EXCESSIVE PRICES WITHIN EU COMPETITION LAW

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A. Introduction

An excessive price is a price set by a dominant undertaking excessively above the competitive level in order to exploit its customers. This purpose of exploitation makes an excessive price essentially different from a disguised refusal to supply or a variant of price squeezes. A disguised refusal to supply may take the form of an unacceptably high price with the intention to deny the request of supply. A price squeeze may be committed by imposing a high price on an upstream market while maintaining or decreasing the price at the related downstream level. However, both a refusal to deal and a price squeeze are aimed at excluding competitors, rather than exploiting consumers. While the devastating effect of excessive prices on consumer welfare is notorious, the prohibition of excessive prices falls into the most controversial subjects both in economics and law in the EU. In particular, many economists cast doubt on the viability of excessive prices in the long term, and at the same time the European authorities, including the European Commission and the European courts, including the European General Court (EGC, former European Court of First Instance) and the European Court of Justice (ECJ), found excessive prices in only two cases[1] in their more than half a century of competition law practices.

This article aims to shed some light on the relevant practices in EU competition law. In the following, the second part briefly introduces two dramatically opposed views in economics on the viability of excessive prices. Due to the controversy many scholars have submitted that excessive prices can only take place in exceptional circumstances. Thus, the third part first evaluates several exceptional circumstances proposed by scholars, and then brings forward its own proposal. The subsequent part examines the analytical framework established by case law. Some conclusions are presented in the last part.

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[1] Case 226/84, *British Leyland Public Limited Company v Commission*, ECR [1986] 3263; 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), [2001] OJ L331/40.

B. Controversy

Since competition law enshrines "the invisible hand" as the most effective tool to regulate a market, it in principle abdicates its duty where a competition problem can be solved by the market itself. Consequently, the debate on excessive prices in essence concentrates on two questions: (i) whether excessive prices are self-correcting and (ii) whether an intervention could generate benefits. Two diametrically opposed arguments have been formed by academia: the non-interventionist and the interventionist. The following paragraphs give them a brief introduction.

1. Non-interventionist

This group of scholars in general argues that excessive prices should not be subject to any antitrust intervention. Their argument is mainly based on the following four grounds.

First and foremost, they consider that excessive prices cannot last in the long term, and can only benefit a dominant undertaking in the short term. A dominant undertaking cannot obtain excessive profits on a market for a sufficiently long time because new entrants will always be attracted to enter that market. Excessive prices therefore cannot be self-sustainable under the threat of potential competition unless the market is protected by high and non-transitory entry barriers.[2] Furthermore, intervention with an intention to lower the prices of dominant undertakings may increase consumer welfare in the short term. However, it would result into two unexpected side effects in the long run: first, potential competitors would have less incentive to enter the market thereafter; and secondly, the intervention would hinder dominant undertakings from maximising their efficiency in order to obtain a higher profit margin.[3] In these regards, competition authorities should not intervene in excessive prices, especially when new entries may be stimulated within a reasonable period.

Secondly, although an excessive price can in theory be discovered by making a price–cost comparison, there are at least three practical obstacles to prevent competition authorities from succeeding in such a comparison. First, audited financial data, though constantly reported by companies, are not made for the purpose of implementing competition law. Those data usually do not touch upon capitalisation of R&D and advertising, they do not address inflation and they do not properly adjust rates of return for risk; thus they do not reflect

[2] A Fletcher and A Jardine, "Towards an Appropriate Policy for Excessive Pricing" in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Oxford, Hart Publishing, 2008), 533.

[3] M Motta and A de Streel, "Exploitative and Exclusionary Excessive Prices in EU Law" in CD Ehlermann and I Atanasiu (ed), *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (Oxford, Hart Publishing, 2006), 91.

economic costs.[4] They accordingly cannot be directly used by competition authorities. Moreover, it could be worse when an undertaking sells multiple products because those accounting data usually do not differentiate the shared common costs. Secondly, while it goes without saying that R&D costs directly linked to the product in question must be included, it is less certain how to allocate the costs of failed R&D costs to the cost of the product concerned.[5] Thirdly, the future finance for the replacement of existing assets should in principle also be calculated when evaluating the economic cost of a product.[6] Nevertheless, no consensus has been reached on how to determine the amount of future finance for replacement.

Thirdly, the non-interventionist suggests that competition authorities are not suitable bodies to regulate price (fines for excessive prices essentially equate to price regulation). Intervening in an occasional way on the price set of a dominant firm does not solve the problem forever. As a result, either the competition authority or the courts must continue to monitor the industry (but in this way it would convert itself into a *de facto* regulator) since market conditions change over time and the dominant firm would adjust its prices from time to time. However, competition authorities, unlike sector-specific regulators, have less experience in telling firms what prices they should charge.[7]

In addition, a constantly quoted example supporting non-intervention is that US antitrust law, contrary to its European counterpart, does not prohibit excessive prices.[8]

2. Interventionist

In opposition to the non-interventionists, there is another school of economists and lawyers who argue that excessive prices must be included into the jurisdiction of competition law. Their argument is based mainly on the following four observations.

[4] DS Evans and AJ Padilla, "Excessive Prices: Using Economics to Define Administrable Legal Rules" (2005) 1 *Journal of Competition Law and Economics* 97.

[5] D Geradin, "The Necessary Limits to the Control of 'Excessive' Prices by Competition Authorities—A View from Europe", Tilburg University Legal Studies Working Paper, available at http://ssrn.com/abstract=1022678 (accessed on 25 November 2010).

[6] Case COMP/36.568 *Scandlines Sverige AB v Port of Helsingborg*, Commission Decision of 23 July 2004, not yet reported, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/36568/36568_44_4.pdf (accessed on 25 November 2010).

[7] M Motta and A de Streel, "Excessive Pricing in Competition Law: Never Say Never?" in Swedish Competition Authority (ed), *The Pros and Cons of High Prices* (Stockholm, Konkurrensverket, 2007), 14; E Paulis, "Article 82 and Exploitative Conduct" in Ehlermann and Marquis, *supra* n 2, 515.

[8] See, eg *Berkey Photo, Inc v Eastman Kodak Co* 603 F 2d 263, 294 (2nd Cir 1979), cert denied 444 US 1093 (1980), para 141; *Verizon Communications, Inc v Law Offices of Curtis v Trinko, LLP* 157 L Ed 2d 823 (2004), first paragraph of Section III.

First, prohibiting excessive prices is one of the objectives of EU competition law. According to Akman, the original drafters of Article 102 of the Treaty on the Functioning of the European Union in the middle of last century intended to apply that article only to exploitative abuses rather than exclusionary abuses; it was only later extended to cover exclusionary abuses.[9] Since excessive prices can indeed harm consumer welfare, competition authorities should intervene to protect consumers. There is accordingly a good fit between a law against excessive pricing and the overarching objectives of competition policy.[10]

Secondly, they suspect that excessive prices are not always self-correcting. First, the main reason for the non-interventionist is that high prices attract competition and competition can lower down prices. However, Ezrachi and Gilo, for example, considered that this argument may be not tenable: it was not pre-entry prices but post-entry prices that ultimately attracted entry. If potential competitors were aware that dominant undertakings would decrease prices after their entry, they may not enter that market even if the current prices were high. Potential competitors would enter the market only when they knew that they were more efficient than the dominant undertaking. Therefore, it was not excessive prices by themselves but efficiency that invites competition.[11] Secondly, potential competitors would be prevented from entering a market with high and non-transitory entry barriers even if the prices on that market are high, which has been observed in many network industries, such as electronic communications. Intervention of competition law authorities should be justified in those cases.[12]

Thirdly, the interventionist argues that the difficulty in assessing excessive prices cannot be overstated. While there are cases where it can be difficult to draw a clear line between excessive pricing and lawful pricing, there are nevertheless still cases where prices are so high that it is relatively easy to demonstrate that they are excessive.[13]

Fourthly, although the interventionist accepts that price regulation can be intrusive and also burdensome for competition authorities, they have also argued that price regulation is not the only remedy to deal with excessive prices. Competition authorities can choose other, more appropriate remedies to avoid becoming a price regulator. For example, if an excessive price is due to a combination of strong past market power and consumer inertia (as is often the case in newly liberalised sectors), the best remedy may be to encourage

9 P Akman, "Searching for the Long-Lost Soul of Article 82EC" (1 March 2007), CCP Working Paper No 07-5, available at http://ssrn.com/abstract=977221 (accessed on 25 November 2010).

10 Fletcher and Jardine, *supra* n 2.

11 A Ezrachi and D Gilo, "Are Excessive Prices Really Self-Correcting?" (2009) 5 *Journal of Competition Law and Economics* 249.

12 Motta and de Streel, *supra* n 7.

13 Fletcher and Jardine, *supra* n 2.

consumers to switch towards less expensive offers made by new entrants. If the excessive price is due to strategic entry barriers, the best remedy would be to prohibit such barriers. If the excessive price is due to structural entry barriers, competition authorities should try to remove the barriers.[14]

3. Summing-up

The arguments from the interventionist and the non-interventionist imply that an antitrust intervention against excessive prices presents a high risk of both type I (false condemnation) and type II (false acquittal) errors. It is not my intention in this article to decide which side prevails. Nevertheless, it should be noted that the interventionist and the non-interventionist converge at a certain point. In particular, the interventionist does not intend to completely overturn the views of the non-interventionist. His preference over antitrust intervention is established on some exceptional circumstances where the arguments of the non-interventionist reach their limit. For example, both the interventionist and the non-interventionist submit that excessive prices would sustain in a market with high and non-transitory entry barriers. Besides, the interventionist does not disagree with the non-interventionist about the general difficulty to assess excessive prices, but rather argues that excessive prices can be clear-cut in some extreme cases. All of these suggest that even the interventionist takes a rather cautious attitude on excessive prices. He does not contend that competition authorities should intervene in all cases of excessive prices—only in some exceptional circumstances.

C. Exceptional Circumstances

The controversy described above indicates that the prohibition of excessive prices could risk distorting competition to a great extent. Therefore, even scholars who advocate antitrust intervention against excessive prices have admitted that the prohibition should be initiated only in exceptional circumstances. Since the European authorities are clearly interventionist in prohibiting excessive prices,[15] it is useful to look at the exceptional circumstances in which prohibition has taken place. The following will first provide a snapshot of a number of proposals submitted by scholars and then, after assessing them, will suggest its own.

[14] Motta and de Streel, *supra* n 7.

[15] Communication from the Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, COM(2008), 3 December 2008, para 7.

1. Various Proposals

Motta and de Streel proposed three cumulative conditions to justify actions against excessive pricing. The first condition was that high and non-transitory barriers to entry lead to a super-dominant position. In such a case, it is extremely unlikely that market forces would be able to challenge the dominant firm, thus correcting the abusive practices. The second condition was that the super-dominant position must be due to current/past exclusive/special rights or to uncondemned past exclusionary anti-competitive practices. This condition aimed to eliminate cases where the first condition was fulfilled and the persistence of a monopoly situation was nevertheless a result of innovations or investments made in the past. In those cases excessive prices could be either a reward for risky investment and/or innovations, or an attraction for potential competitors. Their third condition highlighted the absence of a sector-specific regulator. Sector-specific regulators are in general better equipped than competition authorities with regard to price regulation. Therefore, competition authorities should in principle abstain when a sector-specific regulator has jurisdiction to act. Justified antitrust intervention exists only in cases where there are no sector-specific regulators or there is manifest regulatory failure.[16]

Evans and Padilla also submitted that excessive prices may be prohibited where a firm enjoys a (near) monopoly position in the market that is not the result of past investments or innovations and is protected by insurmountable legal barriers to entry. However, unlike Motta and de Streel, they did not considered that this condition could completely prevent false conviction since, for example, the legal monopolist may be engaged in, or planning to undertake, costly investment projects that could be put at risk if prices were to be regulated. Consequently, they added one more cumulative condition: there should be a risk that those prices may prevent the emergence of new goods and services in adjacent markets.[17]

Röller argued that antitrust action under the banner of exploitative abuse needed to be applied with great caution. The reason was not only that it was difficult to identify the price–cost margin properly, but also that it was far from obvious what an "excessive price" would be and how antitrust action would subsequently benefit consumers. Accordingly, he proposed five cumulative conditions: (i) there are significant entry barriers; (ii) the market is unlikely to self-correct; (iii) no structural remedy is available; (iv) there is no regulatory or regulatory failure; and (v) they are "gap cases" or "mistake cases". The first two conditions are self-evident, as the market is better left untouched

[16] Motta and de Streel, *supra* n 7. See their earlier views in Motta and de Streel, *supra* n 3.

[17] Evans and Padilla, *supra* n 4. There was one more condition proposed by Evans and Padilla: the prices charged by the firm widely exceeded its average total costs. I nevertheless consider it more related to the analytical framework to deal with excessive prices than a condition for the exceptional circumstances. Therefore this condition is not discussed here.

when there are no or low entry barriers and/or the market is self-correcting. With regard to the third condition, Röller claimed that the proper policy against excessive prices should give priority to structural remedies, such as removing relevant entry barriers, opening markets, liberalisation, etc. Exploitative abuse cases under Article 102 would be helpful only when they supported a structural remedy. The fourth condition takes into account that specialised regulatory institutions are likely to have superior regulatory know-how than antitrust authorities. Therefore, antitrust actions are only warranted if there is no regulatory agency, or if the regulator does not operate effectively. The fifth condition excludes excessive price accuses in cases where dominance is obtained through competition on the merits. Action against exploitation would only be justified where dominance was obtained through inappropriate manners. Creation or strengthening of a dominant position must be achieved first by excluding competitors. Those exclusionary abuses would usually be caught under Article 102. Nevertheless, there may be two cases where the exclusionary abuses had not been condemned and could subsequently stimulate excessive prices. Those cases comprise "gap cases" (anti-competitive conducts that could not be caught under Article 102 as an exclusionary abuse) and "mistake cases" (for some reason an antitrust authority may not have effectively prosecuted an exclusionary abuse).[18]

Paulis provided the least intrusive condition. He argued that there should be only one reasonable criterion to identify markets that could be candidates for interventions: the presence of very high and lasting barriers to entry and expansion.[19]

2. Evaluation

First and foremost, a consensus has been observed among all the aforementioned proposals that action against excessive prices should be taken only in markets with the presence of high and lasting barriers to entry. This article also admits that there is no need for antitrust intervention where a market presents only low entry barriers. Without the protection of high entry barriers, excessive profits cannot be sustainable under the threat of easy potential entry, in particular through a hit-and-run strategy. Although the definition of entry barriers is still disputed,[20] all scholars agree that high and lasting entry barriers can be either structural (such as natural monopoly) or legal (ie undertakings granted with special or exclusive rights). Those high and lasting entry barriers can effectively prevent potential competitors from entering the market even

[18] L-H Röller, "Exploitative Abuses" in Ehlermann and Marquis, *supra* n 2, 525; and Fletcher and Jardine, *supra* n 2.

[19] Paulis, *supra* n 7.

[20] See, eg RP McAfee, HM Mialon and MA Williams, "What Is a Barrier to Entry?" (2004) 94 *The American Economic Review* 461.

with above-competitive-level profits, at least in a reasonable period. Since the invisible hand cannot work in this case, antitrust action may be justified.

Secondly, some scholars have suggested that the infringer of excessive pricing must hold a market position of more than normal dominance. This was termed as "super dominance" by Motta and de Streel, and "a (near) monopoly position" by Evans and Padilla. With regard to the existence of a large amount of market power, Paulis submitted that it was superfluous to add the condition of super dominance, as this is always this case.[21] However, it should be noted that competition may also be generated in some markets protected by high and lasting entry barriers, such as the wholesale market for access and call origination on the public mobile telephone network,[22] and thus high and lasting entry barriers do not necessarily guarantee the establishment of super dominance. Consequently, it is not necessarily superfluous to set up a hurdle in terms of market power. Furthermore, an infringer must be certain that its existing competitors do not have the ability to take advantage of its high pricing in order to succeed in exploitation. The implication of this is twofold: first, not every dominant undertaking can charge excessive prices; and secondly, successful price manipulation does not in any case require a monopoly or near monopoly. Excessive pricing may also succeed in markets with many competitors, provided that the dominant undertaking has relatively overwhelming market power in comparison with its competitors and there are barriers to expansion.[23] In this regard, the consumer demand that is suppressed due to elevated prices cannot be fulfilled by other small-sized competitors. Therefore, this article has as a condition the presence of more-than-normal dominance. Such dominance includes not only absolutely overwhelming market power (ie monopoly or near monopoly), but also relatively overwhelming market power. From this perspective, I prefer the wording of Motta and de Streel (super dominance), as it can refer to both.

Thirdly, Motta and de Streel, Evans and Padilla, and Röller proposed that the super dominance should be the result not of past investments or innovations, but of current/past exclusive/special rights or uncondemned past exclusionary anti-competitive practice. However, I do not consider it necessary

[21] Paulis, *supra* n 7, 520.

[22] Commission Staff Working Document, Explanatory note accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (C(2007) 5406), SEC(2007) 1483/2, 44–46.

[23] This may seldom happen in markets with structural entry barriers, as the number of market players is always limited by economies of scale. Nevertheless, high and lasting entry barriers may be created by regulation. It is not rare to see regulated industries with a number of licensed market players, eg communal monopolies in funerals in Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECR 2479.

to include this condition—a position also supported by Paulis.[24] Any excessive price, so long as it does not invite potential competition, cannot be corrected by the invisible hand. Thus, excessive prices, regardless of the cause of super dominant position (ie innovation or others), affect consumer welfare in the same way. If this argument is valid, it would be unclear how excessive prices applied by undertakings achieved by investments or innovations could be corrected without antitrust intervention. Consequently, I reject it as a condition to initiate antitrust actions.

Fourthly, Motta and de Streel, together with Röller, submitted that competition authorities should abstain in the case of presence of sector-specific regulators since the latter were better equipped than the former in price regulation. They added that competition authorities could intervene in cases of no such regulators or where there are manifest regulatory failures. Nevertheless, this argument has no legal support, at least at the EU level. In fact, EU competition law has a constitutional value that sector-specific regulation cannot circumvent, and as a result the Commission has always been tempted to use antitrust action to discipline and harmonise the actions of national regulators.[25] For example, the Commission has intervened in several cases in the electronic communications sector where national regulatory authorities (NRAs) were present.[26] In addition, while it is always appropriate to argue that competition authorities must be justified to intervene where there is a regulatory failure, it is uncertain what constitutes a regulatory failure. Against this background, it seems that the Commission nevertheless in practice showed its courtesy to sector-specific regulation. For example, the Commission opened several cases for excessive prices in fixed-to-mobile calls and their related wholesale charges in 1998.[27] Those cases were later passed on to NRAs when they had jurisdiction to intervene under national electronic communications law. Moreover, the Commission sent two separate "statements of objections" to O_2 and Vodafone for their high international roaming rates.[28] Those cases were, however, closed

[24] Paulis, *supra* n 7, 520.

[25] D Geradin, "Limiting the Scope of Article 82 of the EC Treaty: What Can the EU Learn from the US Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?" (2004) 41 *Common Market Law Review* 1519.

[26] Eg Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 *Deutsche Telekom AG*), [2003] OJ L263/9; Commission Decision of 4 July 2007 relating to a proceedings under Article 82 of the EC Treaty (Case COMP/38.784 *Wanadoo España vs Telefónica*), [2007] OJ C83/05; Commission Decision of 16 July 2003 relating to a proceeding under Article [82 EC] (Case COMP/38.233 *Wanadoo Interactive*), not yet published.

[27] IP/98/141, Commission launches inquiry into mobile and fixed telephony prices in the European Union, 9 February 1998; IP/98/707, 27 July 1998; IP/98/1036, Commission concentrates on nine cases of mobile telephony prices, 26 November 1998; IP/99/298, Commission successfully closes investigation into mobile and fixed telephony prices following significant reductions throughout the EU, 4 May 1998.

[28] IP/04/994, Commission challenges UK international roaming rates, 26 July 2004.

after the adoption of the Roaming Regulation.[29] In conclusion, this may represent a condition, though its application is rather vague and lacks legal support.

Lastly, Evans and Padilla claimed that excessive prices should be prohibited only when those prices may prevent the emergence of new goods and services in adjacent markets. They introduced this condition because they were concerned that the other conditions were not sufficient to eliminate false acquittal. It is true that excessive prices are highly distortive when they can prevent the emergence of new goods and services in adjacent markets. However, it does not mean that other excessive prices produce no anti-competitive effect. In line with the argument of Paulis, I am not convinced that competition authorities should intervene only in such cases.[30]

In conclusion, I support the hypothesis that the exceptional circumstances that justify antitrust intervention against excessive prices comprise the following three cumulative conditions:

1. there are high and lasting entry barriers;
2. the infringer has a super dominant market position; and
3. with the lack of legal support at the European level, the Commission should in principle take great care when intervening in excessive cases where there are sector-specific regulators in place.

However, it should be kept into mind that neither the European courts nor the Commission has ever articulated in their judgments or decisions that the application of Article 102 to prohibit excessive pricing should be subject to any limitation. Nor is it certain that those authorities will accept it in future cases.

D. The Analytical Framework

The European authorities have developed an analytical framework to assess whether a high price could be qualified as an excessive price under Article 102. This part is dedicated to this analytical framework based on the relevant case law. In the following, the first section briefly introduces the two-step approach established in *United Brands*, and the subsequent sections discuss the three components within that approach.

[29] Regulation 717/2007 of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21, [2007] OJ L171/32, which was amended in 2009 by Regulation 544/2009 of 18 June 2009 amending Regulation 717/2007 and Directive 2002/21, [2009] OJ L167/12.

[30] Paulis, *supra* n 7, 521.

1. Multiple Approaches?

In the first two decades after the adoption of the Treaty of Rome, the European authorities deliberated on excessive pricing only from limited notional perspectives. In *Parke* the ECJ indicated that "a higher price for the patented product as compared with the unpatented product does not necessarily constitute an abuse".[31] Later, in *Sirena* and *Deutsche Grammophon*, it held that "although the price level of the product may not of itself necessarily suffice to disclose such an abuse, it may, however, if unjustified by any objective criteria, and if it is particular high, be a determining factor".[32] The ECJ did not touch upon the substantial analysis of excessive pricing in those cases partially because all the three cases were preliminary ruling cases. In *General Motors*, the ECJ had to rule for the first time on an excessive price decision made by the Commission. Nevertheless, that case provided little guidance, since the court annulled the Commission decision mainly due to the fact that General Motors quickly reduced its price to a level which was in line with the real cost of the operation even before the Commission's intervention.[33]

The analytical framework for excessive prices remained untested until the seminal case *United Brands*.[34] In that case, the ECJ first defined excessive pricing as a price which had "no reasonable relation to the economic value of the product";[35] it then formulated the analytical framework for excessive prices, which, according to the Commission,[36] contained three parallel methods:

1. "this excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin";[37]
2. "the questions . . . to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products";[38] and

[31] Case 24–67 *Parke, Davis and Co v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55, para 34.

[32] Case 40-70 *Sirena Srl v Eda Srl and others* [1971] ECR 69, para 17. See also Case 78-70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* [1971] ECR 487, para 19.

[33] Case 26–75, *General Motors Continental NV v Commission of the European Communities*, ECR [1975] 1367, para 19.

[34] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1976] ECR 425.

[35] *Ibid*, para 250.

[36] Case COMP/A.36.570/D3 *Sundbusserne v Port of Helsingborg*, Commission decision of 23 July 2004, not yet reported, para 123; and also Case COMP/A.36.568/D3 *Scandlines Sverige AB v Port of Helsingborg*, Commission Decision of 23 July 2004, not yet reported, para 145.

[37] *United Brands*, *supra* n 34, para 251.

[38] *Ibid*, para 252.

3. There may be "other ways . . . of selecting the rules for determining whether the price of a product is unfair".[39]

Does this result in multiple methods to deal with excessive prices in practice? First of all, the third option should be excluded immediately. It simply implies the prudence of the ECJ at that time to make room for innovative approaches in the future. However, no "other ways" have ever been suggested, either by the European courts or the Commission.

Subsequently, the first two approaches seem different at first glance. The first approach examines the absolute profit margin, ie price minus cost. No benchmarking is needed. It implies that in some cases the abusive nature of a price is self-evident vis-à-vis its high profit margin. By contrast, the second approach apparently introduces the concept of benchmarking. It contains two steps. This first step requires competition authorities to evaluate the profit margin. If the profit margin is considered excessive, it then goes to the second step. The second step has two parallel prongs. The first prong evaluates whether the price applied by a dominant undertaking is unfair in itself; the second prong compares the price in question with those of competing products.

Looking more closely, the difference between the two approaches is not clear any more. While the first approach focuses on the profit margin, the first prong of the second approach also pinpoints the price level itself. Both refer to no benchmarking. When benchmarks are not employed, the examination of the excessiveness of a price in the end still has to depend on a comparison with costs, or in other words profit margin. Thus, the two approaches should in theory work in the same way. Moreover, neither the Commission nor the European courts have had recourse to the first approach. In this regard, it is contended that either the first approach is equal to part of the second approach or it only remains an approach on paper. Hence only the second approach is meaningful, at least for the time being.

The following three sections elaborate on the second approach, with its three components discussed separately, ie the first step and the two prongs of the second step.

2. The First Step: Excessive Profit Margin

The first step analyses whether a dominant undertaking has earned an excessive profit; if affirmative, then the second step is initiated to assess whether the high price in question is abusive either in itself or in comparison with others. The first step apparently comprises two analyses: (i) to calculate the profit margin through "a comparison between the selling price of the product

[39] *Ibid*, para 253.

in question and its cost of production";[40] and (ii) to determine whether this profit margin is "excessive".

(a) The First Element: Calculating the Profit Margin

The most important factor in calculating the profit margin is the economic cost of the product concerned. However, the cost calculation is notoriously difficult. Even the ECJ has acknowledged

> "the considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its set up, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other, the production costs of the banana do not seem to present any insuperable problems."[41]

However, the ECJ did not shed more light on a practical solution for cost calculation. Neither did the Commission often conduct cost accounting in its excessive price exercise. In its four decisions adopted after *United Brands* the Commission only carried out cost accounting in one case: *Port of Helsingborg*.[42] In other three decisions the Commission did not touch upon cost calculation by itself. In *British Leyland* the infringer suddenly increased its price up to 600% with no detectable cost increase. This shifted the focus of that case to a comparison between the current price and the past price, thus leaving the discussion of economic cost behind.[43] In *Deutsche Post*, the Commission did not calculate by itself the cost for the service in question, but accepted the cost reported by Deutsche Post as the basis for the analysis of the second step.[44] In *Scippacercola*,[45] the Commission received a complaint about the high prices in an airport. It rejected the complaint mainly because the data provided by the complainant were inaccurate or insufficient to establish a prima facie case of excessive prices. Therefore, the following paragraphs only examine *Port of Helsingborg* for hints in calculating the profit margin. Three observations are made with regard to that decision.

First, the Commission did not follow *United Brands* in computing the profit margin by deducting the cost of production from the selling price; instead, the

40 *Ibid*, para 250.
41 *Ibid*, para 254.
42 This case comprised two decisions, *Sundbusserne* and *Scandlines*, *supra* n 36.
43 *British Leyland*, *supra* n 1, paras 25–30.
44 *Deutsche Post*, *supra* n 1, paras 160 and 166.
45 Case COM/D3/38469 Complaint relating to charges levied by AIA SA and the Olympic Fuel Company SA, Commission Decision of 2 May 2005, not yet reported. This decision was appealed first before the EGI and then ECJ. Both courts supported the Commission. See Case T-306/05 *Isabella Scippacercola and Ioannis Terezakis v Commission* [2008] ECR-II 4*, Summ pub; Case C-159/08 P *Isabella Scippacercola and Ioannis Terezakis v Commission* [2009] ECR-I 46*.

profit margin was calculated by dividing the difference between the total revenue and the total costs by the total revenue. This method can also be found in *Scippacercola*.

Secondly, the Commission did not conduct cost accounting at the very beginning, possibly because of the heavy burden within the cost-based approach.[46] It first requested HHAB, the suspect, to provide the related data. However, the date provided by HHAB showed a negative profit. The Commission cast doubt on the accuracy of this accounting result because otherwise HHAB would have faced bankruptcy, and hence began its own calculation. It should be noted that the Commission took the same approach in *Deutsche Post*, where it asked Deutsche Post to provide the data for the cost of the service concerned and finally accepted Deutsche Post's accounted costs.[47]

Thirdly, the service concerned in the case, ie ferry operation, was only one of the services provided by HHAB. As aforementioned, it was thus necessary for the Commission to differentiate common costs. The method used by the Commission could be categorised as fully allocated costs: common cost was allocated based on the proportion of the revenue generated by the service concerned out of HHAB's total income.[48] The types of costs taken into account by the Commission included direct operating costs and overhead costs, as well as depreciation costs, which were based on the historical value of the assets. Both fixed costs and variable costs were taken into account. However, the cost of capital was excluded by the Commission because of the lack of reliable information.[49] The Commission admitted that the result could underestimate the costs allocated to the service in question. It nevertheless added two explanations. First, *United Brands* allowed for "a discretionary apportionment of indirect costs and general expenditure"; and secondly and more importantly, this method was in any event more favourable to the complainant.[50] It should also be noted that all the Commission's cost accounting was mainly based on the audited financial reports made available by the suspect. After such a calculation, the Commission concluded that in the period 1994–2000 the profit margin varied between 40–60% and 50–70% for the service at issue.[51]

In addition, it is also observed that the Commission has always based its decisions on the undertakings' actual costs. The ECJ in *SACEM* suggested the possibility of calculating the production costs of an efficient firm in cases where lack of competition resulted into high administrative costs so that the dominant

46 A Pozdnakova, "Excessive Pricing and the Prohibition of the Abuse of a Dominant Position" (2010) 33 *World Competition* 138.
47 *Deutsche Post*, *supra* n 1, para 104.
48 *Scandlines*, *supra* n 36, Appendix 3.1, point 31.
49 *Ibid*, para 224.
50 *Ibid*, para 118.
51 *Ibid*, para 122.

undertaking had no incentive to keep costs down (X-inefficiency).[52] However, no workable methods were offered by the ECJ in that case or later cases. It is therefore uncertain how this possibility could be actualised, given that it is almost impossible to ascertain, in the abstract, the costs of an efficient firm in a given market.[53]

(b) The Second Element: Excessive Profit

After calculating the profit margin, competition authorities should then assess whether it is excessive. However, there are at least two legal uncertainties in relation to this exercise. First, while an excessive price margin may in theory be self-evident, it is difficult to prove in practice. Hence what constitutes an excessive profit margin is ambiguous. Secondly, since the second step also investigates whether the price concerned is abusive, it is unclear how the two can be differentiated.

The examination of excessive profit margin had never been touched upon until *Port of Helsingborg*. In that case the Commission, having finished the cost accounting, came to the conclusion that the revenues (through the port charges) derived from the ferry operations exceeded the costs actually incurred by the port in providing their services and facilities to users. However, the Commission did not continue its analysis on whether the profit was excessive, but went directly to examine the second step. It acknowledged that its conclusion could only imply that the suspect did not make a loss, not that there was an excessive profit margin.[54] Nevertheless, the Commission justified that it was not necessary to carry out such an analysis because, even if it were to be assumed that the profit margin of HHAB was excessive (the first step), it would still be not sufficient to conclude that the price charged was abusive (the second step).[55] Since the second-step analysis would be initiated in any case, it was not a mistake to avoid determining whether the profit margin was excessive.

The Commission's omission indicates the awkward position of the second element: first, it is uncertain how to assess whether a price margin is excessive; and secondly, the second element cannot differentiate itself from the analysis of the second step, ie abusive prices. Therefore, I propose removing the second element from the analytical framework for excessive prices. Consequently, the first step in essence examines whether the high price at issue actually results in a positive profit. Once affirmed, a comprehensive analysis on the second step should then be launched.

52 Joined Cases 110/88, 241/88 and 242/88 *François Lucazeau and others v SACEM* [1989] ECR 2811, para 29; 395/87, *Ministère public v Jean-Louis Tournier* [1989] ECR 2521, para 42.

53 Geradin, *supra* n 5.

54 *Scandlines, supra* n 36, para 142.

55 *Ibid*, para 158.

3. The First Prong of the Second Step: Abusive Price in Itself

After having completed the first step analysis and obtained a positive answer, competition authorities must initiate the second step analysis to thoroughly examine the abusive nature of the price through two directions: in itself or compared with other products. The ECJ in *Scippacercola* maintained that the two prongs were not cumulative but parallel.[56] The first prong will be discussed in this subsection, and the second in the next.

United Brands envisaged that an abusive price in nature must be a price disproportionately higher than its economic value. Since in most cases a price can be found directly from the market, the gravity of this prong lies in discovering the economic value of the product in question, then comparing it with the price. However, the relevant case law of the European authorities provided little guidance on how to determine the economic value. Only in *Port of Helsingborg* does the Commission offer any hints, which are discussed in the following paragraphs.

Investigating the economic value of a product is in principle based on a cost-plus framework. Nevertheless, the Commission refused to determine the economic value by simply adding to the costs incurred in the provision of the product/service a profit margin which would be a predetermined percentage of the production costs.[57] One of the Commission's reasons was that the cost accounting conducted in the first step contained a number of uncertainties. For example, the depreciation costs were based on the historical values of the assets. This calculation would not allow HHAB to finance future capital expenditures of replacing existing assets.[58] Moreover, the cost of capital, which was legitimate for any undertaking to cover, was not taken into account in the first-step analysis.[59] These uncertainties could not guarantee an accurate result based on a simple cost-plus approach.

Another, more important reason was that the Commission believed that the cost-plus framework should take into account not only cost incurred in the production, in other words the conditions of supplying the product/service, but also non-cost-related factors, such as the demand-side aspects of the product/service concerned.[60] With regard to non-cost-related factors, the Commission maintained that higher prices may be caused both by higher production costs and by customers' willingness to pay more.[61] In the latter case, the Commission took into account two features of the port in question: first, it was the shortest sailing distance between Sweden and Denmark; and secondly, it had excellent

[56] Case C-159/08 P, *supra* n 45, para 47.
[57] *Scandlines*, *supra* n 36, para 221.
[58] *Ibid*, para 223.
[59] *Ibid*, para 224.
[60] *Ibid*, para 226.
[61] *Ibid*, para 227.

connections with road and rail transport.[62] The two features were considered to make the ferry operation valuable in itself. Consequently, the Commission found insufficient evidence to conclude that the port charges would have "no reasonable relation to the economic value" of the services and facilities provided to the ferry operators. Therefore, the Commission decided that the price was reasonable.

Thus, cost calculation is carried out both in the first step, ie to determine whether there is an excessive profit margin in itself, and the first prong of the second step, ie to determine whether there is an abusive price in itself. In *Port of Helsingborg*, in the second step the Commission took into account a more comprehensive set of factors that could affect price setting. This in-depth examination made the cost accounting under the first step only a preliminary step. Possibly for that reason the Commission took a stricter cost allocation method in the first step in order to discover whether HHAB had actually made a profit by its pricing. It may also explain why the Commission refused to determine whether the price margin based on its strict method was "excessive" in the first step. This neglect of evaluating excessiveness in the first step does not affect the final result, and its removal from the analytical framework is thus further consolidated.

4. The Second Prong of the Second Step: Abusive by Benchmarking

The second prong provides the possibility of comparing the price concerned with those of other products. The evaluation based on benchmarking is the best developed part within the analytical framework. To date, all cases adjudicated have been based mainly on benchmarking. There are six types of benchmarking: (i) the dominant undertaking's past price for the same product; (ii) the dominant undertaking's current price for other products in the same relevant market; (iii) the dominant undertaking's competitors' prices in the same relevant market; (iv) the dominant undertaking's prices of the same relevant products in other geographic markets; (v) the dominant undertaking's prices of related products in other markets; and (vi) other undertakings' prices of comparable products in other markets. The first three are taken directly from the same relevant market and the last three are from outside the relevant market. Such a differentiation is meaningful in that the comparison within the first three benchmarks is in principle more reliable than the last three because products from the same relevant market share a greater number of characteristics, thus making the comparison more robust. The following paragraphs give a snapshot of each of those benchmarks.

[62] *Ibid*, para 234.

(a) Dominant Undertaking's Past Prices for the Same Product

This is the best and the most self-evident benchmark because a price increase should in general be in line with the cost increase. It is probably an excessive price if a dominant undertaking increases its price out of proportion with the increased cost. This benchmark was relied upon in *British Leyland*. British Leyland, a private company, was granted by the UK government the right to issue "certificates of conformity" for imported cars. From 1 July 1981 it suddenly increased the fee for left-hand-drive vehicles to £150 for dealer and £100 for private individuals from the original £25. After examining the cost for this service, the ECJ held that it was a simple administrative check which could not entail significant costs. [63] Since there was no noticeable increase in cost, such a 600% price increase could not be justified. This benchmarking was also used in *Scippacercola*. Due to the 9/11 attacks, the Athens International Airport of Spata increased its security charge, which drew complaints as an excessive price. However, the Commission considered that the price increase was justified since the costs for security were also increased, entailing, for example, the hiring of more security staff and the updating of all equipment related to security.[64]

(b) Dominant Undertaking's Current Prices for Other Products in the Same Relevant Market

European authorities also compare the price concerned with the dominant undertaking's prices of other products in the same relevant market. Such products are comparable for two reasons. First, the demand-side aspects of those products are in principle equivalent (in other words, non-cost-related factors are insignificant); and secondly, the fact that all the compared products are provided by the same company certainly reduces the competition authorities' burden related to cost accounting. Nevertheless, the compared products are not the same product, and are probably produced under different costs. When applying this benchmark, it is important for competition authorities to take account of the different costs between those products.

This benchmark was also relied upon in *British Leyland*. The ECJ compared the price in question with another service provided by British Leyland, ie issuing certificates for right-hand-drive vehicles. The two services were considered to belong to the same relevant market. The compared service was originally priced the same as the issuing of left-hand-drive vehicles, and remained unchanged after the price increase for the service concerned. The ECJ noted that the extra check for left-hand-drive vehicles did indeed present a difference

[63] *British Leyland*, *supra* n 1, para 28.
[64] *Scippacercola*, *supra* n 45, para 73.

between the two services. However, that difference could in no way justify the 600% increase.[65]

Furthermore, in *United Brands* the Commission compared the prices of the dominant undertaking in different regions in the same relevant geographic market, more specifically the prices of UBC's branded banana in five Member States (Irelands and four others). The Commission claimed UBC applied excessive prices in four other Member States based on a finding that the prices in the four others countries were twice as high as those in Ireland.[66] However, it should be noted that it would have been more logical for the Commission to deal with this case under the category of discriminatory prices rather than excessive prices. In fact, the Commission accused UBC's price policy under both categories, and therefore it was not a typical excessive price case. Nevertheless, the interest in this case lies in the reason of the ECJ to reject the Commission's claim of excessive price, which was that the price in Ireland had produced a loss. Thus, a rule for benchmarking was established that a loss-making price was not suitable for such a comparison. This was the main basis on which some commentators[67] criticised the UK case *Napp*. In that case, Napp's excessive pricing was established based on a comparison between the prices in the community and those in the hospital sector. The price in the hospital was found to be predatory.[68]

(c) Dominant Undertaking's Competitors' Prices on the Same Relevant Market

The prices of competitors in the same market can in theory also serve as a good benchmark. However, it is not clear how this benchmarking can be applied in practice. The Commission never used this benchmarking because the infringers were always confronted with no competitors in all the excessive price decisions except *United Brands*.[69] Correspondingly or coincidently, neither did the European courts provide more guidance than a statement that higher prices for patented products or branded products as compared with the unpatented or unbranded products did not necessarily constitute an abuse.[70]

The conclusion reached in the third part of this article may prove that this benchmarking is not an effective tool. In that part, three preconditions are defined for excessive price abuses. The first two are that (i) there are high and non-transitory entry barriers, and (ii) the infringer has a super dominant

65 *British Leyland*, *supra* n 1, para 28.

66 *United Brands*, *supra* n 34, para 239.

67 See, eg Geradin, *supra* n 5.

68 See OFT Decision of 30 March 2001, *Napp Pharmaceutical Holdings Limited* [2001] UK CLR 585. Napp appealed the OFT's decision to the Competition Commission Appeal Tribunal and was rejected. Case 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading*, judgment of 15 January 2002.

69 See the previous paragraph.

70 *Parke*, *supra* n 31, para 34; and also *United Brands*, *supra* n 34, para 266.

market position. These imply that the markets where excessive price concerns arise are to a great extent not effectively competitive. Even if there were some marginal competitors, it would be the best strategy for them to follow the price of the dominant undertaking. Furthermore, the difference from the dominant undertaking's price must be insignificant. Those competitors have no incentive to maintain too low a price because they have no sufficient capacity to serve all suppressed demand due to barriers of expansion. Therefore, they usually align their prices with the dominant undertaking to some extent. This price alignment makes price comparison less meaningful.

(d) Dominant Undertaking's Prices of the Same Relevant Product in Other Geographic Markets

Compared products can be ones in the same relevant product market, albeit in different geographic markets. With regard to this benchmarking, the ECJ has established a clear and strict precedent in *SACEM* and *Tournier* that

> "When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States."[71]

The ECJ was unambiguously strict about those cases where dominant undertakings maintained different prices for the same product in different geographic markets. Provided consistently appreciable differences in price for the same product have been found among Member States, a prima facie case of excessive prices can be immediately established. Most importantly, after establishing such a prima facie case, the burden of proof is switched to the suspected undertaking. In comparison, in other situations, even if a prima facie case has been successfully established, it still remains the complainant's responsibility to verify the abusive nature of the excessive prices.

(e) Dominant Undertaking's Prices of Related Products in Other Markets

This benchmarking compares the price at issue with those of other related products provided by the same company. Related products are not products in the same relevant product market, but ones sharing a considerable amount of common costs. Via this benchmarking, competition authorities may avoid burdensome cost calculation.

[71] *SACEM*, *supra* n 52, para 25; and also *Tournier*, *supra* n 52, para 38.

This strategy was employed by the Commission in *Deutsche Post*. In that case, the service in question was the delivery of incoming cross-border mails, while the compared service was the domestic mailing service. The two services were priced identically by Deutsche Post. However, the services apparently share the same delivery channel, and the cost for delivering cross-border mails should in principle be less than that for domestic mails since in the former activity a postal office could save costs in collecting mails. Even Deutsche Post did not deny that fact, and claimed that the costs of forwarding cross-border mail may be approximately 80% of the domestic tariff.[72] Because Deutsche Post could not explain why it priced the two services the same even though there was a considerable difference in costs, the Commission concluded that it was an excessive price within the meaning of Article 102.

(f) Other Undertakings' Prices of Comparable Products in Other Markets

The last form of benchmarking is based on prices of other undertakings for comparable products in other markets. Comparable products are distinct from equivalent products in that the former do not necessary belong to the same relevant product market. In theory, it could be assumed that a comparable product should be priced the same even in different markets. However, the application of this benchmarking is weak in practice because prices are affected by many factors. In particular, the demand-side and supply-side conditions in different markets may vary so appreciably that those products are not comparable. Accordingly, this benchmarking is subject to the most controversy. The core of the debate lies in the question of how to make a solid comparison, or in other words, how to ensure that the compared products are in fact comparable.[73]

The ECJ in *Bodson* maintained that the compared product(s) must come from competitive markets.[74] Thus, products from monopolistic markets or regulated markets should be excluded. No further guidance has been provided by the European courts since then. Moreover, the Commission shed only some light on this benchmarking in *Port of Helsingborg* and *Scippacercola*. It emphasised that a meaningful comparison of prices should mean that:

1. "the products/services provided must be comparable; and
2. the charging systems must allow a meaningful comparison."[75]

With regard to the first part, searching for comparable products, the Commission's practice suggests two implications.

[72] *Deutsche Post*, *supra* n 1, para 160.
[73] *Scandlines*, *supra* n 36, para 169.
[74] *Corinne Bodson*, *supra* n 23, para 31.
[75] *Scandlines*, *supra* n 36, para 175.

First, the comparability should not be based on the similarity in denomination, but on the equivalence in characteristics. While in some cases a similar name may imply comparability, in other cases different products may be provided under a similar name in different locations. In *Port of Helsingborg* the Commission excluded the comparability between the port concerned and another port due to the non-equivalent services between them. There were two main differences between the ports: first, the services of the port concerned were provided under a much more developed infrastructure than the compared one; and secondly, the port in question included into the provision of ferry operation a quay or berth that was not offered by the other port.[76] This concern was also extensively raised by the Commission in *Scippacercola* to reject the complainant's proposed comparison between the security services and the passenger facility services provided by the Athens International Airport of Sparta and those of other European airports. The Commission noted that the type, scope and/or quality of those services varied considerably among airports, and thus considered that they were not comparable.[77]

Secondly, it should also be ascertained that the cost structures of the compared products are comparable as well. Any difference in cost structure could result into different prices. The Commission admitted that a thorough investigation of the compared undertakings' cost structures would be highly unlikely. It suggested focusing only on major differences. In the aforementioned two decisions the Commission focused mainly on direct operating costs, depreciation costs and investment. Disparities in costs can be observed through examining direct operating costs, such as labour costs, capital costs and rental costs.[78] Moreover, different depreciation costs can also affect the cost structure. This difference can be found in distinct depreciation systems (in *Port of Helsingborg* the compared port was a state-owned port and thus did not depreciate its assets while the port in question did[79]) or the age of infrastructures (newer infrastructure, facilities and equipment are of significantly greater quality and value than older ones because the latter have been depreciated in part or in full[80]). In addition, different market situations may require different investment, thus resulting into different costs. In *Port of Helsingborg* the Commission found that the port in question had to make investments to protect against prevailing winds and water stream that the compared port did not have to make because it was geographically better protected.[81]

Having observed that the compared products are comparable both in characteristics and in cost structure, a further comparison of price can be carried

[76] *Ibid*, paras 162, 193 and 202.
[77] *Scippacercola*, *supra* n 45, paras 66 and 84.
[78] *Ibid*, para 67; see also *Scandlines*, *supra* n 36, para 194.
[79] *Scandlines*, *supra* n 36, para 194.
[80] *Scippacercola*, *supra* n 45, para 68.
[81] *Scandlines*, *supra* n 36, para 184.

out. Nevertheless, competition authorities must ensure that the charging systems do indeed allow for a meaningful comparison. There may be cases where undertakings impose the same price for all clients. Price comparison between those products is indeed solid. However, there are also cases where there is no single price, either because most of products are sold under individual contracts or because individual rebates are frequently given, as in *Port of Helsingborg*.[82] Under those situations, a comparison of the officially suggested prices could be somewhat misleading.

E. Conclusions

Excessive pricing is one of the most controversial topics in the field of EU competition law. These antitrust actions on the one hand constantly receive complaints from economists, and on the other hand are limited by the resource possessed by competition authorities. After examining the related controversy, this article proposes that excessive prices should continue to be subject to the intervention of EU competition law, albeit only in the following exceptional circumstances: (i) there are high and lasting entry barriers; (ii) the infringer has a super dominant market position; and (iii) with lack of legal support at the European level, competition authorities may self-restrain from intervening excessive price cases where there are sector-specific regulators. However, competition authorities should be justified in taking action when it discovers regulatory failures.

Subsequently, the analytical framework established in *United Brands* to deal with excessive prices involves a two-step analysis: first, to investigate whether the difference between the costs actually incurred and the price actually charged is excessive; and secondly, if the answer is affirmative, to examine whether the price is unfair either in itself or compared to other products. Having examined the relevant case law, I propose that the purpose of the first step should not be the identification of an excessively high profit margin, but a preliminary step to establish prima facie excessive price cases. Therefore, in the first step it is sufficient to assess only whether the dominant undertaking concerned is making profit by its high price. If the answer is positive, then the analysis goes to the second step.

The second step consists of two parallel prongs. The first prong is that the price is abusive in itself. Under this prong, competition authorities should compare the price with its economic value. The economic value is estimated based on a cost-plus framework that should take into account not only the costs of

[82] *Ibid*, para 202.

production, ie the supply-side conditions, but also non-cost-related factors, ie the demand-side conditions.

The second prong is to compare the price with prices of other products. In practice, there are six forms of benchmarking: (i) the dominant undertaking's past price for the same product; (ii) the dominant undertaking's current price for other products in the same relevant market; (iii) the dominant undertaking's competitors' prices in the same relevant market; (iv) the dominant undertaking's prices of the same product in other geographic markets; (v) the dominant undertaking's prices of related products in other markets; and (vi) other undertakings' prices of comparable products in other markets. However, it should be noted that the third benchmark is of little practical relevance.