PREDATORY CONDUCT GUIDELINES

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1.0 INTRODUCTION

1.1 These Guidelines are intended to be used by staff of the Competition and Consumer Authority when reviewing a case of predatory conduct.

1.2 This document provides the general approach that is taken in the investigation of predatory conduct under the Competition Act (Cap 46:09) (hereafter referred to as 'the Act').

1.3 The Predatory Conduct Guidelines address a number of key issues related to the provisions of the law, but they cannot anticipate all questions that may arise in the market place and may be updated from time to time to account for future developments in policy and law.

1.4 These Guidelines are not a substitute for the Act. They must, therefore, be read in conjunction with the Act, Regulations and other guidelines. Their purpose is to complement what is in the law.

2.0 PREDATORY CONDUCT

2.1 Predatory conduct is that requires the following elements to be present for it to have anti-competitive effects:

(i) Existence of an enterprise with uncontested market power and

(ii) Exercise of such market power has predatory effects in the relevant market.

2.2 Conceptual Framework

2.2.1 Predatory conduct is both price and non-price conduct by an enterprise, which conduct has negative effects on competition. The most common form of predatory conduct is predatory pricing. Predatory pricing refers to the conduct of selling a product or service at a very low price, with the intention of driving competitors out of the market, or creating barriers to entry for potential new competitors.[1] If competitors or potential competitors cannot sustain equal or lower prices without losing money, they either go out of business or choose not to enter the business. The predator then has fewer competitors or it even becomes a *de facto* monopoly after an opponent exits.

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1 Report on Predatory Pricing, prepared by The Unilateral Conduct Working Group of the International Competition Network (ICN). The Report was presented at the 7th Annual Conference of the ICN Kyoto, April 2008. Areeda-Turner suggest predatory pricing is pricing below Short Run Marginal Costs, the AKZO case suggests it is costing below Average Variable Costs, and the case of United Brands suggests it is simply when the difference in cost between the cost of manufacturing and the price charged to consumers is excessive, http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf.

2.2.2 After the weaker competitors are driven out, the surviving business can raise prices above competitive levels (to supra competitive pricing). The predator hopes to generate revenues and profits in the future that will more than offset the losses it incurred during the predatory pricing period. This is known as recoupment of the losses incurred during the predation period.

2.2.3 The predator, therefore undergoes short-term pain for long-term gain. Consequently, for the predator to succeed, it must have sufficient strength (financial reserves, guaranteed backing or other sources of offsetting revenue) to endure the initial lean period.

2.2.4 There must be substantial barriers to entry for new competitors, hence price predation involves lowering prices to an unreasonably low (usually below-cost) or unprofitable level in a market in an effort to weaken, eliminate, or block the entry of a rival.

2.2.5 Logic dictates that only dominant enterprises would be able to sustain below cost pricing sufficiently long enough to harm competitors in the short-term and customers in the long-term. While competing enterprises sometimes have similar cost structures which should allow them to match prices, the dominant enterprise's economies of scale may allow it to price far below the price of the competing fringe.[2] Normally, the dominant firm faces a number of small competitors, referred to as a competitive fringe. The competitive fringe sometimes includes potential entrants. Thus the dominant firm may be a monopolist facing potential entrants.

2.2.6 The International Competition Network (ICN) also considers predatory pricing to be the common practice of abuse of market dominance, which firstly requires the predator to have dominance and then set the price at a level lower than the normal trading price to have the potential to exclude rival enterprises.[3] That means, predatory pricing as an unfair trade practice requires below-cost pricing that has the potential to exclude competitors.

2.2.7 Predatory pricing explains that the predator enterprise first lowers its price until it is below the average cost of its competitors. The competitors must then lower their prices below average cost, thereby losing money on each unit sold.[4] If they fail to cut their prices, they will lose virtually their entire market share; if they do cut their prices, they will eventually go bankrupt. After the competitor has been forced out of the market, the predator enterprise raises its price, compensating itself for the money it lost while it was engaged in predatory pricing, and earns monopoly profits thereafter.

2.2.8 Predatory pricing benefits consumers only in the short-term when the company charges below-cost prices.[5]

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[2] CATO Policy Analysis No. 169: *The Myth of Predatory Pricing*; by Thomas J. DiLorenzo (February 28, 1992) Available in: http://www.cato.org/pubs/pas/pa-169.html.

[3] International Competition Network (ICN): Predatory Pricing. Read: http://www.themarketingcorp.com/?m=Predatory_pricing.

[4] John S. McGee, "*Predatory Price Cutting: The Standard Oil* (N.J.) Case," Journal of Law and Economics, Vol. 1 (Oct., 1958) pp. 137-169, published by the University of Chicago Press. Available in: http://www-personal.umich.edu/~twod/oil-ns/articles/research-oil/research-oil/john_mcgee_predatory_pricing_standard_oil1958.pdf.

[5] Economic theory points to the fact that predatory pricing is not beneficial to consumers in the long term; therefore, competition policies should discourage its existence.

2.2.9 However, in the long-term, consumers can suffer when a company remains as the monopoly; i.e., after successful elimination of rivals or competitors. This is because the dominant enterprise is likely to raise prices or set terms of transaction to its advantage.[6]

2.2.10 Predatory pricing is a conduct covered under section 30 of the Act (Abuse of Dominance). Such pricing behaviour does confer some benefits to the purchasers/consumers in the market during the period of predation, those benefits are transitory or short-term, and are eventually outweighed by increased costs during the period of recoupment.[7]

2.2.11 Predatory pricing by a firm with substantial market power can be an instrument of abuse. However, the dilemma on the other side is that price reductions are the hallmark of competition and the tangible benefit that consumers perhaps most desire from an economic system.[8]

2.2.12 It is on the basis of the foregoing notions that confirmed predatory pricing by dominant firms is illegal in many jurisdictions across the world.[9]

2.3 Applicable Law

2.3.1 Predatory pricing is an instance of 'abuse of dominant position', and is captured under Section 30(1) of the Act, which states that:

Any conduct on the part of one or more enterprises is subject to prohibition by the Authority if, following an investigation by the Authority, such conduct is determined to amount to an abuse of a dominant position in any market.

2.3.2 The Competition and Consumer Authority has published a comprehensive guide to monopolisation and abuse of dominance which can be referred to, whose objective is to provide a framework that assists in determining whether a dominant position increases or decreases the risk of market power.

2.3.3 Additionally, Regulation 4(a) of the Competition Regulations, 2011 stipulates that an enterprise is considered to be in a dominant position if it acquires at least 25% of the sale of goods and services in the market, i.e., a market share of 25% and more.

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[6] From the economics point of view, profit-maximizing price set by a monopolistic enterprise is higher than the price set in a competitive market. For this reason, predatory pricing by enterprises is usually dissuaded by Competition Agencies, which intervene to encourage a competitive environment.

[7] The consequence thereof is that, following the exit of competitors from the market, or upon successfully deterring new entry, the predator is expected to raise prices significantly in an attempt, in the now less-competitive market it had created, to recover costs incurred during the period of predation.

[8] While they made the view that in modern economics predatory pricing is a rational business strategy to be more successful than other enterprises they also reached a consensus that it is unfair to set prices below cost, and that is why competition laws consider predatory pricing illegal. Also refer to Predatory pricing in the telecoms sector: the ECJ rules on the issue of recouping losses. By: Iratxe Gurpegui Ballesteros and Agnes Szarka (Available in: http://ec.europa.eu/competition/publications/cpn/2009_2_8.pdf.

[9] One of the famous early cases for predatory pricing that started in the 19th Century (1890) and completed in 1911 under the Sherman Antitrust Act of 1890 in the United States of America involved Standard Oil Company as the predator (respondent) and Pure Oil as the complainant. The main business of these companies was oil refinery. The nature of the complaint was that Standard Oil had set prices below cost with the intention to close down competitors. Standard Oil, at the time, was owned by the world's richest man, namely, John D. Rockefeller. In 1911 the Supreme Court ruled that Rockefeller and his company, Standard Oil, had "monopolized" the oil refinery business by predatory pricing. Standard Oil was therefore instructed to divest or break-down the company into smaller units where other entrepreneurs could acquire shareholding.

2.3.4 In regard to these provisions of the Act, the level of market dominance will always be determined before considering the practice of predation on other businesses.

2.4 Elements of the Offence

2.4.1 A number of elements must be proved for an offence to have been committed. The elements of the offence (refer to 2.4.2), read together with the Guidelines on Monopolisation and Abuse of Dominance, should be the guiding principles in order to prove the conduct.

2.4.2 While generally all the elements may be present in one case, the critical point to establish is whether there is a dominant enterprise with substantial market power engaged in below cost pricing as its deliberate strategy. The Authority need not wait for a competitor to exit or a barrier to take effect before intervening. The Authority will have to redress the matter in light of circumstances of each case.

2.4.3 A typical predatory pricing complaint received by the Authority can come from any person who contends that, in effect, a dominant player's prices are too low that they have an anti-competitive effect in the market. In essence, the complainant might lay out a set of suggested facts, and ask the Authority to assess the actual or likely outcome of the alleged predation.

2.4.4 The purpose of the assessment is to distinguish predatory pricing from vigorous and desirable price competition. The analysis should emphasise the presence of, or potential for market power. The analysis may proceed (where necessary) to determine if, after a period of low pricing, the alleged predator would be able to raise prices and recoup losses (or forgone profits), unconstrained by competition in the future.

2.5 The Assessment of Predatory Pricing

2.5.1 There are various tests to assess whether the pricing is predatory:

i. Costing below Average Variable Costs (AVC) as argued in the AKZO[10] case; and

ii. When the difference between the cost of manufacturing and the price charged to consumers is excessive.[11] This is explained in the United Brands[12] case.

2.5.2 When analysing predatory pricing, the following elements/questions have to be ascertained:

i. Is the enterprise or company in a dominant position in the market?;

ii. Is the enterprise pricing below some measure of cost? (for example, sacrificing current profits);

[10] Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission [1991] ECR I-3359. Kings College London. Economics for Competition Law 2013/2014, Unit 4, pages 4-35.
[11] International Competition Network (ICN), about Korea predatory pricing available in: http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20pp/korea%20response.pdf.
[12] United Brands v Commission of the European Communities, Case 27/76 (1978).

iii. The basis of such a price strategy is predicated on the rational calculation that losses incurred may be later recouped through increased prices (for example, does it make economic sense that foregone profits may be recovered through later price increases?);

iv. Are competitors likely to respond by exiting the market, reducing output, or deciding not to enter? (for example, will the pricing strategy injure relevant competitors?); and

v. Given such an outcome, if consumers will be injured through later price increases on the part of the predator (for example, will there be injury to consumer welfare?).

2.5.3 Two tests are used to ascertain abuse in the form of predatory pricing:

i. prices below average variable cost are always to be considered abusive; and

ii. prices below average total cost but above average variable cost are only to be considered abusive if they form part of a plan to eliminate competitors. Therefore, competitors who are not as financially stable or strong may suffer even greater loss of revenue or reduced profits.

3.0 THE GUIDING PRINCIPLES TO PROVING A CASE OF PREDATORY PRICING

3.1 The Threshold Factor: Unreasonably Low Prices

3.1.1 A critical issue in a predatory pricing case is whether or not the prices of a dominant firm which are the subject of a complaint can be said to be unreasonably below the average market prices.[13]

3.1.2 The determination of price reasonableness is not a simple matter of comparing the alleged predator's prices and costs. Rather, it is important to know a great deal about the context within which the alleged predator and rival enterprises are competing with one another.[14]

3.1.3 While precise price/cost data applicable to the alleged predator may not be readily available to the Authority at the outset of a typical inquiry or investigation, often much of the evidence needed to determine the likelihood of predation can be obtained, in whole or part. The Authority should evaluate whether or not the suggested prices are unreasonably low by undertaking a two stage analysis:[15]

[13] While it is true that they must also be part of a policy of pricing and that they must bring about, or be designed to bring about, one of the harmful effects, the reasonableness of the prices themselves can be used as a threshold.

[14] That is, was the alleged predator responding to price cuts of a rival enterprise, or did the alleged predator initiate them? How long were the prices in effect in the market? Was there excessive chronic capacity in the industry resulting in enterprises (including the alleged predator) offering prices which could fairly be described as loss-minimising in an effort to remain viable and retain market share? Also refer to article by P. Bolton, J. F. Brodley and M. Riordan, Predatory Pricing: Strategic Theory and Legal Policy.

[15] Article by P. Bolton, J. F. Brodley and M. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*.

i. firstly, by considering market characteristics, such as seller concentration and the conditions of entry, which indicate the existence of, or the potential for building market power; and

ii. secondly, the Authority confirming that prices are indeed unreasonably low and this is done by evaluating the relationship between the alleged predator's prices and costs.

3.1.4 The first stage analysis is undertaken to determine whether it is plausible that this pricing could result in anti-competitive effects. If the Authority concludes that this is unlikely, no further investigation occurs. In the alternative, the investigator would proceed to the second stage, a price/cost analysis.

3.1.5 In circumstances where a particular input required for a market is in short supply, a dominant enterprise may be found to be abusing its dominance if it takes measures to ensure that it obtains significant quantities of the input in question, when it does not require the volume which it has secured. This includes the enticement of employees from a competing enterprise in circumstances where the dominant enterprise does not objectively require those employee's services. The following will need to be ascertained:[16]

i. the input concerned is essential to the competitor's ability to compete;

ii. the dominant enterprise is responsible for securing a disproportionate volume of the input (this, by implication, would require some analysis as to the stock requirements objectively required by the dominant enterprise); and

iii. the competitor cannot source an alternative supply of the input concerned.

3.1.6 The next section explains the two main stages to proving a case of predation. The two stages involve, market power aspects, and the price/cost comparisons.

3.2 STAGE 1: - Market Power

3.2.1 Market Definition[17]

i. The market has to be clearly defined. This is done both with respect to the product(s) and to the geographical area(s) being contested and it involves identifying all actual and potential sources of competition that may constrain the exercise of market power by the alleged predator.[18]

ii. A conclusive finding depends on the assessment of the conditions of entry into an industry.

[16] Report on Predatory Pricing. Prepared by, The Unilateral Conduct Working Group. Presented at, the 7th Annual Conference of the ICN Kyoto, April 2008. http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf.

[17] For further details on market definition, the Competition and Consumer Authority (Botswana) has published separate Guidelines on 'Market Definition' (2014).

[18] In general, the factors considered in defining the market include, on the demand side, the willingness of buyers to switch to substitute products or to the same product sold in other areas, and on the supply side, whether new entry will likely occur through the construction of facilities, the adaptation of existing facilities, or the sale of the product from distant areas.

3.2.2 Market Share and Concentration Level

i. Predation presumes that the alleged predator possesses sufficient market power to unilaterally impose price levels on the market long enough to harm its rivals financially.[19]

ii. Because predation is a form of abuse of dominance, enterprises engaged in this conduct are unlikely to declare any intention, even through the minutes of meetings. The effect of doing so would make it more apparent to the relevant authority that predatory pricing was the deliberate strategic plan.[20]

3.2.3 Recoupment of Losses

i. Recoupment is recovering of losses by the predator (in most cases by charging excessively high prices as a result of no competition) after the competitors have exited the market. This would normally signal predatory conduct, but there are instances where recoupment may not be relied on when assessing predatory conduct. The Tetra Pak II[21] case is the primary case in which the question of whether an enterprise was able to recoup its losses was part of the test for predatory pricing.[22] In this case the courts were not willing to apply recoupment as a criterion for predatory pricing; however, whether this approach was restricted to the individual circumstances of this case remains to be seen.[23]

ii. There is much debate about whether recoupment should be part of the test for predatory pricing.[24]

iii. Predatory pricing by a dominant company may have anti-competitive effects even if the dominant company does not or could not recoup its losses.[25]

iv. Therefore, it is crucial to have a good understanding of the extent to which the alleged predator may be able to unilaterally affect industry pricing.

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[19]The intention is to harm competitors. In addition to the rationality reasons, it is also very difficult to ascertain intention of the concerned enterprise.

[20]This is illustrated in the Wanadoo case, and the intention is difficult to ascertain because if an enterprise has negative intentions, it is likely to hide them. This is also best illustrated in the AKZO case; hence there was no express declaration in regards to removal of competition. Furthermore, refer to Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission [1991] ECR I-3359, and CATO Policy Analysis No. 169: The Myth of Predatory Pricing; by Thomas J. DiLorenzo (February 28, 1992) Available in: http://www.cato.org/pubs/pas/pa-169.html.

[21]Refer to case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951.

[22]The Court of First Instance (CFI) held that recoupment was not a necessary part of the test for predatory pricing stating that: "It would not be appropriate … to require in addition proof that Tetra Pak had realistic chances of recouping its losses".

[23]Office of Fair Trading (July 2001) '' *The role of market definition in monopoly and dominance enquiries*'' Economic Discussion Paper 2, accessed at http:www.oft.gov.uk.

[24]In France Telecom case, the Community courts cited paragraph 44 of Tetra Pak II and came to the conclusion that "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".

25 Report on Predatory Pricing, Prepared by The Unilateral Conduct Working Group. Presented at, the 7th Annual Conference of the ICN Kyoto, April 2008 http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf.

The table below illustrates possible conditions of entry into the market.

Box 1

Conditions of Entry in the Market Conditions of entry in a market are useful to understand as they affect the description of a market The following are the guiding points for the Authority's consideration of entry barriers after exit has occurred in the market (about the conditions of entry upon predation): a) In the context of a predatory pricing complaint, it is necessary to determine whether or not the alleged predator appears to have the market power to recoup its initial losses by raising prices to above normal levels once its target/rival has been driven from the market. This determination depends, to a considerable extent, on an assessment of the conditions surrounding successful entry to the industry, including potential for re-entry by any rivals forced out by the alleged predatory pricing behaviour or expansion by existing enterprises.[26] b) The Authority will endeavour to identify circumstances and conditions which may impede effective entry. Essentially, the Authority will determine whether or not attempted recoupment of profit by the alleged predator, through price increase following the exit of a rival or rivals, would, within a reasonable time, invite entry into the industry on a sufficient scale to ensure that price increase could not be sustained. c) The Authority should also assess and analyse the period of time the predator took to achieve a level of sales sufficient to effectively foreclose the competitor. d) If a number of factors combine to suggest that entry to the industry would be less likely or more difficult, this would strengthen the investigator's concern that the pricing behaviour of the alleged predator could have the potential to cause harmful long-term anti-competitive effects in the market.[27] e) If, on the other hand, it would appear that entry or expansion would likely occur on a sufficient scale to constrain the ability of the alleged predator to recoup its initial losses at a later time, the investigator would have less concern. f) The assessment of the conditions of entry emphasises an examination of whether entry is likely to be delayed or hindered by the presence of absolute cost differences or the need to make investments that are not likely to be recovered if entry is unsuccessful.

[26] Office of Fair Trading (July 2001) '' *The role of market definition in monopoly and dominance enquiries*'', Economic Discussion Paper 2, accessed at http:www.oft.gov.uk.

[27] Report on Predatory Pricing. Prepared by, The Unilateral Conduct Working Group. Presented at, the 7th Annual Conference of the ICN Kyoto, April 2008 http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf.

g) Incumbent enterprises can gain important cost advantages relative to potential entrants through a variety of sources. One type of barrier might well be institutional in nature, such as tariffs or non-tariff barriers in international trade.

h) An import of production inputs, or a lack of access to necessary technology, could also represent an important cost disadvantage to potential entrants.[28]

i) The enterprises may be integrated to such an extent that they significantly control the sources of raw materials used in the down-stream production processes, or possess patent rights to products and processes necessary to the most efficient production of the goods in question.

3.2.4 Prices below average total costs (i.e., plus variable costs, but above average variable costs) must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.

3.2.5 Additionally, prices below Average Variable Cost (AVC)[29] are presumed to be predatory. However, a price above AVC but below Average Total Costs (ATC)[30] are not presumed predatory, but can be presumed predatory if they are part of a plan to eliminate a competitor.

3.3 Price/Cost Predation.

3.3.1 Price/Cost predation is an analysis of predation conduct using price or cost strategy. The analysis involves comparison of a price to average variable cost and the time it takes for that price to be sustained by the alleged predator. The details are explained below.

3.3.2 The Price and Cost Factor

i. If an enterprise has market power, the Authority will then address the question of whether the price is at a level low enough to be considered unreasonable. To do this, the Authority will use a price/cost comparison test which assumes that, absent unusual circumstances, an enterprise will continue to operate only if it makes a contribution to its fixed costs of operation. The analyst performs the price/cost comparison based on two considerations:[31]

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[28] In some cases, necessary inputs and technology may well be controlled by existing industry members, including the alleged predator.

[29] Average variable cost includes the costs of labour, materials, energy, promotional allowances, use-related plant depreciation and all other costs that vary with the levels of output

[30] Average total cost is the sum of average variable cost and average fixed costs; that is, a cost associated with investment in real plant and machinery and any other fixed assets which do not vary with output produced. Whenever possible the analysis will be based on reasonably anticipated, rather than book (historical) average variable costs. This distinction recognises that price may sometimes fall below average variable costs for unanticipated reasons such as a shortage of materials or a labour strike. For example, Enterprise A has the following cost structure for it to manufacturer a single product:

- Average Variable cost = P10.00
- Average Fixed cost = P15.00

Therefore, this translates that Average Total cost for Enterprise A to produce one item is P25.00. So realistically, Enterprise A should in the long run sell its single produce or item at a price more than P25.00 or at least equivalent.

[31] Report on Predatory Pricing, Prepared by The Unilateral Conduct Working Group. Presented at the 7th Annual Conference of the ICN Kyoto, April 2008, http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf

a) firstly, a price set at or above the average total cost of the alleged predator will not be regarded as unreasonably low by the Authority, regardless of how much market power is possessed by the alleged predator;

b) secondly, a price set below the average variable cost of the alleged predator is likely to be regarded as "unreasonably low" by the Authority, unless there is a clear justification such as the need to sell off perishable inventory.

ii. Some industries have well-developed costing methodologies which identify forecast-based costs, such as prospective incremental costs. Where this is an accepted industry standard, it will be used by the investigator in preference to book average variable cost.

iii. On the other hand, a price within this range would be regarded as unreasonable if there was proof that the alleged predator was ignoring opportunities to raise prices in the face of increasing demand, or there was direct evidence of the enterprise's intent to use pricing for an anti-competitive purpose.

iv. While a complainant may be able to provide valuable evidence at the outset on the alleged predator's pricing behaviour, and compare that to the complainant's own cost structure, it will seldom be completely evident to the Authority what the exact relationship is between the alleged predator's prices and costs.

3.3.3 **Object or Effect on Competition**

i. It is not sufficient for the Authority to conclude, based on the factors outlined above, that an offence has been committed only if the alleged predator's prices are unreasonably low. In addition, the investigator must be able to conclude from the evidence that the alleged predator’s conduct has the object or effect of preventing, restricting or distorting competition. In this regard, the investigator will be looking for evidence that the alleged predatory prices are not competitive expedients of a brief duration, that they are not simply defensive reactions to the pricing initiatives or behaviour of other enterprises, or that they are not randomly occurring events attributable to specific business circumstances extant in the market at any given point in time.[32]

ii. The investigator will be looking for evidence to determine whether the prices in question have resulted from, and are part of, a deliberate corporate programme of pricing in the relevant market. The price should be applicable throughout and should have been applied for a sufficient duration to constitute a price offering in the context of the relevant market.

iii. A price which may have applied generally in the market, but for a relatively short period of time, should not be confused with predation.

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[32]Thomas W. Hazlet, *Predation on Local Cable TV Markets*, 40 Anti-Trust Bull, 609 (Fall 1995) (hereafter Hazlett article).

iv. In markets in which the bulk of purchasing is done over a short period of time, such as seasonal markets and those in which infrequent large tender calls constitute a significant portion of market transactions, the investigator may well conclude that prices applicable over a short duration may be a result of the type of a seasonal product.

v. If the Authority's examination concludes that the alleged predator sets prices that are unreasonably low and with the effect or object of adversely affecting competition, then the Authority will go on to reach a finding of predation.[33]

4.0 NON-PRICE PREDATORY CONDUCT

4.1 The theory of non-price predation allows a broader framework for evaluating strategic behaviour, the result of which may be more frequent anti-trust liability.[34] The same principles of existence of market power in a correctly defined relevant market apply.

4.2 To understand arguments for and against a theory of non-price predation, one must understand the context in which the non-price predation arguments have emerged and the behavioural assumptions and legal framework that underlie present enforcement practices. In the Darlington Bus[35] case, the competition inquiry into the larger issues in bus services in the north east of England, concerning the collapse of Darlington Transport Company Ltd (DTC), the Competition and Markets Authority (formerly Office of Fair Trading (OFT)) stated that:

It was the combination of Busways' actions in recruiting so many of DTC's drivers so quickly, registering services on all its routes and running free services which caused DTC's final collapse. We find these actions to be predatory, deplorable and against the public interest.

4.3 The OFT[36] stated that, while registration of routes and recruitment of a competitor's drivers was not against the spirit of deregulation, the scale of Busways' actions were unprecedented, and were attributable to Busways' considerable dominance in the region, and ability to absorb losses due to free services.

4.4 Other forms of non-price predation include the following:

4.4.1 Predatory Advertising**:** This refers to increasing advertising expenditure to an extent that it is above the profit-maximising level. It has been defined as advertising which redistributes market share, but does not affect market demand. It is commonly assumed in the industrial economics literature; but its existence is an empirical question.[37]

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[33] David Gabel and David I. Rosenbaum, *Prices, Costs, Externalities and Entrepreneurial Capital: Lessons from Wisconsin*, 40 Anti-trust Bull (1995).

[34] American Bar Association, Section of Anti-trust law, Monograph 18.

[35] Report title, *Local bus services market investigation. A report on the supply of local bus services in the UK* (excluding Northern Ireland and London), refer to; http;//www/competitioncommission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/localbus/pdf/00_sections_1_15.pdf

[36] Refer to article by Bolton, P. et al (2000), *Predatory Pricing: Strategic Theory and Legal Policy*, pages 131-134, Article accessed on http://www0.gsb.columbia.edu/faculty/pbolton/PDFS/BBRPrincetonDP.pdf

[37] Motta M (2004), *Competition Policy: Theory and Practice*, Cambridge University Press, pages 65-69.

4.4.2 Predatory Product Variety: Frequent introduction of many brands with the intention to make it difficult and non-profitable (create barrier to entry) for the new entrant.[38]

5.0 **CONCLUSION**

5.1 A dominant enterprise engaged in predatory pricing may be charged with abuse of its market position and appropriate remedies directed by the Authority or Commission.

5.2 It is not enough for an enterprise to cite a defence. The defence must be self-evident in relation to the abusive conduct and must be of such value to society that it outweighs the detriment to competition (see the Authority's relevant guidelines on Public Interest).

5.3 Staff of the Authority or any party using or referring to these Guidelines needs to ensure that they compare the process or conclusions herein with latest decisions or judgments of the Commission, competition tribunal/s, or superior courts in Botswana or other relevant comparable jurisdictions.

[38] ibid