

**UNILATERAL CONDUCT WORKING GROUP QUESTIONNAIRE –  
PREDATORY PRICING**

**FINAL RESPONSE – CANADIAN COMPETITION BUREAU**

*Analysis (elements and evidence)*

**1. Please provide the main relevant texts (in English if available) of your jurisdiction’s laws and guidelines on predatory pricing.**

Predatory pricing can be addressed under a criminal provision found in s. 50(1)(c) of the Competition Act (the “Act”) or a civil abuse of dominance provision found in ss. 78 and 79 of the Act. The criminal provision in section 50 states as follows:

*50. (1) Every one engaged in a business who*

*(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,*

*(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or*

*(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.*

*R.S., 1985, c. C-34, s. 50; 1999, c. 31, s. 50(F).*

In respect of the civil provision, section 79 of the Act is intended to address various forms of anti-competitive conduct that constitutes an abuse of dominance. Section 78 of the Act outlines a non-exhaustive list of types of anti-competitive conduct that may be the subject of a remedy under s. 79, including s. 78 (1)(i), “*selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.*”<sup>1</sup>

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<sup>1</sup> S. 78(1)(c) and (d) also refer to freight equalization and the introduction of “fighting brands”, which may also be considered predatory conduct. Although s. 78(1)(i) refers to “articles” and “acquisition cost”, the

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The relevant excerpts of s. 79 are listed in full in the Bureau's corresponding response to the questionnaire on exclusive dealing.

The Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions*<sup>2</sup> (the "Guidelines") state that predatory pricing occurs where "a dominant firm [has] the ability to raise prices once rivals have been disciplined or have exited the market. Consequently, a key consideration in determining that low prices are in fact predatory and may lead to a substantial lessening of competition is whether the market is characterized by high barriers to entry." The Guidelines continue:

*In the case of predatory behaviour by a dominant firm or group of firms, establishing dominance is sufficient to satisfy that market power exists and therefore recoupment is possible. The Bureau will also consider the extent to which the act of predation will deter entry through establishing a reputation for predation.*

*Having established dominance, the Bureau will consider whether the dominant firm is pricing below some measure of its costs. The Tribunal emphasized the importance of such a price-cost comparison in the NutraSweet case. In conducting such price-cost comparisons, the Bureau will include in its measure all costs that are avoidable. That is, the Bureau will consider any costs that could have been avoided by not offering the product or service in the relevant time frame. [footnotes omitted]*<sup>3</sup>

The Bureau will also shortly be releasing its Draft Predatory Pricing Enforcement Guidelines for public comment.<sup>4</sup>

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

To secure a remedy under the criminal predatory pricing provision found in section 50(1)(c) of the Act, the following elements must be established:

- (i) the supplier has engaged in a policy of pricing "unreasonably low"; and
- (ii) that policy has the effect or tendency of substantially lessening competition or eliminating a competitor, or is designed to have that effect.

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Tribunal has ruled that the definition of "anti-competitive act" under s. 78 is broad enough to encompass other forms of predatory pricing. See *Canada (Director of Investigation and Research) v. NutraSweet Co.*, [1990] 32 C.P.R. (3d) 1 (Comp. Trib.) [*NutraSweet*] at p. 74-75.

<sup>2</sup> Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)" (Ottawa: Industry Canada, 2001) at p. 23. Available online at <http://strategis.ic.gc.ca/pics/ct/aod.pdf>

<sup>3</sup> *Ibid.*

<sup>4</sup> When they are available, these guidelines will be posted on the Bureau's web site: <http://www.cb-bc.gc.ca>

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When predatory pricing is addressed under s. 79, the following elements must be established:

- (i) the respondent supplier or suppliers hold a dominant position within a relevant product and geographic market;<sup>5</sup>
- (ii) the supplier or suppliers have engaged in or are engaging in a practice<sup>6</sup> of anti-competitive acts (in this case, predatory pricing);<sup>7</sup> and
- (iii) as a result, competition has been, is being, or is likely to be lessened or prevented substantially.

**3. Please explain the circumstances under which a firm’s pricing is, or may be, considered “predatory” in your jurisdiction. As part of your analysis, does the price have to be below one or more measures of cost? Is the same cost measure applied in all cases? If price must be shown to be below cost, for which of the dominant firm’s sales must this be shown? Could a firm’s price above average total cost ever be found to be predatory? If prices do not have to be below a cost benchmark to be considered predatory, please explain the circumstances under which the firm’s prices are considered predatory.**

Under both s. 50 and s. 79, the Bureau uses an avoidable cost test in assessing if prices are predatory. In *Air Canada* (2003), the Tribunal defined avoidable costs as “all costs that can be avoided by not producing the good or service in question. In general, the avoidable cost of offering a service will consist of the variable costs and the product-specific fixed costs that are not sunk.”<sup>8</sup> Although the Bureau used other cost measures in earlier predation cases<sup>9</sup>, the Tribunal in *Air Canada* used an avoidable cost standard as prescribed in the airline regulations of the *Act*. The Bureau believes that avoidable cost is the most appropriate measure of cost for assessing predation; since *Air Canada*, the

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<sup>5</sup> See the Bureau’s response to last year’s questionnaire for a detailed description of how dominance is assessed. Available online at:  
[http://www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/questionnaire/CanadaQuestionnaireResponse.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/CanadaQuestionnaireResponse.pdf)

<sup>6</sup> A “practice” has been defined as something beyond an isolated act, but may constitute a single sustained occurrence. See *Canada (Director of Investigation and Research) v. NutraSweet Co.*, [1990] 32 C.P.R. (3d) 1 (Comp. Trib.) [*NutraSweet*] at p. 23, where the Tribunal found that different individual anti-competitive acts, taken together, may constitute a practice.

<sup>7</sup> The Federal Court of Appeal affirmed *NutraSweet*’s definition of an anti-competitive practice being one with “an intended negative effect on a competitor that is exclusionary, disciplinary, or predatory.” See *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée*, 2006 FCA 233 at para. 50 [*Canada Pipe*] at p. 64-65.

<sup>8</sup> *Canada (Director of Investigation and Research) v. Air Canada* (2003), 26 C.P.R. (4<sup>th</sup>) 476 (Comp. Trib.) at p. 76. [*Air Canada*]

<sup>9</sup> Prior to *Air Canada*, the Bureau adopted the Areeda-Turner average variable cost test in assessing whether pricing was “unreasonably low” under s. 50(1)(c), and similarly under s. 79. See *R. v. Hoffmann La Roche Ltd.* (1980), 28 O.R. (2d) 164 (H.C.J.), affirmed 33 O.R. (2d) 694 (C.A.) [*Hoffmann La Roche*], and *R. v. Consumers Glass Co.*, (1981), 33 O.R. (2d) 228 [*Consumers Glass*] which established average variable cost as the relevant cost standard above which pricing would not be “unreasonable.”

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Bureau has not taken a case to the Tribunal to test this standard, but has used avoidable cost in several predatory pricing investigations.

Generally, the Bureau considers avoidable costs to be all costs that would be avoided if the firm in question chose not to produce or sell the relevant product(s) during the period of time the firm engaged in its alleged predatory pricing policy. This includes:

- i) variable costs such as labour, materials, energy, use-related plant depreciation, promotional allowances, etc.;
- ii) non-sunk product-specific fixed costs (“quasi-fixed costs”); and
- iii) incremental fixed and sunk costs associated with sales generated by the firm during the period the pricing policy is in place.

It is assumed that a firm selling at prices that do not cover its avoidable costs will not be profit-maximizing unless there is an expectation that its pricing policy will eventually create or enhance that firm’s market power. Otherwise, the firm would cease production or raise its prices. In the course of its analysis, the Bureau will focus its price-cost comparison on the period of time the predatory pricing policy is alleged to have occurred. Note that the longer a pricing policy is in place, the more costs are likely to be considered avoidable as short-run fixed costs become variable in the long run. However, the Bureau will first assess whether or not a firm’s pricing activity is in fact a “policy” (as compared to a short-term competitive tactic). In *R. v. The Producers Dairy Limited* (1966), the Ontario Court of Appeal interpreted a “policy” as more than a temporary measure to counteract aggressive competition.<sup>10</sup> Similarly in *R. v. Hoffmann-La Roche* (1980), the Court found that to constitute a policy, sales must be ongoing or repeated, and not one-time occurrences. Similarly, to secure a remedy under the abuse of dominance provision, the Tribunal must find that predatory pricing was part of a “practice” of anti-competitive acts under s. 79.<sup>11</sup>

The Bureau does not use an average total cost standard in assessing predation; most firms are multi-product firms, with fixed costs incurred on behalf of multiple products. Allocating these common costs to individual products may be difficult and inaccurate. It is also inappropriate to require a firm to cover its total costs given that certain revenues and costs (e.g. asset sales, property and casualty losses) do not reflect the firm’s ongoing operations.

**4. To be unlawful, must the alleged predatory pricing occur in the market in which the firm holds a dominant position/substantial market power?**

To secure a remedy under the civil predatory pricing regime found in section 79, predatory pricing must be engaged in by a firm that has or is likely to have market power, such that recoupment is likely. That assessment will be made in the market in which the predatory pricing is alleged to be occurring, although dominance may also be relevant in other markets if that firm can engage in recoupment in those markets.

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<sup>10</sup> *R. v. Producers Dairy Ltd.* (1996), 50 C.P.R. (2d) 265 [*Producers Dairy Ltd.*]

<sup>11</sup> *Supra* note 6.

Under the criminal predatory pricing provision in s. 50(1)(c), dominance is not explicitly required in the market in which the conduct is alleged to be occurring, but market power is a consideration in assessing whether a firm has the ability or intention to substantially lessen competition or eliminate a competitor.

**5. Apart from the cost criteria referenced in question 3 above, must other objective criteria, such as the duration or continuity of the pricing behavior, be demonstrated for a finding of liability under a predatory pricing theory? If so, please explain. For example, if the behavior must be sustained over a certain time period, why, and for what period?**

Yes. See response to question three for consideration of what constitutes a pricing “policy” or “practice.” Further, as mentioned in the response to question 2, any anti-competitive conduct must be shown to be performed with an intended negative effect on a competitor that is exclusionary, disciplinary, or predatory.

**6. On what type of evidence do you rely to prove predatory pricing? Please explain, including examples as appropriate. Are cost data from the firm used? Are there circumstances when cost data of other firms can be used? What other data or information is used, if any? Please provide examples as relevant.**

Although dominance is generally assessed using indirect evidence (*e.g.*, market shares, barriers to entry) and sometimes direct evidence (*e.g.*, profit and pricing data), predatory conduct is established on the basis of direct evidence, namely price and cost data. Once the Bureau has commenced a formal inquiry, the Bureau is able to seek orders to compel the production of records and written returns under oath. In the course of a predation investigation, the Bureau will attempt to secure appropriate price/cost data from both the alleged predator(s) and the alleged victim(s) of the predation, as well as any other relevant industry participants. This is intended to determine whether the prices the alleged predator is selling at are below the costs of its competitors as well as its own, and that those prices will have the eventual effect of eliminating those competitors. The Bureau will also examine any available evidence of financial status and projections of future viability from both the predator and its alleged targets.

Other types of information will also be used, as in any unilateral conduct investigation, such as evidence relating to the issues of whether predation is part of a practice or policy and that recoupment is likely because of barriers to entry, among other factors.

**7. Does pricing below a particular cost benchmark create a presumption of predatory pricing?**

See below.

**8. Is there a “safe harbor” from a finding of predatory pricing for pricing above a particular cost benchmark? If yes, please explain, including the terms of the safe harbor.**

An investigation by the Bureau into allegations of predatory pricing must establish several criteria – that the firm in question is dominant, is engaging in a practice of pricing below avoidable cost, will likely force competitors to exit the market, prevent entry, or significantly diminish the competitive effectiveness of a competitor, and will be able to recoup its losses through future price increases. The Bureau is of the view that predatory pricing requires prices to be below avoidable cost. In this sense, pricing above avoidable cost can be generally considered to be a safe harbour.<sup>12</sup>

**9. Is recoupment (obtaining additional profits that more than offset profit sacrifices stemming from predatory pricing) required for a finding of liability under predatory pricing rules in your jurisdiction?**

Under the abuse of dominance provision in s. 79(1)(c), any allegation of predatory pricing must be shown to lessen or prevent competition substantially in a market or be likely to do so. Similarly under the criminal prohibition in s. 50(1)(c), the pricing policy in question must be designed to substantially lessen competition or eliminate a competitor. In the context of predatory pricing, the Bureau examines whether the alleged predatory pricing enhances or preserves the ability of the predator to exercise market power to the extent that the firm can likely recoup its losses. Recoupment is taken to be an increase in price (or decrease in service, choice, quality, or innovation) in the relevant market following the elimination or disciplining of competitors.

Recoupment may occur within the same market as the predatory pricing, or it may occur in another product or geographic market if the predating firm is able to charge or maintain higher prices in other markets. The Bureau will assess whether existing barriers to entry are high enough such that recoupment will be likely, as well as whether any alleged predation raises barriers to entry, such as by establishing a “reputation for predation” and discouraging future entry. The Bureau will also evaluate factors that may reduce the probability of recoupment, such as whether customers are large and can exploit supply alternatives to effectively counter recoupment. Such countervailing conduct may include stockpiling inventory or entering into supply contracts or alliances with alleged targets of the predation.

**10. Is the firm’s intent relevant in predatory pricing cases? If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples. If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment – are not demonstrated, does intent matter?**

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<sup>12</sup> See for example *Hoffmann La Roche*, *supra* note 9, which established that above-cost pricing can never be held to be ‘unreasonable’ under s. 50(1)(c).

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Intent is generally relevant in predatory pricing cases. The criminal prohibition in section 50 prohibits predatory pricing that is “designed to have [the] effect” of substantially lessening competition or eliminating a competitor. In *Hoffman La Roche*, the court held that “design” includes “the intention that this will substantially lessen competition or eliminate a competitor . . . even though the tactic is entirely ineffective in achieving its aim.”<sup>13</sup>

Under abuse of dominance, all potentially anti-competitive acts under s. 79(1)(b) must have “an intended negative effect on a competitor that is exclusionary, disciplinary, or predatory”. Under s. 79, proof of subjective intent is not necessary, as firms are assumed to intend the reasonably-foreseeable effects of their actions (per *Laidlaw*), but evidence of subjective intent can be used to establish an overall anti-competitive purpose. Similarly, if there is evidence of a valid business justification for the practice in question (which will be discussed below), this may prevent the Tribunal from finding the requisite anti-competitive intent.

Intent is not a sufficient condition to establish a predatory pricing offence under s. 79; pricing below avoidable cost combined with a likely substantial lessening of competition are necessary conditions, as described above. Under s. 50(1)(c), below-cost pricing that is shown to be designed to substantially lessen competition or eliminate a competitor is sufficient to establish a violation, although no such case has been brought.

**11. In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability?**

Under s. 79(1)(c), a substantial lessening or prevention of competition must be demonstrated. Under s. 50(1)(c), this is a sufficient (but not necessary) condition. See the Bureau’s response to question 11 of the accompanying questionnaire on exclusive dealing for a detailed description of this requirement.

*Justifications and Defenses*

**12. What type of justifications or defenses, if any, are permitted for predatory pricing, e.g., an efficiency, meeting competition or objective necessity defense? Please explain and provide examples, as relevant.**

Under s. 79(1)(b), in determining whether the overriding purpose of an alleged anti-competitive practice is an intended negative effect on a competitor, the Tribunal will consider whether the dominant firm has a valid business justification that explains the overall purpose of the practice. See the Bureau’s response to question 12 on exclusive dealing for a complete description. Similarly, s. 50(1)(c) creates an offence for predatory pricing that is designed to substantially lessen competition or eliminate a rival, which again requires an assessment of anti-competitive intent counterbalanced with any valid business justification.

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<sup>13</sup> *Supra* note 9 at para. 145.

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In the context of predatory pricing, there may be legitimate business objectives for pricing below cost, such as liquidating excess, obsolete, or perishable products, or using promotional pricing to introduce a new product. The Bureau will also assess any “meeting competition” defense, such as matching a competitor’s price reduction, even if it is below the firm’s avoidable costs.<sup>14</sup> A possible example is matching a competitor’s short-run promotion as that competitor enters the market. The Bureau will generally not consider such a response to be anti-competitive, but will examine each situation on a case-by-case basis.

If there are qualitative differences between the firm’s product and products being offered by other companies, a meeting competition defense may not apply. Where one product is superior to another in terms of quality or service, price matching may in fact constitute undercutting. Adding production capacity, introducing giveaways, or providing additional service in addition to a price match may also constitute predation, particularly if the firm in question is already pricing below avoidable cost.

***Enforcement***

- 13. Please provide the following information for the past ten years (as information is available):**
- a. The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase).**
  - b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.**
  - c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction’s predatory pricing rules (*i.e.*, “clearance decisions”).**
  - d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.**

- a. Since 1997, the Bureau has conducted three formal inquiries into predatory pricing under either s. 50(1)(c) or s. 79 of the Act.
- b. The Bureau contested one predatory pricing case (*Air Canada*) before the Tribunal under s. 79, pursuant to the Act’s airline-specific regulations. However, predatory pricing was only an element of an overall allegation of abuse of dominance.
- c. The remaining two inquiries into predatory pricing were discontinued on grounds that the practice or practices in question did not raise competition issues under the Act.

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<sup>14</sup> Under s. 50, see *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 [*Boehringer*], where the court held that pricing cannot be predatory if it is done to match a competitor’s lower price.

d. *Air Canada* was tried in two phases before the Tribunal. In the first phase, the Tribunal accepted the use of the avoidable cost standard and found Air Canada had engaged in pricing below avoidable cost on two routes, but reserved its examination of the other elements of s. 79 for the second phase of the hearing. The second phase was stayed pending Air Canada's emergence from bankruptcy protection and was ultimately discontinued by the Commissioner due to changes in the airline industry.

**14. Does your jurisdiction allow private cases challenging predatory pricing?**

There is no private action available for challenging predatory pricing under the s. 79 civil abuse of dominance provision. However, under s. 36 of the Act, parties that have suffered loss or damage as a result of conduct contrary to the criminal predatory provision under s. 50(1)(c) may sue for civil damages; see for example *Boehringer*.

**15. Is predatory pricing a civil and/or a criminal violation of your jurisdiction's antitrust laws? If both, what are the differences in the criteria applied to these categories? On what basis does the agency choose to bring a criminal or civil case?**

As noted above, predatory pricing may be pursued civilly as abuse of dominance under s. 79, which is a civil provision, or s. 50, which is a criminal provision. Predatory pricing will generally be examined under the Act's abuse of dominance provisions at first instance. If the Bureau determines that the conduct at issue merits a criminal examination, such as where the conduct is egregious, recidivist, or corollary to cartel activity, the Bureau may pursue a criminal investigation under s. 50(1)(c).

In Canada, civil litigation is subject to a burden of proof on the "balance of probabilities," while criminal litigation requires proof "beyond a reasonable doubt." Given that predatory pricing examinations generally involve complex considerations of market structure and effects on competition, as well as evaluations of pricing conduct and its overall purpose, these requirements may be better suited to the civil provisions of the Act and adjudication before the Competition Tribunal, rather than criminal courts.

**16. As relevant, please provide a short English summary of the leading predatory pricing decisions/cases in your jurisdiction, including information on the method used to calculate costs, to the extent applicable, and, if possible, a link to the English translation, an executive summary or press release of the case.**

Many of the decisions on predatory pricing in Canada referenced above were made before the institution of the Act in 1986, and are not generally available online. Relevant case summaries are included in the Bureau's Draft Predatory Pricing Enforcement Guidelines, which should be available on the Bureau's web site in the near future.

The leading predatory pricing case under the civil provisions of the Act, which establishes the use of the avoidable cost standard, is *Air Canada*. The Bureau made an abuse of dominance application to the Tribunal under the airline-specific provisions of s.

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78, alleging that Air Canada increased its capacity and offered flights below its avoidable costs on certain routes in response to entry by competitors. The decision from the first phase of the proceeding is available online:

**The Commissioner of Competition v. Air Canada (2003)**

[http://www.ct-tc.gc.ca/CMFiles/CT-2001-002\\_0145a\\_40QXN-4132004-736.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2001-002_0145a_40QXN-4132004-736.pdf)

**17. Please provide any additional comments that you would like to make on your experience with predatory pricing rules and their enforcement in your jurisdiction, including, as appropriate but not limited to:**

- a. Whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess predatory pricing, explaining these developments as relevant.**
- b. Whether there are significant policy and/or practical considerations that may lead to greater or lesser agency enforcement against predatory pricing pursuant to unilateral conduct rules in your jurisdiction, *e.g.*, concern with the risks of false positives/false negatives, the existence of related laws such as a general ban on below-cost pricing, limited evidence of consumer harm, and/or difficulties in obtaining reliable cost data (please provide explanation as relevant).**

There have been refinements in the criteria by which the Bureau assesses predatory pricing over time, such as the adoption of the avoidable cost standard as the most appropriate measure of cost. The Bureau is in the process of drafting updated guidelines on predatory pricing that will clarify its approach.

Generally, the Bureau has taken a careful stance in its enforcement of predatory pricing in an attempt to avoid false positives and avoid chilling legitimate price competition. Low prices are generally a hallmark of competition and a benefit to consumers. As a result, the Bureau uses price-cost and recoupment screens to avoid over-deterrence, but has investigated and will continue to investigate allegations of predatory pricing where it appears likely competition has been or will be lessened or prevented substantially as a result of the practice.