

Excessive pricing: Competition Law in Shared Regulatory Space

Giorgio Monti

‘these are regulators and they are not obliged to apply logic to a situation’¹

1. Introduction

Among the abuses of dominance prohibited under Article 102 TFEU is the imposition of unfair selling prices. The mainstream reactions to this prohibition range from denying that excessive pricing constitutes an antitrust offence to attempts to interpret this prohibition so narrowly as to whittle it out of existence.² Two recent judgments have embraced the spirit of these responses. Both Advocate General Wahl in *AKKA/LAA*³ and the Competition Appeals Tribunal in *Flynn* take the view that ‘[c]ases of pure unfair pricing are rare in competition law. Authorities find them difficult to bring and are, rightly, wary of casting themselves in the role of price regulators.’⁴ Both judgments serve to make the application Article 102 TFEU to excessive pricing more difficult. These judgments are discussed further below.

However, this paper is not yet another contribution to the discussion about how to devise an appropriate test for excessive pricing. These recent judicial pronouncements fit within a broader pattern whereby EU competition law is transformed to follow the edicts of ‘mainstream economics’, in particular those that emanate from a particularly restrictive variant of antitrust enforcement (the so-called Chicago School) that entered the scene in the 1960s, against which many have tried to object largely without success.⁵ In this context, it is remarkable that in interpreting EU Law, AG Wahl should make reference to a judgment of the US Supreme Court, *Verizon v Trinko*, a judgment so conservative that even some in the US have distanced themselves from it. But the surprise at the favourable

¹ Communication between Pfizer and Flynn. Competition and Markets Authority, *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK* Case CE/9742-13, paragraph 3.323.

² On the former see M.K. Ohlhausen ‘The Elusive Rome of Competition in the Standard-Setting Antitrust Debate’ ((2017) 20 Stanford Technology Law Review, 93; P. Akman *The Concept of Abuse in EU Competition Law* (2012) p.124 suggesting the prohibition is inherently irrational. For the latter see e.g. D.S. Evans and A.J. Padilla ‘Excessive Prices: Using Economics to Define Administrable Legal Rules’ (2005) 1(1) Journal of Competition Law and Economics 97.

³ Case C-177/16 *AKKA v Latvia Competition Authority* paragraphs 3, 4 and 49 respectively.

⁴ *Flynn and Pfizer v CMA* [2018] CAT 11, paragraph 2

⁵ The variant is the so-called Chicago School. An example of an attempt to challenge this stance is found in Pitofsky (ed) *How the Chicago School Overshot the Mark* (2008)

reference to this case is also for two other reasons. First because US antitrust law does not prohibit excessive pricing (we qualify this below) but also because in a judgment restating this, Justice Scalia took the view that ‘charging... monopoly prices... is an important element of the free-market system.’⁶ Since the express prohibition of excessive pricing in Article 102 suggests a diametrically opposite attitude to the one expressed here, it is hard to see why one should see *Trinko* as a helpful discussion for the purposes of EU Law, but it reveals the trend to assimilate much of the thinking (ideology?) that underpins Scalia’s thinking into EU antitrust even when, as here, it runs against the statutory text.

The point in this paper is to challenge the restrictive vision embraced by the courts not by lamenting the degeneration of EU competition law, but by showing that instances when competition agencies raise concerns about excessive prices are less rare than assumed, not any more difficult to bring than other kinds of antitrust action, and do not necessarily require the agency to act as a price regulator. Rather, cases of excessive prices are instances where the application of competition law responds to, or helps to shape, the regulatory framework. Understood in this manner, excessive pricing cases are strategic actions designed to stimulate other regulatory responses. Therefore, the attempt by the recent judgments to rein in the scope of the excessive pricing appears to ignore this function of antitrust law enforcement.

In parts 3 and 4 of the paper we consider, perhaps controversially, excessive pricing considerations found in Article 101 cases. If we focus on the Commission’s enforcement practice since the coming to force of Regulation 1/2003 and exclude cartel cases, we find that the Commission has focused on two types of practices where the key issue is the price level: reverse payment settlements and interchange fees. Other than these there has only been one other decision which has no direct price component. Sections 5 and 6 we examine instances where national competition authorities (NCAs) are investigating excessive pricing using Article 102: collecting societies and pharmaceutical products.

In all these four examples the nexus between antitrust and regulation plays out differently but some common themes emerge, which we discuss in the final section. Section 7 has a quick look at the requirements to establish excessive pricing as they have evolved with the recent spate of cases to indicate how these limitations are hard to square both as a matter of internal logic and also with the spirit of antitrust law enforcement outlined here.

⁶ *Verizon v Trinko* 540 US 398, 403 (2004)

2. A reality check

Before moving to the case studies, a quick reality check on the propositions advanced by the supporters of a restrictive reading of excessive pricing law. Recall from the CAT judgment above we are told these cases are rare and competition agencies are wary of becoming price regulators. This statement is reflected of the mainstream literature. Reality is rather different.

On the rarity point, in addition to the examples in the sections below, we find a number of other instances where the Commission resolved competition concerns via commitment decisions where the concern was excessive pricing. Counting from 2011 we find Standard & Poor's (excessive licensing fees); Rambus (excessive royalties resulting from patent ambush); IBM (constructive refusal to deal, inter alia using high prices); Gazprom (high gas prices). During the same period the Commission has taken at most a dozen other cases, so it is not as if we are dealing with a practice that the Commission does not keep an eye on. It will be objected that few of these cases are 'pure' excessive pricing cases, but then most instances where a firm abuses its dominant position are not easily classified as a single abuse, often multiple strategies are devised to exploit and exclude.

Another remark appears appropriate on the impossibility of determining excessive pricing. In its drive to stimulate damages claims for victims of cartel prices the Commission has invested in developing soft law documents establishing best practices to calculate the overcharge resulting from cartels. This exercise is not that different from testing for monopoly prices so there is willingness by the Commission to invest in methods to calculate excessive prices.

On the remedial front, the Commission was able to regulate conduct in the above cases without becoming a price regulator. In Gazprom a competitive price benchmark was set and a compulsory arbitration procedure is in place in case there are disputes over the price offered. In S&P the fee was removed. In Rambus the firm offered licensing fees for the Commission and third parties to evaluate before a commitment decision made them binding. In IBM the firm undertook to sell on reasonable terms, subject to arbitration in case of disagreement. One might query the effectiveness of the remedies in any one of these instances, but the point is that the Commission is able to secure remedies that in its view remove the anticompetitive harm caused by higher prices. It may be objected that these are all commitment decisions but similar remedies may also be imposed in infringement decisions, see for example the remedy structure imposed on Microsoft.

3. Multilateral Interchange Fees: from competition to regulation

Four Commission decisions since 2005 have considered that the level at which multilateral interchange fees are set by Mastercard and Visa restricts competition. In brief Mastercard's and Visa's fallback interchange fees are said to create a price floor for the negotiations between issuing and acquiring banks such that the fees that acquiring banks set to merchants are raised. Absent the fallback fee, acquiring banks might compete more aggressively for the custom of merchants. The Mastercard decisions prohibit high interchange fees leaving space for Mastercard to design an Article 101(3)-compliant MIF, while Visa secured one of the last Article 101(3) exemptions in 2007 allowing certain interchange fees to be continued for a limited period. For the purposes of this paper what is of interest is the regulatory aftermath of these decisions.

In a first instance we can observe that both Visa and Mastercard made various commitments to ensure that they could retain the use of interchange fees, with the Commission monitoring the appropriateness of the fees. Procedurally, Visa secured a commitment decision in 2010 where MIFs were capped at 0.2% for debit payment cards, with the Commission justifying this level in the proportionality part of the decision.⁷ Then a cap of 0.3% was set for credit cards in 2014.⁸ However these decisions did not cover all the MIF agreements that Visa had entered into, and further enforcement action is pending which will similarly regulate prices. Mastercard instead provided unilateral undertakings in 2009, pending appeals against the decisions issued against it, with the same caps as those found in the Visa decisions.⁹ Hence, since 2009 the Commission regulated MIFs through two distinct legal instruments: commitment decisions (which have a codified procedure that includes the opportunity for third parties to comment before the commitments are approved) and unilateral undertakings (for which no procedural pathway is formally available).

Second, in 2013 the Commission proposed sector-specific regulation. It noted the difficulties encountered in monitoring prices using antitrust powers as well as the number of cases pending in some National Competition Authorities (NCAs): 'competition enforcement according to different timelines and procedures may not lead to sufficiently comprehensive and timely results to unlock the market integration and innovation that are necessary to ensure the competitiveness of the European payments

⁷ Case COMP/39.398 - Visa MIF (8 December 2010)

⁸ Case AT.39398 – VISA MIF (26 February 2014)

⁹ Commission Memo, 'Antitrust: Commissioner Kroes notes MasterCard's decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases – frequently asked questions' (1/4/2009)

market at a global level.’¹⁰ The case for regulation then is to ensure all market players are regulated at the same time, creating a level-playing field. This motivation is repeated in the Recitals to the Regulation on Interchange fees.¹¹

The regulation broadly mirrors the approach taken in the Mastercard undertakings and Visa commitments, Articles 3 and 4 setting the same caps as above. Further provisions are of interest, for instance forbidding the imposition of a rule that merchants must honor all cards. This stimulates competition between cards as the merchant may offer a discount if the buyer uses a different credit card where the merchant fee is lower. This too can serve to stimulate lower interchange fees.

Whether this regulatory approach is successful is beyond the scope of this paper. The example serves to show that: (i) excessive price considerations extend beyond simple cases of monopoly prices; (ii) the Commission is able to devise regulatory pathways to keep prices in check; (iii) competition law enforcement serves to stimulate regulatory efforts by the EU.

4 Reverse-payment settlements: special surveillance

The gist of these settlements may be summarized as follows: a generic manufacturer thinks a patent on a branded medicine has expired, it seeks to enter the market and is challenged by the originator for patent infringement. Instead of pursuing the patent infringement case, the parties settle: the generic manufacturer agrees to delay entry until a specified date (at which time the parties agree the patent has expired) in exchange for a sum of money and/or marketing advantages provided by the originator. These settlements may be in the public interest because settlement is more efficient than lengthy litigation on the validity of the patent. However these settlements may be contrary to the public interest when the patent is in fact invalid and the settlement is akin to a cartel whereby the two firms share the market. Patent settlements, however, do not resolve the question of the patent’s validity.

The analysis to be carried out under Article 101 TFEU as the law stands currently, is twofold: first to work out whether the generics manufacturer is a potential competitor of the originator, and second to use the payment level to ascertain if the settlement is anti-competitive. In *Lundbeck* for example, it was held that the payments corresponded to the

¹⁰ Commission, *Proposal for a regulation on Interchange fees for card-based payment transactions* COM(2013) 550 Final 2, p.6

¹¹ Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions OJ L123/1, Recitals 10 and 12

profits that the generics manufacturers expected, and this indicated that there was a restriction of competition because the originator was sharing his profits with the potential competitor and depriving the buyer of cheaper products. This assessment is controversial for its wide definition of potential competition (if a patent is presumed valid, how can the generics manufacturer be considered a potential entrant?) and for classifying the restriction as one by object rather than effect (however the object-type analysis in *Lundbeck* similar to the structured rule of reason found in some US judgments implementing *Actavis*).¹² However the purpose of this paper the key point is that the Commission penalizes excessive prices which serve to exclude rivals.

Unlike interchange fees, however, the decisions do not determine what a fair price would be, and so far we have seen no legislative initiative at EU level. Legislative silence might be explained by the unsettled state of the case law, with appeals pending, and limited legislative competence in the field. The Commission has however stimulated self-regulation since 2008 when it reviewed the pharmaceutical sector. It monitors patent settlements on an annual basis and this effort may be seen as a regulatory technique to stimulate compliance with the Commission's line on what is an appropriate price. The degree to which suspect settlements have diminished (from 22% in 2000-2008 to 11% in 2016) may indicate that it has been successful.¹³ However it is not completely clear if this monitoring is perceived to be a deterrence strategy (increasing the probability of firms getting caught).

One may also consider developments at national level. For example the Commission has noted that Portuguese Law (since 2012) requires that an originator must initiate arbitration proceedings within 30 days of the publication of a marketing authorisation application by a generic company or lose their right to assert the validity of the patent. This serves to accelerate settlements. It may be worth studying the extent to which this leads to settlements that pose less risk to competition. The data compiled by the Commission indicates that the Portuguese settlements are less likely to entail competition risks, but only by a small margin. This suggests that regulatory adjustments might ameliorate anticompetitive results together with a deterrence-based strategy based on high fines.

¹² E.g. *In re Cipro I & II* (2015) in the California Supreme Court.

¹³ Reports are available here: <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/>. The latest report covers the period January to December 2016.

5. Copyright Management Organisations: a variety of models for regulating prices

The market for Copyright Management Organisations (CMOs) in the EU is in the process of liberalization as a result of Directive 2014/26. This in spite of the ECJ considering that monopoly rights were fine as a matter of EU Law.¹⁴ As Emanuela Arezzo noticed, the likely impact of this Directive (assuming it is implemented properly) will be to reduce the number of collecting societies in the EU, with a small number of large societies serving the EU market in competition with each other.¹⁵ This may be preferable to the present de jure or de facto national monopolies enjoyed at present even if one might see several attempts by incumbents to delay entry, which will spur NCAs into action.¹⁶ This reconfiguration may also present risks to cultural diversity if no CMO is interested in safeguarding rights that have little economic value. In this section, we compare models for regulating the price for licensing these rights to users: competition law, sector-specific regulation and consent decrees.

5.1 Excessive/discriminatory licensing fees

Many national competition authorities have challenged the prices set by collective management organisations. One approach has been to challenge the prices for being discriminatory, offering similar prices to different licensees. The ECJ's guidance appears relatively generous towards the dominant undertaking in these claims. In cases like *Tournier* and *Kanal 5 and TV 4* the Court was willing to tolerate the practice of setting the royalty rates by reasonable rules of thumb. Specifically: in *Tournier* it was a flat rate royalty dependent on the turnover of the discotheque and in *Kanal 5* it was a rate based on the proportion of TV channels' revenue from broadcasts that included licensed music. These approaches allow de facto discrimination. While a more precise and cost-effective way of estimating the precise use of music by the licensee could be identified it seems that the burden is on the plaintiff/competition authority to demonstrate that such a method exists and that it would entail reduced royalty rates. Toleration for arbitrary results is also found most recently in the *MEO* judgment where the Court requires that a challenge against second degree price discrimination under Article 102 requires that there

¹⁴ Case C-351/12, *OSA*.

¹⁵ E. Arezzo 'Competition and Intellectual Property Protection in the Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights and Shadows of the New European Directive 2014/26/EU' (2015) 46(5) IIC 534.

¹⁶ E.g. the ongoing Italian NCA case against SIAE's exclusionary tactics.

is a convincing story that the downstream rival is disadvantaged.¹⁷ This judgment effectively kills off this line of challenge.

It follows that excessive pricing is the sole possible basis for challenging licensing fees. In determining whether prices are excessive the judgment in *AKKA/LAA* confirms and elaborates on the standard set in earlier case law. While worrying about Type 1 errors,¹⁸ the Court ratifies and develops a method which most would agree is likely to be under-inclusive and for which no immediate solution from the market is likely to emanate. This buys directly into the Chicagoan creed that Type 2 errors are anyway self-correcting.

In brief, to determine whether prices are excessive, the ECJ confirms that there is a two stage test. In stage one a showing that a CMO whose prices are ‘appreciably higher’ than those in other Member States is indicative of an abuse. The ECJ finesses this comparison approach by allowing an NCA to make a comparison with selected Member States, provided the method for selection is ‘objective, appropriate and verifiable.’¹⁹ Comparisons must remain ‘consistent’ which is jargon for checking that the price structures of the CMOs should be similarly arbitrary (e.g. rates calculated on the basis of the surface area).²⁰ Stage two in an excessive price case is to determine if the high prices are so high to constitute an abuse. This part of the judgment raises two interesting points: first the NCA may presume that rates that are appreciably higher than those of others are abusive if the difference persists for a certain length of time;²¹ second the CMO may justify the high rates either by noting that national law requires higher remuneration rates for artists or because the CMO’s operating costs are high. We return to these legal standards in section 7.

The problem with this approach is that since in most Member States CMOs enjoy a dominant position, which has been largely unregulated, that there is hardly going to be a benchmark competitive price in other Member States. Thus, this approach allows the NCA lucky enough to have the CMO setting the EU’s highest rates to bring a challenge, when it is likely that more CMOs are pricing well above what would occur in a competitive market. The result is that the test accepted by the ECJ, if applied successfully at all, is likely to lead to under-enforcement.

¹⁷ Case C 525/16.

¹⁸ AG Wahl even cites Frank Easterbrook’s Chicagoan call to under-enforce the law

¹⁹ Case C-177/16 paragraph 41.

²⁰ *Ibid*, paras 44-45.

²¹ *Ibid*. para 56.

One point that the ECJ seems to have missed is that in some states there is a system for rate regulation and one might wonder if those states are best able to furnish evidence about what a competitive price might be and thus one might construct a competitive price by reference to those jurisdictions. On the other hand it may be argued that the presence of bespoke regulation may not provide a reliable indicator of what a competitive price is.

5.2 Regulating CMOs

Another way to safeguard users is to regulate CMO prices: Germany has such a system.²² The law provides that the CMO must deal with anyone who requests exploitation rights, and they the CMO must deal on 'equitable conditions'. In cases where there is a dispute on the fairness of the price the legislation provides that the user may at first pay that sum which he considers reasonable, and the remainder of the sum is put into a separate account pending resolution of the dispute.²³ This allows the user to begin to exploit the copyright and the CMO to secure some of the remuneration. The dispute over the extra sum requested by the CMO is handled by the Arbitration Board which facilitates an amicable settlement.²⁴ This framework does not prevent the application of competition law, but it is likely that disputes on the price will be resolved through this procedure which, as far as can be seen, is not designed to identify an adequate price in the same way as under Article 102. Some might suggest that a determination of equitable remuneration could benefit from input by competition authorities, on the other hand other considerations pertaining more specifically to copyright law might inform the determination of rates.²⁵ At any rate it is arguable that a properly regulated system for setting rates may provide a better benchmark for testing that rates in systems where there is no such regulation, and it may substitute for the application of competition law.

In *MEO AG Wahl* noted for example that the Portuguese NCA might consider whether in light of the regulatory framework present, by which disagreements about rates are adjudicated by arbitration, whether CMOs have a dominant position, or if the regulatory scheme dents their market power somewhat. Of course it is black letter law that a

²² Law on the Administration of Copyright and Neighboring Rights, as amended in 1998. An English language version is available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=126251. The discussion in the text is based on J. Reinbothe 'Collective rights Management in Germany' in D. Gervais (ed) *Collective Management of Copyright and Related Rights* 2nd ed (Kluwer, 2010)

²³ Article 11(2) of the Law cited above.

²⁴ Details are available at:

https://www.dpma.de/english/our_office/about_us/further_duties/cmcs_copyright/arbitration_board_under_the_cmo_act/index.html

²⁵ For an interesting reflection, see Cirace 'CBS v ASCAP: An Economic Analysis of a Political Problem' (1978) 47 Fordham Law Review 277.

determination that a rate is equitable from the perspective of CMO-specific laws does not prevent a finding of abuse of dominance, but this position again speaks in favour of designing the regulatory framework in a manner that takes competition considerations into account.

As noted above, the EU has now legislated to facilitate the transformation of CMO industry structure in the EU. The bulk of the Directive seeks to allow for the entry of new rivals and to safeguard the interest of members.²⁶ However one provision addresses the relationship between CMOs and users. It requires that CMOs and users negotiate in good faith, providing each other all necessary information. Significantly for the purposes of this paper, '[l]icensing terms shall be based on objective and non-discriminatory criteria.'²⁷ The Directive further specifies that the license fee should 'be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization.' It remains to be seen how far this Directive shifts enforcement away from antitrust law. Two indications suggest that this might occur. First, procedurally, like in the US consent decree discussed below, provision should be made for ADR. This might provide a less expensive avenue for obtaining redress than recourse to a competition authority. Second, substantively a complaint like that in *MEO* (which focused on price discrimination) might fare better under the Directive since at hand is the fairness of the contract between the parties and not the anticompetitive effects. It remains to be seen then if the Directive renders the ECJ's efforts to make the law of excessive prices hard to apply irrelevant.

The interesting aspect of this spate of antitrust litigation is that the Commission left it for national competition authorities to fight the CMOs, rather than using its decisions as a lever for proposing the CMO Directive. It then used the diversity that emerged at national level to secure EU-wide harmonization.

5.3 consent decrees

It is worth noting that even in the jurisdiction where it is said antitrust law is not price regulation (the US), CMO conduct, and prices, have been regulated by consent decrees

²⁶ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72.

²⁷ Ibid. Article 16(2)

since 1941, requiring that licensing fees set be reasonable.²⁸ Disagreements on the fee between CMO and user are settled by the US District Court for the Southern District of New York, by trying to elicit an appropriate price. The court is well aware of the difficulties of comparing one price with another, and judgments echo the kinds of thinking we find in the ECJ's case law discussed above as judges search for competitive benchmarks when the market is far from competitive, aided by significant expert evidence.²⁹ However, in some instances the court seems to pick a rate in between that sought by the two sides.³⁰ A further criticism of the US framework is that the duration of litigation is often longer than the duration of the license being sought.³¹ Hence the revised consent decree with ASCAP has sought to accelerate procedures. The Antitrust Division is said to be reviewing all consent decrees, including these.³²

6. Branded Medicines: regulatory gaps

Challenges against excessive pricing of certain medicines are on the rise and we may see more NCAs follow the efforts of the Italian and the British NCA. Rather than focusing on the appropriate test for identifying excessive prices, we look at the institutional framework and the interaction between competition law and regulation, which plays out slightly differently in the two cases under discussion.

6.1 The CMA's Pfizer case: competition law fills a regulatory gap

The prices at which the NHS purchases medicines are regulated largely by a voluntary scheme agreed between the supplier and the Department of Health. In *Pfizer/Flynn* the Department of Health signaled that the firms in question had found a way to escape the regulatory framework by rebranding the drug and this allowed them to increase the price significantly (nearly 500% higher than the regulated price).³³ One wonders whether on

²⁸ Consent decrees apply to ASCAP and BMI, see: *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. June 11, 2001); *United States v. BMI* (Application of Music Choice), 316 F.3d 189 (2d Cir. 2003). These are reviewed regularly by the Department of Justice.

²⁹ E.g. *US v Broadcast Music* (Application of Music Choice, Inc.) 316 F.3d 189 (2nd Cir, 2003); *In re Application of MobiTVTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010).

³⁰ E.g. *ASCAP v Showtime/The Movie channel* 912 F.2d 653 (2nd Cir, 1990) where ASCAP wanted a rate of \$25 per subscriber, Showtime considered \$8 was appropriate and the court held that \$15 was reasonable.

³¹ Memorandum of the US in support of the Joint Motion to enter second amended final judgment, *US v ASCAP* (5 September 2000) at: <https://www.justice.gov/atr/case-document/memorandum-united-states-support-joint-motion-enter-second-amended-final-judgment>

³² Assistant Attorney General Makan Delrahim Delivers Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation (Washington, DC ~ Thursday, April 26, 2018).

³³ See especially the charts at pp.83-86 of the CMA decision. If this is not sufficient to presume anticompetitive conduct one has to wonder what is.

the strength of this finding, the ancient common law maxim *res ipsa loquitur* might apply – thus shifting the burden of justification on the defendant. After all: nothing other than rebranding had changed in the market; the buyer had to continue to buy this drug for a segment of patients who could not switch to another; no new entrant would likely have an interest in penetrating this market. Indeed some years ago scholars suggested that one way of applying rules against abuse of dominance would be to ask whether the conduct in question makes no economic sense but for the wish to harm consumers. This would reverse the burden of proof and ask the defendant to explain why a 500% price increase could be justified on efficiency grounds.

However, the CAT would never countenance this aggressive approach. It held that such high prices are merely a valid reason to investigate the matter.³⁴ Contrarily the CAT seems to be of the view that the burden falls heavily on the NCA, not only to carry out more than one test to determine the competitive price, but also to respond proactively to the doubts raised by the defendant – we return to the substantive test in section 7.

While that CAT quashed the infringement decision of the CMA, it looks like the legislator has filled the regulatory gap. The Health Service Medical Supplies (Costs) Act 2017 allows the Government to intervene in a scenario like that found in *Pfizer/Flynn*.³⁵ As the parliamentary debates make clear even the Conservative members took the view that the business models deployed to game the system are unethical. There was consensus that actions by the Competition Authority would not have a sufficient deterrent effect to prevent further instances. The details of the regulatory scheme have yet to be announced, so the criteria to be used to determine the price level have yet to be identified. However, while the CAT's judgment may diminish the scope of application of Article 102, this may be immaterial now that the Government can regulate prices directly, where some of the intercepted communication does little to reassure patients that health care companies are interested in their welfare.

6.2 The AGCM rescues the regulator

The *Aspen* case taken by the Italian NCA presents a similar factual setting insofar as the dominant undertaking suddenly increased its prices, this time by successfully negotiating this price increase with the regulatory agency (the Agenzia Italiana del Farmaco, AIFA), which in turn sought the assistance of the NCA.³⁶ The decision is a bit puzzling because two theories of harm are utilized, when it would appear that one was

³⁴ CAT paragraph 439

³⁵ Section 4, amending s.262(2) NHS Act 2006.

³⁶ Decision of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*.

sufficient. One strand of reasoning focuses on the improper manner in which the undertakings dealt with the regulator combined with evidence of anticompetitive intent (an abuse-of right approach to Article 102) while a second considers the unfairness of the prices that resulted. It is not clear how far this is a monopoly-broth approach: combining a series of acts which together add up to an abuse of dominance or if there are two discrete abuses. Unlike the CMA, the AGCM survived judicial review in the first instance, and it appears that unlike the CMA, AGCM applied two methods to test if the prices were excessive.

There has not yet been a regulatory response to this case but the NCA and AIFA have signed a Memorandum of Understanding to foster cooperation. Of relevance for present purposes is an arrangement where each agency will inform the other of issues that pertain to the others' competences. This provides a clear procedural pathway that might accelerate the response time of the NCA.³⁷ More specifically, if the regulator notifies the NCA quickly it will more likely than not lead the NCA to apply the abuse of right approach to sanction the dominant firm, for prices might not yet have been set, and thus the NCA would enjoy a relatively risk-free case because judicial review of abuse of rights does not hinge on the accuracy of the economics standards but on the application of a rule.

7. The test for excessive pricing

7.1 The two stage test in Article 102

In both sets of cases discussed in sections 5 and 6 there is consensus that the test for abuse of dominance is based on a two stage test: stage 1 asks if the prices are excessive; stage 2 asks if the prices are unfair in themselves (alternative 2a) or unfair when compared to competing products (alternative 2b).³⁸ AG Wahl's Opinion might be read to indicate that stage 2 of the test is one for the defendant to show that the prices are fair notwithstanding the finding that they are excessive, while the CAT appears (even if it regards the AG's Opinion to be 'eminently sensible') to take the view that the burden under the second limb remains with the NCA/plaintiff. This divergence creates opportunities to discuss the adequacy of the existing excessive pricing framework.

Stage 1 is fairly uncontroversial – the courts don't want to allow a claim every time price rises above marginal cost, but only when prices are way above the competitive

³⁷ Protocollo d'intesa tra l'Agenzia Italiana del Farmaco e l'Autorità Garante della concorrenza e del Mercato (19 January 2017) Article 1.

³⁸ This is based on United Brands, paragraph 252.

benchmark. Different standards have been proposed to determine what the competitive price could be but no formal line has been drawn to state for example that prices that are 40% above the competitive benchmark are excessive. The matter is judged on the merits of each case, but most judicial scrutiny occurs in the identification of the competitive price benchmark.

Stage 2 has always been a bit of a mystery: is ‘unfairness’ some sort of ethical concept? The Advocate General’s approach to the notion of prices unfair in themselves (alternative 2a) is a little hard to follow. Some of the cases he cites are instances where the excessive price is combined with other factors which reveal that the prices are unfairly high. For example in *General Motors* and *British Leyland* the price level was set to curb parallel imports, so the centre of gravity was not the level of the price itself but the strategy of the dominant actor.³⁹ In *DSD* the prices seemed to serve an exclusionary purpose: DSD charging customers for the full load of their waste even if the customer only wished to have some of it collected by the dominant company meant that rivals would struggle to enter, so this is not a helpful precedent. *Merci Convenzionali* (abuse by making clients pay for non-existent services) fits a bit more nicely in the approach set out by the AG but here the burden would seem to rest on the NCA to show that the price level is unfair in light of the services received. In sum, it is not clear on the basis of the cases cited, that the AG makes a compelling case of what ‘prices unfair in themselves’ means, nor that the burden shifts to the defendant to justify the price.

The AG’s analysis of prices being unfair when compared to other products (alternative 2b) is more consistent with his reading of stage 2 of the test serving as a defense for he notes that a defendant may say that the price is not excessive either because the defendant has higher costs or because consumers place a much higher economic value on his products than others, hence the high price reflects the gains to consumers. With respect, the approach of the ECJ is preferable in treating these factors as part of an objective justification/efficiency defence, rather than subsuming them under the two limbs of the United Brands test.⁴⁰

In contrast the approach of the CAT in *Flynn* seems more in line with the case law: stage 2 is a separate test, for prices must be excessive and unfair, hence the burden rests with

³⁹ Note that this is also an instance where market segmentation at the time was facilitated by the absence of an EU-wide regulatory framework, a gap that was filled in 1993. For detail see G. Monti EC Competition Law pp.199-200.

⁴⁰ See paragraphs 57-60 adding an additional justification, viz. the possibility that in Latvia the remuneration to artists is higher than in other Member States, hence justifying the higher prices on the other side of the market.

the NCA/claimant. There may be instances (collecting societies cases being one example) where showing that the price is excessive is indicative of abuse, in which case stage 2 is satisfied by showing that the prices are persistently higher.

Unfortunately however the CAT's view that the two alternatives in stage 2 must both be considered in cases where there is a prima facie case that they might provide different results makes what is already a difficult case to bring even more costly. In brief the CMA marshalling a set of good enough reasons to provide that the prices are unfair (including a finding that the prices set bore no relation to the costs, that the price increased overnight, that similar price hikes did not occur in other Member States, and the commercial purpose of the arrangements was evidenced by some fairly colorful documents) would not be sufficient should the defendant make a prima facie case to indicate that the CMA should consider the price of the product in question with the price of another product. In other words the defendant may, even if the CMA satisfies the court that it has shown prices are excessive in themselves (alternative 2a), have to also satisfy the court that prices are excessive compared to other products (alternative 2b).

There are two puzzling things about the interpretation of alternative 2b in this case: the first is that the *United Brands* test requires a comparison between the price of the dominant firm's product and that of 'competing products' while the product that the CAT thought served as a comparator was not a competing product – this was stated clearly by Derek Ridyard in his testimony which was cited with approval.⁴¹ Second, one wonders if the comparison with competing products can always be useful: suppose you have a market with a dominant firm and a competitive fringe: should the dominant firm raise prices the fringe has two options: follow the higher price (akin to umbrella pricing in cartel cases) or undercut the dominant firm.⁴² Hence, a comparison with the prices of competitors would only serve a purpose if (a) there are fringe competitors; (b) the economic and regulatory conditions make it profitable for them to undercut the monopoly price to secure greater market share. Then in this instance it may be worth comparing the price of the dominant firm with that of the rival, the rival's price being a proxy for a competitive price thus indicating that the dominant firm's capacity to sustain a higher price means it enjoys some advantage over the rival.

⁴¹ So that is why in principle the tablet price is such a beautiful comparator because it is not – it does not interact competitively with the capsules as far as I can judge but it is in other ways the same product. Cited at paragraph 374.

⁴² See generally Salop 'Raising Rivals' Costs'

In sum, the CAT's position on stage 2 of the test appears erroneous not only for requiring that the CMA examine both conditions to a degree of thoroughness which the CAT determines is sufficient (which itself may be problematic for those who take the view that for complex economic assessments you should defer to the NCA's discretion provided it considers all evidence in a reasonable manner) but also for misreading the comparison called for in alternative 2.

To summarise this technical discussion: the judges in the two courts generally believe that plaintiffs should find excessive pricing cases hard to bring, for most frequently the market will heal the anticompetitive effects of high prices. The irony is that while in these two episodes the courts push to limit the scope of antitrust, both sectors now have a system to regulate prices.

8. Conclusion

The more economic approach is (finally for some) gaining ground in Article 102. Who would have imagined even five years ago for an Advocate General to quote, uncritically, passages from *Verizon* and from Frank Easterbrook's 1984 paper advocating minimalist antitrust. These sources are even controversial in the US mainstream. This approach naturally raises the enforcement costs of NCAs/plaintiffs, and recent case law in the EU and the UK reveals a similar impact in cases of excessive pricing. Paraphrasing from the Supreme Court's predation case law, excessive price cases will become rarely tried and rarely successful.⁴³

However there is an additional consideration that this paper has tried to reveal: if the competition law approach is found to be lacking, the legislator can step in and provide a regulatory framework that controls prices in ways that risk becoming more intrusive than under antitrust. Hence, avoiding Type 1 errors by NCAs appears to yield the risk of Type 1 errors by regulators. Restricting the scope of application of competition law by economics might have the perverse effect of calling into play what Chicagoans consider to be an even more dangerous beast than the NCA: a prone-to-capture regulatory agency.

From a more benevolent perspective, antitrust enforcement might be seen as a pathway that facilitates regulation: by revealing how intractable a problem is under competition law, this creates space for other kinds of intervention that may be more effective. In addition to the examples in the text one may refer to the roaming regulation which began as an Article 102 case but quickly turned to a long legislative battle, and to REMIT

⁴³ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) writing in the context of predatory pricing.

(Regulation on wholesale energy market integrity and transparency) where market manipulation is regulated after the difficulties noted by some NCAs in applying competition law.⁴⁴ In this context the success or failure of NCA enforcement is less relevant than the capacity for competition law intervention to elicit a more systematic response for the market concerned.

Conversely, it is arguable that in establishing a system for price regulation, those in charge may benefit from the insight of NCAs in determining how to ensure that prices are adequate: a competition impact assessment of price regulation might assist regulators.

⁴⁴ Regulation 1227/2001, [2011] OJ L326.1, Article 5. For an overview, see P Willis, 'REMIT Energy Market Manipulation' Global Competition Review 23 February 2018.