Excessive Pricing of Pharmaceuticals in the EU: Balancing between Exploitation and Exploitative Abuse

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Abstract: Normally, after the end of the exclusivity period offered by patents, medicines fall in public domain attracting competing companies to launch generic production that would bring down price levels. For different reasons, generic production of off-patented medicines does not always take place, allowing the main producer to continue dictate price levels. Under some circumstances, this conduct may turn into exploitative abuse. However, excessive pricing itself is not anti-competitive unless other cost-and non-cost-related factors are present that turn excessive pricing a concern of competition law.

The article analyses the most relevant EU case-law on abusive pricing in the pharmaceutical sector questioning what the right benchmark price is in the light of the *United Brands* two-limb test. As economic calculations cannot provide universal solutions in these cases, the article suggests that the *United Brands* test should not be the only method to judge exploitative abuse, but rather a combination of different methods that need to be applied to achieve reliable results. As emphasised in several cases, both economic calculations and other factors should be considered to avoid the risk of false-positive results. Furthermore, exploitative abuse exists only in case excessive pricing is additionally unfair. However, judging unfairness, as discussed in this article, is a complicated task where the outcomes depend on the impact of the test results on the competition process.

Keywords: *balancing competition law, EU, exploitative abuse, pharmaceuticals, patents*

1. Exploitative abuse and the competition process

Whish (2009) defines exploitation as earning of monopoly profits at the expense of the customer. From a pure economic point of view, however, it can be argued that earning profits takes place at the expense of the customer in any case. For this reason, it has been questioned whether it is necessary at all, for the purposes of determining the existence of violation under Article 102 of the Treaty of the Functioning of the European Union (hereinafter TFEU), to define the term ‘exploitation’ *per se* because a mere existence of exploitative behaviour is not sufficient for identifying anti-competitive practices. From the economic perspective, exploitation can be either pro-competitive or anti-competitive and therefore, applying Article 102 of the TFEU too prematurely could give false-positive results and eventually drag down innovation. Röller (2007, p. 7) has argued that the essence of pro-competitive behaviour is to increase market power, which will, in turn, increase rents by means of exploiting this very market power. In fact, if there was no possibility to ever exploit one’s market power, there would be no incentive to compete. Thus, pro-competitive behaviour must also involve exploitation (Röller 2007, p. 9). Vestager (2016) has expressed a view that when we do take action against excessive prices, we need to make sure we are not taking away the rewards that encourage businesses to innovate.

As exploitation can be both pro- and anti-competitive, it is important to analyse pricing policies within a broader context using additional evidence to help decide on *case-by-case* basis whether the exploitative conduct falls within the category of abuse. Therefore, it can be argued that when the evidence proves abusive conduct in charging excessive prices by a dominant undertaking, it inevitably encompasses exploitation but any exploitative conduct by a dominant undertaking does not have to be abusive. The exploitative character of the abusive conduct in charging excessive prices is relevant for categorising and differentiating between versatile forms of abuses. When the conduct is abusive under Article 102 of the TFEU as regards charging excessive prices, it is exploitative by its own nature and the exploitative character is an element of definition because unfair pricing would have to harm the competition process by creating an anti-competitive effect in the market and ultimately put consumers at a disadvantage.

Furthermore, Article 102 of the TFEU itself begins with the following: “Any abuse...” (TFEU, 2012), suggesting that the type of abuse is not a determining factor for deciding upon the violation of the norm. The wording

of the legal norm also consists of different elements, namely dominant position, abuse of the dominant position, imposing (directly or indirectly) unfair prices, suggesting that in order to apply the norm, these aspects need to be analysed. The controversial element in this norm is the notion of ‘unfair pricing’, which is a rather vague and broad term. In order to determine unfairness, it is not quite clear what evidence should be considered. It is because price levels can be decided based on economic evaluation, but in order to determine the unfairness, further quantitative and qualitative evidence should be analysed. According to the ruling in the *Scandlines* case, 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 102 (*Scandlines Sverige AB v. Port of Helsingborg* [2004]). As a consequence, the latest approach in Europe towards ‘unfair pricing’ has been based on several different tests (Motta & de Streel, 2006).

For example, it is possible that a company holds that position because it is better than its competitors. In this case it is fair that one should get rewards for the efforts. However, the defining factor in finding the “fairness” in the conduct is not just about charging high prices but rather defining the appropriate balance between the extent of the reward and its impact to the competitive process. The defining factor is the *effects* that the conduct creates in the market, taking into consideration cost-and non-cost-related aspects. The abuse in charging high prices takes place when the reward exceeds the input, making it therefore unfair and unjustified in the market consisting of consumers. The abuse in charging high prices within the context of exploitation could also appear in the upstream market hampering the competition process by allowing recouping rewards beyond one’s merits.

Either way, exploitative behaviour in charging excessive prices, should, in order to be abusive, involve an element of unfairness as otherwise exploitation itself could be understood as “making full use of a resources”, which means that even when it concerns a dominant undertaking, such behaviour may be part of doing business. It is the term ‘unfairness’ that makes a difference as to its legal consequences. Unfairness should hamper the competition process either because of being unfair in comparison to other products or unfair in itself considering the product value. Based on the ruling in the *Pfizer* case in the UK (*Pfizer Inc. and Pfizer Limited v. Competition and Markets Authority* [2017]), the Competition Authority Tribunal contested that considering that Article 102 of the TFEU contains two alternatives for judging unfairness (unfair on comparison to other products or unfair in itself) means that it

is not possible to confirm unfairness under one alternative and come to an opposite conclusion under the other.¹

The European Commission's approach to dealing with excessive pricing has mainly been grounded on economic analysis consisting of examining economic data relating to cost and sales prices (TFEU, 2012). After performing such analysis, if the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission would integrate this in the general assessment of anti-competitive foreclosure taking into account other relevant quantitative and/or qualitative evidence (TFEU, 2012). It can be deduced that the economic evaluation should be incorporated in the assessment of anti-competitive foreclosure together with other evidence. It also seems that the Commission generally approaches excessive price cases based on the *United Brands* two-limb test.²

The challenging part of the test is defining the "right" benchmark price for analysing excessive price levels. Whether prices are higher or lower under antitrust enforcement is fundamentally associated with the analysis of the relevant counterfactual (Röller, 2007, p. 9) focusing on the question what the price level would have been absent of antitrust intervention. Röller (2007, p. 7)³ argues that, what constitutes "excessive" pricing is, based on economic evaluation, difficult to answer without relating all aspects of market with its economic environment. It is risky to rely solely on economic analysis on determining proper pricing levels by merely comparing cost and sales prices; quantitative and qualitative factors as regards the impact on the competition process and consumer welfare should be taken into consideration.

The practices of ECJ and the Commission have used several benchmarks to decide upon the 'unfairness' element in the pricing of pharmaceuticals. These benchmarks include the costs of the dominant undertaking, prices charged

¹ Although in the *Scandlines* decision it was stated that the breach of Article 102 of the TFEU can be established either of the alternatives without needing to succeed in both. However, as further clarified in *Pfizer* decision, this is not the same as saying that the authority has an unfettered choice between the two. Nor does it mean that a breach of Article 102 can be established by selecting only one alternative to give an affirmative conclusion.

² The two-limb test considers the following: (i) 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; (ii) whether the price is either unfair in itself or when compared to the prices of competing products (*United Brands Company and United Brands Continental BV v. EC Commission* [1978]).

³ Röller argues that price-cost tests are bound to raise a number of difficult methodological questions such as cost allocation, efficient costs, what is the proper benchmark and what is the nature of competition.

by the dominant undertaking on other markets, the prices of competitors' products on the same market and the prices of competitors' similar products on other markets (*Scandlines Sverige AB v. Port of Helsingborg* [2004]). In *Parke Davis*, for example, the ECJ held that even though the sale price of a patent protected product may be regarded as a factor to be taken into account in determining the possible existence of an abuse, a higher price for the patented product as compared with the unpatented product does not necessarily constitute an abuse (*Parke Davis and Co v. Probel, Reese, Beintema-Interpharm and Centrafarm* [1968]). According to the decision in *United Brands*, price excess could be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product and its cost of production which would disclose the profit margin (*United Brands Company and United Brands Continental BV v. EC Commission* [1978]). The Court proposed a twofold test for deciding upon abusive pricing. First, it should be determined whether the difference between the costs actually incurred and the price actually charged is excessive. Second, if the answer to the first question is in the affirmative, it should be assessed whether a price has been imposed which is either 'unfair' in itself or when compared to competing products. (*United Brands Company and United Brands Continental BV v. EC Commission* [1978], para. 252) The judgment does not provide a clear guidance on what is meant by the part of the reasoning containing the expression "price which is *unfair in itself*". The unfairness in itself, however, is extremely difficult to assess considering that the case-law of the European Court of Justice as well as the decisional practice of the Commission provide little guidance on how to determine it. For example, in *United Brands* the Court did say that charging excessive prices constitutes abusive because the price has no reasonable relation to the economic value of the product supplied (*United Brands Company and United Brands Continental BV v. EC Commission* [1978], para. 250). But what the Court did not explain was how to determine the economic value of the product.

In the *Scandlines* case, the Court pointed out the weaknesses of relying solely on the economic valuation of the price, stating that the determination of the economic value of the product should also take account of other non-cost-related factors, especially regarding the demand-side aspects of the product. The notion of the term 'unfair in itself' was analysed more profoundly in the *Scandlines* case, in which it was suggested that the unfairness in itself could refer to the economic value of the service/products (*Scandlines Sverige AB v. Port of Helsingborg* [2004]). A similar approach was used in the judgment

in the *British Leyland plc v. EC Commission* [1987] case where it was found that fees charged were clearly disproportionate to the economic value of services. Also, in the *Kanal 5 Ltd. and TV4 AB v. STIM* [2008] ruling, ECJ referred to its earlier decision in *United Brands* stating that [...] such an abuse might lie in the imposition of a price which is excessive in relation to the economic value of the service provided. When there are no competing entities in the market, the unfairness in excessive pricing ought to exist in itself. In this situation, the harm to competition is at the downstream level consisting of customers of the dominant undertaking.⁴

In paragraph 252 of the *United Brands* judgement, the Court made a clear distinction between, on the one hand, the question whether the difference between the price and the production costs—the profit margin—is “excessive” and, on the other hand, the question whether the price is unfair. Therefore, a comparison between the price charged and the costs incurred can only serve as a first step in an analysis of excessive or unfair pricing. The *United Brands* judgment made clear (in paragraph 250) that an abuse can only be established where the price bears no reasonable relation to the economic value of the product concerned (*United Brands Company and United Brands Continental BV v. EC Commission* [1978], para. 250). In *Scandlines* judgment it was determined that the analysis should focus on the price charged plus the economic value of the product. The pure economic analysis between price and cost cannot serve as a conclusive argument for finding an abuse.

As a result, high price, even when it is excessive, cannot be considered abusive unless it is unfair. However, it is not clear what benchmark should be considered for evaluating the economic value of the product under the criteria ‘unfair in itself’ or is there, in fact, any single criteria at all to make such an evaluation. Perhaps the critical point here is not the factors that are used for determining unfairness under the economic value standpoint, but rather making the right choice between the two available alternatives under the *United Brands* test to reach solid conclusions.

Although there are several methods that can be applied in finding price excess and unfairness, it seems that excessive pricing is not an anti-competitive act in itself unless it harms the functioning of competition either on the upstream level affecting competing undertakings or, on the downstream level, affecting consumer welfare. The exploitative nature of

⁴ In *Continental Can v. Commission* [1973] it was ruled that “Art. 102 is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.”

the dominant firm's conduct is not a defining factor for finding abuse as it refers to a type of abuse among other existing forms. The defining factor is what consequences the conduct would have on the competition process if the *United Brands* test plus other methods turn out to be affirmative. In other words, the exploitative nature of the illegal conduct would, under these circumstances, be exploitative anyhow. The main challenge, under the *United Brands* test, is first of all defining the right benchmark prices before judging price excess and, secondly, choosing the right alternative and applying correct methods to judge unfairness.

2. When price negotiations get out of hand—the approach of Italy and the UK

Recently, the practices of pharmaceutical companies imposing very high price increases leading to unfair prices have attracted scrutiny from competition authorities, leading to the adoption of three infringement decisions in Europe since 2016 in Italy, the UK and Denmark. While the early cases, such as the *United Brands*, based the argumentation for finding exploitative abuse in excessive pricing mainly on the economic considerations, recent case-law has shifted its focus to encompass additional factors. Exploitative abuse-related cases have become grounded in the manner of how markets work rather than simply deciding on what is excessive or unfair. Therefore, it can be argued that the implementation of Article 102 of the TFEU prioritises abuses that affect the fundamental process of competition (Lyons, 2007, p. 18). Although the ultimate goal of Article 102 of the TFEU may be consumer welfare, the core of the norm is to focus on the competition process. This approach has been expressed in the cases *Continental Can v. Commission* and also in *Michelin v. Commission*, where it was said that in the light of Article 102, conduct is regarded as abusive only if it restricts competition process (*Manufacture Francaise des Pneumatiques Michelin v. EC Commission* [2003]) despite what the eventual goal of the norm might be.⁵

Price increase cases are natural candidates for anti-trust intervention. At the same time, in some cases, price increases may be justified due to lack of competition, for example, after the end of IP exclusivity. Considering that the price level is dependent on other additional factors such as interplay between

⁵ In *Continental Can v. Commission* [1973] it was ruled that “Art. 102 is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.”

offer and demand, a pure economic analysis may not provide sufficient guidance on solving cases involving exploitative abuse. Perhaps, anti-trust laws should interfere when unjustified pricing is consistent with both unfairness and economic considerations. Therefore, unfairness could exist in harming the flow of the competition process or in case there are no other competing entities, the unfairness in itself (as discussed in the *United Brands* case) could exist in increasing profits at the expense of customers without any justification. As discussed above, in case of harming the flow of the competition process, consumer harm is automatically present as an eventual result of the abuse. Exploitation should be used to test anti-competitive effects on the market and, in this case, the anti-competitive conduct should be deemed abusive only if it is exploitative. Such exploitation should *prima facie* be a result of harming the competition process (Akman, 2006).⁶

The concept of exploitation by implying unfair pricing in the pharmaceutical sector has been discussed in recent European case-law involving a South-African pharmaceutical company Aspen and its life-saving cancer drugs Cosmos. European Commission opened an investigation in 2017 into Aspen Pharma's excessive pricing for five life-saving cancer medicines. Aspen Pharma developed these medicines in the 1950s and 1960s, which means that they are off-patent by now. Despite the expiry of the patents a long time ago, there is no competing product on the market. The European Commission began its investigation in 2017 for a suspected breach of EU rules under Article 102 of the TFEU. The Commission started to investigate information about Aspen having imposed unfair and excessive prices in the form of significant price increases for its medicinal products (European Commission, 2017). Although the case is still under investigation by the Commission, a similar case involving Aspen was decided in Italy in 2016 by the Italian Competition Authority (ICA), as a result of which the pharmaceutical company was fined over 5 million euros for the violation of Article 102 of the TFEU. Thus, despite the fact that there is no ruling on the EU level as of today, the Italian ruling can give valuable insight into its possible outcomes.

In 2016, the ICA found that some companies of the Aspen Group abused their dominant position by pressuring Italian Medicine Agency (AIFA), the Italian pharmaceutical regulator, into accepting excessively high prices for several anti-cancer drugs.⁷ Aspen started negotiations with the AIFA

⁶ This can be harmful to competition at the level of the production chain that the dominant undertaking is active on.

⁷ The Cosmos drugs referred to the following medications: Leukeran, Alkeran and Purinethol Tioguanine.

with the sole aim to obtain a high increase in prices, even in the absence of any necessary economic justifications. This negotiation strategy resulted in substantial price increase ranging from 300% up to 1500%. Considering that the Cosmos drug portfolio consisted of irreplaceable lifesaving medicines, the AIFA had no choice but to accept the 1500% increase. Furthermore, Aspen insisted on the Cosmos products being listed in the 'C' category (i.e., not reimbursable) although being aware that such a request was allegedly not admissible. Also, it had threatened to withdraw the Cosmos drugs from the market and deliberately caused a shortage of the products on the Italian market during price negotiations (*Incremento prezzi farmaci/Aspen* [2016]). The decision was later appealed but the Lazio Regional Administrative Tribunal decided to uphold the decision of the ICA to the fullest.

From the legal point what is important is that the substantive assessment of Aspen's pricing strategy was based on the two-prong test also used in the *United Brands* case. Firstly, ICA considered the pure economic analysis to evaluate the disproportion between costs and prices. Secondly, it verified whether the excessive prices were additionally unfair considering other factors. As the pure economic cost-price comparison for deciding on the price excess could lead to false positive results, other criteria were also analysed. The reason why a simple economic calculation on prices and costs could give a false response was that a high profit margin may result both from the exercise of market power by setting high prices and from superior efficiency of the dominant firm leading to low costs or a superior product (*Incremento prezzi farmaci/Aspen* [2016]). It was therefore necessary to find out whether a high profit margin originated from the exercise of market power due to the lack of effective competition or from superior efficiency in terms of costs or innovation, in other words, whether it originated from high prices or from low costs/a superior product (OECD, 2011, p. 11). Considering that exploitation is a very ambiguous term within the meaning of Article 102, the ICA recognised that there is no straightforward rule as to the methods applied for determining the existence of unfairness by implying unfair prices (Bishop & Walker, 2002).⁸ Therefore, the Authority referred to several cases in EU case-law.

The practice of the European Commission and courts evidence a range of benchmarks against which prices have been compared in order to

⁸ It is not clear what the benchmark is for deciding whether a given price is excessive or unfair. It is questionable whether such exploitation should refer to prices, quality and/or choice to become exploitative. One benchmark can be 'perfect competition', but there is wide agreement that 'perfect competition' is not a realistic or always desirable state since, for example, it would require pricing at marginal cost which could distort incentives to invest and innovate.

demonstrate unfairness. Some of the examples include the costs of the dominant undertaking, prices charged by the dominant undertaking on other markets⁹, the prices of competitors' products on the same market and the prices of competitors' similar products on other markets (OECD, 2011, p. 11). After performing the price-cost comparison (revenues minus direct costs), ICA further considered other factors, namely the comparison between revenues and 'cost-plus' (direct costs, standard profitability measure, indirect costs related to the drugs) (OECD, 2011, p. 11). The Authority concluded that there was no justification for the price increase, for example, if there had been the need to recoup prior R&D costs or if additional benefit had existed for patients.

While the initial analysis conducted by the Authority clearly set its focus on the economic analysis on prices to consider the price excess under the first limb of the *United Brands* test, the second stage focused on the assessment of unfairness. In performing the second stage analysis, the Authority followed previous EU case-law in *Sirena Srl. v. Eda Srl. and Others* [1971] stating that despite the fact that price level in itself does not disclose abuse, if there is no objective justification, it may become a determining factor. Considering that the "right" price is, at least from the economic perspective, a result of the interplay between offer and demand, it remains questionable when the price level exceeds its expected level and becomes unfair. After all, the rationale behind incentivising the effective flow of competition process is providing rewards for innovative products. If a company is left without the reward, there is no motivation to innovate and invest in R&D. Thus, the question of whether conduct is justified or not should be assessed on the basis of the principle of proportionality (*Masterfoods Ltd. v. Ice Cream Ltd.* [2000]). The second limb of the test analysing unfairness in the *Aspen* case determined that there was no additional benefit for patients and the national health system because the quality of products was not improved.

Another case involving high pricing of medicines and allegations of abuse is the *Pfizer* case in the UK that has, by now, gone through two levels of

⁹ In *Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v. Concrete padome* [2017] (hereinafter *AKKA/LAA* [2017]), it was established that for the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 of the TFEU, it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index, provided that the referenced Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis.

litigation leading to very different outcomes from the *Aspen* case in Italy. Although Phenytoin, a drug used in treating epilepsy, was launched 80 years ago, it is still used to treat patients suffering from the disease in the UK. In 2012, Pfizer transferred its marketing rights for capsule forms of the drug to Flynn Pharma, although it continued to manufacture and supply them to Flynn which then sold them to the National Health Services (NHS). Flynn decided to genericise the drug, which meant that because of the UK pricing regulation, the selling price to the NHS increased between 2300% and 2600%. The Competition and Markets Authority (CMA) reached to a decision that the conduct qualified abuse of the dominant position under Article 102 of the TFEU. Both companies were fined, Pfizer in the sum of 84.2 million pounds and Flynn 5.2 million pounds, respectively (Decision of the CMA CE/9742-13). The decision was logged on to appeal.

Similarly, to the *Aspen* case, the decision in *Pfizer* also employed the two-limb test of the *United Brands* case (Decision of the CMA CE/9742-13). Differently from the Italian Competition Authority who analysed the price excess (the first limb of the *United Brands* test) based on two different methods,¹⁰ the CMA only relied upon the cost-plus method. For the assessment of fairness, the ICA considered manifold criteria to analyse whether the drug was unfair in itself. The CMA also viewed the prices to be unfair in itself, but it ruled out that any non-cost-related factors had to be considered to determine the economic value of the drug supplied. In the CMA's view, the substantial gap between the prices charged and the economic value was enough to indicate that such prices were unfair in themselves (OECD, 2011).

The Competition Appeal Tribunal (CAT) severely criticised the methods applied by the first instant Authority in both assessing price excess and unfairness. As for determining the excessive price, the CAT stated the following: "As with its consideration of Pfizer, the CMA's approach to aspects of its cost-plus analysis for Flynn is affected by its failure to set a benchmark price or range in circumstances of normal and sufficiently effective competition" (*Flynn Pharma Limited, Flynn Pharma Holdings Limited v. Competition and Markets Authority* [2018]). The main problem in performing the economic analysis in setting the benchmark price was that CMA relied on a hypothetical market conditions that did not reflect the conditions of effective competition. Here, the CAT referred to the decision of the *AKKA/LAA* [2017] case where the Advocate General Wahl had pointed out that the excess has to be measured with respect to a benchmark price

¹⁰ The ICA compared the prices and costs of Aspen with two different methodologies: the contribution margin analysis and the cost-plus analysis.

(OECD, 2011, para. 17). Considering that there is no single test¹¹ to judge the excess of prices, there are different ways of performing the test as long as the results provide to be objective, verifiable and appropriate (*AKKA/LAA* [2017], paras. 42–43).

As for the unfairness, CMA's analysis included an overall assessment that the prices bore no reasonable relation to the economic value of the product and a series of other factors.¹² CAT pointed out that CMA had made a wrong choice in assessing unfairness based on the 'unfairness in itself', as by doing so, CMA failed to properly assess the possible impact of meaningful parameters. Thus, for assessing unfairness, the critique of the Appeal Tribunal was not targeted to the factors that were considered but the fact that they had selected one alternative based on discretion.

Also, where the analysis of the ICA and CMA diverged was in the price-cost comparison limb of the test. While both competition authorities applied the cost-plus methodology, the ICA also relied on the contribution margin analysis. The CMA had additionally failed to consider any non-cost-related factors, such as patient benefits, and the nature of the product together with all the surrounding circumstances when evaluating the economic value of the drugs (*Flynn Pharma Limited, Flynn Pharma Holdings Limited v. Competition and Markets Authority* [2018]). Furthermore, the CMA decided to rely on one alternative available under the second limb of the *United Brands* test leading to conflicting results if the comparative alternative had been chosen instead. However, as noted by the Appeal Tribunal in the *Pfizer* case, when judging over unfairness it was not about choosing the "right" alternative but the fact that both alternatives should have resulted in the same answer. One cannot simply opt for an alternative that is likely to give expected results. Differently from the methodology in *Pfizer*, the *Aspen* case assessment was carried out in two phases: (i) the excess of prices on costs was found through the use of two different methodology (margin analysis and profitability or cost-plus analysis); (ii) the unfairness of the imposed prices was ascertained in the light of the specific circumstances of the case

¹¹ In addition to the *United Brands* tests that considered the cost of production and cost-plus elements, other methods can be used. For example, as AG Wahl stated in *AKKA/LAA* case, the prices charged in other product or geographic markets by the dominant undertaking; the prices charged by other undertakings in the same or related markets; and the evolution of pricing over time (*AKKA/LAA* [2017], para. 19).

¹² The competition and Markets Authority relied on several parameters to judge the economic value of the product. For example, the increase in price; the selective change of prices in the UK but not elsewhere; the impact on the buyer; the lack of any independent or objective justification; etc.

at stake. The Italian Authority used more than one type of methodology to assess whether prices were excessive to reduce potential errors (*AKKA/LAA* [2017], paras. 43 & 45) and false positive results.

3. Concluding remarks

Deriving from the existing case-law, excessive pricing does not yield to be automatically abusive. Thus, the pure economic analysis cannot suffice to determine the existence of abuse by a dominant undertaking. At the same time, the exploitative character of the abusive conduct implies that as far as unfair pricing is confirmed, exploitation can be interpreted as the ultimate result stemming from the abuse, which means that it is present in itself. There is no need to further prove the type of abuse, as in the case of excessive pricing there is ultimately one type of abuse (Fox, 2002) which is exploitative by its nature. At the same time, based on the rulings in several case-law both on the EU level as well as on the national level, it seems that the decisions dealing with excessive pricing are moving towards the economic value-based approach rather than purely economic calculations on price and cost comparison. For example, in the *Scandlines* case, it was pointed out that the pure economic method should be accompanied with other evaluative criteria¹³ meaning that the exploitative abuse should affect either the upstream market, i.e., the competition between undertakings or the downstream market as meaning consumers. Either way, the conduct of a dominant undertaking would harm the competition process and consumers no matter in which of the two categories it falls.

The economic evaluation of the *United Brands* decision as regards determining the existence of price excess was applied in the Italian *Aspen* case but here the Competition Authority went further in its analysis considering not just the price-cost measured through the gross contribution margin, but also other factors such as the difference between revenues and cost-plus.¹⁴ The unfairness was analysed based on the notion of ‘unfairness in itself’ because, differently from the *Pfizer* case, there were no other alternatives to the *Cosmos* drugs in the market for comparison. Several aspects were

¹³ The Commission stated in its arguments that the economic value must be determined with regards to the particular circumstances of the case and consider also non-cost related factors such as the demand for the product/service (*Scandlines Sverige AB v. Port of Helsingborg* [2004]).

¹⁴ For example, direct costs, proportion of indirect costs and plus profit margin.

also considered for judging unfairness in the *Aspen* case. For example, ICA analysed intertemporal comparison between prices, the lack of economic justification and also the lack of benefits for customers. This is what was lacking in the *Pfizer* decision in the UK as the Competition and Markets Authority restricted its first-limb analysis to cost-plus assessment rather than seeking to establish a benchmark price. As emphasised by the Appeal Tribunal, the CMA was wrong in law to adopt a cost-plus methodology that produced a result that would have pertained in circumstances of perfect or, more accurately (for the purpose of the present case), idealised competition, rather than the “real world”; and made an error of assessment by relying only on the cost-plus approach that it selected (*Flynn Pharma Limited, Flynn Pharma Holdings Limited v. Competition and Markets Authority* [2018], para. 310). The CMA also relied on analysing only one alternative under the *United Brands* test for unfairness while it could have performed a comparative study with drug capsule prices that existed in the course of trade. In doing so, the CMA did not properly assess the possible impact of meaningful comparators.

In conclusion, although considering the right benchmarks for finding the violation of the first limb of the test is crucial as otherwise it could lead to false-positive results, it is the unfairness that makes a difference between a lawful conduct by a dominant undertaking and illegal abuse, not the price excess in itself. Price-cost comparison can be useful for deciding on price excess but even when the result exceeds the cost-plus benchmark, excess in itself is not abusive unless it is further unfair. Anti-trust should therefore interfere if the unjustified price increase is consistent both with fairness and economic considerations. Thus, the unfairness based on economic evaluation should further be considered in the context of proportionality considering also non-economic factors. The benchmark for deciding upon unfairness could perhaps be that the price charged exceeds the economic value (the average cost including a reasonable profit margin) of a given product (Commission Decision 2001/892/EC) or that the price level differs from what is charged in other markets (*Corinne Bodson v. SA Pompes funèbres des régions libérées* [1988]) or the comparison of the economic value of the product to non-cost-related factors such as market demand (*United Brands Company and United Brands Continental BV v. EC Commission* [1978]). Although the *United Brands* test is not the only way to assess unfair pricing and there are different types of benchmarks developed in European case-law, the test does have a central role in dealing with cases involving exploitative abuse of dominant undertakings. The existing decisions on relevant case-law shows

that the second parameter of the *United Brands* test is becoming more and more dominant in the assessment of unfair prices.

At the same time, the *United Brands* test should be approached with caution because, even though in many markets prices may be temporarily high, due to a mismatch of demand and supply or the exercise of market power, it is preferable to give market forces the time to play out and entry and expansion to take place, thereby bringing prices back to more normal levels (Decision of the CMA CE/9742-13, p. 10). However, if the market is characterized by such entry barriers that it is unlikely that market forces will bring prices down, enforcement actions aimed directly against excessive prices may indeed be appropriate (Commission Decision in Cases COMP/39.388 & COMP/39.389). In view of the case-law, it is clear that the abusive conduct over exploitative pricing practices focuses foremost on the flow of the economic process and eventually consumers. For example, in the *Aspen* case in Italy, the problem arose because of a disruptive change in the prior course of action of the dominant firm, which negatively affected not only the competition process but also consumers due to increasing profits at the expense of customers. The unfairness in the form of exploitative pricing would therefore also harm the effective functioning of the competition and consequently consumer welfare.

Although the *United Brands* two-fold test focused on the economic evaluation on cost-price relation and on the cost-plus evaluation, the judgment actually confirmed that other alternative methods can be applied for finding exploitative abuse in unfair pricing. The ECJ specifically referred that other ways may be devised for selecting the rules for determining whether the price of a product is unfair (*Kanal 5 Ltd. and TV4 AB v. STIM* [2008]). Thus, it seems that despite the fact that there is no universal benchmark for deciding exploitative abuse cases, it is possible to deploy different evaluation methods to determine whether the price is excessive. Also, in *AKKA/LAA* [2017] case, the Advocate General Wahl emphasised that there are several methods that can be used for determining the existence of the abusive pricing. If only one method is applied, it could lead to false-positive results. For this reason, as criticised in *Pfizer* case in the UK by the Competition Appeal Tribunal (CAT), the excessive price cannot be solely calculated based on hypothetical conditions¹⁵ but should consider a range of possible analysis

¹⁵ The Competition Appeal Tribunal stated the following: "In *Pfizer's* case, we consider the CMA's theoretical approach may understate what the appropriate benchmark price for Pfizer would notionally have been under conditions of normal and sufficiently effective competition, but without further investigation we are not in a position to say whether this is the case."

that reflect real market conditions in order to establish the benchmark price (*Pfizer Inc. and Pfizer Limited v. Competition and Markets Authority* [2017]). Similarly, unfairness should be judged considering the economic value of a given product and whether the price bears any reasonable relation to it. If these two conditions give affirmative response, the excessive pricing and unfairness should be analysed in the context of normal and effective competition process meaning that if the impact to the latter is harmed, abuse can be confirmed to exist in the form of exploitation by the dominant firm. Based on the ruling of the *United Brands*, there are two aspects to consider. First, the dominant undertaking must have “reaped trading benefits” that it would not have earned under conditions of “normal and sufficiently effective” competition. Secondly, the price complained of must bear “no reasonable relation” to the “economic value” of the product supplied (*United Brands Company and United Brands Continental BV v. EC Commission* [1978]). This confirms the argument that was raised in this article—namely the fact that, although there is no such phenomenon as perfect competition, the key in finding abuse in excessive pricing exists in the impact of the conduct of the dominant company to the normal and sufficiently competitive process. The excessive pricing does not equal automatic abuse. It should be further found unfair, which is ultimately the element that determines the impact on the competitive process and finally consumer welfare.

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References

- Akman, P.** (2006), 'Article 82 reformed? The EC Discussion Paper on exclusionary abuses,' *Journal of Business Law*, vol. 816, pp. 821–822.
- Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v. Concrete padome* [2017], C-177/16, EU:C:2017:689.
- Bishop, S. & Walker, M.** (2002), *The Economics of EC Competition Law: Concepts, Application and Measurement*, London: Sweet Maxwell.
- British Leyland plc v. EC Commission* [1987], C-226/84, ECLI:EU:C:1986:421.
- Commission Decision of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915—Deutsche Post AG—Interception of cross-border mail) (Text with EEA relevance) (notified under document number C(2001) 1934), 2001/892/EC, *OJ L* 331, 15.12.2001.
- Commission Decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Cases COMP/39.388—German Electricity Wholesale Market and COMP/39.389—German Electricity Balancing Market) (notified under document number C(2008) 7367 final) (Text with EEA relevance), *OJ C* 36, 13.2.2009.
- Consolidated version of the Treaty on the Functioning of the European Union, 2012/C 326/01, *OJ C* 326, 26.10.2012.
- Continental Can v. Commission* [1973], C- 6/72, ECLI:EU:C:1973:22.
- Corinne Bodson v. SA Pompes funèbres des régions libérées* [1988], C-30/87, ECLI:EU:C:1988:225.
- Decision of the CMA Article 102 TFEU/Chapter II investigation into Pfizer and Flynn Pharma in relation to an alleged abuse of dominance through charging excessive and unfair prices for an anti-epilepsy drug (phenytoin sodium capsules), Case CE/9742-13.
- European Commission (2017), 'Manufacture of pharmaceutical preparations,' 40394 Aspen, C.21.2, European Commission Competition Antitrust/Cartel Cases.
- Flynn Pharma Limited, Flynn Pharma Holdings Limited v. Competition and Markets Authority* [2018], CAT-11, 1275/1/12/17.
- Fox, E. M.** (2002), 'What is harm to competition? Exclusionary practices and anticompetitive effect,' *Antitrust Law Journal*, vol. 70, no. 2, pp. 371–411.
- Incremento prezzi farmaci/Aspen* [2016], A480, Autorità Garante della Concorrenza e del Mercato, Bollettino, 36/2016.
- Kanal 5 Ltd and TV4 AB v. STIM* [2008], C-52/07, ECLI:EU:C:2008:703.
- Lyons, B.** (2007), *The Paradox of the Exclusion of Exploitative Abuse*, ESRC Working Paper CCP 08-1. <https://doi.org/10.2139/ssrn.1082723>

Manufacture Francaise des Pneumatiques Michelin v. EC Commission [2003], T-203/01, ECLI:EU:T:2003:250.

Masterfoods Ltd v. HB Ice Cream Ltd. [2000], C-344/98, ECLI:EU:C:2000:689.

Motta, M. & de Streel, A. (2006), 'Excessive pricing and price squeeze under EU law,' in C. D. Ehlermann & I. Atanasiu (eds.) *What Is an Abuse of Dominant Position?* Portland, OR: Hart Publishing.

OECD (2011), Working Party No. 2 on Competition and Regulation Excessive Prices, DAF/COMP/WP2/WD (2011)54, 17.10.2011.

Parke Davis and Co v. Probel, Reese, Beintema-Interpharm and Centrafarm [1968], C-24/67, ECLI:EU:C:1968:11.

Pfizer Inc. and Pfizer Limited v. Competition and Markets Authority [2017], CMA 1276/1/12/17.

Röller, H. (2007), 'Exploitative abuses,' *ESMT Business Brief* No. BB-107-002, p. 5. *Scandlines Sverige AB v. Port of Helsingborg* [2004], COMP/A.36.568/D3.

Sirena Srl v. Eda Srl and Others [1971], C- 40/70, ECLI:EU:C:1971:18.

United Brands Company and United Brands Continental BV v. EC Commission [1978], C-27/76, ECLI:EU:C:1978:22.

Vestager, M. (2016), 'Protecting consumers from exploitation,' Speech held for European Commission at Brussels Chillin' Competition Conference, 21 November.

Whish, R. (2009), *Competition Law*, Oxford: Oxford University Press.