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## THE IMPORTANCE OF THE INTENT IN PREDATORY PRICING CASES

Raimundas Moisejevas

Mykolas Romeris University, Faculty of Law,  
Department of Business Law  
Ateities 20, LT-08303 Vilnius, Lithuania  
Telephone (+370 5) 2714 525  
E-mail raimundas11@yahoo.com

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**Abstract.** *One of the most important principles of EC law is the prohibition of the abuse of dominant position as established in Article 102 TFEU. Predatory pricing is one of the forms of abuse of a dominant position. In order to decide whether the dominant undertaking has referred to predatory pricing it is necessary to evaluate several elements, one of which is analysis of the intent of the undertaking. European judicial institutions and Commission while assessing predatory pricing give too much importance to the intent of the dominant undertaking. It should be recognized that intention to use predatory pricing is only additional evidence for the determination that undertaking abused dominant position. Intent to eliminate competitors and to take a big part in the market is the aim of all dominant undertakings, the driving force of competition. Competition law officers should inquire whether pricing will cause elimination of competitors and damage to consumers. If competition law officers will provide too much importance to consideration of intent in that case competition law rules will be applied too strict and dominant undertakings and will not charge low prices that are good for consumers.*

**Keywords:** *abuse of dominant position, intent, predatory pricing, recoupment of losses, average variable costs, effect on the market.*

## Introduction

While assessing the novelty of the present article in respect to Lithuanian legal science, it should be noted that Lithuanian legal scholars have not published any articles or other research on predatory pricing previously, except for the author of this article. Although predatory pricing is analyzed in a number of articles, the author could not find any dissertation or book completely devoted to predatory pricing, while doing research at several libraries in Germany, Denmark and Switzerland.<sup>1</sup> The aforementioned circumstances allow for the conclusion that the concept of predatory pricing should be more developed and research in this sphere is not important. Importance of the researches in present area is substantiated by the fact that the European Commission at the moment is reviewing its policy in the area of abuse of a dominant position. In December of 2005, the Commission published „DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses”<sup>2</sup> (hereinafter—„Discussion paper”) and on the basis of the „Discussion paper,” the Commission prepared and published on the 24<sup>th</sup> of February, 2009 a 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” (hereinafter—„Communication from the Commission”).<sup>3</sup> The Communication from the Commission attempts to summarize the competition policy of the Commission *inter alia* in relation to recoupment of losses in cases of predatory pricing.

The concept of intent of dominant undertaking in relation to predatory pricing is a relevant topic since it is analyzed only in a few decisions of the ECJ and of the CFI.

The object of the article is to evaluate the importance of the intent in case of predatory pricing in the competition law of the EC and legal system of the Lithuanian Republic. Analysis is concentrated on the legal decisions formulated in the practice of the ECJ, CFI and Lithuanian competition council and also on EU and Lithuanian legal acts related to the predatory pricing.

The aim of the article is to use scientific methods to analyze comprehensively peculiarities of the intent in case of predatory pricing in EC competition law.

In this article, many different research methods were used: logical, systematic analysis, comparative and linguistic.

### 1. Analysis of the Intent in Predatory Pricing Case Law

Importance devoted to the intent of undertakings engaged into predation differs in various legal jurisdictions and in writings of different scholars.

1 It should be noted in this respect that the author analyzed a few dissertations on predatory pricing written in the United States. However, there are no dissertations on predatory pricing in EU.

2 European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses [interactive]. [accessed 11-03-2007]. <<http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>>.

3 *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, 45(2).

Judicial institutions of the European Union claim that the intent of dominant undertakings is an important element.<sup>4</sup> The significance of the intent of the dominant undertaking in the specific case is dependant on the relationship between costs and price i.e., in case if undertaking establishes a price smaller than average variable/avoidable costs, it is suggested that undertaking is engaged in predatory pricing and also it is suggested that intent of undertaking is illegal; in case undertaking sets prices higher than average variable/avoidable costs. In order to recognize that undertaking is engaged in predatory pricing it is necessary to prove illegal intent of the undertaking.<sup>5</sup> It should be emphasized that judicial institutions in the European Union do not recognize only on the basis of the evidence of illegal intent that dominant undertaking refers to predatory pricing.<sup>6</sup>

In the legal jurisprudence of the United States, prohibited anticompetitive actions are related to intentional acquisition or maintenance of monopolistic power<sup>7</sup> and intention is not viewed as important while evaluating actions of the undertakings in dominant/monopolistic positions.<sup>8</sup> The fact as to why in the United States intention is not given primary importance is partly influenced by the fact that jury, differently from judges, might be easily misguided by evidence concerning intent of undertaking. US Appeal Court (District Columbia) in the Microsoft case noticed that it is most important to „separate illegal exclusionary behavior, which reduces social welfare from legal behavior, which increases it.”<sup>9</sup> The US Appeal Court noticed that „while evaluating whether actions of monopolist breach competition and should be recognized as exclusionary actions in relation to article 2, the most important thing is the real effect of such actions and not the intent behind it. Evidence of the intent is important as long as it allows understanding probable effect of monopolistic actions.”<sup>10</sup>

Scholars who propose to devote high importance to the intent of dominant undertaking notice that the bosses of the undertakings have better opportunity than officials in the competition council or judges to evaluate profitability of predatory pricing and the extent to which such predatory pricing will distort competition. It is noted that rational planning of the activity of undertaking by the bosses of a company means that evidence, which proves intent of the undertaking to apply predatory pricing, is more important

4 While considering predatory pricing, big importance is given 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 given in Hungary, Italy, Jamaica, Russia, South Africa and US. However, in Italy, intent is important in order to determine size of the fine [interactive]. [accessed 11-08-2010]. <[http://www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/FINALPredatoryPricingPDF.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf)>.

5 Case T—340/03, *France Telecom SA v. Commission* [2007], para. 197.

6 Almost all competition institutions in the world take the position that it is not sufficient to provide evidence concerning illegal intent of undertaking in order to prove that undertaking was engage in predatory pricing [interactive]. [accessed 11-08-2008] <[http://www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/FINALPredatoryPricingPDF.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf)>.

7 *United States v. Grinnell Corporation*, 384 U.S. 563, 570. 1966.

8 Posner, R. *Antitrust Law*. 2nd ed. University of Chicago Press, 2001, p. 214.

9 *United States v. Microsoft Corporation*, 253 F3d 34, 54 (D.C. Circ.) 2001.

10 *Ibid.*; also *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603, 86 L. Ed. 2d 467, 105 S. Ct. 2847. 1985.

than guesses from the competition officials concerning the basis of the pricing of undertaking.

The ECJ emphasized importance of the intent of dominant undertaking in 1978 in the *United Brands* case, claiming that “such behavior cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.”<sup>11</sup>

In *AKZO Chemie BV* case the ECJ claimed that in certain cases intention to eliminate a competitor is the decisive factor recognizing that the reducing of prices becomes abuse of dominance. Establishment of prices less than average variable costs is viewed as illegal since “a dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position” and “moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.”<sup>12</sup> The ECJ claims that if undertaking sets prices higher than average variable costs and smaller than average total costs the undertaking has the opportunity to eliminate even effective competitors without experiencing losses. Such pricing is recognized as illegal if evidence concerning intent to eliminate competitors is provided.<sup>13</sup> The ECJ in *AKZO* case on the basis of factual circumstances decided that AKZO intended to eliminate ECS company: “... AKZO has not denied that it charged differing prices to buyers of comparable size. It has, furthermore, not advanced arguments to show that these differences related to the quality of the products sold or to special production costs ... The prices charged by AKZO to its own customers were above its average total costs, whereas those offered to customers of ECS were below its average total costs ... This behavior shows that AKZO’s intention was not to pursue a general policy of favorable prices, but to adopt a strategy that could damage ECS.”<sup>14</sup> According to the ECJ, 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 their competitor from the market.

In case the ECJ determines that the undertaking sets prices smaller than average variable costs and concludes that the undertaking intends to eliminate competitors, it should be allowed for the undertaking to justify its pricing and prove legitimacy of its intent.<sup>15</sup> In certain cases the undertaking may explain the motives of its behavior (for example intention to empty storehouses), moreover, it is important to evaluate the ability of undertaking to recoup losses.<sup>16</sup> The fact that Article 102 TFEU has no exemption

11 Case C—27/76, *United Brands v. Commission*, [1978], para. 189.

12 Case C—62/86, *AKZO Chemie BV v. Commission*, [1991], para. 71–72; Case T-228/97, *Irish Sugar v. Commission*, [1999], para. 111.

13 Case C—62/86, *AKZO Chemie BV v. Commission*, [1991], para. 72;

14 *Ibid.*, para. 113–115.

15 Ridyard, D. Exclusionary pricing and price discrimination abuses under Article 82: An economic analysis. *European Competition Law Review*. 2002, 23(6): 296.

16 Case C-333/94, *Tetra Pak International SA v. Commission*, para. 44. The ECJ held that it is not necessary to provide evidence that it is practically possible to recoup losses. However, in the *Wanadoo* case, the Commission researched whether recoupment is possible. The European Commission’s decision, delivered on 16th

similar to para 3 of Article 101 TFEU,<sup>17</sup> does not deny dominant undertakings' ability to justify its actions.<sup>18</sup>

In *Tetra Pak II* case many facts of the case (long term of the unprofitable sales, durability of abuse and data of accounting) allows for the conclusion that dominant undertaking was intentionally experiencing losses and used this to sell in certain regions products cheaper than their costs of production i.e., in certain regions the price of the product was even 50% lower than in other regions. During the investigation, officials from the Commission found documents, which proved the intention of the Board of the Directors to use a big part of the profit for the fight with competitors.<sup>19</sup> The ECJ held in *Tetra Pak II* case that "... prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown. ... At paragraph 150 of the judgment under appeal, the Court of First Instance carried out the same examination as did this Court in *AKZO*. For sales of non-aseptic cartons in Italy between 1976 and 1981, it found that prices were considerably lower than average variable costs. Proof of intention to eliminate competitors was therefore not necessary. In 1982, prices for those cartons lay between average variable costs and average total costs. For that reason, in paragraph 151 of its judgment, the Court of First Instance was at pains to establish and the appellant has not criticized it in that regard that *Tetra Pak* intended to eliminate a competitor."<sup>20</sup>

On July 18, 1988 the Commission on the basis of the request of Napier Brown and certain other sugar producers, reached a decision in *Napier Brown—British Sugar* case.<sup>21</sup> British Sugar Company was the biggest producer and the only processor of sugar in Great Britain. The Commission claimed that British Sugar abused their dominant position, because it used to sell sugar for a price higher than the cost of processing the sugar. The Commission noted that if British Sugar would refer to its illegal practice for a long time in the case of Napier Brown (or other undertaking as effective as British Sugar), they would have to leave the sugar retail market in Great Britain. After establishment of the intent of British Sugar to eliminate Napier Brown from the retail market

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July, 2003, Wanadoo case, No, COMP 38.233, Commission press release IP/03/1025. Also take a look to Lowe, Monopolization versus abuse of dominant position, panel discussion statement, 2004, F.C.L.I. 2003, 355.

- 17 Case T-51/89, *Tetra Pak v. Commission*, 1990, para. 27; Case T-65/89, *BPB Industries and British Gypsum* (1993), para. 75; Case C-66/68 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V.*, [1989]; Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v. Commission* [2000], para. 135.
- 18 Guidelines on Vertical Restraints, OJ, 2000, C 291/1, para. 141; Gyselen, L. Rebates: Competition on the merits or exclusionary practice? In Ehlermann, C. D.; Atanasiu, I. (eds.). *European Competition Law Annual—What Is an Abuse of a Dominant Position?* Oxford and Portland, Oregon (forthcoming): Hart Publishing, 2003, para 12; Lowe, "DG Competition's Review of the Policy on Abuse of Dominante", (2004) Fordham Competition Law Institute 2003, para. 171.
- 19 Case C-333/94, *Tetra Pak International SA v. Commission*, [1996].
- 20 *Ibid.*, para. 41–42.
- 21 European Commission decision delivered on 18th July, 1988 concerning research on the basis of the Article 86 of the EEC Treaty (case No. IV/30.178 *Napier Brown—British Sugar*).

of sugar, the Commission recognized that the pricing of British Sugar was illegal<sup>22</sup> and should be regarded as predatory pricing.<sup>23</sup>

Napier Brown Company also alleged that British Sugar abused their dominant position in the granulated sugar market of Great Britain, since British Sugar was intentionally selling sugar to certain clients for prices substantially smaller than to Napier Brown. Although it was not recognized that by such actions British Sugar abused their dominant position, the Commission emphasized that selectively made offers to certain clients to buy goods, which undercut the prices offered by the competitors should be regarded as abuse of dominant position.<sup>24</sup> However, actions of undertaking, which offers goods to certain clients of the competitors for a price that is smaller than its usual price but not smaller than the price of the competitor, should not be viewed as abuse of dominance.<sup>25</sup>

In *Wanadoo* case<sup>26</sup> the Commission surveyed an application of predatory pricing when undertaking was setting prices, which were higher than variable and smaller than total costs. The Commission noted that if there is no direct evidence about intention to eliminate a competitor, it is possible to indicate intention on the basis of the facts of the case.<sup>27</sup> It is possible to criticize the position of the Commission in this case, since the Commission emphasized importance of intention of Wanadoo Company and didn't pay any attention to the evaluation of pricing effect to the market.<sup>28</sup> It is clear that survey concerning the intention of dominant undertaking and survey concerning effect on the market of the actions of the undertaking are substantially different. Moreover, in *Wa-*

22 European Commission decision delivered on 18th July, 1988 concerning research on the basis of the Article 86 of the EEC Treaty (case No. IV/30.178 *Napier Brown–British Sugar*), para. 66.

23 *Ibid.*, para. 87.

24 *Ibid.*, para. 31.

25 Andrews, P. Is meeting competition a defence to predatory pricing? The Irish Sugar decision suggests a new approach. *E.C.L.R.* 1998, 19(1): 49–57; Buttigieg, E. Consumer Interests and the Antitrust Approach to Abusive Practices by Dominant Firms. *EBLR*. 2005, 16(3): 1235; Geradin, D.; O'Donoghue, R. The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector. *The Global Competition Law Center Working Papers Series*. 04/05. p. 64; European Commission decision delivered on 20th March, 2001, decision *Deutsche Post AG*, No. 2003/707/EB, O.L. 2003, L 263/9–41, para. 37; European Commission decision in case 88/138 EEC, *Eurofix-Bauro v. Hilti*, O.J. 1988, L 65/19.

26 European Commission decision delivered on 16th July, 2003, *Wanadoo case*, No, COMP 38.233, Commission press release IP/03/1025.

27 *Ibid.*, para. 271.

28 Ashurst commentary <<http://ec.europa.eu/comm/competition/antitrust/art82/066.pdf>>; Assonime, Associazione fra le societa italiane per azioni <<http://ec.europa.eu/comm/competition/antitrust/art82/031.pdf>>; Allen and Overy <<http://ec.europa.eu/comm/competition/antitrust/art82/055.pdf>>; Baker and McKenzie LLP <<http://ec.europa.eu/comm/competition/antitrust/art82/076.pdf>>; Confederation of Finnish Industries <<http://ec.europa.eu/comm/competition/antitrust/art82/080.pdf>>; Crecedi, Centre de Recherches sur le commerce et l'Economie Numérique, FR <<http://ec.europa.eu/comm/competition/antitrust/art82/086.pdf>>; RBB Economics, BE <<http://ec.europa.eu/comm/competition/antitrust/art82/068.pdf>>; Shapiro & Hayes, CRA International, US <<http://ec.europa.eu/comm/competition/antitrust/art82/020.pdf>>; France Telecom <<http://ec.europa.eu/comm/competition/antitrust/art82/088.pdf>>.

*nadoo* case the Commission did not pay enough attention to justifications based on the learning effects, economy of scale and ability to recoup losses.<sup>29</sup>

The ECJ takes position that in order to recognize that dominant undertaking breached Art 102 TFEU, therefore it is not necessary to prove that actions of the undertaking had any real effect on the market. It is enough to prove that actions of the dominant undertaking may restrict or will restrict competition in the market.<sup>30</sup> Commission believes that dominant undertaking, which has a clear strategy of predatory pricing, will also have instruments to apply predatory pricing and will be able to eliminate competitors.<sup>31</sup> CIF noted in *Michelin II* case that in order to prove abuse of dominant position it is necessary to prove that the dominant undertakings' actions had negative effect on competition or that dominant undertaking intended to achieve illegal aim.<sup>32</sup> CIF noted that "it follows that, for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing (see, in that regard, *Irish Sugar v. Commission*, cited at paragraph 54 above, paragraph 170). If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect."<sup>33</sup> Although CIF noted that effect and intent are closely related,<sup>34</sup> however CIF did not explain how in practice illegal intent should be determined. The author of this article completely does not agree with the statement of the Commission and CIF that undertaking, which intends to eliminate competitors, will have sufficient means to achieve this aim.

The ECJ quite often refers to special responsibility concept in order to prove that dominant undertaking should be recognized as engaged in predatory pricing irrespective of the effect on consumers and ability of undertaking to recoup losses.<sup>35</sup> Entrenchment of such concept in the jurisprudence of the ECJ was partly determined by the fact that as dominant are regarded companies, which have big share in the market. The ECJ in the *Michelin I* case held that dominant undertaking has special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.<sup>36</sup> Therefore, although it is not prohibited to have a dominant position, dominant undertaking may not restrict competition in the market and its "special responsibility" means that dominant undertaking has much more limitations concerning its actions than undertaking, which

29 Bavasso, A. The role of intent under article 82 EC: from "flushing the turkeys" to "spotting lionesses in Regent's park". *E.C.L.R.* 2005, 26(11): 616–623.

30 Case T-219/99, *British Airways v. Commission*, 2003, para. 293.

31 European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, *supra* note 2.

32 Eilmansberger, T. 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*. 2005, 42: 147.

33 Case T-203/01, *Michelin v. Commission*, para. 241; Case T-228/97 *Irish Sugar plc. v. Commission* 1999, para. 170.

34 Fox, E. M. Monopolization and dominance in the US and the EC: Efficiency, opportunity, and fairness. *Notre Dame Law Rev.* 1986, 61: 1001.

35 European Commission decision delivered on 16th July, 2003, *Wanadoo case*, No, COMP 38.233, Commission press release IP/03/1025.

36 Case C-322/81, *Michelin I v. Commission*, 1983, para. 57. Case T-228/97 *Irish Sugar plc. v. Commission*, 1999, para. 112.

is not in a dominant position.<sup>37</sup> In the US legal jurisprudence it is also recognized that the Sherman act establishes “special responsibility” in relation to dominant undertakings.<sup>38</sup>

Competition Council of Lithuania recognizes the intent to eliminate the competitor as one of the elements of the predatory pricing.<sup>39</sup> Therefore, evidence of predatory intent (for example, detailed calculations what prices might limit competition or how losses should be recouped) also might be regarded as important.<sup>40</sup> However, the Competition Council of Lithuania has not used such evidence previously.

The author of this article believes that the ECJ and Commission, while evaluating application of predatory pricing devote too much importance to the intent of dominant undertaking. First, strategic plans of undertaking may contain intent to eliminate competitors, but bosses of undertakings do not always take correct decisions and they often do not succeed in fulfillment of their business plans. Example of *Aberdeen Journals* case shows that,<sup>41</sup> undertakings might wrongly believe that by engaging in predatory pricing they will be able to weaken competition in the market. Bosses of the undertaking might wrongly evaluate conditions of the market, power of competitors and ability of undertaking to maintain war of prices. It was held in the *Aberdeen Journals* case that the Aberdeen Journals Company used to apply prices smaller than average total costs and that Aberdeen Journals company intended to eliminate Independent company from the market. On the basis of these facts it was recognized that the Aberdeen Journals Company engaged in predatory pricing and it was fined. Big attention in this case was paid to the evaluation of intent of Aberdeen Journals Company although the illegal plan was not fulfilled and Independent Company has not experienced any real danger to be eliminated from the market. The Court might have come to completely different conclusion in this case if the Court would evaluate not only intention of the dominant undertaking, but also real effect on the market and ability of the dominant undertaking to recoup losses.

Secondly, it is difficult to separate illegal and legal intent to eliminate competitors, since many undertakings aim to eliminate competitors on the basis of price competition.<sup>42</sup> US judge J. Easterbrook in *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* case

37 Report by the EAGCP “An economic approach to Article 82,” [interactive]. July 2005, p. 15 [accessed 06-30-2010]. <[http://ec.europa.eu/comm/competition/publications/studies/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf)>.

38 *United States v. Aluminium Co. of America*, 148 F.2d 416, 430-31 (2d Cir. 1945) (L. Hand, J.); *Olympia Equipment Leasing Company and Others v. Western Union Telegraph Company*, 797 F.2d 370 (7th Cir. 1986) (Posner, J.).

39 Competition council of the Republic of Lithuania, Resolution No. 52, 17 May 2000, On the explanations of the Competition council concerning the establishment of a dominant position, the Resolution published in *Official Gazette*, 2000, No. 52—1516, provision 20.2.

40 International Competition Network [interactive]. [accessed 08-11-2008]. <[http://www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/2007QuestionnaireDocs/LITHUANIA%20REPSONSE.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/2007QuestionnaireDocs/LITHUANIA%20REPSONSE.pdf)>.

41 Case No. CA98/14/2002, Predation by Aberdeen Journals Limited (16 September 2002) (Decision of the Director General of Fair Trading), affirmed by Competition Appeal Tribunal (23 June 2003) (see OFT press release, 23 June 2003, “OFT Competition Ruling Upheld,” <[www.oft.gov.uk/news/press+releases/2003/pn+84-03.htm](http://www.oft.gov.uk/news/press+releases/2003/pn+84-03.htm)>).

42 O’Donoghue, R. Over-Regulating Lower Prices: Time for a Rethink on Pricing Abuses under Article 82 EC. *Working Paper*. 2003.



held that “firms ‘intend’ to do all the business they can, to crush their rivals if they can. ... Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. ... Almost all evidence bearing on ‘intent’ tends to show both greed-driven desire to succeed and glee at a rival’s predicament. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one’s rivals is entirely consistent with, often is the motive behind, competition. ... Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition.”<sup>43</sup> The desire to eliminate competitors, which might be found in business plans of dominant undertakings is inseparable from usual statements of undertakings and is common to all the undertakings.<sup>44</sup>

Thirdly, if legal acts would recognize intent as necessary element, and in certain case it would not be possible to prove illegal intent of the undertaking this would mean that the undertaking should be relieved from responsibility. Establishment of such requirement might cause negative effect on competition and wealth of consumers, since undertaking might destroy evidence concerning intent and escape from responsibility in such a way.<sup>45</sup>

Fourthly, analysis of the intent of undertakings in relation to articles 101 and 102 TFEU allows understanding better importance of the intent of undertakings that allegedly engage in predatory pricing. Article 101 TFEU prohibits agreements, decisions of associations and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market. According to Article 101 TFEU intent and effect are alternative criteria i.e., intent to make certain effect and effect to the competition each separately are regarded as sufficient basis in order to recognize certain agreement between undertakings as illegal. However, subjective evidence of intent, which has not taken the form of agreement or concerted practices, is not sufficient in order to prove breach of Article 101 TFEU.

It should be noted that according to Article 101 TFEU subjective evidence of the aim (intent), which is not entrenched in the form of the agreement or concerted practices is not sufficient in order to prove breach of the Article 101 TFEU. If only evidence concerning intent is submitted without submission of evidence concerning relevant actions, in such case it should be viewed as not sufficient in order to prove that actions of undertaking are contrary to competition.<sup>46</sup> Officers of competition institutions should devote big interest not to the intent of undertaking, but to the research of whether pricing of dominant undertaking will lead to the elimination of competitors, since negative effect on the competition is a factor, which determines that usual actions of undertaking beco-

43 *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989) (Easterbrook, J.).

44 Posner, R. *Antitrust Law: An Economic Perspective* 190, 1976; Elhauge, E. *US commentary*. Harvard Law School <<http://ec.europa.eu/comm/competition/antitrust/art82/072.pdf>>.

45 *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.).

46 Gyselen, L. Rebates: Competition on the merits or exclusionary practice? In Ehlermann, C. D.; Atanasu, I. (eds.). *European Competition Law Annual—What Is an Abuse of a Dominant Position?* Oxford and Portland, Oregon (forthcoming): Hart Publishing, 2003, p. 9.

me contrary to the Article 102 TFEU.<sup>47</sup> Intent of the dominant undertaking to eliminate competitors will be relevant if there is a big chance that the elimination will negatively affect competition and the wealth of the consumers.<sup>48</sup> Objective evidence, which confirms that prices were decreased, aiming to eliminate competitors, should be recognized as a legal defense, which may justify engagement in predatory pricing.

Article 102 TFEU *expressis verbis* does not prohibit the dominant undertaking to take action while aiming to achieve illegal aims if such action causes no damage for the competition. Article 102 TFEU, differently from Article 101 TFEU does not provide reference to the intent of undertaking, therefore it might be assumed that in order to prove that undertaking abused dominant position it is not necessary to prove that undertaking wanted to achieve illegal aims. Such position is supported by the decision of the ECJ in *Hoffman La Roche* case, in which abuse of dominance was named “objective concept.”<sup>49</sup>

## 2. Evidence of the Intent of Dominant Undertaking in the Predatory Pricing Cases

The Commission claims, that in order to determine predatory intent of dominant undertaking especially important is the following evidence: direct evidence of the intent; evidence that pricing only makes commercial sense as part of the predatory strategy; likely exclusion of the prey; whether certain customers are selectively targeted whether the dominant company actually incurred specific costs in order for instance to expand capacity, the scale, duration and continuity of the low pricing, the concurrent application of other exclusionary practices and the possibility of the dominant company to off-set its losses with profits earned on other sales.<sup>50</sup> Evidence used by the Commission is divided into direct and indirect.

*Direct evidence.* Direct evidence of a predatory strategy can consist of documents from the dominant company, such as a detailed plan demonstrating the use of predatory prices to exclude a rival, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action.<sup>51</sup> Such evidence needs to be clear cut about the predatory strategy and for instance indicate the specific steps that the dominant company is taking. Commission claims that in case direct evidence concerning intention of undertaking is submitted it does not need to submit additional evidence. The ECJ

47 O'Donoghue, R., *supra* note 42.

48 Bavasso, A., *supra* note 29, p. 616–623.

49 Case C–85/76, *Hoffman-La Roche v. Commission*, 1979, para. 91.

50 European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, *supra* note 2.

51 Commission of the European Communities, Brussels, 3 December 2008, COM (2008), Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 65; European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, *supra* note 2.

and Commission quite rarely base their cases on direct evidence since it is difficult for officials of the competition institutions to collect direct evidence concerning intention. On the other hand internal documents of the undertaking, which reveal negative position towards competitors, quite often have limited importance.<sup>52</sup>

*Indirect evidence.* In most cases officials of the Commission (or other subjects) submit indirect evidence concerning intent of undertaking.<sup>53</sup> In such case it is necessary to show that actions of the undertaking cause losses. Commission argues that in order to base a case on the indirect evidence of the following elements will in particular be of relevance to show a plausible scheme of predation: does the pricing behavior only make commercial sense as part of a predatory strategy or are there also other reasonable explanations, is there an actual or likely exclusionary effect, the scale, duration and continuity of the low pricing, does the dominant company actually incur specific costs in order for instance to expand capacity which enables it to react to entry, are certain customers selectively targeted and certain other factors.<sup>54</sup> Commission claims that determining that actions of dominant undertaking are viable only in case if they form part of predation strategy is enough by itself to conclude that undertakings' actions are illegal and it is not necessary to prove that such actions will cause elimination from the market. In order to evaluate whether certain pricing behavior makes commercial sense only as part of the predatory strategy, it should be evaluated whether there is a possibility that competitors will be eliminated from the market.<sup>55</sup>

The Commission points out several examples of evidence, which witness that intent of the undertaking to eliminate competitors does exist. First, if pricing of undertaking is profitable only in case of application of predatory strategy and elimination of competitors, it will be enough to make conclusion that undertaking is engaged in predatory pricing and there will be no need to submit additional evidence that new competitors will not be able to enter the market.<sup>56</sup> Secondly, certain acts of undertaking might witness intent to eliminate competitors, for example dominant undertaking might provide loyalty rebates to customers, who refuse to buy goods from the competitors of the dominant undertaking. Thirdly, if the dominant company with its low prices selectively targets

52 Posner, R. *supra* note 8, p. 214.; R. O'Donoghue, R., *supra* note 42, p. 34. In most cases Commission referred to internal documents of the undertaking, which witness intent to eliminate, for example - European Commission decision in case 91/299/EEC, *Soda ash - Solvay*, O.J. 1991, L 152/21, paras. 19 ir 52 et seq.; European Commission decision in case 88/138 EEC, *Eurofix-Bauro v. Hilti*, O.J. 1988, L 65/19, para 81.; European Commission decision delivered on 14th December, 1985 concerning research on the basis of the Article 86 of the EEC Treaty (case No. IV/30.698 ECS/AKZO) paras. 123 et seq.; European Commission decision in case *Irish Sugar* (Case IV/34.621) O.J. (1997) L258/1, para. 69; European Commission decision in case 89/22/EEC, *BPB Industries plc*, O.J. 1989, L 10/50, at paras. 96 et seq.

53 Officials of France, New Zealand, Denmark and United Kingdom also refer to the nondirect evidence of intent [interactive]. [accessed 08-11-2008]. <[http://www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/FINALPredatoryPricingPDF.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf)>.

54 *European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, supra* note 2.

55 JWP, Joint Working Party of the Bars and Law Societies of the UK, BE commentary [interactive]. <<http://ec.europa.eu/comm/competition/antitrust/art82/101.pdf>>.

56 *European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, supra* note 2.

specific customers and in particular when these customers are the actual customers of one or more particular rivals in the market, this may be an important part of the evidence of a predatory strategy. On the other hand, a general price decrease applied to all the output of the dominant company is in general less likely to be part of a predatory strategy.<sup>57</sup> In case the undertaking is trading in several geographical markets, but reduces the prices only in the market, in which he meets the competitors, such behavior witness predatory intent. In case undertaking reduces prices in all the geographical markets it allows to suggest that costs of undertaking were reduced and reducing prices undertaking wanted to increase profit to the maximum. Fourthly, dominant undertaking may want to acquire competitor and after failure to do it, undertaking may engage to predatory pricing in order to weaken competitor and to reduce the price of acquisition of the competitor.<sup>58</sup>

Director General of the competition directorate P. Lowe notes that: “It may be possible for our officials (or those of a national competition authority) to find in a dawn raid documentary proof such as statements by the company or its decision making bodies. On the other hand, the proof of intent would be more straightforward when (as it often happens in abuse cases) dominant companies combine the suspected prices with other concurrent exclusionary practices targeting the same competitor or sharing the same aim. In the same way, sometimes it is possible to find documented threats to competitors or internal documents, schemes, projections and prognosis work used in the decision-making process to support the decision to incur short term losses with the prospect to eliminate or discipline a competitor. In order to establish the existence of predatory intention, it is useful to consider the duration and continuity of the practice, since the existence of a predatory strategy should necessarily last long enough to influence competitors’ decisions to leave or enter a given market.”<sup>59</sup>

There is a chance that use of indirect evidence in order to evaluate whether undertaking engage into predatory pricing might have negative effect on the competition, since undertaking might be afraid to start the action, which is potentially beneficial for the competition. Evidence concerning intention of the undertaking Commission should view as important (however, not sufficient by themselves) if it is revealed that undertaking intends to engage into predatory pricing and it is guaranteed that the undertaking will succeed.<sup>60</sup> Certain concern is also caused by the fact that officials of competition institutions often refer to indirect evidence in order to prove that the undertaking was engaging into predatory pricing. However, such evidence is not completely reliable.

57 *European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, supra* note 2.

58 *Ibid.*, para. 122.

59 EU competition practice on predatory pricing. Introductory address to the Seminar. Pros and Cons of Low Prices. Stockholm, 5 December 2003 by Philip Lowe [interactive]. [accessed 2007-03-11]. <[http://ec.europa.eu/comm/competition/speeches/text/sp2003\\_066\\_en.pdf](http://ec.europa.eu/comm/competition/speeches/text/sp2003_066_en.pdf)>.

60 Such position is supported by the American Chamber of Commerce to the European Union, commentary [interactive]. <<http://ec.europa.eu/comm/competition/antitrust/art82/100.pdf>>.

## Conclusions

1. European judicial institutions and Commission while assessing predatory pricing give to much importance to the intent of the dominant undertaking. It should be recognized that intention to use predatory pricing is only additional evidence for the determination that undertaking abused dominant position. In strategic plans of undertaking it might be provided that undertaking aims to eliminate competitors, however, managers of companies do not always make correct decisions and quite often they do not achieve their business goals.

2. Intent to eliminate competitors and to take a big part of the market is the aim of all dominant undertakings, driving force of the competition. Competition law officers should inquire whether pricing will cause elimination of the competitors. The policy of European Commission competition law officers to prove illegality of the dominant undertakings actions with reference to indirect evidence, should be criticized, because such evidence is not fully reliable.

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## GROBUONIŠKĄ KAINODARĄ TAIKANČIO DOMINUOJANČIO ŪKIO SUBJEKTO KETINIMAS

Raimundas Moisejevas

Mykolo Romerio universitetas, Lietuva

**Santrauka.** *Vienas svarbiausių Bendrijų konkurencijos teisės aspektų – piktnaudžiavimo dominuojančia padėtimi draudimas, kurį reglamentuojančios nuostatos įtvirtintos Sutarties dėl Europos Sąjungos veikimo 102 straipsnyje. Grobuoniška kainodara yra viena iš piktnaudžiavimo dominuojančia padėtimi formų. Nustatant ar dominuojantis ūkio subjektas taikė grobuonišką kainodarą, vienas iš aspektų, kurį reikia įvertinti, tai dominuojančio ūkio subjekto ketinimas. Šis straipsnis skirtas grobuonišką kainodarą taikančio ūkio subjekto ketinimo analizei. Straipsnio autoriaus nuomone, Europos teisminės institucijos ir Komisija, vertindamos grobuoniškos kainodaros taikymą, skiria pernelyg didelį dėmesį dominuojančio ūkio subjekto ketinimui. Dominuojančio ūkio subjekto ketinimą taikyti grobuonišką kainodarą reikėtų pripažinti tik papildomu įrodymu, patvirtinančiu, jog ūkio subjektas piktnaudžiavo dominuojančia padėtimi.*

*Strateginiuose ūkio subjekto planuose gali būti numatytas siekis pašalinti konkurentus, tačiau ūkio subjektų vadovai ne visada priima teisingus sprendimus ir jiems dažnai nepavyksta įgyvendinti verslo planų. Be to, noras pašalinti konkurentus ir užimti didelę prekių rinkos dalį yra visų ūkio subjektų tikslas, varomoji konkurencijos jėga. Konkurencijos institucijų pareigūnai ypač daug dėmesio turėtų skirti ne ūkio subjekto ketinimui, o tyrimui, ar taikoma kainodara nulems konkurentų pašalinimą. Kitiškai vertintina, kad konkurencijos institucijų pareigūnai, siekdami pagrįsti ūkio subjekto ketinimų neteisėtumą, dažniausiai remiasi netiesioginiais įrodymais, o tokie įrodymai nėra visiškai patikimi.*

**Reikšminiai žodžiai:** *Piktnaudžiavimas dominuojančia padėtimi, grobuoniška kainodara, galimybė susigrąžinti nuostolius, ketinimas, vidutiniai kintamieji kaštai, poveikis rinkai.*

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**Raimundas Moisejevas**, Mykolo Romerio universiteto Teisės fakulteto Verslo teisės katedros lektorius, socialinių mokslų daktaras. Mokslinių tyrimų kryptys: EB konkurencijos teisė, ES materialinė teisė, ES institucinė teisė, nekilnojamojo turto teisė, tarptautinė viešojo teisė.

**Raimundas Moisejevas**, Mykolas Romeris University, Faculty of Law, Business Law Department, lecturer, doctor of law. Research interests: EC competition law, EC institutional law, EC material law, real property law, international public law.