BALTIC JOURNAL OF LAW & POLITICS
A Journal of Vytautas Magnus University
VOLUME 10, NUMBER 1 (2017)
ISSN 2029-0454

DE GRUYTER OPEN

Cit.: *Baltic Journal of Law & Politics* 10:1 (2017): 124–155
DOI: 10.1515/bjlp-2017-0005

PREDATORY PRICING: A FRAMEWORK FOR ANALYSIS

Raimundas Moisejevas

Professor; Attorney
Mykolas Romeris University, Faculty of Law (Lithuania)

Contact information
Address: Ateities 20, LT-08303 Vilnius, Lithuania
Phone: +370 618 79 947
E-mail address: raimundasm@mruni.eu; raimundas11@yahoo.com

Received: March 26, 2017; reviews: 2; accepted: June 16, 2017.

ABSTRACT

One of the key principles of EU Competition law is a prohibition of the abuse of a dominant position established in the Article 102 of the TFEU. Predatory pricing is one of the forms of the abuse of dominant position. To decide whether the dominant undertaking has referred to predatory pricing it is necessary to check several elements: costs and prices of the dominant undertaking; the possibility to recoup losses; intent; and objective justifications. The Court of Justice, the European Commission and competition institutions in most member states perform extensive analysis of a relationship between costs and prices of a dominant undertaking while dealing with cases on predatory pricing. However, we believe that competition authorities should pay more attention to evaluation and to whether pricing will cause elimination of competitors and damage to consumers. This article critically reviews the framework of the analysis of predatory pricing in the practice of the Court of Justice and the European Commission.

KEYWORDS

Abuse of dominance, predatory pricing, predatory intent, objective justifications, recoupment of losses, pricing below costs, average avoidable costs

INTRODUCTION

From 1890, the courts of the United States began to deal with predatory pricing cases. State institutions of the US especially aimed to protect small undertakings from the establishment of low prices by the dominant undertakings. To recognize the actions of the dominant undertaking as illegal, it was necessary to establish 'predatory' settlement of low prices and damage to competitors.[1] Scholars usually do not try to estimate the beneficial effect of low prices for undertakings and competition. Although claimants won most of the cases concerning predatory pricing, several legal scholars have concluded that the accusations of claimants in many cases were not well grounded.[2] This period is sometimes called the era of populist actions against predation.[3] During that period, the courts of the United States and legal scholars did not manage to create any clear system that would allow evaluating whether certain pricing amounts to predation.[4]

Many lawyers and economists have tried to describe the concept of 'predatory pricing', but a common agreement on the content of this term has not reached.[5] A commission claims that dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short-term, to foreclose or be likely to foreclose one or more of its real or potential competitors with a view to strengthening or maintaining its market power, thereby causing the consumer harm.[6] R. A. Posner proposes to define predation as pricing actions of a dominant undertaking that aim to remove the effective competitor from the market.[7] R. H. Koller claims that predation is a situation in which a large and financially powerful undertaking establishes prices that do not cover costs to eliminate smaller competitors and monopolize the relevant market. To remain competitive a smaller

[1] Carla A. Hills, *Antitrust Advisor* (New York, 1978), 312–313; Austin Cyrus, *Price discrimination and related problems under the Robinson-Patman act*, Revised edition (Committee on Continuing Legal Education, 1954), 46-47; Christine Piette Durrance, "Proposed standards for identifying predation: Williamson's perspective and the Court," *The Antitrust Bulletin* Vol. 55, No. 3 (2010).
[2] Richard H. Koller, "The Myth of Predatory Pricing: An Empirical Study," *Antitrust Law and Economic Review* Vol. 4 (1971): 105. From 1890 until 1971 year, 123 federal cases related to predatory pricing have been investigated in US. Predatory pricing was proved in 95 cases, or otherwise in 75 percent of all the cases.
[3] Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, "Predatory Pricing: Strategy Theory and Legal Policy," *Georgetown Law Journal* Vol. 88 (2000); Paul Jones, "Analyzing Refusal-to-Deal Cases Under Brooke Group's Predatory Pricing Test: The Tenth Circuit Misses the Mark in Christy Sports, LLC v. Deer Valley Resort Co.," *Brigham Young University Law Review* No. 1 (2010).
[4] *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911) (in this case regional reduction of prices was recognized as illegal, without provision of clear rules, how such actions should be analyzed); *See* also, *United States v. Am. Tobacco Co.,* 221 U.S. 106 (1991) (it was established that pricing below costs contradicts to section of the Sherman Act, but it was not explained how predatory pricing is to be analyzed).
[5] Vijaya Nagarajan, "*Predatory pricing: A search for a regulatory standard*," *Working paper series* No. 31 (1987) (Kingswood, N.S.W., Nepean College of Advanced Education, School of Business): 2.
[6] *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02), para. 63.
[7] Richard A. Posner, *Antitrust Law. An economic Perspective* (University of Chicago Press, 1976), 189.

undertaking might be forced to cut prices and sell at a loss.[8] Since the dominant undertaking has substantial financial resources, smaller undertakings might be eliminated from the market. After the elimination of competitors, the dominant undertaking may start to exploit consumers, which must pay a higher price.[9] Ahlborn C. and Allan B. distinguish three core elements that they believe are common to all predatory pricing definitions. First, the predator behaves in a way which, in the short run, is not optimal and which is only rational strategically, by reason of reduced competition in the future; second, the behaviour reduces competition; third, the predator benefits from the reduction in competition in the long run through added market power.[10]

The definitions of predatory pricing provided in judicial practice and jurisprudence are quite similar. We propose the following definition: predatory pricing occurs when the dominant undertaking sets prices lower than the costs of production and excludes competitors or creates additional barriers for new competitors to enter the market and subsequently establishes high prices, which could not have been established without the exclusion of the competitors (or creation of additional barriers), thus causing damage to the consumers.

Usually the Court of Justice focuses on analysis of four key elements in predatory pricing instead of focusing on application of a concept of predatory pricing to the circumstances of the case. Firstly, it analyses whether the price of the products covers all the costs. There are different cost benchmarks: average variable costs, average avoidable costs, average total costs and long run average incremental costs. Secondly, it analyses whether the dominant undertaking by establishment of low prices intends to eliminate competitors from the market, to increase its share in the market. Thirdly, it analyses whether the actions of the alleged predator may exclude competitors from the market and whether dominant undertaking will be able to recoup experienced losses. Fourthly, it analyses whether the predator may justify illegal actions by providing objective justifications. In this article, we will focus on the abovementioned main elements of predatory pricing, since they are analysed in the cases on predation.

This article is structured in accordance with the analysis of the main elements of predatory pricing. Section II covers the main goals of competition law. Section III focuses on pricing below costs. Section IV discusses predatory intent. Section V focuses on recoupment of losses. Section VI is devoted to objective justifications. Section VII provides conclusions.

[8] Richard H. Koller, *Predatory pricing in a market economy* (New York: Arno Press, 1978), 4.
[9] *Ibid*.
[10] Christian Ahlborn and Bill Allan, "The Napp Case: A study of predation?" *World Competition* Vol. 26(2) (2003).

In the article, we aim to identify and critically evaluate the framework of the analysis of predatory pricing used by the Commission, the General Court and the Court of Justice. We also provide some proposals concerning the potential modification of the attitude of the Commission, the General Court and the Court of Justice towards predatory pricing.

1. THE MAIN GOALS OF COMPETITION LAW AND THE PROHIBITION OF PREDATORY PRICING

Protection of consumers is one of the main goals of competition law.[11] The European Commission proposes to focus the enforcement of Article 102 of the TFEU on the evaluation of whether actions of the dominant undertaking negatively affect the market and hurt consumers.[12] It is recognized that Article 102 should protect consumers and ensure effective distribution of the resources instead of simply protecting all the competitors. The Communication of the Commission "Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" stipulates that while applying Article 102 to exclusionary actions of dominant undertakings, the Commission will focus on the conduct that is most harmful to consumers.[13] The Commission aims to direct its enforcement towards ensuring that the market functions properly and consumers benefit from the efficiency. At the same time the Commission believes there is a direct link between protection of the competitors and protection of the consumers, claiming that dominant undertakings should be prohibited from hampering competitors' activities and harming consumers as a result.[14] The Commission believes that effective competition in the market is ensured by "efficient" competitors, i.e. hypothetical competitors that have the same costs as the dominant company.[15] The Commission does not aim to protect all competitors and it is acceptable that the competitors who deliver less to the consumers in terms of price, choice, quality and innovation, may leave the market.[16] Although the Commission pays a lot of attention to the protection of consumers, it does not explain how to determine whether consumers experience loses when competitors are

[11] Raimundas Moisejevas and Ana Novosad, "Some thoughts concerning the main goals of competition law," *Jurisprudencija.* No. 20(2) (2013): 630.
[12] Neelie Kroes (European Commissioner for Competition Policy), "Preliminary Thoughts on Policy Review of Article 82," Speech at the Fordham Corporate Law Institute, New York (September 23, 2005) // http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en. *Antitrust: Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings*, Brussels: 3rd December 2008, IP/08/1877.
[13] European Commission, DG Competition, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses" (December 2005) // http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.
[14] *Communication from the Commission*, *supra* note 6, para 19.
[15] European Commission, DG Competition, *supra* note 13: para 63.
[16] *Ibid*., para 6.

expelled from the market. Most likely the Commission relies on the presumption that actions of the dominant undertaking, which help to eliminate "efficient" competitors, cause damage to the competition and thus also cause damage to the consumers.

While analysing the decisions of the Commission, it is not clear whether the Commission intends to determine the real effect of the actions of the undertakings for the consumers and the market. Former head of the Directorate General for Competition P. Lowe has noted that it is quite difficult to determine the effect to the market, which has been caused by the dominant undertakings. Therefore, according to P. Lowe, in cases related to application of the Article 102, it is necessary to rely on formal criteria.[17] In our opinion, P. Lowe's position does not correspond to the official aspiration of the Commission to direct main attention to the evaluation of the effect that the dominant undertakings caused to the consumers and the market.[18]

In the practice of the Court of Justice and the General Court, there is a lack of consistency as well. In *Österreichische Postsparkasse AG* and *GlaxoSmithKline* cases, the General Court has named the welfare of the consumers the main goal of competition law.[19] Moreover, President of the General Court declared in paragraph 145 of the *IMS Health Inc.* case that the Commission gratuitously established a link between effective competition and the interests of the particular competitors. The President of the General Court claimed that the primary purpose of Article 102 is to prevent the distortion of competition, and, especially, to safeguard the interests of consumers rather than simply protect the position of particular competitors.[20] However, during appeal proceedings the President of the Court of Justice stated that the reasoning of the General Court provided in paragraph 145 cannot be accepted without reservation, i.e. it should not be understood as excluding the interests of competing undertakings from the aim pursued by Article 102. The President of the Court of Justice held that interests of competitors cannot be separated from the maintenance of an effective competition structure.[21] Therefore, although the General Court recognized protection of the consumers as the main aim of the Article 102, the Court of Justice in the appeal decision in a parallel manner emphasized protection of the interests of the competitors.

[17] Philip Lowe (Director General, EC Commission Directorate-General for Competition), "Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?" 13th International Conference on Competition and 14th European Competition Day, Munich (March 27, 2007).
[18] Neelie Kroes, *supra* note 12.
[19] *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v. Commission of the European Communities,* Joined cases T-231/01 and T-214/01 [2006], para. 115; *GlaxoSmithKline Services Unlimited v. Commission of the European Communities*, Case T-168/01 [2006], para. 171.
[20] *IMS Health Inc., v. Commission of the European Communities*, T-184/01 R, Order of the President of the Court of First Instance [2001], para. 145.
[21] *NDC Health GmbH & Co KG and NDC Health Corporation v. Commission of the European Communities,* C-481/01, Order of the President of the Court [2002], para. 84.

In *Continental Can* and *British Airways* cases the Court of Justice stated that the Article 102 prohibits not only actions of the dominant undertakings, which directly harm consumers, but also such actions that harm consumers through negative impact on an effective competition structure.[22] In the *France Telecom* case the General Court dismissed the argument made by the Wanadoo Company that the pricing policy of Wanadoo did not cause any damage to consumers and even was beneficial to them. The Court claimed that the competition law protects the structure of the market from false distortions, since in such case the interests of the consumers are safeguarded in a best way. According to the Court, it is not necessary to prove that certain behaviour causes direct negative effect to the consumers.[23] Analysis of the practice of the Court of Justice and the Commission does not allow clearly identifying one dominant goal of the EU competition law.

The EU judicial institutions emphasize the need to protect effective competition, the competitors and the consumers.[24] It seems that practically the Court of Justice focuses on an evaluation of whether dominant undertakings cause damage to competition and competitors, instead of evaluating whether the consumers have suffered any damage. The Court of Justice should focus on the question whether the actions of the dominant undertaking caused any damage to the consumers. Such evaluation should be done instead of raising the question of whether the dominant undertaking damaged competitors and consequently hampered "effective competition structure". We believe that only actions which may affect the wealth of the consumers consequently, should be recognized as detrimental to "effective competition structure". In case actions of the dominant undertaking do not cause damage to the consumers, then, despite the effect on the competitors, we should not recognize that the structure of the market is damaged.[25] It is necessary for the Court of Justice and the Commission to formulate a consistent approach to how the damage caused to the consumers might be established.[26]

From a practical point of view, it is important to evaluate the negative economic effect of the actions of the dominant undertakings and harm caused to the

[22] *British Airways v. plc Commission of the European Communities*. Case C-95/04 [2007], para. 106; *Europemballage Corpn and Continental Can v. Commission of the European Communities*, Case C-6/72 [1973], para. 26.
[23] *France Télécom v. Commission*, Case T – 340/03, para. 266; *British Airways plc v. Commission of the European Communities*, Case T-219/99 [2003], para. 264.
[24] Eugene Buttigieg, "Consumer Interests and the Antitrust Approach to Abusive Practices by Dominant Firms," *European Business Law Review* Vol. 16, No. 5 (2005).
[25] Such position is supported by several legal scholars – Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 82 EC* (Oxford: Hart Publishing, 2006), para. 221; John Vickers, "Abuse of Market Power," *Economic Journal* Vol. 115, No. 504 (2005); Howard H. Chang, David S. Evans, and Richard Schmalensee, "Has the Consumer Harm Standard Lost Its Teeth?" *AEI-Brookings Joint Center Working Paper; MIT Sloan Working Paper* No. 4263-02 (August 13, 2002) // https://ssrn.com/abstract=332021; EAGCP, "An economic approach to Article 82" (July 2005) // http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.
[26] The need to reconsider the current approach to the predatory pricing is also discussed in Einer R. Elhauge, "Defining Better Monopolization Standards," *Stanford Law Review* (2003).

consumers. Ignoring the abovementioned criteria may result in controversial decisions of the competition institutions and the courts.[27] In predatory pricing cases damage to the consumers will appear only if the dominant undertaking may recoup losses. Without actual recoupment of the losses taking place, only competitors may experience the damage. Consequently, if protection of the consumers is recognized as the main goal of the competition law, then recoupment of losses should be recognized as a necessary constituent element of predatory pricing. Therefore, predatory pricing should be viewed as illegal only if it is possible to prove recoupment of losses. At the same time, we should bear in mind that Article 102 is not a part of consumer protection law; thus, to establish breach of Article 102, it is also necessary to prove restriction of competition when legality of exclusionary abuse is assessed.[28] Therefore, the competition authority has to prove that damage to consumers has been caused by the illegal restriction of competition.[29]

2. PRICING BELOW COSTS

2.1. AVERAGE VARIABLE COSTS TEST

Phillip Areeda and Donald Turner proposed the first test for analysis of predatory pricing on the basis of costs.[30] Areeda and Turner claimed that undertakings engage in predatory pricing quite rarely, therefore rules which prohibit such actions should be very clear and should not deter undertakings from legitimate pricing.[31] The scholars noted that price which is higher than average variable costs should be legal and the price which is lower than average variable costs should be illegal.[32] Nowadays competition institutions mostly follow the proposal of Areeda and Turner and do not refer to marginal costs.[33]

Scientific theory of Turner and Areeda received wide recognition in the courts of the United States.[34] The Court of Justice relied on this test in the first case on

[27] Kati Cseres. "The Controversies of the Consumer Welfare Standard," *The Competition Law Review* No. 2 (2007).
[28] *Michelin v. Commission of the European Communities*, Case T-203/01 [2003], para. 237; *Microsoft Corp v. Commission of the European Communities*, Case T-201/04 [2007], para. 867.
[29] Pinar Akman, "'Consumer Welfare' and Article 82EC: Practice and Rhetoric," *CCP Working Paper* No. 08-25 (July 31, 2008) // https://ssrn.com/abstract=1210802.
[30] Phillip Areeda and Donald F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," *Harvard Law Review* Vol. 88, No. 4 (1975).
[31] *Ibid.*: 699. Raimundas Moisejevas, Ana Novosad, Virginijus Bitė. "Cost benchmarks as criterion for evaluation of predatory pricing." *Jurisprudencija.* No. 19(2) (2012): 587.
[32] *Ibid.*: 733.
[33] International Competition Network, "Report on Predatory Pricing": 10 // http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf.
[34] Wesley J. Liebeler, "Whither predatory pricing? From Areeda and Turner to Matsushita," *Notre Dame Law Review* (1986): 1052; *Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Hanson v. Shell Oil Co.,* 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); *International Air Indus. v. American Excelsior Co.,* 517 F.2d 714, 724 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

predatory pricing in the EU – *AKZO Chemie BV* as well as in *Tetra Pak* and *France Telecom* cases.[35]

We could make some critical notes in relation to the Areeda-Turner test.[36] Firstly, establishment of prices higher than average variable costs sometimes is predatory.[37] Secondly, average variable costs test is beneficial for the undertakings which have high fixed and small variable costs, for example to those who operate in the sectors of transport and software. In these sectors, even in the case of establishment of small prices, they will be higher than average variable costs.[38] Thirdly, it is more important to understand economic factors of the market than to analyse average variable costs.

2.2. AVERAGE AVOIDABLE COSTS TEST

William Baumol proposed to use average avoidable costs test instead of the test of Areeda-Turner.[39] This test was used by the European Commission in *Deutsche Post AG* case,[40] the Competition Council of Canada *Commissioner of Competition v. Air Canada* case, the US appeal court in *United States v. AMR Corp.* case[41] and by a number of competition councils from the other member states.[42] Average avoidable cost is the average per unit cost that the alleged predator would have avoided during the period of below-cost pricing had it not produced the predatory increment of sales.[43]

We should point out a number of limitations for the use of the average avoidable test. Firstly, the average variable costs test has the same drawbacks as the average avoidable costs. Secondly, in certain cases the benchmark of the average avoidable costs will be higher than the benchmark of the average variable costs. Thus, in such cases it is easier to prove that the undertaking engaged in predatory pricing.[44]

---

[35] *AKZO Chemie BV v. EU Commission*, Case C – 62/86 [1991]; *Tetra Pak International SA v. EU Commission,* Case C – 333/94 [1996], para. 41; *France Télécom,* Case T-340/03, *supra* note 23, para. 130.
[36] Raimundas Moisejevas, Ana Novosad, Virginijus Bitė, *supra* note 31: 588.
[37] James Hurwitz and William Kovacic, "Judicial analysis of predation: the emerging trends," *Vanderbilt Law Review* Vol. 35 (1982): 106.
[38] *Ibid.*: 588.
[39] William J. Baumol, "Predation and the Logic of the Average Variable Cost Test," *Journal of Law and Economics* Vol. 39, No. 1 (1996).
[40] *Deutsche Post AG*, Decision of the European Commission of March 20, 2001, OJ L 125/27.
[41] *Commissioner of Competition v. Air Canada*, Canadian Competition Tribunal (2003), 26 C.P.R. (4th) 476 [2003] C.C.T.D. No. 9; *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003). See William J. Baumol, *supra* note 39. Average avoidable costs test was mentioned in legal literature from 1981: Janusz Ordover and Robert Willig, "An Economic Definition of Predation: Pricing and Product Innovation," *Yale Law Journal* Vol. 91, No. 1 (1981): 17-18.
[42] Average avoidable costs test is applied in Brazil, Canada, EU, Chile, France, Germany, Ireland, Jamaica, New Zealand, South Africa, United Kingdom and United States. See: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricing PDF.pdf (at 10). Raimundas Moisejevas, Ana Novosad, Virginijus Bitė, *supra* note 31: 588.
[43] Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *supra* note 3: 2271.
[44] Raimundas Moisejevas, Ana Novosad, Virginijus Bitė, *supra* note 31: 592.

Thirdly, desire of the Commission to use the average avoidable costs does not correspond to the practice of the Court of Justice.

2.3. LONG-RUN AVERAGE INCREMENTAL COSTS

A long-run average incremental cost is the average of all the costs that are incurred to produce a particular product.[45] The Commission in the *Deutsche Post* case admitted that the undertaking, which produces several goods will not be recognized as a predator if its income covers incremental costs of provision of certain service.[46]

The Commission indicates two situations when establishment of prices lower than long-run average incremental costs means predation. Firstly, it might be the case if certain business is a monopoly.[47] Secondly, it also might be the case if specific costs relate to sectors that were liberalized recently or in which liberalization is in progress, for example, the telecom sector.[48]

Some scholars greeted the decision of the Commission in the *Deutsche Post* case to use incremental costs instead of average variable costs.[49] Long-run incremental costs test is suitable for industries in which undertakings experience high fixed costs and produce many goods.[50] Average variable costs test is beneficial for the undertakings, which act in industries that require a lot of investment and when variable costs are close to zero.[51] However, we believe that long-run average incremental costs test is not universal and should be applied only to some businesses.[52]

[45] European Commission, DG Competition, *supra* note 13: para. 64.
[46] *Deutsche Post AG*, *supra* note 40, para. 10. Long-run average incremental costs are also used by the Competition institutions in Brazil, Denmark, EU, France, Ireland, Italy, Jamaica, Russia, South Africa, Taiwan and United Kingdom. See: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricing PDF.pdf (at 9). Raimundas Moisejevas, Ana Novosad, Virginijus Bitė *supra* note 31: 592.
[47] *Deutsche Post AG*, *supra* note 40, para 27. See also: *Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services*, European Commission, OJ C 39, 06.02.1998; see also: *Notice on the application of competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles*, OJ C 265, 22.08.1998.
[48] *Ibid*., para. 110-115. Raimundas Moisejevas, Ana Novosad, Virginijus Bitė *supra* note 31: 592.
[49] Cyril Ritter, "Does the law on predatory pricing and cross-subsidization need a radical rethink?" *World Competition* Vol. 27, No. 4 (2004): 622.
[50] Paul A. Grout, "Recent Developments in Definitions of Abusive Pricing in European Competition Policy," *CMPO Working Paper Series* No. 00/23 (2000) (University of Bristol); Paul Joskow and Alvin A. Klevorick, "Framework for Analyzing Predatory Pricing Policy," *Yale Law Journal* Vol. 89, No. 2 (1979).
[51] Temple Lang, "European Community Antitrust Law: innovation markets and high technology industries," *Fordham International Law Journal* Vol. 20 (1996); see also Access Notice by the EU Commission, which recognize that AKZO test may be not suitable for the telecommunications sector: *Notice on the application of the competition rules to access agreements in the telecommunications sector*, European Commission OJ C 265/2 [1998], para. 113-115.
[52] Raimundas Moisejevas, Ana Novosad, Virginijus Bitė, *supra* note 31: 594.

2.4. PRICES HIGHER THAN AVERAGE AVOIDABLE COSTS AND SMALLER THAN AVERAGE TOTAL COSTS

While a dominant undertaking has no reason to establish prices below average avoidable costs, since such prices do not maximize profit, it may have found reasonable establishment of prices above average avoidable cost but below average total cost.[53] Average total costs are calculated by dividing total costs (fixed and variable costs) by many produced goods.[54] Recently the Court of Justice in *Post Danmark* case confirmed that prices below average total costs, but above average variable costs, must be regarded as illegal only if additional evidence on intent to eliminate competitors is present.[55] Such position of the Court is widely supported.[56]

We believe that it is possible to apply average total cost test only if special circumstances are present, since in this case variable and part of fixed costs are covered, and pricing of the undertaking does not accrue as many losses as establishment of prices, which are smaller than average variable/average avoidable costs.

2.5. PRICES HIGHER THAN AVERAGE TOTAL COSTS

Establishment of prices higher than average total costs normally does not amount to predatory pricing. Usually, such pricing eliminates only less effective competitors and is illegal only if there are exceptional circumstances, which show that consumers experience disadvantage.[57]

Firstly, establishment of prices higher than average total costs amounts to predatory pricing when undertakings in a collective dominant position apply strategy to eliminate certain undertaking and reduce its revenue, propose to certain clients' goods/services for a price lower than relevant undertaking, and mutually share losses which are experienced because of detrimental trade.[58] The *Compagnie Maritime Belge* case serves as example, when the Court of Justice prohibited any 'collective exclusion or marginalization', since the dominant liner conference proposed to the

[53] European Commission, DG Competition, *supra* note 13: para. 111.
[54] Raimundas Moisejevas, Ana Novosad, Virginijus Bitė, *supra* note 31: 594.
[55] *Post Danmark A/S v Konkurrencerådet,* Case C-209/10 [2012], para. 17.
[56] Former Head of the General Directorate for Competition Philip Lowe supports this position. Philip Lowe, "EU competition practice on predatory pricing," Introductory address to the Seminar 'Pros and Cons of Low Prices', Stockholm (December 5, 2003) // http://ec.europa.eu/comm/competition/speeches/text/sp2003_066_en.pdf. For example, Professor Robert O'Donoghue, who is against prohibition of prices higher than average costs, points out that situation may be different if evidence on intent to eliminate competitor is submitted. Robert O'Donoghue, "Over-Regulating Lower Prices: Time for a Rethink on Pricing Abuses under Article 82 EC"; in: Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2003*: *What is an abuse of a dominant position?* (Oxford and Portland: Hart publishing, 2006).
[57] European Commission, DG Competition, *supra* note 13: para. 127.
[58] *Ibid*., para. 128. Raimundas Moisejevas, Ana Novosad, Virginijus Bitė, *supra* note 31: 596.

most important buyers of a competitor services for a low price in order to match the pricing of the competitor.[59]

Secondly, the Commission proposed to recognise the establishment of prices higher than average total costs as predation when the dominant undertaking has unique advantages or acts in the market where economies of scale are very important, and entrants to the market initially will have to operate at a significant cost disadvantage.[60]

We believe prices higher than average total costs should not be treated as predation. Most competition institutions from different countries recognize that pricing above average total costs does not constitute predation.[61] Prohibition to apply prices higher than average total costs may deter the dominant undertaking from competing effectively and cause appearance of ineffective competitors. Thus, prohibition of such pricing would not be beneficial for consumers.[62]

3. PREDATORY INTENT

The judicial institutions of the European Union recognise the intent of the dominant undertaking as an important element in predation cases.[63] The significance of the intent of the dominant undertaking in specific case depends on the relationship between costs and price.[64] In case the undertaking establishes price smaller than average variable/avoidable costs, the presumption of predatory pricing and illegal intent is made. However, in case undertaking sets prices higher than average variable/avoidable costs, then to recognise predation it is necessary to prove illegal intent of the undertaking.[65] Judicial institutions of the European Union do not admit

[59] *Compagnie Maritime Belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v. EU Commission* [2000]; lowering of prices to eliminate certain competitor from specific airlines was prohibited in *Lufthansa case, decision 2002-02-18, B9-144/01*, German Bundeskartellamt.
[60] European Commission, DG Competition, *supra* note 13: para. 129.
[61] Establishment of prices higher than average total costs in not recognized as predation in Brazil, Bulgaria, Canada, Czech, Denmark, France, Hungary, Ireland, Italy, Jamaica, Japan, Kenya, Latvia, Lithuania, Mexico, New Zealand, Peru, South Africa, Taiwan, Turkey, United Kingdom, United States. Only in exceptional circumstances such type of pricing is recognized as predation in Germany and Russia. See: http://www.international-competitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf (at 9).
[62] Raimundas Moisejevas, Ana Novosad, Virginijus Bitė, *supra* note 31: 598.
[63] Dustin Sharpes, "Reintroducing intent into predatory pricing law," *Emory law journal* Vol. 61 (2012): 903. While considering predatory pricing, big importance is devoted to intent in Brazil, Bulgaria, Canada, Chile, Denmark, France, Germany, Ireland, Japan, Kenya, Korea, Latvia, Lithuania, Mexico, New Zealand, Norway, Peru, Singapore, Switzerland, Taiwan, Turkey and UK. Small importance to intent is devoted in Hungary, Italy, Jamaica, Russia, South Africa and US. However, in Italy intent is important to determine size of the fine. See: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf (at 24).
[64] Raimundas Moisejevas, "The importance of the intent in predatory pricing cases" *Jurisprudencija.* No. 4(122) (2010): 321.
[65] *France Télécom*, Case T – 340/03, *supra* note 23, para. 197.

that dominant undertaking referred to predatory pricing only based on the evidence of illegal intent.[66]

In the US intention is not viewed as important while evaluating the actions of the dominant undertakings.[67] In the US, intention is not given primary importance, partly because the evidence concerning the intent of the undertaking might easily misguide the jury differently from judges.[68]

Some scholars notice that managers of the undertakings have a better opportunity than officials of the competition councils to evaluate profitability of predatory pricing and the extent to which it may distort competition.[69]

The Court of Justice emphasized importance of the intent of dominant undertaking in 1978 in the *United Brands* case.[70] The Court of Justice held s that in certain cases intention to eliminate competitor is the decisive factor for recognition of predation.[71] The Court of Justice claimed that if undertaking sets prices higher than average variable costs and smaller than average total costs the undertaking has an opportunity to eliminate even effective competitors without experiencing losses.[72] In *AKZO* case the Court of Justice recognized that the selective nature of the setting of the prices smaller than average total costs and higher than average variable prices witnesses that AKZO intended to eliminate a competitor from the market.[73]

When the undertaking establishes prices lower than average variable costs and intent to eliminate competitors is established, then we should allow the undertaking to justify its pricing.[74] Sometimes the undertaking may justify the motives of its behaviour. We should also aim to evaluate the ability of undertaking to recoup

[66] Almost all competition institutions in the world take the position that it is not sufficient to provide evidence concerning illegal intent of undertaking to prove that undertaking was engage in predatory pricing. See: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricing PDF.pdf (at 25).
[67] *United States v. Grinnell Corporation*, 384 U.S. 563, 570 (1966). Richard Posner, *Antitrust Law*, 2nd ed. (University of Chicago Press, 2001), 214.
[68] Moisejevas Raimundas, *supra* note 64: 321. *United States v. Microsoft Corporation,* 253 F3d 34, 54 (D.C. Circ.) (2001); also, *Aspen Skiing Co. v Aspen Highlands Skiing Corp.,* 472 U.S. 585, 603, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985).
[69] Raimundas Moisejevas, *supra* note 64: 321. Irwin M. Steizer, "Changing Antitrust Standard", Remarks before the Workshop on Antitrust Issues in Today's Economy, the Conference Board, New York (March 5, 1987): 5.
[70] *United Brands v. Commission*, Case C - 27/76 [1978], para. 189.
[71] *AKZO Chemie BV v. Commission*, *supra* note 38, para. 71 - 72; *Irish Sugar v. Commission,* Case T-228/97 [1999], para. 111.
[72] *Ibid.*, para. 72.
[73] Raimundas Moisejevas, *supra* note 64: 322. *Ibid*., para. 113–115.
[74] Ridyard Derek, "Exclusionary pricing and price discrimination abuses under Article 82: An economic analysis," *European Competition Law Review* Vol. 23 (2002): 296.

losses.[75] The dominant undertaking may justify its actions[76] although Article 102 TFEU has no exemption similar to paragraph 3 of Article 101 TFEU.[77]

In *Tetra Pak II* facts of the case (long term of the unprofitable sales, durability of abuse and data of the accounting) allowed recognizing that dominant undertaking was intentionally experiencing losses and selling products cheaper than their costs of production in certain regions (prices were even 50 percent lower than in other regions). [78]

In *Wanadoo* case[79], the Commission claimed that it is possible to indicate an intention based on the facts of the case even without having direct evidence on elimination of the competitor.[80] We believe that the Commission should have paid more attention to the pricing effect on the market of the dominant undertaking. Evaluation of the intention of the dominant undertaking and analysis of the effect of the undertaking's actions is completely different. Moreover, in *Wanadoo* case the Commission has not paid enough attention to justifications based on the learning effects, economy of scale and the ability to recoup losses.[81]

The Court of Justice claims that for recognition of the abuse it is not necessary to prove negative effect of the actions of the dominant undertaking. The Court believes that it sufficient proving potential negative effect of the actions of the dominant undertaking.[82] The General Court held that for the recognition of abuse it is sufficient if showing illegal intent of the undertaking.[83]

The Court recognized close connection between the effect and intent of the dominant undertaking, [84] but failed to explain the means for the practical

[75] *Tetra Pak International SA v. EU Commission,* Case C – 333/94 [1996], para. 44. The ECJ held that it is not necessary to provide evidence that it is practically possible to recoup losses. However, in Wanadoo case Commission researched whether recoupment is possible. *Wanadoo case*, European Commission decision delivered on July 16, 2003, No, COMP 38.233, Commission press release IP/03/1025. Also, take a look to Phillip Lowe, "Monopolization versus abuse of dominant position," Panel discussion statement, Fordham Competition Law Institute (2004).

[76] *Guidelines on Vertical Restraints*, OJ, 2000, C 291/1, para. 141; Luc Gyselen, "Rebates: Competition on the merits or exclusionary practice?"; in: Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2003 What is an Abuse of a Dominant Position?* (Hart Publishing, 2006); Lowe Phillip, "DG Competition's Review of the Policy on Abuse of Dominance," Fordham Competition Law Institute (2004).

[77] *Tetra Pak v. Commission*, Case T-51/89 [1990], para. 27; *BPB Industries and British Gypsum*, Case T-65/89 [1993], para. 75; *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale zur Bekdmpfung unlauteren Wettbewerbs e. V.,* Case C-66/68 [1989]; *Compagnie Maritime Belge*, *supra* note 59, para. 135.

[78] Raimundas Moisejevas, *supra* note 64: 323. *Tetra Pak International SA,* Case C – 333/94, *supra* note 87.

[79] *Wanadoo case*, European Commission decision, *supra* note 75.

[80] *Ibid.*, para. 271.

[81] Raimundas Moisejevas, *supra* note 64: 325. Antonio Bavasso, "The role of intent under article 82 EC: from 'flushing the turkeys' to spotting lionesses in Regent's park," *European Competition Law Review* Vol. 26(11) (2005).

[82] *British Airways v. Commission*, Case T-219/99 [2003], *supra* note 23, para. 293.

[83] Thomas Eilmansberger, "How to distinguish good from bad competition under article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses," *Common Market Law Review* No. 42 (2005): 147.

[84] Eleanor M. Fox, "Monopolization and dominance in the United States and the European Community: Efficiency, opportunity, and fairness," *Notre Dame Law Review* No. 981 (1986): 1001.

determination of illegal intent. However, we do not agree with a position of the Court that dominant undertaking aiming to eliminate competitors necessarily has enough instruments for the real elimination of the competitor.[85]

We could summarize our critical attitude towards the practice of the Court of Justice in a couple of points. Firstly, the undertaking may aim to eliminate competitors, but most of such goals fail. Example of *Aberdeen Journal's* case shows that[86] undertakings may wrongly believe that by engaging in predatory pricing, they will be able to distort competition. It was held in *Aberdeen Journal's* case that the Aberdeen Journal's company used to apply prices smaller than average total costs and that Aberdeen Journals company intended to eliminate Independent company from the market. Aberdeen Journals Company was fined for the abuse. Competition authority paid a lot of attention to the intent of the Aberdeen Journals company, although it failed to implement illegal plan and there was no real danger to exclude the competitor.[87] In case a real effect on the market and ability to recoup losses was evaluated, then different outcome of the case could have been possible.

Secondly, many undertakings like to claim internally aim to eliminate competitors and it is hard to draw a clear line when such statement becomes illegal.[88]

Thirdly, officers of competition institutions should devote interest not to the intent of undertaking, but to the research whether the pricing of dominant undertaking will lead to the elimination of competitors. We believe that only distortion of the competition should be taken into account recognizing abuse.[89]

4. RECOUPMENT OF LOSSES

4.1. RECOUPMENT OF LOSSES IN PREDATION CASES

The Court of Justice recognized that to prove predation, it is not necessary to establish that undertaking may recoup losses. In *Tetra Pak case* the Court of Justice noted that:

> Furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a

[85] Raimundas Moisejevas, *supra* note 64: 326.
[86] *Predation by Aberdeen Journals Limited*, Case No. CA98/14/2002, September 16, 2002, Decision of the Director General of Fair Trading.
[87] Raimundas Moisejevas, *supra* note 64: 326.
[88] Robert O'Donoghue, *supra* note 25; *A. Poultry Farms, Inc. v. Rose Acre Farms,* Inc., 881 F.2d 1396, 1401-02 (7th Cir. 1989); Damien Geradin and Robert O'Donoghue, "The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector," *Journal of Competition Law and Economics* (2005); "Comments of Professor Elhauge on DG Competition Discussion Paper on Exclusionary Abuses" // http://ec.europa.eu/competition/antitrust/art82/contributions.html.
[89] Robert O'Donoghue, *supra* note 25.

> risk that competitors will be eliminated (…) The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.[90]

Advocate General Fennelly in *Compagnie Maritime Belge case* noted that to prove that undertaking referred to predatory pricing, it is necessary to prove that undertaking might recoup losses.[91] Advocate General believed that the actions of the predatory undertaking would cause damage to competition only if after elimination of competitors undertaking establishes high prices that are unfavourable to the consumers. On the other hand, elimination of competitors itself, without setting high prices allowing to recoup losses does not distort competition.[92] Since the Court of Justice has expressed it opposition to the attitude of the Advocate General some scholars thought that the Court left an open question for the future discussion of the importance to recover losses.[93]

In *France Telecom SA* case, the General Court decided that recoupment of losses is not necessary in predation.[94] Wanadoo Company claimed that it had no possibility to recoup losses and therefore it has not used predatory pricing.[95] The General Court dismissed necessity to prove recoupment. The Court declared that it is sufficient to prove prices of the undertaking were smaller than average variable costs and the undertaking aimed to abuse dominance.[96]

It is interesting to note that in the analysis of the appeal claim Advocate General Mazak wrote that it is necessary to prove that the dominant undertaking is able to recoup losses.[97]

We may also refer to *AKZO case* which declared that a dominant undertaking has no interest to establish prices below average variable costs except that of eliminating competitors 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.[98] The Court recognizes that undertaking refers to predatory pricing, because it expects to recoup losses later (gain some profit). Moreover, it is provided in *Hoffmann-La Roche case*[99] that the concept of abuse is an

[90] *Tetra Pak International SA*, Case C – 333/94, *supra* note 75, para. 41, 42, 44.
[91] *Compagnie Maritime Belge SA (C-395/96 P) and Dafra-Lines v. Commission*, Opinion of Advocate General Fennelly delivered on October 29, 1998, Joined cases C-395/96 P and C-396/96, para. 136.
[92] Raimundas Moisejevas, "Recoupment of losses by the dominant undertaking, which allegedly have used predatory pricing and legality of actions," *Jurisprudencija* No. 2(120) (2010): 291.
[93] Miguel de la Mano and Benoît Durand, "A Three-Step Structured Rule of Reason to Assess Predation under Article 82," *Office of the Chief Economist Discussion Paper* (December 12, 2005): 27 // http://ec.europa.eu/dgs/competition/economist/pred_art82.pdf.
[94] *France Télécom*, Case T – 340/03, *supra* note 23.
[95] Raimundas Moisejevas, *supra* note 113: 292.
[96] *France Télécom*, Case T – 340/03, *supra* note 23, para. 227–228.
[97] *France Telecom SA v. Commission*, Case C-202/07, Opinion of Advocate General Mazák delivered on September 25, 2008.
[98] *AKZO Chemie BV v. Commission*, *supra* note 35, para. 71
[99] *Hoffman-La Roche v. Commission*, Case C – 85/76 [1979], para. 91

objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[100]

The Commission claims that undertaking while abusing dominant position distorts competition. However, restriction of competition and recoupment of losses is related. We believe, that the Court should recognize that consumers suffer damage only if an undertaking may recoup losses. Advocate General was critical towards Commissions' argument that dominant position guarantees the ability to recoup losses and argued that to recognize the company dominant the present market structure is valued and to determine the ability of undertaking to recoup losses it is necessary to evaluate future changes of the market.[101]

However, in *France Telecom SA* decision on the 2nd of April 2009 the Court of Justice did not modify its practice and held that proof on the ability to recoup losses does not constitute a necessary precondition to recognizing pricing policy as abusive.[102] This decision ended discussion whether under the EU competition law it is necessary to prove ability of the predator to recoup losses. We believe that this decision of the Court lacks legal reasoning. We presume that one of causes why the Commission refuses to evaluate recoupment is Commissions' intention to protect not only consumers, but also competitors. On the other hand, in some specific cases (related with mergers and not abuse of dominant position) Commission pays attention to recoupment.[103]

4.2. THE ABILITY OF THE DOMINANT UNDERTAKING TO RECOVER LOSSES

The Commission believes that when an undertaking is dominant, it also follows that entry barriers are high enough and such undertaking can recoup losses.[104] High entry and re-entry barriers prevent competitors from entering or re-entering the

[100] Raimundas Moisejevas, *supra* note 92: 292.
[101] *France Telecom SA v. Commission*, Case C-202/07, *supra* note 97, para. 76.
[102] *Ibid*., para. 76.
[103] *Boeing / Lockheed Martin / United Launch Alliance JV* Case No. IV/M.3856, European Commission decision delivered on August 9, 2005, recognizing that concentration is compatible with common market on the basis of Council Regulation No. 4064/89, para. 27–36.
[104] European Commission, DG Competition, *supra* note 13; Tommy Pettersson and Stefan Perván Lindeborg, "Comments on a Swedish case on predatory pricing – particularly on recoupment," *European Competition Law Review* Vol. 22 (2001); Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *supra* note 3: 2265; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 US 209, 222–24 (1993).

market, and the predating undertaking will be able to increase its prices.[105] According to the Commission the dominant position itself guarantees the ability to recoup losses. We are not able to fully agree with such statement because of the reasons provided below.

The Discussion paper prepared by the European Commission Directorate General Office of the Chief Economist named "A three-step structured rule of reason to assess predation under article 82" contradicts official doctrine of the Commission and provides that the dominance is not sufficient to recoup losses and is not a necessary condition for the recovery of losses.[106] The Discussion paper provides that the ability to recover losses does not follow directly from the dominance. To determine whether the undertaking occupies a dominant position the market power before the actions of predation is evaluated. However, the market power before the predation does not supply information about the increase of the market power in the subsequent period.[107] The dominant undertaking may only recover losses if, after the elimination of competitors, its market power will increase substantially.[108] The recoupment happens if after the elimination of competitors the profit is higher than the foregone revenue. On the other hand, the profit depends on the changes in market power after the exclusion of competitors. Therefore, an evaluation of the dominance before predation is insufficient for conclusion whether the undertaking may use the increase of the market power and recoup losses. The ability to recoup also depends on the expenses incurred for the elimination of the competitors. Such expenses could not have been evaluated during the prior establishment of the dominant position. If during predation the dominant undertaking incurs considerable expenses, then the amount of losses to be recovered automatically rises as well. Thus, dominance itself does not guarantee ability to recoup losses.[109]

On the other hand, it is not necessary for the undertaking to be dominant to recoup losses, since an undertaking through predation in the market where it is not dominant may create a "tough" reputation and deter potential competitors from entering the market.[110] Predation in a small market dramatically decreases the

[105] Paul Joskow and Alvin Klevoric, *supra* note 50; Janusz Ordover and Robert Willig, *supra* note 41: 10–13. There are also some authors who believe that the element of recoupment is not important in predatory pricing case. See for example – Christopher R. Leslie, "Predatory pricing and recoupment," *Columbia Law Review* Vol. 113, No. 7 (2013).
[106] Miguel de la Mano and Benoît Durand, *supra* note 93.
[107] *Ibid*.: 28.
[108] *Ibid*.
[109] Raimundas Moisejevas, *supra* note 92: 293.
[110] David Kreps and Robert Wilson Robert, "Reputation and Imperfect Information," *Journal of Economic Theory* Vol. 27 (1982): 253; Paul Milgrom and John Roberts, "Predation, Reputation and Entry Deterrence," *Journal of Economic Theory* Vol. 27, No. 2 (1982): 280; Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *supra* note 3: 2239. National competition institutions of Canada, Chile, France, Jamaica, Peru, UK, USA, Mexico, Italy and Ireland recognize that undertaking might recoup losses in other product or geographical market than that in which predatory pricing was applied. See: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricing PDF.pdf (at 19).

amount of losses incurred (the predator at the same time deters competitors from the entrance to bigger markets in which a predator operates).[111]

A dominant position is not the main key element necessary for predation. The ability to fill the market, to satisfy the increase in demand and reduce prices of the products are more important than having a dominant position. C. Newton also believes that the competition authorities should pay more attention to the financial capacities of the undertaking and less to its market share.[112] Sometimes dominant undertakings may even experience higher losses than other undertakings, since low prices will be applied to a huge number of products. Moreover, the ability of a dominant company to enhance profits through increase of market share is quite limited. At the same time, an undertaking that is not dominant, may apply predatory pricing to abuse its dominant position in the future (which might increase substantially) and recoup the losses.[113]

The courts should recognize that dominant undertaking predated only if there is evidence that dominant undertaking may recover losses.[114] Firstly, damage to consumers occurs only if dominant undertaking recovers losses. If recoupment is recognized as a necessary element, competition institutions should inquire whether dominant undertakings' actions caused damage to consumers. Secondly, if recoupment were recognized as a necessary element, competition institutions would evaluate real effect of dominant undertakings' actions. Thirdly, Commission incorrectly concludes that high entry barriers guarantee the ability of dominant undertaking to recoup losses, since the evaluation of entry barriers and dominant position provide information concerning the existing structure of the market and not about future changes in market structure that might occur after predation. Fourthly, if recoupment is not considered, competition law rules may be applied very strictly and dominant undertakings will refrain from establishment of low prices that are beneficial for consumers.

5. OBJECTIVE JUSTIFICATIONS

5.1. MEETING COMPETITION DEFENCE

Competitions institutions in most countries of the world recognize that it is possible to justify the establishment of prices lower than costs based on the meeting

[111] Miguel de la Mano and Benoît Durand, *supra* note 93.
[112] Carl Newton, "Do predators need to be dominant?" *European Competition Law Review* Vol. 20 (1999): 127. Raimundas Moisejevas, *supra* note 92: 300.
[113] *Ibid*.: 300
[114] Emmanuel Mastromanolis, "Predatory Pricing Strategies in the European Union: A Case for Legal Reform," *European Competition Law Review* Vol. 19 (1998); Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (Hart Publishing, 2000).

competition defence.[115] Many scholars believe position that dominant undertaking may refer to meeting competition defence if undertaking sets price, which is smaller than average total costs and higher than average avoidable costs.[116] The meeting competition defence appeared for the first time in the United States.[117]

In the *Hilti* case, the Commission recognized the meeting competition defence.[118] The meeting competition defence also was recognized in *AKZO* case.[119] The establishment of small prices based on a meeting competition defence should be proportional and fit for the actual circumstances.[120]

We regret that in the practice of the Court of Justice, the content of the meeting competition defence is interpreted ambiguously and the dominant undertakings face some lack of legal certainty.[121]

In 1997, Commission took informal decision in *Digital Undertaking* case in which Commission affirmed obligations of the dominant undertaking previously accused of abuse of dominant position.[122] Digital company aiming to resolve the case peacefully took obligation to ensure that all reduced prices will be higher than average total costs[123]. Digital reserved right to lower prices in response to competition but undertook obligation that such reduction will be proportional and will not disturb competition.[124]

---

[115] For example, in Brazil, Bulgaria, Canada, Denmark, France, Mexico, New Zealand, South Afrika, US and the EU. See: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricing PDF.pdf (at 28); Raimundas Moisejevas, "Objective justification in predatory pricing," *Jurisprudencija.* No. 18(1) (2011): 218.

[116] Such a position is taken by Ulrich Springer, "Meeting Competition: Justification of Price Discrimination Under EC and US Antitrust Law," *European Competition Law Review* (1997): 255; Moritz Lorenz, Maike Lübbig, and Alexia Russel, "Price Discrimination, a Tender Story," *European Competition Law Review* (2005): 359; Robert O'Donoghue, *supra* note 56: 390; with this position disagrees Michael Waelbroeck, "Meeting Competition: Is This a Valid Defence for a Firm in a Dominant Position?": 489; in: A. Giuffrè, ed., *Divenire sociale e adeguamento del diritto: Studi in honore di Francesco Capotorti* (1999).

[117] Paul Andrews, "Is meeting competition a defence to predatory pricing? The Irish Sugar decision suggests a new approach," *European Competition Law Review* Vol. 19(1) (1998): 49–57.

[118] *Eurofix-Bauco v Hilti,* Decision of Commission of December 22, 1987, case COMP/30.787, [1988], O.J. L 65/19, see part devoted to obligations; John Ratliff, "Abuse of Dominant Position and Pricing Practices: A Practitioner's Viewpoint"; in: Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2003*: *What is an abuse of a dominant position?* (Oxford and Portland, Oregon: Hart Publishing, 2006); Stephen Kon and Sarah Turnbull, "Pricing and the Dominant Firm: Implications of the Competition Commission Appeal Tribunal's Judgment in the NAPP Case," *European Competition Law Review* (2003): 76.

[119] *ECS v. AKZO-temporary measures*, Decision of the European Commission of July 29, 1983, case COMP/30.698 [1983] O.J. L252/13, para. 38.

[120] Martin Andreas Gravengaard, "The meeting competition defence principle – a defence for price discrimination and predatory pricing," *European Competition Law Review* Vol. 27(12) (2006).

[121] Donald Slater and Denis Waelbroeck, "Meeting Competition: Why it is not an Abuse under Article 82," *College of Europe Research Papers in Law* (3/2004): 2; rules formulated in the practice of EU judicial institutions are ambiguous. Summary of judicial practice is submitted by Denis Waelbroeck, "Exclusionary Pricing and Price Discrimination under EC Competition Law"; in: Mads Andenas, Michael Hutchings, and Philip Marsden, eds., *Current Competition* Law, *Vol. III* (British Institute of International and Comparative Law, 2005).

[122] "Commission press release IP/97/868 of 10 October 1997 on Digital Undertakings," IP/97/868 (October 10, 1997).

[123] *Ibid*.

[124] Raimundas Moisejevas, *supra* note 115: 219.

In *France Telecom*[125] case, the General Court analysed meeting competition defence. A France Telecom company claimed that pricing is not predatory, even if prices are smaller than costs, since the undertaking was coordinating its prices with prices of competitors and the fact that prices of competitors were smaller than costs of France Telecom is not relevant.[126] The Commission noted that although dominant undertaking has a right to coordinate its prices with those of competitors, the undertaking is deprived of such right in case prices of undertaking are smaller than the costs of its goods/services. The Commission believed that prices applied by the France Telecom did not cover its costs; therefore, it may not coordinate prices with an undertaking that does not have a dominant position and intends to encourage sales. The General Court rejected arguments made by France Telecom and noted that right of the dominant undertaking to coordinate its prices with those of competitors is not absolute.[127] In the opinion of the Court, the dominant undertaking has a right to protect its business interests in case they are endangered, but may not refer to actions, which are intended to strengthen dominant position and abuse it.

The Court also noted that even if the dominant undertaking refers to certain action protecting commercial interests and alignment of prices with its competitors "is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position."[128] This decision of the General Court does not provide clear guidance whether dominant undertaking, which aims to protect business interests and not to strengthen a dominant position (or abuse it), has a right to align prices with competitors, if its prices are lower than average variable costs. The Court differently approaches cases when dominant undertaking responds to competition to protect its interests and when undertaking strengthens its dominant position and abuses it. Michal Gal believes that the present decision of the Court allows a dominant undertaking to rely on meeting competition defence, if it intends to protect legitimate interests and sets prices lower than costs.[129]

European judicial institutions recognize that in predation, it is not possible to rely on meeting competition defence, if there is evidence that dominant undertaking intended to eliminate competitors.[130] Moreover, in *Compagnie Maritime Belge* case the Court of Justice held that the right of the undertakings to rely on meeting

[125] *France Télécom*, Case T – 340/03, *supra* note 23.
[126] *Ibid*., para. 171.
[127] *Ibid*., para. 182.
[128] *Ibid*., para. 187.
[129] Michal S. Gal, "Below-cost price alignment: meeting or beating competition? The France Telecom case," *European Competition Law Review* Vol. 28(6) (2007): 382–391.
[130] *Ibid*., para. 330 and 331; *AKZO Chemie BV v. Commission*, *supra* note 35, para. 102, 108–109 and 115; *Tetra Pak*, Case T-51/89, *supra* note 77, para. 147. This principle is also embedded in the case *United Brands*, *supra* note 70, para. 189, in which the ECJ noted that dominant undertaking cannot rely on its right to defend commercial interests if real aim is to strengthen dominant position and abuse it.

competition defence should be valued especially strictly, if their position is close to a monopoly.[131] Although courts do pay attention to these differences, it is quite difficult to evaluate them precisely.[132]

5.2. EFFICIENCY AND OBJECTIVE NECESSITY DEFENCES

Commission claims that the actions of the dominant undertaking are not contrary to the Article 102 of the TFEU if the undertaking provides objective justification of its actions or proves that its actions produce efficiencies, which outweigh the negative effect on consumers.[133] In para 74 of the 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' Commission provides that it seems unlikely that dominant undertaking accused of predatory pricing will be able to rely on efficiency defence, since it is doubtful that predatory pricing will create efficiencies.[134] Dominant undertaking in order to rely on the efficiencies defence, should prove the following criteria: 1) efficiencies are/or will be achieved because of certain actions, for example, improvement of the quality of products; 2) certain actions are necessary in order to increase efficiencies, that is it is not possible to rely on the other, not so anti-competitive actions; 3) Increased efficiencies compensate negative effect on competition and consumers; 4) actions should not limit competition, since competition is the source of economic effectiveness.[135] As we may conclude, conditions applied to the Article 102 of the TFEU are in essence similar to part 3 of the Article 101 of the TFEU.[136] In *Post Danmark* case the Court of Justice explicitly held that a dominant undertaking may justify its predatory actions by demonstrating, either that its conduct is objectively necessary or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.[137]

The undertaking may rely on the objective necessity defence if it could prove that actions were objectively necessary, for example, because of security or health reasons related to dangerous qualities of certain products.[138] According to the Court of Justice, dominant undertaking is not allowed to take action *ex officio* in order to

[131] *Compagnie Maritime Belge*, *supra* note 59, para. 119; Opinion of Advocate General Fennelly in Compagnie Maritime Belge SA, *supra* note 91. It should be noted that Compagnie Maritime Belge had more than 90 percent of the market. Raimundas Moisejevas, *supra* note 115: 224.
[132] *Decision of 18 February 2002, Case B-9-144/01,* Federal Cartel Office.
[133] Raimundas Moisejevas, *supra* note 115: 219. *Communication from the Commission*, *supra* note 6, para. 74; European Commission, DG Competition, *supra* note 13: para. 77.
[134] *Communication from the Commission*, *supra* note 6, para. 74.
[135] *Ibid*., para. 30, see also Mateus M. Abel, "Predatory pricing: a proposed structured rule of reason," *European Competition Journal* Vol. 7, No. 2 (2011). Raimundas Moisejevas, *supra* note 115: 225.
[136] *Commission Communication – Notice – Guidelines on the application of Article 81 (3) of the Treaty*, OJ 101, 27.4.2004.
[137] *Post Danmark*, Case C-209/10, *supra* note 59, para. 40-42.
[138] *Communication from the Commission*, *supra* note 7, para. 29.

eliminate products from the market, which are regarded by the undertaking as dangerous or of inferior quality in relation to its products.[139]

5.3. PRODUCT INTRODUCTIONS, OBSOLETE INVENTORY AND INDUSTRY DOWNTURN

It is legitimate to establish low prices while selling obsolete products and vacating space for new goods.[140] An undertaking may also apply especially low prices in order to enter the market. If prices lower than costs are applied for a short period, are used to advertise goods and do not cause damage for competition, such pricing might be recognized as economically sound even if it does not allow an undertaking to get maximum profit in a short time.[141] Example of objective justification was provided in the Press release submitted by the U.K. Competition and Markets Authority on 29th April of 2004. Bus Company started business in a new geographical market and was accused of predatory pricing. Although prices of the services of the bus company were lower than its costs, Competition and Markets Authority (CMA) decided that undertaking did not breach Competition act, since there was evidence that undertaking intended to create a commercial background in a new place and did not attempt to obtrude competitor from business. CMA concluded that the actions of undertaking amounted to legitimate competition, period of small prices was beneficial for consumers and competition was not weakened.[142]

The dominant undertaking may establish prices smaller than costs of certain goods, to encourage consumers to buy other goods for higher prices. For example, grocer's shop may implement advertising campaign, during which the price of orange juice is lower than costs, expecting that buyers will also buy other goods.

CONCLUSIONS

After a review of the framework for the analysis of the predation cases, we can make several conclusions.

The Court of Justice, the General Court and the Commission should not recognize the relationship between costs and prices of the dominant undertaking as a key element in predation cases. Most important is the evaluation of the effect of predatory pricing on competition in the market and consumers. Moreover, the proposal of the Commission to use average avoidable costs does not correspond to

[139] *Hilti v. Commission*, Case T-30/89 [1991], para. 118-119; *Tetra Pak*, Case T-51/89, *supra* note 79, para. 83-84 and 138. Raimundas Moisejevas, *supra* note 115: 225.
[140] European Commission, DG Competition, *supra* note 13: para. 131.
[141] Raimundas Moisejevas, *supra* note 115: 226.
[142] *First Edinburgh / Lothian*, Decision of the Office of Fair Trading (now CMA), No. CA98/05/2004 (April 29, 2004) (Case CP/0361-01). Raimundas Moisejevas, *supra* note 115: 226.

the practice of the Court of Justice. The Commission should propose more clearly the method of calculation of average avoidable costs and long-run average incremental costs to increase legal certainty of undertakings. Long-run average incremental costs test is not universal and is applicable only in some business areas. Only in exceptional circumstances prices higher than average variable/avoidable costs should be illegal, since in this case part of fixed and all the variable costs are covered. In the present case, pricing of the undertaking is not as loss making as by establishment of prices lower than average variable/avoidable costs. Moreover, establishment of prices higher than average total costs by the dominant undertaking should not treated as predation.

The Court of Justice, the General Court and the Commission while assessing predatory pricing give too much importance to the intent of the dominant undertaking. We believe that intention to predate should be only additional evidence for the determination of abuse. Strategic plans of the undertaking may provide evidence that undertaking aims to eliminate competitors; however, managers of companies do not always make the correct decisions and often do not achieve business goals.

We propose recognizing that dominant undertaking referred to predatory pricing only if there is evidence that the dominant undertaking may recoup losses. In case recoupment is recognized as a necessary element, competition institutions would evaluate whether dominant undertakings' actions caused damage to consumers. If recoupment is not considered, competition law rules might be too strict and dominant undertakings will not charge low prices that are beneficial for consumers. It is possible that such position will gain more support if private subjects submit more claims to dominant undertakings aiming to compensate damages incurred because of the application of predatory pricing.

The position of the Commission towards objective justifications should be modified since conditions for the application of such defences are too strict and ill defined. Therefore, the ability to rely on such defences is limited. The Court of Justice and the General Court should recognize the right of the dominant undertaking to submit objective justifications of its actions in all cases, irrespective of whether prices applied are lower than costs. Therefore, the right of the dominant undertaking to set prices lower than average avoidable costs should be legal if the competitors use such pricing.

BIBLIOGRAPHY

1. Abel, Mateus. M. "Predatory pricing: a proposed structured rule of reason." *European Competition Journal* Vol. 7, No. 2 (2011): 243–267.
2. Ahlborn, Christian, and Bill Allan. "The Napp Case: A study of predation?" *World Competition* Vol. 26(2) (2003): 233–262.
3. Akman, Pinar. "'Consumer Welfare' and Article 82EC: Practice and Rhetoric." *CCP Working Paper* No. 08-25 (July 31, 2008) // https://ssrn.com/abstract=1210802.
4. Andrews, Paul. "Is meeting competition a defence to predatory pricing? The Irish Sugar decision suggests a new approach." *European Competition Law Review,* Vol. 19(1), (1998): 49–57.
5. Areeda, Phillip, and Donald F. Turner. "Predatory Pricing and Related Practices under Section 2 of the Sherman Act." *Harvard Law Review* Vol. 88, No. 4 (1975): 697-733.
6. Baumol, William J. "Predation and the Logic of the Average Variable Cost Test." *Journal of Law and Economics* Vol. 39, No. 1, (1996): 49-72.
7. Bavasso, Antonio. "The role of intent under article 82 EC: from 'flushing the turkeys' to spotting lionesses in Regent's park." *European Competition Law Review* Vol. 26(11), (2005): 616–623.
8. Bolton, Patrick, Joseph F. Brodley, and Michael H. Riordan. "Predatory Pricing: Strategy Theory and Legal Policy." *Georgetown Law Journal* Vol. 88 (2000): 2239–2330.
9. Buttigieg, Eugene. "Consumer Interests and the Antitrust Approach to Abusive Practices by Dominant Firms." *European Business Law Review* Vol. 16, No. 5 (2005): 1191–1285.
10. Chang, Howard H., David S. Evans, and Richard Schmalensee. "Has the Consumer Harm Standard Lost Its Teeth?" *AEI-Brookings Joint Center Working Paper; MIT Sloan Working Paper* No. 4263-02 (August 13, 2002) // https://ssrn.com/abstract=332021.
11. "Comments of Professor Elhauge on DG Competition Discussion Paper on Exclusionary Abuses" // http://ec.europa.eu/competition/antitrust/art82/contributions.html.
12. "Commission Press Release on Digital Undertakings." IP/97/868 (October 10, 1997).
13. Cseres, Kati. "The Controversies of the Consumer Welfare Standard." *The Competition Law Review* No. 2, (2007): 121–173.

14. Cyrus, Austin. *Price discrimination and related problems under the Robinson-Patman act*. Revised edition. Committee on Continuing Legal Education, 1954.
15. De la Mano, Miguel, and Benoît Durand. "A Three-Step Structured Rule of Reason to Assess Predation under Article 82." *Office of the Chief Economist Discussion Paper* (December 12, 2005): 1–48 // http://ec.europa.eu/dgs/competition/economist/pred_art82.pdf.
16. Durrance, Christine Piette. "Proposed standards for identifying predation: Williamson's perspective and the Court." *The Antitrust Bulletin* Vol. 55, No. 3 (2010): 663–678.
17. EAGCP. "An economic approach to Article 82" (July 2005) [interactive] // http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.
18. Eilmansberger, Thomas. "How to distinguish good from bad competition under article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses." *Common Market Law Review* No. 42 (2005): 129–177.
19. Elhauge, Einer R. "Defining Better Monopolization Standards." *Stanford Law Review* (2003): 253–344.
20. European Commission, DG Competition. "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses" (December 2005) // http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.
21. Gal, Michal. S. "Below-cost price alignment: meeting or beating competition? The France Telecom case." *European Competition Law Review* Vol. 28(6), (2007): 382–391.
22. Geradin, Damien, and O'Donoghue Robert. "The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector." *Journal of Competition Law and Economics* (2005): 355–425.
23. Gyselen, Luc. "Rebates: Competition on the merits or exclusionary practice?": 267–290. In: Claus-Dieter Ehlermann and Isabela Atanasiu, eds. *European Competition Law Annual 2003 What is an Abuse of a Dominant Position?* Hart Publishing, 2006.
24. Gravengaard, Martin Andreas. "The meeting competition defence principle – a defence for price discrimination and predatory pricing." *European Competition Law Review* Vol. 27(12) (2006): 658–677.
25. Grout, Paul A. "Recent Developments in Definitions of Abusive Pricing in European Competition Policy." *CMPO Working Paper Series* No. 00/23 (2000) (University of Bristol).

26. "Higher Regional Court Düsseldorf Provisionally Confirms the Prohibition of Lufthansa's Abusive Pricing Strategy." *FCO Press Release* (April 10, 2002) // www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002_04_10.shtml.
27. Fox, Eleanor M. "Monopolization and dominance in the United States and the European Community: Efficiency, opportunity, and fairness." *Notre Dame Law Review* No. 981 (1986): 983–1018.
28. Hills, Carla A. *Antitrust Advisor*. New York, 1978.
29. Hurwitz, James, and William Kovacic. "Judicial analysis of predation: the emerging trends." *Vanderbilt Law Review* Vol. 35 (1982): 63–157.
30. International Competition Network, "Report on Predatory Pricing": 1–43 // http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf.
31. Jones, Paul. "Analyzing Refusal-to-Deal Cases Under Brooke Group's Predatory Pricing Test: The Tenth Circuit Misses the Mark in Christy Sports, LLC v. Deer Valley Resort Co." *Brigham Young University Law Review* No. 1, (2010): 135–148.
32. Joskow, Paul, and Alvin A. Klevorick. "A Framework for Analyzing Predatory Pricing Policy." *Yale Law Journal* Vol. 89, No. 2 (1979): 213–270.
33. Koller, Richard H. "The Myth of Predatory Pricing: An Empirical Study." *Antitrust Law and Economic Review* Vol. 4 (1971): 105–124.
34. Koller, Richard H. *Predatory Pricing in a Market Economy*. New York: Arno Press, 1978.
35. Kon, Stephen, and Turnbull Sarah. "Pricing and the Dominant Firm: Implications of the Competition Commission Appeal Tribunal's Judgment in the NAPP Case." *European Competition Law Review* (2003): 70–86.
36. Korah, Valentine. *An Introductory Guide to EC Competition Law and Practice.* Hart Publishing, 2000.
37. Kreps, David, and Wilson Robert. "Reputation and Imperfect Information." *Journal of Economic Theory* Vol. 27 (1982): 253-279.
38. Kroes, Neelie (European Commissioner for Competition Policy). "Preliminary Thoughts on Policy Review of Article 82." Speech at the Fordham Corporate Law Institute, New York (September 23, 2005) // http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en.
39. Lang, Temple. "European Community Antitrust Law: innovation markets and high technology industries." *Fordham International Law Journal* Vol. 20 (1996): 717–818.
40. Leslie, Christopher R. "Predatory pricing and recoupment." *Columbia Law Review* Vol. 113, No. 7 (2013): 1695–1772.

41. Liebeler, Wesley J. "Whither predatory pricing? From Areeda and Turner to Matsushita." *Notre Dame Law Review* (1986): 1052–1098.
42. Lorenz, Moritz, Lübbig Maike, and Russel Alexia. "Price Discrimination, a Tender Story." *European Competition Law Review* (2005): 352–386.
43. Lowe, Phillip (Director General, EC Commission Directorate-General for Competition). "Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?" 13th International Conference on Competition and 14th European Competition Day, Munich (March 27, 2007).
44. Lowe, Phillip. "DG Competition's Review of the Policy on Abuse of Dominance." Fordham Competition Law Institute (2004).
45. Lowe, Phillip. "EU competition practice on predatory pricing." Introductory address to the Seminar 'Pros and Cons of Low Prices'. Stockholm (December 5, 2003) // http://ec.europa.eu/comm/competition/speeches/text/sp2003_066_en.pdf.
46. Lowe, Phillip. "Monopolization versus abuse of dominant position." Panel discussion statement, Fordham Competition Law Institute (2004).
47. Mastromanolis, Emmanuel. "Predatory Pricing Strategies in the European Union: A Case for Legal Reform." *European Competition Law Review* Vol. 19 (1998): 211–224.
48. Milgrom, Paul, and Roberts John. "Predation, Reputation and Entry Deterrence." *Journal of Economic Theory* Vol. 27, No. 2 (1982): 280–312.
49. Moisejevas Raimundas, "The importance of the intent in predatory pricing cases" *Jurisprudencija.* No. 4(122) (2010): 319-334.
50. Moisejevas Raimundas, "Recoupment of losses by the dominant undertaking, which allegedly have used predatory pricing and legality of actions," *Jurisprudencija.* No. 2(120) (2010): 289-303.
51. Moisejevas Raimundas, "Objective justification in predatory pricing," *Jurisprudencija.* No. 18(1) (2011): 213-232.
52. Moisejevas Raimundas, Novosad Ana, Bitė Virginijus. "Cost benchmarks as criterion for evaluation of predatory pricing." *Jurisprudencija.* No. 19(2) (2012): 585-603.
53. Moisejevas, Raimundas, and Novosad Ana. "Some thoughts concerning the main goals of competition law." *Jurisprudencija.* No. 20(2) (2013): 627–642.
54. Nagarajan, Vijaya. "Predatory pricing: A search for a regulatory standard." *Working paper series* No. 31 (1987) (Kingswood, N.S.W., Nepean College of Advanced Education, School of Business).
55. Newton, Carl. "Do predators need to be dominant?" *European Competition Law Review* Vol. 20 (1999): 121–143.

56. O'Donoghue, Robert. "Over-Regulating Lower Prices: Time for a Rethink on Pricing Abuses under Article 82 EC": 371–427. In: Claus-Dieter Ehlermann and Isabela Atanasiu, eds. *European Competition Law Annual 2003*: *What is an abuse of a dominant position?* Oxford and Portland, Oregon: Hart Publishing, 2006.
57. O'Donoghue, Robert, Padilla Jorge. *The Law and Economics of Article 82 EC.* Oxford: Hart Publishing, 2006.
58. Ordover, Janusz, and Willig Robert. "An Economic Definition of Predation: Pricing and Product Innovation." *Yale Law Journal* Vol. 91, No. 1 (1981): 8–53.
59. Pettersson, Tommy, and Stefan Perván Lindeborg. "Comments on a Swedish case on predatory pricing – particularly on recoupment." *European Competition Law Review* Vol. 22 (2001): 55–83.
60. Posner, Richard. *Antitrust Law*. 2nd ed. University of Chicago Press, 2001.
61. Posner, Richard. *Antitrust Law. An economic Perspective*. University of Chicago Press, 1976.
62. Ratliff, John. "Abuse of Dominant Position and Pricing Practices: A Practitioner's Viewpoint": 427–441. In: Claus-Dieter Ehlermann and Isabela Atanasiu, eds. *European Competition Law Annual 2003*: *What is an abuse of a dominant position?* Oxford and Portland, Oregon: Hart Publishing, 2006.
63. Ridyard, Derek. "Exclusionary pricing and price discrimination abuses under Article 82: An economic analysis." *European Competition Law Review* Vol. 23 (2002): 286–310.
64. Ritter, Cyril. "Does the law on predatory pricing and cross-subsidization need a radical rethink?" *World Competition* Vol. 27, No. 4 (2004): 613–649.
65. Sharpes, Dustin. "Reintroducing intent into predatory pricing law." *Emory Law Journal* Vol. 61 (2012): 903–943.
66. Slater, Donald, and Waelbroeck Denis. "Meeting Competition: Why it is not an Abuse under Article 82." *College of Europe Research Papers in Law* (3/2004).
67. Springer Ulrich. "Meeting Competition: Justification of Price Discrimination Under EC and US Antitrust Law." *European Competition Law Review* (1997): 225–257.
68. Steizer, Irwin M. "Changing Antitrust Standard." Remarks before the Workshop on Antitrust Issues in Today's Economy, the Conference Board, New York (March 5, 1987).
69. Vickers, John. "Abuse of Market Power." *Economic Journal* Vol. 115, No. 504 (2005): 244–261.
70. Waelbroeck, Denis. "Exclusionary Pricing and Price Discrimination under EC Competition Law": 234–257. In: Mads Andenas, Michael Hutchings, and Philip

Marsden, eds. *Current Competition Law, Vol. III*. British Institute of International and Comparative Law, 2005.

71. Waelbroeck, Michael. "Meeting Competition: Is This a Valid Defence for a Firm in a Dominant Position?": 481–490. In: A. Guiffrè, ed. *Divenire sociale e adeguamento del diritto: Studi in honore di Francesco Capotorti*. 1999.

LEGAL REFERENCES

1. *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale zur Bekdmpfung unlauteren Wettbewerbs e. v.* Case C-66/68 [1989].
2. *AKZO Chemie BV v. EU Commission*. Case C – 62/86 [1991]
3. *Antitrust: Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings*. Brussels: 3rd December 2008, IP/08/1877.
4. *A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* 881 F.2d 1396, 1401-02 (7th Cir. 1989) (Easterbrook, J.).
5. *Aspen Skiing Co. v Aspen Highlands Skiing Corp.* 472 U.S. 585, 603, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985).
6. *Boeing / Lockheed Martin / United Launch Alliance JV* Case *No. IV/M.3856*. European Commission decision delivered on August 9, 2005, recognizing that concentration is compatible with common market on the basis of Council Regulation No. 4064/89.
7. *BPB Industries and British Gypsum*. Case T-65/89 [1993].
8. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*. 509 US 209, 222–24 (1993).
9. *British Airways plc v. Commission of the European Communities*. Case T-219/99 [2003].
10. *British Airways v. plc Commission of the European Communities*. Case C-95/04 [2007].
11. *Commissioner of Competition v. Air Canada*. Canadian Competition Tribunal (2003), 26 C.P.R. (4th) 476 [2003] C.C.T.D. No. 9.
12. *Commission Communication – Notice – Guidelines on the application of Article 81 (3) of the Treaty*. OJ 101, 27.4.2004.
13. *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*. 2009/C 45/02.
14. *Compagnie Maritime Belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v. EU Commission*. [2000].

15. *Compagnie Maritime Belge SA (C-395/96 P) and Dafra-Lines v. Commission.* Opinion of Advocate General Fennelly delivered on October 29, 1998, Joined cases C-395/96 P and C-396/96.
16. *Deutsche Post AG*. Decision of the European Commission of March 20, 2001, OJ L 125/27.
17. *Decision of 18 February 2002, Case B-9-144/01*. Federal Cartel Office.
18. *ECS v. AKZO-temporary measures*. Decision of the European Commission on 29th of July 1983, case COMP/30.698 [1983] O.J. L252/13.
19. *Europemballage Corpn and Continental Can v. Commission of the European Communities*. Case C-6/72 [1973].
20. *Eurofix-Bauco v Hilti.* Decision of Commission of December 22, 1987, case COMP/30.787 [1988] O.J. L 65/19.
21. *France Telecom SA v. Commission*. Case C – 202/07.
22. *France Télécom v. Commission*. Case T – 340/03.
23. *France Telecom SA v. Commission*. Case C-202/07. Opinion of Advocate General Mazák delivered on September 25, 2008.
24. *First Edinburgh / Lothian*. Decision of the Office of Fair Trading (now CMA), No. CA98/05/2004 (April 29, 2004) (Case CP/0361-01).
25. *GlaxoSmithKline Services Unlimited v. Commission of the European Communities*. Case T-168/01 [2006].
26. *Guidelines on Vertical Restraints*. OJ, 2000, C 291/1.
27. *Hanson v. Shell Oil Co*. 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977).
28. *Hoffman-La Roche v. Commission*. Case C – 85/76 [1979].
29. *Hilti v. Commission*. Case T-30/89 [1991].
30. *IMS Health Inc., v. Commission of the European Communities*. T-184/01 *R,* Order of the President of the Court of First Instance [2001].
31. *International Air Indus. v. American Excelsior Co*. 517 F.2d 714, 724 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).
32. *Irish Sugar v. Commission*. Case T-228/97 [1999].
33. *Lufthansa case, decision 2002-02-18, B9-144/01.* German Bundeskartellamt.
34. *Michelin v. Commission of the European Communities*. Case T-203/01 [2003].
35. *Microsoft Corp v. Commission of the European Communities*. Case T-201/04 [2007].
36. *NDC Health GmbH & Co KG and NDC Health Corporation v. Commission of the European Communities*. C-481/01, Order of the President of the Court [2002].
37. *Northeastern Tel. Co. v. AT&T Co*. 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

38. *Notice on the application of the competition rules to access agreements in the telecommunications sector*. European Commission, OJ C 265/2 [1998].
39. *Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services*. European Commission, OJ C 39, 06.02.1998.
40. *Notice on the application of competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles*. OJ C 265, 22.08.1998.
41. *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v. Commission of the European Communities*. Joined cases T-231/01 and T-214/01 [2006].
42. *Post Danmark A/S v Konkurrencerådet*. Case C-209/10 [2012].
43. *Predation by Aberdeen Journals Limited*. Case No. CA98/14/2002, September 16, 2002, Decision of the Director General of Fair Trading.
44. *Standard Oil Co. of New Jersey v. U.S*. 221 U.S. 1 (1911).
45. *Tetra Pak v. Commission*. Case T-51/89 [1990].
46. *Tetra Pak International SA v. EU Commission*. Case C – 333/94 [1996].
47. *United Brands v. Commission*. Case C - 27/76 [1978].
48. *United States v. Grinnell Corporation*. 384 U.S. 563, 570 (1966).
49. *United States v. Microsoft Corporation*. 253 F3d 34, 54 (D.C. Circ.) (2001).
50. *United States v. Am. Tobacco Co*. 221 U.S. 106 (1991).
51. *United States v. AMR Corp*. 335 F.3d 1109 (10th Cir. 2003).
52. *Wanadoo case*. European Commission decision delivered on July 16, 2003, No. COMP 38.233, Commission press release lP/03/1025.