

Abuse of dominance by firms charging excessive or unfair prices: an assessment

Frederic Jenny

Professor of economics, ESSEC Business School, Paris

Former Judge, French Supreme Court (Cour de cassation)

Chairman OECD Competition Committee

Competition authorities throughout the world are under pressure from government officials and the general public to intervene against high prices. Because the goal of competition law is widely recognized as being the protection of consumer surplus, competition authorities might seem to be ideally placed to lead the fight against exploitative practices by dominant firms or firms having market power and charging high prices to consumers might seem to be one such practice.

Competition authorities in a number of countries have the legal means to intervene against “excessive” or “unfair” prices by dominant firms and have used this power in the past. In the countries in which excessive prices can be sanctioned as a violation of competition law, the case law is neither abundant nor very clear as to the conditions under which high prices can be considered to be violations of the competition law. However the competition authorities in these countries might seem to be satisfied with their power to intervene against high prices.

In other countries, the Courts and the competition authorities have categorically excluded the possibility that charging a high or monopolistic price could qualify as a competition law violation under their law and they are adamant that their perspective is the only one consistent with the goals of competition law.

In addition to this difference among competition authorities, a number of economists and legal scholars have criticized the enforcement practices of competition authorities that intervene against pricing abuses of dominant firms or monopolies and have argued that, for theoretical and practical reasons, competition authorities should refrain, except in rare cases, from enforcing such provisions.

One important element of the debate is whether charging a monopolistic price as a competition violation necessarily implies that profit maximization (which leads monopolists or dominant firms to charge comparatively higher prices than if they were subject to competition) can be a violation of competition law. Yet profit maximization (and the perspective of enjoying high profits if one successfully overcomes the competition) are key to the competitive process. Any restriction to this process can have the possibility of lessening competition in the long run.

Competition economists critical of the enforcement of provisions on abuse of dominant position through “excessive” or “unfair prices” do not ignore that high prices hurt consumers and do not ignore the pressure under which competition authorities are to address the problem of high prices charged by monopolies or firms with a dominant position but they suggest that alternative means of competition law enforcement are at the disposal of competition authorities to deal with this problem

and that these alternative means are better able to address on a lasting basis the causes of the competition failure which has led to the high prices.

A lively debate over the use of competition law to sanction abusive prices by dominant firms also exists in Israel. Section 29A(b)(1) of the Israeli Restrictive Trade Practices Act of 1988 prohibits the acts of charging purchasing or selling prices which are unfair by a “monopoly”, where a “monopoly” is defined as a firm controlling over half of the relevant market. However, there has not been a case yet where the Courts have issued a final judgment that excessive prices were included in the prohibition of unfair prices.

Nevertheless, according to the contribution of Israel to the 2011 OECD Competition committee roundtable on excessive pricing two tort cases had been brought via consumer class actions claiming excessive pricing (against two Israeli credit card companies and against a telecommunication company). In both cases the plaintiffs based their claim on the fact that the monopolistic firms had lowered their prices significantly after the entry of a competitor which suggested that their original price had been excessive. In both cases the Israeli District Court admitted the class action but the judgments were overturned by the Israeli Supreme Court which considered that the District Court decisions were not based on a reliable comparative benchmark (and, that, in the telecommunication case, the price had been regulated during the alleged period of abuse).

More recently, the District Court for the Central-Lod District approved a class action against Israel's largest dairy product manufacturer, Tnuva, for charging unfair cottage cheese prices. The District Court's main arguments were, first, that the language of unfair pricing did not exclude excessive pricing, and second, that excessive pricing claims exist under section 102 of the Treaty on the Functioning of the European Union, after which the RTPL's monopoly abuse section was fashioned. Additionally, the Court took into consideration a controversial guideline ("Guidelines 1/14 on the Prohibition of Excessive Pricing by a Monopoly") issued by the Competition Commissioner in April 2014 which is not binding on the Court. This guideline is being reviewed at the present time by the new Commissioner for competition.

This paper tries to shed some light on the debate over the use of competition law enforcement to fight high prices by dominant firms or monopolies. It describes the practices of competition authorities in this regard, analyzes the arguments in favour and against the use of the enforcement of competition law to address the issue of high prices and reviews the policy options of competition authorities. It is organized as follows: section I takes stock of the enforcement activities of competition authorities against high prices (or the lack of enforcement) in a number of countries; Section II analyzes the general arguments in favor or against the enforcement of provisions sanctioning pricing abuses by dominant positions or monopolies, section III examines the risks associated with wrongful decisions by competition authorities in this area and the cost of such errors; Section IV analyzes the economic screens which have been proposed by various economists to minimize the cost of enforcement of provisions prohibiting pricing abuses by dominant firms and section V comments on the alternative solutions at the disposal of competition authorities and is followed by a brief conclusion ⁽¹⁾.

¹ This paper, however, does not address the question of whether competition authorities can and should impose FRAND obligations on the owners of standard-essential patent (SEP). Indeed the problems raised by the

Section I) The practices of competition authorities and Courts with respect to high prices by monopolies or dominant firms

In some countries, such Australia, Mexico or the United States competition laws do not cover excessive pricing by monopolies or firms holding a dominant position.

In the US the fact that the Sherman Act allows lawful monopolists, and a fortiori other market participants, to set their prices as high as they choose has been stated on numerous occasions by the Courts. For example, in *Berkey Photo, Inc. v Eastman Kodak Co* ⁽²⁾, the Court of Appeals for the Second Circuit stated : "*[a] pristine monopolist...may charge as high a rate as the market will bear*". Similarly in *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, the Seventh Circuit Court stated : "*[a] natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of 'monopolizing' in violation of the Sherman Act...and can therefore charge any price that it wants,... for the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute.*"³ Similarly, in its unanimous *Trinko* decision ⁽⁴⁾, the Supreme Court stated : "*The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.*"

This does not mean however, that the competition authorities in the United States (the Antitrust Division of Department of Justice and the Federal Trade Commission) are not concerned with high prices due to a lack of competition. For example, the question of whether or not a merger might lead to an increase in price can be grounds to block a merger. Thus, the FTC's objection in 1997 to a proposed merger of Staples and Office Depot ⁽⁵⁾ was based on a "*competitive problem that would lead to...higher prices*" and on data showing that "*in markets where three superstores compete, prices are significantly lower than in two chain markets.*"

But, according to the US contribution to the debate at the 2011 OECD Competition Committee on excessive prices ⁽⁶⁾ this means that US competition authorities will tend to treat high prices as an

interface between intellectual property rights and competition law are specific in the sense that they try to resolve a conflict between the desire to limit competition in order to promote innovation and the goal of promoting competition on markets. Also it does not deal with the cases where a high price charged by a monopoly can have an exclusionary effect as it is concerned exclusively with the treatment of exploitative pricing practices of dominant positions or monopolies.

² 1 *Berkey Photo, Inc. v Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979)

³ *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), citing *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1023-24 (8th Cir. 1985); *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945); *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d at 1325, 1339 (7th Cir. 1986); *Berkey Photo*, 603 F.2d at 296-98.)

⁴ *Verizon Communications, Inc v Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 875, 879 (2004).

⁵ See "FTC Rejects Proposed Settlement in Staples/Office Depot Merger," Press Release, available at <http://www.ftc.gov/opa/1997/04/stapdep.shtm>;

⁶ US Contribution to the 2011 OECD Competition Committee roundtable on excessive prices, paragraph 3 and 4

indicator of underlying competition problems which need to be addressed through appropriate means rather than as a variable on which they should intervene directly. US authorities thus rely, among other means, on sectoral regulators which are deemed able to develop a deep understanding of the regulated firm's cost structure to control prices in industries such as electricity or gas which have the features of natural monopolies. The FTC also undertakes industry studies to understand the causes of high prices in some industries such as petroleum distribution.

By contrast, the EU Commission offers ⁽⁷⁾ three reasons to justify the fact that excessive pricing can be a violation of EU Competition law. The first reason is that Article 102 explicitly states that an abuse may consist in : *"directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions"*, which the European Court of Justice has confirmed on various occasions ⁽⁸⁾ covers conduct such as charging excessive prices. The second reason is that where there are two types of intervention possible to protect consumer welfare (indirect intervention on the exclusionary practices which allow a firm to enjoy a monopolistic position or direct intervention on the price) : *"it is highly unlikely that under all circumstances one type of intervention is superior to achieve the aim"*. The third reason is that Article 102 does not prohibit the acquisition of dominance, unlike the US Sherman act which prohibits the monopolization or attempts to monopolize. As a result, : *"there may be cases where intervention against unilateral exclusionary conduct is legally not possible"* and where intervention against exploitative conduct may be the only possibility to effectively protect consumers.

The legal basis on which the Commission can intervene against high prices is article 102 of the TFEU ((ex Article 82 TEC) which states inter alia: *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."*

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;(...)"

However, even in the EU the number of cases of pricing abuses by a dominant firm remains quite limited because the EU Commission recognizes that intervening directly against unfairly high prices may, in many cases, be costly or difficult. Thus between 1980 and 2010, a period during which there were 40 decisions by the Commission regarding exclusionary practices by dominant firms⁽⁹⁾, there were only 11 decisions regarding exploitative abuses of a dominant position with 4 violation

⁷ European Union: Article 102 and Excessive Prices, Contribution to the 2011 OECD Competition Committee roundtable on excessive prices, paragraph 2

⁸ See, e.g., the ECJ decisions in *Sierna v. Eda* [1971] ECR 69; *Case 26/75 General Motors v. Commission* [1975] ECR 1367; *Case 27/76 United Brands v. Commission* [1978] ECR 207; *Case 30/87 Corinne Bodson v. Pompes Funebres* [1998] ECR 2479; *Case 110/99 Lucazeau v. SACEM* [1989] ECR 2811; see also Commission Decisions: *COMP/C-1/36.915 British Post Office v. Deutsche Post AG* [2001] OJ L331/40, *COMP/A 36.568/D3 Scandlines Sverige AB v. Port of Helsingborg* [Jul 23, 2004].

⁹ See Patrick Hubert & Marie-Laure Combet, « Exploitative abuse: The end of the Paradox? Doctrines I Concurrences N° 1-2011 – pp. 44-51 .

decisions by the EC Commission ⁽¹⁰⁾. Two of the 4 violation decisions were overturned by the European Court (the General Motors Decision and the United Brands Decision).

It should be added, however, that some decisions of the Commission on excessive pricing have been commitment decisions (similar to the United States “consent decrees”). For example, in 1997, the European Commission made an inquiry into charges set by Belgacom for access to telephony subscriber data. Belgacom subsequently agreed to charge on an average cost basis rather than as a function of the purchaser’s turnover ⁽¹¹⁾.

The XXIVth Commission Report on Competition Policy (1994), ⁽¹²⁾ expressed the view that pursuits against excessive prices of dominant position should remain rare. It stated: *“(…) the existence of a dominant position is not in itself against the rules of competition. Consumers can suffer from a dominant company exploiting this position, the most likely way being through prices higher than would be found if the market were subject to effective competition. The Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it”*. Similarly, the EU contribution to the 2011 OECD Discussion on exploitative abuses ⁽¹³⁾ states: *“(…) the balance in the EU over the last 50 years has been tilted towards addressing exclusionary conduct, to prevent that exclusionary conduct leads to market conditions which allow exploitation of consumers, rather than intervening directly against exploitative conduct. This has resulted in a rather limited case law concerning excessive prices”*. Furthermore a number of the leading cases on abusive pricing (General Motors, United Brands, British Leyland and Deutsche Post II) are mixed cases where the Commission was concerned about a combination of exploitative and exclusionary conducts.

The caution of the European Commission in dealing with cases of abuses of dominance through excessive prices is also confirmed by the Guidance on the enforcement priorities in applying Article 82 of the EC Treaty ⁽¹⁴⁾ which deals exclusively with exclusionary abuses of dominance. Indeed the Guidance states: *“Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behavior that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning*

¹⁰ 1) EC Comm. Dec. IV/28.851, 19 December 1974, General Motors Continental OJ 1975 L21/14 and ECJ, 13 November 1975, General Motors v. Commission, case 26/75, ECR 1975 p. 01367;

2) EC Comm. Dec. 76/353/EEC, 17 December 1975 Chiquita, OJ 1976 L95/1 and ECJ, 14 February 1978, United Brands Company and United Brands Continental BV v. Commission, case 27/76, ECR 1978 p. 00207; EC Comm. Dec. 84/379/EEC, 2 July 1984,

3) British Leyland Public Limited, OJ 1984, L207/11 and ECJ, 11 November 1986, British Leyland Public Limited Company v. Commission, case 226/84, ECR 1986 p. 03263

4) EC Comm. Dec. 2001/463/EC and ECJ, 16 July 2009, Der Grüne Punkt - Duales System Deutschland GmbH v. Commission, case C-385/07P, ECR 2009 p. I-06155)

¹¹ European Commission (1998), ‘XXVIIth Report on Competition Policy (1997)’, p. 26.

¹² XXVIIth Commission Report on Competition Policy (1997), para. 77

¹³ Contribution from the European Union to the OECD Competition Committee discussion on Excessive pricing, “Article 102 and excessive pricing”, paragraph 3

¹⁴ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02)

of the internal market cannot otherwise be adequately ensured. For the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and, in particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common” (para.7)”.

The first case in which the European Court of Justice (ECJ) considered the issue of unfair pricing is the General Motors (¹⁵) case in which GM was accused of charging a fee to parallel importers of its cars in Belgium for the inspection of the vehicles entering the country and the issuance of certificates of conformity (a service which had been delegated by the Belgian Government to the automobile manufacturers) which was 2,400 percent higher than the fee charged for cars that it sold in the EU. The Court considered that : *“ the imposition of a price which is excessive in relation to the economic value of the service provided could amount to an abuse of dominance but it did not elaborate on how one could assess the excessiveness of the price”.*

In its United Brands Judgement, the ECJ went one step further and gave some indication of how the rule should be applied to excessive pricing by dominant firms.

It stated that:

249. *“It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition”.*

250. *“In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product would be an abuse”.*

The Court also proposed a test to establish a violation for excessive pricing:

251. *“This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its costs of production, which would disclose the amount of the profit margin (...)”.*

252. *“The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is on the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products”.*

253. *“Other ways may be devised – and economic theorists have not failed to think up several - of selecting the rules for determining whether the price of a product is unfair”.*

Thus the ECJ is generally considered (¹⁶) to suggest a two-step test including, first, a comparison between the price of the product and its cost and, second, the determination of whether the price is excessive in itself or in comparison to competitors’ products.

¹⁵ Case 26/75 General Motors v Commission [1975] ECR 1367, [1976] 1 CMLR 95

¹⁶ Note that Massimo Motta and A de Streel in “Excessive Pricing in Competition Law: Never say Never?” (in The pros and cons of high prices, Konkurrensverket Swedish Competition Authority, 2007) argue that the court did not impose a cumulative two-step test but a one-step. They argue that the test imposed by the Court is not necessarily cumulative and both parts of the test aimed to prove the same thing: that a price is above its

The European Commission in subsequent cases, most notably in its Scandline Port of Helsingborg decision ⁽¹⁷⁾, explained that the assessment of the fairness of a price could not come from a simple comparison of the price–cost margin of two similar services on different markets. Indeed the intensity of demand by consumers may influence the economic value of the product or the service and must be taken into consideration. As the Commission has stated in its decision: *“227 the demand-side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However, it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service”*.

The debate over the approaches of the EU Commission and the ECJ to unfair pricing abuses by dominant firms has dealt with four questions: First, is the test proposed economically sound ?; second, is the test legally predictable?; third, is the enforcement consistent?; fourth, do national competition authorities follow the lead of the EU Commission and Courts ?

With respect to the first question, in part II we will discuss the reasons for which a test relying on the consideration of price cost margins is, from an economic standpoint, at best, difficult to implement and possibly misleading in some cases.

With respect to whether the test is legally predictable, one should note that the European Court of Justice did not explain how one should determine that a price cost margin was excessive in the first step of the test nor that a price was “ unfair” in the second part of the test.

Furthermore, as noted by Damien Geradin ⁽¹⁸⁾: *“ Unfortunately, subsequent cases referred to the ECJ only led to sporadic pronouncements on the methods applicable for establishing an excessive price within the meaning of Article 82 EC”*.

With respect to the question of the consistency of the approach of the ECJ, whereas in most cases the Court has stuck to the methodology laid out in the United Brands case, it has accepted that there are cases where cost benchmarks cannot be used ⁽¹⁹⁾. In such cases, the Court seems to have favored an approach based simply on a single step of benchmarking. As Damien Geradin observes: *“In a first strand of cases, the ECJ directly compared the pricing policy of a dominant firm with the prices of*

competitive level in spite of the (clear) wording of paragraph 252 of the ECJ United Brands judgment. They argue that the Court is very pragmatic in its standard of proof requiring a price cost analysis when feasible but also suggests relying on other indicators to prove excessive prices. A number of commentators disagree with this view and find that there is an inconsistent application of its test by the Court which in the United Brands case made a clear distinction between the test for the excessiveness of the price and the test for the unfairness of the price.

¹⁷ Case COMP/A.36.568/D3 – Scandlines Sverige AB v Port of Helsingborg

¹⁸ Damien Geradin, “The necessary limits to the control of “excessive” prices by competition authorities – A view from Europe”, TILEC Discussion Paper, October 2007

¹⁹ See, for example, the Joined Opinion of Mr. Advocate General Jacobs on Lucazeau and Tournier cases, *“[t]here is a consensus in the observations made to the Court in these cases that the test laid down in Case 27/76 United Brands v Commission [1978] ECR 207 for determining whether a price is excessive in relation to the economic value of the benefit conferred is inapplicable in the present context [...] It is pointed out that it is inappropriate in the present context to proceed on the basis of a comparison between the costs of production and the selling price because it is impossible to determine the cost of the creation of a work of the imagination such as a musical work”*(para 53)

equivalent firms active on neighboring geographic markets. In a second strand of cases, the Court undertook to make comparisons between the prices charged by the same dominant firm (i) to various customers and (ii) over time". For example, in the Lucazeau and others v. SACEM case (²⁰) the Court stated : "When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position". In the Corinne Bodson v. SA Pompes funèbres des régions libérées judgement (²¹) the Court stated that : "to determine whether prices are unfair, "[I]t must be possible to make a comparison between the prices charged by the group of undertakings which hold concessions and prices charged elsewhere".

Even in some cases where price cost margin comparisons were possible the European Commission has considered that such comparisons were not adequate to compare the price and the 'economic value' of the service rendered. One such case concerned the Port of Helsingborg (²²), which was accused by ferry operators of setting excessive charges. The European Commission rejected the complaint.

In its decision, the European Commission first had a sharp disagreement with the Port of Helsingborg (HHAB) over the proper allocation of the fixed costs of the port between its ferry activity and other services. The disagreement mostly touched on three issues: 1) whether the port of Helsingborg (a wholly owned subsidiary of the City of Helsingborg) which was the owner of all assets on land such as gangways, ferry ramps, cranes and buildings and the City of Helsingborg (which owned the land, quays, docks, breakwaters and terminal areas and leased them to HHAB which was responsible for their maintenance) should be considered as one entity; 2) whether the depreciation costs of the assets of HHAB should be based on the replacement cost of these assets (as HHAB argued) or the historical value cost of these assets (as the Commission chose) and 3) what should the allocation of fixed costs be between the ferry services and the other services.

The European Commission decision acknowledges the difficulty of the task it faced and the subjective choices it made to allocate the fixed costs of HHAB. It states :

"116. As HHAB did not provide a realistic allocation of its costs to the ferry-operators, the Commission has sought to make an approximate calculation and allocation of these costs, based on data made available by the port, mainly from the audited financial reports.

117. It must be stressed that this is only an approximate cost allocation made for the purposes of addressing the present complaint. In particular, it has not been possible to determine with certainty all relevant incurred costs. The Court has recognised in United Brands the "considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its setup, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other" 68.

²⁰ Lucazeau and others v. SACEM case, and others, 110/88 [1989] ECR-2811 at §25

²¹ Corinne Bodson v. SA Pompes funèbres des régions libérées, 30/87 [1988] ECR-2479

²² Case COMP/A.36.568/D3 – Scandlines Sverige AB v Port of Helsingborg

118. *It should be noted that most of the costs of the port are fixed costs and that the variable costs (i.e. costs that would vary with the number of calls by the ferry operators or the number of passengers/vehicles transported onboard the ferries) are minor. Furthermore, most costs (the overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg) had to be treated as distributed costs. These indirect costs are not allocated by HHAB between the different categories of users of the port and the Commission and this renders the task of allocating these costs very difficult. The Commission has applied a key of repartition of those costs between the different users of the port. However, (...) the choice of which key to apply is not evident and that choice naturally affects the outcome. However, for the purposes of the present decision, the Commission has proceeded based on assumptions that are in any event more favourable to the complainant.*

119. *In addition, due to a lack of precise data and to the intricacy existing between the services and facilities provided by HHAB within the port charges and those provided within specific agreements, it has not been possible to segregate out of the approximate total costs (all costs incurred by HHAB which have been attributed to all services provided to the ferry-operators active on the Helsingborg-Elsinore route), the costs incurred attributable to services covered by the port charges”.*

The European Commission found that contrary to what HHAB had submitted it made a profit and that on the basis of its approximate cost/price analysis, HHAB’s revenues (from port charges) derived from the ferry-operations “*would seem*” to exceed the costs actually incurred by the port to provide services and facilities to these users, but it stopped short of qualifying these prices as excessive.

The European Commission then examined the profitability of the port but faced some difficulties with the choice of a suitable benchmark.

Finally, the European Commission examined the question of the relationship between the price and the economic value of the service rendered. It stated: “*102. It is important to note that the decisive test in United Brands focuses on the price charged, and its relation to the economic value of the product. While a comparison of prices and costs, which reveals the profit margin, of a particular company may serve as a first step in the analysis (if at all possible to calculate), this in itself cannot be conclusive as regards the existence of an abuse under Article 82*”, thus arguing that unfair prices could not be established through a simple cost-plus approach.

The Commission took into account various non-cost related factors to assess the economic value of the services rendered. Among those factors were factors related to the value to consumers of the services and, in particular, the fact that : “*the ferry-operators benefit from the fact that the location of the port of Helsingborg meets their needs perfectly*”. It stated : “*that this represents an intangible value in itself, which must be taken into account as part of the assessment of the economic value of the services provided by HHAB, and which is not reflected in the costs actually incurred by HHAB, based on the approximate calculation made by the Commission*”.

More recently, in April 2015, the European Commission filed charges against Russia’s state-controlled gas company, OAO Gazprom, accusing it, first, of hindering cross-border gas sales through a number of territorial restrictions in its supply agreements with wholesalers preventing the export of gas in eight EU Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia), second, of charging unfair prices in Central and Eastern Europe to its customers such

as gas wholesalers and industrial customers, and third, of leveraging its market dominance in Bulgaria and Poland by making gas supplies conditional upon obtaining certain infrastructure-related commitments from wholesalers.

With respect to the unfair pricing charges, the Commission explains in its press release ⁽²³⁾ that generally, Gazprom pegs the price of the natural gas it sells to a number of oil products (so-called "oil indexation"). It goes on to say that : *"The Commission does not consider that indexing a product's price to oil products or any other product is in itself illegal and does not take issue with the fact that gas prices are different in different countries since competitive conditions may vary in Member States, such as the importance of gas as an energy source in a country's "energy mix". However, in order to assess whether individual price levels in a country are unfair, the different Member State prices were compared to a number of different benchmarks, such as Gazprom's costs, prices in different geographic markets or market prices. On the basis of this analysis, the Commission has come to the preliminary conclusion in its Statement of Objections that the specific price formulae, as applied in Gazprom's contracts with its customers, have contributed to the unfairness of Gazprom's prices"*.

The competition laws of most EU Member states have a provision similar to article 102 allowing the sanctioning of unfair prices of a firm holding a dominant position. However, the enforcement of these national laws may be both procedurally and substantively quite different from EU enforcement.

We will comment on a few examples of national experience.

In the United Kingdom, chapter II of the Competition Act 1998 is based on article 102 TFEU and prohibits abusive conduct by one or more undertakings which, either singly or collectively, hold a dominant position in a market and which may affect trade within the UK.

Both Article 82 TFEU and the Chapter II prohibition provide, in similar terms, that conduct may constitute an abuse if it consists of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.

There have been relatively few excessive price cases in the UK and the leading cases are the 2001 Napp case, concerning a pharmaceutical company, which raises interesting questions about the test used at the time by the Office of Fair Trading and the 2007 Attheraces case where the Court of Appeal overturned what had been the first final judgment by the High Court finding an abuse of dominant position for unfair pricing in prohibition of Article 82 E and of the Chapter II prohibition.

Napp was the first company to launch a sustained release morphine product (MST) in the UK in 1980, and held a patent on the drug through 1992. At one point there were three other suppliers in the market besides Napp, and two remained in the market at the time of the case. MST are sold on two market segments : the community (or general practitioner) segment and the hospital segment. The OFT found that Napp had a very strong market share, in excess of 90%, on both segments and that there were considerable barriers to entry on the market with the result that Napp was considered to have a dominant position on the relevant market. The OFT analyzed Napp's pricing policies for MST and found it to be predatory in the hospital segment and excessive in the community/general practitioner segment.

²³ Antitrust: Commission sends Statement of Objections to Gazprom – Factsheet Brussels, 22 April 2015

The OFT stated that, under the UK Competition Act of 1998, a price is considered excessive if it is above that which would exist in a competitive market and where it is clear that high profits will not stimulate successful new entry within a reasonable period. In order to assess whether Napp's price was excessive the OFT used both a comparison of price-cost margins (by comparing Napp's profit margins across two consumer segments and with the profit margins of competitors) and a comparison between Napp's prices and those of its competitors. The OFT found that Napp earned in excess of 80 percent profit margins for the community segment whereas its competitors earned "less than 70 percent". It also found that Napp's prices were 33%-67% higher than those of its competitors in 2000 and did not change for 10 years after the expiration of its patent. The OFT also found that Napp's community segment charges were over 10 times more than hospital prices, and between 4 and 7 times higher than export prices. On the basis of these elements the OFT fined Napp for abuse of dominance. Its decision was upheld on appeal to the UK Competition Appeal Tribunal (CCAT) in 2001, but the fine was reduced.

As noted by David Evans and Jorge Padilla ⁽²⁴⁾ in this case the OFT did not adopt the two stage test of the ECJ but adopted a "preponderance-of-the-evidence" approach to excessive pricing (a method which was explained in more details in the 2004 OFT Assessment of Conduct Draft competition law guideline).

The CAT also seems to have approved the OFT's "preponderance-of-the-evidence" standard as it stated ⁽²⁵⁾: *"in our view those [price and margin] comparisons, taken together, amply support the Director's conclusions that Napp's prices were ... well above what would have been expected in competitive conditions"*.

Some commentators have suggested that this approach could also be accepted by the EC Court of Justice (in a departure of its two step test in the United Brands case).

Before moving to the Attherace case, it is worth mentioning that in 2002 the OFT also began an investigation into excessive pricing by the makers of Durex condoms. Condoms had been the subject of various monopoly inquiries, and resultant price regulation, during the 1970s and 1980s. In 1994, the price of condoms was liberalized in light of new entry and the fall in Durex's market share from 95% to around 75% during the 1980s. The OFT terminated the case in 2005 without finding an abuse, noting that it found 'evidence of emerging competition'—Durex's market share had fallen further (although slowly) to around 60% in 2002, and several new brands had entered the UK market, including Trojan, the market leader in the USA. The OFT observed that in such circumstances: *"any potential remedies such as a price cap could stifle such entry and hinder rather than help the competitive process."*

The Attherace case, involved a challenge, on competition law grounds, to the lawfulness of the financial and other terms on which The British Horseracing Board (BHB), in sole possession of valuable information (pre-race data about British horse races) that could be used in broadcast services overseas, was selling this information to Attheraces (ATR), a broadcaster.

²⁴ David S. Evans and A. Jorge Padilla, "Excessive prices: using economics to define administrable legal rules" CEMFI Working Paper No. 0416 September 2004

²⁵ Case No. 1001/1/1/01, NAPP PHARMACEUTICAL HOLDINGS LIMITED AND SUBSIDIARIES/ DIRECTOR GENERAL OF FAIR TRADING, 15 January 2002, at 397

The trial judge had decided that the competitive price would be one where BHB would recoup the cost of producing its database together with a reasonable return on that cost, and that the actual price was excessive because it was higher than this competitive price.

The Court of Appeal overturned the trial judge. The Court of Appeal argued, first, that prices exceeding costs plus a reasonable margin were not in themselves excessive. It thus distinguished the abuse of fair pricing by dominant firms under competition law from the sort of rate-of-return regulation carried out by sector-specific regulators with respect to natural monopolies.

Second, the Court of Appeal held, along the lines of the Commission's decision in *Scandlines vs the Port of Helsingborg* case, that, when assessing a claim of excessive pricing, it was necessary to consider all the relevant circumstances including the economic value of the product to the purchaser and that demand-side considerations were thus relevant factors in excessive price inquiries. It held that the value of the pre-race data was high for ATR, which had shown a willingness to pay substantial amounts for other media rights, because it was related to British horseracing which represented a core part of the broadcasting service offered by ATR. Thus there was a huge gap between the value of the data to ATR and the cost of producing it for BHB which was relatively modest and the Court of Appeal held that BHB was entitled to reflect a price that reflected the value (willingness to pay) of ATR.

The Court of Appeal stated ⁽²⁶⁾:

216. (Attherace)'s response to a hypothetical case put by the Court - a monopoly wholesale supplier of a delicacy to a supermarket who charges to the supermarket his cost plus a moderate margin but finds that the supermarket is marking up his product by 500% - was that the supplier would be abusing his dominant position if he raised his price to more than he could get in a competitive market, if there was one, however much the supermarket was charging the public for it. (BHB)'s answer was that the supermarket had established the economic value of the product and there was nothing to stop the producer securing as much as he was able to. This seems to us more consonant with Article 82 and its jurisprudence. The consumer might well need protection, albeit from the supermarket rather than from the producer; but if neither solution is going to provide it, the central purpose of Article 82 would not be accomplished and the Courts would not be justified in intervening. The control on the monopoly producer would be the wholesale price: if he raised the price too high he would lose his business.

"217. We appreciate that this theoretical answer leaves the realistic possibility of a monopoly supplier not quite killing the goose that lays the golden eggs, but coming close to throttling her. We do not exclude the possibility that this could be held to be abusive, not least because of its potential impact on the consumer. But Article 82, as we said earlier, is not a general provision for the regulation of prices. It seeks to prevent the abuse of dominant market positions with the object of protecting and promoting competition. The evidence and findings here do not show ATR's competitiveness to have been, or to be at risk of being, materially compromised by the terms of the arrangements with or specified by BHB".

²⁶ *Attheraces v British Horseracing Board* [2007] EWCA Civ 38, February 2nd 2007, para 217.

More recently, in August 2015, the UK Competition and Markets Authority (CMA) issued a Statement of Objections to pharmaceutical suppliers Pfizer and Flynn Pharma for a breach of UK and European competition law by selling an epilepsy drug at an excessive price after 2012. The CMA alleges that Pfizer sold the drug to Flynn at prices 8 to 17 times higher than those Pfizer had charged customers for the drug before it sold the distribution rights to Flynn in September 2012. In turn, Flynn sold the drug at prices between 25 and 27 times higher than those Pfizer had previously charged.

In Germany, two sections of the Act against Restraints of Competition (the ARC) deal with pricing abuses by dominant firms: Section 19 (4) which is the general prohibition and section 29 which was added to the ARC in 2007 to facilitate the prosecution of excessive pricing in the energy sector.

Section 19 (4) no. 2 the Act against Restraints of Competition (ARC) prohibits dominant players from engaging in business practices which deviate substantially from those expected to occur if they were in “effective competition”. This provision applies to their pricing strategy.

This article stipulates that : *“in particular, the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account”*. The price that such a competitor would charge if he were on the investigated market is then computed and an abuse can be found if the actual price of the investigated firm substantially differs from the benchmark price that the competitor would charge on the investigated market.

Thus the prevailing test in Germany under this provision is different from the test at the EU level (the price-cost test) even if the Courts in Germany have recognized the validity of other methods such as price-cost analysis. The enforcement of Section 19 (4) n°2 of the ARC is complicated by the difficulty in finding suitable comparators i.e. *“comparable markets where effective competition prevails”* as the Bundeskartellamt (BKA) found out in the Valium case ⁽²⁷⁾ when the German Federal Court of Justice (Bundesgerichtshof) concluded that the market used as a benchmark and the hypothetical competitive price established by the Higher Regional Court of Berlin (Kammergericht), were not adequate for a number of reasons.

Section 29 ARC differs from the general anti-abuse-provision of Section 19 ARC in several respects ⁽²⁸⁾. This section was added to the law following an investigation of the EU Commission in the gas and electricity sectors which showed that the German market was characterized by high concentration, vertical integration and high prices.

Unlike what is stipulated in section 19, the price of the investigated energy provider can be compared with the price of other firms even if these other firms are not in a situation of competition. Second, and very importantly, “the dominant firm investigated has to demonstrate why the rejected behaviour was not abusive or that the comparative market concept applied by the Bundeskartellamt was erroneous, i.e. that the alleged deviation of their prices is objectively justified” ⁽²⁹⁾. Furthermore, Section 29 s. 1 no. 2 ARC explicitly states that the abuse of dominance can also be

²⁷ BGH [Federal Court of Justice], decision of 16. 12. 1976, KVR 2/76 – Valium; BGH [Federal Court of Justice], WuW/E 1445 ff., 1454 Valium II.

²⁸ German contribution to the OECD Competition Committee Roundtable on excessive prices part 2

²⁹ A similar mechanism, putting the burden of proof that large deviations from prices charged by similar firms in other contexts are either non existent or justified was mentioned by the ECJ in its Sacem II decision when it

constituted by demanding prices that “*unreasonably exceed the costs*”. Finally, the decisions of the Bundeskartellamt with respect to the energy sector are immediately enforceable, irrespective of whether the decision is appealed.

The contribution from Germany to the 2011 OECD Roundtable Competition Committee on excessive prices states: “*After the introduction of the new provision Section 29 ARC in 2007 and the establishment of a specific decision division with a focus on cases of abuse of a dominant position in the energy sector in 2008, the Bundeskartellamt successfully initiated a number of proceedings against companies in the energy sector on account of alleged abusive practices*”. And it concludes: “*Despite the difficulties raised by complex excessive pricing cases, the experience in Germany shows that by pursuing such abusive practices, even when cautiously focusing only on the most exorbitant excessive pricing cases, benefits for consumers can be achieved reasonably quickly and other tools available to competition authorities can be deployed to foster the emergence of competition in dominated markets*”.

Furthermore, the Bundeskartellamt has closely examined drinking water markets in Germany, a country where drinking water prices vary greatly from one city to another (³⁰). Between 2012 and 2014, the Bundeskartellamt successfully concluded proceedings against several suppliers of water in Berlin, Mainz, and Wuppertal for charging abusively high prices (³¹). In 2016, it published a report on the framework conditions of drinking water supply and the control of fees charged by water suppliers (³²). Besides calling for a revision of the ARC (³³), the report advocates other measures which could increase the ability of water suppliers to improve the efficiency of their operations and could prevent the charging of excessive prices. In view of the monopoly positions in the sector, the

stated: “25 When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States”.

³⁰ For example, in 2013, the average net revenue of the water suppliers in Germany's 38 largest cities varied between 1.40 and 2.60 euros/m³. According to the Bundeskartellamt, these significant differences can be explained partly by the different conditions of supply, such as e.g. density of supply or differences in altitude in the supply areas. However, in individual cases an efficient control of water fees by the authority is necessary to prevent suppliers from abusing their monopoly position to the detriment of consumers.

³¹ See press releases of 24.02.2014 and 05.06.2012 Berlin, 09.05.2012 Mainz and 19.10.2015 Wuppertal.

³² The report is available at [http://plus.google.com/share?

url=http%3A%2F%2Fwww.bundeskartellamt.de%2FsharedDocs%2FMeldung%2FEN%2FPressemitteilungen%2F2016%2F30_06_2016_Wasserbericht.html%3Fnn%3D3591568&t=Homepage++ Bundeskartellamt%26%23039%3Bs+report+on+public+drinking+water+supply+in+German+cities+%0ALarge+price+differences++ lack+of+transparency]

³³ A 2013 amendment to the ARC excluded water charges levied by a public law entity from abuse control under competition law. As a result such charges were only subject to the supervision of municipal authorities exercised by the individual Länder, which is based on less stringent criteria than those which apply to abuse control under the ARC. This gave municipal water suppliers the possibility to switch from water prices to charges if they wished to avoid price abuse control. Some companies against which the competition authority had opened proceedings had switched to charges in the past. Andreas Mundt, President of the Bundeskartellamt, said : “In recent years the Bundeskartellamt and individual competition authorities of the Länder have successfully conducted proceedings against water suppliers which charged excessive prices. It is regrettable that in 2013 the legislator decided to exclude water charges levied by municipal suppliers from competition law control. The resulting division of control does not make economic sense. It is certainly of no difference to the consumer whether he pays excessive prices or excessive charges for his drinking water.”

Budeskartellamt suggests that further development and implementation of benchmarking projects, for example, would be worth considering, since they could inform water suppliers about their relative ranking among other water suppliers, identify cost saving possibilities and trigger improvement processes. It also suggests that measures to make prices and charges more transparent could enable consumers to better assess their supplier's price level.

In the Netherlands, Article 24 of the Dutch Competition Act provides that : *“undertakings are prohibited from abusing a dominant position”*.

The Nederlandse Mededingingsautoriteit (the NMa); which was the Dutch competition authority until 2013 and has been replaced by the Autoriteit Consument en Markt (the ACM), conducted nine excessive price investigations but only one led to a finding of excessive prices. The decision in question was, however, abandoned following an appeal by the investigated firms.

To determine whether a price was excessive the NMa first computed the costs of the firm after a proper allocation of the common costs to different products or services and then compared the return on invested capital of the firm with its weighted average cost of capital. It was only if the return was durably and significantly above the cost of capital that the NMa considered that prices were excessive.

In 2004, the NMa imposed a fine of €30m on Interpay, at the time the provider of network services for transactions on the PIN debit card network in the Netherlands, for excessively charging retailers for these services ⁽³⁴⁾. The PIN network had achieved a strong position among the various payment methods. The NMa determined the existence of excessive pricing by analysing the profitability of Interpay. It commissioned an accounting firm to measure the return on capital employed (ROCE) for PIN services over the period 1998–2001. The NMa found that the ROCEs over this period were well in excess of the cost of capital which it had estimated, and concluded that an abuse had taken place over that period.

As Gunnar Niels⁽³⁵⁾ observes: *“The main shortcoming of the NMa’s approach was that the returns over the period 1998–2001 did not provide an accurate picture of the economic profitability of the PIN network services. The test should take account of any investments and risks incurred by the capital providers (in this case the banks that owned the PIN system) before 1998. The PIN system was set up in 1989 under conditions of uncertainty. Until the mid-1990s, it was not guaranteed that the system would become successful (it had to gain a critical mass of users among both retailers and consumers, and faced some competition from rival card networks). Start-up losses were made for a number of years. From an economic (as opposed to accounting) perspective, these start-up losses should also be treated as investments. An analysis of profitability over the whole period 1989–2001, incorporating the earlier start-up losses, demonstrated that the PIN network services had achieved an internal rate of return (IRR) in line with the appropriate cost of capital”*.

In 2005, following the appeal stage, the NMa withdrew the fine it had imposed.

³⁴ NMa (2004), ‘Besluit van de directeur-generaal van de Nederlandse Mededingingsautoriteit als bedoeld in artikel 62 van de Mededingingswet, nummer 2910/638’, April 28th.

³⁵ Gunnar Niels : Excessive Prices: An overview of EU and national case law, Concurrences, e-Competitions | N° 62463, www.concurrences.com

In Spain, Article 6.2.a) of the Law 16/1989 prohibits the abuse of a dominant position consisting in the imposition of prices or other unfair trading or services conditions.

In Spain, the National Competition Authority has actively pursued excessive prices by dominant firms in recent years. The three part test used by the Comisión Nacional de los Mercados y de la Competencia (CNMC) was established and validated by the Spanish Supreme Court in the Explosivos case (³⁶).

- (1) First, in order to enforce article 6.2 a), the CNMC must establish that the investigated firm has the ability to impose different prices. In other words it must establish that the investigated firm has market power thanks to the existence of high barriers to entry, a monopolistic or near monopolistic structure of the market and/or a relatively inelastic demand curve.
- (2) Second, the CNMC must establish whether the dominant firm is “reaping trading benefits which it would not have reaped if there had been normal and sufficiently effective competition”. Comparative methods (either a comparison with prices on more competitive markets or on the same market across regions or across time) or price-cost comparison can be used.
- (3) If the two preceding conditions are met, the burden of proof shifts to the investigated firm, in order to demonstrate the existence of an objective justification for the difference in price. The Court has explicitly rejected as a valid objective justification the intention of the dominant firm to maximize its profits.

Thus in Spain, the definition of excessive prices covers any price substantially above the competitive level (a much looser test than the ECJ test which considers that to be excessive the price must bear no reasonable relation to the economic value of the product) and does not have to establish the unfairness of the excessive price (³⁷).

Also, similarly to the system in Germany for the energy sector, but with a general application in the case of Spain, once the Competition Authority has established that a firm has market power and charges a supra competitive price, the burden of proof is shifted to the investigated firm to prove the existence of an objective justification for this high price. This considerably simplifies the task of the CNMC.

Two decisions of the Italian competition authority concerning the tariffs of airport services are worth mentioning because they raise the question of the articulation between competition law and sectoral regulations (³⁸).

The Italian Competition Authority held in the ADR-Tariffe Aeroportuali and in the SEA-Tariffe Aeroportuali cases that the airports had charged excessive and unfair prices. To arrive at this

³⁶ Resolution of 12 February 2008, Expte. 626/, Canarias de Explosivos. and Judgment of the Supreme Court of 29 May 2013

³⁷ It has been argued that, unlike at the European level, the Spanish test is an “as if” test, inspired by the Ordoliberal concept of competition law, which requires firms to behave as if they did not have market power. See for example Antonio Robles, Exploitative prices in European Competition Law, ASCOLA Conference –Tokyo, May 2015

³⁸³⁸ For a discussion of these cases and other airport excessive pricing cases in Europe see : Michele Giannino “Enforcement of excessive price competition provisions in the airport sector: An overview” SSRN Paper, June 9, 2012

conclusion, the Italian Competition Authority applied the United Brands excessive price test. The regulated costs, determined by the civil aviation regulator (ENAC) were taken as a proxy for the economic value of the services supplied by each of the airports to implement the cost-price comparison limb of the test.

With respect to the provision of common and individual refueling facilities, the Italian competition authority considered that the fees levied by ADR and SEA were excessive because they were significantly higher than the economic value of the service as determined in the investigations of ENAC (the airport regulator).

With respect to the charges for sub-letting airport space for freight handling activities, the Italian competition authority used as a proxy for the economic value of this service, the rent charged to independent freight handlers. The Italian competition authority found that the rents charged by ADR and SEA were as much as twice the cost benchmark and thus in breach of Article 102 TFEU. With respect to charges for access to common and exclusive facilities for catering services, the Italian Competition Authority found the SEA charges to be excessive prices in that they amounted to 9% of yearly revenues, whereas the regulated costs were in the region of 3% of annual revenues.

The decisions of the Italian Competition Authority were confirmed by the Administrative Courts but the sanctions were reduced because the Italian Competition Authority had failed to take into consideration the respect by the airports of the regulatory framework as a mitigating circumstance.

The Czech Republic offers an interesting contrast to the case of Germany or Spain.

Article 11 of the Act on the Protection of Competition prohibits abuse of dominant position and lists a few abusive practices. These include *“direct or indirect enforcement of unfair conditions in agreements with other participants in the market, especially enforcement of performance, which is at the time of conclusion of contract conspicuously inadequate to the counter-performance provided”*. According to the Czech submission to the OECD Competition Committee roundtable on excessive prices in 2011, the Czech competition law is fully harmonised with the EU competition rules and has to be interpreted in accordance with EU law. Therefore, Article 11 of the Competition Act ought to be interpreted in accordance with Article 102 TFEU and the relevant case law of the Court of Justice.

The Czech contribution stated that it very rarely opened investigations on excessive pricing by firms having a dominant position. Its last case of this nature before the 2011 roundtable was a case in 2000. In that year the Office for the protection of competition received numerous complaints from consumers about the pricing behavior of Dattelkabel, a Cable TV operator. The complaints were about a brutal and substantial increase in the price of a number of cable TV packages. The Office for the protection of competition issued a decision finding DattelKabel guilty of having engaged in pricing below cost in 1998 and 1999 and having recouped its losses in 2000 through substantial price increases leading to an excessive price.

One of the reasons for the very small number of cases of excessive pricing accepted by the Competition Authority of the Czech Republic lies in its approach regarding when its intervention on this ground is justifiable. It considers that intervention against exploitative excessive pricing should be taken only in exceptional circumstances and it will only investigate cases if a number of cumulative structural conditions on the market are met. There must be high and non-transitory

barriers to entry, a monopoly situation or a situation of superdominance, market power must not have been acquired through competition on the merits, the market must be such that risky investment and innovation are insignificant, there must not be a sector regulator or a regulated price ceiling and, finally, an efficient structural remedy must be available.

Finally as at the EU level, a number of national competition authorities in Europe have been able to end investigations on excessive prices by receiving price commitments from the dominant firms investigated which are often in partly regulated network industries. For example, the London Stock Exchange offered price commitments in 2004 following the OFT inquiry into the fees it charged; Enel, the Italian electricity incumbent, offered commitments in 2010, following an inquiry by the Italian competition authority into excessive prices in Sicily; six regional gas suppliers belonging to E.ON offered price commitments following an inquiry by the German Federal Cartel Office in 2008; a monopoly gas supplier offered price commitments following an investigation by the Romanian competition authority.

Various countries outside the European Union have competition law provisions which are similar to the EU competition law or follow European jurisprudence in interpreting their own domestic law.

Turkey is an example of such a country and stated in its contribution to the 2011 OECD debate on excessive practices that *“the Act on the Protection of Competition No. 4054 (the Competition Act) sets the basic framework in terms of antitrust rules. The provisions of the Competition Act are generally compatible with Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) and Merger Regulation of the EU as part of Turkey’s aim and commitments towards becoming a member of the EU. Moreover, the principles contained in the case-law of the European Commission, General Court (former Court of First Instance) and the European Court of Justice are taken into account as precedent in the decisions of the Competition Board, the decision making body of the Turkish Competition Authority”*.

Taking into consideration the fact that Article 102(a) of the TFEU explicitly prohibits a dominant firm from directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, the Competition Board, which is the decision making body of the Turkish Competition Authority, considers that the article 6 of its law which prohibits abuse of dominance, applies to excessive prices, even though excessive prices are not explicitly mentioned by article 6.

The Turkish competition authority has however been reluctant to sanction dominant firms for excessive pricing and has in general preferred to act against firms charging excessive prices through competition advocacy rather than through competition law enforcement.

The contribution from Turkey to the Competition Committee 2011 discussion on excessive prices refers to only two cases over an 11 year period from 2000 to 2011. One of those cases is particularly interesting because it shows some of the practical difficulties that competition authorities which enforce competition law against excessive prices face. This case concerns Belko⁽³⁹⁾, a public company owned by the municipality of Ankara, which has a legal monopoly on the distribution of coal consumed for house-heating in Ankara. In this case, where the competition board adopted the first decision regarding an excessive price violation, the investigation had established that the prices

³⁹1 Belko, dated 6.4.2001 and numbered 01-17/150-39

charged by Belko were on average 50 to 60% higher than the prices on competitive markets. However, the investigation also attempted to make a price-cost comparison and found that the costs of Belko were actually quite high due to losses from irrelevant activities and ineffective management of its operations, particularly with respect to the purchase of coal, with the result that its profit margin was low or even negative.

The Competition Board ruled that “... while, along with high prices, a large margin between the sale price and the total cost (excessive profit) could be considered a sign of excessive pricing, monopolistic pricing is also possible in situations where the profit margin turns out low or even negative due to establishment of real or fictitious costs in excessively large magnitudes (along with prices set at relatively high levels).” The Competition Board considered that a firm in a dominant position has special responsibilities and cited prudent and efficient management as important responsibilities. It thus considered that the 50 to 60% higher price charged by Belko for the coal sales due to increased costs resulting from inefficient management was an abuse of dominance under the Competition Act.

The Competition Board used the opportunity given by this case to advocate for a removal of the special rights conferred to Belko arguing that competition could lead to better results on the market and the exclusive rights granted to Belko were effectively removed.

The Belko decision of the Turkish competition authority is aligned with the Sacem II decision of the ECJ. Indeed in Sacem II, Sacem argued that the higher collection fees it charged compared to other collecting societies were due to its higher level of operating expenses. The ECJ rejected this argument by stating :

“29 That argument cannot be accepted. It is apparent from the documents before the Court that one of the most marked differences between the copyright-management societies in the various Member States lies in the level of operating expenses. Where —as appears to be the case here, according to the record of the proceedings before the national Court — the staff of a management society is much larger than that of its counterparts in other Member States and, moreover, the proportion of receipts taken up by collection, administration and distribution expenses rather than by payments to copyright holders is considerably higher, the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties.

“30 It must therefore be concluded that a comparison with the situation in other Member States may provide useful indications regarding the possible abuse of a dominant position by a national copyright-management society. Accordingly, the answer to the question as formulated by the national Courts must be in the affirmative”.

In other words if a dominant firm’s costs were higher than those of firms providing the same service elsewhere, prices might be excessive, even if profits were not.

This brief review of some of the leading cases of the enforcement of abuse of dominance with respect to excessive pricing in European jurisdictions or in jurisdictions which adopted the European approach to excessive pricing in competition law is incomplete and does not cover jurisdictions such as Chile or South Africa which also have provisions against excessive pricing. However it suggests a number of comments or questions :

First, In most of the countries which follow the EU approach to excessive pricing by firms having a dominant position the level of enforcement is usually quite modest. The reason for this low level of enforcement is that, in general, there is recognition by the competition authorities of these countries that they are not well equipped to assess whether prices are excessive or unfair. The price-cost comparisons or the comparison of the alleged excessive price with the price in comparable competitive markets to be used to establish the existence of excessive pricing are difficult to implement (see for example the Scandline Port of Helsingborg case in Europe or the Belko case of Turkey) and that competition authorities should intervene only as a last resort where there is little or no hope that the market will correct itself, in the most extreme cases (see the quote by the German delegation to the OECD Competition Committee referred to above or the screens used by the competition authority of the Czech Republic) and/or if there is no alternative mechanism to bring price in line with costs (see Turkey).

Second, both in the EU and in the Netherlands, it seems that a number of investigations of excessive prices have been abandoned some months or years after they have been opened, possibly because of the complexity of these investigations. Given their cost, one may wonder whether these investigations are cost effective for competition authorities or if some form of action (other than an attempt to enforce the excessive pricing violation) could allow the competition authority to reach the same goals at a lower cost.

Third, there is controversy among the National competition authorities (NCAs) and the Courts about whether the legal test laid out by the ECJ makes economic sense, is administrable, is consistently used and whether it leads to sufficient legal predictability (see the discussion of the ECJ jurisprudence). Some competition authorities use different tests than the test of the ECJ (see the Napp case in the United Kingdom) even when they apply EU law, which raises additional issues of legal predictability.

Fourth, there are significantly different opinions about what constitutes an excessive and/or an unfair price. Whether it is a price which is such that the profit rate of the company is in excess of its costs plus a competitive profit rate or whether it is a price which is in excess of the economic value of the product or the service (see the discussion of the Attherace case in the UK), and , if this is the case whether observed prices can ever be excessive is in debate. Finally, if an excessive price is a price which provides a rate of return to the firm above the weighted cost of its capital what is the threshold beyond which one should consider that the price is excessive? (see, for example, the discussion of the decisions on excessive airport prices in Italy).

Fifth, price cost comparisons, which are usually a first step in an investigation of excessive prices, may be misleading indicators of excessive prices, particularly in dynamic industries where R&D investment outlays are repaid over a number of years (see the discussion of the Scandline/Port of Helsingborg EU decision). They may also be misleading because monopolist with high prices may have higher costs than they would have if they were under competitive pressure (and therefore low or negative margins) (see the example of the Czech Republic or the Sacem II case of the European Union). Those price cost comparisons can also be particularly complex (and open to criticism) because of the difficulty of assessing the relevant costs to be taken into consideration and of choosing the relevant measure of those costs. (see the discussion of the Scandline vs Port of Helsingborg case).

Sixth, the procedural arrangements vary from one country to another and may influence the intensity of enforcement of the provisions against excessive pricing. For example, in some countries, once the competition authority has established that the price cost margin or the price are larger than some benchmarks, it is up to firms to establish why such a difference is not excessive (see the example of Germany for the fuel sector and the example of Spain). This reversal of the burden of proof can be considered to be problematic, particularly in the face of concerns about the fact that competition authorities' interventions can sometimes stifle competition rather than promote it (see the Durex case in the United Kingdom).

A number of these questions will be debated more systematically and thoroughly in the remainder of this paper. We now turn to the pros and the cons of having competition authorities intervene to enforce the prohibition of excessive prices by dominant firms.

Section II The pros and the cons of the prohibition against excessive or unfair prices.

A number of arguments have been proposed in support of the idea that competition authorities should not intervene against high (unfair or excessive or both) prices or in support of the idea that an intervention by competition authorities in this domain was justified. Those arguments are somewhat confusing because they partially contradict one other and are a mixed bag of general statements as to whether competition authorities should ever control high prices and of more limited statements offering views about specific cases where competition authorities should or should not intervene. Rather than reviewing all the arguments we will concentrate on the most relevant ones.

Self-correcting markets

The most frequently invoked argument opposing the intervention of competition authorities against excessive prices relates to the fact that high prices (or high margins) may be important market signals attracting entry and that, therefore, excessive prices or profits are often self-correcting. This argument suggests that as excessive prices or abnormally high profit rates are purely transitory, they do not necessitate government intervention. This argument was referred to, among others, by the United States Court of Appeals, Second Circuit in the landmark *Berkey Photo* case⁽⁴⁰⁾ in the United States. The Court stated : *"(...) although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can"*. Equally, Richard Whish ⁽⁴¹⁾ has alluded to this argument by stating: *"If normal market forces have their way, the fact that a monopolist is able to earn large profits should inevitably, in the absence of barriers to entry, attract new entrants to the market. In this case the extraction of monopoly profits will be self-detering in the long run and can act as an important economic indicator to potential entrants to enter the market. If one accepts this view of the way that markets operate, one should accept with equanimity periods during which a firm earns monopoly profit: the market will in due course correct itself and intervention by the competition authorities will have the effect of undesirably distorting this process."*

As a an argument in favor of generalized non-intervention of competition authorities against excessive prices, this argument is not as strong as some of the other arguments and has been

⁴⁰ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263,294 (2nd. Cir., 1979)

⁴¹ RICHARD WHISH, *COMPETITION LAW* (LexisNexis, 5th ed. 2003) pp. 688–689

criticized by several authors (see for example Ariel Ezrachi and David Gilo (⁴²) and Michal Gal (⁴³)). There are at least three weaknesses in this argument which is based on a static rather dynamic view of markets.

First, in the best of cases, if barriers to entry are not impossible to overcome and if the potential entrants are confident that they will make high profits if they enter the market where a dominant firm is charging high prices, they will enter the industry and bring down prices. But economic theory tells us very little about the time frame in which this might happen. What we do know is that in the medium or long run it is likely to happen. But being able to predict that an event that is going to take place in the future will correct the high prices and high margin observed in the short run may or may not be a reason for non-intervention. Whether or not the Competition Authority should intervene very much depends on when such an event is likely to happen and what discount rate is applicable to future events on the one hand and the social cost of the intervention by the competition authority on the other hand. Drawing a general conclusion that this provides an overall case for non-intervention is clearly unwarranted.

Second, where high margins or high prices are implemented because of the existence of high barriers to entry, it is far from obvious that entry will take place and if there are low barriers to entry it is fairly unlikely that a firm will have a dominant position and be in a position to charge supra competitive prices in the first place. Motta and de Streel (⁴⁴), in their discussion of why there may be a case for non-intervention, assume that competition authorities do not intervene in sectors with high barriers to entry. They state: *“(...) competition law applies to sectors where in principle market forces are free to operate. Unlike sectors characterised by legal barriers to entry or where market failures are such that one cannot assume that competition works, competition authorities deal therefore with sectors where one can presume that free entry should be able to erode over time dominant positions”*. Such a statement is not confirmed by the facts. As we saw in reviewing enforcement by competition authorities of excessive pricing provision in several jurisdictions, the concern of competition authorities is often with markets such as energy, postal services, collecting societies, cable TV, telecom, and with firms to which a legal monopoly has been conferred whether it is for the issuance of certificates of conformity of its product or for the distribution of coal. In all those markets, it cannot be assumed that entrants will easily chip away at the monopolistic power of the incumbent.

Third, it is in any case not the pre-entry price or profit which will attract entry but the possibility of enjoying a high post-entry price. However, pre-entry prices might not be good proxies for post-entry prices in concentrated markets. When they are not well protected by technical or legal barriers to entry, dominant firms have numerous ways to develop strategies (such as most favored nation clauses in their contracts with their customers or predatory pricing) to either protect themselves against aggressive post-entry competition or to build up a reputation for aggressiveness if

⁴² Ariel Ezrachi & David Gilo, Are excessive prices really self-correcting? *Journal of Competition Law & Economics*, October 2008 ,5(2), 249–268

⁴³ See Michal Gal, «Abuse of Dominance- Exploitative Abuses», in in *HANDBOOK ON EUROPEAN COMPETITION LAW* (Lianos and Geradin eds., Edward Elgar, 2013), Chapter 9, pp. 385-422.

⁴⁴ Massimo Motta and Alexandre de Streel, “ Excessive Pricing in Competition Law: Never say Never?”, In *The pros and cons of high prices*, Konkurrensverket Swedish Competition Authority, 2007

challenged. This means that high prices today may not necessarily attract entry even when technical or legal barriers to entry are moderate. Finally, the case to which Richard Whish alludes (a monopolist with high prices and low barriers to entry) is clearly an exceptional case.

Overall, it is far from obvious that the automatic self-correcting mechanism referred to in this argument for non-intervention against excessive prices is sufficiently general to warrant a pronouncement on what competition authorities should do. However, to the extent that it suggests that competition authorities should refrain from intervening in the specific cases where self-correcting mechanisms are likely to work in the short run, this argument has some validity.

Harmonization versus gap cases

A second argument against the intervention of competition authorities in excessive pricing cases relates to the fact that there is a big transatlantic divide over this issue and that there is a need to harmonize national practices in competition law enforcement as differences increase the transaction costs of transnational businesses. The argument then goes on to suggest that since US law focuses solely on exclusionary abuses and does not intervene in case of mere exploitative abuses, EU law should then ignore exploitative abuses.

Even if all countries had the same law, one of the weaknesses of the harmonization argument is that it does not explain why the alignment of enforcement practices with regard to high prices should be on the benign neglect typical of the United States rather than on the type of enforcement against high prices found in Europe. There are two competing considerations. On the one hand, the prospect of being able to charge high prices is an important reason for which firms try to acquire market power through superior performance and compete on the merits, which clearly benefits consumer surplus in the long run; on the other hand, the charging of prices above the competitive level by firms which have acquired market power, through competition on the merits (or through other means), clearly reduces the consumer surplus in the short run. The net balance between these two effects depends on the speed with which firms with market power are challenged by new competitors. This is an empirical matter. Thus the harmonization argument is in itself incomplete. It makes sense only if one can assume that markets self-correct sufficiently rapidly (a hypothesis which is hardly justified, as we saw previously).

Furthermore, all countries do not have the same competition law and some authors have suggested that differences in the substance of competition laws across countries may explain and justify differences in their practices with respect to excessive pricing.

In particular, it has been argued that one of the justifications for the intervention of the EU Commission in cases of excessive prices, is the fact that such interventions help solve the “gap cases” or the “second-shot cases” existing in competition laws which prohibit abuses of dominance. The existence of “gap cases” is alleged to come from the fact that the acquisition of dominance through anticompetitive means cannot be covered by laws, like the European competition law which limits interventions against single firms to cases where those firms already have a dominant position whether such a dominant position has been acquired through competition on the merits or through anti-competitive means.

Röller, an adept of the “gap case” rationale for the enforcement against excessive dominant position in the EU, states ⁽⁴⁵⁾: *“In principle, an abuse case must identify anticompetitive conduct that results in increased market power, relative to the counterfactual. As was mentioned above, it is the road to dominance that is important in order to identify pro- from anticompetitive conduct. If dominance (or for that matter any kind of market power) is obtained through competition on the merits, then this is good for consumers; otherwise, not. By contrast, Article 82 only applies to firms that are already dominant. In other words, anticompetitive conduct that leads to a dominant position cannot be caught in Europe under exclusionary abuse. This is an enforcement “gap”, since it is precisely the way in which dominance is acquired that matters in terms of economic effects”.*

“I like to suggest that antitrust enforcement through exploitative abuse can be used to close this important gap. That is, exploitative abuse cases should be based on acquiring a dominant position through anti-competitive exclusionary conduct. In this way, exploitative abuse cases are back to investigating exclusionary conduct, which is in fact the proper way to identify anticompetitive conduct. By focusing on the road to dominance through anticompetitive behavior, exploitative abuse cases are firmly grounded in the way markets work, rather than deciding on what is “excessive” from an ex post point of view”

“Note that this approach is very much in line with the observation that many exploitative cases exist in sectors with former state owned monopolies. Perhaps this observation has something to do with the fact that these firms did not get their dominant positions based on merit alone, but rather by a public policy decision usually based on a natural monopoly policy. To the extent that the road to dominance matters, these should in fact be considered gap cases, even though dominance is not achieved by anticompetitive exclusionary conduct”.

“Overall, there appear to be three main advantages in defining exploitative abuse as acquiring dominance as a result of an exclusionary abuse: First, it is in line with sound economics, second it avoids the standard debate on what is “excessive” (which, I believe, is impossible to define operationally), and third it closes a gap in Article 82”.

The gap theory of enforcement of competition law against excessive pricing in countries which prohibit abuse of dominance but not anticompetitive means to acquire dominance thus suggests that such enforcement is a way to remedy a defect in those competition laws. But in the process, Röller, proposes a definition of exploitative abuse which is quite different from that given by the Courts in the United Brands case and quite different from the likely interpretation that Courts could give to excessive pricing provisions.

Accepting the Röller “gap” theory to justify interventions against excessive pricing by firms having a dominant position, is a very convoluted way to remedy a weakness of competition laws prohibiting abuse of dominance and it raises numerous questions regarding the consistency of the economic approach with the legal approach taken by the European Courts.

Rather than trying to use such an esoteric mean to bridge the gap between EU inspired laws and US law, It would be much preferable to modify the substance of those laws (by abandoning the concept

⁴⁵ Lars-Hendrik Röller, “Exploitative Abuses”, ESMT Business Brief, No. BB-107-002; ESMT European School of Management and Technology, 2007.

of dominance and replacing it with the concept of monopolization) to bring them in line with economic reasoning and to harmonize them better with US law.

It is usually beyond the powers of a national competition authority to redraft the domestic competition law of its country or to change the interpretation by the Courts of the excessive pricing provision of its domestic law. Thus the formal legal harmonization of European and other competition laws which prohibit abuse of dominance, on one side, and the US and US inspired laws which prohibit monopolization, on the other side, is unlikely to occur soon. The next best, then may be for national competition authorities to exercise restraint in their enforcement of those provisions by carefully choosing the cases which are least likely to lead to undesired results rather than adopting an interpretation of the excessive pricing provisions of their law which has little chance of being followed by the Courts.

Overall, the validity of the harmonization argument against the enforcement of excessive pricing provisions in competition law rests on whether or not one can make economic sense of the excessive pricing provisions. We will return to this issue later on.

Protecting consumer surplus versus distorting incentives to compete

A third argument, this time in favour of the intervention of competition authorities against excessive pricing, is that monopoly profits clearly disadvantage consumers by reducing their surplus and that it is incomprehensible that competition authorities which claim to be protecting consumer surplus would not act against monopolistic pricing.

One problem with this argument is that it implicitly describes the competitive process in very static terms whereas, in real life, competition is a dynamic process. Thus, for example, the monopoly profits enjoyed by a dominant firm may be the result of the fact that the firm previously undertook efforts to improve the quality of its product or invested in R&D to make its manufacturing processes more efficient and to lower its costs and may explain why the firm passed those benefits on to its consumers in order to acquire the market dominance that it now enjoys. In such a case, it is not clear that consumers have been disadvantaged by the dominant firm's strategy. The counterfactual indeed would be that the firm would not invest in improving the quality of its product and/or reduce its cost if it knew that its monopoly profits would be eliminated by antitrust enforcement.

Along similar lines, a contrary argument (i.e. an argument against the intervention of competition authorities in excessive pricing cases) is that such interventions may discourage innovation or investment both by the firms having the dominant position and for the potential entrants. This argument was implicitly referred to by Judge Scalia in the Verizon judgment when he stated⁽⁴⁶⁾ : *"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly prices –at least for a short period- is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth"*. Motta et de Streel⁽⁴⁷⁾, for example, explain : *"Excessive price actions may undermine the investment incentives of new entrants. (...)Excessive pricing actions (...) while in the short run they might be beneficial in that they*

⁴⁶ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP.

⁴⁷ Massimo Motta and Alexandre de Streel, "Excessive Pricing in Competition Law: Never say Never?", the Pros and Cons of excessive pricing , Konkurrensverket Swedish Competition Authority, 2007

could reduce prices, in a long run perspective they would be detrimental because they may impede entry that could otherwise take place (the objection is all the more important if one considers that excessive price actions are unlikely to be repeated over time). Furthermore, this may also have the effect of depriving consumers of more variety, to the extent that new entrants would supply substitutable but different products and services with respect to those of the dominant firm.” They add “Excessive price actions may also undermine the investment incentives of the dominant firms. High prices and profits should be seen in general as the reward for a firm’s efforts, innovations and investments, and firms indeed invest and innovate precisely because they are able to appropriate the benefits from their risky investments. Hence, however beneficial excessive price interventions may be ex post, if a competition authority pursued a policy of resorting to excessive pricing actions, this policy would have important negative effects ex ante, by lowering expected returns, and therefore discouraging firms’ investments in all the economy. This objection is particularly relevant in highly dynamic industries where innovation plays a crucial role”.

As Motta and de Streel recognize, their argument suggests that competition authorities should exercise restraint when they consider intervening against high prices. They should balance the benefit of acting against high prices which may in the short run benefit the interests of consumers (assuming that there is a conceptual and practical way of defining excessive prices, a topic which we will examine later on) against the cost of diminishing the incentives of dominant firms and potential entrants in all markets due to their intervention. Michal Gal ⁽⁴⁸⁾ argues that : *“this challenge does not necessarily lead to the abolishment of the prohibition, but rather might limit its scope in cases in which harm to dynamic efficiency is not offset by static efficiency gains”*

However, since balancing the benefits in the form static efficiencies and the costs in the form of disincentives to invest seems to be impossible to do on a case by case basis, the argument really suggests that competition authorities should not enforce excessive pricing prohibitions in dynamic industries.

Regulation vs competition

A fourth argument against the intervention of competition authorities against excessive prices is that competition authorities are not equipped to be price regulators. Motta and de Streel, for example, state: *“An additional common objection against excessive price action is that it would lead to price regulation, which is difficult to implement. Indeed, intervening in an occasional way on the price set by a dominant firm does not solve the problem forever (on the contrary, to the extent that it may discourage entry, it may even exacerbate it and make it permanent). As a result, either the competition authority or the Court continues to monitor the industry – but in this way it would convert itself into a de facto regulator and would have to sacrifice important resources – or would have to resign to see its intervention as ineffective, since market conditions change over time and the dominant firm would adjust its prices to them. Moreover competition authorities – unlike sectoral regulators – have no experience and no role in telling firms which prices they should charge”.*

This argument is definitely an argument against all interventions of competition authorities against excessive prices.

⁴⁸ Micha Gal, “Abuse of Dominance- Exploitative Abuses* in HANDBOOK ON EUROPEAN COMPETITION LAW (Lianos and Geradin eds., Edward Elgar, 2013), Chapter 9, pp. 385-422.

As Motta and de Streel themselves state: “ (...) *the objection is not always convincing as the finding of an abuse and the choice of remedy should be kept separate. Indeed, there are other ways – and often more easily implemented and efficient ways- to deal with an excessive price abuse*”. Indeed solving an excessive price case with a behavioural remedy enjoining the firm to reduce its price amounts to suppressing the symptoms rather than curing the disease.

However there is a stronger argument related to the difficulty for a competition agency to exercise the role of a regulator by imposing behavioural remedies in cases of excessive prices. Indeed, just as establishing the proof of excessive price raises considerable conceptual and practical difficulties (as we shall see below), the monitoring of any injunction to limit price to a “non excessive” level will raise equally complex questions. Indeed, any modification of the costs of the firm or any technological development or any change in the demand for the product or service considered will require the competition authority to consider the impact of such changes on the level of the price considered to be excessive. This means that the monitoring of a price injunction will require the active involvement of the competition authority and will not be easily delegated to a trustee paid by the dominant firm. Thus the complex debate over the appropriate benchmark, the discussion as to the benchmark cost and the interpretation of what is excessive will be a recurring issue absorbing a lot of the competition authority’s resources.

Section III The cost and the risks of errors

The cost of errors

The debate on the pros and cons of having competition law enforcers intervene against high prices of dominant firms would not be so important if the social cost of mistakes by competition authorities or by Courts is limited.

Let us focus, first, on the relative costs of type I and type II errors in the case of mistakes by a competition authority. A type I error would lead the competition authority to sanction a price for being excessive or unfair when, in fact, the intervention of the competition authority reduces the static and dynamic efficiency of the market to the detriment of consumers, i.e., when it causes consumer harm in the long run. A type II error would lead the competition authority to fail to recognize that a price was such that a lowering of this price would increase static and dynamic efficiency to the benefit of consumers.

In the case of interventions against excessive pricing, the cost of a type I error (lowering of a price leading to a reduction of the static and dynamic efficiency of the market) is likely to be higher than a type II error (lack of recognition that the lowering of the price would increase the static and dynamic efficiency of the market).

Indeed, if the competition authority erroneously fails to recognize that a price is such that its lowering would increase the static and dynamic efficiency to the benefits of consumers, its erroneous judgement will have an impact on the allocative efficiency (a higher price and profit margin resulting in a lower consumer surplus will be the result) but will not affect the dynamic aspect of competition (it will not discourage potential entrants from trying to enter the industry and it will not distort the incentives of the dominant firm and the potential entrants to invest). Furthermore it will not distort the incentives of potential entrants and dominant firms in other industries.

If, on the other hand, the competition authority erroneously considers that a price is abusively high, its decision will increase the surplus of the consumers of the product but it will have a negative impact on static efficiency and on the dynamic dimension of competition. As we saw earlier, entrants on the market examined might have less of an incentive to enter since low pre-entry prices will not suggest to them that they will be able to enjoy high profit margins post-entry and the incentives both of the dominant firm and the potential entrants in the market will be distorted by what they will consider is a cap on the expected profitability of their investments. As Evans and Padilla state: *“The cost of a type I error is likely to be large in dynamic industries where firms compete for the market launching new products and services⁽⁴⁹⁾, in emerging industries where firms are contemplating whether to start up,⁽⁵⁰⁾ and in those mature industries where, due to technological change, firms have the opportunity to upgrade their services. The cost of this type of error is bound to be large in industries where trial and error is common, in which the cost of experimentation is high, but the return to success is potentially huge. The music recording industry is an example in which the profits for a few blockbuster albums pay for the vast majority of unprofitable acts. In all those cases, the size of area A is likely to be large, whereas it will be small in mature or declining industries where investment is no longer a factor”*. Furthermore, the effect of the decision may affect dynamic effects in other markets as well because of the value of the (wrong) decision as a legal precedent.

Because the dynamic efficiencies are more important than static allocative efficiencies for the long term welfare effect of consumers, the social cost of type I errors (resulting from interventions against excessive prices) is likely to be higher than the social cost of type II errors (resulting from non intervention).

The risks of errors

Knowing the costs of type I and type II errors, then begs the question of whether those errors are likely or not. This will depend among other things on whether it is simple or difficult to define clear rules about “excessive pricing”. As Evans and Padilla state: *“(…), the likelihood and cost of the type I and II errors under a rule of reason approach crucially depend on the actual formulation of the price-cost test (…): i.e., on the value of X that is finally chosen and on the precise definition of the terms “price” and “cost” to be used in practice. (...) economic theory provides no guidance in this respect. Neither does the available case law. The only unambiguous conclusion that emerges from the economic literature and the case law is that distinguishing between competitive and supra-competitive prices is a daunting (...)”*.

The question of why economic theory does not provide us with a clear definition of what is an excessive price deserves elaboration first and, afterwards, the question of why there is little possibility for competition authorities to practically use a price cost measure or a profit rate comparison to assess the existence of an excessive price will be discussed.

The first and possibly most important conceptual difficulty in the enforcement of excessive or unfair price provisions in competition law is that the concepts of “excessive price” or “unfair price” which suppose the existence of a threshold beyond which prices should be illegal is alien to economic

⁴⁹ For example, according to the authors, the software and pharmaceutical industries

⁵⁰ For example, according to the authors, the biotechnology sector

thinking. For this reason using an economic methodology to solve the problem of excessive prices is at best challenging.

In economic analysis the market price, which is the result of a clearing mechanism between supply and demand is neither good nor bad. A monopolistic price means that competition is lacking and that the market mechanism does not perform as well as it would if there was more competition (i.e. it generates a welfare loss). The monopolistic price plays the same role as the temperature of a patient which reflects his underlying state of health. When the temperature of a patient is high it is the sign that his organism is affected by a disease. With a high fever comes the fact that the patient is weak and cannot perform as well as he would if his temperature was lower. His body requires treatment. As the result of forces affecting both supply and demand, in economic theory the market price is simply an indicator of the fact that the underlying conditions of the market need to be fixed.

If one tries to define an “excessive” price in the legal sense as a price above what the competitive price would be, one is faced with major conceptual and practical difficulties.

Indeed, in most real life cases, there is no unique or easily identifiable “competitive price”.

In single face markets characterized by static pure and perfect competition (which assumes a perfect homogeneity of the products or services supplied, a constant marginal and average cost and therefore the ability of any firm to serve the entire demand, a large number of firms and no barriers to entry), the competitive price is equal to the incremental cost of production and firms earn no “economic rent”, that is no profit over and beyond the opportunity cost of the factors they use. A similar result is found in Bertrand oligopolies (oligopolies in which competitors compete on prices) if the oligopolists have constant marginal and average costs.

However, these results crucially depend on the assumptions and these assumptions practically never reflect the real conditions of markets. In the classical real economy, on single face markets, the number of firms is limited, products are differentiated, barriers to entry exist due to the need for fixed investment to enter production, marginal costs may be increasing if firms have capacity constraints or may be decreasing in industries which have large fixed costs and firms may compete in quantity rather than compete in prices. In these circumstances the equilibrium price of these (imperfectly) competitive markets will not be equal to the marginal (or incremental) cost. It will depend, among other things, on the number of competitors and the shape of the demand curve ⁽⁵¹⁾.

Moving from the static to the dynamic vision of real markets, Padilla and Evans observe ⁽⁵²⁾: *“In dynamic industries, where typically fixed costs are high and incremental costs are low, the “competitive” price is not given by marginal costs. Rather, it is efficient to charge prices according to customers’ willingness to pay so as to cover fixed costs in the least output restricting way. In short in these industries it is impossible to define “competitive” prices using only information on costs”.*

⁵¹ See for example: Martin Dufwenberga, Uri Gneezyb, Price competition and market concentration: an experimental study, Int. J. Ind. Organ. 18 (2000) 7 –22 or Beth Allen and Martin Hellwig “Price-Setting Firms and the Oligopolistic Foundations of Perfect Competition”, American Economic Association Papers and Proceedings, May 1986

⁵² David S. Evans and A. Jorge Padilla: Excessive prices: using economics to define administrable legal rules, CEMFI Working Paper No. 0416 September 2004

Finally in multi-sided markets, the competitive level of the price on each side may bear no relationship to the cost of delivering the service to the consumers on that side. Indeed decisions on the price on one side are based not only on the cost of delivering services on this side of the market, but also on the price elasticity of demand on this side of the market, the interaction with the demands of consumers on the other sides of the market and the cost of servicing the consumers on these other sides. Different combinations of prices may be optimal.

Altogether, except in the wholly unrealistic case of pure and perfect static competition in the long run, the competitive price cannot be defined without making assumptions about the structure of the market, the type of interaction between the competitors or the shape of the demand curve. As a result, depending on what these assumptions are, different level of prices may be considered to be competitive prices for a given market.

Thus, what is an excessive price will depend on the hypothesis retained to define the competitive price rather than on an objective definition.

Furthermore, even if the hypothesis of pure and perfect competition applies to a real life market, it does not follow that the observation on this market of a price higher than the marginal cost necessarily implies that the price is excessive. Indeed, the equality of the competitive price and the marginal cost is a long run relationship once the firms have adjusted their decisions to the market environment and/or once the mechanism of entry and exit has run its course. But in a real life market, firms are constantly adjusting to changes in costs and demand conditions and the long run price may never be observed. A price higher than the marginal cost may mean that there is a competition failure or may mean that firms are in the process of adjusting toward the long run competitive equilibrium. Thus no definitive conclusion can be drawn on whether the price is excessive or not.

We then have to turn to the Courts to understand what they mean by an excessive or an unfair price.

The ECJ early on recognized the need to give a definition of what would be an excessive price in its General Motors case. It stated that: “12 (...) *an abuse might lie, inter alia, in the imposition of a price which is excessive in relation to the economic value of the service provided*”

The ambiguity in the formulation comes from the fact that we do not know whether the Court had in mind the economic value of the product from the point of view of the consumers or the economic value of the product to the producer or the economic value of the product from the point of view of society.

If, what the Court had in mind was the economic value of the product to consumers, its attempt at defining what an abusive price is fails from the point of view of economic analysis. Indeed, one of the tenets of market theory is that consumers maximize their own welfare, under their revenue constraint, in their consumption activities by buying units of goods or services only if the satisfaction they derive from these units is greater than the satisfaction they could derive from spending the price of these units on any other good or service. In other words, they will only buy a unit of a good or a service if this transaction increases their satisfaction. Even if a monopolist reduces its output and increases its price, for the limited quantity of the monopolized good produced, the price of each unit

will be equal or inferior to the value assigned to these units by the consumers. This means that even in the case of a monopolistic price the value to the consumers (who buy the goods or the service) of the units consumed is greater or equal to their price. Thus, if the Court refers to the economic value to consumers of the units of the good or service they buy, its definition cannot help us establish what an excessive price is.

Likewise, if the Court had in mind the value of the product or service for consumers who do not buy it (or who restrict their consumption of the good or service because of its high price), its definition of what an excessive price fails. Indeed, by definition, if a consumer abstains from buying a unit of a good or a service, it means that the value to him of this unit is below its price. Otherwise the consumer would buy the unit to maximize his welfare. In other words, from an economic point of view, whatever the price charged for the units bought by the consumers, the price is below the value of these units for the consumers who bought them and, for the units not bought by consumers, the price is above the value to consumers of these units. From the economic standpoint, a reference to the value to consumers of the good or the service cannot help us define what is an excessive price.

If what the Court had in mind was the value of the service to the producer, the definition it gave also fails to establish what an excessive price is. Indeed, the value to a producer of a unit produced is the maximum amount that for which it can be sold. Thus if a monopolist can sell the (limited) number of units it produces at a monopolistic price, this price represents the value of each unit for the producer.

If what the Court had in mind was that the value of the service was its opportunity cost (i.e. its incremental cost), the Court was implicitly referring to the static competition model discussed previously. But for the reasons mentioned above, the incremental cost of a good or a service may not represent the competitive price of this product on real markets.

In its *United Brands* judgment, however, the ECJ went further than in the *General Motors* judgment. Even though it still failed to define the concept of “excessive” price, it gave an indication of how to go about establishing it. The Court stated :

“250. “In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product would be an abuse” but it added:

“251 This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC's costs structure.

252 The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products”.

253 Other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair.

254 While appreciating the considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its set up, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other, the production costs of the banana do not seem to present any insuperable problems”.

The Court thus expressed a preference for an analysis of price cost-margin if at all possible because it considered that taking into account the price-cost margin was an “objective” way to define an excessive price. It also opened the way for alternative methodologies suggested by economists if price-cost margins could not be computed.

Besides the fact that they have no conceptual basis, the methods suggested by the ECJ and used by competition authorities to assess whether prices are “excessive” are also extremely complex to implement.

The most common method for assessing the existence of excessive prices used in the EU context is price-cost comparison. A large difference between the price charged by the dominant firm and its costs is presumed to be an indication of supra-competitive profits. The prevalence of this method is due to the pronouncement of the European Court of justice in the United Brands case according to which: *“252 The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products”. Indeed, in this case the ECJ also criticized the Commission for not having undertaken such a method while it was feasible. The Court stated: “UBC claimed it had made losses in Ireland during the period under analysis. It also claimed that it had failed to earn any profits on the relevant market in the period from 1973 to 1978 (save in 1975). The Court determined, among other things, that the fair price could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however, the Commission has not done this since it has not analyzed UBC’s costs structure”.*

Implementing price-cost comparisons is fraught with practical difficulties related to the type of costs that should be considered.

As the OECD background document prepared for the 2011 discussion of the Competition Committee on excessive prices observes: *“the application of price-cost margins may be very difficult in practice. Complications are unavoidable when considering pricing strategies designed to maximize the sales of a group of related goods and services rather than a single product or when the product is manufactured by multiple company divisions, possibly across multiple countries, over several years and possibly also relying on IPR based on considerable past R&D efforts related to a different product. The reason for the difficulty lies in the fact that the profit maximizing pricing decisions of such firms involve setting prices such that the overall cost of production including all common or joint costs are covered. This implies different price-cost margins for products facing demands of different elasticities. As a result, it has been suggested that the pricing policy of a multiproduct firm should be analyzed in its entirety”*

For example in the case of a firm producing two products and facing different demand elasticities for these two products, an optimal pricing strategy may require that the price of product x be used to cover costs associated with product y. The price of product y, as it is cross-subsidized by x may not contribute to common or joint cost at all and the price of product x, covering all joint and common cost could be found excessive based on a “traditional” cost analysis.

Another difficulty is that of knowing which of the firm’s costs the competition authority should consider. For example, is it the cost of the dominant firm alleged to practice excessive pricing or the cost of an efficient firm on the same market? The question deserves attention since, as we saw in the Turkish case regarding Belko, the costs of the dominant firm may be those of an inefficient firm precisely because it is not challenged by competition. If, therefore the answer is that it must be the cost of an efficient firm, the question will be to know on which data the competition authority is going to base its analysis to find the cost of an efficient firm in markets characterized by the existence of a dominant firm which may not be efficient itself even though it is much larger and possibly much more diversified than smaller competitors.

The fact that the incremental cost of an efficient firm is in any case difficult to assess explains why a number of competition authorities have also used other methods to assess excessive prices.

A second method used by competition authorities to assess excessive prices is the “profitability analysis”. Competition authorities compare the weighted cost of capital of the dominant firm (considered to approximate the competitive return on capital) and its return on capital employed to assess whether its returns are excessive. This method is fairly standard in the regulation of public utilities, but the OECD background paper prepared for the 2011 Competition Committee discussion on excessive pricing points to an important difference between the use of this method to regulate utilities and its use to assess excessive prices in markets open to competition. It states: *“While this so-called rate-of-return regulation can also be employed in the context of excessive prices, there is an important difference between investments made by state utilities or utilities in protected markets and investments made in a competitive market environment facing substantial ex ante risk of failure. While ex ante risks can probably be ignored in a utility setting, where monopoly positions may even have been legally granted, any existing ex ante risk of failing has to be rewarded ex post in a competitive market environment”*.

More generally this OECD Background paper identifies at least four reasons for which profitability analysis is not straightforward to assess excessive returns in the context of competition law (⁵³): 1) Accounting profits are often sensitive to different approaches to depreciation; 2) Cost and revenue allocation for multi-product companies operating multiple lines of business is particularly difficult; 3) Company accounts of international companies depend on transfer price arrangements and 4) Risk factors are highly dependent on assessments of investors that can fluctuate substantially. Along the same lines, Evans and Padilla state: *“Even if one could devise meaningful accounting rules for approximating the return on capital and the weighted average cost of capital, deciding among the various available options would always be arbitrary. (...) Accounting procedures do not provide for capitalization of R&D and advertising, do not address inflation, and do not properly adjust rates of return for risk. Thus accounting profits do not reflect economic profits except under the most*

⁵³ See Frank Maier-Rigaud, : Excessive prices , Background Paper by the Secretariat for Competition Committee the Round Table on excessive prices, DAF/COMP(2011)18

unrealistic assumptions. The relationship between accounting and economic rates of return hinges on the time shape of net revenues, something that varies across industries, across firms within an industry, and even across time for a given firm. Nor can the divergence between the two rates be assumed away as small. As Fisher and McGowan illustrate with their calculations, “there is no way in which one can look at accounting rates of return and infer anything about relative economic profitability or, a fortiori, about the presence or absence of monopoly profits.

These problems become particularly severe in industries where firms invest and innovate regularly. In those industries a few companies succeed but the winners typically obtain enormous profits. Those profits would appear excessive ex post, when the innovations are commercialized. However, from an ex-ante perspective and once the cost of capital is adequately adjusted for risk, competitors may earn normal profits: the huge profits earned by the winner(s) may compensate for the huge losses made by all those who fail”.

Recognizing the limitations of this method, the OFT Draft Guidelines on the Assessment of Conduct stated:” *A profitability assessment [of excessive pricing] can require an element of judgment about the relevant rates of return, the valuation of assets, the appropriate cost of capital, and the appropriate cost and revenue allocation methods.”*

The use of “Profitability analysis” by competition authorities for assessing excessive prices is thus just as controversial as the price cost comparison and equally likely to lead to intense disagreements between the firm investigated and the competition authority or the Court.

Price comparisons is a third method employed by competition authorities to assess the existence of excessive prices. Three types of comparisons can be made: comparisons across geographic markets, comparisons of the price charged by the dominant firm across time, or comparisons of prices within the same market across competitors.

In 2006 the OECD discussed geographic comparisons in the context of market power ⁽⁵⁴⁾, stating : *“Using excessive prices as indicator of market power suffers from some of the same problems as profitability measurements. It will typically be difficult to determine a benchmark competitive price level against which the allegedly competitive prices could be measured. One commentator has noted, however, that in some cases it might be possible to find a reasonable benchmark by way of cross-sectional comparison, i.e., when the same product is sold in separate markets and one of the markets appears to be structurally competitive while the other is not. In this situation it might be possible to compare a competitive price with the price charged by a firm in a market where market characteristics suggest that a firm has substantial market power. Such cross-sectional comparison might produce useful evidence of market power where relevant markets tend to be local, such as, for example, retail markets. Simply comparing prices that two firms charge, or that the same firm charges in separate markets, however, will not produce reliable evidence of substantial market power. It will not always be obvious whether higher prices in one market can be attributed to the exercise of market power by a firm, or whether they might be caused by other factors as well such as higher costs.”*

⁵⁴ OECD (2006a:42).

It is precisely a concern of that type which led the European Court of Justice to overturn the EC decision in the United Brands case. The Court expressed doubts about the relevance of the price practiced in Ireland as a proper benchmark to assess whether United Brands had charged excessive prices in Denmark, the Netherlands, Belgium, Luxembourg and Germany where United Brands charged prices which were twice as high as in Ireland. United Brands had indeed argued that it was losing money in Ireland. The Court stated:

“262 The applicant also states that the prices charged on the relevant market did not allow it to make any profits during the last five years, except in 1975.

263 These assertions by the applicant are not supported by any accounting documents which prove the consolidated accounts of the UBC group or even by the consolidated accounts for the relevant market.

264 However unreliable the particulars supplied by UBC may be (and in particular the document mentioned previously which works out the "losses" on the Irish market in 1974 without any supporting evidence), the fact remains that it is for the Commission to prove that the applicant charged unfair prices.

265 UBC's retraction, which the Commission has not effectively refuted, establishes beyond doubt that the basis for the calculation adopted by the latter to prove that UBC's prices are excessive is open to criticism and on this particular point there is doubt which must benefit the applicant, especially as for nearly 20 years banana prices, in real terms, have not risen on the relevant market.

266 Although it is also true that the price of Chiquita bananas and those of its principal competitors is different, that difference is about 7%, a percentage which has not been challenged and which cannot automatically be regarded as excessive and consequently unfair.

267 In these circumstances it appears that the Commission has not adduced adequate legal proof of the facts and evaluations which formed the foundation of its finding that UBC had infringed Article 86 of the Treaty by directly and indirectly imposing unfair selling prices for bananas”.

It results from the previous analysis that the first two methods used by competition authorities to establish if a price is excessive (price–cost comparisons and profitability analysis) are both problematic from a conceptual standpoint and that all three techniques raise extremely complex problems of implementation.

This explains partly the fact that a number of economists have expressed great reservations about the enforcement of excessive pricing provisions in competition laws. Thus , for example, Evans and Padilla ⁽⁵⁵⁾ argue: *“Several firms have been found to abuse their dominant positions by charging excessive prices in cases brought by the European Commission and the competition authorities of several Member States. Those cases show that the assessment of excessive pricing is subject to substantial conceptual and practical difficulties, and that any policy that seeks to detect and prohibit excessive prices is likely to yield incorrect predictions in numerous instances”*. Roller ⁽⁵⁶⁾ states that it

⁵⁵ David S. Evans and A. Jorge Padilla “Excessive prices: using economics to define administrable legal rules”, CEMFI Working Paper No. 04,16 September 2004

⁵⁶ Lars-Hendrik Röller, ESMT; Exploitative Abuses; Business Brief No. BB-107-002; ESMT European School of Management and Technology, 2007.

is impossible to define operationally that a price is excessive compared to the competitive price and the OECD Background note written by Frank Maier Rigaud states that all the methods to assess excessive prices are fraught with difficulties.

Because the methodologies available to assess excessive prices do not have a strong conceptual basis and because they are so complex to implement, the risk of type I errors by competition authorities when assessing whether a price is excessive are quite important and, as we saw earlier, the cost of such errors can be very significant.

Furthermore because these methods are very complex to implement, the cost to the competition authorities of taking up excessive prices cases will itself be very high both in terms of investigatory resources and in terms of confrontation with the legal advisers of the party investigated. Indeed, because of the uncertainties regarding their methodological basis and because of the fact that the implementation of these methodologies requires many subjective judgments, each one of the assertions of the competition authorities will be seen as challengeable.

Finally the skills which are necessary to implement those methodologies are typically not those found in the staff of competition authorities. Whereas most of the activities of competition authorities require an expertise with respect to market mechanisms or the construction or the testing of predictive models (in the case of mergers), excessive abuse cases also require expertise in accounting, finance and the technology of the industry considered. Those skills are more easily found in specialized regulatory agencies which set up ex ante regulation in the markets they oversee and monitor the behaviour of industry participants on a permanent basis.

One counter argument which has been voiced by proponents of an active policy of fighting excessive prices by dominant firms is that some of the complexities referred to earlier are similar to those encountered when competition authorities deal with exclusionary practices such as, for example, predatory pricing. In such cases, the competition authority has to decide whether a price is too low compared to its long run average incremental costs. Thus these critics argue that there is nothing different from excessive price cases and the concerns about the ability of competition authorities to implement price-cost comparisons are exaggerated.

Cases of errors in the implementation of competition law to predatory pricing cases are not unknown. An example would be a recent decision by the French competition authority finding that the French public railway company (SNCF), the incumbent, had abused its dominant position by charging prices below its long run incremental cost on the market for freight transportation by whole trains while the decision explains that the new entrants have costs which are about 30% lower than the incumbent because by law the incumbent is forced to provide advantages to its (public sector) employees that the private competitors do not have to offer to their employees (in the private sector) (⁵⁷).

However, one of the many difference between excessive price cases and predatory pricing cases is that in predatory pricing cases, a misguided finding of violation (a type I error) will not have the same consequences as a misguided finding of an excessive price will. As we saw earlier, a type I error in an excessive price case can discourage investment and R&D expenditures both by the dominant firm

⁵⁷ Autorité de la concurrence, Décision n° 12-D-25 du 18 décembre 2012 relative à des pratiques mises en œuvre dans le secteur du transport ferroviaire de marchandises

and by potential entrants and reduce dynamic competition. A misguided finding by a competition authority that the price of a dominant firm is predatory will, if anything, improve the investment prospects of potential entrants (in the industry and because of the value of the decision as precedent in other markets as well) and lead to more dynamic competition on their part rather than less competition. So the social cost of errors in the case of predatory cases is lower than the social cost of errors in excessive pricing cases.

In the above-mentioned French case, the mistaken decision has, if anything, increased the incentives of the entrants to invest in this activity as their expected profit tended to be greater after the decision than before it.

The fact that the social cost of type I errors is significantly more important in excessive price cases than in other cases (for example predation cases) should lead us to be much more cautious about the excessive prices cases.

The complementary concept of “fairness” is again a concept alien to economic analysis. It is a legal construct which has been analyzed in some detail by Patrick Hubert and Marie Laure Combet (⁵⁸). The authors consider that this concept encompasses : “*different balancing tests between the legitimate interests at stake*” such as the consideration of proportionality, reasonableness and indispensability. They conclude : “*balancing tests are, by definition, relatively subjective and thus rather unclear from a practitioner’s viewpoint*”.

For example, in the Kanal 5 / TV IV AB, judgment (⁵⁹), the Court answered a set of prejudicial questions sent by a Swedish referring Court which had a case opposing STIM, an association of composers and music publishers which enjoys a de facto monopoly in Sweden for making available copyright protected music for television broadcasting and two broadcasters Kanal 5 and TV IV. One question put to the ECJ was, first, whether the fact that a copyright management organization, which enjoys a de facto monopoly in a Member State on the market for making music protected by copyright available for television broadcasts, applies with respect to the remuneration paid for that service, using a remuneration model according to which the amount of royalties is calculated on the basis of the revenue of companies broadcasting those works and the amount of music broadcast, constitutes an abuse of a dominant position prohibited by Article 82.

The ECJ, following the precedent of United Brands, assessed whether the royalties were reasonable in relation to the economic value of the service provided by STIM. In doing so, it struck a balance between the interests of composers of music protected by copyright and those of the television broadcasting companies whereas economists, if they had to consider both the consumer surplus and the producer surplus, would have chosen a total welfare criterion.

Thus the concept of “unfair” price also lacks a conceptual basis in economics.

Altogether, not only do the concepts of “excessive” or “unfair” price lack a sound economic basis, but their use to sanction pricing practices of dominant firms may cause serious economic harm as we saw in the analysis of the risks associated with wrongful decisions in this area.

⁵⁸ Patrick Hubert and Marie Laure Combet, Exploitative abuse: The end of the Paradox, *Concurrences* N° 1-2011 – pp. 44-51

⁵⁹ Case C-52/07,

Section IV The use of screens and prioritization criteria by competition authorities

A number of competition economists have proposed screens designed to limit the use of excessive price provisions in competition laws so as to limit the risk of type I errors by competition authorities. Although they differ somewhat they have lots of elements in common as one can see from the following table:

Conditions For intervention of CA	Motta /de Streel	Evans/ Padilla	Fletcher/Jardine	Roller	Paulis
High barriers to entry	High and non-transitory barriers to entry leading to a monopoly or near monopoly (superdominance)	Insurmountable legal barriers to entry	There should be no intervention against high prices if one expects such prices to stimulate successful new entry within a reasonable period.	Interventions only if there are significant entry barriers the market is unlikely to self-correct.	Presence of very high and long lasting barriers to entry and expansion.
Near monopoly which should not be the result of past investment or innovations but be due to past exclusionary practices	Near monopoly being due to current or past exclusive or special rights; or the super-dominance should be caused by un-condemned past exclusionary practices. However, analyzing whether the super-dominance was due to past exclusionary abuses should remain exceptional as it is extremely difficult to do.	The firm enjoys a (near) monopoly position in the market, which is not the result of past investments or innovations.	No intervention under Article 82 against the high prices of an innovative product within its patent period.	The dominant position is due to exclusionary abuse or government actions ("gap case").	
Market power which is due to IP	In most cases, IPR laws protect worthy		Any good or service protected by Intellectual		

rights should not be subjected to excessive price prohibitions	investments made by a firm, which in exchange enjoys a monopoly over the product or process for a certain length of time. Allowing excessive price action would undermine the very object of those IPR.		Property Rights should in principle not be subject to an excessive prices action. Even the antitrust authority thinks that the IPR is not justified at allowing an excessive price action is not appropriate given the high risk and cost of type I error		
No competent sector regulator	No sector regulator being competent to regulate the excessive prices.			There is no regulator or there is a regulatory failure	
Wide difference between the price and the average cost		Prices charged by the firm widely exceed its average total costs			
The high price may prevent the emergence of new goods and service in adjacent markets	<u>(we do not require that the excessive prices prevent the emergence of a new product or service. To us, this condition would be extremely difficult to implement and its restrictive role is not justified).</u>	There is a risk that the high price may prevent the emergence of new goods and services in adjacent markets			
Consideration of the pricing of the different elements of a portfolio of products in risky dynamic industries			In examining high prices for one element of a firm's product portfolio, it is important also to consider carefully the pricing of other elements of its portfolio, the competition the firm faces in those		

			other markets, and the impact on consumers' choices.		
The high price is not transmitted as a low price to other side of the market (case of multi-sided markets)			The high price is not transmitted as a low price to other side of the market (case of multi-sided markets)		
Consideration of the effect of ex post intervention on ex ante investment In the CA's analysis			Competition authorities should consider carefully the effect of any ex post intervention on ex ante investment incentives.		
No fines no civil damages may be imposed in cases of excessive prices			Firms should not face fines for excessive pricing, and should not face the risk of private damages actions in respect of such behaviour.		
Remedies should not be price regulation but remedies against the causes of the high price			Competition authorities should seek alternative remedies to price regulation, which are designed to address demand side problems and thereby to activate competition in the market.	No (structural) remedy is available (otherwise advocacy)	

These conditions aim to achieve five complementary goals: 1) to remind competition authorities that as long as markets can self-correct high prices and profit margins will be transitory phenomena which may not justify a competition intervention; 2) to promote the idea that profit maximization, even by a firm having a dominant position, as long as it is the result of competition on the merits, should not be considered as a violation of competition law 3) to ensure that competition authorities do not enforce excessive price provisions in dynamic industries where the risks of errors and the cost of errors are the most important ; 4) to steer competition authorities away from the analysis of the price level to the analysis of the causes of the competition failure and 5) to restrict the use of price regulation as a remedy to cases where there are no other options. Indeed, regulating the price

addresses the symptoms but does not address the underlying causes which provoked this symptom. If the price was “excessive” in the first place, it must mean that there was a competition failure on the market due to legal or technical barriers to entry or exclusionary practices on the part of the dominant firm or the inability of consumers to make competition work. It is only if this competition failure is remedied that the market will spontaneously generate “non-excessive prices”. Thus choosing price regulation as a remedy to an excessive price case implies that the competition authority will monitor and control the dominant firm on a continuous basis. One could add that if there are no structural remedies that can be implemented, it would be advisable for the competition authority to advocate the creation of a specialized regulator whose function would be to monitor the price charged by the dominant firm. Such a regulator would be in a better position to ensure the continuous oversight of the price of the dominant firm (⁶⁰).

Priority setting criteria

In most countries, competition authorities have to set their enforcement priorities in relation to the limited resources they have at their disposal. Across countries a great number of different criteria are used. For example, these criteria may be related to the likely cost of the case, the ability of the authority to close the case rapidly, the legal strength of the case, the impact of the case on consumer surplus or on efficiencies, the need to establish a legal precedent, the capacity to impose effective remedies, the reputational value of the case for the competition authority, the social or economic significance of the case, etc (⁶¹)....

Some of the criteria commonly used by competition authorities, suggest that “excessive price” cases should have a low priority for these competition authorities.

First and foremost, “excessive price” cases are very expensive in terms of the level of skills required and the amount of staff time to collect and treat the data. There will be also long and intensive legal challenges to the decisions that the authority makes to implement the methods used to investigate such cases (be it the benchmark prices chosen or the hypothesis done to compute the long run average incremental cost of an efficient firm). Thus taking on an “excessive price” case is a major commitment of the economic and legal resources for the authority (particularly if it is relatively small) and means that a number of other cases (such as cartel cases or exclusionary abuses of dominance) will have to be foregone.

⁶⁰ Se US contribution to the OECD debate on excessive prices : «Historically, when legislative bodies in the U.S. have chosen regulation over competition, they have established regulatory agencies or commissions staffed with employees that develop substantial expertise in the industry. This expertise includes a deep understanding of the regulated firm’s cost structure, which is important for determining the prices that encourage continued investment and provide maximum benefits to consumers. Although regulatory agencies face some of the same difficulties determining prices that antitrust authorities would face if they enforce rules prohibiting excessive pricing, regulators are in a better position to do this because of their specialized expertise”.

⁶¹ For example, in the United Kingdom, the CMA’s prioritisation principles are: (i) expected impact on consumer welfare and the expected additional economic impact on efficiency, productivity and the wider economy, (ii) strategic significance - in the sense that it ties in with its strategy and objectives and the possible impact on other lines of work is considered, (iii) likelihood of a successful outcome, (iv) resource implications, namely whether the human and financial resource requirements of the work are proportionate to the benefits it is likely to yield.¹⁴⁰

Second, excessive price cases are unlikely to contribute significantly to legal predictability for dominant firms or for their competitors. As we saw previously, each case will involve subjective judgments made by the competition authority (such as what is the limit between an excessive price and a “non-excessive” price in a particular case) which will not easily be adaptable in other cases. Furthermore, the search for the cost of an efficient firm as an element of comparison will entail extremely complex computations that other firms or their counsels are unlikely to be able to duplicate. Finally, as seen previously, the trade-offs taken into consideration for the establishment of the fairness criteria offer little legal transparency or predictability. For these reasons, it will be quite difficult for a dominant firm to predict whether or not it is acting within the law with respect to excessive prices. Excessive price decisions therefore have little precedential value.

Third, there is a high risk for the competition authority of error which will actually reduce efficiency in the long run. As we saw, the gains in consumer surplus in the short run brought about by a lowering of the price may be more than compensated by the efficiency effects of the disincentives of firms due to the fear of regulation of their prices or their profit margins. Competition authorities can limit this risk by limiting their intervention following the economic screens suggested above which will make their interventions against high prices exceptional but that is akin to giving a low priority to excessive price cases.

Section V) Alternative tools at the disposal of competition authorities to deal with excessive pricing

There is one prioritization criteria, however, which is likely to push competition authorities to take up excessive pricing cases. It is the desire to promote the reputation of the authority. Indeed it is common knowledge that competition authorities are under constant pressure in many countries by both politicians and consumers to “do something” against high prices. Being reluctant to take up excessive price cases and to go after dominant firms or monopolists charging high prices is unlikely to make competition authorities popular (or understood) and competition authorities may be tempted to give in to this pressure (even if they have misgivings about their chance of success) in order to get necessary support for their other enforcement activities.

However, there are alternative ways for competition authorities to be at the forefront of the fight against excessive prices.

What economic analysis suggests is not that competition authorities should be disengaged from trying to alleviate the problem of high prices charged by monopolists or firms with dominant positions but that intervening by using an enforcement tool such as the pursuit of violations for excessive prices or imposing remedies in the form of price regulations are dangerous ways to go about it because these tools are clumsy, costly and risk failing or doing more harm than good to economic efficiency.

However competition authorities usually have a variety of tools at their disposal. Enforcement of the provisions of the laws is one tool. Competition authorities often also have other tools which do not require them to look for violations of the law but allow them to “advocate for competition” or to “impose conditions to improve the functioning of markets” following a market investigation. The

provision of “advisory opinions” or the “undertaking of a market investigation” are usually referred to as the “non-enforcement tools” of competition authorities.

Thus, one of the ways through which competition authorities can deal with concerns regarding high prices is by investigating markets where there is a dominant position and high prices to determine the source of the competition failure in those sectors and either adopt remedies (if they have the power to do so) or advocate for relevant remedies.

Market investigations

If they have market investigation powers, following a thorough examination of the functioning of the market and of the reasons for the competition failure leading to high prices, competition authorities may be able to impose wide ranging remedies (such as the breaking up of the dominant firm into several competing entities on the supply side or measures to improve the information of consumers on the demand side) to eliminate the source of the market failure.

In the United Kingdom, the Competition and Markets Authority (CMA) can investigate and remedy problems in markets which do not appear to be working well. The CMA first carries out a Market Study, after which it can either make recommendations to the industry or to government (e.g. for regulatory action), or it can decide to carry out a full Market Investigation. In that case, the CMA is required to decide whether there is an Adverse Effect on Competition ('AEC') arising out of an identifiable feature or features of the market and it can impose remedies on the participants in the market.

For example, In April 2012, the Competition Commission, which was a predecessor of the Competition and Markets Authority (CMA), started a market investigation into private health care. In its provisional findings report, published in November 2015, the CMA found an adverse effect on competition due to the fact that HCA (Hospital Corporation of America) was facing weak competitive constraints which led to its charging higher prices than would be expected in a well-functioning market to private medical insurers and to patients who self-pay in central London. Roger Whitcomb, Chairman of the Private Healthcare Market Remittal Group, stated: *“(we have)”evidence of probable entry into the central London market, which we consider will provide a competitive constraint on HCA in this market within the next 4-6 years. This means that benefits to consumers of a divestment would be short-lived and not large enough to outweigh the cost of divestment, and we have found no other remedy which is both effective and proportionate”*.

In Mexico ⁽⁶²⁾, market investigation powers were given to the competition authorities (COFEC and IFT) in 2013. They are based on Article 94 of the Federal Law on Economic Competition and are conducted by the investigating authorities of the Competition Commissions, that can use all the powers granted by the Federal Law on Economic Competition to conduct enforcement investigations, with the objective of determining the existence of barriers to competition or essential facilities that may generate anticompetitive effects. Following the market investigation, they can issue: *“(i) recommendations to the Public Authorities so that, in the case of legal provisions impeding or distorting free competition in the market, within its competence and in accordance with the procedures provided by law they determine what is appropriate; (ii) issue an order to the*

⁶² See Carlos Mena-Labarthe, “Market Investigations as a New Tool for Competition Agencies: The Mexican Experience”, CPI Antitrust Chronicle, March 2016

corresponding Economic Agent to remove a barrier that unduly affects the process of free competition; (iii) determine the existence of essential facilities and issue guidelines to regulate, as applicable, the access modes, prices or rates, technical and quality conditions, as well as an implementation schedule; or (iv) order the divestiture of assets, rights, partnership interests or shares of the Economic Agent involved to eliminate the anticompetitive effects in the needed proportions, when other remedies are not sufficient to address the identified competition issues”.

The success of the U.K. market investigations system has provided the inspiration for a nearly similar regime in Iceland. This regime is based on Art. 16 of the Icelandic Competition Act, which authorizes the Competition Authority to take measures against circumstances or conducts that prevent, limit or affect competition in the detriment of the public interest, even in cases when the provisions of the Competition Act have not been violated.

Market studies for advocacy purposes

When competition authorities do not have the powers to undertake market investigations and to impose remedies, they may nevertheless undertake market studies and use them as the basis on which they advocate with regulatory authorities, government officials and the public opinion at large for the appropriate measures to be taken to improve competition in the market studied

As defined by the Market Studies Good Practice Handbook prepared by the International Competition Network (⁶³), market studies are research projects aimed at gaining an in-depth understanding of how sectors, markets, or market practices are working. They are conducted primarily in relation to concerns about the functioning of markets arising from one or more of the following: (i) firm behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector intervention in markets; and (vi) other factors which may give rise to consumer detriment. The output of a market study is a report containing findings based on the research, which may conclude that the market is working satisfactorily or set out the problems found.

Market studies can be used to understand why prices seem to be high on some markets compared to other markets. For example, the Australian Competition and Consumer Commission recently started producing ‘micro’ market studies examining petrol price drivers in regional markets. Starting with Darwin (Northern Territory) and Launceston (Tasmania), the regional studies aim to shine a light on why petrol prices are higher in some regional locations.

Market studies can also be used to advocate for regulatory or legislative changes in order to increase competition. For example, In 2007, the Canadian Competition Bureau, alerted by the fact that retail prices of generic drugs in Canada were high in relation to those of other developed countries undertook a study of generic drug pricing to look into the possible causes for these high prices (⁶⁴). It examined the sector starting from the acquisition of ingredients for manufacturing generics and proceeding through their production, approval process, distribution and wholesaling, dispensing and reimbursement or payment by public and private insurance plans, and persons paying out of pocket. To perform the study, the Canadian Competition Bureau acquired and analysed data, retained outside experts and conducted interviews with participants and interested parties at all levels of the

⁶³ Market Studies Good Practice Handbook Prepared by ICN ADVOCACY WORKING GROUP, April 2012

⁶⁴ The study is available on the Competition Bureau’s website at www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02495e.html.

sector. Before finalization, a draft of the report was circulated to over 100 sector participants and interested parties for fact-checking purposes. The final report, following completion of Phase 1 of the study, found that more than ten generic drug manufacturers were competing for shelf space in Canadian pharmacies by offering rebates of up to 40 percent of the retail price of generics. However, in many provinces, the benefits of this competition were not passed on to provincial drug plans, consumers or insurance companies. A key-contributing factor to this finding was the design of public drug plans which gives pharmacies limited incentive to pass rebates on to consumers. The second phase of the project made concrete recommendations to regulators on ways to design provincial drug programs that would allow passing the benefits of competition among generic manufacturers on to consumers.

In the case of Israel, The Director General of the Israeli Antitrust Authority was successful in advocating a report introducing debit cards into the Israeli credit card market, so as to substantially reduce the costs of merchants and raise the efficiency of payment systems in Israel. The IAA's market study on this subject was, for the most part, adopted by the Bank of Israel and the Israeli Cabinet, and reforms were planned.

Market studies can also be used to propose structural changes which will improve the functioning of the market. For example, in June 2007 the Italian Competition Authority concluded an extensive sector enquiry into food product distribution in order to ascertain the effect on prices of the structure and organization of the sector's distribution chain. According to the report of the Italian competition Authority to the Roundtable of the OECD competition Committee on market studies, *"the enquiry identified several inefficiencies in the distribution process, such as a very fragmented structure at the production level, the existence of several "micro" markets, a long distribution chain, elements that, although not immediately connected to specific anticompetitive behaviour, determined high prices to final consumers. The Authority suggested improvements in the organization of the distribution chain (such as a reform in the organization of wholesale markets) that might eliminate some of the inefficiencies"*.

Finally market studies can reveal the possible existence of competition law violations. After joining the EU, in 2004 Lithuania experienced quite a sharp rise of food prices that occurred again during the summer of 2007 (⁶⁵). There was a lot of concern expressed about the repercussions of these food prices on consumers, and especially on the low income households, and the Government ordered the concerned ministries to determine what factors caused price changes in the food sector. Simultaneously, the Competition Council started a study to *"establish if the price changes in various levels of supply chain were more likely to be explained by the changes in economic environment, such as increased costs, lower reserves or supply (e.g. due to increased exports) or by anticompetitive behaviour of undertakings in the markets"*. The analysis revealed parallelism in the pricing of certain milk products as well as the fact that the relevant undertakings were regularly and frequently exchanging confidential and detailed information about their sales through their trade association. The Competition Council then initiated an investigation into possible collusive behaviour in the milk market.

Finally, in rare cases, where the market investigation finds that a lack of competition conducive to the high prices cannot be corrected by any remedy other than price regulation, the competition

⁶⁵ See the Lithuanian contribution to the 2011 OECD contribution to the roundtable on excessive prices

authority should either defer to the established regulator or publicly call for the establishment of such a regulator. There are some advantages of entrusting price regulation to a sectoral regulator rather than to the competition authority (⁶⁶). First, even when regulators' decisions are subject to judicial review, their decisions are typically accorded greater deference than rulings by competition authorities. This difference in treatment could come from the fact that competition agencies are charged with enforcing a law of general application, as opposed to drawing up and enforcing industry or even firm specific rules, presumably based on information and expertise extending beyond what a Court could appreciate and apply. Second, with their focus on regulating entry and lines of business, setting prices, ensuring appropriate levels of product quality, and policing universal service obligations, regulators clearly require technological and accounting expertise. Competition agencies would have relatively fewer resources in terms of accounting expertise since, except for predatory pricing cases, they are not normally involved in judging the appropriateness of particular prices. Third, regulators may also have the power to specify accounting systems to ensure they have relevant, understandable information, especially if they wish to engage in comparison, or "yardstick" regulation, whereas competition authorities typically do not have a power to specify accounting systems for the dominant firms they investigate. Fourth, because they have often a wider set of objectives, sectoral regulators will have access to a greater variety of information on the market than competition authorities which are not specialized. Fifth, sectoral regulators are in a better position to undertake the continuous close monitoring required in the case of price regulation. Fifth, because regulators define the rules of the game *ex ante* and continuously, dominant firms and their competitors will benefit from more legal security and previsibility than if their price regulation is the result of an *ex-post*, discrete competition law enforcement intervention.

Conclusion

There is a consensus on the fact that a low quantity high price equilibrium on a market resulting from a profit maximization by a dominant firm or a monopoly entails a lower level of consumer surplus than a purely competitive equilibrium. There is also a consensus that the goal of competition law is to protect consumer surplus. In a significant number of countries inspired by EU competition law, competition authorities can sanction "abuses of dominance" and one example of abuse of dominance mentioned in a number of national laws is "unfair" or "excessive" pricing. In many of these jurisdictions there are a number of instances of decisions which have been taken by competition authorities and/or Courts to sanction "excessive" or "unfair" prices due to a dominant position even if it is also clear that most competition authorities will only exceptionally enforce this type of provision, preferring to focus on exclusionary practices.

The use of competition law provisions on abuse of dominance to sanction dominant firms which practice "excessive" and "unfair" prices remains a highly controversial tool.

Indeed, first of all, the concepts of "excessive" or "unfair" prices are not grounded in economic analysis. From the economic standpoint price levels reflect the underlying conditions of technology and competition among firms on the supply side and the characteristics of demand. Therefore, high prices are a symptom rather than the cause of a competition failure and the issue that competition authorities should focus on and remedy is the cause or causes of the competition failure.

⁶⁶ This discussion is based on the background paper of the Secretariat prepared for the OECD Competition Committee Roundtable on the Relationship between Regulators and Competition Authorities, 1998

Second, decisions on excessive or unfair prices necessarily require elements of subjectivity not only in the interpretation of the concepts of “excessive” or “unfair” prices but also when comparing the price cost margin or the profitability of the dominant firms to what would be the price cost margin or profitability of an efficient firm in competitive conditions. Such comparisons can be misleading, among other reasons, because accounting practices do not give an accurate description of economic costs.

Third, making profit maximization by a dominant firm a violation of competition law when profit maximization is the driver of competition runs the risk of distorting the incentives of competitors on markets. Because they put an implicit or explicit cap on the price that can be charged by the dominant firm (and because they reduce the profitability prospects of potential entrants) decisions of competition authorities sanctioning “excessive” or “unfair” prices can decrease the incentives to invest or to innovate for both the dominant firms and for their competitors or potential entrants, leading to an overall reduced efficiency in spite of the direct gains of consumers. This means that competition authorities should assess the indirect effect of their decisions on “unfair” or “excessive” prices, which is a task particularly daunting.

Fourth, even if not they do not reduce efficiency, competition authorities decisions on “excessive” or “unfair” prices, because of the complexity of the analysis that they require, will generally not provide legal predictability to dominant firms which want to stay within the limits of the law.

Finally, competition authorities should try to remedy the causes of high prices rather than focus on the prices themselves. If they regulate prices they are bound to have to reconsider their (complex and partly subjective) analysis whenever cost or demand conditions change.

In the rare cases where no structural or behavioural remedy is available and price control is the only possible remedy, competition authorities should advocate the creation of a sectoral regulator or the extension of the powers of an existing regulator. In a number of countries competition authorities and sectoral regulators must consult one other on subjects of common interest. Their consultations with the other institution or institutions, are made public and although they are not binding they must be taken into consideration by the requesting institutions. These mechanisms ensure that the competition authority’s voice will be heard by the sectoral regulator.

When competition authorities have discretion with respect to the cases they pursue, there can be several reasons why taking up cases of abuse of dominant position through excessive or unfair price should be given a low priority. Indeed, they entail serious risks of costly errors for the competition authority, they are very resource intensive and require, among other things, certain skills which the staff of the competition commission may not have, and competition authorities have alternative tools to deal with markets which are malfunctioning.

If the intervention of competition authorities in excessive or unfair prices cases cannot be ruled out in countries where the law explicitly provide for the possibility of such interventions, competition authorities should exercise self-restraint by using this tool only in the limited number of cases where the dominant firm’s position has not been acquired through the granting of an intellectual property right or through competition on the merits but results from past legal protection or past anticompetitive practices, where the dominant firm has either a monopoly or a super-dominant position, where the dominant firm is protected by insurmountable barriers to entry, where the

dominant firm is not and cannot be regulated by a sectoral regulator, where the dominant firm charges prices or exhibits price–cost margins which are much higher than in the benchmark industries and where no structural remedy to reinvigorate competition is conceivable.

Rather than enforcing provisions against excessive or unfair prices which are blunt and unwieldy, Competition authorities can be (and can be seen to be) at the forefront of the fight against high prices due to competition failures either if they have powers to undertake market investigations or if they have the power to advocate on the basis of market studies. Those two forms of action allow the competition authority to concentrate on the causes of the market failure rather than on prices and to propose a wider range of remedies (for example, remedies directed at making consumers more active agents of competition) than is generally the case with enforcement decisions.

Paris September 15 2016

A handwritten signature in black ink, appearing to be 'J. Henry', written over a horizontal line.