DOUTRINAS

THE ICN UNILATERAL CONDUCT WORKING GROUP: HIGHLIGHTS OF ITS WORK ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, DEFINING DOMINANCE AND PREDATORY PRICING ANALYSIS

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*Introduction; **I** – Objectives of Unilateral Conduct Laws; **II** – Assessment of Dominance/Substantial Market Power; **III** – From General Principles to Specific Unilateral Conduct; **IV** – Common Approaches in the Analysis of Predatory Pricing; **V** – The Role of Effects and Intent Evidence in Predatory Pricing Cases; **VI** – Justifications & Defenses; **VII** – Next Steps.*

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INTRODUCTION

In most jurisdictions, firm unilateral conduct laws prohibit anticompetitive behavior undertaken by a dominant firm or an individual with substantial market power. The objective of unilateral conduct laws varies across jurisdictions, but ensuring an effective competitive process is a common objective either in its own right or as a means to achieve other desirable goals such as consumer welfare, economic freedom or efficiency.

Assessing whether a firm is dominant or possesses significant market power generally is the first step in the evaluation of potentially anticompetitive unilateral conduct. Market power is defined generally as the ability to price profitably above the competitive level. Dominance or substantial market power is a high degree of market power both with respect to the level to which price can be profitably raised and to the duration that price can be maintained as such a level[1]. Laws differ in the methodology for defining dominance/sig-

[1] Raising and maintaining prices is used as a shorthand for alternative exercises of market power, such as restricting of output, retarding innovation etc.

nificant market power. Many antitrust agencies rely on a behavioral definition, focusing on a firm's ability to act in ways that competitively constrained firms could not. Others rely on structural definitions, i.e., those focusing primarily or exclusively on an established market share threshold.

It is important to note that it is not the possession of substantial market power or its creation through competition on the merits that is prohibited by unilateral conduct laws. Rather, it is its abuse that is unlawful. One type of abuse is predatory pricing. Predatory pricing typically involves a practice by which a firm temporarily charges prices below an appropriate measure of its costs in order to limit or eliminate competition, and subsequently raise prices.

The objectives of unilateral conduct laws, assessment criteria for defining dominance, and the treatment of potentially abusive conduct, such as predatory pricing, were the subject of study by the Unilateral Conduct Working Group ("UCWG" or "Working Group") of the the International Competition Network ("ICN"). The Working Group was established at the ICN's fifth annual conference, held in Cape Town, South Africa, in May 2006, to examine the challenges involved in addressing anti-competitive unilateral conduct of market dominant firms, both domestically and internationally[2]. In its first year, the Working Group launched a dialogue, shared experiences and exchanged views on general principles and methodological issues. A stock-taking exercise among ICN members resulted in a report examining the goals of unilateral conduct laws and the definition and assessment of dominance/substantial market power. In addition, the report addressed the special circumstances of recently liberalized markets and state-created monopolies[3].

Based on the on this report, in its second year of activity (2007-2008) the Working Group developed recommendations on the assessment of dominance/substantial market power pursuant to unilateral conduct laws and on the application of unilateral conduct rules to state created monopolies[4]. The recommended practices provide that, while market shares can be a useful starting point for analyzing substantial market power, a firm should not be found to possess substantial market power without a comprehensive consideration of factors affecting competitive conditions in the market under investigation.

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2 The Working Group's Mandate is available at: <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/UCWGMandate.pdf>.The work plan is available at: <http://www.internationalcompetitionnetwork.org/media/library/conference%207th%20brno%202008/2008-09WorkPlanFINAL.pdf>.

3 ICN Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies (2007). Available at: <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf>.

4 Available at: <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf>. ("Assessment of Dominance RP") and <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_2.pdf>. ("State-created Monopolies RP")

The recommended practices further provide that agencies should use a sound analytical framework, firmly grounded in economic principles, in determining whether a firm has substantial market power, and that assessment of entry and expansion conditions should be an integral part of the analysis.

In line with the UCWG Mandate, the Working Group's natural path towards better understanding and promoting convergence led it to begin exploring specific conduct patterns that may be considered an abuse of unilateral conduct laws. During its second year the Working Group chose to commence this intricate task by examining potentially abusive conduct, starting with predatory pricing and exclusive dealing/single branding. The group gathered information through a questionnaire on the analysis and treatment of these two types of conduct by ICN member competition agencies. The resulting paper on predatory pricing was based on the responses of agencies and non-governmental advisors (NGAs) covering thirty-five jurisdictions[5].

This article briefly highlights some of the key findings from the UCWG's work, focusing on the recently issued predatory pricing report. Part one reviews findings on objectives of unilateral conduct laws; part two looks into the work on assessment of dominance / substantial market power; part three places the conduct papers within the broader context of the UCWG work; part four comprises the main body of the paper in describing the Working Group's findings on predatory pricing; and, finally, part five looks into the Working Group's planned next steps for its third year of activity.

I – OBJECTIVES OF UNILATERAL CONDUCT LAWS

The first chapter of the UCWG's first report, whose lead drafter was the U.S. Federal Trade Commission, reviewed the objectives of unilateral conduct laws as described by thirty-three ICN members and fourteen non-governmental advisors who responded to a questionnaire on this topic[6]. The chapter found that respondents identified ten different objectives of unilateral conduct laws, regulations, and policies, as relevant to their unilateral conduct regimes. These objectives, listed in order of the number of times

5 ICN Report on Predatory Pricing (2008). Available at: <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf>. Responses were received from agencies in thirty-four jurisdictions; six responses were received from NGAs. The questionnaire and responses are available at: <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-and-responses-2007>.

6 Questionnaire and responses available at: <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-questionnaire-and-responses>.

cited by respondents that is listen in brackets, included: ensuring an effective competitive process (32); promoting consumer welfare (30); maximizing efficiency (20); ensuring economic freedom (13); ensuring a level playing field for small and medium size enterprises (7); promoting fairness and equality (6); promoting consumer choice (5); achieving market integration (4); facilitating privatization and market liberalization (2); and promoting competitiveness in international markets (2). All but one member agency identified more than one of these objectives as underlying its unilateral conduct laws. At the same time, most respondent agencies tended to characterize their various objectives as compatible[7].

Notably, virtually all responding agencies cited ensuring an effective competitive process as an objective in its own right, a means to achieve other desirable goals such as consumer welfare, economic freedom or efficiency, or both an objective and a means to achieve such goals. Of the nine other objectives that respondents identified as objectives in and of themselves, a significant number of respondents relied on the economic concepts of the promotion of consumer welfare and maximizing efficiency. The result of the survey therefore suggested important similarities as to these three central objectives of unilateral conduct rules.

In addition to these findings on core objectives, respondents characterized an effective competitive process as a dynamic, self-initiating market phenomenon that calls for competition agency intervention only when the process is obstructed[8]. In addressing the issue of complementarity of unilateral conduct objectives and intellectual property goals, most respondents viewed these goals as consistent[9]. Various respondents expressed concern about under- and/or over-deterrence, but did not suggest a direct relation between their choice of unilateral conduct laws' objectives and their desire to optimize the level of deterrence[10]. Finally, the report found that respondents referred to the importance of transparency of unilateral conduct laws, predictability in their enforcement, and independence of competition agencies' decision-making in achieving the objectives of unilateral conduct rules[11].

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7 These findings are best summarized in Annex A at p. 89 of the Objectives and Dominance Report and p. 21-22.

8 Id., p. 28-30.

9 Id., p. 22-23.

10 Id., p. 34-36.

11 See id., respectively, p. 36-37 and 33.

II – ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER

The second chapter of the UCWG first report, whose lead drafter was the German Bundeskartellamt, reviewed various jurisdictions' legal definition for dominance/substantial market power, based on responses from thirty-four ICN members and thirteen non-governmental advisors to a questionnaire on this topic.

The paper broadly divided responses into two types of definitions: behavioral definitions, i.e., those focusing on firms' appreciable freedom from competitive constraints or ability to act in ways that competitively constrained firms could not, and; structural definitions, i.e., those focusing primarily or exclusively on an established market share threshold. Between these two definitions archetypes, twenty-eight responding jurisdictions were found to employ a behavioral dominance test, while five reported employing a market-share based test[12]. In other words, the vast majority (80%) of respondents reported using a behavioral definition.

Chapter two's main section examined how responding jurisdictions assessed substantial market power in practice. Assessment criteria included assessing constraints stemming from actual competition, market entrants, potential competitors, and the use of presumptions and safe harbors. The chapter found that all respondents used a comprehensive set of criteria to assess dominance, with market share, barriers to entry or expansion, and durability of market power emerging as the most important criteria[13].

III – FROM GENERAL PRINCIPLES TO SPECIFIC UNILATERAL CONDUCT

None of the agencies who responded to the questionnaire indicated that its unilateral conduct laws prohibited the mere possession of dominance/SMP or its creation through competition on the merits. Hence, the report pre-assumed that it is specific anti-competitive conduct that is condemned by the unilateral conduct law, rather than the possession of substantial market power as such[14]. The Working Group took up the matter again as it developed its recommended practices for assessment of dominance, where it confirmed, again, that "[a]ll jurisdictions agree that unilateral conduct

12 Id., p. 40-42.

13 Id., p. 43-44.

14 Id., p. 40.

laws address specific conduct and its anticompetitive effects, rather than the mere possession of dominance/substantial market power or its creation through competition on the merits"[15].

All jurisdictions also agree that the goal of enforcement is to identify and act against conduct that is anticompetitive, although it can be difficult to distinguish between pro and anticompetitive conduct[16]. Most of the responding agencies have investigated alleged predatory pricing, but have either never challenged it or only found it in one or two instances in the period from 1997-2007. Less than a handful of agencies reported finding violations in three or more cases during this time period. Indeed, there have been fewer than twenty-five predatory pricing cases brought by the responding agencies[17]. Predatory pricing is a civil law violation in all but one of the thirty-five jurisdictions covered by the Predatory Pricing Report, but more than a quarter of ICN members responding also can challenge this conduct under criminal laws[18]. All of the reported cases were civil and no responding agency reported bringing a criminal predatory pricing case during this time period[19]. In most of the responding jurisdictions, private parties can challenge predatory pricing in court, but these types of challenges are rare[20].

The most likely explanation for the paucity of cases is that this type of conduct is rare and risky. Pricing below cost is very expensive in the short term. To drive out its rivals, the firm loses money on every sale over the lion's share of the market. Moreover, this tactic may not yield long term rewards because it may not succeed. What's more, even if it does succeed in temporarily driving out current rivals, another firm may be able to enter and drive prices back down to pre-predation levels.

A key reason cited by competition agencies for the low number of predatory pricing enforcement actions was the risk that legitimate price cutting would be deterred – competition agencies are understandably hesitant to use their powers to attack pro-consumer discounting and raise prices to consumers. Agencies also cited a reluctance to make the substantial resource commitment that this type of complex case involves[21].

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15 See the preamble to the Assessment of Dominance RP.

16 Id., p. 1.

17 Predatory Pricing Report at 7. The report also notes that responding agencies initiated at least five times as many investigations in which predatory pricing was alleged, but no violation was found.

18 Id., p. 5.

19 Id.

20 Id., p. 8.

21 Id (citing responses to question 17 from agencies in Canada, Jamaica and the United States).

IV – COMMON APPROACHES IN THE ANALYSIS OF PREDATORY PRICING

It is frequently stated that, of all areas of competition law, single firm conduct is the one on which there is the least consensus worldwide. And, indeed, areas of divergence in the analysis of predatory pricing cases were identified in the responses to the ICN questionnaire. Differences include whether the predatory pricing has to occur in the same market in which the firm holds a dominant position/substantial market power and whether the intent to drive out one's rivals is a relevant factor in deciding whether prices are predatory[22].

Despite these differences, a surprising number of commonalities emerged from the questionnaire responses. These commonalities include the use of cost measures or benchmarks to determine whether firms were selling at a loss (or profit sacrifice) and the concomitant acknowledgement that prices above total costs are not predatory (or could be predatory only under exceptional circumstances)[23].

Another area, in which on initial review it appeared that the practices among the respondents sharply diverged, is recoupment – i.e., the ability to obtain additional profits that more than offset profit sacrifices stemming from predatory pricing. Just under half of the responding agencies indicated that they require recoupment as a prerequisite to finding liability. But on closer examination, it appeared that the responding agencies were not as far apart as the numbers suggest. As described below, a number of respondents acknowledged the relevance of recoupment in predatory pricing cases, even if not required as part of their assessment. The extent to which recoupment is used as a relevant factor and what this means in practice are areas that could benefit from further study. However, given the paucity of predatory pricing cases, a proposal to address these issues further was not deemed a Working Group priority.

The Use of Cost Measures/Benchmarks

In analyzing predatory pricing cases, virtually all responding agencies indicated that prices must be below an appropriate measure of cost for a violation to occur. Respondents use cost measures or benchmarks to assess whether the alleged predator is selling at a loss or sacrifice. However, not all agencies used the same measures and, frequently, agencies used more than one measure[24].

22 Id., p. 15.

23 Id., p. 9.

24 Id.

The most commonly cited measure was average variable cost, or "AVC" (defined in the report as the total variable costs divided by the number of units produced), although there appeared to be a growing trend toward the use of average avoidable cost, or "AAC" (the costs that can be avoided by not producing any given number of units divided by that number of units). The European Commission uses AAC as a starting point in the analysis and, in most cases, pricing below AAC is understood to be a clear indication of conduct that entails a sacrifice (loss)[25].

Consistent with this approach, there also appeared to be near universal agreement that prices above average total cost, or "ATC," are not predatory[26]. Over a dozen agencies reported employing a safe harbor from a finding of predation for pricing above a particular cost benchmark, which in almost all jurisdictions was ATC[27]. An equal number of responding agencies did not have defined safe harbors, but acknowledged that pricing above ATC is not considered predatory or could only be so exceptional cases[28]. This reflects the view that above-cost pricing is considered competition on the merits and that antitrust enforcers do not penalize discounting in these circumstances[29].

Agencies, however, looked to different types of evidence to demonstrate that below cost pricing has occurred. Cost data of the dominant firm were used, where available. In addition or alternatively, other types of evidence were used by some agencies, such as cost data of other firms, if reliable cost data from the dominant firm was not available, or for comparison purposes to test the veracity of the dominant firm's cost data[30].

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25 Id. noting the European Commission response explaining that average avoidable cost may be the same as AVC on the basis that often only variable costs can be avoided. According to the European Commission, when AVC and AAC differ, the latter better reflects possible sacrifice. For example, if the dominant firm had to expand capacity to be able to predate, then the sunk costs of this extra capacity should be taken into account in looking at the dominant firm's losses. These costs would be reflected in the AAC, but not the AVC.

26 Id., p. 13 and n. 43. In Canada, pricing above AAC is generally considered within a safe harbor. Courts in Italy have found prices above long run incremental costs cannot be considered predatory; in the United States, at least since the Supreme Court's 1993 decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco*, no firm has been found liable for predation if its prices were shown to be above AVC.

27 Id.

28 Id., p. 14.

29 Id., p. 9.

30 Id., p. 14.

For some respondents, the relevant price was the average price over all units or the price for selected deals where, for example, the predation strategy was applied selectively to certain customers[31]. For others the only relevant comparison was between the cost measure and the dominant firm's average price for all of its sales in the relevant market[32].

Respondents also differed with regard to whether the alleged predatory pricing must occur in the market in which the firm held a dominant position or substantial market power[33]. An approach taken by the European Commission and agencies in France, Jersey, and the United Kingdom, for example, provided that an abuse may consist of a dominant firm engaging in predatory conduct if it protects or strengthens its dominant position either by predating in the market in which it is dominant, or less commonly, in another, *e.g.*, adjacent market, if that has the effect of protecting or strengthening its position in the dominated market. By contrast, for some other agencies, to be unlawful the alleged predatory pricing must occur in the market in which the firm holds a dominant position or substantial market power. However, markets in which the predator lacks dominance/significant market power may be relevant if the firm could recoup its losses in those markets[34].

Recoupment

Many responding agencies assessed whether the dominant firm had the ability to obtain profits that more than offset profit sacrifices stemming from predatory pricing. For fifteen of the responding agencies, recoupment was a legal requirement to find liability on the grounds that absent the ability to recoup losses, predatory pricing produces lower prices and consumers benefit from those lower prices. In some cases, recoupment was used as a screen to decide predatory pricing claims without having to delve into whether price was below an appropriate measure of cost. One rationale that came out of the responses was that this can help avoid over-deterrence and chilling legitimate price competition[35].

For thirteen responding agencies, the ability to recoup was not a legal requirement, but could be a relevant factor in the assessment of predatory pricing[36]. For example, in the UK, recoupment has been addressed in some decisions when evidence was available showing recoupment or,

31 Id., p. 15 (citing responses from the European Commission and the German Bundeskartellamt).

32 Id. (citing responses from agencies in Brazil, Chile, Denmark, and Kenya).

33 Id.

34 Id. at n. 68.

35 Id., p. 17.

36 Id., p. 18.

alternatively, in exceptional circumstances in which the dominant firm was able to prove the impossibility of recoupment[37]. Similarly, in Jersey, evidence that the dominant firm would be unable to recoup its losses incurred during the period of predation was cited as potentially material in determining if the conduct has, or is likely to have, an actual or potential detrimental effect in the market[38].

Still, a handful of other responding agencies consider recoupment to be neither required nor relevant, and, in those jurisdictions, below-cost pricing may be challenged whenever there is a risk that competitors will be eliminated[39].

Various methods exist to analyze recoupment, but there was agreement that the examination of recoupment and consumer harm is not a mechanical calculation of profits and losses[40]. Some agencies examine recoupment by assessing the effect of the below-cost pricing combined with other factors such as entry barriers, the position of the dominant firm after predation and foreseeable market changes[41]. When recoupment is assessed in a specific case, it generally must be probable, possible, or likely, but an agency does not necessarily have to demonstrate that it took place or that initial losses were actually recouped before a finding of predatory pricing can be made[42].

For most agencies that assess recoupment, it may occur within the same market as the predatory pricing, or in another product or geographic market if the predating firm is able to charge or maintain higher prices in those other markets[43]. The Canadian Competition Bureau also assesses whether the alleged predation raises barriers to entry in another market, by establishing a "reputation for predation" and discouraging future entry. For example, a firm may seek to build a reputation for aggressiveness towards entry in general if it is dominant in one market and, by predating, scares off entry in other markets in which it operates[44].

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37 Id.

38 Id.

39 Id., p. 17.

40 Id., p. 19.

41 Id., p. 21.

42 Id., p. 20.

43 Id., p. 19.

44 Id. (citing responses from the European Commission and Jamaican agency).

V – THE ROLE OF EFFECTS AND INTENT EVIDENCE IN PREDATORY PRICING CASES

In addition to below-cost pricing, many responding agencies require that effects, such as market foreclosure or consumer harm, be demonstrated to establish predatory pricing[45]. Even if an agency does not consider market effects as part of its prima facie analysis, evidence of a lack of detrimental market effects is potentially relevant[46]. For example, some agencies indicated that consideration of the scale of allegedly below-cost sales, or the duration or continuity of the conduct, should be considered, suggesting that a finding of predatory pricing is not appropriate in circumstances in which there are no market effects[47]. Two responding agencies indicated that even if market effects were not necessary to establish predatory pricing, the extent of effects (or lack thereof) may be relevant in determining the appropriate penalty[48].

The report noted two qualifications with respect to effects. First, most jurisdictions stated that proof of actual market effects is not necessary so long as there is evidence of likely detrimental effects. As summarized in the response from Italy, it is not necessary for exclusion of the competitor to actually take place, provided it can be shown that the pricing behavior under scrutiny is capable of excluding an as-efficient competitor and harm consumers[49].

Second, some jurisdictions indicated that for prices shown to be below a firm's AVC, predatory pricing may either be presumed without proof of market effects, or the need to show market effects in such circumstances may not be as important as when prices are between average variable and average total costs[50]. In most jurisdictions, this presumption is rebuttable and the burden generally shifts to the dominant firm to justify the below cost pricing[51]. The evidence necessary to rebut a presumption of predation varies among jurisdictions. Some agencies focus on lack of anticompetitive effects of the predatory conduct. Others also list specific

45 Id., p. 22.

46 Id., p. 23.

47 Id.

48 Id., p. 22 (citing responses from agencies in New Zealand and Norway).

49 Id., p. 23.

50 Id., p. 22 (citing responses from agencies in Mexico and South Africa).

51 Id. But see responses from agencies in the Czech Republic, Turkey and Russia claiming the presumption is irrebuttable.

commercial reasons as justifications or defenses that can rebut a presumption of predation[52].

Many of these same jurisdictions may also bring a case when price is between AVC and ATC and there is evidence that the predator had the requisite anticompetitive intent[53]. For example, the Jersey response mentioned that prices falling between AVC and ATC for short-run periods can be perceived as legitimate competition. However, if prices were set at this level as part of a strategy to eliminate a competitor, this conduct could be considered abusive[54].

The most commonly cited type of intent was the intent to eliminate a competitor[55]. But, in practice, intent is not easy to apply in a meaningful way because, after all, all businesses legitimately strive to triumph over their rivals. Those jurisdictions that look at intent reported that it can be proven by direct and indirect evidence, including documents from the dominant firm such as detailed calculations on what prices might have the effect of eliminating competition or how the losses could be recouped[56]. Those jurisdictions also examine the dominant firm's activities, such as targeting price cuts against a competitor, the frequency of cuts, and whether there is a pattern of aggressive pricing[57]. In some responding jurisdictions the requisite intent also may be found when the pricing behavior makes no commercial sense (or makes commercial sense only because it eliminates a competitor) and there are no other reasonable explanations[58].

An important qualification to note is that, for those agencies that do assess intent, it is usually considered a relevant factor in their analysis if, and only if, prices are below the relevant cost measure[59].

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52 Id., p. 13. Justifications and Defenses are discussed in § IV, below.

53 Id., p. 24 (citing responses from agencies in the Czech Republic, Denmark, France, Germany, Ireland, Jersey, Singapore, Turkey, and United Kingdom).

54 Id., p. 24.

55 Id., p. 25.

56 Id.

57 Id., p. 26 (citing response of the United Kingdom).

58 Id. (citing responses from agencies in Peru, Latvia, and United Kingdom).

59 Id.

VI – JUSTIFICATIONS & DEFENSES

In many jurisdictions, the dominant firm's provision of a pro-competitive rationale for its conduct may serve as a justification or defense in a predatory pricing case or preclude an initial finding of predation. The dominant company must either demonstrate that its conduct is objectively necessary or produces efficiencies that outweigh the anti-competitive effects[60].

Examples of objective justifications as applied by responding agencies include promotional prices over a short period of time[61], *i.e.* to penetrate a market or launch a new product[62], or adaptations to sudden changes in market conditions[63], or the sale of products because they are damaged, obsolete or perishable[64]. In some jurisdictions a "meeting competition" defense allows firms to match a competitor's price reduction even if it is below the relevant measure of cost[65].

The dominant firm may be able to show further that the low pricing helps it to achieve economies of scale[66] or efficiencies[67] related to expanding the market, such as promoting a shop location or reducing costs through learning effects[68]. In most of these jurisdictions, the likelihood or sufficient probability of justifications and defenses have to be proven by the dominant firm[69].

VII – NEXT STEPS

Over the coming year (2008-2009), the Working Group plans to continue its work on the analysis of unilateral conduct by studying tying and bundled discounts along with single product loyalty discounts and

60 Id., p. 27.

61 Id. (citing response from agency in Singapore).

62 Id. (citing responses from agencies in France or South Africa).

63 Id. (citing responses from agencies in Canada and Singapore).

64 Id. (citing response from agency in Japan).

65 Id., p. 28.

66 Id. (citing response from the United Kingdom).

67 Id. (citing responses from the European Commission and agencies in France, Germany, Hungary, Italy, Jamaica, Korea, Mexico, Peru, and South Africa).

68 Id., p. 28.

69 Id., p. 29.

rebates. For purposes of the group's work, the working definition for tying is a scenario whereby a dominant firm (or firm with substantial market power) sells one product (the tying product) only on the condition that the buyer also purchases a different (or tied) product, or agrees that it will not purchase the tied product from another supplier. It also includes the sale of products or services that could be viewed as separate but are sold only together as a bundle.

Bundled discounting is defined as discounts or rebates based on a buyer's purchase of two or more different products or services. Unlike tying, bundled discounting arrangements do not prevent buyers from purchasing individual products separately, although the aggregate price of the individual components is typically higher than the price of the bundle.

The final topic, single-product loyalty discounts and rebates, is defined as a discount or rebate on all units purchased of a single product, conditioned upon the level or share of purchases, i.e., the discount or rebate applies to all units rather than only the units beyond the threshold that triggers the discount or rebate.

As with its prior reports, the group will gather information on each practice through a questionnaire on issues including agencies' approaches to assessing the conduct and the tests used to distinguish pro-competitive from anticompetitive conduct. The Working Group also plans to hold a workshop this spring in Washington, D.C., aimed at furthering understanding of issues raised in its reports and guidance documents.

The Working Group expects its work on conduct to last several years and to address additional types of conduct. On the basis of the analysis of various practices, the Working Group will consider the possibility of work on a general framework for assessing unilateral conduct.