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RECOUPMENT OF LOSSES BY THE DOMINANT UNDERTAKING, WHICH ALLEGEDLY HAVE USED PREDATORY PRICING AND LEGALITY OF ACTIONS

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Abstract. *One of the most important principles of the European Community (EC) law is the prohibition of the abuse of a dominant position based on Article 82 of the EC Treaty. Predatory pricing is one of the forms of the abuse of a dominant position. It is likely that the world financial and economic crisis will lead to an increase in competition among the undertakings. The fact that some dominant undertakings seeking to sustain or increase their market share might decide to engage in predatory pricing and that no comprehensive research on predatory pricing has been carried out by legal scholars in Lithuania and the European Union up to date, underlines the relevance of this study. To decide whether dominant undertaking has become a "predator", it is necessary to evaluate several issues, such as the ability of the dominant undertaking to recoup its losses incurred during the alleged application of predatory pricing strategy. The judicial institutions of the European Union pay little attention to this issue and might recognize that predatory pricing took place even without the evidence on the possibility for the undertaking to recoup its predatory losses. This study analyses the recovery of predatory losses by the dominant undertaking and the importance of such recovery in determining whether or not the dominant undertaking engaged in predatory pricing. The judicial institutions of the European Union should recognize that dominant*

undertaking engages in predatory pricing only when it is able to offset the predatory losses. If the recovery of losses is recognized as a necessary element in the analysis of predatory pricing, competition regulatory authorities should assess whether the actions of dominant undertakings harm consumers. When the recovery of predatory losses is not considered, the antitrust laws will be applied too strictly. As a result, dominant undertakings are likely to set higher than optimal prices, which harms consumers.

***Keywords**: abuse of dominant position, predatory pricing, recovery of losses, entry barriers, average variable costs.*

Introduction

While assessing the novelty of this study, it should be noted that Lithuanian legal scholars have not published any articles or other studies on the ability for the undertaking to recover its losses incurred during predatory pricing period up to date. Scholars in Europe and the United States often criticize decisions made by the European Union judicial institutions and the European Commission on predatory pricing, because the institutions pay more attention to the formal conditions of predatory pricing and generally neglect the effect of the actions of dominant undertakings. Predatory pricing is analysed in a number of articles; however, the author did not find a dissertation or a book that would be entirely devoted to predatory pricing issues during his research in several libraries in Germany, Denmark and Switzerland[1]. The concept of predatory pricing should thus be analysed much deeper and more research on predatory pricing should be encouraged.

The fact that the European Commission is currently reviewing its policy on the abuse of a dominant position also underlines the relevance of the studies on predatory pricing. In December 2005, the Commission published a DG Competition Discussion Paper on the application of Article 82 of the EC Treaty to exclusionary abuses[2] (The Discussion Paper). The analysis on exclusionary abuses by the Commission encouraged the author to become engaged in the research on predatory pricing, which is one of the forms of the abuse of a dominant position, and to examine the problem concerning the recovery of losses, which is addressed only in a few decisions made by the ECJ and by the CFI. Based on the Discussion Paper, the Commission published the Communication from the Commission on "Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" (The Communication from the Commission)[3] on 24 February 2009. The

1 The author analysed a few dissertations on predatory pricing written in the United States.

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

Communication from the Commission summarizes the competition policy of the Commission *inter alia* in relation to the recoupment of predatory losses in predatory pricing cases. The Commission renewed its position in the aforementioned Communication from the Commission, therefore it is vital to review the most recent studies published by the Commission.

The object of the study is the regulation of the recoupment of losses in predatory pricing cases in the EC competition law and the legal system of the Republic of Lithuania. The author analyses the decisions made by the European Court of Justice (ECJ), the Court of First Instance (CFI) and the Competition Council of the Republic of Lithuania, and the EU and Lithuanian legal acts on predatory pricing.

The goal of the study is to analyse the recoupment of losses in predatory pricing cases in the EC competition law

Various research methods were used in the article: logical, systematic analysis, comparative and linguistic.

1. The Position of the European Union Judicial Institutions on the Recoupment of Losses in Predatory Pricing Cases

According to the CFI and the ECJ, it is not necessary to account for the possibility to recoup losses to prove that predatory pricing strategy has been used. For instance, in *Tetra Pak* case the ECJ stated that "…it would not be appropriate, in the circumstances of the present case, to require an additional proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a 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."[4] In *Compagnie Maritime Belge* case, however, Advocate General Fennelly noted that the proof of the ability to recoup the predatory losses is necessary to determine whether an undertaking engaged in predatory pricing: "At the same time, I would say that such requirement (recoupment of losses) should be part of the test for abusively low pricing by dominant undertakings. It is implied in the first paragraph of the quotation from AKZO (…). It is inherent in the Hoffmann-La Roche test (…). The reason for restraining dominant undertakings from seeking to hinder the maintenance of competition by, in particular, eliminating a competitor is that they would thus be enabled to charge abusively high prices. Thus, an inefficient monopoly would be reinstated and consumers would benefit only in the short run. If that result is not part of the dominant undertaking's strategy it is probably engaged in normal competition."[5]

According to Advocate General Fennelly, predatory pricing hurts competitive markets only if, after driving the competitors out of the market, an undertaking charges

Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" (2009/C 45/02).

4 Case C-333/94, *Tetra Pak International SA v. Commission* [1996], para. 41, 42, 44.

5 Opinion of Advocate General Fennelly delivered on 29 October 1998, Joint cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge SA* (C-395/96 P) and *Dafra-Lines v. Commission*, para. 136.

higher than optimal prices and thus harms consumers. Elimination of the competitors without charging higher prices in the later period (which would enable to recoup the predatory losses) will not harm competitive markets. The ECJ has not endorsed the opinion of Advocate General, but it has not contradicted it either. Therefore, some scholars believe that it is possible that in the future the ECJ might start requesting the evidence on the ability of the undertaking to recoup the predatory losses.[6]

In *France Telecom SA* case the CFI confirmed that it is not necessary to consider the recoupment of losses in predatory pricing cases.[7] In this case, Wanadoo claimed that it had no possibility to recoup losses and therefore should not be recognized guilty for the use of predatory pricing. The CFI referred to the above mentioned quotation from *Tetra Pak* case and noted that it is sufficient for the Commission to prove that the prices charged were lower than average variable costs of the undertaking and the prices were lowered seeking to increase market share; it is not necessary for the Commission to prove the ability for the undertaking to recover the losses incurred.[8] The CFI held that "in line with Community case-law, the Commission was therefore able to regard as abusive prices below average variable costs. In that case, the eliminatory nature of such pricing is presumed (see, to that effect, Case T-83/91 *Tetra Pak v. Commission*, paragraph 130 above, paragraph 148). In relation to full costs, the Commission had also to provide evidence that WIN's predatory pricing formed part of a plan to 'pre-empt' the market. In the two situations, it was not necessary to establish an additional proof that WIN had a realistic chance of recouping its losses (…) The Commission was therefore right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing."[9]

France Telecom appealed the CFI decision on 16 April 2007. One of the arguments of the appeal is the fact that the CFI and the Commission did not evaluate the ability of France Telecom to recoup the predatory losses. Advocate General Mazák supported the position of France Telecom on the responsibility of the CFI to prove the ability of the undertaking to recoup the predatory losses.[10] Advocate General Mazák stated that the CFI should not refer to *Tetra Pak* case. The statement "referring to the circumstances in this particular case" by the ECJ in the *Tetra Pak* case shows that the ECJ did not intend to establish a universal rule.[11] Advocate General Mazák on the basis of the arguments submitted by the Advocate General Fennelly in *Compagnie Maritime Belge* case noted that *AKZO* and *Hoffman-La Roche* cases show that the European Union judicial institutions require proof of the ability of an undertaking to recoup losses. *AKZO* case

6 DG Competition, European Commission Office of the Chief Economist Discussion Paper A Three-Step Structured Rule of Reason to Assess Predation under Article 82 Miguel de la Mano and Benoit Durand [interactive]. 12 December 2005, p. 27 [accessed 03-03-2007]. <http://ec.europa.eu/dgs/competition/economist/pred_art82.pdf>.

7 Case C-340/03 *France Telecom SA v. Commission* [2007].

8 *Ibid.*, para. 227–228.

9 *Ibid.*, para. 227–228.

10 Opinion of Advocate General Mazák delivered on 25 September 2008 Case C-202/07. *France Telecom SA v. Commission*.

11 *Ibid.*, para. 56–78.

states that "…prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced. "[12] Therefore, the ECJ recognizes that an undertaking engages in predatory pricing only because it hopes to recoup losses it suffered during predatory pricing period and earn higher profits in the future. The *Hoffmann-La Roche* case[13] considers the concept of abuse of a dominant position to be an objective one to describe the behaviour of an undertaking in a dominant position, which, by using methods different from those generally employed in competitive markets, weakens the competition in the market or limits an increase in the competition. The ECJ definition of the abuse of a dominant position requires evaluating the effect of the actions of the dominant undertaking on the degree of competition in the market. According to the author, the ECJ recognizes that by abusing its dominant position an undertaking influences the market structure and may harm the competition in the market. A possibility to influence the degree of competition and an ability to recover losses are directly related, e.g., according to Advocate General Mazák, consumers could be harmed only when an undertaking has the possibility to recoup losses. Advocate General criticized the position taken by the Commission, which states that dominant position by itself guarantees the ability to recoup losses. Advocate General Mazák also claims that to determine whether the firm is dominant or not, existent market structure should be examined, while to determine the ability of an undertaking to recover losses, it is necessary to evaluate future changes in the market structure.[14]

In *France Telecom SA* decision on 2 April 2009 the ECJ did not support the position of Advocate General Mazák and claimed that "…it does not follow from the case-law of the Court that proof of the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive. In particular, the Court has taken the opportunity to dispense with such proof in the circumstances where the eliminatory intent of the undertaking at the issue could be presumed in the view of that undertaking's application of prices lower than average variable costs (see, to that effect, *Tetra Pak v. Commission*, paragraph 44)"[15]. This decision ended the discussion whether or not it is necessary under the EC competition law to prove the ability of an undertaking to recover losses in order to determine whether predatory pricing has occurred. The author does not approve of this decision and regrets that the ECJ did not support Advocate General Mazák's position on the issue.

12 Case C–62/86, *AKZO Chemie v. Commission* [1991], para. 71.

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

14 *Supra* note 10, para. 76.

15 Case C–202/07, *France Telecom SA v. Commission* [2009], para. 110.

The Commission considers that the recovery of predatory losses will occur when the "predator" increases prices to the level impossible to reach if the competitors were not driven out of the market and the entry of the new firms to the market was not prevented.[16] The actions to recover losses are defined broadly, because the dominant undertaking might engage in predatory pricing not only to drive other firms ("prey") out of the market but also to create a reputation of being an aggressive or a "tough" competitor.

According to the Commission, it is not necessary to prove the ability of an undertaking to recoup losses; however, in some cases addressing market concentration issues rather than issues on abuses of a dominant position, the Commission evaluates the ability of an undertaking to recover losses. In *Boeing* case in 2005 the Commission examined whether an attempted merger of Boeing and Lockhead Martin in a satellite market is compatible with the common market and whether the undertakings might be able to engage in predatory pricing against their main competitor, Arianespace. The undertakings would have to weaken Arianespace or drive the firm out of the market to be able to recover losses in the future period. It was not enough, however, to weaken Arianespace in this particular case Arianspace possessed the necessary means to survive during the predatory pricing period and regain its market share after Boeing and Lockheed Martin increased their prices. The Commission provided the following arguments in support of its position: 1) Satellite market requires large upfront investments. The merging firms would have to forego large investments to be able to apply the pricing strategy that does not cover costs for a longer period of time; 2) In commercial markets, frequency of satellite launches is limited (16-20 launches are allowed per year). Launching service providers operate according to the order book, which is usually filled for a few years ahead. Arianespace occupies 40-50 percent of the commercial market; therefore, the process aimed at bankrupting the company would have to be especially lengthy; 3) Most of the firms prefer a guarantee that their satellites will be launched. Therefore, they may decide not to terminate their agreements with Arianespace even if other companies offer them a better deal on their services; 4) large investments and the uncertainty whether losses can be recovered in the near future reduce the possibility that Boeing might be able to persuade the partners to adopt predatory pricing strategy. Given that it is nearly impossible to recover losses, the Commission decided that the probability for the companies to engage in predatory pricing strategy after the merger is low.[17]

In seeking to prove the existence of predatory pricing behaviour, the Commission might not aim to evaluate the abilities of an undertaking to recover the predatory losses, because the goal of the prohibition of predatory pricing is not only to protect consumers, but competitors as well. The author believes that the European Union judicial institutions and the Commission, in analysing predatory pricing cases, should always present evidence, which proves the ability of dominant undertakings to recover the losses incurred. First, consumers are harmed only if the dominant undertaking is able to recover

16 *Supra* note 2, para. 122.

17 European Commission decision delivered on 9 August 2005, recognizing that concentration is compatible with common market (Case No. IV/M.3856 – Boeing / Lockheed Martin / United Launch Alliance JV) on the basis of Council Regulation No. 4064/89, para. 27–36.

losses. Second, if the recovery of losses is considered a necessary element in predatory pricing cases, competition regulatory authorities and other institutions would evaluate the real effect of the actions of the dominant undertaking. Third, the Commission and P. Lowe reached an unfounded conclusion in assuming that high entry barriers guarantee the capability for a dominant undertakings to recoup losses. The evaluation of barriers to entry and a dominant position provide information on the existing structure of the market, but not about the future changes that might occur during predatory pricing period. Finally, if the ability of an undertaking to recoup losses is not taken into consideration, competition rules might be applied too strictly. In such cases, dominant undertakings might charge higher than necessary prices.

The definition of predatory pricing provided by the Competition Council of the Republic of Lithuania[18] does not include the requirement to prove the ability of a dominant undertaking to recoup losses. No such cases, where the ability of an undertaking to recoup losses was assessed, exist in the practice of the Competition Council of the Republic of Lithuania. The Competition Council, however, states that the ability of an undertaking to recoup losses should be taken into consideration.

According to the author, the European Union judicial institutions and the Commission should recognize that dominant undertaking used predatory pricing only if there is evidence that the dominant undertaking might be able to recoup the losses incurred.[19] When the recovery of losses is included as a necessary condition, competition regulatory authorities and other institutions should determine whether the actions of the dominant undertaking harmed consumers. If the recovery of losses is not considered, the competition law rules will be applied too strictly and dominant undertakings might charge higher than optimal prices. It is possible that the position of the author will gain more support if private subjects sue dominant undertakings for the damages incurred due to predatory pricing. Most claims regarding predatory pricing in the European Union are made by the Commission. Therefore, the issue of the recovery of losses is rather neglected, and could gain more visibility if private subjects increased the number of claims made.

One of the problems that might occur if it is required to prove the possibility to recover losses is the ability of the firm to charge any price if it operates in the market, recognized to offer no chances to recover the losses. Nevertheless, if the ability to recover losses is evaluated accurately, there is little possibility for the monopoly to emerge, i.e., the losses suffered by the competitors will not necessary harm the competitive structure of the market.

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18 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 no 20.2.

19 Mastromanolis, E. P. Predatory Pricing Strategies in the European Union: A Case for Legal Reform. *European Competition Law Review*. 1998, 4(211); Korah, V. *An Introductory Guide to EC Competition Law and Practice*. Oxford: Hart Publishing, 2000.

2. The Necessary Conditions for the Undertaking to Recover the Losses Incurred during Predatory Pricing Period

It is possible to distinguish several conditions, which are necessary for an undertaking to recover the losses incurred during the application of predatory pricing strategy.

Barriers to entry and re-entry. Only the dominant undertaking can be accused of predatory pricing. To determine whether an undertaking occupies a dominant position, it is necessary to examine the barriers to entry. The Commission defines barriers to expansion and entry as factors that make an entry to the market impossible or unprofitable and at the same time permit the established undertakings to charge prices above the optimal level.[20] After driving the competitors out of the market, the dominant undertaking will increase prices substantially to offset the losses incurred during predatory pricing period and to earn higher profits. High profits will attract new competitors to the market, which will lower prices in the market and consequently undermine the ability for the undertaking to recoup the losses incurred during predatory pricing. Therefore, the dominant undertaking will not be able to recoup losses if re-entry barriers are low and the competitor will be able to re-enter the market.[21] In the market, where high entry and re-entry barriers exist, the undertaking, which is engaged in predatory pricing, will be protected from the appearance of new competitors and will be able to increase the prices of its products or services.[22] In summary, entry barriers can be claimed to be necessary for the dominant undertaking to recoup the losses incurred, however, they are not sufficient.

Excessive capacity and financial strength of an undertaking. The lowering of prices during the application of the predatory pricing strategy might increase the demand of company products or services. The dominant undertaking will have to satisfy the increase in demand; in case the undertaking is unable to do so, prices of products or services might rise and it will become more difficult to eliminate the competitors. It is difficult for the undertaking to engage in predatory pricing if the undertaking does not have enough excess capacity. Dominant undertakings do not always have an excess capacity; therefore dominance does not guarantee the recoupment of losses. If dominant undertaking is financially sound, there is a higher chance that its predatory pricing strategy will be successful.

Reputation. A dominant undertaking will have more chances to recoup losses if it portrays a reputation, which signals the ability to drive the competitors from the market by applying predatory pricing strategy.[23] The reputation of being a "tough" player is

20 *Supra* note 2, para. 38.

21 Brodley, J. F.; Bolton, P.; Fiordan, M. H. Predatory Pricing: Strategic Theory and Legal Policy. *Georgetown Law Journal*. 1999-2000, 88: 2265; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 US 209, 222–24 (1993); Peterson, T.; Lindeborg, S. P. *Comments on a Swedish Case on Predatory Pricing –Particularly on Recoupment. European Competition Law Review*. 2001, 22(3): 77.

22 Joskow, P. L.; Klevorick, A. K. A Framework for Analyzing Predatory Pricing Policy. *Yale Law Journal*. 1979, 89(2): 274–279; Ordover, A. J.; Willig, R. D. An Economic Definition of Predation: Pricing and Product Innovation. *Yale Law Journal*. 1981, 91: 8, 10–13.

23 Kreps, D. M.; Wilson, R. Reputation and Imperfect Information. *Journal of Economic Theory*. 1982, 27: 253; Milgrom, P.; Roberts, J. Predation, Reputation and Entry Deterrence. *Journal of Economic Theory*. 1982, 27: 280; Bolton, P.; Brodley, F. J.; Riordan, H. M., *supra* note 21, p. 2239.

considered an entry barrier,[24] because potential competitors might refrain from entering if they believe that such an attempt might encourage the dominant undertaking to engage in predatory pricing. The resolution of Lithuanian Competition Council "Concerning the Explanations of the Competition Council on Determination of Dominant Position" states that an undertaking, which tends to engage in predatory pricing might seek to be known as an "aggressive" player and use this reputation as a barrier to entry.[25] The Commission, P. Lowe and specialists from the Office of the Chief Economist refer extensively to the importance of the reputation of the dominant undertaking in assessing the capability of the dominant undertaking to recover the predatory losses.[26] The significance of the reputation was also mentioned by the ECJ in *AKZO* case.[27]

Market share changes. If no changes in the market share occurred during predatory pricing period or if the dominant undertaking lost part of its market share, the recovery of losses is doubtful. Recoupment is possible only if the market share of dominant undertaking increases during the application of the predatory pricing.

Brand loyalty. Brand loyalty of consumers determines the amount of expenses incurred by the dominant undertaking during the application of predatory pricing strategy.

Relative efficiency. If a dominant undertaking is efficient, it will be cheaper to use predatory pricing strategy. The higher efficiency of the dominant undertaking in most cases will be sufficient to defeat the competitor in the long run even without setting prices below costs.

Price discrimination. If the dominant undertaking establishes prices lower than costs only to certain groups of customers (who are undecided whether they should buy products from the dominant undertaking or its competitors), such price discrimination might reduce the costs experienced during predatory pricing period. For instance, refer to the decisions of the ECJ and the CFI in *Compagnie Maritime Belge*[28] and *Irish Sugar*[29] cases.

Dominant position. The legal acts and court jurisprudence provide that only the dominant undertaking might engage in predatory pricing and that the dominant position largely determines the capability of an undertaking to recoup losses. This question is analysed in part 3 of this study.

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24 Office of Fair Trading Guidelines [interactive]. 415, s. 5.11 [accessed 11-04-2007]. <http://www.oft.gov.uk/shared_oft/business_ leaflets/enterprise_act/oft511.pdf>.

25 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. *Official Gazette*. 2000, No. 52–1516.

26 *Supra* note 2, para. 97, 115, 118, 119; *supra* note 6, p. 10; EU competition practice on predatory pricing. Introductory address to the Seminar Pros and Cons of Low Prices [interactive]. Stockholm, 5 December 2003 by Philip Lowe, p. 6 [accessed 07-03-2007]. <http://ec.europa.eu/comm/competition/speeches/text/sp2003_066_en.pdf>.

27 Case C-62/86, *AKZO Chemie v. Commission* [1991].

28 Joint Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge SA and Dafra-Lines A/S v. Commission* [2000].

29 Case T-228/97, *Irish Sugar plc. v. Commission* [1999].

3. The Dominant Position of an Undertaking and its Ability to Recoup the Predatory Losses

According to the jurisprudence of the judicial institutions of the EU, only a dominant undertaking engages in predatory pricing. The institutions believe that only the undertaking with a large market share is capable to charge predatory prices. A substantial market power is necessary because: 1) an undertaking engaged in predatory pricing should be able to influence the prices of products in the market, 2) after finishing the predatory pricing period, the undertaking should have acquired more market power, which would enable to charge higher prices. Legal acts that prohibit the application of predatory pricing and require for the undertaking to be dominant during predatory pricing period are not applicable to the undertakings that become dominant as a result of predatory pricing (such legal regulation exists in legal systems of all the member states of the EU).

According to the Commission, if an undertaking occupies a dominant position, entry barriers are usually high enough and the dominant undertaking is able to recover the losses.[30] The Commission believes that dominant position ensures the capability to recoup the losses and that it is directly related to high barriers to entry. It is not possible, however, to agree completely with the position of the Commission that dominance by itself constitutes a sufficient ground for the recoupment of losses.

It is necessary to pay attention to "A Three-Step Structured Rule of Reason to Asses Predation under Article 82"[31] Discussion Paper prepared by the European Commission Directorate General Office of the Chief Economist (Office of the Chief Economist). This discussion paper was prepared by the employees of the Commission; however, it critically evaluates the Commission policies on predatory pricing issues. The discussion paper criticizes the position of the Commission and provides arguments to prove that first, dominance is not sufficient to recoup losses and second, dominance is not a necessary condition for the recovery of losses. Given high competence of specialists who prepared this discussion paper and their persuasive arguments, this position deserves to be further examined.

The aforementioned discussion paper provides several arguments intended to prove that dominance is not sufficient for the recoupment of losses.[32] The ability to recoup losses is not directly related to dominance and it is necessary to evaluate its degree of market power before the predatory pricing period to establish whether the firm occupies a dominant position. The degree of market power that exists before predatory pricing does not provide enough information about the increase in the market power in the subsequent period. The undertaking will only recover losses if its market power will substantially increase after the elimination of competitors. The recovery of losses will

30 European Commission, DG Competition, Brussels December 2005, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses [interactive]. para. 122 [accessed 11-03-2007]. <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

31 *Supra* note 6.

32 *Ibid*., p. 28.

be possible if the profit after the elimination of competitors will outweigh the revenues lost. The profit in turn depends on the changes in the market power after the elimination of competitors. The elimination of present competitors and high barriers to entry for potential competitors influences the market structure. An advance evaluation of dominance might not be sufficient to determine the possibility of an undertaking to take advantage of the increase in the market power and recoup losses after the elimination of competitors. Recoupment of losses also depends on the expenses spent in order to drive the competitors out of the market, which are not assessed in evaluating the dominance of an undertaking. If an undertaking has to incur considerable expenses, the amount of losses to be recovered will rise as well.

It is possible to agree completely with the discussion paper discussed above that the dominant position by itself does not guarantee the ability to recoup losses. The study outlines a number of factors, which are necessary in order for an undertaking to recoup the predatory losses.

To prove that it is not necessary for the undertaking to be in a dominant position to recoup losses, the authors use a reputation argument. An undertaking might create a reputation of being a "tough" player and thus deter the competitors from entering.[33] Predatory pricing strategy is applied in a smaller market, while the undertaking actually aims to drive competitors out of the larger market. Predatory pricing in the smaller market also lowers the amount of predatory losses incurred.[34]

In *AKZO Chemie BV*[35] case, for example, AKZO engaged in predatory pricing in one market aiming to eliminate ECS from another market. Two markets were recognized: the European market for organic peroxides, which were used for the production of plastics, and the relatively small market for flour additives. AKZO held a dominant position in the market of organic peroxides and intended to eliminate ECS from this market by applying predatory pricing strategy in the flour additives market. AKZO did not occupy the dominant position in the flour additives market. AKZO hoped that ECS, after experiencing losses in the flour additives market, will leave the plastics market. This should have increased the AKZO market share in the plastic market and enabled AKZO to earn higher profits. AKZO did not intend to drive ECS from the flour additives market. AKZO aim was to create a reputation of an "aggressive" company and recover predatory losses incurred using this strategy. *AKZO Chemie BV* case sets an example, which shows that it is not necessary for the undertaking to be dominant in the market where predatory pricing strategy is applied to be able to recover predatory losses.

Previously mentioned certain advantages are more important to the "predator" than a dominant position.[36] It is necessary for the dominant undertaking to be able to have

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33 National competition institutions of Canada, Chile, France, Jamaika, Peru, UK, USA, Mexico, Italy and Ireland recognize that undertking might recoup losies in other product or geographical market than that in which predatory pricing was applied [interactive]. p. 19 [accessed 11-08-2008]. <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf>.

34 *Supra* note 6, p. 28–29.

35 Case C-62/86, *AKZO Chemie v. Commission* [1991].

36 *Supra* note 6, p. 29.

the necessary capacity to satisfy the increase in demand and be able to reduce the prices of the products. It is not necessary to occupy the dominant position if the undertaking enjoys these advantages. C. Newton provides that officials ensuring the implementation of the EC competition law should pay more attention to the financial capability of the undertakings and less to their market share.[37]

Dominant undertakings in some cases may experience higher losses than other firms, because low prices will apply to a larger quantity of products. Moreover, the possibility of the dominant undertaking to increase profits by raising its market share is limited. At the same time, an undertaking, which does not have a dominant position, might apply predatory pricing with a goal to abuse its dominant position in the future and recover the losses incurred then.

Conclusions

1. The judicial institutions of the European Union should recognize that a dominant undertaking uses predatory pricing only if it is able to recoup the losses incurred. If the recovery is recognized as a necessary condition, the competition institutions should assess whether the actions of the dominant undertaking harmed consumers. If the recovery of losses is not addressed, the antitrust law rules will be applied too strictly and dominant undertakings might have no incentive to lower prices. It is possible that this position on the issue will gain more support if firms make more claims and seek compensation to the damages incurred due to predatory pricing. Most claims in the European Union are currently made by the European Commission. Therefore, the issue of the recovery of losses is rather neglected and might gain more visibility when firms increase the number of the claims.

2. Dominant position by itself does not guarantee the ability to recoup losses. To be able to recoup predatory losses, several conditions should exist: entry barriers, relative financial strength, low price elasticity of demand, excess capacity, market share changes, brand loyalty, relative efficiency and cross-subsidization.

3. The author partially agrees that the relationship between the dominant position and the recoupment of losses is ambiguous; however, the dominant position provides more chances for an undertaking to recoup losses. First, during the application of predatory pricing, it is necessary to reduce prices and increase the level of production (after prices are lowered, the demand of products might increase); therefore, it will be necessary to increase the supply of products. An ability to increase the supply affects the market share of the dominant undertaking. If the dominant undertaking has a large share of the market, it will be easier to increase production. Second, the fact that dominant undertakings usually act in markets that are characterized by high entry barriers, aids in recovering losses. High entry barriers are necessary for the recovery of predatory losses to be successful.

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GROBUONIŠKĄ KAINODARĄ TAIKANČIO DOMINUOJANČIO ŪKIO SUBJEKTO GALIMYBĖS SUSIGRĄŽINTI NUOSTOLIUS IR JO VEIKSMŲ TEISĖTUMAS

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Santrauka. *Vienas svarbiausių Bendrijų konkurencijos teisės aspektų – piktnaudžiavimo dominuojančia padėtimi draudimas, kurį reglamentuojančios nuostatos įtvirtintos EB Sutarties 82 straipsnyje. Grobuoniška kainodara yra viena iš piktnaudžiavimo dominuojančia padėtimi formų. Manytina, kad pasaulyje įsivyraujant finansinei krizei labai didės ūkio subjektų konkurencija ir dalis dominuojančių ūkio subjektų, siekdami išlaikyti užimamą rinkos dalį arba ją padidinti, gali taikyti grobuonišką kainodarą. Vertinant, ar dominuojantis ūkio subjektas taikė grobuonišką kainodarą, reikia atsižvelgti į keletą aspektų. Vienas iš svarbiausių aspektų – tai įvertinimas, ar dominuojantis ūkio subjektas gali atgauti nuostolius, patirtus taikant grobuonišką kainodarą. Šiuo metu Europos Teisingumo Teismas ir Europos Komisija galimybės susigrąžinti nuostolius nepripažįsta būtinu grobuoniškos kainodaros elementu. Tačiau, autoriaus nuomone, Europos Bendrijų teisminės institucijos ir Komisija turėtų pripažinti, jog dominuojantis ūkio subjektas taikė grobuonišką kainodarą, tik pateikus įrodymus, kad ūkio subjektas gali atgauti dėl grobuoniškos kainodaros taikymo patirtus nuostolius. Galimybę atgauti nuostolius pripažinus būtinu elementu, konkurencijos institucijos siektų įvertinti, ar dominuojančio ūkio subjekto veiksmai sukėlė žalą vartotojams. Neatsižvelgiant į ūkio subjekto galimybes atgauti nuostolius konkurencijos taisyklės gali būti taikomos pernelyg griežtai, o dominuojantys ūkio subjektai nesieks nustatyti mažas, vartotojams naudingas kainas.*

Straipsnyje taip pat nagrinėjamos sąlygos, reikalingos grobuonišką kainodarą taikiusiam ūkio subjektui susigrąžinti nuostolius. Tai būtų tokios sąlygos: įėjimo ir grįžimo į rinką kliūtys, perteklinis produktyvumas bei ūkio subjekto finansinių išteklių dydis, ūkio subjekto

reputacija, ūkio subjektų užimamų rinkos dalių pasikeitimai, kryžminis finansavimas, paklausos ir kainų tarpusavio priklausomybė, ištikimybė prekės ženklui, sąlyginis efektyvumas, diskriminavimas kainomis ir dominuojanti padėtis. Aptariant dominuojančios padėties reikšmę prieinama prie išvados, jog ši padėtis nėra būtina ir nėra pakankama tam, kad ūkio subjektas galėtų taikyti grobuonišką kainodarą.

Iš dalies sutinkant su nurodytomis abejonėmis dėl užimamos dominuojančios padėties reikšmės nuostoliams atgauti, autoriaus nuomone, dominavimo faktas suteikia ūkio subjektui didesnes galimybes atgauti patirtus nuostolius. Vis dėlto užimama dominuojanti padėtis suteikia tam tikrų pranašumų dominuojančiam ūkio subjektui, siekiančiam taikyti grobuonišką kainodarą. Pirma, taikant grobuonišką kainodarą reikia ir sumažinti kainas, ir padidinti gamybos apimtis. Sumažinus kainas turėtų padidėti ūkio subjekto prekių paklausa, todėl reikės pateikti papildomą prekių kiekį mažomis kainomis. Jei grobuonišką kainodarą taikantis ūkio subjektas nesugebės pateikti pakankamai prekių, esami ir potencialūs konkurentai galės laisvai prekiauti savomis prekėmis, parduodami jas didesnėmis kainomis nei grobuonišką kainodarą taikantis ūkio subjektas. Galimybė pateikti papildomą prekių kiekį yra susijusi su ūkio subjekto užimama rinkos dalimi. Juo didesnę rinkos dalį užima ūkio subjektas, juo lengviau jis sugebės susidoroti su šiuo uždaviniu ir užimti konkurentų rinkos dalis. Antroji priežastis, suteikianti dominuojančiam ūkio subjektui didesnes galimybes atgauti nuostolius, jog dominuojantys ūkio subjektai dažniausiai veikia rinkose, kuriose yra didelės įėjimo į rinką kliūtys, o tai yra būtina sąlyga nuostoliams atgauti.

Reikšminiai žodžiai: *Piktnaudžiavimas dominuojančia padėtimi, grobuoniška kainodara, galimybė susigrąžinti nuostolius, įėjimo į rinką kliūtys, vidutiniai kintamieji kaštai.*

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