

Gerwin Van Gerven, Partner, Linklaters LLP

Predatory Pricing

This questionnaire seeks information on ICN members' analysis and treatment of predatory pricing claims. Predatory pricing typically involves a practice by which a firm temporarily charges low prices in order to limit or eliminate competition, and thereby allows the firm to raise prices subsequently. This questionnaire concerns only treatment of single product discounts; rather than pricing practices involving multiple products (including bundling, tying, and related prices). Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

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.***

The relevant provision is Article 82 of the EC Treaty, prohibiting any abuse of a dominant position within the EU, in so far as it may affect trade between EU Member States.

There do not yet exist European Commission Guidelines for the application of Article 82 but it is understood that the Commission may issue such Guidelines in the near future. In 2005, DG Competition published a Discussion Paper on the application of Article 82 to exclusionary abuses (the "Article 82 Discussion Paper"). Even though it is merely a Discussion Paper, it is understood to reflect the most recent expression by DG COMP of its enforcement policy in the area of, among other abusive practices, predatory pricing.¹

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

Predatory pricing occurs where a dominant firm (a) sells a product or service below its own cost (b) with the intention to foreclose actual or potential competitors (e.g., weaken a competitor, cause exit or deter entry). Further, in order for predation to be abusive under Article 82 EC Treaty, the exclusion should be instrumental in protecting or strengthening the predator's dominant position, thereby allowing it to return to or obtain high prices afterwards. Since the benchmark is pricing below the firm's own cost, it implies that only conduct seeking to foreclose an "as efficient competitor" may infringe Article 82.

¹ The Article 82 Discussion Paper, together with the comments and replies received by DG Competition from interested parties, are available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>. Chapter 6 of the Commission's 2005 Discussion Paper deals with predatory pricing.

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The criteria are laid down in a number of cases, in particular the *AKZO* case,² the *TetraPak II* case,³ the *French Telecom/Wanadoo* case.⁴ More details and clarifications are also found in Chapter 6 of the Article 82 Discussion Paper.

3. Please explain the circumstances under which a firm's pricing is, or may be, considered "predatory" in your jurisdiction, by responding to the following questions:

(a) As part of your analysis, does the price have to be below one or more measures of cost? **Yes/No**

In principle, yes. But please note that in the Article 82 Discussion Paper, the Commission notes that "[W]here in general no reliable information on cost data is available to the Commission, it may nonetheless be able to build on other arguments a credible case of predatory abuse".⁵

(i) If yes, please identify which of the following measures is/are used, as applicable:

Cost benchmark/ measure	Used?		Comment
	Yes	No	
<u>Below marginal cost</u> (the cost of producing one more unit of output)		✓	Rejected as impractical in the Discussion Paper. (Article 82 Discussion Paper ¶ 107)
<u>Below average variable cost</u> (cost that varies with output)	✓		Where a dominant firm is selling below AVC, this is presumed predatory because pricing below AVC pricing means that the firm does not even partially recover fixed cost. Accordingly, this price level does not make sense <i>but for</i> the purpose of foreclosure. The presumption is rebuttable where there is an objective justification. (Article 82 Discussion Paper, ¶ 108)
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all	✓		The dominant firm pricing below AAC is presumed to be making a sacrifice in order to foreclose. The Discussion Paper proposes AAC as the most appropriate benchmark because it answers directly the question

² Case 62/86, 1991 E.C.R. 3359. This is a judgment of the European Court of Justice, confirming a Commission Decision *ECS/AKZO Chemie* of 14 December 1985, Case IV/30.698, 1985 O.J. L374/1.

³ Case C-333/94P, *TetraPak II*, 1996 E.C.R. I-5951. This is a judgment by the European Court of Justice, confirming an appeal judgment by the Court of First Instance, Case T-83/91, 1994 E.C.R. II-755. This latter judgment confirmed earlier Commission Decision *TetraPak II* of 24 July 2001, Case IV/31.043, 1992 O.J. L72/68.

⁴ Case T-340/03, 2007 E.C.R. II-000, Judgment of 30 January 2007, not yet published). This is a judgment of the Court of First Instance, confirming a Commission Decision *Wanadoo Interactive*, of 16 July 2003, Case COMP/38.233, non confidential version available at www.ec.europa.eu/comm/competition/antitrust/cases/decisions/38233/en.pdf.

⁵ Article 82 Discussion Paper, ¶ 103.

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Cost benchmark/ measure	Used?		Comment
	Yes	No	
output)			<p>whether the firm has incurred loss that could have been avoided, i.e., has made a sacrifice. AAC is often equal to AVC, if only variable costs can be avoided but if fixed investments have to be made in order to predate successfully (e.g., capacity expansion), these fixed costs are part of the avoidable costs.</p> <p>Again the presumption is rebuttable. (Article 82 Discussion Paper ¶¶ 109-110)</p>
<p><u>Below average long run incremental cost</u> (average variable costs and product-specific fixed costs)</p>	✓		<p>Yes, this could be relevant. In some sectors, the Commission has deviated from the AAC benchmark and has chosen to use LAIC (long run average incremental cost). This is so in particular in cross-subsidization cases, where a legal monopolist is accused of using profits from the monopoly activity to establish itself in a non-regulated market. A legal monopolist is required to cover at least long run incremental costs (variable and fixed in the non-regulated market). Otherwise, it is deemed to cross-subsidize with the proceeds from the regulated market activity.</p> <p>The rule is also applied in markets which have been recently deregulated (and where the incumbent previously had a monopoly). It is expected that the incumbent prices above LIAC to avoid an abuse.</p> <p>Sectors where LIAC has been used are, as far as we know, the telecommunications and postal sectors. (Article 82 Discussion Paper ¶¶ 124-126)</p>
<p><u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)</p>	✓		<p>Prices below ATC, but above AVC are only to be considered abusive if an intention to eliminate can be shown. It is unlikely though that DG COMP would pursue on this basis if ATC is above LRAIC. However, the <i>Akzo</i> Court judgment said that if there is evidence of intent, pricing below ATC is deemed predatory. (Article 82 Discussion Paper ¶¶ 127-129)</p>
<p><u>Other measure of cost</u> (Please identify)</p>		✓	

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

The European Commission and the European Courts define the different cost measures in line with those definitions provided in the first column of the table above. It is likely that in a predation cost, the Commission may consider varying cost measures in order to determine true predation.⁶

- (c) ***Is the same cost measure applied in all cases? Yes/No***

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

The European Commission and the European Courts have reviewed a number of predatory pricing cases in different industries, varying from manufacturing of chemical products to carton packaging to telecommunications or postal services. The cost benchmark applied to the individual case is *not* specific to the industry. Going forward, one should expect the Commission to use AAC and ATC as the most relevant cost benchmarks, except in cross-subsidisation cases where LAIC will be used to verify whether the dominant firm has acted illegally.

In *AKZO*, the Commission relied on pricing below ATC with evidence of an exclusionary strategy to find predation. In *France Telecom/Wanadoo*, the Commission relied on pricing below AVC and pricing above AVC but below ATC, each practised during different time periods, to find predation. In *TetraPak II*, the Commission relied on pricing below AVC and below direct variable cost.

In the *Deutsche Post* case,⁷ the European Commission applied an LAIC cost standard. UPS, the complainant, had accused Deutsche Post of selling its parcel service (a deregulated activity) at below-cost prices to drive out competitors from the market. Deutsche Post was accused of cross-subsidizing losses from such below-cost parcel sales from profits made in its reserved postal services (i.e., still subject to a legal monopoly). The analysis of the European Commission focused on the long run incremental costs of parcel services and whether Deutsche Post covered these costs.⁸ The test was whether Deutsche Post covered its long run costs which it incurred incrementally for offering this parcel service (i.e., excluding common fixed costs).

- (ii) ***If more than one cost measure can be applied in any individual case, please explain why and whether, in practice, this has raised issues.***

The pricing behaviour may vary over time. In *France Telecom/Wanadoo*, for example, the Commission found that Wanadoo had priced below AVC for the period March-August 2001 and above AVC but below ATC for the period of August-October 2001. However, the Commission had evidence

⁶ See also the definitions provided in the Article 82 Discussion Paper, ¶ 64.

⁷ Case COMP/35.141, *Deutsche Post*, 2001 O.J., L125/27.

⁸ See also *Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector*, 1991 O.J. C233/02, ¶¶ 102-110.

that the pricing was part of a strategy to foreclose and therefore found the pricing over the whole period abusive.

This has, as far as we know, not raised issues.

(d) *If price must be shown to be below cost, for which of the dominant firm's sales must this be shown?*

(i) *Is the only relevant comparison between the cost measure and the dominant firm's average price for all of its sales in the relevant market?*
Yes/**No**

(i) *If no, over which of the dominant firm's sales can cost be compared?*

As far as we can tell, the below-cost price can be applied not only to all sales, but also to specific units or to specific classes of customers. In these instances, the relevant price to be taken into consideration is the price of the specific units or the one applied to the specific class of customers.

See also with regard to the specific targeting of customers of competitors or new entrants, the Article 82 Discussion Paper, ¶ 118.

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

(i) *If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement.*

According to the Article 82 Discussion Paper, above ATC pricing could in "exceptional circumstances" lead to a finding of abuse. The Discussion Paper provides two examples from the case law. In *Compagnie Maritime Belge*,⁹ the Commission found an abuse where a shipping company which was part of a liner conference (and held to be collectively dominant on the routes governed by that conference) selectively cut prices in order to match those of a new entrant. This practice is referred to as "fighting ships", i.e., vessels used by the liner conference to sail in competition with a non-conference carrier on a line governed by the liner conference. Losses were shared between liner conference shippers. The Commission showed a clear strategy to exclude or marginalize non-conference shipping companies, including a plan to share losses.

Another example provided in the Article Discussion Paper is where a dominant firm prices above the ATC but below the ATC of a new entrant, (ii) the new entrant will inevitably operate initially at a cost disadvantage (start up costs, initial pricing below minimum efficient scale) but would be able to become as efficient as the incumbent firm over time, (iii) proof that entry is prevented or eliminated as a result of the price cuts.¹⁰

⁹ Joined Cases C-395/96P and C-396/96P, *Compagnie Maritime Belge*, 2000 E.C.R I-1365. This is a judgment upholding an appeal against a judgment of the Court of First Instance, which itself rejected an appeal against Commission Decision TACA of 16 September 1998, Case IV/35.134, 1999 O.J. L95/1.

¹⁰ Article 82 Discussion Paper, ¶¶ 128-129.

- (f) *If prices do not have to be below a cost benchmark to be considered predatory, please explain the circumstances under which the firm's prices are considered predatory.*

See above, the introduction to question 3. There must likely be a clear strategy to foreclose and a high likelihood of negative effects to be effective. We believe that such cases will be very rare.

4. *To be unlawful, must the alleged predatory pricing occur in the market in which the firm holds a dominant position/substantial market power? Yes/**No***

- (a) *If no, please explain.*

Predatory pricing has been dealt with as an abuse under Article 82 EC Treaty also when the dominant firm has applied predatory pricing in a market other than that where it holds a dominant position. Examples include *AKZO* and *TetraPak II*. For example, in *AKZO*, *AKZO Chemie* was accused of predating in the market of flour additives in order to protect its dominance in the adjacent market for organic peroxides.

Price reductions offered on a market different from the market where the firm in question is dominant may be caught by Article 82 EC Treaty if they have the effect of protecting or strengthening the firm's dominance in the dominated market.

5. *Apart from the cost criteria referenced in question 3 above, must other objective criteria, such as the duration or continuity of the pricing behaviour, be demonstrated for a finding of liability under a predatory pricing theory? **Yes**/No*

- (a) *If so, please explain. For example, if the behaviour must be sustained over a certain time period, why, and for what period?*

Simple below-cost price behaviour is not sufficient to prove predation. The Court of Justice, in *AKZO*, confirmed that a predation offence includes below cost pricing and a strategy to foreclose.¹¹ Duration or continuity is likely to be an important factor. In *AKZO*, the continuity of prices below ATC to some customers was seen as evidence of a strategy to predate.¹² Very short-term below-cost pricing is unlikely to be found predatory. For example promotional pricing or clearing of perishable goods are mentioned as indicative of predatory pricing, even if the actual sales occur below AAC or AVC.¹³

The Article 82 Discussion Paper notes that on the basis of objective factors it needs to be shown that the pricing of the dominant firm has a predatory intent, i.e., it is part of a strategy or plan to foreclose. This can be shown with the help of various elements, which individually or together may prove such a strategy or plan. The Discussion Paper notes the following elements that may prove to be of particular relevance: direct evidence of intent, evidence that firm recognizes that the conduct may only make sense if part of a predatory strategy, the actual or likely exclusion of the prey, whether certain customers are particularly targeted (in particular customers of the prey or likely customers of the prey), whether the dominant firm incurs specific costs to engage in the predation, e.g., capacity expansion which only makes sense

¹¹ *AKZO*, Case 62/86, ¶ 74.

¹² *AKZO*, Case 62/86, ¶ 98-109.

¹³ In this sense, see also the Article 82 Discussion Paper, ¶¶ 104-105.

in the context of predation, the scale, duration and continuity of the low pricing, the concurrent application of other exclusionary practices, the possibility of the dominant company to offset its losses with profits on other sales and the possibility of recouping the losses in the future. These elements are also deemed indicative of a likely effect.¹⁴

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

(a) *Are cost data used? **Yes/No***

(i) *If so, are cost data from the firm used? **Yes/No***

Cost data will be an important part of the predatory pricing case. That is shown by past case law.

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

(i) *If so, please specify the circumstances.*

Cost data of “apparently efficient competitors” can be used whenever reliable cost data for the dominant firm are not available. When the case is argued on the basis of cost data provided by competitors, the dominant undertaking may rebut by showing that it is or was actually not pricing below the appropriate cost benchmark.¹⁵

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

Any direct or indirect relevant evidence may be used. Besides cost data, *direct* evidence of a predatory strategy can consist of documents from the dominant company, such as a plan illustrating the intention to exclude a rival or evidence of threats of predatory action.¹⁶ For example, in *France Telecom/Wanadoo*, the Commission relied for the period during which Wanadoo priced below ATC but above AVC on a number of internal documents seized at Wanadoo’s premises, proving that Wanadoo had followed a strategy of ‘pre-emption’ for the high speed internet access market.

Indirect evidence may include the following elements, according to the Article 82 Discussion Paper: Does the pricing behaviour only make sense as part of predatory strategy or are there also other reasonable explanations? Is there an actual or likely exclusionary effect? What are 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 achieve entry? Are certain customers selectively targeted? Is there concurrent application of other exclusionary practices? Does the dominant company have the possibility of offsetting its losses with profits earned on other sales? Does it have the possibility of recouping the losses in the foreseeable future through high prices? Can predation on one market have a reputation effect on other markets? Is the prey particularly dependent on external financing and does the prey have counter strategies.¹⁷

¹⁴ Article 82 Discussion Paper, ¶ 112.

¹⁵ Article 82 Discussion Paper, ¶ 103.

¹⁶ Article 82 Discussion Paper, ¶¶ 113-114.

¹⁷ Article 82 Discussion Paper, ¶¶ 115.

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

According to the *AKZO* judgment, prices below AVC are a clear indicator of predation, since every sale would generate a loss for the dominant firm.

*“Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.”*¹⁸ (emphasis added)

That has been confirmed recently by the *France Telecom/Wanadoo* judgment.¹⁹

Once it is established that the price charged is below AVC (or AAC), this will be regarded by the Commission as a clear indication of a conduct entailing a sacrifice (if not meant to reduce losses in the short term).

- (a) If yes, is this presumption rebuttable or irrebuttable? Please explain.

N.A.

- (b) If the presumption is rebuttable, what must be shown to rebut the presumption?

N.A.

8. Is there a “safe harbour” from a finding of predatory pricing for pricing above a particular cost benchmark? Yes/**No**

- (a) If yes, please explain, including the terms of the safe harbour.

There is no “safe harbour” strictly speaking, although pricing above ATC will normally not constitute an abuse.

9. Is recoupment (obtaining additional profits that more than offset profit sacrifices stemming from predatory pricing) required for a finding of liability under predatory pricing rules in your jurisdiction? Yes/**No**

The European Courts and the European Commission have held that it is not necessary to provide separate proof of recoupment in order to find an abuse of dominance.

In particular, in the *Tetra Pak II* judgment, the European Court of Justice held that it would not be appropriate, in order to establish that pricing is predatory, to request proof that the dominant undertaking has a realistic chance of recouping its losses.²⁰ That has been confirmed recently by the *France Telecom/Wanadoo* judgment.²¹

However, recoupment is not relevant. The application of Article 82 requires consumer harm and therefore if proven that recoupment is not possible that would be relevant and preclude

¹⁸ *AKZO*, Case C-62/86, ¶ 71.

¹⁹ *France Telecom/Wanadoo*, Case T-340/03, ¶ 197.

²⁰ *TetraPak II*, Case C-333/94P, ¶ 44.

²¹ *France Telecom/Wanadoo*, Case T-340/03, ¶ 130.

the finding of an infringement. The case law must be understood to mean that recoupment may be presumed. According to Article 82 Discussion Paper, since dominance (and the resulting assumption that sufficiently high entry barriers exist) is a prerequisite for finding a predatory pricing abuse, it is logical to presume, without separate proof, that recoupment is likely.²²

Please note that, according to the Article 82 Discussion Paper, the likelihood of recoupment is seen as one of the circumstances which may be relevant to prove predatory intent (assuming there is no direct evidence of such intent).²³ Moreover, the Discussion Paper allows the defendant to prove that recoupment is not possible and therefore consumers will not be harmed. If that evidence can be put forward, no infringement should be found.²⁴

So, for pricing above AVC with no direct evidence of predatory intent, proof of recoupment will not be irrelevant.

If so:

- (a) *Is this assessment conducted separately from the analysis of the firm's market power and the predation? Yes/**No***

Not relevant.

- (b) *What factors are employed in assessing recoupment in your jurisdiction?*

Not relevant.

- (c) *Is there a specific recoupment calculation or amount to be shown? Yes/**No***

- (i) *If so, what is this?*

Not relevant.

- (d) *Is there a relevant time period for recoupment? Yes/**No***

- (i) *If so, what is it?*

Not relevant.

- (e) *Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? **Yes/No***

- (i) *If so, please explain and provide relevant examples.*

If predation is used to establish a reputation of an aggressive/pre-emptive competitor, the benefits of such strategy may be recouped in another market than the one where predatory pricing has been done.

- (f) *What degree of likelihood of recoupment is required (e.g., possibility or probability)?*

- (i) *Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment.*

We understand the case law of the European Commission and the European Courts to mean that the *ex ante* perspective towards the likelihood of recoupment will be relevant. If the predator believes that

²² Article 82 Discussion Paper, ¶ 110.

²³ Article 82 Discussion Paper, ¶ 112.

²⁴ Article 82 Discussion Paper, ¶ 123.

recoupment is likely, that will be sufficient. If there is evidence of a predatory strategy, it might be assumed that the dominant firm expects that recoupment, in one way or another, is likely. Otherwise, it would not make commercial sense to engage in the below cost pricing. Therefore, the likelihood of recoupment is linked closely to the proof of predatory intent. We would expect that proof that recoupment was not possible will only be allowed if there is no clear evidence of a predatory strategy.

Moreover, the failure by the dominant firm to succeed in the abusive strategy (i.e., foreclosure) is not sufficient to exclude an infringement.²⁵ Thus, evidence that recoupment has not happened will not be sufficient to exclude liability.

10. *Is the firm's intent relevant in predatory pricing cases? Yes/No (but please see below)*

- (a) *If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples.*

As a general point, the European Courts have underlined that the concept of abuse is an objective one, meaning that a behaviour can be abusive even where the dominant undertaking had no intention of infringing Article 82 EC.

Such an "abusive" intent is not a prerequisite for finding an infringement of Article 82. However, a predatory pricing abuse does require proof of a foreclosure strategy by way of presumption or otherwise. Thus, the Commission (or any other relevant authority or plaintiff) will have to prove a strategy or plan for eliminating or marginalizing a competitor and this will imply, inevitably, a showing of intent.

The Court of First Instance has recently reiterated this case law in the *Wanadoo* judgment,²⁶

"It is clear therefore that, in the case of predatory pricing, the first element of the abuse applied by the dominant undertaking comprises non-recovery of costs. In the case of non-recovery of variable costs, the second element, that is, predatory intent, is presumed, whereas, *in relation to prices below average full costs, the existence of a plan to eliminate competition must be proved.* According to Case T-83/91 *Tetra Pak v Commission*, that intention to eliminate competition must be established on the basis of sound and consistent evidence."

- (b) *If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment -- are not demonstrated, does intent matter? Yes/No*

- (i) *If so, please explain.*

Not relevant.

11. *In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability? Yes/No*

²⁵ *Compagnie maritime belge*, Joined Cases T-24/93 to T-26/93 and T-28/93, ¶ 104 and *Irish Sugar*, Case T-228/97, 1999 E.C.R. II-2969, ¶ 191.

²⁶ *France Telecom/ Wanadoo*, Case T-340/03, ¶ 197.

- (a) *If yes, please explain the elements assessed (e.g., exit or delayed entry of competitors, price increases, prevention or delay of price decreases) and the types of evidence required to do so.*

The assessment of predation should not focus only on the dominant firm pricing below the relevant cost benchmark, but also on whether such a behaviour leads to anticompetitive foreclosure, and thus is likely to harm consumers.

If there is direct evidence of a strategy or plan to foreclose (or it may be legally presumed that such strategy exists), it will be assumed that such foreclosure is likely and that consumer harm will follow. If there is no direct evidence but only indirect evidence, and if the pricing behaviour only makes commercial sense as part of a predatory strategy and there are no other reasonable explanations, that will normally suffice to show a strategy to predate. In such a case it will not be necessary to show that a foreclosure effect is likely.²⁷

In all other cases, it will be necessary to show that a foreclosure effect is likely in view of the scale, duration and continuity of the below-cost pricing before predatory pricing can be found to exist.²⁸

In predatory pricing cases, consumers will benefit short term from lower prices, but they will likely suffer long term if the dominant firm has eliminated, marginalized or disciplined a competitor, or prevented entry, thus strengthening its dominant position.

Justifications and Defences

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

A predatory pricing behaviour may not be regarded as abusive in case the dominant firm can provide an objective justification for its behaviour or can demonstrate that its conduct results in efficiencies which outweigh the negative effects.

In its Article 82 Discussion Paper,²⁹ the European Commission has summarized the possible defences applicable in relation to predatory pricing behaviours:

- an initial justification, which is unlikely to apply for pricing below AAC, is that the dominant undertaking is minimising its losses in the short run. This may be related, for instance, to a restart-up cost or to a change in market conditions (i.e. excess capacity, entry of a rival);
- a meeting competition defence can normally not be applied to abuses concerning pricing below AAC, as the dominant undertaking is deliberately incurring losses to hinder the rival's entry in the market;
- finally, as for efficiencies, such defence cannot in general be applied to predatory pricing behaviours, as it is often difficult for the dominant firm to prove that the efficiencies really outweigh the negative foreclosure effects of the pricing behaviour

²⁷ Article 82 Discussion Paper, ¶ 116.

²⁸ Article 82 Discussion Paper, ¶ 117.

²⁹ Article 82 Discussion Paper, ¶¶ 130-133.

and, moreover, that predation is the least restrictive way to achieve such efficiencies.

- (a) *What is the standard of proof applicable to these defences? Who bears the burden of proof? What evidence is required to demonstrate that these defences or justifications are met?*

The burden of proof will always be on the dominant firm.

In case of efficiencies, the dominant firm should demonstrate with a sufficient degree of likelihood that (a) efficiencies will be produced as a consequence of the conduct, (b) the conduct is necessary to realize the efficiencies, (c) the likely efficiencies outweigh the likely negative effects on competition, (c) the conduct does not eliminate competition.³⁰

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).*

Not available to us.

- (b) *The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.*

On the basis of publicly available information, the European Commission has issued three decisions in the past ten years which found an infringement under Article 82 EC Treaty relating (at least in part) to predatory pricing: *Irish Sugar* (1997), *United Parcel Service/Deutsche Post* (2001) and *Wanadoo Interactive* (2003).

On December 2003, the European Commission announced that it had sent a statement of objections to TeliaSonera (Sweden), alleging it had abused its dominant position in the market for the provision of high-speed Internet access in relation to contracts to construct a new fibre-optic network for the provision of broadband services.

“The Commission takes the view that TeliaSonera’s bid for that contract was *intentionally set below cost* and did not allow the operator to recover the investments and expenses derived from the provision of infrastructures and services contained in the contract. By setting such a low price, TeliaSonera *prevented the development of alternative infrastructure and the entry of competing service providers*. TeliaSonera thereby strengthened its dominant positions in the markets for the provision of local broadband infrastructure and the provision of high-speed Internet access.” (*emphasis added*)³¹

- (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”).*

Not available.

³⁰ Article 82 Discussion Paper, ¶ 133.

³¹ Commission Press Release IP/03/1797 of 19 December 2003.

- (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.*

The following Commission prohibition decisions were appealed to the European Courts:

- Case T-228/97, *Irish Sugar plc v Commission* 1999 E.C.R. II-2969
The European Court of First Instance annulled the finding that Irish Sugar had applied selectively low prices to potential customers of a competitor on factual grounds. However, the Court upheld the finding that Irish Sugar had been guilty of granting selective rebates to particular customers.
- Case T-340/03, *France Télécom (formerly Wanadoo Interactive) v Commission* Judgment, Judgment of 30 January 2003, not yet published.

The European Court of First Instance dismissed Wanadoo's appeal in its entirety. An appeal was brought on 16 April 2007 by France Télécom SA against the judgment of the Court of First Instance (Case C-202/07 P).

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

Breaches of EC antitrust law can represent, in the context of private enforcement, a basis for private parties' claims for damages before their national courts.³²

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

Not applicable.

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

Predatory pricing is a civil violation under EC antitrust law. The European Commission is entitled to impose on a dominant firm abusing its dominant position an administrative fine not exceeding 10% of its total turnover, having regard to the gravity and the duration of the infringement.³³ National competition authorities may impose similar fines (as specified in their national laws).

The European Commission is also empowered to order that an infringement be terminated, and may also impose interim measures.³⁴ Remedies may also take the form of commitments offered by the dominant firm, in order to avoid recurrence of the infringement.³⁵ Finally, it may impose "structural remedies" are a new feature and can be adopted only where there is "no equally effective behavioural remedy" or where "any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy". Therefore, structural remedies should merely be imposed when they are proportionate and necessary to bring the infringement to an end. Clearly the characteristics of the specific industry involved will influence the decision on the most appropriate remedy, together with some considerations on the durability of the remedy through time.

³² Apart from damages actions, private enforcement can take also the form of actions for nullity or actions for injunctive relief. Case C-453/99, *Courage v Crehan* [2001] ECR I-6297; Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055.

³³ Council Regulation No. 1/2003, Article 23 (2) and (3).

³⁴ Council Regulation No. 1/2003, Article 8.

³⁵ Council Regulation No. 1/2003, Article 9.

An example of a settlement prior to the entry into force of Article 9 of Regulation 1/2003 is the *Deutsche Post* case,³⁶ where the company agreed to structurally separate its commercial parcel services by creating a distinct, independent legal entity.

(a) *If both, what are the differences in the criteria applied to these categories?*

Not applicable.

(b) *On what basis does the agency choose to bring a criminal or civil case?*

Not applicable.

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.*

Please see the reply by the European Commission.

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.*

As explained above, in December 2005 the European Commission published for consultation a Discussion Paper on the application of Article 82 of the EC Treaty to exclusionary abuses by dominant firms. The Discussion Paper sets out a proposed analytical framework, and in particular, methodologies for the assessment of exclusionary abuses such as predatory pricing, rebates, tying and refusal to supply which could assist in identifying those cases where competition would be most likely to be harmed. It also considered whether, and how, efficiencies should be taken into account as part of an Article 82 assessment.

The Discussion Paper in itself has not legal effects, but the European Commission is expected to adopt further Guidelines on the application of Article 82.

(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).*

³⁶ *Deutsche Post* case, *ibidem*.