait un pouvoir de marché significatif, et qu'une fraction importante du marché de détail était fermée. En outre, les accords visés avaient empêché toute entrée ou expansion significative sur le marché de détail et provoqué une augmentation des coûts des concurrents, ceux-ci étant contraints d'ouvrir de nouveaux points de vente au détail. La minorité en désaccord a estimé, quant à elle, qu'il n'y avait pas eu de réduction substantielle de la concurrence, parce que les contrats n'évinçaient pas les concurrents du marché dans son ensemble, mais seulement de certains points de vente. En outre, l'entrée ne soulevait aucune difficulté puisque des espaces de vente au détail étaient aisément accessibles et qu'il n'existait pas de coûts irrécupérables significatifs. La minorité en désaccord est parvenue à la conclusion que les contrats visés renforçaient l'efficacité de la distribution, et qu'ils empêchaient les concurrents de bénéficier sans contrepartie de la réputation de F&P.

En appel, la Haute Cour a souligné que l'évolution récente de la jurisprudence aux États-Unis portait à conclure que les restrictions verticales étaient favorables à la concurrence, sauf dans des cas exceptionnels. La Haute Cour a également jugé que les barrières à l'entrée étaient limitées et que les accords entraînaient des gains d'efficacité. En conséquence, elle s'est ralliée dans son jugement à l'analyse de la minorité dissidente des membres de la Commission.

Le président donne ensuite la parole aux participants.

Un délégué français fait observer que lors de l'examen de pratiques d'éviction – que ce soit par les prix ou par d'autres moyens –, il importe de s'orienter vers une approche plus globale, permettant de prendre en compte les gains d'efficacité économique. Il ajoute que dans le cadre du débat actuel en France sur la fixation des prix de détail dans les grandes surfaces commerciales, il convient de ne pas perdre de vue trois éléments :

1. si l'on s'oriente vers une analyse prenant en considération les gains d'efficacité, cela ne doit pas affecter la prévisibilité des mesures d'application des lois. Ce qui est frappant dans le débat français, c'est que les entreprises demandent non seulement que les règles d'établissement des prix soient assouplies, mais aussi qu'elles soient clarifiées. En fait, elles préféreraient une plus grande prévisibilité des règles qu'une déréglementation très poussée. Il devrait donc exister une liste de points à vérifier qui soit appliquée de manière prévisible. Le délégué ajoute que les tribunaux souhaitent également des règles claires et prévisibles, car ils voient mal pourquoi ils devraient sanctionner des pratiques tarifaires bénéfiques aux consommateurs ;
2. les gains d'efficacité devraient être mesurés avec précision, notamment en ce qui concerne les consommateurs ;
3. les gains d'efficacité devraient être évalués sur une période adéquate, car l'avantage qu'ils peuvent représenter à court terme pour les consommateurs est susceptible d'être plus limité à long terme.

Un délégué de l'Espagne fait remarquer que l'autorité espagnole de la concurrence a été confrontée à plusieurs cas de prix d'éviction, mais que la plupart des actions engagées n'ont pas abouti. Une affaire récente concernait le marché des cigares, précédemment contrôlé par un monopole d'État. Cet ancien monopole avait réduit ses prix de manière à évincer un concurrent, puis relevé ses tarifs après l'élimination de ce rival. Il s'agissait d'un cas manifeste de prix d'éviction et de compensation des pertes, et l'entreprise mise en cause a été sanctionnée par la justice.

Le délégué met également en avant trois éléments. Premièrement, l'existence d'une position dominante est nécessaire pour pouvoir conclure à un comportement d'éviction, et il est indifférent de savoir si cette position dominante a été acquise par le jeu de la concurrence ou grâce à des barrières légales à l'entrée. Deuxièmement, il est beaucoup plus facile d'engager des poursuites lorsque la compensation des pertes a déjà eu lieu que de prouver qu'elle se produira dans l'avenir. Il est clair toutefois que si les autorités doivent attendre la compensation effective des pertes pour intervenir, elles risquent de le faire trop tard, les concurrents ayant déjà été évincé du marché. Troisièmement, il peut s'avérer très difficile de déterminer quels coûts doivent être comparés avec les prix pratiqués. C'est tout particulièrement vrai dans les cas de rabais sélectifs et de stratégies de vente liée ou de subordination de vente.