A Comparative Analysis of the Control of Excessive Pricing by Competition Authorities in Europe

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Exploitative abuses remain one of the most controversial practices in competition law. There is a significant effort in the literature to determine the exceptional circumstances under which there should be antitrust action against excessive prices. In the United States courts have clearly ruled that excessive prices should not be considered an infringement on Section 2 of the Sherman Act, at least for a short period of time. In the European Union, there had been rare cases where the Commission and the European Union Courts had sanctioned excessive prices within article 102 of the Treaty on the Functioning of the European Union. However, recently, there has been several cases of control of excessive pricing by competition authorities in Europe. This Article analyzes and compares this recent case law in Italy, the United Kingdom and the EU on excessive pricing. The aim is to identify the commonalities and patterns in the control of excessive pricing by competition authorities and courts. The Article seeks to establish that recent developments reveal a weakness of the ex ante control by regulatory authorities resulting in antitrust action.

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I. INTRODUCTION

While forms of exclusionary conduct are prohibited almost globally, exploitative abuses remain one of the most controversial practices in antitrust law. The prohibition of exclusionary conduct is easily understandable: because it is harmful at least to the dominant firm's competitors, it is regarded as harmful to competition and eventually to consumers. The debate on the prohibition of exploitative behaviour stems from the question of whether the conduct is harmful to competition in the market or to competitors. Exploitative prices may not *prima facie* be considered harmful to competition. In fact, exploitative pricing may even be beneficial for the competitor, allowing it to attract more buyers and presumably generating a positive impact on competition. Exploitative pricing is also believed to encourage new entry into the market under certain circumstances, as potential competitors may see high prices as an opportunity for a profitable new business. Finally, it is argued both in the literature and in some case law that exploitative pricing should be allowed

because it creates incentive for the dominant firm to invest and innovate. Nevertheless, the literature and the case law on excessive pricing are divided. While a majority of scholars argue that excessive pricing should not be prohibited at all, others try to determine the exceptional conditions under which it may or should be prohibited. The most significant problem in sanctioning the conduct comes from the difficulty of measuring and evaluating the excessiveness of the price. Yet exploitative prices are prohibited in certain jurisdictions. The United States of America (US) is not one of them. In past and recent decisions, the US Supreme Court has ruled that excessive pricing is not necessarily an antitrust violation and that monopoly pricing should be in fact be allowed, at least for a certain period of time, in order to incentivize investment and innovation. The Commission and the EU Courts have also established or at least tried to establish tests that would allow for the assessment of the excessiveness of prices. This effort was taken further in 2017 with the Opinion of Advocate General (AG) Wahl[1] and the preliminary ruling of the ECJ[2] on *AKKA/LAA*.

In the past two years, a number of excessive pricing cases have also been enforced by national competition authorities, notably in the UK and Italy. Interestingly, these cases all concerned the pharmaceutical sector. The European Union (EU) Commission, certain Member States of the have chosen thus far to prohibit excessive pricing as a breach of antitrust rules. Nevertheless, the question of to what extent and how antitrust enforcement should sanction excessive pricing remains crucial. As will be argued in this Article, prohibiting excessive pricing is not dubitable only because it may kill incentives to innovate or because markets may have a propensity to self-correct. This Article therefore examines the commonalities and the differences in the approaches of several antitrust authorities. To this end, the existing case law on excessive pricing in competition law will be examined with a comparative approach in order to identify the sound and reasonable analyses that have been used by courts and authorities in different jurisdictions.

The US case law on excessive pricing will then be discussed to enrich the comparison with European examples and to portray the different dimensions of the debate. The European approaches to excessive pricing

1. *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* (‘*AKKA/LAA*’), Case C-177/16 (Opinion of the Advocate General Wahl:2017).

2. *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* (‘*AKKA/LAA*’), Case C-177/16 (Judgement of the European Court of Justice:2017).

will be discussed in three Parts. First, a brief overview of the early case law of the European Union Court of Justice (ECJ) will be provided. Second, the recent ruling of the ECJ on excessive pricing will be examined in detail in order to establish whether there is a new or a different approach. The decisions of the Italian and UK authorities in the pharmaceutical sector will then be analyzed. In a final Part, the convergences and divergences of the analysis applied by the Courts and authorities will be identified. It is argued in this Article that, as revealed by the recent case law, the control of excessive pricing by competition authorities is directly linked to a weakness or failure of sectoral regulatory rules and ex ante control exercised by competition authorities.

II. Excessive Pricing as a Form of Exploitative Abuse

Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of dominant position. Although this prohibition may appear very similar to the prohibition of monopolization under Sherman Act Section 2, significant differences may be found with a closer look at the enforcement of these articles by competition authorities and courts. One of the key differences is the prohibition of what is known as exploitative abuses. As will be explained in detail in following Parts, US antitrust law only prohibits exclusionary conduct whereas in EU competition law exploitative abuses which may not have exclusionary effects are also prohibited. Exploitative abuses are practices that are not necessarily or directly harmful to the competitors of the dominant firm but are harmful to consumer welfare or possibly to the total welfare of the market. They are of course constituted by conducts where the firm in question enjoys significant market power. Exploitative abuses may technically be seen in the form of different conducts such as unfair discrimination between customers or reduction of quality or innovation, but practically exploitative abuses are associated with excessive pricing. This is mostly due to the fact that most EU case-law on exploitative abuses relates to excessive pricing.

Excessive prices may be defined as prices that are appreciably higher than the competitive price. As article 102 TFEU prohibits "directly or indirectly imposing unfair purchase or selling prices," EU courts have in certain cases considered excessive prices to be an infringement on the article. Excessive prices are equal or close to what in economic theory would be considered monopoly prices. Monopoly prices are prima facie not desirable as they may not generate efficient markets. However, they would not necessarily have exclusionary effects as high prices could

normally incite customers to switch to competitors and competing products. If this scenario occurs, excessive prices may be beneficial for competitors and perhaps for competition in the market, in so far as it may strengthen competitors' market position or attract new entry into the market. Only if the firm charging excessive prices is a true monopoly would there be no competitors to turn to, and the customers and consumers, therefore not having access to alternative products, would be bound to purchase at the excessive price level. Which in the end result in a loss in consumer welfare as consumers would be prevented from allocating their resources efficiently.

It may be argued therefore that sanctioning excessive prices is driven by a concern for consumer welfare. As it does not have exclusionary effects or even adverse effect on competition between competitors, excessive prices become an issue when there is an undeniable decrease in consumer welfare. If this effect is accompanied by other structural problems related to the market it may also become harmful to actual competition or potential competition. However, as the negative effects of excessive pricing are uncertain or limited, prohibiting it requires careful consideration. Furthermore, as will be explained in the next Part, measuring and proving the excessiveness of prices is not an easy task. Economic tools should therefore be carefully deployed. Competition authorities and courts would also have to be prudent in terms of effects in the market: conditions under which excessive pricing should be prohibited have to be clearly defined in order not to dismiss possible positive effects of high prices.

III. THEORETICAL FRAMEWORK OF EXCESSIVE PRICING

The first tasks when delving into exploitative pricing are to define the concept and to frame the circumstances under which excessive pricing should be considered anticompetitive. However, defining excessive pricing is not an easy task, as there is no consensus amongst scholars and implementing institutions about what constitutes excessive pricing. As mentioned earlier, some tests and criteria have been established by the ECJ in its case law. The methods of assessment and standards of measurement vary, however, according to the sector and the structure of the market. The relevant market where excessive pricing has occurred is of crucial importance. Implementers must also consider criteria such as barriers to entry, the propensity for self-correction in the market, structural remedies and regulatory failure.

This Part will present a review of the conditions and tests that have been advanced in that literature. As will be seen, these arguments are marked by commonalities rather than disagreements, though there are important nuances in the tests that are presented.

A. Arguments Against Prohibiting Excessive Pricing Under Competition Law

Perhaps the strongest argument against prohibiting excessive pricing through antitrust enforcement is that doing so will reduce the incentives to invest and innovate.[3] Undertakings that innovate or make new investments aim to recuperate the cost of their operations in the medium run. They therefore need to increase their prices for a certain period of time to fund their investments. This simple logic is also the reasoning behind the legal monopoly allowed for patent holders. If undertakings know in advance that they will run the risk of a sanction under antitrust law if they increase prices, they may be reluctant to innovate and invest.

A similar argument may hold true for potential new entrants. If prices are high, especially in a nonregulated market, they may signify that the market is profitable.[4] Potential entrants may be drawn to a market when they look at the profits made by actual competitors. If high profits are cut down by antitrust enforcement, the market will lose its appeal. Therefore, competition law may halt new entry into the market if excessive prices are redundantly sanctioned.

Another important economic argument against the prohibition of excessive prices is the difficulty of determining the excessiveness of the price. Economic analyses of price always entail a cost analysis. However, in terms of excessive prices, it is difficult to determine which cost should be considered. As Motta and Streel argue, unlike the cost-price analysis used for predatory pricing, "neither the doctrine nor the case law offer much guidance on the relevant cost measures to be analysed"[5] for excessive prices. In predatory pricing, it is generally the average variable cost that is taken into account. However, it is unclear to what extent authorities should consider marginal costs, fixed costs, investment costs

3. Massimo Motta & Alexandre de Streel, *Excessive Pricing in Competition Law: Never Say Never?* in Konkurrensverket Swedish Competition Authority *Pros and Cons of High Prices* Lenanders Grafiska 26779 Kalmar 4-46 (2007); Ariel Ezrachi & David Gilo, *Are excessive prices really self-correcting?*, Journal of Competition Law and Economics, 249-268 (2008).

4. Motta & de Streel, *id.*, 20.

5. Motta & de Streel, *id.*, 35.

and/or capital costs.[6] These different types of costs may all affect the profitability of the undertaking, which is a vital element of monopoly pricing.

Furthermore, even if there were consensus on the determinant cost for the analysis, there would still be significant difficulty in establishing the point after which the price would be considered excessive. In other words, the question would remain of how much above the relevant cost prices would have to be in order to qualify as abusively excessive. The analysis could hence lead to both Type I (false conviction) and Type II (false acquittal) errors. False convictions would further harm incentives to invest and innovate, and false acquittals would be detrimental for consumers, who would have to pay higher prices.[7]

Also, it should be underlined that refraining from interfering with excessive prices is justified by the market's propensity to self-regulate. Although this argument is at times criticized in the literature,[8] authors usually opine that if prices are high, the market forces will regulate them without interference by authorities. An important role may be played by the demand side in the market, as buyers will switch to competing goods or alternatives if the prices charged by a dominant firm are too high. Furthermore, if there is competition law enforcement against high prices, new entrants will be deterred, as they will expect lower return after entry.[9] If potential competition is deterred and there is no entry into the market, the market becomes less likely to self-correct.

Finally, it is possible to make a purely legal argument against interfering with excessive prices. There is consensus in the literature and the case law on the necessity of enforcing competition law in excessive pricing cases under exceptional circumstances. However, as will be discussed below, determining these circumstances is a difficult task. Furthermore, antitrust authorities are not price regulators. Excessive pricing occurs mostly in regulated markets where a sectoral authority exercises ex ante control of prices. After the ex ante control, undertakings desire to safely assume that their pricing strategy will no longer be subject to further sanctions. The possibility of ex post control through antitrust

6. Mark Williams in Konkurrensverket Swedish Competition Authority *Pros and Cons of High Prices* Lenanders Grafiska 26779 Kalmar 128-154 (2007).

7. Pınar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (2015).

8. Ariel Ezrachi & David Gilo, *Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation*, Antitrust Law Journal, 873-897 (2010).

9. Lars-Hendrick Röller, *Exploitative Abuses*, ESMT Business Brief (August 12, 2019, 4.30 PM), https://d-nb.info/1012903311/34.

action creates a problem for legal certainty. When this matter is combined with the ambiguity of the conditions under which excessive pricing will be penalized ex post, undertakings will fear that they will be exposed to too many risks when determining their pricing strategy. The lack of legal certainty may then lead to a reluctance to invest and innovate.

B. *Conditions for Prohibiting Excessive Pricing Under Competition Law*

There appears to be a quest to establish the conditions under which excessive prices should be sanctioned by antitrust enforcement. This effort is understandable in light of the consensus in the doctrine that excessive pricing should be sanctioned under exceptional circumstances. This Part will look at the conditions that have been proposed by various economic and legal authors as a framework for antitrust action against excessive pricing. The conditions determine factors that should be cumulatively taken into account in the presence of excessively high prices in the market.

1. Existence of High and Non-Transitory Barriers to Entry

High and non-transitory barriers to entry is generally seen as the most important condition for prohibiting excessive pricing. In a market in which barriers to entry are high, market forces such as pressure from the demand side or potential competition will have little effect, allowing the dominant position firm to maintain high prices for a longer period of time. Moreover, high barriers to entry strengthen the market force of the undertaking in the dominant position.

The OECD competition committee emphasizes the significance of high barriers and non-transitory barriers to entry and state the "existence of high and non-transitory structural entry barriers are probably considered the most important single requirement for conducting an excessive price case."[10] As a matter of fact, Paulis takes a very restrictive approach in terms of sanctioning excessive prices by arguing that antitrust intervention would only be justified if there are high and non-transitory barriers to entry.[11] Other authors also underline this requirement, underlining that excessive prices may attract entry into the market in the absence of high barriers to entry, rendering therefore antitrust action unnecessary and

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10. *Policy Roundtables: Excessive Prices*, OECD (August 12, 2018, 4.30), https://www.oecd.org/competition/abuse/49604207.pdf.

11. Emil Paulis, *Article 82 EC and Exploitative Conduct*, in Claus-Dieter Ehlermann & Mel Marquis (eds.), *European Competition Law Annual: 2007—A Reformed Approach to Article 82 EC*, Hart Publishing 515-524 (2008).

harmful.[12] An overview of the literature there shows that competition authorities are expected to demonstrate the existence of high and non-transitory barriers to entry to enforce antitrust rules.

2. Monopoly or Near Monopoly Position of the Dominant Undertaking

In the presence of high and transitory barriers to entry, not only does the market's propensity to self-regulate diminishes, but the dominant position undertaking's market force is also enforced. In addition, in privatized sectors, undertakings may enjoy a monopoly or quasi-monopoly position that was not necessarily earned through competition on the merits. Some authors argue that such a monopoly or quasi-monopoly position, especially one that is obtained through prior exclusive rights, should be another condition for sanctioning excessive pricing.

Evans and Padilla for instance argue that the undertaking should have a "near monopoly" situation in the market if excessive prices are to be prohibited.[13] The main explanation for this criterion is that these "near monopoly" firms are not trying to recuperate past innovation or investment costs. Motta and de Streel following a similar line of argument also argue that the dominant undertaking should hold a quasi-monopoly or monopoly position that "has been achieved through special and exclusive rights or to un-condemned past exclusionary anticompetitive practices rather than market competition."[14] Such a super-dominance criterion has been used as a condition by the South African Competition Tribunal in the Mittal litigation, which held that the dominant undertaking's market share "should approximate 100%."[15]

3. Failure of Sectoral Rules and Regulatory Authorities

In regulated sectors, pricing may be subject to strict rules and scrutiny. Regulatory authorities usually have the competence an exercise an ex ante control over prices charged in the market. These authorities are expected to have insight into the conditions and needs of the market. They are thus

12. Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 82 EC*, (2006); Massimo Motta & Alexander de Streel, *Excessive Pricing and Price Squeeze under EU Law*, in Claus-Dieter EHLERMANN and Isabela Atanasiu (eds), *What is an abuse of a dominant position?,* Hart Publishing, 91-125 (2006).

13. David S. Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, Journal of Competition Law and Economics, 97-122 (2005).

14. Motta & de Streel, *supra* note 12, 26-29.

15. *Harmony Gold Mining Co. v. Mittal Steel S. Afr. Ltd.,* 13/CR/Feb04 (2007) (S. Afr. Competition Trib.).

believed to have "superior regulatory know-how"[16] in comparison to the competition authorities. For these reasons, some authors have also claimed that to justify antitrust action in case of excessive pricing, there should be no regulatory authority present in the market[17] or there should be a regulatory failure.[18] Otherwise, the market would risk overregulation. Furthermore, prices will have been regulated ex post by the competition authority, which may not be the enforcer that is best equipped to do so.

It would appear therefore that competition law scholars have made significant efforts to establish conditions under which excessive prices should be sanctioned. This effort alone demonstrates that excessive pricing is not perceived as a per se violation in antitrust law. If most or all these conditions are applied excessive pricing would be sanctioned very rarely which has thus far been the case in Europe. However, in the US even when such conditions are met, excessive pricing does not constitute an infringement under antitrust law.

IV. EXCESSIVE PRICING IN US CASE LAW

The US approach to exploitative conduct generally and excessive pricing specifically is worth a brief examination. Although it stands in complete contrast to the European approaches that will be further explained, the grounds on which the American authorities refuse to control excessive pricing are important to note for a richer comparison. This comparison will also allow for a deeper understanding of this Article's counter-arguments.

A. The US Supreme Court's Trinko Ruling[19]

The most recent and perhaps the most cited US case on excessive pricing is the *Trinko* case. The case was a consumer class action wherein customers of AT&T alleged that Verizon, the incumbent monopoly service provider, had not provided its competitors access to systems and support operations. In other words, Trinko claimed that the monopoly firm had refused to supply an essential facility. On this matter, the US Supreme Court ruled that "insufficient assistance in the provision of service to rivals is not a recognized antitrust claim."[20] According to the Court, the services

16. Röller, *supra* note 9, 11.
17. Motta & de Streel, *supra* note12, 26-29.
18. Röller, *supra* note9, 11.
19. *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LLP ('Trinko')*, 540 (2004) (U.S. 398).
20. *Trinko*, paragraph 411.

requested by the competitors were not essential and therefore did not fall under the essential facilities doctrine. Before it reached this conclusion on the essentiality of the facility, the Court re-stated that holding monopoly power and acquiring and establishing infrastructure in order to strengthen an economic position are not unlawful under Sherman Act Section 2.

Furthermore, the Court stated that "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."[21] This ruling is highly relevant for a comparative analysis of exploitative pricing. The Supreme Court clearly indicated in the *Trinko* decision that charging excessive prices is not necessarily a violation of antitrust law. The justification for such an approach lies in the mere fact that there is or may be a correlation between incentive to innovate (and therefore trigger economic growth) and monopoly pricing. The basic logic behind this argument is that innovation generally entails some investment cost that the firm will be willing to expend if it believes that it will be able to recuperate the cost in the future. Monopoly pricing, if allowed, creates an incentive to invest, as there will be no antitrust intervention in the recoupment period. Nevertheless, the Court stated that such a pricing strategy should be permissible for a "short period" of time only. What the *Trinko* case does not elaborate on is how this "short period" of time shall be defined and limited.

As much as the case proves the Supreme Court's willingness to allow monopoly pricing at least for a certain period of time to protect investment incentives, it also shows its unwillingness to use antitrust regulation as a regulatory tool.[22] The Court discussed at length the balance that must be struck in a regulated market between sector-specific regulation and antitrust regulation. It concluded that antitrust regulation should be used only within the sphere that is left to it from the application of sector-specific rules. It can perhaps be said that this is a reflection of the *lex specialis* principle, whereby special regulation must be applied before the general rule. The Supreme Court furthermore stated that where sector-specific regulatory rules may be applied, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional

21. *Trinko*, paragraph 407.

22. James E. Scheuermann & William D. Semins, *A New Method For Regulatory Antitrust Analysis? Verizon Communication Inc. v. Trinko*, Richmond Journal of Law and Technology, 1-27 (2005).

scrutiny."[23] Hence the Court appears to suggest that even where antitrust rules may be enforced, the authorities should weigh the benefits of enforcement against its disadvantages. Moreover, it may be redundant to apply antitrust rules even if the behaviour in question falls outside the scope of the special legislation; a balance must be struck between the advantages and the disadvantages of applying antitrust rules.

B. The US Supreme Court's Actavis Ruling[24]

In addition to the *Trinko* case, the *Actavis* case of 2013 provides significant input in terms of the US approach to excessive pricing. In the *Actavis* case, the Supreme Court undoubtedly reiterated the *Trinko* ruling by stating that monopoly pricing is not on its own a violation of antitrust legislation. However, in this case, the Court also underlined that a patent does not insulate the patent-holder from an analysis under antitrust law. The case is of the utmost importance because it concerned the pharmaceuticals sector and the patent for a drug. Specifically, it concerned two pharmaceutical companies that agreed on what is called a "reverse payment"[25] agreement. The subject of the settlement was the infringement of a patent right by one company. According to the settlement, the infringer company had to cease to produce the patented drug, and in return, the patentee would pay the infringer a large sum in compensation. The question before the US Supreme Court was whether this settlement, which excluded a competitor from the market and had the effect of fixing prices, constituted an antitrust violation.

According to the Court, a patent does not give a monopoly a "blank check"[26] that allows it to circumvent antitrust rules. Furthermore, if combined with other anti-competitive conduct, excessive pricing may constitute a violation of Sherman Act Section 2. The Court states that:

> An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness.[27]

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23. *Trinko*, paragraph 410.
24. *Federal Trade Commission v. Actavis ('Actavis')*, 133 (2013) (S. Ct. 2223).
25. *Actavis* paragraph 2235.
26. Frederick M. Abbott, *Excessive Pharmaceutical Prices and Competition Law: Doctrinal Development to Protect Public Health*, UC Irvine Law Review, 281-320 (2016).
27. *Actavis* paragraph. 2236.

Therefore, what can be deduced from the *Actavis* case in addition to the principles stated in *Trinko* is that a license such as a patent in a regulated market does not immunize the monopoly firm against antitrust enforcement. In fact, even in a regulated market such as the pharmaceutical sector and even for a patented drug, when excessive prices are combined with other anti-competitive conduct, they may constitute an antitrust violation. Although the US position is very different from the EU position, it is important to note that in rare circumstances, US courts may also find that excessive pricing constitutes antitrust infringement in regulated sectors when it is combined with other factors.

C. The Divergence Between US and European Attitudes Towards Excessive Pricing

Gal argues that when it comes to excessive pricing, "the divergent legal rules reflect different ideological goals and different assumptions about how markets operate."[28] US antitrust law relies on the assumption that an unregulated market is competitive or has the full potential to be competitive. If in such a market, a monopoly is achieved not through artificial barriers but by competitive means, there is no need to regulate the market or the behaviour of the monopoly firm, unless the monopoly is exclusionary. The role of regulation is to preclude artificial barriers in order to allow the market to correct itself.[29] Antitrust legislation therefore safeguards the free market, economic opportunity and the freedom of contract. In the EU, however, again according to Gal, there is "a lesser belief" in the market's ability to regulate itself.[30] The regulator must therefore intervene to pave the way for a more efficient outcome.

The divergence between the US and the EU approaches becomes more cutting when we consider monopoly behaviour in general and monopoly pricing in particular. On a theoretical note, this divergence can perhaps be traced back to Ordo-liberal thought and its hostility to dominant firms.[31] According to Ordo-liberal theory, firms that have a dominant position should compete in the market 'as if' they do not hold a dominant position and 'as if' there is complete competition in the market. This approach also came to be known as the special responsibility of the

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28. Michal Gal, *Monopoly Pricing as an Antitrust Offence in U.S. and E.U. Competition Law: two systems about belief in monopoly?*, Antitrust Bulletin, 343-384 (2004).

29. Gal, *id.*, 348.

30. Gal, *id.*, 246.

31. Daniel J. Gifford & Robert T. Kudrle, *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy* (2015).

dominant position firm[32] and was acknowledged by the ECJ in *Michelin v. Commission*,[33] in which the Court held that the dominant firm "has a special responsibility not to allow its conduct to impair undistorted competition on the common market."

When we look at how monopoly pricing is approached in the EU, the effect of the special responsibility doctrine can be clearly observed. It may therefore be worth mentioning that there are also major differences regarding another type of monopoly pricing, namely predatory pricing. Predatory pricing is a practice whereby a firm that holds a dominant position sets its prices below the average variable cost for a certain period of time. In economic theory, this pricing strategy would have exclusionary effects: since the competitors will not able to sell at the same level, they will eventually have to exit the market. Once all the competitors have exited, the dominant position firm will increase its prices over time to reach in the end a monopoly price. This last stage is called 'recoupment,' as it is the period over which the firm will recuperate the losses it incurred in the first stage. In the US, for predatory pricing to be considered a violation of Sherman Act Section 2, the firm has to enter into the recoupment period. Hence, as the Supreme Court held in *Brooke Group*,[34] merely pricing below the average variable cost does not suffice to qualify the behaviour as predatory. The approach to predatory pricing in the EU is conspicuous in two leading decisions: *AKZO*[35] and *Tetra Pak II*.[36] What the Court established in *AKZO* as the twofold method of analysis for determining predatory pricing was reiterated in *Tetra Pak II*:

> First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown.[37]

In both cases, it is clear that the ECJ emphasized the "intention" of the dominant position firm rather than the economic effect achieved in the market by the pricing strategy. This test held by the ECJ may also reflect

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32. Eleanor M. Fox, *We Protect Competition, You Protect Competitors*, World Competition, 149-165 (2003).
33. *NV.Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, 322/81, para. 57 (1983).
34. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 (1993) (U.S. 209).
35. *AKZO Chemie BV v Commission*, C-62/86 (Judgement of the Court of Justice: 1991).
36. *Tetra Pak International SA v Commission ('Tetra Pak'),* C-333/94 P (1996).
37. *Tetra Pak* paragraph 54.

the special responsibility principle. According to this test, even if the dominant firm does not produce any exclusionary effects in the market through its pricing strategy, it may nevertheless violate article 102 TFEU. Because it is a dominant firm, its pricing strategy therefore has to comply with the special responsibility principle, to a certain extent regardless of the effects in the market.

The case law on predatory pricing clearly indicates major differences between the US approach and the EU approach to monopoly pricing. The difference deepens when we look at excessive pricing, as US authorities and courts generally do not consider excessive pricing to be a violation of Sherman Act Section 2. Sanctioning excessive pricing certainly has important policy implications. US authorities choose not to interfere in the case of excessive pricing, as they tend to focus on the market's propensity to self-regulate. It is also clear from cases such as *Trinko* and *Actavis* that prohibiting excessive pricing is perceived as *overregulating*, especially if the market is already subject to sector-specific regulation. The US case law clearly demonstrates an approach whereby a monopoly position accomplished on the merits has the liberty to charge excessive prices for at least a certain period of time based on the belief that the ability to do so will incentivise innovation and investment. However, past and recent European case law has clearly shown that excessive pricing may constitute an abuse of dominant position.

V. EUROPEAN CASE LAW ON EXCESSIVE PRICING

A. Landmark Decisions of the ECJ on Excessive Pricing

Article 102 (a) prohibits "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." The basis of all sanctions imposed in the EU on excessive pricing is the prohibition of "unfair" prices found in this Article. It is generally understood that there are two types of unfair pricing: discriminatory pricing and excessive pricing. The much-debated issue is whether excessive prices are unfair and, more importantly, whether fairness is an objective criterion in competition law.[38]

It was not until the prominent *United Brands* case[39] that the ECJ not only acknowledged excessive pricing as a breach of competition but also fined the dominant position undertaking for, amongst other things,

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38. Akman, *supra* note 7, 187-191.
39. *United Brands Company and United Brands Continentaal BV v Commission of the European Communities ('United Brands'),* 27/76 (Judgment of the Court: 1978).

charging unfair prices. Furthermore, the Court then provided a twofold test that remains the "analytical framework"[40] for assessing excessive pricing.

United Brands was the largest exporter of bananas in the world and was accused by the Commission of charging unfair prices in Ireland. The Commission's fundamental concern was not the prices charged by United Brands' competitors, but the different prices charged by United Brands in different Member States. The Commission therefore focused on the dominant undertaking's own pricing strategy and found it to be excessive in some Member States in comparison to others. The ECJ, however, disagreed with this approach. In the *United Brands* case the ECJ established the infamous twofold test: in order to determine whether prices are excessive competition authorities and/or courts must first do an analysis of cost incurred in relation to prices charged by the undertaking and then must compare it with prices charged by competitors. According to the Court, the question to be determined is "whether the differences 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."[41] This price-cost analysis would reveal the profit margin of the undertaking, and if it was found to be too high, further investigation would be warranted. This first limb of the test, known as the cost-plus test, requires economic analysis whereby the fairness of prices would be examined itself, attempting to determine whether prices are excessive objectively. In the second limb, prices would be compared with other prices charged by competitors, prices charged by the dominant undertaking in the past or prices charged in other geographical markets. The second limb is therefore about determining excessiveness through comparison. In the *United Brands* case the Commission had only compared United Brands' prices both with competitors' prices and with the company's own prices in other Member States of the EU without examining the excessiveness of price in itself. The Court emphasized the necessity of applying a cost-plus analysis before moving on the price comparisons. Thus, the Court stated in *United Brands* that only if the first limb of the test yields to the conclusion that prices are unfair themselves should the authority move to the second limb. The ECJ also held in *United Brands* that "charging a price that is excessive because it has no reasonable

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40. Damien Geradin, The necessary limits to the control of "excessive" prices by competition authorities—A view from Europe, Tilburg University Legal Studies Working Paper (August 12, 2018, 4.30 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022678.

41. *United Brands*, parapraph 252.

relation to the economic value of the products" should be considered an abuse of the dominant position. The Court therefore introduced the concept of the "economic value" of the product in light of which the profit margin of the dominant undertaking should be analyzed.

Perhaps the most significant ruling of the ECJ on excessive pricing after United Brands is perhaps the *Lucazeau* case.[42] The case concerned a French association SACEM which set tariffs for authors' copyrights in music. These prices were challenged by discotheques who argued that SACEM was using its licenses to set excessively high prices. The Court reiterated that the twofold United Brands test should be applied in order to determine the excessiveness of price. In this case, as SACEM was the only undertaking that set the tariffs for copyrights a comparison with competitors' prices was not possible and the Commission compared its prices with similar undertakings in other Member States. According to the Court the dominant undertaking could justify the price differentiation because of the "objective dissimilarities" in different market conditions but SACEM had failed to do so.[43] Furthermore, the Court also held in the joint *Lucazeau/Tournier* case that it may not always be possible to determine the costs incurred by undertakings.[44] In such cases the competition authority should, after establishing the difficulties in calculating costs and therefore applying the first limb of the twofold test, should move on to price comparisons.

The past case-law reveals that competition enforcement on excessive prices in the EU has been rather cautious. As there are few cases, it is also difficult to draw solid conclusions on the tests and analyses that are applicable. However, the ECJ has consistently emphasized the use of the *United Brands* test where possible and the use of different comparative methods (such as *Tournier/Lucazeau* test) if cost-price analysis is not meaningful or possible. As will be seen, the recent case law has been largely in line with this approach.

B. The ECJ's Preliminary Ruling on Excessive Pricing in Licenses for Public Performance of Musical Works: The AKKA/LAA Case

Excessive pricing had not been on the agenda of the EU authority and courts for a decade until preliminary question on AKKA/LA referred

42. *F. Lucazeau v Societé des Auteurs, Compositeurs et Editeurs de Musique ('Lucazeau')*, Cases 110/88, 241/88 & 242/88 (1989).

43. *Lucazeau.*

44. *François Lucazeau and others v SACEM,* Joined Cases 110/88, 241/88 and 242/88 (1989) (ECR 2811); *Ministère public v Jean-Louis Tournier*, 395/87 (1989) (ECR 2521).

to the ECJ by a Latvian court. This preliminary question gave the ECJ the opportunity to clarify and reiterate its stance on excessive pricing as an abuse of dominant position. It is therefore important to review the recent and possibly future case law (notably the investigation that has been opened by Commission a formal into Aspen's pricing of a certain cancer drug) in light of the approach used in this decision.

The Latvian case involved a collecting society, AKKA/LAA, that issued licenses for the public performance of musical works on commercial premises. The collecting society was a legal monopoly. The rates applied by AKKA/LAA were calculated on the basis of the surface of the premises on which the public performance took place. These rates were found to be excessive by the Latvian Competition Council, and AKKA/LAA was sanctioned for an abuse of dominant position. The Regional Administrative Court upheld the decision wherein the Competition Council had deemed the prices to be excessive (although it overruled the Council's decision on the fine). The Appeal Court referred several questions focusing on how unfair pricing should be understood, assessed and analyzed to the ECJ for a preliminary ruling.

1. The Opinion of Advocate General Wahl

In his opinion, AG Wahl first confirms that unlike US lawmakers, the "drafters of EU Treaties" had "evidently"[45] intended to prohibit excessive pricing. The prohibition of unfair prices provided in article 102 TFEU is to be understood as a prohibition of excessive prices. AG Wahl also acknowledges that when barriers to entry are low, excessive prices will attract new entry and the market will therefore display a propensity to self-correct. However, when barriers to entry are not low, excessive prices should not escape competition law enforcement.

AG Wahl then affirms that although there is no single method, the reference test for excessive pricing should still be the *United Brands* test. According to Wahl, determining the excessiveness of the price may involve the use of various benchmarks. Evidently, one of the benchmarks that could be used at this stage is the cost of the products. Wahl claims that this analysis focuses "on the margins (or the profitability) made by the dominant undertaking in the sale of the products or services in question."[46] Other benchmarks have also been used by the ECJ, such as the price charged for the same product or service by non-dominant undertakings or

45. Opinion of AG *AKKA/LAA*, paragraph 2.
46. Opinion of AG *AKKA/LAA*, paragraph 18.

undertakings in other geographical markets or the prices charged by the same dominant undertaking previously or in other geographical markets. This method, also known as reference pricing, was applied by the ECJ in *Lucazeau* (*Tournier/Lucazeau* test). Accordingly, if the reference pricing is used by making geographical comparisons, authorities have to ascertain whether it is a meaningful comparison by looking at the characteristics of the market and its homogeneity. If these comparisons lead to the conclusion that there is a serious discrepancy between the prices charged and the benchmark, the prices can be considered excessive.

Once the excessiveness of the price is established, authorities should move to the second limb of the test, in which its unfairness is assessed. According to Wahl, for there to be an infringement, the excessiveness of the price should not be the consequence of "legitimate reasons."[47] Hence, the second stage of the *United Brands* test is about eliminating the possibility that there may be valid reasons for charging excessive prices.

AG Wahl emphasizes throughout his opinion that these methods may not all be applicable under all circumstances or may present certain risks. Some information may not be available to the competition authorities, or the information that is available may not be satisfactory for a meaningful comparison due to the lack of homogeneity in the market in time or across different geographies. Under such circumstances, the competition authorities may have to make "adjustments"[48] to their data and strive to combine several methods, such as a combination of several tests that would strengthen the analysis and reduce the risk of running Type I and Type II errors. According to AG Wahl, when this method is applied to comparisons with other geographical markets, the selection thereof must be made in accordance with "objective, appropriate and verifiable criteria."[49] Socio-cultural factors such as consumption habits, per capita GDP, and cultural and historical heritage must also be considered.[50] In addition, the use of Purchasing Power Parities index (PPP) is mandatory because living standards vary, and the economic value of the product may also vary.

For the price be qualified as excessive, it must be appreciably higher than the benchmark prices. As the ECJ affirmed in *United Brands*, only "disproportionate or exorbitant prices" have "no reasonable relation to the

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47. Opinion of AG *AKKA/LAA*, paragraph 21.
48. Opinion of AG *AKKA/LAA*, paragraph 39.
49. Opinion of AG *AKKA/LAA*, paragraph 41.
50. Opinion of AG *AKKA/LAA*, paragraph 129.

economic value of the product supplied."[51] According AG Wahl, there is no minimum threshold above which a rate must be regarded as appreciably higher. However, AG Wahl does specify that a difference between rates may be qualified as appreciable when it is "both significant and persistent."[52] Hence, if the higher prices are temporary or episodic, they may not be sufficient to constitute an abuse. The dominant position firm must prove that prices are fair with reference to objective factors that have an impact on cost.

AG Wahl argues that excessive prices can "only exist in regulated markets"[53] where the barriers to entry are high and non-transitory, as there is little free competition in markets where supply is controlled by a regulatory authority. In markets where the regulatory framework is looser or non-existent, markets self-correct in the short or medium term. However, AG Wahl also admits that sectoral authorities are "better-equipped than competition authorities to oversee prices."[54] Furthermore, sectoral authorities are better judges of when it is necessary to sanction such pricing strategies and may therefore enforce more adequate remedies. According to AG Wahl, competition authorities should interfere in excessive pricing cases in regulated markets in the case of error or of the failure of the regulatory authority to act.

2. The Preliminary Ruling of the ECJ

Naturally, the ECJ's preliminary ruling for the *AKKA/LAA* case contains a less elaborate analysis then AG Wahl's opinion. The Court clearly reiterates the essentiality and significance of the twofold *United Brands* test. However, the Court also accepts, as opined by AG Wahl, that other methods may be used. One such test has been acknowledged by the Court in the *Tournier* and *Lucazeau* cases. The Court affirms that when applying this test, competition authorities must select their sample of Member States based on "objective, appropriate and verifiable criteria."[55] The Court recognizes criteria similar to those listed by AG Wahl and also emphasizes the importance of the use of the PPP index for the selection.[56] However, the number of Member States that should be included in the sample will depend on the circumstances of the case. The Court clearly

51. Opinion of AG *AKKA/LAA*, paragraph 123.
52. Opinion of AG *AKKA/LAA*, paragraph 22-23.
53. Opinion of AG *AKKA/LAA*, paragraph 48.
54. Opinion of AG *AKKA/LAA*, paragraph 49.
55. *AKKA/LAA*, paragraph 51.
56. *AKKA/LAA*, paragraph 46.

indicates that there can be "no minimum markets"[57] and that the test should not be considered insufficiently representative merely because a limited number of Member States have been taken into account. For the case at hand, the Latvian Competition Council had made comparisons with two different samples: one with two neighboring countries and another one with twenty other Member States. According to the Court, this method is also valid, as the comparison with a wider number of Member States may serve to verify the results of a comparison with a limited number of Member States.

The Court also addresses the issue of a comparison between different user segments or within the same specific segment by stating that the competition authority has a "margin of manoeuvre and there is no single adequate method."[58] Hence, competition authorities do not necessarily have to resort to an assessment and comparison of average rates. Accordingly, competition authorities must verify for themselves which comparison is more meaningful in order to establish the abuse by sampling the segments that are affected by excessive prices.

Unlike AG Wahl, the Court does not consider the issue of excessive pricing in regulated markets. This omission is comprehensible, as the preliminary ruling questions did not include the issue of dealing with regulated markets. Furthermore, although AKKA/LAA enjoys a legal monopoly, there is no indication that the market for collecting societies is a heavily regulated one. Thus, it is not possible to determine whether the Court agrees with AG Wahl on the view that in such markets, the sectoral authorities are better placed and better equipped than the antitrust authorities to assess pricing strategies.

The *AKKA/LA* ruling clearly shows that there are no significant novelties in the EU Courts approach to excessive pricing. *AKKA/LA* only provides a very elaborate guide for future case law. It does not however establish new tests or new criterion for excessive pricing analysis. However, as AKKA/LA is only a preliminary ruling, it does entail an application of the existing tests and methods. For more recent such applications, we must therefore turn to recent decisions held by national authorities in Europe.

57. *AKKA/LAA*, paragraph 41.
58. *AKKA/LAA*, paragraph 49.

C. *Recent European Case Law*

Although excessive prices did not play a central role in European competition law discussion over a decade, in the past four years there has been a succession of decisions by national competition authorities in Europe on this type of abuse. These recent decisions have all been pertinent to regulated markets. Given that the EU Commission has also started an investigation on excessive pricing in the pharmaceutical sector, a study of this recent case law may be critical.

1. Excessive Pricing in Pharmaceuticals in Italy: The *Aspen*[59] Case

The Italian Competition Authority (ICA) has recently ruled on a significant case concerning excessive pricing in the pharmaceuticals sector. The *Aspen* decision of 2016 is described by the ICA itself as a "rediscovery of a form of abuse—abuse through excessive pricing—which, although envisaged by European Union competition law, seemed to have been forgotten in antitrust practice."[60] The ICA also affirms that excessive pricing should be prohibited under competition law when new entry is unlikely to occur and that markets will not necessarily have a propensity to self-correct. ICA furthermore states that in such cases, "excessive prices worsen inequality and are particularly objectionable from the perspective of social equity."

The case concerned "a portfolio of antineoplastic drugs,"[61] also called the Cosmo package, which are a form of life-saving drug produced by the South African multinational Aspen. The drug originally belonged to GlaxoSmithKline, which sold its rights to market to Aspen. After the acquisition, Aspen went through an "aggressive"[62] period of negotiations with the Italian Health Authority (AIFA), during which it asked for a re-categorization of the drugs as C[63] and wanted to increase the prices. Aspen argued that this increase would align it with the price in other EU Member

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59. Autorita Garante della Concorrenza e del Mercato, A 480—*Incremente prezzi farmaci/Aspen* ('*Aspen*') (2017).

60. *Italian Competition Authority Annual Report*, Autorita Garante della Concorrenza e del Mercato, (August 12, 2018, 4.30 PM), http://www.agcm.it/component/joomdoc/relazioni-annuali/Relazioneannuale2016/AnnualReport2016_Presentation.pdf/download.html.

61. Alessandra Tonazzi, *The Aspen case by the Italian Competition Authority*, Concurrences Review, 17-22 (2017).

62. Margherita Colangelo & Claudia Desogus, *Antitrust Scrutiny of Excessive Prices in the Pharmaceutical Sector: A Comparative Study of the Italian and UK Experiences*, World Competition, 225-254 (2018).

63. This categorisation is also referred to as delisting as a result of which the drug would fall under the category of drugs that is not reimbursed by the national health system.

States and would therefore prevent parallel trade.[64] These demands by Aspen were refused by AIFA, after which Aspen allegedly threatened to withdraw from the Italian market.[65] Nevertheless, in the end of the negotiation phase, AIFA finally approved the requested price increase. The price increase implemented by Aspen varied between 300% and 1500%. However, the ICA used this aggressive negotiation phase as an argument against Aspen in the antitrust case.

Aspen did not invest in innovation.[66] In fact, Aspen tried to justify its demand for an increase in prices by citing the importance of the revenue obtained from these drugs for a non-innovating company. Furthermore, Cosmos was no longer a patented drug, as the patent had long since expired and therefore Aspen was not acting as a patent holder. Consequently, the lack of a patent also meant that barriers to entry were very low,[67] as the only barriers to entry Aspen was facing were the licences that would be issued by AIFA and other relevant authorities. With regard to entry into the market, the ICA observed that the scarce sales volume at the new price level and the subsequent risk of not recovering the entry cost reduced the incentive to enter the market. Therefore, the ICA argued that there had been no entry into the market, which was interpreted in the case at hand as proof that excessive prices did not attract new entrants.

The ICA used a twofold test that it claimed was in line with the *United Brands* test. The first limb of the test aimed to establish the excessiveness of the prices, whereas the second limb would, through the use of various methods, determine whether prices were unfair. In the first stage of its economic analysis, the ICA used an elaborate cost-price test in which both direct and indirect costs were taken into account. It carried out a comprehensive analysis of whether there was an excessive discrepancy between the cost of manufacturing drugs and the increased prices. In the second stage, the ICA examined the unfairness of the prices, considering factors such as changes in price over time (ex ante prices), the lack of economic justification, the nature of the Cosmos drugs, and the damage to the National Health Service caused by the prices.[68] The ICA found that the analysis established through the twofold test proved that prices were both excessive and unfair.

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64. Mélanie Thill-Tayara, *Développements récents en Europe en droit de la concurrence appliqué au secteur pharmaceutique*, Concurrences Review, 1-8 (2017).
65. Tonazzi, *supra* note 61, 20.
66. Colangelo & Desogus, *supra* note 62, 227.
67. Tonazzi, *supra* note 61, 20.
68. Elizabetta Maria Lanza & Paola Roberta Sfasciotti, *Excessive Price Abuses: The Italian Aspen Case*, Journal European Competition Law and Practice, 382-388 (2018).

2. Excessive Pricing in Pharmaceuticals in the UK: The *Pfizer/Flynn*[69] Case

In 2017, the UK Competition and Markets Authority (CMA) found the conduct of a pharmaceutical's company to be abusive. The case presented many similarities to the Italian *Aspen* case. The relevant drug in this case was a prescription drug called Epanutin used for the treatment of epilepsy. Pfizer had acquired the rights to the drug in 2000, at a time when the drug had already become "off patent."[70] Until 2012, the drug was part of Pfizer's portfolio of branded products, and its price was therefore regulated by the NHS's Pharmaceutical Price Regulation Scheme (PPRS). However, in 2012, Pfizer sold the marketing authorizations of the drug to Flynn, after which Flynn withdrew the drug from the PPRS. As a result, after 2012, the drug's price was not subject to any regulation. From that date onwards, Flynn sold the drug at what is known as the "tariff price (the sum pharmacies are paid for dispensing the product)."[71]

From the beginning, the drug was produced by Pfizer in Germany. After the marketing agreement with Flynn, Pfizer continued to manufacture outside the UK and deliver the drug to the UK. According to the CMA, Flynn thus took a "very low commercial risk,"[72] and Pfizer still implemented its own pricing strategy. Furthermore, Flynn also "contracted out many of its responsibilities"[73] and only fulfilled the very limited legal obligations related to the marketing of the drug. The CMA therefore concluded that Pfizer was the undertaking behind the pricing strategy.

According to the CMA, the price of the drug began to increase significantly after September 2014, when Flynn started distributing the drug, although there had been no innovation and no new patent thereof for the drug. The CMA estimated that the price increases instigated by Pfizer varied between 488% and 1309%, depending on the dosage of the drug, over a period of approximately four years. Flynn, in contrast, increased its prices by more than 2000% over the same period.

The CMA claims to have conducted a twofold analysis to establish the abuse committed by Pfizer and Flynn. The first step of this analysis clearly applied a cost-price analysis. At this stage, the CMA put particular emphasis on the "cost plus a reasonable rate of return,"[74] examining

69. *CMA ('Pfizer/Flynn')*, CE/9742-13 (2016).
70. *Pfizer/Flynn*, paragraph 1.9.
71. *Pfizer/Flynn*, paragraph 1.12.
72. *Pfizer/Flynn*, paragraph 1.14.
73. *Pfizer/Flynn*, paragraph 1.14.
74. *Pfizer/Flynn*, recital 4.224.

whether the prices charged by the pharmaceutical companies were excessive in relation to what they could be expected to reasonably charge with regard to their costs and anticipated profit. The CMA found that Pfizer and Flynn had sustained excessive prices for over several years. The CMA also stressed that Flynn did not incur any major commercial risks during this period, which made the excessive prices even less justifiable.

For the second step of its analysis, the CMA claimed that to establish the abuse, the competition authority must prove that the prices are unfair in themselves or in comparison to competing products. According to the CMA, these are alternative tests. Furthermore, the CMA asserted that a competition authority need not establish that prices are both unfair in themselves and in comparison to competing products. In other words, the CMA claimed that these tests are not cumulative. The CMA did nevertheless present a thorough analysis that took into account various factors. It considered primarily additional non-cost-related factors that may have increased the economic value of the product and would have therefore justified the increase in prices. The CMA emphasized, for instance, that Pfizer and Flynn could sustain these excessive prices for several years because they were concealed from effective competition. The CMA also drew attention to the lack of pressure from potential competitors by stating that it was unlikely that market forces would create such pressure in the near future. Another significant factor taken into account was the adverse effect the excessive prices had had on the end customer, namely the NHS. Moreover, the CMA claimed that both Pfizer and Flynn were aware of these effects. Last but not least, the CMA asserted that the prices charged by Pfizer in the UK were considerably higher than the undertaking's prices in other EU countries. Thus, the CMA included a comparative analysis in its arguments: it compared the prices charged by the same undertaking in other countries with those applied in the UK. On this note, the CMA rejected Pfizer's claims that it had sold at a loss before the increase of prices in September 2012 by arguing that the increase after that period should have allowed the undertaking to recuperate within two months any loss incurred in previous periods.

It should finally be noted that a central point in the CMA's argumentation was the debranding operation conducted by Pfizer and Flynn. According to the authority, as soon as Flynn had acquired the marketing rights to the drug, it withdrew it from the PPRS and therefore placed it outside the regulated domain.[75] Once the prices were outside the

75. Thill-Tayara, *supra* note 64, 3-4.

reach of the sectoral authorities, Pfizer and Flynn started to increase their prices. Hence, the debranding of the drug was what allowed them to determine prices with no regulatory pressure and to sustain increased prices for several years. Although it was not regulated by any sectoral authority, the drug nevertheless had to be purchased by the NHS, which had to, along with patients, endure the adverse effects. Overall, the CMA concluded by affirming that Pfizer and Flynn did not innovate and did not generate any profits for patients and therefore did not produce any significant pro-competitive effects.

VI. CONVERGENCES AND DIVERGENCES IN EXCESSIVE PRICING ANALYSIS IN EUROPEAN CASE LAW

As has been discussed in the previous Part, the recent case law in Europe does not offer many novelties in the analysis of excessive pricing. Most of the conditions and tests that have been deployed are those established by the Commission and the ECJ in early case-law. Nevertheless, it would still be of interest to identify the commonalities and divergences that emerge from these recent rulings. This Part examines recent cases in light of the conditions discussed in the literature and the earlier case law for sanctioning excessive pricing. Although the approach adopted by enforcers does not display novelties, identifiable patterns show that there are lessons to be learnt for competition enforcers.

A. Application of the Twofold Test

In all of the case law that has been examined in this Article, the courts and/or authorities have recognized the validity of the twofold *United Brands* test and have applied it to a certain extent. The case law reveals, however, that the first limb of the test proves more problematic and at times difficult to apply. In the *Aspen* case, the ICA carried out a cost-price analysis that took into account both direct and indirect costs. The CMA used a "cost plus a reasonable rate of return" test in the Pfizer/Flynn decision, which is similar to an analysis of cost and profit margin. However, the CMA also argued that competition authorities do not have to prove the unfairness of the price in itself. Accordingly, the first limb of the test is not compulsory for establishing excessive pricing. This argument is in line with the approach of the ECJ who had previously recognized in the *Lucazeau* and *Tournier* cases that not all services or products may allow for a meaningful cost-price analysis.

The first limb has also been heavily and extensively criticized in the literature. The majority of the criticism focuses on the difficulty of calculating the costs incurred. Motta and de Streel have argued that cost calculations are difficult even for sectoral regulators that have ample information about the market, let alone for antitrust authorities.[76] More importantly, Geradin has raised the issue of Research and Development (R&D) costs that are incurred by the dominant undertaking.[77] R&D costs should indeed play a pivotal role in this analysis because the strongest argument against prohibiting excessive prices under antitrust law is the negative effect it may have on incentives to innovate. However, even if they were taken into account, as Geradin argues, calculating R&D costs is a very complex matter, as the costs may entail not one but several R&D projects, including failed projects that have been conducted by the undertaking.[78] It may be argued that in most of these recent cases, the dominant undertakings had not been investing in R&D, but cost calculations have proven difficult nevertheless.

The case law reveals that the second limb is always applied through varying methods. The possibility of using different benchmarks and comparisons and even combining them has been clearly acknowledged by the ECJ in *AKKA/LAA*. The ICA used the ex ante prices of the dominant undertaking itself. Finally, the CMA compared the prices of the dominant undertaking with those charged in other Member States. We can thus deduce that competition authorities have applied the second limb more effectively than the first limb.

However, the second limb has also been criticized in the literature. Akman argues that a comparison of different prices charged by the same dominant undertaking should be considered in price discrimination analysis rather than excessive pricing; as "such a comparison does not necessarily indicate anything about the 'unfairness' of the prices individually."[79] This is a crucial argument against the twofold test, because there is an explicit prohibition of price discrimination in article 102 TFEU ("applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"). Hence, applying a test that establishes price discrimination rather than the excessiveness or unfairness of the price defies the purpose of the test and blurs the lines between two different and separate prohibitions provided

76. Motta & de Streel, *supra* note 12, 120.
77. Geradin, *supra* note 40, 7.
78. Geradin, *supra* note 40, 8.
79. Akman, *supra* note 7, 195.

by article 102. Another problem with the second limb is the comparison with the competitors' prices. When there is a dominant undertaking in the market, the prices charged by competitors are affected, in the sense that their prices may eventually become uncompetitive or unfair. The comparison between the dominant undertaking's price and its competitors' prices may not reveal excessiveness, as the prices in that market will tend to be generally uncompetitive. Therefore, a comparison with the dominant firm's own prices, as the Commission carried out in *Helsingborg*, may be more indicative of abuse than a comparison with its competitors' pricing strategy.

B. The Role of Barriers to Entry

As discussed previously, the presence of high and non-transitory barriers to entry appears as a necessary condition for antitrust action against excessive pricing in the literature.[80] AG Wahl has also recognized that excessive pricing is typically coupled with high barriers to entry and has argued that otherwise the market would correct itself through effective competition.[81]

However, the role of barriers to entry in competition enforcement in the recent case law is dubious. In the *Aspen* case, the undertaking was subject only to the licenses required in the pharmaceutical sector, as there were no patents in that particular market. It can therefore be assumed that the barriers to entry were low. On the other hand, in the *Pfizer/Flynn* case, the drug had been off patent for more than fifteen years and had been outside the regulatory scope of the PPRS for almost five years. It would appear that in this case, there were very low barriers to entry or none at all.

However, in both cases, the competition authorities claimed that despite low barriers to entry, there was no pressure from potential competitors in these markets. The CMA, for instance, claimed that it was unlikely that the market would correct the high prices in the near future through such pressure. In the *Aspen* case, the ICA had observed that the excessive prices, indicating high profitability, had not attracted new entry into the market for many years. According to the ICA, the lack of potential competition was due mainly to the limited volume of sales.

Hence, it would appear that the Italian and UK authorities interfered in markets where barriers to entry were low or non-existent. However, the

80. Röller, *supra* note 9, 11, Motta & de Streel, *supra* note 12, 20, Evans & Padilla, *supra* note 13, 101-102.
81. Opinion of AG *AKKA/LAA*, paragraph 81.

authorities observed that the potential competition was also sparse and that new entry was very unlikely in these markets. In the literature, there seems to be an assumption that the market is not capable of self-regulating high prices if new entry is impossible or unlikely because of barriers to entry. These cases, though they may be exceptional, reveal the possibility that markets may not attract new entry even if barriers to entry are low. Ezrachi and Gilo argue that high prices "in themselves, do not attract new entry, whether entry barriers into the market are low or high."[82] According to the authors, although in markets where there are high barriers to entry excessive prices will be more easily sustained, low barriers to entry and potential competition do not necessarily yield to self-correction in the market.[83] Excessive prices do not necessarily make the market more appealing for new entrants, as potential competitors take into account post-entry prices, i.e. the possibility that the dominant undertaking will lower its prices. The *Aspen* and the *Pfizer/Flynn* cases may be examples of situations in which potential competitors are not inclined to enter the market despite low barriers and high prices. In these cases, the antitrust authorities may be justified in intervening to avoid consumer loss.

C.. Incentives to Invest and Innovate

One of the strongest arguments against antitrust enforcement in cases of excessive pricing is protecting incentives to invest and innovate. Undertakings that incur high investment and innovation costs may have to recuperate the costs by increasing prices for a certain period of time. AG Wahl recognized the importance of such costs in his *AKKA/LAA* opinion, stating that failing to take into consideration such costs and their effects on price may discourage investment and innovation.

Ezrachi and Gilo argue that the competition authority should intervene when "the level of investment required in the particular industry is very low, when the dominant firm has presumably recouped its investments in the past (. . .) or when the competition authority has found a way to take account of the investment when assessing what an excessive price is." The possibility of taking into account investments costs presents many difficulties.[84] However, recent case law mostly fits into the first and second situations described by the authors. In the *Aspen* case, the dominant undertaking had undertaken no R&D investment. In fact, Aspen defended

82. Ezrachi & Gilo, *supra* note 8, 251.
83. Ezrachi & Gilo, *supra* note 8, 878.
84. Geradin, *supra* note 40, 7.

the significant increase in prices by citing the need for such revenue on the part of a non-innovating undertaking. Pfizer and Flynn increased their prices by more than 2000% without having obtained a patent in more fifteen years. Hence in these cases, competition intervention does not entail the risk of hampering innovation or investment by punishing an undertaking that has run such costs.

D. Excessive Pricing in Regulated Markets and the Role of Regulatory Authorities

There seems to be widespread agreement in the literature that when there is a price-regulating authority in the market, antitrust measures should not be used to regulate prices.[85] The interaction between regulatory intervention and antitrust implementation may at times prove problematic. In a regulated market, any antitrust action incurs the risk of over-regulation or too much interference in the market, thereby potentially impeding the natural forces of the market.

All of the cases discussed above are examples in which sector-specific regulation was applicable, and yet antitrust action was taken. Furthermore, the dominant position firms in these cases had all been subject to control by the sectoral authorities in the past or before the intervention of antitrust authorities. Antitrust enforcement under these circumstances raises three fundamental questions: (1) Is competition enforcement necessary when there is a sectoral regulatory authority? (2) Is price regulation a goal within competition policy? And (3) are competition rules the best tool for such an intervention?

US case law on excessive pricing clearly demonstrates that where there are sector-specific rules, authorities should not overregulate by using antitrust enforcement. One of the important reasons behind this stance is, of course, the belief in the market's capacity to self-regulate. However, the combination of sector-specific regulation and competition action also leads us to question policy choices. In other words, using competition action in markets where policy makers have clearly intended to establish and implement sector-specific rules may defy the purpose of these rules.

An interesting point on the *Aspen* case is that control or review of prices by the sectoral authority preceded competition enforcement. As a matter of fact, there were claims that Aspen had threatened AIFA with

85. Liyang Hou, *Excessive Prices Within EU Competition Law*, European Competition Journal, 47-70 (2015), Evans & Padilla, *supra* note 13, 99, Röller, *supra* note 9, 11, Geradin, *supra* note 40, 42.

leaving the market in the negotiation phase, which led to the approval of the price increase by the latter. In the *Pfizer/Flynn* decision, however, there was no recent control by a sectoral authority. The lack of control in this case occurred because the drug had fallen outside the scope of control exercised by the PPRS after Flynn acquired its marketing authorizations.

In his opinion on the *AKKA/LAA* preliminary ruling, AG Wahl argues that excessive pricing is an issue pertaining to regulated markets, because in markets where there is low or no regulation, prices are regulated by the market forces. However, AG Wahl also opines that sector-specific regulators are better equipped to deal with high prices in such markets. Röller also argues that there should be antitrust enforcement against excessive pricing only when there is no sectoral regulator or regulatory failure. The *Aspen* and *Pfizer/Flynn* cases may demonstrate that weakness in or lack of sectoral control of high prices leads inevitably to competition enforcement. In other words, sectoral rules or sectoral authorities may not be efficient and well equipped to deal with excessive prices, and under these circumstances, competition authorities may see an obligation to interfere with high prices.

However, the purpose of competition law is hardly price regulation. Competition authorities should be allowed to sanction excessive prices, but they do not possess the right tools to determine fair and correct prices. In fact, (except for the control of concentrations where price analysis is not a central issue) competition authorities have been given an ex post control power specifically for this reason. In contrast, sectoral authorities have a duty to establish fair and opportune prices in regulated markets. Their control is first and foremost an ex ante one. When competition authorities interfere with prices, they risk blurring the lines of ex ante and ex post controls and thus defying the purpose of these policies, which should be kept separate. As Röller argues, recourse to ex ante structural remedies, such as removing the barriers to entry, rather than ex post action may also be a more efficient policy choice.[86]

This finding does not necessarily imply that in the cases analyzed above, competition authorities erred in judgement or in policy. These cases may also be interpreted as showing the weaknesses of regulatory authorities and sector-specific rules. For instance, in the *Flynn/Pfizer* case, the fact that Flynn could withdraw (by debranding the product) from the scope of the PPRS may be a sign of a regulatory loophole. On the other

86. Röller, *supra* note 9, 11.

hand, in the *Aspen* case, it can easily be argued that AIFA should have stronger tools and mechanisms to deal with threats similar to that of Aspen.

Overregulation is indeed a serious concern in excessive pricing cases. Exercising heavy ex ante and ex post control in regulated markets may harm competition. Given that there is a consensus both in the literature and in the case law that competition enforcement, and thus ex post control, against excessive pricing should be exceptional, policy makers may have to focus on the ex ante control mechanisms. If ex ante control implemented by sectoral authorities is stronger and more efficient, the need for ex post control by competition authorities may recede as a result. AG Wahl argues in his *AKKA/LAA* opinion that competition authorities should interfere in the case of error or failure of the regulatory authority. Price regulation should indeed be an ex ante control enforced by sectoral authorities. From a policy-making point of view, it could be argued that in such cases, instead of resorting to competition law rules, sectoral rules and measures should be improved or reformed.

Finally, it should be noted that the Italian and UK cases both concern very high price increases in the pharmaceutical sector. Price increases in a very short time period would of course result in a visible consumer welfare loss. However, when such economic losses concern patients it can also raise, aside from economic factors, more sensitive issues such as consumer well-being. As noted in the EU's recent note to the OECD, in this sector price-demand is rather inelastic as consumers are usually dependent on a particular product for their treatment and cannot easily switch to other products.[87] Moreover, the price of a generic product is often not regulated ex ante, however the fact that the drug is generic does not necessarily mean that there are many alternative products available. Therefore, excessive pricing in pharmaceuticals may attract more attention and sensitivity than other sectors. For these reasons, better and more efficient sectoral regulation and ex ante control should be adopted particularly in this sector.

VII. CONCLUSION

Competition enforcement against excessive pricing is one of the most debated prohibitions in the literature and case law. The US approach relies on the market's ability to self-regulate. The US courts, focusing on protecting the incentives to invest and innovate, have opined that dominant

87. *Excessive Pricing in Pharmaceutical Markets—Note by the European Union,* OECD, DAF/COMP/WD(2018)112 (August 12, 2018, 4.30 PM), https://one.oecd.org/document/DAF/COMP/WD(2018)112/en/pdf.

undertakings should be allowed to charge high prices for a certain period of time as a reward for their competition on merits.

On the other side of the Atlantic, however, there have been a few cases in which excessive pricing has been sanctioned. The ECJ has confirmed in the recent *AKKA/LAA* ruling that excessive pricing is prohibited under art. 102 TFEU. The Court's reasoning focused on how excessive prices should prohibited rather than on why excessive prices should be prohibited. In this way, the ECJ has reiterated the twofold test that was developed in the infamous *United Brands* case. Both AG Wahl's opinion and the ECJ preliminary ruling on *AKKA/LAA* provide an elaborate guide to how excessive pricing should be measured and established without questioning the conditions under which excessive pricing should be prohibited.

In addition, the economic and legal literature has undertaken the task of establishing the conditions under which excessive pricing should be prohibited. The concerns relating to overregulation and unnecessary intervention in the market have led scholars of competition law and economics to determine the exceptional circumstances under which antitrust action would be justified. Most scholars agree that when high prices are accompanied by high non-transitory barriers to entry, a quasi-monopoly market position and the absence or failure of regulatory authorities, antitrust action is justified. However, if these conditions are not met, the market should be allowed to regulate itself.

It would appear that the recent cases studied in this Article do not necessarily conform to the conditions that have been identified in the economic and legal literature. In the two relatively recent cases discussed in this Article, competition authorities have intervened in markets where some of the conditions established in the literature were not met. Interestingly, both of these cases involved a regulated market, namely pharmaceuticals.

Two significant lessons may be drawn from this case law. First, even in markets where barriers to entry appear to be low, market forces may not correct excessive prices. The *Aspen* case and the *Pfizer/Flynn* cases present examples in which dominant undertakings have managed to sustain high prices in markets where the barriers to entry are low to non-existent. Thus, these cases may also prove that, as has been argued by certain scholars, high prices combined with low barriers to entry are not always self-regulated by the market. In such cases of market failure, competition authorities may have to intervene.

Second, the recent case law seems to underline the significance of the failure of sector-specific regulation and/or sectoral regulatory authorities. In the Aspen case, the pricing strategies of the dominant undertakings were subject to ex ante control by regulatory authorities that failed to sanction or correct excessive prices. In the *Pfizer/Flynn* case, the dominant undertaking managed to keep its product outside the regulatory scope and therefore escaped the ex ante control. In both cases, sector-specific regulation and enforcement failed, and the competition authorities enforced ex post control. To ensure more effective and better-adjusted enforcement, it may be desirable to amend or reform sector-specific rules and strengthen sector-specific regulators. Competition policy is not designed for price regulation. In regulated markets, prices should be monitored ex ante by regulatory authorities. The failure of one policy area should not, in principle, be compensated by another that is not well equipped to do so. It may therefore be necessary to improve the rules governing regulated markets to remedy these failures.