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Predatory pricing

Josef Bejček*

1. Introduction

The price naturally reflects not just the amount of work vested into the goods[1] but it is affected also by a number of other immaterial circumstances (fashion, consumer preferences[2], branded and unbranded goods, effects of promotion, marketing and advertising campaigns, "price of special preference" – *pretium affectionis*, season effects, sales "campaigns" various rebates[3] and likewise). Hence there is a whole number of reasons why there are fully justified, exceptionally low prices.

The relationship between the price and the quantity and quality of performance is self evident. Undiscriminatory volume rebates are in principle admissible also on the side of the dominants and monopolists provided that certain conditions are met and provided that they are not binding (and hence also an exclusionary) effect.

Arbitrary and occasional discounts provided by a subdominant entrepreneur or competitor are discriminating in relation to those members of the market, who do not enjoy the advantage of such discount. Nevertheless, they are not illegal and on their own, they do not accomplish unfair competition either. It is in principle a matter of discretion of such discriminating competitor whether it will undergo the risk of reduced credibility with other customers who do not enjoy such advantage (and perhaps the risk of losing them). The competitor proceeding in this way has to cover the loss of the "extra discount" provided on selective basis either from its profit or by means of increasing prices for other partner, which will in the end discourage his partners however. The market itself will correct such pricing differentiation.

A low price for lower quality of performance does not raise legal concern either as long as the at least declared lower quality corresponds to the exceptionally low price. The exceptionally low price of the non-quality goods is economically even multiplied by the loss from complaint claims.[4] The quality has to be examined not by the narrow perception of the qualities of material of the subject-matter of performance. Branded goods of the same or comparable quality to the "generic" goods will be usually more expensive.[5]

An exceptionally low price may be a kind of bonus in a hazardous contract (an aleatory contract).[6] This is emphasized also by the rule that as concerns these contracts, the rule of shortening by more than a half [7] may not be applied.

2. Predatory Pricing in Antitrust Law

The pricing policy of the *dominant* firm can take two basic problematic forms:

- Either the dominant is trying to push back the competitors by intentional reduction of prices below its costs in such manner that the competitors cannot face such devastating prices and after the competitors are forced to leave the market, the dominant shall compensate the loss incurred in the course of the previous price war by increasing the price to an above-competitive amount; one can see at the first sight, the double effect of this procedure and the difficulty[8] of differentiating between the generally advantageous price reduction in favour of consumers from the devastating (only a short-term) price reduction with a predatory intention that will in the long term turn against the consumers in the form of a price increase. In addition, it is hardly possible to raise serious objections against the effort of the more successful ones to get rid of the less effective competitors. The problem rests in particular in the fact that "if you are hunting a predator and shoot the competitor, you'll damage the consumer".[9] As stated by the Supreme Court of

USA, low prices are advantageous for the consumer regardless of the manner of their specification and as long as (!) they are above the level of predatory pricing, they do not pose a threat to the competition.[10] I am not addressing low prices as a result of applying rebates, which is a special and extensive issue.[11]

- Or the monopolist (which is a "supra-category" of the dominant) charges excessively high prices, which he could not reach on a competitive market. This variant is addressed also in the following chapter.

2.1 *Are there theoretical arguments for an action against the predatory pricing?*

Low prices are generally connected with the consumer and social welfare so it may seem a little bizarre when there are any authoritative interventions against them at all.[12] In certain cases, however, prices may be low to such extent that they damage not just the less effective competitors (which is a necessary result of competition as the "creative destruction") but also the competition itself. Hence the problem is how to reliably distinguish between the loss incurred by or pending to the competitors and the loss incurred by or pending to the competition.

The basic objection rests in the fact that a short-term devastating price reduction increases prosperity only temporarily while as a result of long-term damage or exclusion from the competition, the prosperity is reduced also in the long term. Predatory pricing presumes a short-term loss of the predator and in the same time a reasonable expectation that after the competitors leave the market, who did not sustain the price pressure, the predator will be able to increase prices in such manner as to reach higher profit than before. Predatory pricing is a very risky procedure as losses or lost profit as a result of its application has to be outweighed by the existing (current) value of the future growth of profit; for this reason, it is only rare and cases, when it is successful, are even much rarer. [13] Low prices that perhaps force out certain competitors from the market might also result from higher efficiency of a larger firm that enjoys economies of scale and scope.[14] Competitive behaviour, which is demonstrated by application of below-cost-prices, has to be distinguished from the predatory pricing in particular by the context, in which it is performed.[15]

Some authors[16] state that an enterprise may force out a competitor by devastating prices for several reasons:

1) a large firm[17] sustains larger losses than a small one, a unit loss is multiplied;
2) the exclusionary pricing is worth considering only in the event the "victim" will really leave the market; it may not happen, however as when the assets of the undertaking do not disappear from the market physically, the former owner may put them into operation once again after the price increase or they are acquired by someone else;
3) the exclusionary pricing anticipates that the predator has a "deep pocket" (enough sources to overcome the period of devastating prices) while his victim does not – but the victim may get third person's capital to overcome the difficult times;
4) in order for the predator pricing to be a reasonable strategy, it must be not just feasible but also a more profitable strategy than other possible alternatives (for example than a merger that would retain high profits in the industry).

The success of the price predator depends in particular on whether there are high or unsurmountable barriers to entry the market, from which the competitors are being pushed e out. If there are none, having forced out competitors and subsequently having increased the prices above the competitive level by the pricing predator, other interested persons might enter the market (or perhaps repeatedly the formerly forced-out competitors) and prevent the price increase to the above-competition level. Consumers would benefit from the lower (below-cost) prices in the "predatory period" and from the subsequent competition too.[18]

A dominant may establish by its aggressive price policy a reputation of a predator[19] and hence build a barrier for entering the market even though there are no other (legal, technological, economic) barriers or they are low. This might affect also other markets, on which the dominant operates so that the potential competitors' entry to the market might be more difficult or made impossible at several markets and this increases the price level at several markets.

Nevertheless, not every conduct of the dominant, which discourages from entering the market can be considered predatory;[20] for example implementation of a new technology and its patenting or introduction of a new product to the market or various promoting campaigns for new products and likewise.[21] Such argument, however, may in principle not include the fact that the predator is generating efficiencies by this procedures. Even if some efficiencies could be possibly generated in a specific case, they would be hardly the least restrictive way of reaching them and they would be hardly transferable to the consumer in the long-term for the purposes of outweighing the loss caused to the competition by the predatory activities (which is a prerequisite of the exception from the ban of abuse, which is currently being discussed as a future option).[22]

On the other hand, under certain circumstances, one may be discouraged from entering the market (actually and in the same time intentionally) by the dominant's prices, which are not below-cost ones (for example a sufficiently low price, still not a below-cost one, which prevents adequate return of investments, may turn investor's interest to another market, which offers a promise of higher income). Low prices represent the costs of opportunity – the predator as well as his victim could sell the goods for a higher price if there were no predatory activities.[23]

The theory of predatory prices, on which are administrative as well as judicial decisions based, is founded on two prerequisites:

- sacrificing short-term profit (the predator does not have profit, he is in a loss, his price is below costs), and on
- the ability to increase the profit in the long term thanks to the greater market power after the success of the predatory activities (i.e. not only to compensate the loss, which would make not economic sense, but to increase the profit and generate interest on the loss as a debt of past investment– future uncertain profit have to bear interest according to the relevant interest rate[24]).

If the anticipated price predator in a dominant position generates profit in the course of the period of his aggressive pricing policy, it may not be accused of predatory activities as no one can prove that he would generate higher profit than if his conduct would have been different. It does not matter at all that the dominant forced a smaller and less efficient competitor out of the market – the loss of welfare as a result of such leaving the market by the inefficient firm will not be considerable. It is not verifiable to accuse the dominant of predatory activities (the dominant does not charge prices below its costs) and it would result in legal uncertainty and arbitrariness. After all, it may lead also to the loss of welfare if the dominants, fearing similar accusations, requested a higher price (in order to have a higher profit margin as an argument against accusations of predatory pricing) than were it not for this potential threat.[25]

On the contrary – if the competitor suffers loss due to low prices, it may be a predator but not necessarily as there is a number of various reasons why it is legitimate for the dominant to sell below its costs (sale of short-lived goods, sale support for additional assortment and likewise).[26]

2.2. *Partial Issues*

2.2.1. Costs of the Dominant

The very amount of the dominant's costs, which are to be examined as decisive in relation to the price, is also a subject-matter of disputes. Round the world (despite a number of reservations and specifying variants[27]), one usually applies the so-called Areeda/Turner test[28]. The best criterion of below-cost prices should be the marginal costs[29]. From the practical point of view, however, it is recommended to apply a kind of inaccurate substitution of marginal costs, namely average variable costs.[30] Areda/Turner test anticipates that

- the price at the level of AVC or above this level shall be considered legal without an option of proving the contrary. This should naturally apply also to the price above the total average costs (ATC);
- the price below AVC but above ATC should be conditionally considered legal with an option for the plaintiff or an antitrust body to prove the contrary; the European Court of Justice (ECJ) also starts from this premise: the so-called "AZKO rule ".[31] According to this rule, prices below AVC shall be in all cases considered an abuse of dominance and the prices below the average total costs (ATC) but still above AVC shall be considered in this manner only of the exclusionary intention of the dominant is proved.[32] This rule is too strict however as for example as regards introductory (starting) prices, the price under AVC is absolutely natural and justified and on the contrary pro-competitive (a new product is being introduced, a new competitor is entering). The courts of first instance also admitted this and it adjudicated[33] that under certain circumstances, the dominant could sell with a loss;
- the price under AVC should be considered illegal but its setter would be allowed to prove the contrary.[34] An objective justification of the price loss have to be admitted in certain situations even with the dominant – even the dominant surely has the right to get rid of the stock, react to the conduct of competitors or (if it is less expensive) to keep in operation an enterprise during a short-term drop of demand by means of loss-prices rather than to close it and to start again after a certain period of time.

In Europe[35] (France, Spain, Italy, Ireland, Luxemburg, Belgium, Portugal, Greece...), there is a number of regulations forced by lobbying interest groups of small- and middle-sized businessmen, which in special areas ban the below-the-cost prices, cheap advertising and promotional sales, gifts for consumers, "two for one" and retail discounts under a certain limit. These regulations are applied regardless of the market power

and reason of the discount (see the Czech regulation in Section 2 of the Prices Act). The risks of such procedures endangering the competition are obvious; protection of smaller entrepreneurs should be solved by other tools of the public policy (fro example tax allowances) that are not so dangerous for the competition and in the end for the consumers´ welfare.

The problems arise also when ascertaining average costs. In a number of industries, loss periods are repeated periodically or haphazardly which do not stay away even from the dominant member of the market. It is not an economically reasonable solution to leave the market so that below-cost prices are charged, which however may not mean that the dominant is planning to force out or to "discipline" his competitors at the market. Prices, which cause short-term losses to the dominant, may be an indicator of the predatory pricing, but not necessarily.

The Czech regulation in the Act on Protection of Competition [36] forbids the dominant to abuse its position by long-term offering and sale of goods for unreasonably low prices, which does or may result in a disturbance of competition. In consideration of the fact this provision has not been used so far, one may only deduce that the criteria of adequacy or inadequacy as well as other attributes of the predatory pricing will be compatible with the current practice of European bodies.

2.2.2. Predatory Intention

In addition to the below-cost price, a typical feature[37] of predatory activities is the existence of a predatory intention. "Strong expressions" of businessmen in their internal correspondence and communication ("to disqualify" a competitor, "to destroy" him and likewise) may not be a legally relevant proof of such intention. Such manager is worth much greater suspicion who claims he wants to have good relations with the competitors – it is only correct to investigate him for collusive conduct. On the other hand, it is hardly possible to disprove existence of an explicit plan of disqualifying the competition by means of temporary sacrifice of the profit. The very intention certainly cannot be decisive but if there is one, "it may help the court to interpret the facts and to anticipate the effects".[38]

Since in the normal competition, the existence of a competitor is always subjectively trouble-some, there is a problem with identification of what is already the exclusionary intention and what is still a pure demonstration of general competitive rivalry. Therefore the economy anticipates objectification of the intention test – the thing is that the intention to exclude somebody out of the market is not considered commercially sensible if the exclusion was not actually reached – it is certainly better and ascertainable in contrast to the chase for "he-mannish" statements in the internal correspondence of the deemed predator.[39] Still it is certainly worth recommending for decent companies rather to refrain from sending threats and creating memoranda on the intention to destroy the competition as they can be used as an evidence in an antitrust investigation. The evidence of a clear predatory strategy and not only of an internal communication on expulsion of the competition is suspicious (and it increases the chance of intervention by the antitrust authority).[40]

2.2.3. Compensation of Losses

The test of predation presupposes an examination of the ability of the deemed predator to compensate its losses in the long term from the period of the price exclusion of the competitors (it is an intention or at least a possibility to do so). Hence the test of the loss compensation concerns a special and partial components of the predatory intent – the predatory intent not including the possibility of later compensation of the losses represents a contribution to the social welfare – the dominant reduced the prices…..

In the USA, the compensation of losses is considered an integral condition of proving the predatory conduct (or also a concealment or a "curtain" for the courts for dismissing the accusation of the deemed predatory activity).[41] On the other hand, as a necessary piece of evidence, ECJ requires for the dominant to have a real chance to compensate incurred losses. Such evidence is considered sufficient which proves only the probability (!) of the fact that the predatory pricing will exclude the dominant's rival out of the market.[42] This is in my opinion quite hazardous, too due to its indefiniteness as the markets keep changing and the deemed predator cannot forecast when the competitor will finally leave the market and whether it will do it at all (whether for example it will not provide temporary sources that will help him survive the low prices). Due to this very fact, the deemed predator takes a great risk as any economic "calculations" are impossible; one may perhaps apply only very rough probability estimates.

From the point of view of the European doctrine and decision making, it does not matter whether the dominant has actually compensated its loss or it is doing so at the moment or whether it e was able to do it ex ante(!). An ex post excuse that in the end, the dominant did not make it (perhaps due to the fact that the victim proved to be a stronger competitor or because a speedy reaction of an antitrust authority crossed the intention before it could have been realized), cannot be accepted as a (would-be) legally relevant bonus for the predator. If the price reduction by the dominant is motivated by generating higher profit or reduction of loss, it should not be considered predatory.[43] The criticism of the narrow approach to the predator's costs[44] nevertheless

objects that the below-cost sales by a strong undertaking have to be examined in terms of the "opportunity costs" rather than in terms of absolute data about the costs; real costs of the dominant connected with the predatory activity might be easily overestimated.

It is particularly difficult to diagnose possible predatory activity when a new comers enter the market: the general (!) reaction to that is usually reduction of prices by the existing members in comparison with the previous period (due to the fact that the introductory prices of the new comers are usually lower than the current market prices). How shall we distinguish a reaction of this type from the predatory price reduction? There might be mistakes of both types (a competitive reaction is qualified as predatory activity, and the predatory activity is considered a standard competitive reaction). As it will be difficult to bear the burden of proof, the fears of predatory activity will be probably correct only if the dominant is not able to provide the antitrust authority with a trustworthy economic justification of his procedure.[45]

These days, the compensation of loss sustained during the period of low prices under the average variable costs is considered an integral part of the predatory test in the USA[46] and the European judgments tend to its as well.[47] A defence on the basis of inability to compensate the loss may not be reliable for the above-mentioned reasons – ECJ has ruled[48] that under specific circumstances of one case, it was not suitable to request evidence of the fact that the deemed predator had had a real chance to compensate its losses. According to the Court, it must be possible to punish the predator any time there is a risk of excluding the rivals..

In one opinion, the strategy leading to a short-term lowering of consumer prices which is not followed by the corresponding higher price in the long term, should not be considered an anti-competitive one.[49] It is disregarded, however that a number of price-predators do not act hoping in a future monopoly profit but only with the aim of keeping the settled level of oligopolistic prices that might be disturbed by an aggressive rival.[50]

2.2.4. Loss of Consumers

It is not required to prove the loss of consumers incurred a result of the predatory pricing. It would be also difficult if not even impossible. In the short term, prices fall during the price exclusion and the horizon of their subsequent growth aimed at (super)compensation of the predator's loss may be very long. Moreover, in certain cases, the predator even fails to get to this stage for various reasons – but his conduct is not the less dangerous to the competition. The anti-competitive conduct of the predator may not be excused by the fact that in the end the consumer had profit from it (or from the predator's lack of success respectively) as the prices actually did not rise (see the foregoing paragraph). On the other hand, according to Motta (in the quoted work) it should be admitted as evidence of efficiencies justifying the price below-costs, that the deemed predator is active at complementary markets.

Usual conduct at the competitive market is when an incumbent firm reacts to the price reduction after the entry of a new comer, who usually makes use of lower "introductory" prices. This should not be automatically (per-se) prohibited even to the dominant already operating at the market – if it could not react adequately, it would distort the market conditions and damage the competition (ineffective competitors would be motivated to enter the market) and simultaneously the consumer welfare.

2.2.5. Price Self-Defence

Price reduction as a reaction to competitive prices is therefore possible but not below the level of the average variable costs. While certain types of losses are justifiable for a prospective competitor entering the market, this does not apply automatically for the current (and in particular dominant) member of the market. On the contrary, even a dominant may reduce the price down to the level of his average variable costs even though he undermines the position of a small competitor or a new competitor thereby. A contrary rule would grossly distort the market and purpose of the competition.

2.2.6. Prices in High-Tech Industries

Low prices in "High-Tech" industries have further economic justification regardless of the respective dominance of the one applying it. These industries have often a network nature and they achieve significant network externalities (the extent of the network attracts other members; the successful firm is the one who takes control over the network even though its rival may have perhaps a technologically more advanced solution). Fixed costs are high and the marginal ones insignificant.[51] The one who starts building a network wins – one talks of the first mover advantage. Nevertheless, winning means spending of great efforts and investments from the very beginning, even at the price of a loss as the slight initial advantage can, by means of the "snow-ball" method, extend into a significant dominance at the market.

Hence the competition is the most intensive at the very beginning – then one competes not at he market, which is only appearing, but rather for the market itself. Until the would-be competitors are at this stage (and there is no ex ante dominance), one cannot talk of the predatory pricing at all (the basic condition, i.e. the dominant position at the market, is not met). However, if one of the market participants has acquired a domi-

nant position and tries to strengthen or keep it by means of the predatory pricing, the law should prevent it from doing so and the dominant should be punished for it regardless of the fact that a network industry is concerned.

Another case is the possibility of making use of the dominance on one market to acquire domination also at the "neighbouring" market with complementary goods. To this end, one may use of the predatory pricing at the neighbour-market together with the tying of products.[52] The answer to such situations is not automatic and it requires thorough analyses. If complementary products are concerned, will their provider actually be interested to request lower prices for the consumer welfare (in order to stimulate the demand) than if this was done by two separate competitors?[53] How does the consumer's interest comply with the fact that he or she has to buy tied products for a lower unit price upon hypothetical separation of the products but for a higher price than the price of one single product would be (which is however not supplied separately – full-line forcing), which the consumer is interested in ? Given the complementary nature of the markets, is it really more probable that this will be for the consumers´welfare? It is not unnecessarily and a priori dangerous - as regards the competition - when a great competitor tries to enter a new product market – his marketing, technological, research and development, financial and other capacities probably allow him to do what a small competitor could not. Nevertheless, I do no doubt that the predatory pricing does not belong to legal methods of getting established on a new market.

3. Assessment and Standpoints

If we strictly insist on the test of the below-cost price in connection with the requirement of the loss return, it may result in a fact that a number of aggressive price conduct damaging the competition may remain unpunished. The proposal[54] to replace these two tests with two basic questions (1. Has the deemed predator dominant or monopoly market power? 2. Is there a credible theory that would prove the predatory activities by means of facts corresponding to the theory – including the predatory intent?) has nevertheless the disadvantage of unpredictability, low legal certainty and arbitrary nature.

In the eyes of the public, predatory activities are probably the most striking form of discrimination by strong competitors at the market. In practice it has been proved however[55] that it occurs only rarely as it is a very expensive strategy for the predator that can be substituted by less striking strategies with the same impact.

Any simplifying unambiguous rules in the form of theses from physics[56] have no place in the antitrust analysis of the predatory pricing. There is no place here for a simplifying approach only on the basis of examining average variable costs either and judicial decisions do not maintain this approach either – the thorough examination of conditions of entering the market has the decisive importance. The predatory strategy is not credible when these conditions are easy or are not made more difficult by means of predatory activities.

There is a suspicion[57] that these days, antitrust decisions in this respect protect rather the competitors than the competition. The border between the exclusionary conduct of the dominant and usual hard competition by means of a better economic performance is not very distinct and its assessment depends on a number of factual circumstances of the particular case. Hence it is not possible to rely on a single "pseudoexact" indicator of the predatory pricing as it may happen that as a result of this, laws will be used to disturb and undermine the competition instead of its protection.[58]

The are two possible scenarios[59] of incorrect application of the anti-trust regulations: incorrect accusation and incorrect non-accusation. Incorrect intervening because of predatory pricing may be costly as it constrains the price competition, i.e. the main battlefield of the competitive conduct. In the course of time, by means of market powers operation, its costs will be probably not reduced (in contrast to the costs of the incorrect non-intervening[60] into the anti-competitive conduct).

As regards low predatory prices, two types of mistake appear – mistake I (incorrect accusation) and mistake II (incorrect acquittal). As regards the incorrect accusation, the social cost might be the lost motivation of the dominants to invest and to innovate as by means of the price regulation ex post, means may be taken away from them (or not awarded to them respectively), which they need for the economic recoupment of past investments and to finance other innovations. Social welfare is hence reduced due to the lower ability to innovate and to decreased incentives to risky entrepreneurial conduct. As regards the incorrect acquittal, an allocative inefficiency may emerge and in case of foreclosed markets with high entry barriers, these effects may not be only short-term ones at all.

Any exceptional price that differs from the "current price" established usually by the market, is a subject-matter of the ad-hoc casuistic and value (out-of-law) grounded considerations, which only with difficulties find a reliable and unambiguous verification tests, whether public or private legal ones.

The general criteria of correctness and fairness of the content of legal behaviour apply. They involve mutual bargaining power of the partners and hence include also the protection of the weaker party, not exclusively of the final consumer in all cases but instead of the entrepreneurs (competitors), too.

In the conditions when the market self-regulation does not work, one shall simulate hypothetical market conditions and compare possible prices of substitutable goods that would be achieved under similar business terms under an workable competition.

In some respect more accurate tests of price "correctness" are available in the public legal price regulation and in the ex post regulation of the conduct of dominants who abuse the prices to exclude the others out of the market (or to prevent entry of would-be newcomers to the market) or to exploit participants of the market. Both exceptionally high and exceptionally low prices and rebates are subject in particular to examination of their economic impact on the competition and consumers. Value judgments of correct or fair conduct are not excluded in these cases either. A normative value judgment specified and concretized by judicial decision or by a decision of the relevant administrative authority body is a more suitable tool of the price correction than an ex ante price regulation, whose both direct and indirect costs might be tremendous.

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* prof. JUDr. Josef Bejček, CSc., works as a professor of commercial law at Faculty of Law, the Masaryk University of Brno, the Czech Republic

[1] This was notices by A.Smith and developed by K. Marx...

[2] Such thought is also possible that in this connection, the exceptionally low price might be even the unfair business practice in accordance with Annex No. 1 to (the public legal) Act on Consumer Protection (Act No. 634/1992 Coll., as amended). A business practice is inter alia misleading if the entrepreneur

- offers for purchase products or services for a certain price without stating the reasons, on whose basis the consumer will become convinced that he will not be able to provide, himself or through another entrepreneur, a supply of the said or equal products or services for the price valid for the concerned period and in a reasonable amount in consideration of the nature of the product or service, in the extent of the advertisement and the offered price (inviting advertising);
  (If the consumer was invited to a speedy purchase in this manner for an exceptionally low price, it forms the subject-matter of the *public legal* ban in the interest of protection of the consumer's free will);
- ... untruly states that the product or service will be offered only for a limited period of time or that they will be offered only for a limited period of time under special conditions with the objective of making the consumer make an immediate decisions without providing him with a reasonable period necessary for an informed decision. (Motivation of the regulation as well as the manner of protection are similar).

[3] Sales campaigns and provision of rebates are subject also to public legal regulation of the competition protection. For details see Bejček, J.: Cenová diskriminace a tzv. dvojí ceny v evropském a českém kontextu [Title in translation: *Price Discrimination and the so-called Dual Prices in European and Czech Context*], Právní fórum 2008, No. 5, pp. 181–192. It is a standard in market economies that the option of season sales is regulated and synchronized in such manner that their spontaneous development does not disturb economic competition and that they provide better information comfort also to the consumer: sales campaigns are organized in one period so that the consumer can make a reasonable decision in the real time with the knowledge of all relevant discounts and he does not risk that he would miss a more advantageous offer by waiting for a later, even more advantageous one.

[4] Cf. Section 424 of the Commercial Code, according to which the seller is not liable for those defects in goods about which the buyer knew or ought to have known at the time the contract was concluded due to the circumstances under which it was concluded, unless such defects affect properties which under the contract the goods are supposed to have.

[5] A problem may be the so-called suspiciously low prices – it is naive to rely just on the lower price as an indicator of lower quality and the higher price as an indicator of the higher quality; a sophisticated distributor might sell even low quality for higher prices just to prevent any suspicion of being suspiciously cheap. On the other hand, first-class goods can be often purchased for very low prices.

[6] Cf. Sections 167 – 1268 of ABGB.

[7] Section 934 of ABGB.

[8] Looking for a standard that would differentiate competitive prices of the predator ones, is addressed for example in Sullivan, E.T. – Harrison, J. L.: Understanding Antitrust and its Economic Implications, LexisNexis, 2003, p. 313 et seq.

[9] Elzing, K.G. – Mills, D.E.: Predatory Pricing and Strategic Theory, Georgetown Law Journal, 2001.

[10] Supreme Court of the USA in case of State Oil Co. v. Khan 522 U.S. 3, 15 (1997), a motto adopted from the hading of the book Kasten, B.: Höchstpreisbindungen , Nomos Verlag, Baden-Baden, 2003.

[11] Cf. Bejček, J.: paper quoted in footnote 3, pp. 181–192.

[12] As early as in 2000, the German Bundeskartellamt forbade the German undertakings Wal-Mart, Aldi Nord and Lidl to sell certain products from the field of basic foodstuff under the applicable acquisition price and ordered them to increase the price of the goods. It stated inter alia that the benefit of under-cost prices for the consumer is not only temporary (after removal of competitors from the market, concentration rises) but also insignificant. From the middle- and long term, the remaining competitors have a greater space for price increases not only as regards a few campaign products but the whole assortment. Restricting the competition by unfair damaging of middle-sized undertakings is however permanent and perceivable. According to the statement of the office chairman U. Böge, the main purpose was to prevent forcing out the independent entrepreneurs from the market by unfair price strategy of large undertakings with a great market power event though in a fair competition, they would be successful. Cf. http://www.bundeskartellamt.de/wDeutsch/aktuelles/Aktuelles.php, of 8 September 2000

[13] Sullivan, E.T. – Harrison, J. L., quoted work, p. 315.

[14] *Economies of scope and scale*.

[15] Cf. Sullivan. L.A. – Grimes, W.S.: The Law of Antitrust: An Integrated Handbook, Thomson West, 2006, p. 159.

[16] Mc Gee v r. 1958, quotation according to Motta, M.: Competition Policy, Cambridge, 2004, p. 413 et seq.

[17] According to the subject-entrepreneurial approach, which has nothing in common with the narrow approach to the business name as an identification pursuant to the Com-

mercial Code. The wider or multi-meaning term “undertaking” is used accordingly.

[18] Cf. Bishop, S. – Walker. M. The Economics of EC Competition Law, Sweet & Maxwell, London 2002, p. 220.

[19] This is the case of Microsoft, whose reputation according to the judgment resulted in the fact that potential competitors did not even try to compete with it. Cf. ibid., p. 224.

[20] As emphasized by Bishop, S. – Walker. M.: ibid., p. 222.

[21] Cf. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary contracts, December 2005, Article 95.

[22] Cf. ibid, Section 133 in connection with Section 8.

[23] Cf. Sullivan. L.A. – Grimes, W.S.: ibid. p. 168. I am of the opinion, however, that no objections may be raised against such “predatory activities” as it is pro-competitive, rationalizing and in favour of the consumer.

[24] Bishop, S. – Walker. M.: ibid., p. 221.

[25] In Sullivan, E.T. – Harrison, J. L., p. 316, there is an illustrative example of the judgment of the Supreme Court of the USA of 1986 (Cargill v. Monfort of Colorado, Inc., 479 U.S. 104): the plaintiff raised objections against the merger of two of his competitors who might have used predatory pricing and reduce the prices to the level of their costs or only slightly above this level in order to get a larger market share. If the plaintiff had wanted to remain competitive, he would have to reduce the prices as well –he would not have been forced out of the market but his profit rate would have been affected thereby. The court, however, did not identify with the threat of predator pricing and it did not find any breach of antitrust regulations either as the real threat of reduced profit was created not only due to the reduced competition but on the contrary due to an increased competition.

[26] Motta, M.: Competition Policy, Cambridge, 2004, p. 446.

[27] It is for example recommended to apply criteria of average total costs (ATC). The total costs include the fixed and the variable costs. Cf. Joskow, P.L. Klevoric, A. K.: A Framework for Analyzing Predatory Pricing Policy, Yale Law Journal, 89 (1979), pp. 213–270, quotation according to Motta, quoted work, p. 448. Another approach (Bolton, P. et al.: Predatory Pricing: Strategic Theory and Legal Policy, Georgetown Law Journal 88 (2000), pp. 2239-330) once again requires examination of the average incremental costs (AIC), which include the addition to the output used for additional predatory sale and reflect also any fixed costs incurred due to extension of new sales. These costs are probably a more accurate criterion, however, it is difficult to ascertain them in practice.

[28] Areeda, P.E. – Turner, D. F.: Predatory Pricing and related Practices under Section 2 of the Sherman Act, Harvard Law Review 88 (1974), p. 716 .

[29] These are costs, by which the total costs rise as a result of the addition to the output. Prices below these costs guarantee that the undertaking does not maximize the short-term profit. It is a type of variable costs as it follows from their very definition that the fixed costs may be affected by changes at the output.

[30] *Average variable costs* (AVC) - this is a sum of all variable costs classified by the output as a substitute of “marginal costs”. The reason of the compromise is the fact that the addition of marginal costs per unit of an output cannot be ascertained from the current books as these usually end with monitoring of average variable costs.

[31] According to the case AZKO C-62/86 AZKO v. Commission (1991) ECR I-3359 (1993), according to Bellamy & Child, European Community Law of Competition , 6th Ed., Oxford 2008, p. 956.

[32] This is a controversial statement as the intention to force the competitor out of the market is not anti-competitive itself but on the contrary, it is imminent to the competition process. It is difficult to restore the state of someone’s mind and economists are not qualified for examinations in this very field – cf. Faull, J – Nikpay, A.: The EC Law of Competition, 2nd Ed., Oxford University Press 2007, p. 376.

[33] T-83/91 Tetra Pack v, Commission (1994).

[34] This is a conclusion of Motta in the quoted work, p. 449.

[35] According to the Motta’s quoted work, p. 453

[36] Cf. Section 11, par. 1, subsection e) of Competition Protection Act.

[37] I refer to and paraphrase Motta’s approach, quoted work, pp. 449–453.

[38] Judge Brandeis, quotation according to Sullivan. L.A. – Grimes, W.S.: quoted work, p. 172. Ibid., on p. 173, another witty statement of the judge Easterbrook is mentioned who admonishes to caution when judicially intervening with the business: “Wisdom drops far behind the market.... Lawyers know less about business than people whom they represent... A judge knows even less about business that the lawyers ..“ (Easterbrook: The Limits of Antitrust, 63 Tex. L. Rev. 1, 5 - 1984).

[39] Cf. Korah, V.: An Introductory Guide to EC Competition Law an Practice, 8th Ed., Oxford – Portland Oregon 2004, p. 157.

[40] So for example in the case AZKO, the predator threatened the competitor at two meetings that he would apply below--cost prices unless the competitor would withdraw from the market and in addition, a detailed plan existed describing measures to be adopted by AZKO in such instance (cf. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary contracts, December 2005, Article 113, Note 71).

[41] Sullivan. L.A. – Grimes, W.S.: quoted work, p.169.

[42] Cf. Faull, J – Nikpay, A.: quoted work, p. 379.

[43] Bishop, S. – Walker. M., quoted work, p. 233.

[44] Cf. Sullivan. L.A. – Grimes, W.S.: quoted work, pp. 164–165. For example the producer may have large stock of unsaleable goods of a certain type (for example the type of TV); the most important question – regardless of the production costs of the goods – is: how to use this stock to maximize revenue? It may turn out that it is impossible to sell the goods for a price corresponding to the costs spent. Market sale with a great discount damaging the competitors will limit the costs of lost opportunity to the difference between the amount of the price after discount and the highest price possible, for which the goods might be sold.

[45] Ibid., p. 234.

[46] Cf. the case Matsushita Electric Industrial Co. v. Zenith Radio Corp. (1996). The predatory pricing of Matsushita in the USA as criticized by the competitor and supported by sales on the domestic market in Japan would last for many years and assumed losses would be so extensive that it would not be possible to hope in their return even if Matsushita gained a monopoly. The action for predatory pricing was dismissed as the supposed predatory activity did not have a reasonable economic sense.

[47] Cf. C-395/96P Compagnie Maritime Belge NV and Dafra-Lines v Commission of the EC (2000). See Bishop, S. – Walker. M., quoted work, pp. 237-238.

[48] Tetrapack II, C- 333/94P, 1997, par. 41–45.

[49] As in Bishop, S. – Walker. M., ibid., p. 238.

[50] Cf. Sullivan. L.A. – Grimes, W.S.: quoted work, p. 163.

[51] Cf. fixed costs of covering the territory with a signal of mobile telephones and marginal costs connected with operating of another individual mobile phone which are close to null.

[52] Reducing product differentiation, leveraging. Cf. for example connecting the operation system with the system of VMP players.

[53] As Motta claims in the quoted work on p. 453. In addition, he says that supplies of two products from the same monopolist are usually more advantageous for the consumer than if he received the same products from two various monopolists.

[54] Sullivan. L.A. – Grimes, W.S.: quoted work, p. 174.

[55] According to Utton, M.A.: Market Dominance and Antitrust Policy, 2 nd Ed., Edward Elgar, Cheltenham 2003, p. 124.

[56] The Czech language does not have a one-word expression for the German "*Faustregel*" or English "*rule of thumb*".

[57] Utton, M.A.: ibid.

[58] Similarly Schulz, N.: Wettbewerbspolitik, Eine Einführung aus der industrieökonomischer Perspektive, Mohr Siebeck 2003, p. 174.

[59] Cf. Hylton, K. N.: Antitrust Law - Economic Theory and Common Law Evolution, Cambridge University Press, 2003, p. 214.

[60] If the predator activities are not sanctioned, the market remains in the natural original condition so that the threat of competitors entering the market restricts monopolist prices. On the contrary, an incorrect sanction discourages from competitive conduct both the current as well as the potential members of the market. Courts are not equipped for complete analysis of all predator strategies described in economic literature. If (cf. ibid) courts proceed in such manner that they consider any of the options described by the theory to be predator activities, an incorrect sanction for a non-existing conduct is more probable.