

Supplementary Information to the Bills Committee

Predatory Pricing

Background

At the Bills Committee meeting held on 17 February 2000, the Administration exchanged views with Members about the meaning of “predatory pricing” referred to in the new section 7L as introduced by the Telecommunication (Amendment) Bill 1999.

2. Section 7L aims to prohibit a licensee who is in a dominant position in a telecommunication market from abusing its position. As stipulated under section 7L(4), a licensee who is in a dominant position is deemed to have abused its position if the licensee has engaged in conduct which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market. We further clarified at the meeting that under section 7L(5), one type of conduct referred to in section 7L(4) is “predatory pricing”. Members asked whether a definition of “predatory pricing” including a price level should be provided.

Details

3. We have researched into a number of overseas jurisdictions. Our findings reveal that -

- (a) Nearly all jurisdictions examined deal with “predatory pricing” either as a form of anti-competitive behaviour and/or price discrimination. In some cases the law does not provide for an express provision on “predatory pricing”.
- (b) Although in some other cases the law contains provisions dealing with what would be considered “predatory pricing”, no jurisdiction defines the term “predatory pricing” or provides for the level of price which would constitute “predatory pricing” expressly in the law. The concept of “predatory pricing” applies to abuse of dominant position or where it has the purpose or effect of eliminating or substantially damaging

a competitor, preventing market entry or deterring or preventing competition.

- (c) In some continental legal systems (Austria, France and Switzerland), instead of adopting the “predatory pricing” concept, they use the sale-at-a-loss provisions in their laws.

———— A detailed account of the relevant provisions in the overseas jurisdictions is at Annex.

4. It is evident that any attempt to define “predatory pricing” may at best be a partial definition. The factors which the regulatory authority may take into account include market share, market power to act independently, the various approaches to costing of services, and market entry barrier (including cost barrier and economy of scale barrier). Court judgements are also relevant to both regulators and operators in considering the question of “predatory pricing”.

5. It is therefore unnecessarily restrictive to include in the legislation a definition “predatory pricing” and the price level which constitutes “predatory pricing”. Our proposed section 7L is in line with international practice.

A Research of Relevant Provisions of Predatory Pricing in Overseas Jurisdictions

Australia

Predatory pricing in Australia is subject to Section 46 of the Trade Practices Act, which deals with misuse of market power, and may also be subject to the price discrimination provisions (Section 49) of that Act. Section 46 of the Trade Practices Act prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing market entry, or deterring or preventing competitive conduct.

Canada

Predatory pricing is controlled by the Competition Act. Section 34(1) of that Act provides that various types of price discrimination and unreasonably low pricing may be punishable by up to two years imprisonment. Section 34(1)(c) prohibits unreasonably low prices requiring a tendency to substantially lessen competition, eliminate a competitor or a design to achieve either effect. Section 34(2) requires that these unreasonable low prices be a “policy” rather than an isolated occurrence, such as meeting a competitor's price.

France

Predatory pricing is not separately defined under French law.

French law deals with predatory pricing under the following methods:

- a) reselling at a loss;
- b) price discrimination;
- c) abuse of dominant position;

- d) restrictive agreements and under provisions prohibiting of economic dependence; and
- e) unfair competition in the case of “prix d'appel”, which involves advertised specials sold in limited quantities at low margins, or as false advertising.

Selling at a low price in France is illegal only insofar as it amounts to an anti-competitive practice: cartel conduct, abuse of dominant position or abuse of economic dependency. These prohibitions are set forth in the competition policy provisions against “artificially low” prices in the Ordinance of 30th June 1945 as re-codified. It prohibits, inter alia, “artificial” price reductions by concerted action or by a firm holding a dominant position which have as an object or possible effect a restriction on competition.

Germany

Predatory pricing is dealt with under the Act against Restraints of Competition (ARC) and the Unfair Competition Act (UCA).

The ARC deals with abuse of dominant position which the Federal Cartel Office (FCO) defined to include actions which impair the competitive possibilities of other enterprises in the absence of facts justifying such behaviour. The same act prohibits dominant firms from unfairly hindering other firms or from treating firms differently without justification. Also under the same act the FCO may prohibit a firm with superior market power from engaging in conduct which unfairly hinders such competitors and is likely to distort competition permanently.

The UCA provides that a firm acting *contra bonos mores* may be enjoined and held liable for damages. Conduct *contra bonos mores* can be found under this section in pricing below cost/purchase price designed to eliminate or discipline a rival by acts other than superior economic performance.

Japan

The Anti-monopoly Act of Japan has no particular provisions for predatory pricing. Section 19 of that Act prohibits firms from employing unfair business practices which include price discrimination and unjust low-priced sales.

New Zealand

In New Zealand predatory pricing comes within the general prohibition on the use of market dominance for anti-competitive purposes contained in Section 36 of the Commerce Act 1986, which applies only to firms having a dominant position in a market.

Switzerland

Swiss law contains provisions relating to predatory pricing under its Federal Law on Unfair Competition and the Law on Cartels and Similar Organisations. Under Article 3(f) of the unfair competition law of 19th December 1986 repeated offers through advertising of goods or services at prices below cost are considered unfair competition if such offers provide a deceptive picture of the seller's competitive position.

Also, the Cartel Law prohibits selective price cutting designed to harm or eliminate a specific competitor as an illegal anti-competitive act, unless economically justified and not against the public interest.

United Kingdom

In the United Kingdom action may be taken by the competition authorities to deal with predatory behaviour under the Competition Act 1998. The approach is the same as that of the EU (see below).

United States

In the United States predatory pricing is dealt by Section 2 of the Sherman Act which makes monopolisation or attempts to monopolise any

part of interstate commerce or commerce with foreign nations a felony, punishable by fines or imprisonment.

European Union

Article 82 of the Treaty of Rome is the relevant provision in the EU concerning predatory pricing. Article 82 prohibits conduct which abuses a dominant position. Article 82 sets out four types of conduct which could constitute such an abuse, two of which could be applied against predatory pricing by a dominant firm. Article 82(a) prohibits “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”, while Article 82(c) prohibits “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”.