U.S. Chamber of Commerce
Policy Division

# Center for Competition and Market Regulation

## What is Predatory Pricing?

## THE RELATIONSHIP BETWEEN ANTITRUST AND PREDATORY PRICING?

The theory goes that predatory pricing is the practice of slashing prices so low that other companies can't compete. Once those companies exit the market, the predatory company is then free to raise its prices. But antitrust laws protect consumers by focusing on competition, its not worried if competitors go out of business because the competiton has lower prices. Therefore, it's important to examine how predatory pricing impacts the consumer.

## HOW DOES PREDATORY PRICING IMPACT CONSUMERS?

Where one competitor is more efficient at producing a good or service, it can sell it at a lower price than its competition, and lower prices obviously benefit consumers. This scenario does not raise an antitrust problem. But what happens if a producer sells below what it costs them to produce -- is that a problem?

This is where it's important for antitrust law to consider longer-term considerations. When a store liquidates merchandise to sell excessive inventory, the store might offer prices below the price that they paid for those goods. Companies may also run promotions for a limited time that offer a product or service below cost to attract new customers or entice them to buy additional offerings. In these instances, the consumer is again the winner: consumers love a good deal and there should be no antitrust concern.

## WHEN DOES ANTITRUST LAW STEP IN?

Let's suppose a company sells below costs, and does so for a sustained period of time that results in its competitors going out of business. Wouldn't this potentially leave the surviving company in a position to jack up its prices, given that it no longer faces competition? In this scenario, enforcers may need the tools of antitrust to intervene.

That said, it's tough to predict the future.  In particular, it's tough in most cases to suspect a company will be willing to lose money for a prolonged, undefined period with the hope of one day raising prices when its competitors have exited the market. Furthermore, it is difficult to assume even under this scenario that new competitors wouldn't enter the market to take advantage of healthy profit margins, and ultimately drive prices back down. For these reasons, predatory pricing claims are justifiably difficult to prove as antitrust violations. Courts have been very skeptical that predatory pricing schemes are tried, much less tried successfully.

In predatory pricing investigations, antitrust is never concerned with price when it is above cost. Antitrust is also not concerned with price that is below cost for a short period of time. Antitrust is only concerned when prices are below cost AND when there is evidence to suggest the firm can recoup its losses later once it faces diminished competition.

Antitrust law evaluates predatory pricing the right way. In a market economy where companies need to make a profit, they can't sell below costs for prolonged periods of time. They too have bills to pay. In the short term, a price war between companies is GOOD for the consumer.

## WHY DOES THIS ANALYSIS MATTER?

Some advocates don't like the fact that recoupment is part of the way the law thinks about predatory pricing, because it's often hard to prove in court what will happen in the future. They argue that the law must be amended to explicitly ban the practice of setting prices below cost.

Without the need to show a likelihood of recoupment of losses, consumer-friendly price wars would routinely run afoul of the antitrust laws. Such a fatally flawed recommendation only serves to protect competitors' interests, but fails to serve the interest of consumers.

In other words, by getting rid of the recoupment requirement, policymakers would discourage companies from lowering prices.