

**U.S. FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF
JUSTICE**

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.

Section 2 of the Sherman Act, 15 U.S.C. § 2, the pertinent U.S. federal antitrust law governing single firm conduct, is generally worded and does not attempt to give the definition of, or requirements for, "predatory pricing" in its text. Nor have the U.S. federal antitrust agencies issued guidelines addressing this practice. Section 2 of the Sherman Act provides in pertinent part that it is illegal for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2.

Section 5 of the FTC Act, 15 U.S.C. § 45, enforced by the Federal Trade Commission ("FTC"), also applies to predatory pricing. Violation of Section 2 of the Sherman Act also violates Section 5 of the FTC Act, which prohibits unfair methods of competition.

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

The criteria are (1) pricing below an appropriate measure of cost, and (2) a dangerous probability of recouping those losses.

The U.S. Supreme Court set forth the criteria in *Brooke Group Ltd. v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993). Specifically, the Court said that "[F]irst, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* at 222.

The second requisite the Court set forth is recoupment, that is “a demonstration that the competitor had a . . . dangerous probability, of recouping its investment in below-cost prices.” *Id.* The Court went on to state that “[R]ecoupment 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.” *Id.* at 224.

In the context of predatory bidding whereby a purchaser bids up the market price of an input so high that rival buyers cannot survive, thus acquiring monopsony power, the criteria are the same.

“A plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. That is, the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs. ... A predatory-bidding plaintiff also must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.” *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069, 1078 (2007).

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

Yes. The Supreme Court stated that an “appropriate” method of measuring costs should be employed, without further specifying a particular measurement formulation. *Brooke Group* at 222. Average avoidable cost was used in the U.S. Department of Justice’s (DOJ) case against American Airlines. *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003)(“AMR”).

- 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)			Some courts have indicated that marginal cost is an appropriate measure of cost, though it has not been used in any case.
<u>Below average variable cost</u> (cost that varies with output)	Yes		Many court decisions have indicated that

			average variable cost is an appropriate measure of cost, and it has been used by courts more than any other measure.
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)	Yes		DOJ recently used this measure in <i>AMR</i>, comparing the costs and revenues over the incremental sales made by the alleged predator. See response to questions 3.a. and 3.d.
<u>Below average long run incremental cost</u> (average variable costs and product-specific fixed costs)		No	
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)		No	As discussed more fully in question 8, the U.S. antitrust agencies view pricing above average total cost as a safe harbor. In addition, relatively recent court decisions have explored ways of stating a broader safe harbor for pricing that is below average total cost.
<u>Other measure of cost</u> (Please identify)		No	

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

The courts generally appear to adopt the standard definitions used in economics:

Marginal cost is the increase in total cost attributable to producing the last unit actually produced.

Average variable cost is the total variable cost divided by the number of units produced. Courts have struggled with the problem of determining which costs are variable because that depends on the time frame for the analysis and the magnitude of the change in output considered.

Average avoidable cost is the total change in cost from changing production by any given number of units divided by that number of units.

Average long run incremental cost is a concept created to analyze multi-product firms when some costs cannot be uniquely attributed to a particular product. Average long run incremental cost is the total fixed and variable cost uniquely attributable to a particular product divided by the number of units of that product produced.

Average total cost is total cost divided by the number of units produced.

- c. Is the same cost measure applied in all cases? Yes/No

No. As noted in the chart above, courts have used different measures at times. The U.S. antitrust agencies have not challenged pricing as predatory unless prices fall below some form of avoidable or incremental costs. See response to question 13.

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

Neither the courts nor the U.S. antitrust agencies apply different cost measures on the basis of industry in the United States.

- 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.

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

The courts have not clearly settled this issue. They have consistently held that making a few sales below costs is insufficient to violate the antitrust laws, and they have tended to compare price with costs over the dominant firm's total sales. In the most recent case on point brought by DOJ, DOJ compared price with costs on the incremental sales made by the dominant firm above those it was making prior to the alleged predation episode. The court of appeals indicated that this could be a valid comparison, although it held that the evidence failed to demonstrate that prices were below cost on the incremental sales. *United States v. AMR Corp.*, 335 F.2d 1109, 1116-21 (10th Cir. 2003).

- 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

See response to d., above.

1. If no, over which of the dominant firm's sales can cost be compared?

See response to d., above.

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

No. The Supreme Court's decision in *Brooke Group* indicated that this theory of liability is not viable.

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

Inapplicable

- 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.

Inapplicable.

- 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

Yes.

- a. If no, please explain.

Inapplicable.

- 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? Yes/No

Yes.

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

In addition to below-cost pricing, there must be a dangerous probability of recouping losses. Because pricing behavior is analyzed in the context of a monopolization charge, there must be a demonstration that competition has been affected. "If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market." *Brooke Group*, 509 U.S. at 225. While there is no firm rule about duration, a "one day" sale or the distress sale of perishable goods is unlikely to have the requisite effect on competition.

- 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

Yes.

- i. If so, are cost data from the firm used? Yes/No

Yes.

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

No.

- i. If so, please specify the circumstances.

No other cost data than cost data from the firm.

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

Inapplicable.

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

No. An effect on competition and evidence that the alleged predator will be able to recoup its losses must also be demonstrated.

- a. If yes, is this presumption rebuttable or irrebuttable? Please explain.
 - b. If the presumption is rebuttable, what must be shown to rebut the presumption?
8. Is there a “safe harbor” from a finding of predatory pricing for pricing above a particular cost benchmark? Yes/No

Yes.

- a. If yes, please explain, including the terms of the safe harbor.

The U.S. antitrust agencies believe there is a safe harbor from predatory pricing claims under the federal antitrust laws when pricing is above average total cost. Given the language of *Brooke Group* focusing on incremental cost, 509 U.S. at 223, courts and scholars also believe there is a safe harbor for above-average-total-cost pricing, see, e.g., *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 938 (6th Cir. 2005); *United States v. AMR Corp.*, 335 F.3d 1109, 1117 (10th Cir. 2003); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999) (by implication); 3 Areeda & Hovenkamp, *Antitrust Law* ¶ 723d2 (“Dicta in the Supreme Court *Brooke* decision appears to have settled this matter for all prices higher than average total cost”). Indeed, since *Brooke Group*, no firm has been found liable for predation if its prices were shown to be above average variable cost.

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

Yes.

If so:

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

Yes.

- b. What factors are employed in assessing recoupment in your jurisdiction?

In its *Brooke Group* decision, 509 U.S. at 225, the Supreme Court said that a recoupment showing "requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." The presence or absence of barriers to entry may well determine the ability of the firm to maintain prices at the level necessary to achieve recoupment. A key factor is the total amount apparently sacrificed by selling below cost. If this is sufficiently large in relation to the size of the market, recoupment is infeasible under any circumstances, and it can be inferred that the aggressive pricing was not an investment in future market power. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592-93 (1986) (observing that recoupment might be impossible when the "alleged losses have accrued over the course of two decades"). In other cases, it might be possible to recoup the profit apparently sacrificed, and an inquiry is made into potential rewards from excluding competition. The relevant factors also include elements of market structure, particularly barriers to entry, and other factors bearing on the ability to achieve higher post-predation profits.

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

No.

i. If so, what is this?

- d. Is there a relevant time period for recoupment? Yes/No

No.

i. If so, what is it?

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

Yes. While this issue has not yet been definitively resolved in the U.S. courts, the U.S. antitrust agencies believe that recoupment may occur in markets other than those in which the predatory pricing occurs.

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

Since *Brooke Group*, very few courts have had the opportunity to consider whether reputation effects in markets other than the one in which the alleged predatory pricing is occurring can be taken into account when assessing whether recoupment is likely. The Tenth Circuit in *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1549 n.6 (10th Cir. 1995), seemed to recognize that a firm might engage in predation in one market to prevent the target of the predation from expanding to compete in a separate market. Similarly, the United States Court of Appeals for the Third Circuit in *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1196 n.4 (3d Cir. 1995), explained that predation may make sense when a monopolist operates in several related markets because “the predator needs to make a relatively small investment (below-cost prices in only a few markets) in order to reap a large reward (supracompetitive prices in many markets).” (Accord 3 Areeda & Hovenkamp, Antitrust Law ¶ 727g (a firm that operates in numerous markets may predate in only one to acquire or maintain “higher prices in the others as well”); see also Bolton et al. at 2267–68 (recoupment “may occur in either the predatory market or in a strategically related market where the effects of the predation are felt”). On the other hand, the trial court in *U.S. v. AMR Corp.*, rejected, both as a matter of law and of fact, consideration of reputation effects in markets other than the one in which the alleged predatory pricing was occurring when assessing whether there was a strong probability of recoupment in that case. 140 F. Supp. 2d at 1214-15. (The Tenth Circuit did not address this issue on appeal.)

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

A “dangerous probability” is required. See response to question 2.

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

Few cases have dealt with recoupment because prices generally have not been shown to be below cost. One example of the courts utilizing the recoupment requirement to dispatch the claim without considering whether price was below the appropriate measure of cost is *AA Poultry Farms, Inc., v. Rose Acres Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) (Easterbrook, J.). In *AA Poultry*, the ease of entry and low market shares were such that “market structure . . . made recoupment impossible.” *Id.* at 1403.

10. Is the firm’s intent relevant in predatory pricing cases? Yes/No

No.

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

No.

- i. If so, please explain.

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

Yes. "A claim under § 2 of the Sherman Act requires proof of two elements: (1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means..." *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 782 (6th Cir. 2002). As a first step in the recoupment phase of the case, there must be evidence that the below cost pricing has created or maintained monopoly power, and secondarily, it must be shown that market conditions make it likely that prices can be sustained at a level sufficient to recoup the lost profits subsequently. Only if those two conditions are met, can competition and consumers be harmed.

- 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.

See above.

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.

Defenses might include short term and intermittent price cuts for promotional reasons.

- a. What is the standard of proof applicable to these defenses? Who bears the burden of proof? What evidence is required to demonstrate that these defenses or justifications are met?

If below cost pricing and likelihood of recoupment are shown, a defendant then would be required to demonstrate that these justifications are met. With respect to weekly promotional discounts and perishability discounts, for example, the defendant typically would not have difficulty meeting this burden, because such discounts are inherently very short term and thus likely will not have a substantial effect on competition.

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).

Over the past 10 years, at least 2 substantial unilateral conduct investigations conducted by DOJ have focused on allegations of predatory pricing. FTC had none.

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

As noted below, DOJ litigated a predation case against American Airlines.

- 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").

Neither DOJ nor FTC issues clearance decisions. DOJ conducted one investigation in which it did not bring a case.

- 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.

As described more fully below, DOJ brought a predation case against American Airlines. It lost the case in court. *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

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

Yes. In recent years all but one of the predatory pricing cases in the U.S. have been brought by private parties rather than the U.S. antitrust enforcement agencies. None can be considered authoritative other than the cases that have resulted in a Supreme Court opinion.

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

See 16.a., below.

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

It is a civil offense. The Sherman Act provides for the possibility of criminal prosecution, but the Sherman Act is only enforced civilly by DOJ outside the cartel area, and is only enforced civilly, pursuant to section 4 of the Clayton Act,

by private plaintiffs. The FTC Act is only enforced civilly, by the agency – there is no private right of action under the FTC Act.

- a. If both, what are the differences in the criteria applied to these categories?

See above.

- b. On what basis does the agency choose to bring a criminal or civil case?

DOJ and the FTC only bring civil actions in this area. Both agencies use the legal criteria set forth in response to question 2, above.

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.

1. Brooke Group Ltd. v. Brown & Williamson Tobacco, 509 U.S. 209 (1993)

Brooke Group involved a price war between rival cigarette manufacturers. The plaintiff, Liggett, contended that a competitor had “cut prices on generic cigarettes below cost . . . to force Liggett to raise its own generic cigarette prices and introduce oligopoly pricing in the economy segment,” 509 at 212. Liggett sued on the grounds that volume rebates by its competitor amounted to price discrimination under the Robinson-Patman Act and that the rebates were integral to a predatory pricing scheme ultimately designed to preserve supracompetitive profits on branded cigarettes. The case was not a Sherman Act, Section 2, proceeding but established that there are “two prerequisites to recovery” where the claim alleges predatory pricing under Section 2. A plaintiff must prove that (1) the prices were below cost in the short-term and (2) the seller “had . . . a dangerous probability, of recouping its investment in below-cost prices.” *Id.* at 222. A plaintiff’s proof on recoupment, in turn, would require a showing that a) losses inflicted on the target would cause it to succumb, b) this would injure competition in the relevant market; and c) market conditions would allow prices to rise to a supracompetitive level for a period sufficient to allow the predator to recover its “investment” in the predatory scheme. The Court affirmed the lower courts’ findings that the requisite showing had not been made. The plaintiff’s burden was enhanced because the recoupment would have required its tacit coordination with other cigarette manufacturers to maintain prices at the necessary level.

2. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007)

The allegation in this case was that the defendant had bid up the price of logs so that a sawmill was unable to buy them profitably and was forced to exit the business. The court of appeals affirmed a jury verdict for the plaintiff, in part on the theory that the concerns expressed in Brooke Group did not apply since predatory bidding did not lead to lower prices for consumers. The Supreme

Court disagreed, finding that “Predatory-pricing and predatory-bidding claims are analytically similar... Both claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes...” (127 S.Ct. at 1076-77) and should receive similar legal treatment. The Court noted that, like predatory pricing, predatory bidding schemes are rarely tried and require firms to suffer certain losses in hopes of future gains; that sellers legitimately use price to compete for purchasers just as buyers use price to compete for inputs; and that a failed predatory bidding scheme might benefit consumers if an increase in the purchase of inputs led to an increase in outputs and consequently lower prices. The Court also observed that a successful predatory pricing scheme ultimately leads to higher consumer prices, while a predatory bidding scheme could succeed without any effect on consumer prices. The plaintiff did not contend that it had met the Brooke Group standard and the case was remanded for further proceedings.

3. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)

The case involved a claim that a large group of Japanese companies and their American subsidiaries had entered a decades long conspiracy to drive two American companies out of the consumer electronic products market. The allegation was that the defendants had contrived to maintain artificially high prices for televisions in Japan and low prices for televisions exported to the United States. The district court granted summary judgment to the defendants, the circuit court reversed, and the Supreme Court in turn reversed on the grounds that the plaintiffs had not adduced sufficient evidence in support of their theory. The case is notable for its adoption of a skeptical attitude towards predatory pricing claims that has informed subsequent judicial responses:“... [T]here is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.” 475 U.S. at 589.

4. U.S. v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003)

In AMR, the United States brought suit against American Airlines (“American”) for monopolizing and attempting to monopolize airline passenger service to and from the Dallas/Ft. Worth, Texas International Airport. The government charged that American repeatedly sought to drive small, start-up airlines out of DFW by saturating their routes with additional flights and cutting fares. At its root, the government’s complaint alleged that American: (1) priced its product on four DFW city-pair routes below cost, and (2) intended to recoup these losses by charging supracompetitive prices either on those routes or on other routes where American stood to exclude competition by means of American’s reputation for predation. (The Department of Justice’s appellate brief can be found at <http://www.usdoj.gov/atr/cases/f9800/9814.htm>). The trial court found that the government had failed to demonstrate the existence of a genuine issue of material fact as to either of these allegations and granted summary judgment in favor of American, 140 F. Supp. 2d 1141 (D. Kan. 2001). The Tenth Circuit affirmed the trial court’s granting of summary judgment to American because “the government has not succeeded in establishing . . . pricing below an

appropriate measure of cost,” 335 F.3d at 1120. However, the court “decline[d] to dictate a definitive cost measure for all cases,” *Id.* at 1116.

5. Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005)

This case also involved the response of a dominant carrier to the entry of a low cost carrier. Prior to the new entry, Northwest’s lowest unrestricted fare on the first route was \$411, its lowest restricted fare \$189 and it flew 8.5 flights a day. When Spirit’s service started to attract significant business, Northwest lowered all its fares on the route to \$69, increased its frequency to 10.5 flights a day and added a 289-seat plane that could carry three times as many passengers as Spirit’s entire capacity on the route. The pricing and capacity response of Northwest on the second route was similar, and within months Spirit abandoned both routes.

The district court granted summary judgment for Northwest but the appellate court reversed, holding that a reasonable trier of fact could find that a) the relevant product market was local low-fare passengers, b) the two relevant geographic routes was highly concentrated, c) Northwest possessed overwhelming market share, d) the barriers to entry were high, and that e) once Spirit exited the market, Northwest was able to raise its prices to recoup the losses. The analysis would compare the incremental costs for providing the additional capacity to divert these passengers from Spirit on these routes to the incremental revenues attributable to those diverted passengers.

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.

Other than the confirmation in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.* that the same rules apply in predatory bidding cases, there have been no major developments in the criteria that apply to predatory pricing since the Supreme Court decision in *Brooke Group*, and none can be predicted at this time.

- 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).

The primary consideration in agency enforcement decisions is the fact that lowering prices is often the most important aspect of competition and any legal

rules or enforcement decisions that discourage that form of competition would tend to injure consumers.

“...[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. “[We] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.”” *Matsushita Electric Industrial Co., Ltd v. Zenith Radio Corp.*, 475 US 574, 594(1986).

The risk of discouraging beneficial price competition, also reflected in the Brooke Group test, is thus the paramount consideration governing agency and judicial policy in this area.