POLICY ROUNDTABLES

Excessive Prices

2011

Introduction

The OECD Competition Committee debated excessive prices in October 2011. This document includes an executive summary of that debate and the documents from the meeting: an analytical note by the OECD Secretariat together with a companion paper by Alan Gregory and a short paper by Misja Mikkers and Wolf Sauter, written submissions from Australia, Brazil, Bulgaria, Chile, the Czech Republic, Denmark, the European Union, Finland, Germany, Greece, Hungary, India, Indonesia, Israel, Korea, Lithuania, Mexico, the Russian Federation, South Africa, Switzerland, Chinese Taipei, Turkey, United Kingdom, the United States, and BIAC and an aide-memoire of the discussion.

Overview

One of the most controversial theories of harm in competition law in general and within the category of exploitative abuses in particular is excessive prices. Regulatory interventions with the aim of curbing excessive prices are prevalent not only in those jurisdictions that allow for excessive price cases in antitrust but also in those where competition law does not foresee abusively excessive prices as an antitrust offense.

The reasons against excessive prices cases include inter alia the risk of undermining investment incentives both, of firms already in the market and potential entrants, the legal uncertainty that may be associated with the concept and also the risk of competition authorities overstepping their legitimacy in light of political pressures. Reasons in favour of excessive prices as an antitrust offence include *inter alia* limited potential for market self-correction due to permanently high entry barriers, the lack of self-correcting high prices and the absence of a regulator or regulatory failure. One of the most prominent reasons in favour of excessive price cases in light of the consumer orientation of most competition laws is that excessive prices exert the most direct negative impact on consumers.

Related Topics

The Regulated Conduct Defence (2011)
Remedies and Sanctions in Abuse of dominance cases (2006)
OECD Guiding Principles for Regulatory Quality and Performance (2005)
Access Pricing (2004)
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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Excessive Prices held by the Competition Committee (Working Party No.2 on Competition and Regulation) in October 2011.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les prix excessifs qui s'est tenue en octobre 2011 dans le cadre du Comité de la concurrence (Groupe de travail No.2 sur la concurrence et la réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

(1) Concerns about consumer harm through higher prices are a major motivation for competition law enforcement in exclusionary abuse and cartel cases. Nevertheless, when it comes to direct exploitative abuses such as excessive prices, competition authorities are often hesitant in their enforcement and eager to defer to sector regulators.

The charging of "excessive" prices to consumers and the resulting deadweight loss represent the "textbook" justification for intervention in monopoly sectors. The exploitative nature of excessive prices but also the allocative inefficiency, i.e. a transfer of wealth from consumers to producers accompanied by a reduction in total welfare to society, are brought forward to justify intervention.

In light of this it appears paradoxical that competition authorities are often extremely reluctant to take enforcement action in case of exploitative conduct by dominant firms in general and excessive price abuses in particular. Instead, competition authorities prefer to focus on exclusionary abuses, that is, anticompetitive conduct by dominant firms aiming at excluding or driving competitors out of the market and thus allowing the dominant firm to maintain or strengthen its market position. A key rationale for the prohibition of exclusionary conduct is to prevent the exercise of market power in a manner that exploits consumers. The same holds for the prohibition of cartels. Despite this concern, competition authorities are generally reluctant to intervene *directly* against high prices, even though it is the incipient threat of future "excessive" prices that motivates enforcement action against exclusionary behaviour and cartels. Instead, the phenomenon of excessive prices in the absence of exclusionary conduct or cartelization is often viewed as a temporary and self-correcting market failure or conversely, a problem to be addressed through sector-specific regulation.

(2) The harm to consumers resulting from excessive prices provides a strong argument in support of competition law intervention, particularly in circumstances where the market cannot self-correct. Nonetheless, critics of excessive price cases have advanced a series of objections against interventions, premised on the negative impact on dynamic efficiency that may result and the substantial practical difficulties faced by a competition authority seeking to identify, assess and remedy allegedly exploitative prices. Moreover, many competition authorities have reservations about the quasi-price regulator role considered to be unavoidable in excessive price cases.

The clearest argument in favour of competition law intervention against excessive prices is the direct consumer harm that follows from monopoly or near-monopoly pricing. By addressing high prices, the competition authority can improve consumer welfare, one of the most cited arguments for competition law interventions generally. Moreover, in some circumstances markets cannot self-correct at all or within a reasonable timeframe. This inability may be due to high barriers to market entry, for example, or the presence of an unregulated natural monopoly. Where self-correction is not possible, the prospect of enduring very high prices, resulting in continued detrimental effects on consumer welfare call either for competition law or regulatory intervention. The risk of persistent market failure may be particularly great in small economies, where competitive constraints are typically weaker, or in recently liberalized markets where former state-owned enterprises retain substantial market power post liberalization. Absent

countervailing market forces or regulatory solutions, competition law may provide the instrument of last resort by which to reduce prices for consumers and eliminate allocative inefficiencies in the medium term.

Nonetheless, a series of objections to excessive price cases have been advanced and are at the origin of the cautious approach adopted in most jurisdictions. An important, albeit contested argument, concerns the fear that intervention against high prices has a potential chilling effect on investments and thereby also reduces innovation entailing an ultimate negative consumer welfare impact. While convincing theoretical arguments exist, this is ultimately an empirical question. The verdict is for instance still out on the question whether dominant companies are the ones with the highest investments and in particular if and how their spending is negatively affected by competition law enforcement. Also the question whether higher investment leads to more innovation remains highly contested empirically suggesting that potential chilling effects on investments have a negative impact of undetermined magnitude on innovation. Secondly, excessive price cases are considered to be among the most difficult and complex cases for competition authorities in terms of standards for assessment, analysis of data, and the design and implementation of suitable remedies. Taken together, these difficulties may create a substantial risk of both type I (false convictions) and type II (false acquittals) errors. For critics of excessive price cases, the high risk of type I errors is exacerbated by the particularly harmful impact of such "false positives".[1] More generally, the submissions for the Roundtable suggest that many competition authorities themselves harbour concerns with respect to aggressive competition law enforcement against excessive prices, premised on the belief that competition authorities are ill-equipped to function as price regulators: competition authorities seek to facilitate or preserve competition in the market, rather than dictate its terms.

(3) There is a divide between competition law jurisdictions regarding the treatment of excessive prices. While the overwhelming majority of jurisdictions sanction excessive prices either as an express abuse or subsume the prohibition under more general prohibitions on abusive conduct by dominant firms, a minority considers excessive prices to be per se legal.

Given the strong arguments both in favour and against competition law intervention in excessive price cases, it is perhaps unsurprising that the submissions reveal a broad spectrum of approaches to such cases across jurisdictions. Express prohibitions on unfair prices can be found within some jurisdictions, which may be contained within competition legislation, consumer protection legislation, or more general market regulation or consumer protection provisions. Some concern was expressed that an overly mechanistic application of such provisions, in particular by non-specialist courts, could impact negatively on dynamic efficiency in a manner consistent with the conventional arguments against excessive price enforcement. Express prohibitions may be of a general or sector-specific nature; for example, German competition law contains a recently-enacted and temporary provision emphasizing the prohibition of excessive prices in the energy sector.

Within other jurisdictions, excessive prices are prohibited under the general proscription of abusive conduct by dominant firms. Article 102 of the Treaty on the Functioning of the European Union (TFEU), for example, contains a general prohibition on abuse of dominance, listing as an example of abusive conduct "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions"—a provision that has been interpreted to incorporate excessive prices. The legal test for excessive prices under Article 102 TFEU, developed by the Court of Justice of the European Union in the *United Brands*[2] case, has proven particularly influential in establishing the parameters of the competition law prohibition. The *United Brands* test sets out a two-pronged test to determine whether prices are

1 In the Roundtable discussion it was, however, suggested that the necessary priority setting of competition authorities under tight budgetary constraints alleviates this problem as only particularly harmful cases are considered.

2 Case 27/76 *United Brands Co. v Commission* [1978] ECR 207.

excessive: the difference between the costs incurred and the price charged must be excessive, and additionally, the price charged must be either unfair in itself or in comparison with competing products. While the *United Brands* test has been considered a rigorous basis for assessing excessive price cases, the question remains whether competition authorities or regulators are better placed to tackle these types of market failures.

Consistent with the objections to excessive price cases sketched out above, some jurisdictions consider even very high prices by lawful monopolists to be *per se* legal under the competition rules. Under this approach, competition authorities can address the acquisition of dominance under the exclusionary abuse provisions and merger control rules, but cannot call into question the high prices charged by what may be called a "pristine monopolist."[3]

(4) In considering limitations to the competition law enforcement of high prices, several screens have been discussed in the literature. The objective of screens is to identify situations where intervention is both suitable and necessary to resolve the market failure. The status of these screens within the case law on excessive prices can be controversial, however, insofar as they are generally applied in the exercise of the competition authority's prosecutorial discretion, rather than as a required element of an established legal test.

In general, excessive price cases are conducted infrequently even within those jurisdictions that prohibit and enforce excessive price provisions. In order to prioritize enforcement activities, competition authorities may apply one or more screens in order to identify those excessive price cases where enforcement is both appropriate and necessary.

The most prominent screen is the need for *high and non-transitory barriers to entry*. The higher the barriers and the less they are of a temporary nature, the more warranted intervention becomes. Further screens have been proposed relating to the nature of the dominant position. *Super-dominance* approaching monopoly is frequently proposed and also the *origin of dominance*, i.e. whether dominance was obtained as a result of a current or past special or exclusive rights, or due to an unprosecuted past exclusionary abuse as opposed to competition on the merits. Another relevant factor may be the *absence or weakness (in power or in fact) of a sector regulator.* Indeed, an effective sector regulator would tend to reduce the scope for competition law enforcement against high prices even in those jurisdictions with overlapping powers where interventions may still be legally possible.

In general, while being debated, screens are not widely applied by competition authorities at least not as a part of a formal competition policy mechanism. If at all, screens are mostly used to determine whether a complaint of excessive prices is plausible and consistent with the enforcement priorities of the authority. The main reason for this is that soft-law assessment practices of a competition authority can only deviate to a limited extent from established case law in particular also as courts in private action cases are bound by the case law and not the internal guidelines that competition authorities may use in their priority setting. Incorporating an appropriately restrained and economically rational theory of excessive prices within established competition case law is desirable and may provide an argument in favour of intervention against excessive prices in clear cases of abuse.

(5) The assessment of whether high prices breach the competition rules typically requires an analysis of the actual price and profit, benchmarked against the likely outcome under competitive conditions. Simple price or margin comparisons may, however, be problematic. If the necessary data is available, profitability analysis based on an assessment of the rate of return on capital invested is considered a more accurate and reliable method to measure excessiveness. In light of

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

the inherent methodological difficulties it may be prudent for competition authorities to apply several different tests and proceed on the basis of a "predominance of evidence".

The fundamental question for all jurisdictions with a ban on excessive prices is whether a particular price charged by a dominant firm is to be considered excessive or not. Answering this question reliably is difficult. While a variety of methodologies exist by which the price charged may be assessed, none are without difficulties in practice. In terms of the accuracy and reliability of methodologies, profitability analysis is preferred followed by margin analysis, and finally historic or geographic comparisons.

Profitability analysis examines the firm's return on capital, to determine whether it is earning profits that differ from a normal return on capital to be expected in a competitive market. The companion paper to the background paper on excessive prices deals with profitability analysis in detail and highlights three basic problems with standard profitability measures. Firstly, accounting rates of return may differ from economic rates of return, and therefore, the use of the former as a proxy for the latter may be misleading. Secondly, competition authorities generally need to measure the profitability of the firm over a truncated period, rather than over the whole life of the firm, rendering the exercise more complex and error prone. Thirdly, determining asset values is difficult, in particular in relation to intangible assets. Additionally, where a business operates in a number of segments, an appropriate cost and asset allocation is crucial, a point confirmed by many submissions. The first and second of these, and to some degree the third, can be dealt with by employing a theoretically robust approach, the truncated IRR model. A variation is to base accounting rates of return on modern equivalent asset values. While the practical issues may appear daunting, such models have been successfully employed by competition authorities in the past.

Where profitability analysis is difficult or impractical in practice, the next best alternative is sales margin analysis. Where this too is impossible, a price comparison is the remaining option. The comparison performed may be geographic, considering the prices charged by other firms in similar markets, or historic, considering the prices charged by the firm over time. Price comparisons, however, have the potential to be misleading unless full and appropriate account is taken of the costs of the dominant and comparator firms, as well as the particular market characteristics—for example, a higher price may not imply that it is excessive but rather that the lower price is predatory.

Given the difficulties in identifying an ubiquitous test to assess excessive prices, many competition authorities may prefer to analyse the available data combining several methodologies. The Swiss submission, for example, outlines the broad range of methodologies that were applied to determine whether there had been excessive prices in a recent case in the mobile telecommunications sector. A determination of the acceptability of the margin can then be made by considering the "predominance of evidence," exemplified by the decision of the UK Office of Fair Trading in the *Napp*[4] case.

(6) Competition authorities are reluctant to engage in price regulation, which is frequently viewed as the most obvious and straightforward remedy in excessive price cases. Yet, alternative, in particular structural, remedies may also be appropriate and have the additional advantage of addressing the underlying problem instead of the symptom in the form of pricing constraints.

A recurrent theme in the literature on excessive prices is that even where the question of "excessiveness" can be assessed in accordance with a competition law standard, remedies are difficult to devise. The most obvious remedy to excessive prices is to lower prices directly by means of a price or profit cap. Designing and implementing a remedy of this nature, in particular if a particular maximum price or profit is specified, may require the competition authority to perform tasks and assessments usually

4 *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1.

undertaken only by sector specific regulators. Such remedies also require continuous monitoring and possible adjustments to the cap. This is one of the reasons that competition authorities generally prefer to let specialised sector regulators address the problem instead of becoming active themselves. Thus, advocacy efforts, possibly in parallel to an opening of procedure, directed at improved regulation is a frequent response by competition authorities when faced with evidence of excessive prices.

Yet, direct price regulation is not an inevitable outcome in excessive price cases. In keeping with the general preference of enforcers for "one shot" remedies that address the market failure directly rather than alleviating its harmful effects, the competition authority may choose to implement measures to increase transparency or reduce consumer switching costs. Also structural measures in the form of horizontal or vertical separation may result in the necessary competitive pressure for price decreases in the market. Monitoring obligations may also play a role. Alternatively, the finding of breach may merely determine that the price charged is excessive, and require the dominant firm to reduce its prices to a reasonable (but unspecified) level.

(7) The identification and remedying of excessive prices under competition law can overlap with the functions of a sector regulator. While the absence of a specific regulator may suggest that the problem is best solved through the implementation or extension of a regulatory regime, where an effective (non-captured) regulator exists competition law enforcement may not be necessary. Alternatively, the competition authority and regulator may work together to remedy the problem, with the latter being particularly suited to the task of identifying and enforcing the appropriate remedy.

The typical point of departure for public utilities regulation is the existence of a firm with significant market power (SMP) charging consistently supra-competitive prices. Thus, there is considerable potential for overlap between excessive prices as a competition abuse and the sphere of sector specific regulation. Where excessive prices arise in an unregulated market, this may suggest that sector regulation is desirable and thus presents an opportunity for advocacy efforts by the competition authority. There are, however, also draw backs to what could constitute heavy handed *ex ante* regulation rendering *ex post* competition law intervention in individual cases more desirable.

Nevertheless, where excessive prices arise in a regulated sector, there is a formidable argument that competition authorities should defer to regulatory solutions. However, two important qualifications to this general rule emerge from the submissions. Firstly, where the regulator is captured or there is regulatory failure, competition enforcement may be appropriate insofar as neither the regulatory regime nor the market can self-correct. The Chilean submission, for example, details a number of enforcement actions taken in regulated sectors in response to regulatory failures. Secondly, the jurisdictional reach of even a well-performing sector regulator may be incomplete, so that excessive price cases may arise in market segments outside the regulator's supervision. This was, for example, an issue in the Swedish district heating case that was considered in detail during the Roundtable. In such circumstances, the competition authority is likely to benefit from the involvement of the regulator in the competition investigation, given that the regulator brings with it significant market knowledge and technical expertise. An example of the mutually supportive relationship between competition authorities and sector regulators is seen in the Swiss mobile telecommunications case. Moreover, the competition authority may ultimately determine that the optimal solution is the extension of the regulatory regime to cover the disputed conduct, an outcome observed in the Swedish district heating case.

In situations where competition enforcement against excessive prices occurs in a regulated market—whether the particular activity is price-regulated or not —the competition authority may wish to involve the regulator in the design and implementation of the remedy to be imposed. This division-of-labour approach both harnesses the comparative advantage of the regulator, and avoids the competition authority

taking on the role of a price regulator. The Mexican submission details an interesting variation on this approach: while excessive prices are not a competition abuse under Mexican law, the competition authority has various powers to determine whether excessive prices are being charged in a market, in which case specific regulation can be imposed or extended.

SYNTHESE

Par le Secrétariat

(1) Les préoccupations concernant les dommages causés aux consommateurs du fait des relèvements de prix constituent l'une des motivations majeures de la mise en œuvre du droit de la concurrence dans les cas de manœuvres d'exclusion et d'ententes. Néanmoins, lorsqu'il s'agit de manœuvres directes d'exploitation telles que la fixation de prix excessifs, les autorités de la concurrence hésitent souvent à appliquer la loi et s'empressent de renvoyer la décision aux autorités réglementaires sectorielles.

L'application de prix « excessifs » aux consommateurs et la perte sèche qui en résulte constituent la justification, mentionnée dans les manuels, de l'intervention dans les secteurs contrôlés par un monopole. Le caractère abusif des prix excessifs mais aussi leur inefficience en termes d'affectation des ressources, en raison d'un transfert de richesse des consommateurs aux producteurs, accompagné d'une réduction du bien-être de la société dans son ensemble, sont invoqués pour justifier l'intervention.

De ce fait, il apparaît paradoxal que les autorités de la concurrence soient souvent extrêmement réticentes à prendre des mesures pour sanctionner les comportements abusifs d'entreprises en position dominante en général et les abus sous forme de fixation de prix excessifs en particulier. Les autorités de la concurrence préfèrent plutôt mettre l'accent sur les manœuvres d'exclusion, c'est-à-dire sur les pratiques anticoncurrentielles d'entreprises en position dominante en vue d'exclure ou d'évincer leurs concurrents du marché, de manière à permettre à l'entreprise dominante de maintenir ou de renforcer sa position. L'une des principales justifications de l'interdiction des comportements d'exclusion est d'empêcher l'exercice d'un pouvoir de marché dans des conditions d'exploitation des consommateurs. Il en va de même pour l'interdiction des ententes. Malgré ces préoccupations, les autorités de la concurrence sont généralement réticentes à intervenir *directement* contre les relèvements de prix, même si c'est la menace potentielle de prix « excessifs » futurs qui justifie les sanctions contre les comportements d'exclusion et les ententes. En fait, le phénomène de prix excessifs en l'absence de comportement d'exclusion ou d'entente est souvent considéré comme une défaillance temporaire du marché qui devrait se corriger d'elle-même ou, à l'inverse, comme un problème qui doit être traité au moyen d'une réglementation sectorielle spécifique.

(2) Les dommages aux consommateurs résultant de prix excessifs constituent un argument convaincant en faveur d'une intervention dans le cadre du droit de la concurrence, notamment dans les cas où le marché ne peut se corriger de lui-même. Néanmoins, les critiques émises à l'occasion d'affaires de prix excessifs ont invoqué une série d'objections contre les interventions, fondées sur l'incidence négative qui pourrait en résulter sur l'efficience dynamique et les difficultés pratiques considérables rencontrées par une autorité de la concurrence lorsqu'elle s'efforce d'identifier, d'évaluer et de rectifier des prix prétendus abusifs. De plus, beaucoup d'autorités de la concurrence émettent des réserves sur le rôle de quasi-réglementation des prix considéré comme inévitable dans les affaires de fixation de prix excessifs.

L'argument le plus clair en faveur d'une intervention sur les prix excessifs dans le cadre du droit de la concurrence est le dommage direct aux consommateurs qui résulte de la fixation des prix par un monopole ou un quasi-monopole. En prenant des mesures contre les relèvements de prix, les autorités de la concurrence peuvent améliorer le bien-être du consommateur, ce qui constitue généralement l'un des

arguments les plus souvent cités en faveur de l'intervention dans le cadre du droit de la concurrence. De plus, dans certaines circonstances, les marchés ne sont pas du tout en mesure de se corriger d'eux-mêmes, ou du moins de le faire dans un délai raisonnable. Cette incapacité peut être due, par exemple, à d'importants obstacles à l'entrée sur le marché ou à la présence d'un monopole naturel non réglementé. Lorsque l'autocorrection n'est pas possible, la perspective de subir des prix très élevés aboutissant à des effets constamment préjudiciables au bien-être des consommateurs nécessite une intervention, soit dans le cadre du droit de la concurrence, soit de la part des autorités réglementaires. Le risque d'une défaillance persistante du marché peut être particulièrement élevé dans les économies de petites dimensions où les contraintes de la concurrence sont généralement plus faibles, ou sur les marchés dont la libéralisation est récente et où les anciennes entreprises publiques continuent à exercer des pouvoirs importants. En l'absence de forces compensatrices sur le marché ou de solutions offertes par la réglementation, le droit de la concurrence peut constituer l'instrument à utiliser en dernier ressort de manière à réduire les prix à la consommation et à mettre fin à moyen terme aux inefficiences dans l'affectation des ressources.

Néanmoins, une série d'objections aux affaires de prix excessifs ont été invoquées et sont à l'origine de l'approche prudente adoptée dans la plupart des juridictions. Un argument important bien que contesté est lié à la crainte qu'une intervention contre des prix élevés ne risque d'entraîner un gel des investissements réduisant ainsi l'innovation, avec l'impact négatif sur le bien-être des consommateurs qui en résulterait en définitive. Bien que des arguments théoriques convaincants existent, il s'agit en définitive d'une question empirique. Par exemple la question de savoir si les entreprises dominantes sont celles qui effectuent les investissements les plus importants, et en particulier si l'application du droit de la concurrence a un effet négatif sur leurs dépenses, et dans quelles conditions, n'a pas encore été tranchée. Par ailleurs la question de savoir si des investissements plus élevés aboutissent à un renforcement de l'innovation reste très contestée empiriquement, ce qui tend à montrer que le risque de gel des investissements a un impact négatif sur un montant indéterminé d'innovations. En second lieu, les cas de prix excessifs sont considérés comme étant parmi les cas les plus difficiles et complexes pour les autorités de la concurrence en termes de normes d'évaluation, d'analyses des données et de conception et de mise en œuvre de mesures appropriées. Dans l'ensemble, ces difficultés peuvent occasionner un risque important d'erreurs de type I (condamnations injustifiées) comme de type II (acquittements injustifiés). En ce qui concerne les critiques des cas de prix excessifs, le risque élevé d'erreurs de type I est exacerbé par l'impact particulièrement dommageable de ces « faux résultats positifs ».[1] Plus généralement, les contributions à la table ronde montrent que beaucoup d'autorités de la concurrence se préoccupent elles-mêmes de la mise en œuvre de la législation relative à la concurrence agressive de manière à lutter contre les prix excessifs, en partant du principe que les autorités de la concurrence sont censées être mal équipées pour réglementer les prix : les autorités de la concurrence s'efforcent de faciliter ou de préserver la concurrence sur le marché plutôt que de dicter ses conditions.

(3) Il existe une ligne de partage entre les autorités de contrôle de la concurrence en ce qui concerne le traitement des prix excessifs. Bien que l'immense majorité des juridictions sanctionnent les prix excessifs soit en les considérant expressément comme une pratique abusive soit en intégrant leur interdiction parmi les interdictions plus générales de comportement abusif de la part des entreprises dominantes, une minorité d'entre elles considèrent même que la fixation de prix très élevés par des monopoles légaux est légale en soi en vertu du droit de la concurrence les prix excessifs comme étant légaux en soi.

Étant donné les arguments frappants aussi bien en faveur de l'intervention du droit de la concurrence dans les cas de prix excessifs que contre cette intervention, il n'est peut-être pas surprenant que les

[1] Au cours de la table ronde, il a cependant été fait observer que la nécessité, pour les autorités de la concurrence, de fixer des priorités en tenant compte de contraintes budgétaires strictes atténue ce problème, dans la mesure où seuls les cas particulièrement dommageables sont envisagés.

contributions fassent apparaître un large éventail d'approches des différentes juridictions concernant ces cas. On peut constater que certaines juridictions interdisent expressément la fixation de prix inéquitables, cette interdiction pouvant figurer dans la législation de la concurrence, la législation de la protection des consommateurs ou dans des dispositions plus générales concernant la réglementation du marché ou la protection des consommateurs. Certains ont craint qu'une application trop automatique de ces dispositions, en particulier par des tribunaux non spécialisés, n'ait un impact négatif sur l'efficience dynamique, conformément aux arguments traditionnels contre les mesures prises à l'encontre de la fixation de prix excessifs. Les interdictions expresses peuvent avoir un caractère général ou sectoriel ; par exemple, le droit de la concurrence allemand contient une disposition prise récemment et temporaire qui met l'accent sur l'interdiction de prix excessifs dans le secteur de l'énergie.

Dans d'autres juridictions, les prix excessifs sont interdits dans le cadre de la proscription générale des comportements abusifs d'entreprises dominantes. L'article 102 du Traité sur le fonctionnement de l'Union européenne (TFUE) par exemple, contient une interdiction générale de l'abus de position dominante, en citant comme exemple de comportement abusif le fait « d'imposer de façon directe ou indirecte des prix d'achat ou de vente ou d'autres conditions de transactions non équitables » -- cette disposition ayant été interprétée comme s'appliquant aux prix excessifs. Le critère juridique des prix excessifs prévu à l'article 102 du Traité sur le fonctionnement de l'Union européenne, développé par la Cour de justice de l'Union européenne dans l'affaire *United Brands*[2], s'est avéré particulièrement efficace pour déterminer les paramètres de l'interdiction résultant du droit de la concurrence. Le critère énoncé dans l'affaire *United Brands* énonce une norme en deux volets pour déterminer si les prix sont excessifs : la différence entre les coûts supportés et le prix imposé doit être excessive et en outre, le prix imposé doit être inéquitable soit en lui-même soit par comparaison avec celui de produits concurrents. Bien que le critère d'*United Brands* ait été considéré comme une base rigoureuse pour évaluer les affaires de prix excessifs, la question se pose encore de savoir si ce sont les autorités de la concurrence ou les autorités réglementaires qui sont les mieux placées pour remédier à ce type de défaillance du marché.

Conformément aux objections formulées dans le cadre des cas de prix excessifs esquissés ci-dessus, certaines juridictions considèrent même que la fixation de prix très élevés par des monopoles légaux est légale en soi en vertu du droit de la concurrence. Selon cette approche, les autorités de la concurrence peuvent lutter contre l'acquisition d'une position dominante en vertu des dispositions relatives aux manœuvres d'exclusion et au contrôle des fusions, mais ne peuvent mettre en question les prix élevés pratiqués par ce que l'on peut qualifier de « monopoles parfaits ».[3]

(4) Dans le cadre de l'examen des limitations à l'application du droit de la concurrence aux prix élevés, les travaux effectués ont envisagé plusieurs critères de sélection. L'objectif de ces critères est d'identifier les cas dans lesquels l'intervention est à la fois appropriée et nécessaire pour résoudre des défaillances du marché. La portée juridique de ces critères dans le cadre de la jurisprudence sur les prix excessifs peut cependant être controversée, dans la mesure où les interventions ont généralement lieu dans l'exercice du pouvoir discrétionnaire dont dispose l'autorité de la concurrence pour engager des poursuites plutôt que comme élément obligatoire d'un critère juridique bien établi.

En général, les interventions dans les affaires de prix excessifs sont rares, même dans les juridictions qui interdisent ces pratiques et mettent en œuvre des dispositions en ce sens. Afin de classer par ordre de priorité les mesures d'application de la loi, les autorités de la concurrence peuvent appliquer un ou

2 Affaire 27/76 *United Brands Co. contre Commission* [1978] ECR 207.

3 *Berkey photo, Inc. contre Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979).

plusieurs critères de sélection afin d'identifier les cas de fixation de prix excessifs dans lesquels l'application de sanctions est à la fois appropriée et nécessaire.

Le principal critère de sélection est la nécessité *d'obstacles stricts et non transitoires à l'entrée sur le marché.* Plus ces obstacles sont stricts et moins ils ont un caractère temporaire, plus l'intervention devient souhaitable. D'autres critères ont été proposés concernant la nature de la position dominante. Un critère de *super position dominante proche du monopole* est souvent proposé ainsi que celui de *l'origine de la position dominante,* c'est-à-dire la question de savoir si cette position a été obtenue grâce à des droits spéciaux ou exclusifs actuels ou passés ou grâce à des manœuvres d'exclusion non sanctionnées dans le passé, par opposition à une concurrence fondée sur les mérites. Un autre facteur pertinent peut être *l'absence ou la faiblesse (en droit ou en fait) d'une autorité réglementaire sectorielle.* En fait, une autorité réglementaire sectorielle efficace aurait tendance à réduire le champ d'application des mesures prises dans le cadre du droit de la concurrence contre la fixation de prix élevés même dans les juridictions où les pouvoirs se chevauchent et où les interventions pourraient encore être juridiquement possibles.

En général, bien que faisant l'objet d'un débat, les critères de sélection sont rarement appliqués par les autorités de la concurrence, du moins dans le cadre d'un dispositif formel de politique de la concurrence. Lorsque ces critères sont utilisés, c'est surtout pour rechercher si une plainte pour prix excessifs est crédible et compatible avec les priorités de l'autorité en matière d'application de la loi. Cela s'explique surtout par le fait que les méthodes d'évaluation d'une autorité de la concurrence dans le cadre de dispositions juridiques non contraignantes ne peuvent s'écarter de la jurisprudence établie que dans certaines limites, en particulier lorsque les tribunaux sont liés, dans les cas de recours privés, par la jurisprudence et non par les lignes directrices internes que les autorités de la concurrence peuvent utiliser dans la fixation de leurs priorités. Il est souhaitable d'intégrer une théorie des prix excessifs comportant les restrictions appropriées et qui soit rationnelle sur le plan économique dans le cadre du droit de la concurrence établi, et cela pourrait constituer un argument à l'appui d'une intervention contre la fixation de prix excessifs dans les cas évidents de pratiques abusives.

(5) Afin de déterminer si des tarifications élevées enfreignent les règles de la concurrence, il faut en principe analyser les prix et les bénéfices réels, en les comparant aux résultats qui seraient vraisemblablement obtenus en respectant le jeu de la concurrence. Une simple comparaison des prix ou des marges peut cependant s'avérer problématique. Si les données nécessaires sont disponibles, on considère qu'une analyse de profitabilité fondée sur l'évaluation du taux de rendement des capitaux investis permet de mesurer le caractère excessif de la tarification de façon plus précise et plus fiable. Compte tenu des difficultés inhérentes à la méthode, les autorités chargées de la concurrence pourraient juger prudent de procéder à plusieurs vérifications différentes et de fonder leurs conclusions sur les « éléments probants prédominants ».

La question fondamentale qui se pose à toute juridiction concernant l'éventuelle interdiction d'une tarification trop élevée consiste à savoir si un prix particulier facturé par une entreprise en position dominante doit, ou non, être considéré comme excessif. Or, il n'est pas simple d'apporter une réponse fiable. Certes, diverses méthodes permettent d'évaluer le prix demandé, mais aucune n'est facile à mettre en pratique. En termes d'exactitude et de fiabilité, c'est l'analyse de profitabilité qui a la préférence, suivie de l'analyse des marges et, pour finir, des comparaisons historiques ou géographiques.

L'analyse de profitabilité consiste à examiner le rendement du capital investi par l'entreprise, afin de déterminer si les bénéfices qu'elle dégage diffèrent du taux de rentabilité auquel on peut s'attendre sur un marché concurrentiel. Le document accompagnant la note de référence sur les prix excessifs aborde en détail la question de l'analyse de profitabilité, et met en évidence trois problèmes essentiels concernant les méthodes standard d'évaluation en la matière. Premièrement, le taux de rendement comptable et le taux de

rendement économique pouvant être différents, l'utilisation du premier à la place du deuxième risque de prêter à confusion. Deuxièmement, les autorités chargées de la concurrence doivent généralement mesurer la rentabilité d'une entreprise sur une période bien délimitée, et non sur sa durée de vie globale, ce qui rend l'exercice plus complexe et augmente les possibilités d'erreur. Troisième point : il est difficile de déterminer la valeur des actifs, et notamment celle des actifs immatériels. Par ailleurs, lorsqu'une entreprise opère dans plusieurs segments du marché, une répartition correcte des coûts et des actifs est cruciale, ce que confirment de nombreuses contributions. Il est possible de régler les deux premiers problèmes et, dans une certaine mesure, le troisième, en adoptant l'approche théoriquement fiable du modèle de taux de rentabilité interne (IRR) tronqué. Une variante consiste à baser le taux de rendement comptable sur des valeurs d'actifs équivalentes actualisées. Si les difficultés pratiques peuvent sembler décourageantes, il faut souligner que les autorités de la concurrence ont, par le passé, utilisé ces modèles avec succès.

Lorsqu'il se révèle difficile, voire impossible, de mener à bien l'analyse de profitabilité, la deuxième option sur la liste consiste à examiner les marges sur ventes. Si la démarche s'avère là encore inapplicable, il reste la possibilité d'une comparaison des prix. Celle-ci peut se faire selon des critères géographiques (examen des prix pratiqués par d'autres entreprises sur des marchés similaires) ou historiques (évolution des prix facturés par l'entreprise considérée). Ce type de comparaison peut cependant être source d'erreurs, sauf à tenir dûment et pleinement compte des coûts supportés par l'entreprise dominante et les entreprises de référence, ainsi que des caractéristiques du marché – ainsi, le fait qu'une tarification soit plus élevée ne signifie pas nécessairement qu'elle est excessive, mais plutôt que les prix plus bas sont des prix d'éviction.

Compte tenu des difficultés que pose la mise au point de critères universels pour l'évaluation des prix excessifs, les autorités de la concurrence préfèrent souvent analyser les données dont elles disposent en combinant plusieurs démarches. La Suisse, par exemple, expose brièvement dans sa contribution le large éventail des méthodes qu'elle a utilisées récemment, dans une affaire concernant le secteur de la téléphonie mobile, pour déterminer si des tarifications excessives avaient été pratiquées. Il est ensuite possible de se prononcer sur le caractère acceptable de la marge dégagée en s'appuyant sur les éléments probants les plus nombreux, comme l'a fait, par exemple, le Bureau de la concurrence (Office of Fair Trading) du Royaume-Uni dans l'affaire *Napp*.[4]

(6) Les autorités de la concurrence hésitent à s'engager sur la voie de la réglementation des prix, souvent considérée comme le remède le plus évident et le plus direct dans les cas de tarification excessive. Cependant, d'autres solutions – structurelles, en particulier – pourraient également convenir, et présentent l'avantage supplémentaire de s'attaquer au fond du problème, au lieu de traiter simplement les symptômes en encadrant les prix.

Il ressort fréquemment des travaux consacrés aux prix excessifs que, même lorsqu'il est possible d'évaluer le caractère excessif d'une tarification en fonction d'une norme définie dans la législation sur la concurrence, les remèdes sont difficiles à mettre en place. La solution la plus évidente consiste à faire baisser les prix directement en plafonnant les tarifs ou les bénéfices. Pour élaborer et appliquer ce type de mesure, notamment si un prix ou une marge maximum a été fixé, l'autorité de la concurrence peut se voir amenée à effectuer des tâches et des évaluations qui sont habituellement du ressort exclusif des responsables de la réglementation sectorielle. Il faut également assurer un suivi permanent et, le cas échéant, ajuster le plafond. C'est là une des raisons pour lesquelles les autorités de la concurrence préfèrent généralement laisser ces questions aux mains des responsables de la réglementation sectorielle plutôt que de s'en occuper elles-mêmes. Il n'est donc pas rare, lorsqu'elles se trouvent confrontées à un cas manifeste

4 *Napp Pharmaceutical Holdings Limited and Subsidiaries contre le Directeur général de Fair Trading* [2002] CAT 1.

de tarification excessive, qu'elles mènent une action de sensibilisation, éventuellement associée à l'ouverture d'une procédure, en vue d'améliorer la réglementation.

Un contrôle direct des prix n'est cependant pas inévitable dans les cas de tarification excessive. Les instances chargées de faire appliquer les règles préférant généralement les solutions qui traitent directement, et en une seule fois, les défaillances du marché au lieu d'en atténuer les effets négatifs, l'autorité de la concurrence peut décider de mettre en œuvre des mesures visant à accroître la transparence ou à réduire les coûts que doit supporter le consommateur s'il change de fournisseur. Par ailleurs, certaines mesures structurelles, comme une séparation horizontale ou verticale, peuvent permettre d'exercer la pression concurrentielle nécessaire à une baisse des prix sur le marché. Les obligations de suivi peuvent également jouer un rôle. Il se peut cependant que la constatation d'une infraction se borne à établir que le prix facturé est trop élevé, et qu'il soit simplement demandé à l'entreprise dominante de ramener ses tarifs à un niveau raisonnable (mais non spécifié).

(7) L'identification et le règlement des problèmes de tarification excessive dans le cadre de la loi sur la concurrence peuvent empiéter sur les fonctions d'une autorité chargée de la réglementation sectorielle. L'absence d'organisme de réglementation spécifique peut laisser penser que la meilleure façon de remédier au problème consiste à mettre en œuvre ou à étendre un système réglementaire ; à l'inverse, s'il existe une instance de réglementation efficace (indépendante), il ne sera peut-être pas indispensable d'imposer l'application de la loi sur la concurrence. Par ailleurs, l'autorité chargée de la concurrence et l'instance de réglementation pourront s'employer ensemble à résoudre le problème, la seconde étant particulièrement à même de déterminer et de faire appliquer le remède approprié.

Dans le domaine des services publics, c'est en général lorsqu'une entreprise détenant un pouvoir de marché important pratique systématiquement des prix supra-concurrentiels qu'une réglementation se met en place. Les possibilités de chevauchement sont donc considérables entre la question des prix excessifs qui faussent la concurrence et la réglementation sectorielle. Si une tarification déraisonnable apparaît sur un marché non réglementé, cela peut signifier qu'une réglementation est souhaitable dans le secteur concerné ; l'autorité chargée de la concurrence a alors la possibilité d'engager une action de sensibilisation à cet égard. Il y a cependant des inconvénients à ce qui pourrait constituer une réglementation *ex ante* pesante, rendant plus intéressante la possibilité d'une intervention *ex post*, dans certains cas précis, pour faire respecter le droit de la concurrence.

Toutefois, la pratique d'une tarification excessive dans un secteur réglementé est un argument de poids en faveur de l'idée que les autorités de la concurrence doivent privilégier les solutions réglementaires. Les contributions des pays font cependant ressortir deux exceptions majeures à cette règle générale. Premièrement, lorsque l'organisme chargé de la réglementation n'est pas indépendant ou en cas de défaillance de la réglementation, il peut être utile de faire respecter le droit de la concurrence, dans la mesure ou ni le système réglementaire ni le marché ne peuvent s'auto-corriger. Le Chili, par exemple, donne plusieurs exemples de mesures d'application dans des secteurs pourtant réglementés, motivées par des défaillances de la réglementation. Deuxièmement, le champ d'application des mesures prises par une autorité de tutelle sectorielle, même efficace, peut être incomplet, si bien que des tarifications excessives peuvent se présenter dans des segments du marché échappant au contrôle de l'instance de réglementation. Tel était le cas, par exemple, dans l'affaire du chauffage urbain exposée par la Suède, qui a fait l'objet d'un examen détaillé lors de la Table ronde. Dans de telles circonstances, l'autorité de la concurrence est susceptible de bénéficier de la participation de l'organisme de réglementation à l'enquête de concurrence, car celui-ci connaît bien le marché et possède d'importantes compétences techniques. L'affaire concernant la téléphonie mobile suisse illustre la relation de soutien mutuel entre les autorités chargées de la concurrence et les responsables de la réglementation sectorielle. De plus, l'autorité de la concurrence peut,

en dernier ressort, estimer que la meilleure solution consiste à étendre les dispositions réglementaires aux pratiques controversées, ce qui s'est produit en Suède dans l'affaire du chauffage urbain.

Lorsque l'application du droit de la concurrence face à des tarifications excessives intervient sur un marché réglementé – que les prix soient contrôlés ou non dans le secteur d'activité concerné – l'autorité chargée de la concurrence peut décider d'associer l'organe de réglementation à la conception et à la mise en œuvre du remède. Cette répartition des tâches permet à la fois d'exploiter l'avantage comparatif du régulateur, et d'éviter que l'autorité de la concurrence se charge de réglementer les prix. La contribution du Mexique présente une variante intéressante de cette approche : bien que les prix excessifs ne constituent pas une infraction au droit de la concurrence aux termes de la loi mexicaine, les autorités chargées de la concurrence disposent de pouvoirs leur permettant de déterminer si la tarification pratiquée sur un marché donné est abusive, auquel cas elles peuvent appliquer, ou élargir, une réglementation particulière.

EXCESSIVE PRICES

Background Paper by the Secretariat[*]

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[*] This paper was prepared by Frank Maier-Rigaud. Annexes 1, 3, 4 and 6 were prepared by Anna Pisarkiewicz and Annex 2 was prepared by Jung Won Song.

1. Introduction

The concept of exploitative abuse and more specifically the prohibition of an abusively excessive price[1] has to be considered one of the most controversial issues in competition policy. On the face of it, this is paradoxical, given that consumer harm and efficiency considerations have been considered one of the most important justifications for competition law interventions. The concept of consumer harm has been identified as the "intellectual cornerstone of competition policy".[2] The efficient allocation of resources, in turn, is considered the economic cornerstone of competition.[3] Many regulatory authorities spend much of their time and resources considering whether prices are "too high". Yet interventions by competition authorities to deal with these problems directly are considered controversial at best.

The many reasons for this reluctance to intervene include important concerns to preserve the allocative function of prices as signals of scarcity, particularly if such signals result in new entry or other forms of investment and innovation. In order to fully capture the reasons why antitrust and regulatory intervention in case of excessive prices is so contentious and to understand the pros and cons of intervention and its practical difficulties, the scope of this paper is deliberately broad. It explicitly covers both, excessive prices as antitrust offense and also touches upon excessive prices as a regulatory problem in the widest possible sense.

1.1. A brief sketch of the history of excessive prices

The problem of excessive prices is as old as economic reasoning itself and while it is not possible to give a detailed account of the history of relevant economic thought, a brief but necessarily sketchy overview of the origins of excessive prices appears warranted not only to understand the historical origins of excessive price concerns but also to get a first understanding of the evolution of the underlying concepts and how the concern about fair prices and the debate of what constitutes economic value has shaped economic thinking.

The idea of a just, fair or natural price and with it the concept of economic value and rudimentary equilibrium notions can be traced back to ancient Greece and has therefore occupied political philosophers

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1 The terms "excessive pricing" and "excessive prices" are both used in the competition literature. In addition, the term "price abuse" is used in Asian countries as synonym for "excessive prices" and not as a more comprehensive category comprising various price-based abuses such as predation or margin squeeze. The term "excessive prices" is preferable to "excessive pricing" as it is semantically more appropriate and the latter implies "too much pricing". It is probably based on a false analogy to predatory pricing and while both terms are used interchangeably without possible misunderstandings in the competition community, the term may be misleading in an advocacy context where people not familiar with special competition terms are addressed.

2 Williams (2007:131).

3 In the context of exploitative pricing one should note that the exploitative abuse of monopsony power, as evidenced by excessively low prices depriving for example farmers of a fair price for their products is likely to require a total welfare approach. Excessive or unfair prices in this paper will omit exploitatively low prices. See, however, Case 298/83 CICCE vs. Commission, [1985] ECR 1105, [1986] 1 CMLR 486, where the Court rejected a complaint that the European Commission had refused to condemn unfairly low prices paid by a monopsonist for lack of sufficient evidence. See also The Association of British Travel Agents and British Airways plc, OFT decision of 11 December 2002, [2003] UKCLR 136. For a discussion of consumer versus total welfare standard see Elhauge (2009b) and the interesting discussion of the paper by Barry Nalebuff, Paul Seabright and others in Competition Policy International, Vol. 5(2), 2009 and Elhauge's reply in Vol. 6(1), 2010.

and economists for well over 2000 years.[4] Already at that time writers were concerned with exploitation through unfair prices and attempted to define economic value and with it just prices. In fact modern price theory, a core area of economics, is the result of many political philosophers and economists grappling with these questions over centuries.

The belief that economic value is inherent to the good itself, defines the economic writings from Plato and Aristotle[5] through scholastic writers such as Thomas Aquinas[6] up to Adam Smith.[7] The original notion that value is an objective quality permanently inherent in a good pervaded economic thought in one form or another, leading for example to the objective (Marxist) labour theory of value and Ricardo's objective production cost theory of value.[8] These objective theories of value were finally superseded by the theory of subjective value in the so-called marginalist revolution[9] that was followed by the classic publications of Chamberlin and Robinson that founded modern price theory.[10]

The concept of just price in turn is closely related to the notion of equilibrium that first appeared in its most rudimentary form as equivalence. What was given in an economic transaction should be equal in intrinsic value to what was taken.[11] The link between the natural price and the concept of equilibrium becomes more apparent in Smith's writings where, according to Schumpeter (1954:308) Smith's normal price is simply the price at which it is possible to supply, in the long run, each commodity in a quantity that will equal 'effective demand' at that price, i.e. the price that in the long run will just cover cost.

Schumpeter implies that already Aristotle may have been close to the solutions proposed by some contemporary authors to the problem of excessive prices:

> *"It is not farfetched to equate, for Aristotle's purpose, monopoly prices with prices that some individual or group of individuals have set to their own advantage. Prices that are given to the individual and with which he cannot tamper, that is to say, the competitive prices that emerge in*

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4 See for example Denis (1990:82ff.).

5 Aristotle is the first to define and discuss monopoly (Politics, I, 11 and Ethics, V, 5) condemning monopoly prices as "unjust". See Schumpeter (1954:60f.).

6 Thomas Aquinas (1225-1274) discusses the concept of just price in his treatise Summa Theologica. The just or fair price was supposed to be one just sufficient to cover the costs of production and to allow the worker and his family to live. He considered it immoral for sellers to raise prices simply because buyers were in pressing need for a product: "If someone would be greatly helped by something belonging to someone else, and the seller not similarly harmed by losing it, the seller must not sell for a higher price: because the usefulness that goes to the buyer comes not from the seller, but from the buyer's needy condition: no one ought to sell something that doesn't belong to him."

7 According to Schumpeter (1954) Smith grappled unsuccessfully with the concept of economic value. In fact it was the paradox of value, namely that – to use Adam Smith's own example - water, though useful, has usually no exchange value whereas diamonds though usually not useful have a high exchange value, that led him to reject a utility based approach to the concept of value.

8 The cost theory of value remains of competition policy relevance till this day as it was suggested by the European Courts in the first leg of the United Brands test. See section 5 below.

9 According to Pribram (1983:614) "The emergence of marginal utility analysis signified a victory of hypothetical reasoning in the fight against the substance concept of the goods and the traditional Scholastic belief that the value of a good must be conditioned by some quality inherent in the good."

10 See Robinson (1933/1969), coining the term monopsony and Robinson (1934) as well as Chamberlin (1933/1962).

11 Pribram (1983:612).

> *free market under normal conditions, do not come within the ban. And there is nothing strange in the conjecture that Aristotle may have taken normal competitive prices as standards of commutative justice or, more precisely, that he was prepared to accept as 'just' any transaction between individuals that was carried out at such prices."*[12]

Irrespective of whether Schumpeter's interpretation of Aristotle is correct or not[13], the passage is of interest as it points to the fundamental question of the appropriate benchmark for assessing whether prices are unfair, unjust or excessive that remains unresolved till this day.

1.2. Exploitative versus exclusionary conduct

The most controversial theory of harm in competition law in general and within the category of exploitative abuses in particular is charging an abusively excessive price. While many arguments have been given against intervention by competition authorities in excessive price cases, there also exist many arguments in favour of such intervention. Furthermore, regulation and regulatory interventions with the aim of curbing excessive prices are prevalent not only in those jurisdictions that allow for excessive price cases under their antitrust laws but also in those where excessive price abuses are not an antitrust offense.[14] Furthermore investigations that were induced by political pressure to investigate excessive price concerns have subsequently revealed that the prices were in fact triggered by exclusionary abuses.

Under exploitative abuses, it is the high price itself that is deemed problematic, whereas under exclusionary conduct high or higher prices tend to be the result of the exclusionary practise. In fact any anticompetitive behaviour involves exploitative elements as all anticompetitive conduct ultimately leads to exploitation.[15] While a clear line is normally drawn between these types of abuses, exploitation occurs in both instances. They are also not mutually exclusive as, at least in those jurisdictions where exploitative conduct is considered an abuse, there may be some scope for determining under what general type of abuse the case will be conducted.[16]

1.3. Decision errors and implications

The reasons against regarding excessive prices as abuse include *inter alia* the risk of reducing investment incentives (both of firms already in the market and potential entrants) and the legal uncertainty

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12 Schumpeter (1954:61).

13 See for example the contrary treatment of Aristotle in Pribram (1983:14ff.) in his section on "The Doctrine of the Just Price". In any case any theory of what constitutes a "just" price requires a set of assessment criteria that allow the distinction between "just" and "unjust" prices.

14 For example, although the US case law excludes excessive price cases, price gouging laws and laws against usury exist on the state level and several federal regulators have price regulation powers. While active public enforcement (as opposed to private enforcement via private damage claims) of the Robinson Patman Act seems to have declined substantially, the Act prohibits price discrimination, an exploitative abuse. See Davidson (2011:49ff.).

15 Röller (2008:525f.) points out that "In fact, the sole purpose of firms engaged in exclusionary practices is to increase market power, which in turn will allow firms to increase their rents." The same applies, however, also to pro-competitive behaviour as he points out. In fact, "if there were no possibility to ever exploit one's market power, there would be no incentive to compete."

16 See section 7. In addition, excessive price abuses have also been combined with other abuses in a single case.

that may be associated with the vagueness of the concept[17]. There is also a risk in particular for competition authorities (discussed in section 7) to overstep their mandate in light of political pressures.

However, not all commentators oppose such interventions. Reasons in favour of enforcing and prohibiting excessive prices as an antitrust offence include *inter alia* cases of limited potential for market self-correction due to permanently high entry barriers, the lack of a regulator or of effective action by an existing regulator. One of the most prominent reasons in favour of excessive price cases in light of the consumer orientation of most competition laws is that excessive prices exert the most direct negative impact on consumers.

All these arguments taken together suggest a high risk of error in both, intervening either as a legislator or a law enforcement authority when intervention would not have been warranted (type I error) and not intervening when intervention would have been warranted (type II error).

While the probability of type I and type II errors has been considered higher in excessive price cases than in other suspected competition law infringements, an additional problem arises due to the asymmetry of costs associated with each error. In fact the costs of a type I error, i.e. a false condemnation, is likely to outweigh the costs of a type II error, i.e. a false acquittal. The reason for this is that a non-intervention bears the hope of the market self-correcting through entry, resulting in competition and the usual benefits associated with it such as lower prices, higher quality and more variety, while in the meantime "only" distorting allocative efficiency through its effect on prices.[18] An intervention in turn "only" affects pricing, i.e. allocative efficiency, while it bears the risk of undermining dynamic efficiency, possibly even foreclosing the market to entry.

The paper discusses:

- the grounds for and against intervention in general (section 2);
- the respective role of competition and regulatory authorities if sufficient grounds for intervention exist (section 3);
- appropriate screens for an initial selection of cases (section 4);
- legal tests and a selection of interesting and (in)famous cases (section 5);
- different methodologies that attempt to objectify the concept (section 6);
- "abuse shopping" and abusing excessive price cases as a substantive and procedural shortcuts (section 7);
- the difficult issue of remedies, private actions and disgorgement as well as fines (section 8).

It has been said that the "determination of an exploitative effect necessarily involves, therefore, the need to make a subjective judgement as to the appropriate level of prices and output in a particular

17 Of course vague rules also provide for weak incentives so that the vagueness of the concept is ambivalent.

18 Note, however, that exploitative patent hold-up may also have dynamic repercussions affecting the stylized presentation of expected decision error costs presented.

market."[19] As this paper will demonstrate this is not an easy task and the literature is divided on whether regulators and competition authorities in particular should be placed in such a position.

2. Do excessive prices require intervention?

This section summarises the general justifications given in the literature in favour and against intervening in case of excessive prices (see Table 1). The question of who should intervene, if at all intervention is warranted, is discussed in section 3.

Table 1. The pros and cons of intervention

Ground for non-intervention	Ground for intervention
markets are self-correcting	markets are not always self-correcting (market failures exist)
regulatory failure may aggravate market failure	conduct causes a reduction in consumer welfare
cost of intervention even if it successfully redresses market failure exceeds its benefits	conduct causes a reduction in total welfare (deadweight loss)
Intervention is redundant as excessive prices are competed away	may fill the gap in the competition law and allow a second shot if the authority missed exclusionary conduct
price regulation/ remedies are difficult to devise	increases popular support for competition policy
uncertainty/arbitrariness of the concept (determining excessiveness is difficult)	link between entry and excessive pre-entry price is spurious
prohibiting monopoly prices is tantamount to prohibiting monopoly	excessive price abuses are a competition law infringement
distorts investments, and firm behaviour generally possibly fostering "gold-plating"	public policy considerations/ will of the legislator/ political pressure (primacy of politics)

Opinions for and against such intervention might reflect differences in the fundamental preconceptions of how markets work. Referring to the US and the EU respectively Gal (2004:345f.) writes:

> *"The U.S. views the unregulated economy as essentially competitive, if the creation of artificial barriers is prohibited. This approach places significant emphasis on the working of the market and considers monopoly created by means other than artificial barriers to be relatively unimportant. It also reflects the limited role granted to government in regulating markets directly and the social, moral and political values attributed to the process of competition. EC law reflects a lesser belief in the ability of market forces to erode monopoly and a stronger belief in the ability of a regulator to intervene efficiently in setting the business parameters of firms operating in the market. It also reflects a stronger emphasis on distributional justice."*

The fundamental preconceptions referred to by Gal are plausible but they are unlikely to have spontaneously emerged. The preconceptions in any economy initially comprised of mostly competitive industries with a great degree of economic flexibility and dynamism are likely to be different from those that evolved in an economy that right from the beginning exhibited a significant number of companies with

[19] Esteva-Mosso and Ryan (1999:189). The criticism concerning the subjectivity of excessive price cases is likely to derive from the higher theoretical objectivity of other abuses rather than the lack of subjectivity in the conduct of any particular case by a competition authority.

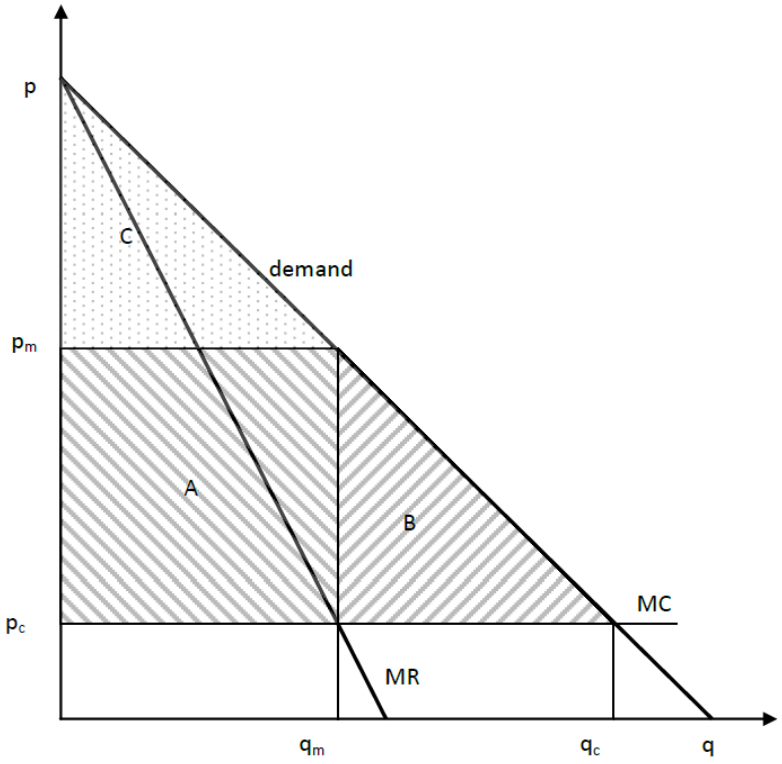
market power. Obviously the role and the perception of exploitative abuses are likely to differ and the question whether provisions on excessive prices are desirable will vary from economy to economy and may also change over the long term.

2.1. The excessive price phenomenon

The competitive price is often considered the appropriate benchmark for assessing excessive prices. As the concept of competitive price has no solid foundation in economics, understanding price formation and equilibrium prices is a precondition for better understanding what a competitive price may be.

Figure 1 introduces equilibrium prices under perfect competition and under monopoly for the simple case of constant marginal cost (MC).[20] The equilibrium monopoly price p_m is substantially above p_c, the competitive equilibrium price.[21] Area A designates the consumer surplus that is "transferred" to the monopolist for the quantities still sold and area B, is the consumer surplus lost associated with a transition from competitive to monopoly prices. The consumer surplus lost, also called the deadweight loss, is associated with the reduction in quantity from q_c to q_m as some consumers who bought at p_c do not value the good sufficiently to also buy at p_m.

Figure 1. Pricing under monopoly and under perfect competition



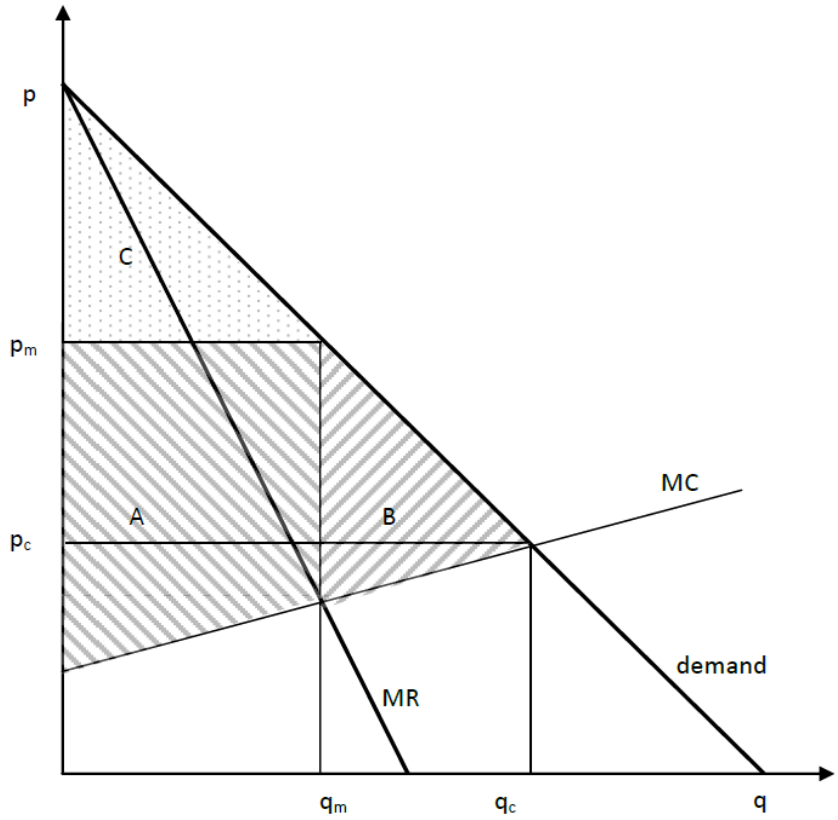
20 Marginal cost is the increase in the firm's total cost that results from an increase in output by one unit.

21 The necessary assumptions for a perfectly competitive equilibrium are rather restrictive and include the assumption that the economies of scale are small relative to the size of the market, that information is perfect and that output is homogenous so that firms are price takers, i.e. firms cannot influence the market price. In addition, no entry or exit barriers are assumed.

A slight variation of market conditions is introduced in Figure 2 that depicts equilibrium prices under competition and monopoly in the case of increasing marginal cost. As before, we can see that the monopolist is not pricing independently of cost and demand. What we can see now in contrast to Figure 1 is that firms under perfect competition may be able to cover their fixed or sunk cost as infra-marginal units allow for profits relative to marginal cost. Figure 2 gives an intuitive illustration that shifts in demand may cause varying price levels in perfectly competitive markets when marginal costs vary with quantity. Observing changes in price or price increases even if new prices are substantially higher than former prices is therefore in line with a perfectly competitive market structure.

The more relevant case in the context of excessive prices is cost economies of scale, i.e. a decreasing, as opposed to constant or increasing, marginal cost curve. The reason for this is that increasing economies of scale are a natural barrier to entry. In such a case we get the opposite effect and marginal cost pricing will not only fail to cover any sunk or fixed cost but will also not allow to cover variable cost (see section 6 for an introduction and discussion of various cost concepts).Under these conditions, prices may be substantially above marginal costs without implying a lack of rigorous competition in the market.[22]

Figure 2: Pricing under monopoly and perfect competition with increasing marginal cost



Having introduced the equilibrium prices under perfect competition and monopoly for different marginal cost curves in Figure 1 and Figure 2, it is important to emphasize the distinction between equilibrium and the characterization of equilibrium itself. While competition tends to lead to prices converging to equilibrium, it depends on the type of competition which equilibrium obtains. In Figure 1 and Figure 2, the two types of equilibria depicted are the equilibrium price quantity combination that a

[22] This has in fact led to a move from the perfect competition benchmark towards a workable competition standard. See the classic article by Clark (1940).

(non-price discriminating) monopolist would charge (p_m, q_m) with the equilibrium price quantity combination that would obtain under perfect competition (p_c, q_c).[23] As a result, the actual equilibrium outcomes have to be distinguished from the predicted (instantaneous) convergence to equilibrium, driven in both instances by profit maximization. The fact that in both instances equilibrium is reached in an effort to maximize profits, is the reason that has led some authors to claim that there is no such thing as an excessive price from an economic point of view.[24]

As the concept of competitive price is not defined, it could be interpreted as any price that obtains under equilibrium conditions, including the monopoly price. In this case competitive would refer to the process of profit maximization under constraints and would simply be a synonym for equilibrium. Alternatively the concept of competitive price could be interpreted as the equilibrium price that obtains under competition. This interpretation allows any equilibrium price short of monopoly to be considered competitive, ranging from equilibrium prices under duopoly or oligopoly to equilibrium prices under perfect competition.

In the UK Napp case the OFT for example stated that a price is to be considered excessive "if it is above that which would exist in a competitive market"[25]. As perfectly competitive markets are only one among many possible competitive markets, the reference is unlikely to be to marginal cost based pricing. On the other end of the spectrum, the reference is unlikely to refer to the equilibrium pricing in a market short of being monopolistic.[26] As market power in the narrow economic sense is found on a continuum between these two extremes, locating the "competitive price" is not trivial.

In the Mittal case (See Annex 1) the Competition Appeals Court of South Africa proposed a definition of what a competitive price is that is reminiscent of Schumpeter's interpretation, quoted above, of what Adam Smith may have considered a "normal" price. In trying to establish what the South African legislature meant in using the term "economic value" as borrowed from EU law, it stated that "'economic value' is the notional price of the good or service under assumed conditions of *long-run competitive equilibrium*. This requires the assumption that, in the long run, firms could enter the industry in the event of a higher than normal rate of return on capital, or could leave the industry to avoid a lower than normal rate of return on capital. It does not imply perfect competition in the short-run, but rather competition that would be effective enough in the long run to eliminate what economists refer to as 'pure profit' – that is a reward of any factor of production in excess of the long-run competitive norm, which is relevant to that

23 Of course there are other market theories that produce a marginal cost pricing equilibrium besides perfect competition. For example marginal cost pricing is predicted for capacity unconstrained, homogenous product one-shot Bertrand (price) competition. Even in a monopoly model with a perfectly contestable market, the equilibrium price may equal marginal cost.

24 See Annex 3 and 4 as well as Section 5 for a discussion of the United Brands test as applied in the Port of Helsingborg cases.

25 Case CA98/2/2001 Napp Pharmaceuticals Holdings Ltd and Subsidiaries, Decision of the Director General of Fair Trading on March 30, 2001, para 203.

26 It should be noted that the claim that prices will never be above the monopoly price (often linked to the idea that therefore excessive price abuses are identical to a monopoly offense) is of theoretical value only in the context of exploitative abuses. In an exclusionary context it may very well be that the only effectively exclusionary price is substantially above the monopoly price. While this is not profit maximizing for the monopolist in that market, the exclusionary strategy may well maximize profits over all markets, for instance up and downstream markets if one thinks of vertical foreclosure. Such a strategy of constructive refusal to supply may well involve rational monopolist pricing above the monopoly price in one of the markets. See Maier-Rigaud et al. (2011) for a refusal to supply case where such prices could be observed.

industry or branch of production."[27] This definition boils down to the long run average cost (LRAC) of an efficient firm. As will be shown in section 6, this is the price at which an efficient firm will just cover its total cost.

2.2. Grounds for non-intervention

Many commentators have argued against treating high prices as an abuse or as excessive. The arguments range from market characteristics over properties of regulation and inherent practical difficulties to general concerns including fairness considerations. These arguments do not necessarily contradict the generally recognized need for regulatory intervention in certain specific cases such as public utilities.

The main justification found in the literature, often not elaborated upon in much detail, concerns the inherent self-correcting properties of markets. Although the market is viewed as capable of self-correction with respect to exploitative abuses quite generally, this is particularly evoked for excessive prices.[28]

The summary by Gal intended to describe the evolution of the US approach nicely captures this view:

> *"The hands-off approach was based, at its inception, on the belief in the self-correcting tendency of the market and the limited role of government in regulating markets. The modern paradigm is based on a dynamic analysis of the market and the economic effects of monopoly pricing regulation. The basic premise still remains that most markets are competitive and monopoly tends to be self-correcting. But even when markets are not competitive, it is believed that the costs of regulation are likely to outweigh its benefits."*[29]

The belief in market forces as the solution to (temporary) market failure is often bolstered by the (perceived high) likelihood of regulatory failure. In other words, even if market forces will not be swift or fully effective in eroding excessive prices, regulatory intervention, due to potential regulatory failure may not be a solution.[30] This scepticism particularly concerns price regulation. It is of course inextricably linked to the difficulties of determining what a "reasonable" as opposed to an "excessive price" is in an environment characterized by asymmetric information. Even if some coherent approach could be devised by a regulator, the degree of remaining uncertainty is typically viewed as sufficiently high not to warrant intervention.[31]

The reason for self-correction is normally associated with entry or, in a wider sense, the contestability of the market. From that point of view, regulatory intervention in the market process is redundant as excessive prices will be competed away by new entry.[32] The probability of market entry is often viewed as directly related to the price level with higher, possibly excessive prices, attracting more entry.[33] In contrast, regulating prices down may inhibit the entry and/or expansion by competitors.[34]

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27 Competition Appeal Court of South Africa, 70/CAC/Apr07, §40 (emphasis in original).

28 See Lowe (2003).

29 Gal (2004:358).

30 See Gal (2004:355).

31 In addition to regulatory failure it may simply be that the cost of regulatory success exceeds the cost of the market failure.

32 See Ezrachi and Gilo (2008), who, however, do not agree with this assessment.

33 That high prices are an important market signal, stimulating entry is almost never questioned. See for example Elhauge (2009a:512) "High prices also provide an important market signal that encourages other firms to enter, which would create competition.." or Furse (2008:78) "One effect of compelling an

The potential chilling effect of regulating prices down has led some authors to develop additional screens[35] that would exclude the possibility of excessive price cases in industries where innovation and investment are important.[36]

The risk of chilling investments and with it innovation is probably by analogy to industries with capacity constraints. Clearly, high profits due to insufficient capacity are likely to be short-lived as they will be competed away once more capacity is added to the market. In that case high prices may indeed fulfil their basic purpose of signalling scarcity and inducing a reallocation of resources.

Further down the hierarchy of grounds against intervention are the inherent (technical) difficulties of properly identifying and subsequently addressing high prices. Assessing prices both *ex post* but even more so *ex ante* is difficult for both competition authorities and regulators.[37]

Some of these difficulties may be due to cyclical demand or demand shocks that can lead to transitory price effects as discussed in the simple model in Figure 2 above. They may also be due to two- or multi-sided markets, where "excessive profits" that are made with one product or service or in one market may be given away in another.[38] So while it is certainly possible for a two- (or multi-) sided platform to abuse its market power and charge excessive prices, this has to be simultaneously determined with regard to all sides of the market. "Seemingly excessive prices on one side of the market may simply be the mirror image of seemingly predatory prices on the other side, and both prices may be the results of the balancing act that the platform must do to attract both sides of the market."[39]

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undertaking in a dominant position to reduce its prices is to dampen this entry incentive.". See, however, Ezrachi and Gilo (2008) who among other aspects emphasize that post-entry prices are the relevant variable for entry. See also Ezrachi and Gilo (2010a) and (2010b).

34 While entry and expansion of competitors may become more difficult if prices are regulated down, this does clearly not depend on the pre-entry prices or the regulated price cap but on the post-entry or post-expansion prices. As long as the price cap is not a binding constraint for the post-entry price that the dominant firm would choose post entry or post expansion, price regulation cannot inhibit entry or expansion. See section 2.3 for a more detailed discussion on this point.

35 The screens are proposed in addition to the requirement of establishing dominance as required in all jurisdictions where excessive prices are a competition law abuse.

36 See section 4. This line of argument presupposes a clear causal relationship between R&D and innovation. This is, however, disputed and it is generally recognized that innovation is typically not observed in the type of concentrated markets where excessive price abuses are likely to occur. Generally speaking innovation is linked to individuals rather than re-investing firms. See Davidson (2011:62ff.) and the review of the works by Solow, Denison Jewkes, Sawers and Stillerman discussed there.

37 Some of these difficulties are listed for example by Fletcher and Jardine (2008:535) who conclude on a positive note that "while it is true that assessment of excessive pricing can sometimes be difficult, it would be wrong to overstate these difficulties." (p.541)

38 See OECD (2009) or Fletcher and Jardine (2008:534) who present the example of an electronic toothbrush producer with proprietary brush heads. While this would render the firm a monopolist in brush heads and would allow it to obtain high profits there, these "excess profits" are likely to be competed away even if consumers do not engage in any form of lifecycle assessment, as long as the firm faces effective competition on the primary electronic toothbrush market.

39 OECD (2009:13f). Note that in some jurisdictions it would matter whether the consumers that pay the elevated prices on one side of the market are identical to those receiving the benefits on the other side of a two-sided market.

Another substantial difficulty arises with respect to industries where intellectual property rights (IPRs) play a substantial role as the relationship between costs and prices will be much more difficult to measure.

All these difficulties have led some authors to conclude "that it could be extremely difficult for young authorities and courts to deal with complex pricing rules".[40]

Determining and measuring what constitutes an unfair or excessive price is difficult.[41] It is difficult for both regulators and competition authorities even if it is standard in utility regulation. Irrespective of these difficulties (and whether they are symmetric or not), regulation is of an *ex ante* nature, so that general concerns about legal certainty are reduced compared with *ex post* intervention in price decisions.

There is a risk of chilling innovation if an excessive price intervention affects expected revenues and reduces the chances of successful R&D cost recovery. Depending on how the standard for intervention is designed it may also encourage so-called gold-plating, that is, lessen incentives for cost reductions and building up so-called x-inefficiencies.[42] Price caps have the potential of distorting investment incentives generally and more specifically incentives for efficiency[43] and cost reductions and incentives to innovate.[44] It also distorts price incentives[45].

Excessive price intervention triggers a risk of succeeding "too much" in the competitive process and ending up as a price regulated monopolist. This may provide incentives for throttling activities just before the perceived intervention threshold.[46]

If competition is viewed as a process in which firms take part and only "the best" succeed in becoming monopolists, the very laws that characterize the prices that such a winning firm charges as "unfair" may be unfairly denying the firm its legitimately earned rewards.[47] Of course this argument rests on the assumption that exclusionary conduct is prohibited and effectively enforced, that merger control

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40 See Terhechte (2010) for whom the Mittal case (see Annex 1) is such an example.

41 See Lowe (2003) or Ezrachi and Gilo (2008).

42 See, however, Paulis (2008:518) who, without stating it explicitly, makes a behavioural economics argument on the likelihood of such effects by suggesting that "many innovators are just as motivated by the sheer joy and stimulus of the innovative process itself".

43 Depending on how excessive prices are calculated, cost efficiency may be punished. Assuming that own cost are used for the calculation and assuming further that a benchmark firm has much higher cost. The more efficient firms prices could be found to be excessive as it has higher price cost margins and higher profitability.

44 *Ex ante*, any potential restriction on the possible recoupment of investments via higher prices are an important element in determining the profitability of investments. This is relevant in particular for contests such as patent races or spectrum auctions where the winner takes all. In order for firms to compete in such contests their expected profits have to be positive, regularly implying huge mark-ups to counter the low probability of "winning".

45 The example given by Fletcher and Jardine (2008:537) is price regulation in the form of average price regulation over two markets. If the firm faces competition in one of the two markets it may be able to lower prices in that market and deterring entry without sacrificing profits as it could raise the price in the other market thereby maintaining the regulated price average.

46 The likelihood that deliberate reductions in Research and Development result in a loss in market share and position are, however, considered to be more important than the risk of being subjected to price regulation. See Areeda and Hovenkamp (2002:58ff.).

47 See Gal (2004:353f.)

functions properly and that monopolization is an abuse in itself, i.e. that the process of competition is undistorted by anti-competitive behaviour.

An even more fundamental concern with controls on excessive prices is the argument that prohibiting high prices as "excessive" is identical to prohibiting monopoly prices which in turn is tantamount to prohibiting monopoly.[48]

2.3. Grounds for intervention

Competition is desirable because it promises better outcomes for society. The negative implications of market failure and monopoly for society are well recognised. Excessive prices in turn are the simplest and clearest manifestations of these negative effects and this naturally invites the proposition that society can simply and directly outlaw such excesses. Most non-specialists almost certainly believe that the main task of competition authorities is to prevent high prices.

The reluctance of authorities to intervene against exploitative abuse has been termed paradoxical.[49] After all, the prevention of the creation and abuse of market power to the benefit of consumers is among the most prominent reasons for competition policy. The elimination of dead-weight loss and the quantity "restrictions" together with the x-inefficiency of monopoly are the main reasons given for regulatory intervention. As monopoly is the ultimate form of (supply-side) market power, competition policy is directly linked to the economic disadvantages related to this market structure. The same holds from a regulatory perspective as monopoly is also the basic workhorse for explaining the benefits of regulation. The main problems that economics textbooks describe with respect to monopoly or dominance is the exploitation of consumers paired with allocative inefficiency.[50] In fact, the textbook monopoly abuse are high prices.[51]

The fundamental problem is that confiscating profits deprives the market of its primary incentive to deliver benefits for society. Therefore, the credible grounds favouring intervention are those which have a degree of nuance by seeking to remedy competitive market failures without undermining the core drivers of efficient markets.

One of the key reasons in favour of intervention in excessive price cases is when markets lack self-correction or at least lack self-correction within a reasonable time frame. Modern economics recognizes many market failures causing this problem. Competition authorities, as the guardians of functioning markets, are well aware of the conditions required for markets to generate socially desirable outcomes. Market power may be based on other factors than superior efficiency or performance, such as first mover advantages in a network industry.

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48 See Lowe (2003). While controls of excessive prices may constrain the monopolist from charging the profit maximizing prices, the prohibition of exclusionary abuses impose a qualitatively similar constraint on the profit maximizing behaviour of the dominant firm rendering this argument rather vacuous.

49 Lyons (2007:70) summarizes the paradox by stating "*it is good to* prohibit only those exclusionary practices which can be expected to result (directly) in an exploitative abuse…but at the same time it is bad to prohibit directly exploitative practices!".

50 See for example Lyons (2007:65ff.) or Williams (2007:129). For a textbook example see Church and Ware (2000).

51 Lyons (2007:67) rightfully points out that there is no reason to restrict the analysis of exploitative abuse to prices as product quality, service levels and product range are alternative variables in the choice set of dominant firms.

In small economies, i.e. economies capable of supporting only a small number of firms in most of their industries, entry barriers and natural market conditions may make it easier to gain and preserve monopoly power for longer periods of time even if superior performance is lacking.[52]

The same applies to market power that may be traced back to formerly state owned monopolies or was achieved through political patronage or corruption. In particular where such businesses have substantial infrastructure assets (sometimes gifted to them), it can take very substantial periods of time before their positions are eroded by the market.

In these instances the industry structure may not evolve, the market may simply not be able to remedy itself and dominant positions will not be eroded. Proponents of this view typically do not negate that self-corrections are possible nor do they negate that such corrections actually occur in a majority of cases. In those cases where self-corrections seem unlikely within a reasonable period of time, however, intervention is considered justified.

Although regulating prices down reduces the incentives to enter the market, recall that entry depends on expected post-entry prices not on pre-entry prices. Ezrachi and Gilo (2008) develop this argument further and show that in a majority of cases and irrespective of whether entry barriers are high or low, excessive prices as such are insufficient to attract new entry. In addition they demonstrate that, rather counter-intuitively, intervention on the basis of excessive prices may encourage rather than discourage entry as it tends to allow potential entrants a better understanding of post entry prices.[53]

Another key argument in favour of excessive price interventions, and more specifically interventions by competition authorities, are so called gap or second-shot cases. As pointed out by Peeperkorn (2009:613), "The possibility under U.S. law to effectively intervene against acquisition of dominance may also partly explain why the possibility to intervene against exploitative conduct is not included in the Sherman Act or other U.S. antitrust laws." In other words, excessive price cases may fill the "acquisition of dominance" gap in those jurisdictions where dominance can be legally acquired by exclusionary means.[54] While Röller (2008:529) calls this an "important gap", the argument may have lost some of its bite at least at the EU level as the EU version of the Rambus case[55], that arguably is an excessive price case, was not

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52 See Gal (2003) and Gal (2004).

53 Their argument essentially relies on the signals potential entrants can derive from pre-entry prices with and without excessive price regulation in a standard two stage entry game where entry is rational if the incumbent has high cost. For entry to occur unequivocally, high cost incumbents have to charge different prices from low cost ones in equilibrium (called a separating equilibrium). They show that excessive price regulation may reduce the scope for a pooling equilibrium, i.e. where high and low cost incumbents charge the same prices not allowing the potential entrant to deduce its cost. This renders a separating equilibrium, which reveals whether the incumbent has high or low cost, more likely, in turn allowing an assessment of post entry prices and profitability and thereby increasing entry. While one may want to be cautious in basing policy on abstract game theoretic models, this style of analysis is also often used to support non-intervention. See also Ezrachi and Gilo (2010a) and (2010b).

54 On this point see also Lyons (2007:82f.), Röller (2008:528f.), Elhauge (2009a:513), Paulis (2008:519) and Werden (2009:661).

55 The EU commitment decision avoids the term excessive price and emphasizes instead the deceptive conduct (patent ambush) employing the term "unreasonable royalties". (See Case COMP/C-3/38626 Rambus available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1192_5.pdf and press release IP/09/1897 available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1897&format=HTML&aged=0&language=EN&guiLanguage=en. Neither the decision nor the press release contains references to the terms "exploitative", "exploitative abuse" or "excessive" (except in a different meaning as excessive liability).

presented as such. As the US Rambus case was conducted as a monopolization case, and as both cases treated essentially the same conduct, the EU Commission apparently found a way of both, filling the gap and at the same time avoiding the treatment of Rambus as (explicitly acknowledged) excessive price case.

Other arguments in favour of excessive price interventions deal with perception. First of all, excessive price abuses may increase public support for competition policy.[56] Irrespective of the actual merits of intervention or its long term repercussions, the regulation of excessive prices may strengthen the public support and political power of the authority. This is particularly true if prices on essential basic products and commodities are significantly reduced.[57] As coined by Terhechte (2010) "the regulation of excessive prices could serve as PR strategy for competition authorities or in light of the visibility could help in creating a competition culture".

Another argument that focuses on the perception of excessive price regulation by competition authorities rather than on the perception of the general public is that price regulation – contrary to this perception - occurs in many instances and is foreseen in many laws and regulations outside the standard context of regulation of public utilities.[58] Reference to fair and reasonable prices are also made in other parts of competition law, for instance in the context of horizontal agreements, where third party access to a standard must be fair, reasonable and on non-discriminatory terms (FRAND) to be admissible. A similar example is the UK Link case in which the OFT concluded that an agreement between all UK banks concerning ATM machines would only qualify for exemption if the charge was set no higher than cost recovery.[59] Another example concerns the regulation of unfair contract terms that require hidden charges to be "fair".[60]

In the context of UK market investigations the UK Competition Commission regularly examines markets in which prices are found to be excessive and while it has typically not resorted to price regulation, this option remains available.[61]

Finally a type of matter of fact argument has been provided. It rests on the simple observation that there exist many jurisdictions with legal provisions in place concerning excessive prices. Where excessive prices fall under competition law, intervention by the competition authority may often be required[62] and

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56 Alternatively and perhaps more understandably, competition authorities may fear losing support at a time of public anger over high prices if they remain inactive.

57 This argument may be of increased importance in jurisdictions with an only limited competition culture where the risk of being perceived as an authority incapable of addressing what may be considered an obvious competition problem by the general public, may result in a backlash of other efforts made by the authority.

58 See section 5.

59 OFT Decision of 11 May 2000, Link Interchange Network Ltd, Case No. CP/0642/00.

60 The example given was the threat of the OFT concerning default fees charged by credit card issuers for late payments, which were considered substantially above cost. See OFT (2008). For an excessive price case on a similar issue, see the Korean Credit Card Case described in Annex 2.

61 See Fletcher and Jardine (2008:540) who note that in practice other remedies have been preferred to regulating prices directly.

62 Of course even in these jurisdictions there typically is some discretion regarding interventions and also regarding the technical assessment of what constitutes an excessive price abuse.

there may simply be no way of escaping "the fact that, from time to time, complaints about alleged exploitative pricing abuses have to be investigated"[63].

3. Regulation versus competition law

The debate on the application of competition law versus regulation has mainly focussed on the role of competition law where sector specific regulation is in force and has not focussed on specific infringements or theories of harm.[64] In addition there is of course an important but largely advocacy based debate on competition assessment and how rules and regulations can be improved and streamlined.[65]

Also with a sector focus, the OECD has explored the factors that government decision-makers should take into account when deciding on the appropriate division of tasks between competition authorities and regulatory authorities in network industries and sectors opened to greater competition in a past roundtable.[66]

The debate on the regulated conduct defence focuses mainly on whether regulation or competition law should take precedence and under what conditions companies may refer to regulatory compliance as alleviating factor in an antitrust context. The discussion of regulation versus competition law in the specific context of excessive prices is broader and concerns the question of the respective roles of competition authorities and regulators more genuinely as it does not focus on questions of precedence in areas of jurisdictional overlap. Discussing the respective roles in the context of excessive prices seems particularly warranted in light of the fact that excessive prices have been rejected not only by individual authors but by whole jurisdictions as not falling under the remit of competition law.

While the title of this section suggests that institutional responsibility to deal with excessive prices is given either to the competition authority or to a sector regulator, implying also that conceptual boundaries are aligned with institutional ones, the reality is often more complex. Indeed, competition law and policy principles are often central to regulatory policies.[67] A common implicit assumption appears to be that whenever competition law fails or has little chance of success, price regulation by a specialist regulator is an appropriate answer. In turn, instances exist where price regulation is removed once appropriate competition tests are satisfied.[68]

It should come as no surprise that competition law will not always provide the right tools to wield against market failure. In turn, not all market failures can be effectively addressed and redressed by sector specific regulation.

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63 Forrester (2008:551).

64 See OECD (2011a).

65 See OECD (2010a), (2010b) and (2009b).

66 See OECD (1999). In that report it was noted that "we will not deal with how both might evolve in the long run depending on the tasks they are assigned and any appropriate changes that legislators might eventually wish to make in their overall mission statements, powers and structures." OECD (1999:17). The same applies here.

67 Under EU Directives on Telecommunications for example, regulation is linked to the concept of significant market power (SMP). Similarly Australia and to some extent New Zeeland have subsumed regulation into a general competition framework, implying for example that regulations are removed if the existence of sufficient competition can be demonstrated.

68 Concerning interstate electricity markets in the US for example, the Federal Energy Regulatory Commission (FERC) removes types of price regulation if electricity generators can prove that they are subject to competition on the basis of FERC's competition test.

Regulatory failure has sometimes been due to a mismatch between the tool deployed and the problem to be addressed.[69] While this is true for specific regulatory instruments, the broader question of whether competition authorities or regulatory authorities are more likely to have the appropriate combination of tools and expertise in their respective repertoire may be crucial in properly addressing excessive prices. Of course this presupposes that excessive prices are considered a problem that should and can be successfully addressed. While it is largely considered uncontroversial that regulatory intervention is warranted for example for public utilities and that sector regulators are better placed than competition authorities in performing these regulatory functions, this is not the case with respect to excessive prices.

The question of the allocation of tasks between competition authorities and (sector) regulators is of course moot in those jurisdictions where excessive prices are not considered an antitrust offense. As in these jurisdictions regulators may nevertheless be entrusted with similar powers on a sector level, understanding the logic behind this (extreme) distribution of tasks may still provide important insights to those where a different distribution is in place. This is of course also true of potential conflicts between regulators and antitrust authorities.

In "gap" and to a more limited extent also in "second-shot" cases, the division of tasks is simple as such cases would clearly fall under the remit of competition law. This is not necessarily true for the other arguments advanced in favour of intervention. According to Blumenthal, the question of the allocation of tasks seems *a priori* excluded at least when ongoing monitoring is required:

> *"Governments have a number of regulatory tools at their disposal for responding to perceived market defects. If a particular monopoly presents a problem that is so severe and intractable that enforcement officials believe the only effective remedy would entail ongoing monitoring and supervision of price, we should be asking whether a sectoral regulator with the appropriate competencies is available. And if none is, we should be asking whether the market failure is really of such a character that one should be constituted."*[70]

Important legal differences between the US and for example the EU exist with respect to excessive prices as antitrust offense. Despite these differences, the reluctance to engage in "price regulation" appears to also be shared by the European Commission:

> *"The Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it."*[71]

This view is seemingly also shared by other jurisdictions:

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69 Breyer (1982:191) notes: "regulatory failure sometimes means a failure to correctly match the tool to the problem at hand".

70 Blumenthal (2008:580). Noting, however, that "(F)from the perspective of the economy as a whole, competition enforcement .. qualifies as the default regulatory tool." Blumenthal (2008:576).

71 European Commission XXIVth Commission Report on Competition Policy 1994, para 207 (1994), See also European Commission Vth Commission Report on Competition Policy 1975, para 76 (1975) and European Commission XXVIIth Commission Report on Competition Policy 1997, para 77 (1997).

> *"It is important not to interfere in natural market mechanisms where high prices and profits will lead to timely new entry or innovation and thereby increase competition. In particular, competition law should not undermine appropriate incentives for undertakings to innovate."*[72]

As has been righty emphasized "to conflate competition law with regulation is a fundamental error"[73] but there is also a danger that competition authorities, eager to free themselves of difficult responsibilities, prefer to point to specific sector regulators as appropriate bodies to deal with alleged excessive price cases. While an effective division of tasks should be sought, it is not clear whether such division implies no role for competition authorities, in particular if competition laws assign corresponding responsibilities. This "hot potato" dimension of the distribution of tasks has been provocatively formulated by Jenny:

> *"..are we ready to go on record saying that we think price gouging should be untouchable because we need to avoid deterring investment? If we do that, politicians will say, 'Ok, competition authorities are useless, so let's enact some price gouging laws.'"*[74]

For the purpose of this paper regulatory authorities are defined as regulators covering one or a small number of sectors where the government believes the public interest would not be adequately advanced merely by relying on private markets supervised by a competition authority and decides therefore to empower an individual or institution to directly specify market outcomes such as price and quality.[75]

Table 2 provides an overview of major differences between competition authorities and regulatory authorities.

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72 See OFT (2004). Note again that it is generally not pre-entry prices and profits that attract entry. There are circumstances, however, where pre-entry prices convey information about post-entry profitability of an entrant. This is particularly the case if high pre-entry prices are due to capacity constraints or other supply constraints. More trivially, post-entry prices will not be above pre-entry prices.

73 Furse (2008:83).

74 Jenny (2008:498).

75 (OECD 1999:18).

Table2. Comparison of Competition Law and Regulation[76]

	Competition law/ competition authority	Regulation/regulatory authority
Policy goals	Efficiency, consumer welfare, protect the competitive process	Efficiency, consumer protection, infrastructure investments, universal service, environmental goals…
Intervention threshold	dominance	varies
Frequency of intervention	selective	Continuous, universal
Information	No systematic market monitoring, burden of proof on authority	Systematic market monitoring, burden of proof on companies
Sector knowledge	lower	high
Independence	high	lower
Capture risk	lower	high
Instruments	Behavioural and structural remedies, fines	Price regulation[77]
Organisational culture	Functioning markets are the rule, interventions the exception	Interventions are the rule, functioning markets the exception
Staff size	smaller	large
Judicial review[78]	full	often limited

A distinction often emphasized in the literature on excessive prices is that:

> *"Regulation is an ex ante process, aiming at dictating conduct and commercial behaviour, as a substitute for real competition until the market can work properly. Competition law aims at forbidding and punishing anticompetitive conduct. With the exception of merger control it applies ex post."*[79]

76 Modified and expanded from Haucap and Uhde (2008:255). See also OECD (1999:24ff.). The Figure assumes that competition law and regulatory policies are not conducted by a single authority as is the case in some OECD Member Countries. It further does not distinguish between characteristics that are likely to be permanent and those that could be changed, such as for example the intervention threshold on the one side and the expert knowledge on the other.

77 With the move from cost-based regulation to incentive based regulation and mechanism design, regulators may also regulate quality to avoid companies trading off quality and price.

78 See Lavrijssen, Essens and Gerbrandy (2009).

79 Forrester (2008:564f.). Note that in some jurisdictions merger control may also be *ex post*.

This dichotomy of *ex post* control through a competition authority and *ex ante* regulation through regulatory authorities is somewhat artificial as the institutional diversity is in reality much larger and goes beyond a simplistic *ex ante* intervention versus an *ex post* oversight approach.

Nevertheless, one reason that such a distinction may be relevant is the problem of legal certainty. Any legal rule that seeks to prohibit excessive prices should be reasonably capable of *ex ante* application by a dominant firm at the time it formulates its pricing policy.[80] Clearly this is much more of a concern for interventions based on competition law than for regulatory approaches.[81]

3.1. Legitimacy and mandate

Discussing legitimacy or the mandate of competition authorities to enforce excessive price abuses may seem superfluous as such provisions can either be found in the jurisdictions' relevant competition law provisions or not. As a result, it is clear that a competition authority that proceeds in bringing an excessive price case based on its particular excessive or unfair price laws is certainly mandated to do so. Nevertheless, there is a distinction between competition authorities on the one hand and regulators on the other concerning legitimacy and in analogy there may also be a distinction between competition authorities when they deal with abusively excessive prices on the one hand and competition authorities enforcing merger control or anti-cartel provisions on the other.

Regulators typically have a sector specific mandate with closely prescribed powers.[82] In the context of excessive prices, or price regulation more generally, the legitimacy typically derives from the specific mandate to regulate a well-defined product or service and to determine the price of that well-defined product or service based on a particular methodology. Such a sector specific regulator regularly collects the needed data, conducts the necessary analysis, organizes the required hearings, follows the foreseen appeal procedures and implements the price in accordance with its specific mandate.

In contrast, a competition authority has a very broad mandate as it is typically responsible for enforcing competition law in all sectors of the economy. While this wide power is limited to the application of competition law and constrained by the courts, it is wider in scope than the power of a sector regulator.[83]

The decision to find a particular price to be abusively excessive is, for example, outside the remit of a sector regulator who often starts its work on the very basis that a particular price is to be regulated.[84] While

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80 "..even if it is accepted .. that exploitative pricing should be controlled, there is the difficulty of translating this policy into a sufficiently realistic legal test. A legal rule condemning exploitative pricing needs to be cast in sufficiently precise terms to enable a firm to know on which side of legality it stands." (Whish 2003:689).

81 Fletcher and Jardine (2008:537) state that "..it seems likely that the 'deterrent' effect of excessive pricing rules – whereby dominant firms in the economy endeavour to keep prices below their 'best guess' as to what constitutes excessive pricing – has the potential to be substantially more problematic than the ex post [the authors probably mean ex ante] regulation of those dominant firms whose pricing has explicitly been found to be exploitative.".

82 While this may be true for price regulation it may not hold generally as regulators deal with large firms on a daily basis on a wide range of issues allowing for "soft power", or in other words, being in the regulator's "good books" will not be something that a firm will casually sacrifice implying some discretionary power of the regulator.

83 Although it could also be viewed as being more constrained as the intervention threshold is much narrower.

84 As hinted at previously, for instance in the context of SMP in Telecommunications regulation, these classical dividing lines are shifting.

regulating prices or ordering a remedy once it has been established that intervention is warranted is something both may have in common, the decision to intervene is made by the legislator in case of the sector specific regulator and not by the regulatory authority itself.

In contrast, the choice of the sector, of the methodology used and of the remedy imposed will be in the discretion of the competition authority but almost never in the discretion of a regulator.[85] In case of a regulator, the sector and the desirability of intervention is (typically) determined by the legislature that does not attempt to objectively derive whether a particular price is abusively excessive or not but intervenes on general public policy grounds.[86]

In particular for those who doubt that excessive price cases can be built on objective criteria, such as an objectively identified margin between price and cost, this difference in powers is important. This is presumptively what Fox is getting at when she writes:

> *"American law rests on the principle that price should be controlled by the free market unless Congress has in effect determined that the market cannot work and has established a regulatory commission"*[87]

To the extent that one believes that concepts such as "economic value" or "excessive price" are difficult to meaningfully define objectively, one may prefer to embrace a normative approach. This would then be much closer to the situation described by Justice Stewart in his threshold test for "hard-core pornography" in 1964:

> *"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But* ***I know it when I see it*** *[emphasis added], and the motion picture involved in this case is not that."*[88]

Typically legislatures, not courts are considered the appropriate bodies for such normative decisions, which explains at least in part why Stewart's quote is often cited. As is also apparent from the quote from Fox above, many authors, even those against any intervention on the basis of price alone, would already feel much more comfortable if decisions on excessive prices were taken by the legislature when determining what sectors and also products and services require price control rather than by courts or competition authorities.

There may be situations in between the two "extremes" just presented, where excessive price abuses are covered under competition law but where the legislature nevertheless emphasizes the desirability of an application of these provisions in particular instances. An example of such a specific provision temporarily introduced into competition law can be found in Germany. Section 29 ARC was introduced into the German competition law. It concerns abuses by gas and electricity companies and will be discussed in some detail in section 5 and Annex 2. As arguably the reason for the introduction was mainly to give more

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85 A possible exception to this may be UK market investigations.

86 The legislative decision in the case of a competition authority is very general and broad as it does for example neither involve the specification of the sector nor the methodology to be used.

87 Fox (1986:993).

88 See Justice Potter Stewart's concurring opinion in Jacobellis vs. Ohio 378 U.S. 184 (1964). The case concerned possible obscenity in the Louis Malle film "Les Amants" (The Lovers). See also Gewirtz (1996). The idea that something may be hard to describe, but instantly recognizable when spotted, has also been dubbed the elephant test.

extensive powers to the competition authority and to emphasize the specific concerns of the legislator, such provisions are certainly capable of fully addressing the legitimacy concerns raised above.

In addition to competition authorities receiving regulatory mandates, there are many examples where competition powers have been given to sector regulators.[89] In the US, for instance, certain competition assessment functions are given to sector regulators such as in the aviation industry (the power to decide airline alliances and mergers) and in railroads (the power to authorise conferences). As a result, the institutional boundaries may in reality be less strict than suggested here.

3.2. Second-shot and gap cases

One of the arguments advanced in favour of excessive price abuse as an active instrument in the competition law enforcement toolbox relates to the possibility that such cases may be used to correct for earlier enforcement "mistakes".[90] Just as errors in merger control may be caught at a later date through an abuse of dominance case, excessive price cases may allow correcting type II errors (false acquittals) in the area of exclusionary conduct (and merger control).[91] The idea behind this argument is that a competition authority may either not be aware of exclusionary conduct or, in the presence of uncertainty, may underestimate the exclusionary effects of a certain conduct. If that happens, and if the dominant position of a firm is strengthened while the exclusionary abuse that allowed the strengthening remains unprosecuted, the authority could intervene on the basis of excessive prices.[92] This argument has also been made by Régibeau (2008:653) who evoking the uncertainties involved in exclusionary cases and merger control, points to the added value in maintaining a rule against exploitative pricing as "additional" tool to help restrain the behaviour of dominant undertakings.

Another key argument advanced in favour of excessive price cases are so-called gap cases.[93] In jurisdictions where the acquisition of monopoly power as such is not caught by competition law, cases based on excessive prices may be a way of filling the enforcement gap. In jurisdiction where the acquisition of monopoly power is caught by competition law, the "second shot" argument could in turn apply when the authority in fact missed the opportunity to prosecute the exclusionary abuse leading to dominance.

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89 This is the case for example in the UK with respect to the gas and electricity markets (Ofgem) and with respect to telecommunications (Ofcom) and in Singapore with respect to the telecommunications authority (iDA). In addition to the specific provision introduced into the German competition law, there are also other, more comprehensive examples where regulatory powers have been given to competition authorities as for example the Australian Energy Regulator which sets prices for energy network infrastructure and is a semi-autonomous part of the Competition and Consumer Commission (ACCC). The broadest regulatory power given to a competition authority is probably the market inquiry tool of the UK Competition Commission.

90 See Röller (2008:529).

91 This is essentially what happened concerning roaming charges in the EU. See Maier-Rigaud and Parplies (2009).

92 "As a result, one may argue that two instruments are better than one. In other words, exploitative abuses can be stopped whenever the exclusionary abuse has had an actual effect, even where it was previously deemed unlikely" (Röller 2008:530) Röller cautions though that one may legitimately wonder whether a better policy response would not be to reduce mistakes rather than to rely on a second shot with an exploitative theory of harm. The analogy to merger control seems reasonable where it is generally considered preferable to prohibit a merger or require divestitures than to try to deal with its anticompetitive effects in a monopolization case afterwards.

93 An additional advantage of interpreting excessive price case in this way is that it would provide for a partial explanation of the differences between the US and the EU approach. See Paulis (2008:519).

3.3. Specialised sector knowledge and regulatory capture

One of the main practical reasons advanced for the reluctance of competition authorities to engage in excessive price cases is the risk for competition authorities of becoming entangled with price regulation, possibly on a day-to-day basis, and that competition authorities simply do not have the specialized sector specific knowledge that would allow them to do this properly.[94]

Representative of this view and focussing on considerations of institutional design, Blumenthal questions "whether competition agencies have the competence to engage in classical price- and profits utility style regulation. As generalist agencies, we lack the right people. We lack the skill sets. We lack adequate industry expertise. Experience has shown that when we've tried to step into the role of utility-style regulators, we've bungled the task."[95]

This concern over the lack of specialized sector knowledge may even be exacerbated in competition law systems that rely on non-specialized courts to take final decisions. Indeed, many competition authorities are required to go to court to obtain orders or levy fines. In administrative law systems in contrast, the differences between competition law enforcement and regulation are more limited and can more easily be addressed by corresponding staffing decisions. Similarly to regulatory authorities such systems combine investigative and prosecutorial functions in the competition authority thereby distinguishing themselves from the typical regulator only by the latter's additional adjudicative function.[96]

In addition, even where regulators' decisions are subject to judicial review, their decisions may be accorded greater deference than rulings by competition authorities. This difference arises from the fact that competition agencies are charged with enforcing a law of general application, as opposed to drawing up and enforcing industry or even firm specific rules presumably based on information and expertise extending beyond what a court could appreciate and apply.[97]

The argument of inadequate specialized knowledge has several facets to it as it is not only due to the recruitment of specialized staff, something a competition authority may in principle mimic, but also builds

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94 As pointed out by Siragusa (2008:646) this is linked with the perception that excessive price cases require a price regulation type of remedy: "One of the reasons for the reluctance to enforce unfair pricing under Article 82 [102 TFEU] is that the competition authority may become entangled with the day-to-day monitoring of pricing behaviour. That fear is steeped in the conviction that the 'right prices' are *the* remedy to excessive pricing offences. If one were to choose the structural remedies option, that fear would clearly be seen as being misguided. The regulator would remain in charge of price setting, while the antitrust authority would be responsible for reforming market structure. In fact, structural remedies may usefully supplement the arsenal of tools given to the regulator." A discussion of types of remedies in excessive price cases can be found in section 8 below.

95 Blumenthal (2008:578). Note that this argument is the only reason advanced by Blumenthal in "cautioning against even limited intervention by competition agencies against high prices". (578)

96 Fox (1986:992) discussing excessive prices in the EU writes that European Law "assumes that high pricing is unfair, it assumes that unfairly high pricing can be identified by the courts, and it implies that courts are better mechanisms than markets to correct unfairly high pricing. The Community's legal standard is not the model of clarity" At least the part of the argument concerning courts seems to confuse the US system with the system in the EU.

97 OECD (1999:27f).

on the fact that the focus on a particular sector limits the range of possible problems and allows for faster learning as the regulator moves from one regulatory decision to the next.[98]

Of course, competition authorities could develop or acquire sectoral knowledge.[99] However:

> *"Some have suggested that competition authorities could develop the needed competencies and might be superior to classical regulators in intervening against excessive pricing in traditionally unregulated sectors. On this view, competition authorities would be more limited in their interventions. They would be more likely to look to market mechanisms before adopting more intrusive steps, they would be more sensitive to the distortions they were causing, and they would be more willing to recede from intervention after the markets had corrected adequately. They would also be less susceptible to capture. All these points have merit. But as a matter of institutional design, they come at an unacceptable cost."*[100]

While both competition authorities and regulators vitally require independence from the firms they oversee, there is reason to believe that regulatory capture is a real problem. In particular and closely linked to the greater sector specific knowledge, it is widely accepted that regulators are more prone to capture than competition authorities. Compared with sector-specific regulators, staff and senior decision-makers at authorities covering the whole economy are less likely to have the kind of in-depth industry specific knowledge, contacts, and outlook that would make them particularly valuable later on as employees with or lobbyists and consultants for those they are currently influencing. In general the frequent and repeated interaction between regulators and regulated firms tends to make capture a greater risk for regulators.[101]

Over time, there is a risk that along with sharing similar information about an industry, regulators will come to share the industry's perspective. This could include its fear of fostering greater competition which could make it harder for regulators to run cross-subsidisation schemes, or to promote policies such as environmental protection and energy security. Over the long haul, these contributions could be just as important for the regulator's own survival as ensuring that a large group of poorly organised consumers enjoys reasonable service quality and prices.[102]

Indeed, the non-sector specific nature of competition authorities that is seen as a major obstacle to successful price regulation by competition authorities has the flipside benefit of leading to "less chance of 'capture'"[103].

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98 It should also be noted that often the comparison between competition authorities and regulators not only reveals different skill sets but substantially larger staff size on the part of regulators. See Table 2 above.

99 That sectoral knowledge of competition authorities can be limited is implicit in the decisions to launch sector inquiries by the European Commission. At the same time, sector inquiries are also a good example of how competition authorities may be able to gain sector specific knowledge. EU sector inquiries have the further advantage that they are based on much more powerful information gathering powers than most regulators have at their disposal. The EU energy and pharmaceutical sector inquiries, for example, generated data bases that were unique on the European level and contain data that is not available to regulatory counterparts.

100 Blumenthal (2008:579).

101 OECD (1999:28).

102 OECD (1999:28).

103 OECD (1999:21).

3.4. Competition authorities as residual regulators

Competition authorities may have a role to play as residual regulators or regulators of last resort particularly for sectors not requiring permanent regulators.

While it may be tempting for competition authorities to defer to regulators or the legislature, despite clear legal provisions in the competition law, it is doubtful whether this approach will always be compatible with a light handed approach to regulating and intervening in markets. Not all problems of excessive prices will require permanent oversight and price regulation on a continuous basis.[104]

As pointed out by Lyons, it "is not unusual to hear the argument that high prices should not be considered under Article 82 (now 102), but should be left to specialist regulatory agencies. But on what grounds should sectors be selected for price control?"[105] In particular in cases where there are no strong *ex ante* grounds for regulation, it may in fact be much less restrictive to allow companies to compete without subjecting them to regulation in the knowledge that a competition authority could still intervene *ex post* in case competition really does not develop and prices become or remain exploitative. Weak *ex ante* grounds for setting up a specialized regulator may also simply be due to the fact that the problem is non-recurring or not recurring sufficiently often.[106]

Permanent regulation may turn out to be a disadvantage. Few regulatory authorities have effectively managed to cut back on regulation over time and finally closed their doors as the market had become competitive and no longer required regulation.[107] A competition authority, already due to the cultural differences mentioned in Table 2 above, is much more likely to withdraw the generally unwanted regulatory task once a sufficient degree of competition emerges.[108]

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104 Another aspect concerns the potential of crowding out more efficient regulation. This may occur both, when the competition authority intervenes in cases where it is not well placed to do so and in cases where it does not intervene despite the fact that a permanent regulatory body is an inappropriate solution. While a competition authority may feel compelled to tackle the issues as a regulator of last resort for example in the absence of a sector specific regulator, even clumsy intervention is likely to reduce the pressure on the legislature to intervene properly and may in the long term hinder a more appropriate solution. The problem is identical with reversed roles under voluntary crowding out when the competition authority steps aside when in fact it would have been the preferred choice.

105 Lyons (2007:84).

106 A variant of this, that arguably could apply for example to the EU Port of Helsingborg cases (see Annex 3), is that the problem is trans-boundary, i.e. concerns different jurisdictions in an asymmetric way and the creation of a supra-institutional regulator is politically unfeasible. While networks of national regulators can go a long way in addressing such problems, as demonstrated in the EU, this may not always be the case, in particular if the problem concerns very specific products or services as opposed to the standard regulated industry sectors.

107 Forrester (2008:554) notes that "regulators have a reluctance to find that effective competition will be sustainable in the absence of regulation". He goes on to note his concern for the lack of expertise and autonomy in national telecoms regulators referring to several annual reports (10-12th report) of the European Commission on European electronic communications regulation and markets.

108 It has similarly been suggested that there may be a role for competition authorities to act as temporary price regulators in instances that may be characterized as price gouging. For example in case of a natural disaster, the competition authority would assume the role of a temporary price regulator as urgent action would be needed and the excessive price could easily be determined with respect to the price prevailing prior to the natural disaster and the intervention would be relatively short-lived. Lewis (2009:588, Footnote 4).

In transition economies, monopoly positions in some sectors may be significant but non-permanent reflecting the pattern of past capital investments, when decisions about plant size and ownership were not market-based. In such cases firms may still have substantial market power for many years after liberalization. In such cases, if the price is persistently excessive, temporary price regulation may be appropriate but may not warrant the creation of a specialized sector regulator.

A drawback of assigning competition authorities the role of regulators of last resort is that involving a competition authority in regulatory matters including "decisions having very important distributional as well as efficiency implications" [109] may be problematic as this is "inherently more political than might be considered optimal for a body that in its general enforcement functions wants and needs to be regarded as an impartial overseer intent on advancing general public welfare rather than dividing a pie among competing interests."[110]

4. Appropriate screens for pursuing excessive prices

Several screens have been proposed in the literature to narrow the legal scope for opening excessive price cases in those jurisdictions where excessive prices are considered an abuse in the law.[111] The following excerpt from a speech of the former Director General of DG Competition contrasting the situation in the EU with the one in the US, demonstrates some of the difficulties of jurisdictions that have excessive price provisions but try to limit the scope of application to specific conditions:

> "*Under US law excessive pricing by a monopolist does not attract liability. Exploitative practices are regarded as self-correcting because the exercise of market power to raise prices will normally attract new entrants.*
>
> *As regards exploitative practices, we are obviously aware that in many markets intervention by a competition authority will not be necessary. We are also aware that it is extremely difficult to measure what constitutes an excessive price. In practice, most of our enforcement focuses therefore as in the US on exclusionary abuses, i.e. those which seek to harm consumers indirectly by changing the competitive structure or process of the market.*
>
> *It is not in our power to change the Treaty. And, in my view, we should continue to prosecute such practices where the abuse is not self-correcting, namely in cases where entry barriers are high or even insuperable. It probably makes also sense to apply those provisions in recently liberalised sectors where existing dominant positions are not the result of previous superior performance."*[112]

In light of the difficulties inherent in the concept of excessive price abuses, it is not surprising that conditions for a sensible narrowing of the scope have been sought. The range of conditions span from screens designed to identify the "exceptional circumstances"[113] under which excessive prices should be

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109 OECD (1999:22).

110 OECD (1999:22).

111 In the words of Blumenthal (2008:577): "what are the narrow, focussed circumstances – what are the extensive preconditions that must be satisfied – before intervention would be warranted". An overview of proposed screens in addition to their own proposal can be found in Motta and de Streel (2006) and Motta and de Streel (2007).

112 Lowe (2003).

113 Evans and Padilla (2005:120).

pursued to more encompassing screens focussing only on entry barriers.[114] Some of these screens directly relate to the regulatory environment or in a wider sense also concern liberalisation and privatisation. Others focus on the way dominance was obtained and include the notion of "gap" or "mistake" cases.

The discussion of possible screens focuses on identifying which markets could be candidates for possible intervention against excessive prices of a dominant firm. This section emphasizes the individual conditions and less the particular bundles of often cumulative conditions that have been proposed. The focus will be on the three most often cited conditions while all other propositions are nevertheless discussed in a separate subsection as well.

In addition the practical legal problems concerning the use of screens as "unofficial" policy constraint in excessive price cases are discussed. These potential problems are related to the particular legal environment within which competition law takes place and may therefore concern different jurisdictions in varying degrees.

4.1. High and non-transitory entry barriers

This requirement is based on the fundamental proposition that competition authorities should not intervene in markets where it is likely that normal competitive forces over time eliminate the possibilities of a dominant company to charge high prices.[115]

Generally three types of entry barriers can be distinguished. *Legal* barriers to entry refer to statutory monopoly provisions or any other special rights and conditions imposed by regulation or law. *Structural* barriers relate to basic industry conditions such as for example cost and demand. *Strategic* barriers, in contrast, are intentionally created or enhanced by incumbents essentially for deterring entry into a market. Obviously *strategic* entry barriers can directly be tackled by competition authorities by pursuing the underlying exclusionary conduct. The proposed screen is therefore focussing on the former two types of entry barriers, in particular structural barriers.

The existence of high and non-transitory *structural* entry barriers are probably considered the most important single requirement for conducting an excessive price case.[116] It is the only screen proposed by Paulis (2008:522) but is certainly also not in contradiction to the statement by Justice Scalia in the US Trinko case if sufficient emphasis is placed on "at least for a short period":

> *"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices — **at least for a short period** [emphasis added] — is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."*[117]

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114 See Paulis (2008). In addition, some authors, such as Werden (2009) or Fox (1986) have rejected the idea of excessive price cases altogether.

115 See Motta and de Streel (2007:22f.).

116 Evans and Padilla (2005:119). It could also be considered the lowest common denominator across the various screens proposed.

117 *Verizon Commc'ns Inc. vs. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, p. 407 (2004). http://law.onecle.com/ussc/540/540us398.html.

High and non-transitory entry barriers defined in this way basically imply that there is neither an effective way for the competition authority to tackle the entry barriers directly nor a hope that such barriers are only of a transitory nature. If that is the case, the authority can tackle the barriers indirectly by advocating in favour of lifting legal barriers and liberalizing the sector (in case of legal entry barriers) or, in case of structural barriers it can advocate a regulatory solution.

Not only to render the advocacy work more effective but also to have a fall-back option in case it ultimately fails, it has been proposed to follow a two pronged approach, coupling advocacy efforts with the opening of an excessive price case by the competition authority.[118]

4.2. Super dominance and its origin

One of the most fundamental conditions discussed in the literature is the requirement of a monopoly or near monopoly position, or, in other words, super dominance.[119] While all jurisdictions require dominance[120] in order to find an abuse to begin with, one of the proposed screens has been to raise the bar even further. The reasons for this are of course related to the fact that the more the monopoly scenario is left behind in favour of an oligopolistic market structure, the less likely the market power of a dominant firm will be sufficient to generate excessive prices. In addition, the higher the degree of market power, the more unlikely the market will self-correct within a relevant timeframe. While this proposed screen has not gone as far as narrowing down the scope for cases to monopoly situations, it requires the other firms in the market to be fringe players incapable of effectively constraining the dominant firm. An additional argument for raising the bar higher may also be due to the resulting legal certainty to firms that may still be considered dominant but would clearly not pass the super dominance test.[121]

A separate screen that has been proposed in this context concerns the origin of the dominant position. In general terms the argument has been made by Vickers (2003) that "appropriate public policy towards firms with actual or potential market power depends on the cause of the market power". While authors such as Paulis (2008:520) have been sceptical of including either the origin of the dominance or super dominance in the equation, some authors have emphasized this aspect as a practical way of linking excessive price cases with exclusionary abuses and of identifying candidate sectors.

The most common argument for considering the origin of the dominance is due to current or past special or exclusive rights. This of course targets former government monopolies or any other company that benefitted from what could be considered legal entry barriers in the past.[122] This argument appears to

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118 This is proposed by Paulis (2008:521).

119 See for example van der Woude (2008:619) speaking of monopolistic or quasi-monopolistic market structure or Motta and de Streel (2007:24f.).

120 For a discussion of collective dominance in the context of excessive prices see section 7 below.

121 See, however, subsection 4.5 below discussing the general constraints of such screens and the possibly resulting limited legal certainty.

122 Evans and Padilla (2005:119) specifically mention „the firm enjoys a (near) monopoly position in the market, which is not the result of past investments or innovations, and which is protected by insurmountable legal barriers to entry". Evans and Padilla (2005:120) explicitly would not consider it relevant if the company is a former state owned monopolist or not as to them only legal barriers still in place would matter. Past barriers or whether investments were based on public funds do not enter this assessment. In addition to the cumulative conditions they propose as screens, the authors remain critical and suggest that "it remains unclear why it may not be better simply to rely on ex-ante regulation, setting up sector-specific regulatory bodies with more information about the fundamentals of the markets in question and better able to monitor compliance." (Evans and Padilla, 2005:122).

be particularly pertinent also in those Asian countries that have excessive or unfair price provisions in their competition laws (often translated as price abuses there).[123] The threshold to intervene on the basis of "abusive prices" is much lower if the firm was set up as a result of a former government led economic development strategy and their position is therefore due to government intervention rather than market based competition. This also applies to sectors where the industry structure is essentially government induced.[124]

So-called "gap" or "mistake" cases are also based on the origin of dominance and have been proposed as they have the direct appeal of linking excessive prices with past exclusionary conduct, thereby avoiding the thorny issue of defining theoretically and operationalising practically what excessive prices are.[125]

Gap cases can only exist in jurisdictions that do not have a monopolization offense as they require dominance in order to find an abuse, as for example under EU law. Mistake cases on the other hand are based on a misjudgement of the effects or unawareness of previous exclusionary conduct of the firm.[126] An excessive price case may then provide a possibility of "correcting" for a lacking intervention concerning exclusionary conduct *ex post*.

There is a link between such cases and the argument that exploitative cases should only be considered with respect to former government monopolies. While former government monopolies may not have gained their dominant position by exclusion, they did not gain that position in a competitive process either.[127]

4.3. Weak or absent sector-specific regulator

Related to the advocacy argument made above is the proposed condition of either a weak or no sector specific regulator.[128] In other words, in the presence of a sector specific regulator it seems reasonable if not necessary to leave the task of addressing the problem to the specific body. This would generally also apply if the sector specific regulator has not (yet) the specific mandate needed to address the excessive price problem. Advocacy on the part of the competition authority may be helpful in allowing the regulator to obtain the required mandate.

While advocating in favour of creating a new regulator may also be an option for a competition authority if no regulator currently exists, the likelihood of success within a reasonable time frame is limited and such efforts should probably then be accompanied by an opening of an excessive price case as set out

123 For example Korea, China, Mongolia and Chinese Taipei have specific excessive price provisions in their competition laws. These are of course to be distinguished from more general unfair pricing laws covering for example what is often called unconscionable conduct. The laws can be triggered when a company takes advantage of another person's inability to properly protect their own position and are independent of whether the company is in a dominant position or not. On this see section 5 below.

124 On this point see Annex 2 discussing a Korean case.

125 This may be overly optimistic as it can be questioned whether the exclusionary acquisition of dominance for example is sufficient to prove that prices charged subsequently are excessive. The same applies to "second-shot" cases where in addition to this problem, *ne bis in idem* concerns may further complicate things.

126 Again, this could concern both, firms already in a dominant position and firms that monopolize through an exclusionary strategy.

127 Röller (2008:529; 531) would, therefore, include former state owned incumbents in the category of gap cases.

128 See Motta and de Streel (2007:26ff.).

above. Competition law enforcement action should probably also be initiated in case there are limited grounds for setting up a regulator, for example due to an only occasional occurrence of problems in this area simply not warranting the creation of a regulatory body.[129] It may also simply not be feasible to set up a regulator.

A particularly noteworthy situation may exist in countries transitioning from a planned to a market based economy. In these countries former state monopolies may have been privatized in problematic ways and while there may be hope for the market to correct these initial problems, transitory intervention by the competition authority may be preferable to the creation of a new regulator.[130]

The issues are thornier if the screen is extended to include the situation of weak regulators.[131] This obviously raises a range of issues including but not limited to the question of the proper allocation of tasks between regulators and competition authorities in case of concurrent jurisdictions and also issues falling into the category of regulated conduct.[132]

In particular in recently liberalized sectors, or in the privatisation process of public utilities in some of the new EU Member States, regulators may not have been able yet to establish a firm presence and properly regulate former state monopolies that maintain high level ties with government.

Recent EU energy cases point to the fact that quite generally at least the EU Commission will not refrain from enforcing competition rules in regulated sectors. This applies to national regulation that is anyhow subservient to EU competition law but also to regulations on the EU level.[133] This includes instances where a national regulator either decided not to intervene or had endorsed the behaviour of a dominant company.[134]

4.4. Additional conditions

A few other screens have been proposed in the literature.[135]

In their discussion of appropriate screens, Evans and Padilla (2005:119) propose to also include the risk that the excessive prices prevent the emergence of new goods or services in adjacent markets as a

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129 In certain circumstances, for example in cases of trans-boundary excessive price problems in EU Member States, without corresponding responsibilities on the European level, it may be extremely difficult to arrange for a regulatory solution. This is particularly the case if the problem does not concern all involved jurisdictions equally or if there are clear winners and losers.

130 Temporary intervention by the competition authority in such situations may also be particularly warranted in light of the high importance of the sectors concerned for consumers and the need to maintain public support for a market based economy.

131 The term weak regulators is used loosely and is meant to encompasses both, regulators that underperform in light of their mandate and regulators that perform well but function on the basis of limited powers.

132 On the latter issue of regulated conduct see OECD (2011a) for an extensive discussion.

133 See for example the EU ENI case described in Maier-Rigaud et. al (2011).

134 Commission Decision 2003/707 of May 21 2003, Deutsche Telekom AG [2003] OJ L263/9 upheld on appeal Case T-271/03 Deutsche Telekom Ag v Commission, judgement of the Court of First Instance of April 10 2008. See also Commission Decision of July 4 2007 Wanadoo Espana/Telefonica, Case COMP/38.784, Case T-336/07 Telefonica SA and Telefonica de Espana.

135 Some of these screens are also discussed in Motta and de Streel (2007) and Motta and de Streel (2006).

necessary condition for conducting an excessive price case and also on a more technical level that prices charged by the dominant firm should widely exceed the firms average total cost.[136]

O'Donoghue and Padilla (2006), concerned with possibly negative dynamic effects suggest that as necessary condition for intervention, investment and innovation should only play a minor role in the industry. Similarly it has been argued that "there should be no intervention against excessive prices or an innovative product within that product's patent life"[137].

Another condition proposed is indispensability[138], i.e. that the product must be a good that customers cannot afford not to have, as for example food or medical products and as opposed to luxury goods.[139] In addition to the "cannot afford not to have" standard, van de Woude also includes necessary inputs for downstream activities or access to essential facilities.

4.5. The potential limits of screens

There may be practical legal problems with exercising restraint by implementing "informal" or even "tacit" screens by competition authorities. These problems exist as long as the screens are not formally integrated into the basic legal provisions or have become part of the case law. As many jurisdictions benefit from a substantial amount of prosecutorial discretion not only in their *ex-officio* case work, i.e. the cases the authority would actively seek and open itself, but also in the treatment of complaints, screens may be easily implemented in the context of the general setting of priorities for the authority. To the extent that the "informal" screens are, however, considered as setting the appropriate enforcement thresholds, such an approach bears the risk of over-enforcement as the screens would at best only be binding for the authority but would not constitute law or accepted policy.

In such cases, private litigation could be launched by a plaintiff on the basis of the law itself and would be capable of producing excessive price cases even if the criteria set out in the non-binding screens (possibly not even known outside the authority) are not fulfilled.

This problem may be further exacerbated by the fact that such cases would no longer be treated by the competition authority itself.[140] As the difficulties of excessive price cases including the design of appropriate remedies, is already a challenge for competition authorities the problems are likely to be magnified if treated by non-specialized courts that may not fully appreciate the need for detailed economic

136 This is actually one of the criteria used in the Australian access regulation provision - there is no intervention unless the intervention can actually promote competition in another market (See Part IIIA of the Competition and Consumer Act available at: http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/s44g.html).

137 Fletcher and Jardine (2008:542). This of course assumes that the monopoly right granted under patent law, more specifically the width and breadth of the patent, provides for the proper weighing of the benefits of encouraged investment incentives *ex ante* (including risk of failure) and the disadvantage of limiting competition with all its effects for the lifetime of the patent. On the possible systemic conflict between intellectual property law and competition law, see Régibeau (2008:661ff.).

138 van der Woude (2008:620).

139 This has a theoretical grounding in the fact that more inelastic demand (indispensability), implies a higher price. It is, however, not clear what van der Woude has in mind when he writes "the supplier will not lose sales volume when he increases his prices, even beyond monopoly price levels" (2008:620). Clearly, by definition, quantity and price cannot both exceed the monopoly price and quantity.

140 This is of course to some extent already the case for jurisdictions where no administrative law approach is followed and where this problem therefore exists also for "normal" cases.

analysis and the difficulties involved in such cases. However, private litigants would likely be seeking mainly damages and an individualised supply agreement into the future, something that courts should have fewer difficulties with than finding a market wide solution.

The reasons set out above have to be seen as a major drawback at least of "unofficial" screens or any explicit or tacit policy of not giving priority to excessive price cases. As noted by Whish (2003:690), "the fact that the European Commission, in its prosecutorial discretion, has decided not to take direct control of prices does not mean that Article 82 (102) is inapplicable". There is also a risk that a prescriptive adherence to informal screens could expose a competition authority who operates in an administrative enforcement system, as opposed to one that must prosecute its cases in court, to administrative review.

5. Some legal provisions on excessive price abuses

In this section some of the legal bases for competition authorities to act on excessive prices are discussed. The legal provisions and the case law play a much more important role than the screens discussed in the previous section as they represent the binding basis for intervention even if the courts have not had as many opportunities to clarify the issues as they have in other areas of competition law. In addition, also the economic theories put to courts have been less settled, leaving the legal system to arbitrate between often radically opposing economic approaches.

European competition law is the main topic discussed here as it has influenced excessive price provisions in many jurisdictions. In addition German competition law, whose excessive price provisions were developed in parallel with EU provisions and are arguably the most developed, is discussed. In addition to these competition law provisions, other regulatory approaches, that typically follow a different public policy rationale such as price gouging and usury laws are discussed. A selection of excessive price cases is discussed in the Annex.[141]

5.1. Unfair pricing under European Law

Article 102(a) of the Treaty on the Functioning of the European Union (TFEU) specifies that imposing unfair purchase or selling prices or other unfair trading conditions either directly or indirectly consists in an abuse of a dominant position (see Box 1). The term "unfair" in turn has been considered by the European Courts and the European Commission to encompass excessive price.[142] Following the case law, excessive prices are prices that have no reasonable relation to economic value. What this means remains open to debate and as was recently noted "even after more than 30 years since the prohibition was first recognized, there is still no sufficiently predictable and concrete definition of what constitutes excessive pricing"[143].

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141 The Annex includes a case from South Africa, a case from Korea, from Albania, from Germany and two cases from the EU. These cases have been selected to give a rough overview of existing decisions and should not be seen as a representative sample of the case law.

142 See for example Sirena vs. Eda [1971] ECR 69, according to Gal (2004:358) the first case where monopolistic prices without harm to competition were found abusive; Case 27/76 United Brands vs. Commission [1978] ECR 207 (on this case see also Annex 4); Case 30/87 Corinne Bodson vs. Pompes Funebres [1998] ECR 2479; Case 110/99 Lucazeau vs. Sacem [1989] ECR 2811 and Commission Decisions COMP/C-1/36915 British Post office vs. Deutsche Post AG [2001] OJ L331/40; COMP/A 36568/D3 Scandlines Sverige AB vs. Port of Helsingborg and Sundbusserne AS vs. Port of Helsingborg [Jul 23, 2004] (on these two cases see also Annex 3).

143 Gal (2004:373).

Box 1. Article 102 TFEU

"Any *abuse* by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

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

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

An important characteristic of many cases on excessive prices conducted by the EU Commission is their link to the single market agenda.[144] More generally it was noted that enforcing excessive price abuses based on a comparative methodology effectively prevents one dominant company in one market from charging substantially different prices from those charged by other firms for comparable goods or services in other markets, also contributing – at least in terms of price equality – to the goal of integration.[145] These factors are of relevance to the discussion of excessive prices as many jurisdictions today[146] either were inspired by these provisions or, as for example Germany, devised their competition law provisions in parallel with EU law and involving a similar set of people.[147]

That excessive prices may be abusive was hinted at already prior to the United Brands case (see Annex 4) but it is only in United Brands that the Court became somewhat more specific as to what constitutes unfair prices.[148]

144 See for example Case 26/75 General Motors Continental NV vs. Commission, [1975] ECR 1367 and Case 226/84 British Leyland vs. Commission [1986] ECR 3263 that both involved restrictions on parallel trade.

145 See Gal (2004:362). This goal of integration has also been cited as the main reason for the initial lack of merger control provisions although some merger control took place under Article 102 TFEU prior to the first EU Merger Regulation (Council Regulation (EC) No. 4064/89) that went into force on 21 September 1990. In fact, mergers across EU Member States were expressly welcomed and encouraged and this may also be one of the reasons that until this day the acquisition of dominance (monopolization in the US terminology) is not prohibited in the EU.

146 See for example Israel or South Africa. Concerning South Africa see in particular Annex 1 discussing the Mittal Case.

147 See Maier-Rigaud (2012).

148 The cases prior to United Brands are Sirena S.r.l vs. Eda S.r.l., Case 40/70, 1971, ECR 69, § 17; Deutsche Grammophon GmbH vs. Metro-SB-Großmärkte GmbH, Case 78/70, 1971 ECR 487, § 19. In General Motors Continental NV vs. Commission, Case 26/75, 1975 ECR 1367, §§ 16-20 no abuse was found for charging a fee that was "excessive in relation to the economic value of the service provided" but was charged only occasionally and for a limited duration only.

In United Brands, the court established that it is necessary "to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition."[149] This is considered to be the case if the dominant company is charging a price that is excessive because it has no reasonable relation to the *economic value* of the product supplied. Establishing that a price bears no reasonable relation to the economic value of the product could, according to the Court, be established by two cumulative conditions. It would first need to be established that the difference between the costs actually incurred and the price actually charged is excessive. If there is an excessive difference between costs and price charged, it would then have to be determined whether the price is unfair in itself or when compared to competing products. The court also emphasized that other methodologies could also be applied for each of the two legs of the test.

The latest decisions of the EU Commission, namely the two port of Helsingborg decisions, have renewed the interest in this test. In particular the statement that "economic value must be determined with regards to the particular circumstances of the case and take into account also non-cost related factors such as the demand for the product/service"[150] has been the subject of considerable debate. This statement has led some authors to conclude that "by making the decisive issue whether prices have 'no reasonable relation to the economic value of the product supplied,' the Commission effectively decreed that prices are not unfair if they are aimed at exploiting the willingness of consumers to pay."[151] According to Werden (2009:656) this implies that all prices charged by dominant companies will have "a reasonable relation to the economic value of the product supplied" as even a monopolist does not price independently of demand and its customers will value the products or services they buy at least as much as they pay for them.[152] In other words, all the decisions are presumably saying is that "the price paid reflects the characteristics of the product, and that this determines the economic value of the product"[153] If that were true, this would indeed "open(s) the way to circularity from which there may be no escape"[154].

The interpretation that the EU Commission "abolished" unfair pricing as an abuse "en passant" in two decisions rejecting complaints is unconvincing. While the EU Commission certainly has the possibility to interpret the law and can modify its policy as for instance done with respect to exclusionary abuses after a long process involving several consultations, it would likely do so only in the context of a policy debate.[155] In addition, it in any case cannot change the Treaty. As a result, the reference to demand factors that, as emphasized by Werden, are of course crucial to the economic (as opposed to the European Courts') concept of economic value as determined by supply and demand, has to be interpreted differently.

Indeed, there is a lot that speaks in favour of an interpretation that would allow capturing those aspects of demand that would have a bearing on prices also in a more competitive (hypothetical)

149 United Brands § 249.

150 See Scandlines §§ 226-228, 232-233 and Sundbusserne §§ 204-208.

151 See Werden (2009:654f.). See also Akman and Garrod (2011).

152 See also Fletcher and Jardine (2008:536) making the same argument and referring to the England and Wales Court of Appeal (Civil Division), judgement of 2 February 2007, Attheraces (UK) Limited vs. The British Horseracing Board Limited, Case No. A3/2006/0126, [2007] EWCA Civ 38.

153 Furse (2008:72f).

154 Furse (2008:73).

155 In fact the decisions to reject the two complaints coincided with the review of Article 102 a period where policy development in individual cases was therefore unlikely. While that review in the end only focussed on exclusionary abuses, this was not clear yet at the time of the two decisions and any policy change would have pre-empted the debate and would therefore have been deferred to a later stage.

benchmark market. The advantage of such an interpretation of the Port of Helsingborg cases is that it would provide a justification of the two-pronged test of the Court in United Brands. Without the second leg it would be possible to establish excessive prices solely on the basis of high profitability as indicated by an excessive difference between costs and price as set out in the first leg of the test. The purpose of the second leg is, however, to try and identify what may be a legitimate cause of the high profitability potentially found under the first leg. A consideration of demand aspects effectively aims at identifying specific properties of the product or service in question that present an "advantage" to the buyer without actually being included in the production cost and therefore may constitute a valid justification for higher prices.[156]

The Port of Helsingborg decisions (see Annex 3) in fact do interpret the second leg of the test as allowing other, special aspects of the product or service to play a role in the analysis and render them capable of justifying a higher price. This interpretation allows outcomes in the price cost comparison in the first leg that suggest that prices may be excessive, without finding excessive prices in the end as the product may have specific aspects to it that are not considered on the cost side. Such higher valuations, even if not based on corresponding cost, may exist and should not be confused with the willingness to pay an excessive price. The idea is that a corresponding higher mark-up over costs would also persist under a competitive market structure.[157] In the words of the case handlers:

> *"The Commission considered, however, that the economic value should be determined with regards to the particular circumstances of the case and take into account also non-cost related factors such as the demand for the product/service.*
>
> *In this respect, the two decisions note that the ferry-operators benefit from an excellent location of the port of Helsingborg and that this should be taken into account in the assessment of the economic value of the service provided by the Port and in its price. The fact that the port services are provided by the Port at this specific place allows both passengers and ferry-operators to cross the Øresund in an expeditious way, which is in itself valuable, creates and sustains demand both on the downstream market (the market for transport services on ferries) and the upstream market (the market for the provision of port services to ferry-operators). This specific feature does not necessarily imply higher production costs for the provider of the port services. However, it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service."*[158]

Some evidence of such a line of reasoning is also found in the Albion Water case, although the case introduces a somewhat odd terminology distinguishing between an unproblematic "excessive price" and an abusive "unfairly high price" triggering intervention:

> *"In certain cases 'economic value' may exceed the cost of supply where there are additional benefits not reflected in the costs of supply. An excessive price is therefore a necessary, but not sufficient, condition for an unfairly high price."*[159]

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156 This is in contrast to for example branded products that while effectively allowing higher prices compared to non-branded products with identical production cost in a narrow sense, do entail higher cost in a broader sense, namely the costs of building up the brand image. This intangible asset should in principle also be included in the cost calculation of the first leg.

157 A way of thinking about this is that in a market with differentiated products but identical costs, prices will not be marginal cost based and may also not be identical.

158 Lamalle et al (2004:42).

159 §7 in Albion Water Ltd. And Albion Water Group Ltd. VS. Water Services Regulation Authority, case no. 1046/2/4/04 [2008] CAT 31.

When a company producing multiple products is under investigation, demand side information is required to determine the socially optimal apportionment of joint and common costs across products.[160] The price elasticity of demand is an essential factor that would need to be considered in the supply side cost-analysis.[161] A classic cost analysis not considering demand elasticity may lead to the unjustified identification of excessive prices in a multiproduct firm context.[162]

5.2. Excessive prices under German Law

The recent enforcement record of the Bundeskartellamt, similar to the EU's demonstrates that excessive price cases are conducted by authorities with extensive enforcement experience and in countries with a mature competition culture. Under certain circumstances a competition law approach can be more effective in dealing with a well-defined problem of excessive prices and intervention can be much quicker than creating a regulatory authority. The comparative market concept methodology applied in Germany furthermore demonstrates that as long as the method used to determine whether prices are excessive does not come for the standard regulatory toolbox of cost-based or incentive based price regulation, competition authorities may even be better placed than regulators to perform the analysis. The German case presented in Annex 5 relies on a traditional finding of abuse of dominance but bases itself in part also on a special (temporary) legal provision in the German law giving specific powers to the Bundeskartellamt. This is interesting as it may be an example of how legitimacy concerns with respect to "quasi-regulatory" interventions may be successfully addressed.

The case presented in Annex 5 concerns the regional supply of natural gas to household customers. In 2007 and 2008 a considerable rise in gas prices and in some cases substantial differences in price between individual suppliers could be observed in Germany. In addition to these price increases and in contrast to the electricity sector, consumers were not everywhere able to switch to another gas supplier. As a result, the Bundeskartellamt together with the competition authorities of the Länder launched a large-scale investigation of 35 gas suppliers in 2008. The cases were opened as the gas suppliers were suspected of charging abusively excessive prices in 2007 and 2008 in the markets for the supply of heating gas to household customers. The proceedings concerning the year 2008 were based on the new Section 29 ARC (See Box 2) which was applied for the first time in these cases.

This new Section 29 ARC applies to the energy sector and was introduced in late 2007 and will remain in force until 2012.[163] This provision makes it easier for the competition authorities to prosecute abusively excessive prices in the electricity and gas markets. In particular, Section 29 ARC allows a partial shift of the burden of proof for excessive prices on the companies suspected of the infringement.[164]

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160 This information is also required for the profit maximization of the firm itself which may or may not coincide with the socially optimal apportionment of cost to the different product lines.

161 So-called Ramsey pricing of course opens up the theoretical question whether cost apportionments in the context of multiproduct firms should follow the cost apportionment used by the firm in devising its "excessive" price strategy or should be assessed considering the socially optimal apportionment.

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

163 A the time of writing a prolongation is being discussed.

164 See Bundeskartellamt (2011:25).

Box 2. Excerpt from the German Act Against Restraints of Competition (ARC)[165]

Section 19
Abuse of a Dominant Position

[...]
(4) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services:
[…]
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account;
[…]

Section 29
Energy Sector

An undertaking, which is a supplier of electricity or pipeline gas (public utility company) on a market in which it, either alone or together with other public utility companies, has a dominant position, is prohibited from abusing such position by

1. demanding fees or other business terms which are less favourable than those of other public utility companies or undertakings in comparable markets, unless the public utility company provides evidence that such deviation is objectively justified, whereby the reversal of the burden of demonstration and proof (Darlegungs- und Beweislast) shall only apply in proceedings before the cartel authorities, or
2. demanding fees which unreasonably exceed the costs.

Costs that would not arise to the same extent if competition existed must not be taken into consideration in determining whether an abuse within the meaning of sentence 1 exists. §§ 19 and 20 remain unaffected.

The proceedings concerning the year 2007 were based on the general prohibition of the abuse of a dominant position (Section 19 ARC, Box 2). Following the "comparative market concept", explicitly mentioned under Section 19 ARC, the investigation focused on whether gas prices differed substantially from those of comparable companies. The proceedings concerning the year 2008 were based on the newly acquired powers under Section 29 ARC.

5.3. Price gouging and usury laws

In addition to the provisions that are most often thought of as addressing excessive prices, i.e. the German competition law, the Article 102 of the EU treaty and the competition laws modelled thereafter, there are also other laws directed to controlling excessive prices. In addition to classic public utility regulation, there exist price gouging and usury laws that often have different public policy rationales from the excessive price prohibitions found in the competition laws.

Price gouging laws aim to protect vulnerable consumers from short term, wind-fall market power in relation to necessities. Interest rate laws also aim to protect poor and uninformed consumers from unscrupulous lenders. This addresses a particular consumer protection concern that can exist in relation to credit provision where a consumer does not understand what is a fair price or is too high a credit risk to be

165 In German: Gesetz gegen Wettbewerbsbeschränkungen (GWB).

accepted by lenders who expect the loan to be repaid (as opposed to lenders who may merely seek to take both high interest payments and foreclose on collateral).

5.3.1. Price gouging laws in the United States[166]

Price gouging laws in the US have recently received renewed attention in the wake of Hurricane Katrina. In the US, 29 States[167] have laws that prohibit excessive prices of certain commodities during periods of abnormal supply disruption.[168] These laws provide for civil penalties, criminal penalties or both and most of them, although not all are triggered by a state of emergency declared either by the president, the governor or local officials.[169]

The basic methodology employed is based on a comparison of a (fictitious) "normal" price with the potentially excessive price in periods of abnormal supply disruptions. In determining the "normal" supply price a variety of definitions are used. While some US States do not define the normal price at all, others use the average price over a specified period or the price immediately prior to the supply disruption or the emergency declaration.

Positive deviations from the "normal" price do not automatically trigger sanctions as limited deviations are allowed. For instance, some states allow price increases to match increases in wholesale costs and others restrict price increases to a certain percentage whereas others do not specify the exact level at which prices would become excessive although they all allow a defence based on cost increases.

The FTC notes in its report that when the question was presented in court, judges have resorted to a case by case analysis and those decisions "have not been particularly consistent"[170]. It further states that given "the uncertainty about what constitutes an unconscionable, excessive or exorbitant price, and the paucity of decisions on the issue, statutes based on any of these terms are likely to be difficult to enforce"[171]

In its report the FTC clearly warns that if "pricing signals are not present or are distorted by legislative or regulatory command, markets may not function efficiently and consumers may be worse off." Despite these concerns, including for instance also the question of "what constitutes a 'reasonable price'" and doubts as to whether a "federal price gouging legislation would produce a net benefit for consumers", the FTC proposes a list of factors that should be considered if Congress nevertheless were to proceed with passing federal price gouging legislation. While the regulatory goal would of course be linked to a relatively short term economic shock in the aftermath of an emergency, the criteria proposed are interesting in the context of excessive prices more generally.

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166 See FTC (2006) for a more detailed discussion. This subsection heavily draws from this report.

167 Although 42 states announced independent investigations or participated in a multi-state working group to investigate gasoline pricing shortly after hurricane Katrina according to FTC research (FTC 2006:192).

168 Alternative terms to "excessive" are "exorbitant", "unreasonable" and "unconscionable" as well as "unjustified" prices.

169 Davis (2008) notes that price gouging laws are not symbolic, toothless measures and reports that state officials are apparently devoting significant resources to enforcing price gouging laws.

170 FTC (2006:191).

171 FTC (2006:192).

"First, any price gouging statute should define the offense clearly. A primary goal of a statute should be for businesses to know what is prohibited. An ambiguous standard would only confuse consumers and businesses and would make enforcement difficult and arbitrary.

A price gouging bill also should account for increased costs, including anticipated costs, that businesses face in the marketplace. Enterprises that do not recover their costs cannot long remain in business, and exiting businesses would only exacerbate the supply problem. Furthermore, cost increases should not be limited to historic costs, because such a limitation could make retailers unable to purchase new product at the higher wholesale prices.

The statute also should provide for consideration of local, national, and international market conditions that may be a factor in the tight supply situation. International conditions that increase the price of crude oil naturally will have a downstream effect on retail gasoline prices. Local businesses should not be penalized for factors beyond their control.

Finally, any price gouging statute should attempt to account for the market-clearing price. Holding prices too low for too long in the face of temporary supply problems risks distorting the price signal that ultimately will ameliorate the problem. If supply responses and the market-clearing price are not considered, wholesalers and retailers will run out of gasoline and consumers will be worse off."

5.3.2. Rate of interest regulation in EU member states[172]

In a recent study conducted for the European Commission[173] on usury and the regulation of consumer credit prices, a comprehensive inventory of the types of interest rate restrictions that exist in the 27 EU Member States was taken and combined with an assessment of the impact of these both on credit markets and (potential) consumers. The particular interest of this study is its attempt to empirically evaluate the effects of the price cap regulation as captured by a set of hypotheses that are classified into the three categories of "plausible", "inconclusive" and "unlikely". Table 3 below presents an overview of the findings.

172 See iff/ZEW (2010) for a more detailed discussion. This subsection heavily draws from this study.

173 See iff/ZEW (2010). While the study focuses on the 27 EU member states it also reviews the literature analyzing the US, but notes that in light of the fact that US interest rate caps are relatively low compared to the frequently much higher caps found in the EU, comparisons are difficult.

Table 3. Interest Rate Regulation (IRR)- Empirical assessment of hypotheses

Plausible	IRR reduces credit access, in particular for low-income borrowers. Without IRR, more product types exist in the market. IRR leads to increased charges as providers will try to compensate the reduced interest revenues by increased charges.
Inconclusive	IRR leads to credit from non-bank sources, such as paying bills late. IRR leads to a substantial illegal market in lending. The lack of IRR has particularly adverse effects on default rates/overindebtedness in the presence of economic downturns. The average consumer – or even more so: low-risk consumer – would be granted cheaper credit in the presence of IRR. IRR represents barriers to consumer credit market integration. IRR leads to a convergence of all consumer credit interest rates at the level of the interest rate cap.
Unlikely	IRR leads to a decline in the volumes of consumer credit granted. The lack of IRR leads to a higher level of over-indebtedness. IRR leads to lower levels of competition in the consumer credit industry.

Another interesting example also related to interest rates can be found in Germany, where contracts involving terms including prices or interest rates deemed to be unethical are automatically null and void. Following a decision of the German Federal Court from 1990[174], a difference of more than 12% between the market interest rate and the contractual rate implies that the contract is "sittenwidrig", i.e. unethical, indecent or immoral depending on the preferred translation of the legal term. The court had apparently no difficulty in determining this percentage.

6. Methodologies for assessing excessive prices

Competition authorities and regulators have used several different methodologies to assess excessive prices and determine price caps. These methodologies can generally be clustered based on how the benchmark is constructed, what type of information is required for the calculation and what is actually being measured.

Several different sorts of benchmarks have been used to determine whether a price is excessive. These benchmarks can be geographic, historic (in time) or relate to other companies providing identical or similar products or services. Benchmarks can also involve a combination of these elements or relate to a notion of reasonable return.

174 Federal Court (BGH) decision of March 13. 1990, AZ: XI ZR 252/89.

The benchmark is geographic if the comparison is based on similar products or services located in other (similar) geographic markets. The benchmark is historic if the comparison is based on a comparison between current and past variables, possibly of the same company. The benchmark involves other companies if the comparison draws on variables from similar companies active in the same or similar markets offering the same or similar products and services.

These benchmarks could be based on a direct comparison of prices, a comparison of profitability or a comparison of price-cost mark-ups.[175] A direct price comparison can, for instance, be based on a price of a company offering similar products in another geographic market that is subject to a higher level of competition. Similarly, profitability analysis or price-cost mark-ups, can use the profitability or price-cost mark-up of firms in other, more competitive geographic markets. Profitability analysis, however, already allows some indication as to the potentially excessive nature of a price in itself as it has a notion of reasonable normal return on capital built in.

In the following profitability analysis is discussed first as it is arguably the economically most important albeit most technical concept, followed by price-cost margin analysis and direct price comparisons. The section on direct price comparisons will also return to the question of benchmarks, discussing geographic and historic comparisons as well as comparisons across competitors or similar firms.

As all these methods are fraught with difficulties, it has been suggested that all or as many of the methods as possible should be applied in any given case.[176] This "predominance of evidence" approach was applied in the Napp case.[177] Implicit in this approach is that no single test can be considered sufficiently reliable and that increased reliability can emerge from aggregating results from different benchmarking tests. While some have argued that "it is unclear why the answers to several imprecise tests – even if producing mutually consistent results – should be more credible than the answer to one imprecise test"[178], there is in fact no reason to doubt this as long as the tests that are used are not fundamentally flawed, the individual test unreliability is not correlated and the tests in themselves are independent. In that case, the different errors involved in the different methodologies would tend to cancel each other out, increasing the reliability of the aggregate.

6.1. Profitability analysis[179]

Profitability analysis is relevant in this context as excessive prices are typically linked to excessive profits.[180] If high prices are considered potentially excessive from a legal point of view even if they do not result in particularly important profits, profitability analysis will not be useful. This is the case if the legal benchmark is given by the cost of an efficient firm and the potential offender is characterized by inefficient

175 Price-cost mark-ups seem to be one of the most prevalent methodologies. While they are a measure of profitability, they follow a distinct methodological approach compared to profitability analysis.

176 See Röller (2007).

177 This approach seems to have been approved by the CAT (at the time CCAT) writing „those comparisons, taken together, amply support the Directors conclusions that Napp's prices.." §397 in Case No. 1001-1/1/01 Napp Pharmaceutical Holdings vs. Director-General of Fair Trading, UK Competition Commission Appeal Tribunal, 15 January 2002.

178 O'Donoghue and Padilla (2006:633). See also Williams (2007:145) and Evans and Padilla (2005:109).

179 See also the specific methodological companion paper to this one by Alan Gregory.

180 For a discussion of profitability analysis as a useful method for determining market power in particular in industries with high and recurring common sunk or fixed costs, i.e. decreasing average incremental cost, see Baumol and Swanson (2003).

production exhibiting much higher cost. More generally the methodology is much more difficult to apply when the costs to be considered are not those of the firm under analysis.[181]

Profitability analysis is fundamentally based on the concept of cost of capital and return on capital. There are essentially two approaches that can be pursued in conducting profitability analysis that under certain conditions have also been shown to lead to identical results.[182] Both approaches are based on the fact that any economic activity involves an initial investment that is subsequently followed by a stream of revenues.

The accounting approach to profitability calculates a return on capital employed (ROCE). ROCE is a measure of company earnings before interest and taxes (EBIT) divided by the capital employed in a given period of time. ROCE is traditionally used in price regulation in sectors such as gas, electricity, rail or water. It aims at determining a normal return usually equal to the weighted average cost of capital (WACC) on the estimated asset base.

The finance approach revolves around the concept of net present value (NPV) and internal rate of return (IRR) to measure profitability.[183] In contrast to ROCE, a calculation of the (truncated) IRR requires cash flow data and estimates of the asset values employed, for both, the beginning and the end of the relevant time period under analysis.[184]

Profitability analysis is not straightforward for at least four reasons[185]:

- Accounting profits are often sensitive to different approaches to depreciation
- Cost and revenue allocation for multi-product companies operating multiple lines of business is particularly difficult
- Company accounts of international companies depend on transfer price arrangements
- Risk factors are highly dependent on assessments of investors that can fluctuate substantially over time.

6.1.1. The cost of capital[186]

The cost of capital is an estimation of the price a company has to pay in order to raise the capital it employs. Alternatively it could also be viewed as the opportunity cost of the next best investment or the return that would be earned if the capital were invested elsewhere adjusted for the risk of the current

181 This aspect will be discussed in more detail below. It is relevant to the inherent tension between a competition and a regulatory approach.

182 See Fisher and McGowan (1983), Martin (1984) and Salamon (1985) for a discussion of the reliability of accounting approaches to measuring profits.

183 According to OFT (2003:5) citing Graham and Harvey (2001), IRR is the most frequently used profitability measured in the business world.

184 A comprehensive discussion of profitability analysis using IRR and NPV tailored to the needs of a competition authority can be found in OFT (2003). For a discussion of the use and misuse of profitability analysis see Lind and Walker (2004).

185 See for example Williams (2007:133) or OFT (2003:12).

186 See Williams (2007) for a more detailed discussion including examples on the cost of capital and the return on capital. The following two sections heavily draw from his article.

investment. More specifically, the cost of capital emanates from two different sources of capital, debt and equity. The moment the business is started, the capital of the company consists of debt capital, i.e. money from investors that bought the bonds issued by the company and equity capital obtained through the sale of newly issued shares in exchange for money paid by investors. The total amount of capital, i.e. equity and debt combined, is called the capital base. The firm is owned by its share or equity holders, who seek a return on their invested capital. The cost of preventing shareholders from withdrawing equity, i.e. the return on capital needed for equity holders to induce them to hold shares is called cost of equity.[187]

The cost of capital is then calculated as a weighted average cost of capital (WACC) and is commonly estimated using the capital asset pricing model (CAPM).[188] The key result of this model is that the rate of return (ROR) for any particular project is given by:

$$ROR = \text{risk free interest rate} + \beta * (\text{market return} - \text{risk free rate}) \quad [1]$$

The risk free rate is normally the government bond rate and β is a parameter measuring the non-diversifiable risk of the company relative to the risk of equities in general.[189] The difference between the market return and the risk free rate is usually referred to as the equity risk premium (ERP). As competition authorities will rarely be interested in the company β unless it is a one-product firm, the β will typically have to be derived relative to the product or service.

6.1.2. The return on capital

As the cost of capital does not readily compare to specific prices charged, a measure for the return on capital such as the ROCE has to be calculated and compared to the WACC. As previously mentioned, the approach of comparing the cost of capital with the return on capital is a standard method in utility regulation. Once a measure of the weighted average cost of capital (WACC) of a company is established, the price the company is allowed to charge is set to generate an expected ROCE equal to the WACC. While this so-called rate-of-return regulation can also be employed in the context of excessive prices, there is an important difference between investments made by state utilities or utilities in protected markets and investments made in a competitive market environment facing substantial *ex ante* risk of failure. While *ex ante* risks can probably be ignored in a utility setting, where monopoly positions may even have been

187 In contrast to bond holders that receive a steady and predetermined interest rate (setting aside the risk of default), shareholders are the residual claimants on profit and their return is therefore more volatile. As portfolio management allows the elimination of diversifiable risk, equity or share holders will require an extra return for the non-diversifiable risk associated with general movement of the stock market.

188 CAPM was used for example by the NMa in KLM (Vereniging Vrije Vogel vs. KLM and Stewart vs. KLM, 8 November 2000. Pijnacker Hordijk (2002) describes the KLM (page 484) and the Schiphol (page 486) cases. He also vehemently criticises the profitability approach noting that CAPM and WACC "are not meant to evaluate the appropriateness, let alone lawfulness, of profits actually made by individual businesses, and they are not capable of doing so. The mere fact that a business or a business activity may be more profitable than a constructed industry or business average, provides as such no valid economic reason to argue that the profits generated are 'excessive'."

189 If $\beta=1$, the share price moves with the stock market overall. $\beta<1$ implies that the stock price under-reacts, whereas $\beta>1$ implies that the stock overreacts in comparison to the stock market generally. For example, producers of luxury goods are typically believed to have a β greater than 1 as consumption of luxury goods is more impacted by general market developments whereas producers of foodstuffs have a β smaller than 1 as people continue to by food even in a recession. See Williams (2007:136f.)

legally granted, any existing *ex ante* risk of failing has to be rewarded *ex post* in a competitive market environment.[190]

The required return for shareholders to induce them to continue to hold the company stocks is calculated as a percentage of the stock market value of the company, not the assets actually invested in the company. The relevant measure for evaluating profitability and indirectly assessing prices is, however, the return on the asset base invested in the company, not the current return on its stock market value. Another reason that focussing on the original assets invested in the company is important, is that this effectively prevents "laundering" of excessive prices. When an acquisition price exceeds the asset value of a company, this may be due to many reasons such as brand image, distribution arrangements, business architecture, know how etc. The cost of building up such "intangible assets" is a legitimate factor in the capital base of a firm. The acquisition price may, however, also exceed the asset value of the company for other, less innocuous reasons. It may simply be due to the value of being able to charge excessive prices. In a nutshell, a firm could simply sell its market power and the buyer could no longer be accused of excessive prices as it had to pay for the capitalized value of the market power.

6.2. Price-cost comparisons

If profitability analysis cannot be used, price-cost comparisons may be a viable alternative methodology.

The price-cost margin is defined as:

$$p\text{-}c/p \qquad [2]$$

So if the price is 10 and the cost is 5, the price cost-margin is 1/2 or 50%. While this may appear a simple measure of the mark-up, the difficulties lie not only in the actual calculation of the mark-ups in any particular case but also in the appropriate choice of cost measure.

The attraction of price-cost margins for measuring profitability and ultimately excessiveness is probably based on the theoretical results presented in Figures 1 and 2 under perfect competition. In this model of perfect competition, firms equilibrium prices are equal to marginal cost, so that deviations from marginal cost pricing as measured by the price-cost margin is considered a direct indicator of market power.[191]

In order to be able to properly undertake price-cost margin analysis a certain understanding of cost concepts is required. The following two Figures summarise the commonly used cost concepts.

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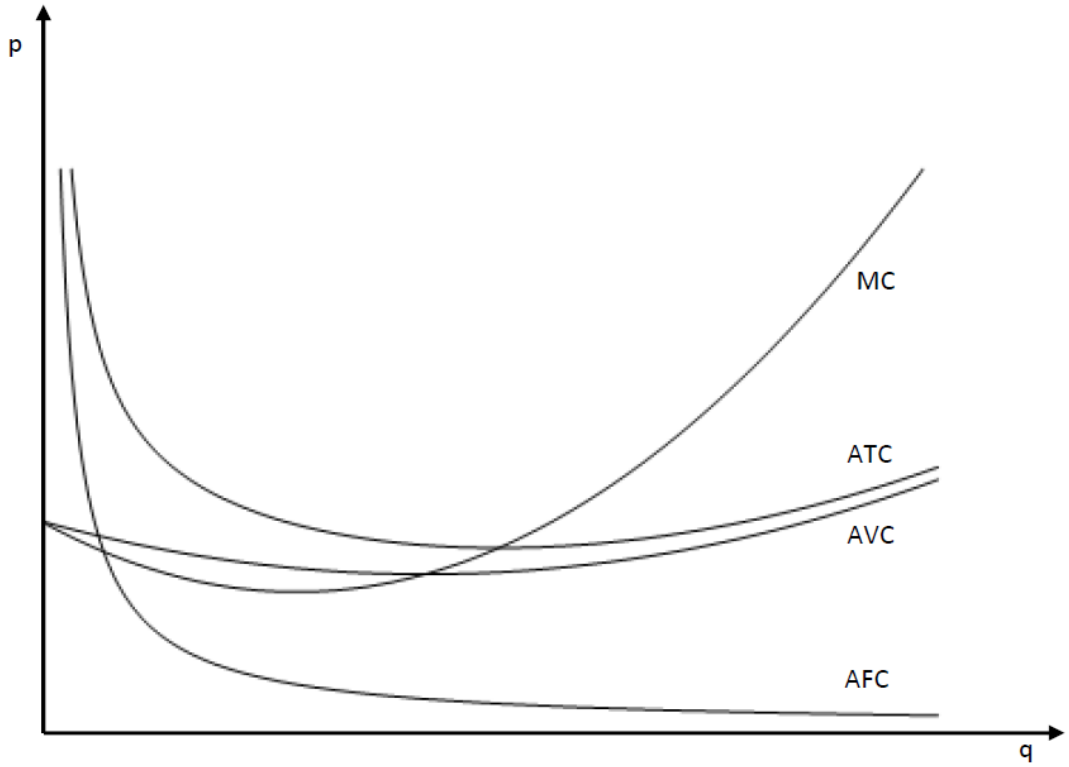
190 This includes the risk associated with demand uncertainty that has only recently become important also in liberalized but regulated sectors.

191 That this inference is problematic has been shown for example by Baumol and Swanson (2003), who state: "The price-equals-marginal-cost standard is tantamount to a requirement that every firm with scale economies, no matter how competitive the market, commit hara-kiri in order for its prices to be deemed 'competitive'." (682)

Figure 3. Marginal Cost, Average Total Cost, Average variable Cost and Average Fixed Cost



The short- and long-run cost curves depicted in Figures 3 and 4 are based on specific assumptions concerning the type of production technology used and will therefore not necessarily always have the shapes depicted here.[192] Fixed costs are the costs that do not vary with the quantity produced, whereas variable costs vary with the quantity produced. Marginal costs (MC) are the additional costs incurred for the production of an additional unit of output.

Average fixed cost (AFC) decrease with quantity as they are simply the fixed cost divided by the quantity. Average variable cost (AVC) again depend on the production technology and are defined as the per unit cost of the variable factor(s) of production. The U-shaped average total cost (ATC) curve is simply the product of the AVC and AFC curves. MC intersects both the AVC and ATC curves at their minimum points. Declining ATC is explained as the result of spreading the fixed costs over higher quantities and at lower quantity levels in addition also by increasing marginal productivity. Increasing ATC occurs when the effect of declining marginal productivity, which increases ATC, dominates the effect of spreading the fixed costs.

192 The underlying production technology is typically given by a function with one variable factor of production displaying first increasing and then decreasing marginal productivity. The increasing marginal productivity is directly associated with the negatively sloped portion of the marginal cost curve, while decreasing marginal productivity is associated with the positively sloped part.

Figure 4. Short Run Average and Long Run Average Total Cost

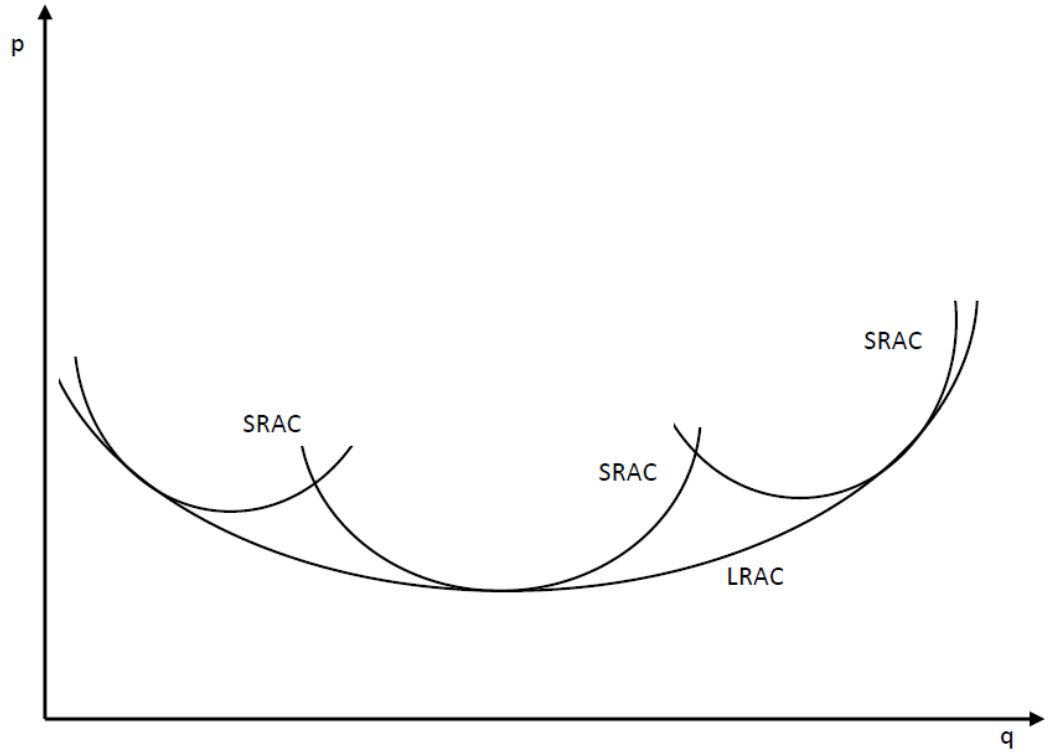


Figure 4 depicts the long-run average cost (LRAC) curve. LRAC is drawn as an envelope of the short-run average cost (SRAC) curves, exhibiting first increasing and then decreasing returns to scale. It lies below or tangent to the short-run curves.[193]

The intuition for LRAC, of particular relevance in the context of excessive price benchmarks, is given by its long-term entry and exit properties. If the price is above LRAC, effective competition will drive the price back to LRAC. If the price is below LRAC, firms will exit the market in the long run. Consequently any price equal or exceeding LRAC will be sustainable for the firm.[194]

While these cost concepts are well defined in theory, the application of price-cost margins may be very difficult in practice. Complications are unavoidable when considering pricing strategies designed to maximize the sales of a group of related goods and services rather than a single product or when the product is manufactured by multiple company divisions, possibly across multiple countries, over several years and possibly also relying on IPR based on considerable past R&D efforts related to a different product.[195] The reason for the difficulty lies in the fact that the profit maximizing pricing decisions of such firms involve setting prices such that the overall cost of production including all common or joint costs are covered. This implies different price-cost margins for products facing demands of different elasticities. As

193 The intuition for the relationship between SRAC and LRAC, in particular that the SRAC curves are not tangent to the LRAC curve in their respective minima, is that the short-run constraints of the firm will not allow it to produce at lower cost than in the long-run when there are no constraints.

194 See Annex 1 on the Mittal case and section 2.1 above.

195 See Evans and Padilla (2005:102).

a result, it has been suggested that the pricing policy of a multiproduct firm should be analyzed in its entirety.[196]

To avoid the problems associated with LRAC in cases of indirect, joint or common cost, long run average incremental cost are sometimes considered (LRAIC). The long run average incremental cost are the total costs associated with entering a market and begin the supply of a product or service, as an average over total output. The measure excludes common cost as only the costs that are causally related to the product or service in question are included in LRAIC. LRAIC can also be explained with reference to the long run average avoidable cost (LRAAC) and sunk costs incurred upon entry as LRAAC is the total value of costs that are avoided in the long-run if provision of the product or service is ceased, as an average over total output. Whereas LRAC takes all variable and fixed costs into account, LRAIC concerns only the product-specific variable and fixed costs. LRAIC will thus usually fall below LRAC because it does not take into account (non-attributable) common costs but remain above average avoidable cost (AAC)[197] because LRAIC takes into account all product specific fixed costs.[198]

An additional question that needs to be addressed once the appropriate measure of cost has been decided upon is who's costs should be used, i.e. the actual cost of the firm under investigation or the cost of an efficient firm or maybe even the cost of the most efficient firm.[199]

As costs can easily and artificially be increased – a phenomenon also known as gold plating[200] -, it has been suggested to use a notion of efficient firm cost rather than the actual cost of the dominant company.[201] Furthermore, using the actual cost of the dominant firm would be problematic in case the firm is particularly inefficient as it would allow for a much higher benchmark price.[202] If the cost of an efficient firm is used, this should not necessarily be the most efficient firm, as this would unnecessarily punish a particularly efficient dominant firm (by lowering the benchmark price) and may also lead to the problem that the benchmark price does no longer allow a particularly inefficient firm to cover its cost.

There are several options regarding the actual calculation of the cost of an efficient firm. Average supply cost may be a reasonable proxy for efficient firm cost in some instances.[203] An alternative approach that also has the advantage of maintaining dynamic incentives to increase efficiency is to use the cost of

196 Although this has been rejected by the CAT in the Napp case.

197 AAC is the total of all the costs that vary when there is a change in the quantity produced, divided by the quantity produced. It excludes all fixed costs.

198 See for example European Commission (2005) or chapter 4 in Department of Justice (2008).

199 See O'Donoghue and Padilla (2006:616) and the Case 110/99 Lucazeau vs. Sacem [1989] ECR 2811.

200 This question is of high relevance in the regulatory literature and is probably the main reason that the literature has moved away from cost based price regulation towards incentive based regulation and mechanism design. See Laffont and Tirole (1993) and Vogelsang (2002).

201 This is not unusual also in other abuse cases. Note, however, OECD (2000:17) „It is also possible […] that both prices and costs might be excessive, implying inefficiency, hence profits may not be excessive, and that might weigh against finding the price level to be abusive." See also Pijnacker Hordijk (2002:492) claiming that "there is no justification for a competition authority or court substituting its own perception of what 'reasonable' costs should be for the approach by the firm's management."

202 This is essentially the result obtained by Neven, Röller and Zhang (2006) in an analysis of the European Airline industry. Their study is based on data from 1976 to 1994 and suggests that while prices have been close to the monopoly level, price-cost margins were compatible with a more competitive outcome.

203 Average supply cost could be unweighed or weighed by volume as calculated for example in the German regional gas supply case (see Annex 5), where average gas supply prices were used as cost indicator.

the second most efficient firm. Although not always relevant in a one-shot excessive price case context, this preserves the incentives of those firms with higher cost and also maintains the incentive of the two most efficient firms to decrease cost.[204]

6.3. Price comparisons

While profitability analysis and also price-cost margin analysis can be used to benchmark the profitability or the price-cost margin of one firm to another in the same market or in other geographic markets and may also be undertaken across time, this type of comparison is typically conducted with respect to direct price comparisons. As a result, this section focuses on the different benchmarks that can be used in price comparisons while similar arguments of course apply when such benchmarks are based on other indicators such as profitability analysis or price-cost margins.

It has been argued that it "is possible to object to almost any price comparison, save perhaps those prices charged by the alleged excessive pricer to other customers"[205]. As a result it may be useful to recall and briefly discuss the three main benchmarking methods that have been employed in past competition decisions on excessive prices.

6.3.1. Geographic comparison

The fundamental idea behind geographic comparisons is that the two geographic markets considered are sufficiently comparable so that price comparisons (or cost-price or profitability comparisons) can meaningfully be made.[206] Geographic comparisons have been made for example in United Brands (see Annex 4), the German regional gas price cases (see Annex 5) and in the two Port of Helsingborg decisions (see Annex 3).

In 2006 the OECD discussed geographic comparisons in the context of market power:

> *"Using excessive prices as indicator of market power suffers from some of the same problems as profitability measurements. It will typically be difficult to determine a benchmark competitive price level against which the allegedly competitive prices could be measured. One commentator has noted, however, that in some cases it might be possible to find a reasonable benchmark by way of cross-sectional comparison, i.e., when the same product is sold in separate markets and one of the markets appears to be structurally competitive while the other is not. In this situation it might be possible to compare a competitive price with the price charged by a firm in a market where market characteristics suggest that a firm has substantial market power. Such cross-sectional comparison might produce useful evidence of market power where relevant markets tend to be local, such as, for example, retail markets. Simply comparing prices that two firms charge, or that the same firm charges in separate markets, however, will not produce reliable*

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204 In fact this approach was used in Australia by the regulator in the context of interchange fees. Note, however, that there may be limits to this approach in any industry where relatively high minimum efficient scales exist. While one could argue that this is less of an issue in a multiproduct context if the multiproduct firm would anyhow "cross-subsidize" the particular product or service in question, it certainly is an issue in single line of business cases.

205 Furse (2008:81f.). There is of course a distinction between price discrimination and excessive prices even if both fall in the category of exploitative abuses.

206 SACEM II was the first EU case where it was mentioned that direct price comparisons may be a substitute to a cost-price test. Deutsche Grammophon is an example that the difference between the home and comparator market price may be indicative of price abuse reversing the burden of proof. See also the discussion of the comparative market concept used in Germany in Annex 5.

evidence of substantial market power. It will not always be obvious whether higher prices in one market can be attributed to the exercise of market power by a firm, or whether they might be caused by other factors as well such as higher costs."[207]

In the Port of Helsingborg cases the Commission suggested that the ports differed substantially in terms of the mix of activities, the volume of assets and investments, how investments are financed, the level of revenues and the cost of each activity. There were also differences with respect to the internal decisions as to how shareholders are remunerated. In addition, as some activities of the port may be loss making, profits of other activities would be masked. All these factors pointed to the difficulty of considering profitability of a port and using other ports as reasonable benchmarks in comparison.

Other difficulties in finding comparable geographic markets for benchmarking purposes are differences in tax rates, exchange rates, the general income level of customers and the elasticity of demand. Another important problem may stem from the degree of market penetration of the product or service in question as newly introduced products are likely to be priced differently than the same product in a relatively mature market where the product is widely used. Finally it would have to be excluded that the benchmark prices are either excessive as well or predatory.

6.3.2. Comparison over time

Another variant is to consider the evolution of profitability, price-cost margins or prices over time. This was the approach of the European Commission used for example in British Leyland and to some extent also in United Brands.[208]

6.3.3. Comparison across competitors

Similarly to benchmarks established in comparison to other geographic markets, comparisons may be feasible within the same market. While excessive prices typically presuppose high market shares and dominance of the alleged infringer, it is not clear to what extent fringe firms could be used to discover more competitive prices. To the extent that the fringe firm is simply following the pricing decisions of the dominant firm such benchmarking would be futile and if that is not the case, the question remains why there is no effect on market share if there are firms in the same market offering their product or service at substantially lower prices than the dominant firm.

7. Abuse shopping and shortcuts

Competition authorities will sometimes have a choice of pursuing a given firm or practice under different legal categories. In some cases, excessive price cases may result from an authority having concerns about market conditions or behaviour but finding it easier to deal directly with the consequences than with the behaviour itself. The term "abuse shopping" describes the choice process that competition authorities engage in when it is possible to subsume a particular abuse under different legal categories with corresponding different standards of proof.

Of course, authorities can and do legitimately choose from different legal instruments in different cases. From a legal procedural view this need not raise concern. From an economic perspective, however, it may appear strange that the substantive assessment criteria for proving one and the same conduct abusive

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207 OECD (2006a:42).

208 See Case 226/84 British Leyland vs. Commission [1986] ECR 3263 and Case 27/76, United Brands Company and United Brands Continentaal BV v Commission [1978] ECR 207, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0027:EN:HTML.

vary based on the legal instrument. This also has obvious consequences with respect to the predictability of the competition law.[209]

The term "shortcut" is used to describe those extreme instances of abuse shopping that will generally be considered illegitimate.

There will be no general agreement on when legitimate abuse shopping becomes a shortcut, but it could be argued that abuse shopping that leads to a reduction in the burden of proof for the authority, should be considered an illegitimate procedural and or substantial shortcut.

Faced with apparently large harm to consumers, authorities may be tempted to use excessive price cases as a "universal theory of harm" that can be quickly applied requiring only limited evidence. However, as we have set out, the difficulties and complexities of properly carrying out excessive price cases render this a problematic strategy.

As many cases that have been conducted as excessive price cases could well have been characterized and conducted as price discrimination or even exclusionary abuse cases, abuse shopping is a reality that has tended to blur the lines between exploitative and exclusionary cases and led to confusion in the debate on excessive price cases.[210]

7.1. Abuse shopping

Abuse shopping allows competition authorities room for strategically choosing the legal category under which the case will be conducted often with substantial consequences. This possibility arises whenever there is no direct mapping of economic effects or even theories of harm into legal qualifications. In such circumstances the right choice, effectively determining the legal requirements that will need to be met and sometimes also the procedure, may make for the difference between successfully concluding a case and losing it.[211] In such instances, competition authorities may find themselves in a situation of "abuse shopping".[212]

One way to think about abuse shopping is framing. As has been noted concerning the Napp case: "While the OFT chose to run the case as two separate abuses, this particular instance of excessive pricing could instead have been framed as ongoing recoupment from Napp's predatory strategy, rather than as an abuse in its own right."[213] A similar statement could be made with respect to British Leyland[214] and

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209 The predictability argument is less convincing as an abuse is supposedly found under both legal characterizations. It may, however, affect the assessment of the firm whether it may get away with an infringement or not as this obviously depends on what the authority will have to prove.

210 Fletcher and Jardine (2008:534) for example state that "in practice many excessive pricing cases are essentially about exclusion rather than exploitation, and moreover the line between the two can sometimes be unclear".

211 Related but not identical to abuse shopping is the strategy to build a theory of harm on separate and ideally fully independent legs or to characterize one infringement of consisting of separate elements. While this strategy will have no impact on the burden of proof for each separate infringement, it allows the case to stand even if one infringement is unconvincing to the court.

212 See OECD (2007:95). The term seems to have been coined by Margaret Bloom, although rather in the sense of a shortcut.

213 Fletcher and Jardine (2008:541).

214 See Case 226/84 British Leyland vs. Commission [1986] ECR 3263.

General Motors[215] as both cases focused on artificial barriers to parallel trade or Albion Water[216] that could have been conducted as constructive refusal to deal case.[217]

7.2. Substantive and procedural shortcuts

While abuse shopping has been considered legitimate, the term shortcut is reserved for those cases where abuse shopping would unlikely be considered objectionable. Whereas abuse shopping is about framing the infringement, shortcuts lower the substantive and procedural requirements in proving the infringement.

Shortcuts are in particular to be expected in young competition authorities, operating in young legal systems and in environments characterized by a limited competition law experience and a weak competition culture. Shortcuts can be traced to weak internal quality control but also to a weak supervision and control by the courts. Obviously, in such an environment it may sometimes be very tempting for competition authorities to open excessive price cases as shortcut or substitute for harder, more difficult and more involved work.

A case possibly falling into this category is discussed in Annex 6. It concerns excessive prices in the mobile telephony market in Albania where the only two operators were found to be collectively dominant. While this case demonstrates how difficult concepts such as collective dominance and excessive prices can be treated in a rather superficial manner to achieve desired results, the case itself is probably not without (regulatory) merit as mobile telephony markets have been regulated in other jurisdictions.[218] The way the mobile telephony problem was tackled by the competition authority in Albania therefore is an example of a substantive shortcut but can also be viewed as a procedural shortcut as it was probably the quickest approach to address the concerns.

Shortcuts, to the extent that "the bluff" is not called, may also be used as effective negotiation tool despite strong court supervision. As shortcuts involve less work and a reduced burden of proof, it is relatively easy to open a procedure on the basis of flimsy facts, on which, in the context of excessive prices, some form of price reduction can be negotiated with the dominant firm.[219]

Of course the concern with procedural or substantive shortcuts is not about labels. Indeed, there could be no objection (except maybe the confusion caused in an interim period) to relabeling, for example, an

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215 See Case 26/75 General Motors Continental NV vs. Commission, [1975] ECR 1367.

216 See Albion Water Ltd. And Albion Water Group Ltd. VS. Water Services Regulation Authority, case no. 1046/2/4/04 [2008] CAT 31.

217 Examples of abuse shopping not involving excessive prices, are margin squeeze cases that alternatively could be conducted as predation or as (constructive) refusal to supply cases. Both, the refusal to supply and the predation test require a higher standard of proof for the authority than the margin squeeze approach and may therefore rather fall into the category of shortcut.

218 See the EU Roaming cases that in the end were abandoned in light of EU wide price regulation.

219 This is not to question the utility of commitment decisions in general or those obtained for instance in the context of UK market investigations although both have raised procedural questions. UK market investigations in contrast for example to the EU sector inquiry tool, are not pure competition law instruments. They have often been used to efficiently resolve (regulatory) problems, using competition law types of remedies based on a procedure that would be considered a procedural shortcut from a pure competition law point of view. A short commentary on the first 5 years of UK market investigations is given in Oxera (2008). More generally commitment decisions, for example in EU energy cases, have been criticized as the outcome of coercing companies into settlements under the threat of fines. To some, this may also constitute a procedural shortcut.

exclusionary theory of harm consisting in a constructive refusal to supply access to an essential facility as excessive price case as long as the exclusionary analysis is not dropped from the case.[220] Obviously, a simple re-labelling would not constitute abuse shopping as it would require the authority to go through all the steps usually required in such exclusionary abuse cases.[221] The attraction of shortcuts, as the term implies, is however, that they lower the procedural and/or substantive requirements. If that is not the case, there is no benefit in reframing infringements.

7.3. Joint dominance and collusion

In this subsection two different aspects revolving around joint dominance and tacit and explicit collusion are discussed. First, perhaps the most extreme example of a shortcut is discussed, namely running a standard cartel case as joint dominance excessive price case. Second, based on this example, the theoretical possibility of attacking *tacit* collusion as a joint dominance excessive price case is discussed.

7.3.1. Cartel vs. joint dominance excessive price

Probably the most prominent example of a shortcut is to run a cartel case as a joint dominance excessive price case.[222] Competition authorities have traditionally spent and continue to spend substantial time and effort at enforcing competition laws against cartels, arguably the single most uncontroversial competition law infringement in existence and one of the most difficult ones to prove.

Dawn raids are conducted to gather evidence, company CEOs are invited for questioning under oath, phones are tapped, sophisticated leniency and whistleblower policies are developed and economic analysis is deployed to detect and prove cartel agreements. All these efforts are costly to the authority and the task of catching cartels has certainly become more difficult with increased sophistication and use of modern technology on the side of the cartelists.

In light of these substantial resource costs and the high burden of proof required to successfully prosecute cartels, it may be particularly tempting to shortcut the procedure, fine the cartelists and end the cartel using a joint dominance excessive price theory of harm that requires little else than establishing joint dominance and an excessive price.

Besides the negative welfare effects of possible type I errors in enforcing "real" excessive price cases, using excessive price cases as a shortcut to weaken procedural and substantive requirements in other areas

220 There is some inherent tension though between exclusionary pricing and exploitative prices as the former may exceed the economically rational profit maximizing price that would obtain under exploitation. In a vertical foreclosure case for example one will observe exploitative prices downstream that are based on exclusionary prices upstream.

221 This may also be a way of interpreting the unfair pricing provision in Article 102 TFEU and some of the other legal texts. Although it would probably be deemed inconsistent with existing case law, it would pay tribute to the argument that Article 102 TFEU originally aimed at exploitative abuse. After all, discussing the requirements for demonstrating an abuse is different from the actual label used for the abuse in the end. In light of the fact that all exclusionary abuses entail exploitation, often in the form of higher prices, does, however, not render such a relabeling attractive.

222 Both excessive price cases and joint dominance cases are probably among the most difficult cases to conduct properly. There is for example only limited prior case law on joint dominance and it is therefore far from being a mechanistic exercise. Nevertheless, it is exactly that paucity of clearly established methods and sound approaches that will render them attractive to inexperienced authorities. The relative vagueness allows a very cursory treatment that could boil down to little more than establishing that prices are neither purely cost based nor significantly different between firms – clearly unsatisfactory evidence to find an excessive price abuse and joint dominance.

of competition law and therefore substantially increase the probability of type I errors in these areas is a real problems that excessive price provisions can entail in the hands of inexperienced authorities and courts. The high procedural and substantive requirements foreseen for example in cartel cases are deliberately imposed by the legislature and the courts to strike an appropriate balance between the negative economic consequences associated with over-enforcement and the negative economic consequences of under-enforcement.[223] Ultimately shortcuts are undermining the rule of law.

7.3.2. Joint dominance and tacit or explicit collusion

If a cartel case should not be construed as joint dominance excessive price case, as argued above, the question arises whether excessive price cases based on joint dominance may not be capable of catching tacit collusion.

While the enforcement of tacit collusion could be considered an enforcement gap, there are good reasons not to pursue such an approach either. As long as there is no possibility of clearly distinguishing between tacit collusion and (seemingly tacit) explicit collusion in those cases where insufficient evidence to prosecute the alleged cartel is found, such cases only have the potential to exacerbate the problem of shortcuts discussed above.

Another, possibly more realistic theory of harm involving joint dominance that may, however, better be caught as anti-competitive agreements are excessive prices charged by patent pools and collecting societies.

8. Remedies, fines, disgorgement and private damage claims

8.1. Remedies

The design of appropriate and effective remedies is a challenge in all competition cases.[224] The task is particularly difficult in excessive price cases.[225] Ongoing price or profitability regulation is difficult and problematic while finding effective alternative behavioural or structural remedies may be equally challenging.

Given the differences in basic approach, timing and frequency of intervention mentioned in section 3, it should come as no surprise that competition authorities and sector regulators display important differences in their approach to remedies.[226]

8.1.1. Price and profitability caps

Since the unlawful conduct concerns the setting of price, the seemingly obvious measure to remedy an excessive price is a price (or corresponding profitability) cap. Similarly to most behavioural remedies, price or rate of return regulation will typically require ongoing monitoring and possibly adjustment and may therefore not be an appropriate choice for a competition authority seeking a one shot remedy.

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223 This is of course a simplification that ignores issues such as basic procedural rights.

224 On remedies and sanctions in abuse of dominance cases see generally OECD (2006b).

225 As noted by Blumenthal (2008:580) a "remedy that entails ongoing regulation of prices and profits by courts or competition authorities is almost certain to fail".

226 Forrester (2008:566ff) discusses a number of EU exclusionary and exploitative cases where pricing remedies have been employed.

However, it may be possible to devise more general rules that may be self-enforcing, for example if they can be designed in a way that would allow the supervision by costumers for example.[227]

Assuming that it is possible to identify a certain price level above which prices become excessive, a behavioural remedy could be designed that obliges the infringing firm not to offer its products above that price. However, there are certain problems associated with this type of remedy. Firstly, it is difficult to determine in practice above what price level a price becomes excessive. As discussed in section 6, the methodologies available to determine whether a price is excessive or not are all fraught with difficulties and even if a method does seem to yield clear results in detecting whether prices are excessive (for example if they are substantially in excess of any measure of cost), it is harder to determine precisely what the right price level ought to be.

Secondly, imposing a *static* pricing remedy is appropriate only as long as the market conditions (such as costs, number of firms, demand) do not change substantially. If any of these parameters change, it is necessary to adjust the price cap. For example, if costs rise, the initial price level that was deemed excessive at the time of the decision may become unproblematic.[228] In that case, the maximum price level would require an upward adjustment in order to avoid the types of negative effects discussed. Conversely, if costs fall, the initial maximum price level may have to be adjusted downwards.[229] While the dominant firm is of course free to pass on the decline in costs to consumers even without a reduction in the level of the price cap it is unlikely to do so. As a matter of fact, an analysis of whether the remedy should be adjusted or not can be almost as demanding in terms of resources as establishing the actual infringement. In that sense changes in costs may even be relatively simple to take into account compared to temporary or permanent shifts in demand for example.

Another related problem with respect to simple static pricing remedies is the possibility to circumvent them. Since only one dimension of competition is regulated, a dominant firm can adopt a strategy where it adheres to the remedy but changes its conduct with respect to other dimensions of competition, which in the end can have an equivalent effect to the one deemed unlawful. This is a familiar problem from regulation: price-capped firms have an incentive to reduce quality. Quality can be hard to measure, and reductions in quality are a strategy that will allow the firm to increase the quality-adjusted price without violating the letter of a price cap remedy. As the dominant firm will typically not find it difficult to justify such adjustments evoking all sorts of seemingly benign reasons, the result is that it might be very difficult for the competition authority to prove non-compliance with the remedy.

An alternative but even more questionable[230] remedy is a dynamic pricing remedy that has some level of built-in flexible adjustment of the price cap. For example, the maximum price level could be automatically adjusted for changes in costs. Any upward movement of costs would then lead to a higher maximum price level and a downward movement would lead to a lower maximum price. Apart from the practical difficulty that there could be constant dispute between the dominant firm and the competition

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227 The suggestion that pricing rules may alleviate the ongoing supervision problem is suggested in Paulis (2007:517).

228 This of course tends to result in gold-plating as previously discussed but may nevertheless be a necessary legal consequence depending on the test used to establish the abuse.

229 While one may argue that this may punish firms that decrease their cost, it may follow from the test used to establish that prices are excessive to begin with.

230 The dynamic approach in fact bears the same problems as the static one except that everything is done in advance and the chances for the company to circumvent or manipulate the remedy are higher.

authority whether costs have actually changed or not,[231] it should also be noted that this kind of adjustment ignores shifts in demand. If demand shifts outwards without a corresponding change in the cost function, the firm would not be able to increase its prices.[232]

A similar remedy to a dynamic pricing remedy would be the imposition of a rate of return or profitability remedy. The incumbent could be obliged to adjust its prices in such a way that it does not exceed a certain rate of return on investment or on capital employed. In that case, the firm would have to lower its price if costs go down and the virtual cap would increase if costs go up.

There are, however, several problems associated with rate of return regulation. Firstly, not only changes in costs but also changes in demand have an influence on the rate of return. In that case, the dominant firm would have to adjust prices in order to maintain the set rate of return. This adjustment may, however, be suboptimal from both, the business perspective of the firm and a welfare perspective. As regulators have increasingly realised, rate of return remedies can lead to perverse incentives. There is no incentive for efficiency. Since the firm is allowed to realise a certain return on investment, it may find it rational to inefficiently over-invest in capital. Apart from productive inefficiencies that are created by such a strategy, this may, if these investments allow the company to decrease its costs in the long run, even lead to increased market power as entry becomes even more difficult.

As with price regulation, it is difficult to determine the "right" rate of return, and regulation at levels too high or too low would cause problems. It should also be noted that rate of return regulation can lead to distortions in the allocation of capital if financial markets perceive the imposed rate of return to be too low compared to the risk-adjusted expected return on capital. In that case, the incumbent may find it difficult to raise capital to make further necessary investments. Finally, the imposition of rate of return remedies suffers from the potential problem that interventions on the basis of excessive prices have in general, namely that firms anticipate that successful investments may increase the risk of coming under rate of return regulation *ex-post* resulting in dynamic inefficiencies. In that case, the incentives to invest *ex-ante* are artificially reduced and under-investment is likely to result.[233]

Another approach to price or rate of return regulation by a competition authority may be to start off by a relatively light handed price or rate of return requirement combined with a heavy handed information gathering order. This would address the information concern in two ways. First, the light handed price regulation will be less likely to cause harm and second, in case of a repeated offense, the authority could base a new decision on a solid factual background.

The difficulties mentioned in particular in a competition law context have been recognized by US courts very early on:

> *"..the subject of what is a reasonable rate is attended with great uncertainty…[E]ven after the standard should be determined there is such an indefinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge sooner than hazard the great expense in time and money necessary to prove the fact… To*

231 As discussed in section 6, accounting provisions allow firms a wide margin of discretion with respect to the ways they allocate costs. Especially where certain services or goods are acquired from another line-of-business within the same undertaking, transfer pricing offers firms many possibilities to legally "manipulate" costs.

232 As discussed in section 2, these effects crucially hinge on the type of production function.

233 This argument was for instance made by RBB (2002:2f.) in the context of the UK Napp case. See also ERG (2004:90).

> *say, therefore, that the Act excludes agreements which are not in unreasonable restraint of trade… is substantially to leave the question of unreasonableness to the companies themselves."*[234]

The consensus in the literature appears to be that alternative remedies to price or rate of return regulation are more in line with the general philosophy of competition law, and that trying to mimic competitive outcomes directly via price or rate of return regulation is inferior to structural or informational behavioural remedies capable of unleashing competitive forces in disciplining the market.

8.1.2. Other behavioural remedies

Another approach to remedies in excessive price cases is to focus on the demand side of the infringement – by reducing entry barriers created by the behaviour of potential customers.[235] These include:

- Difficulty of collecting information on the existence of substitutes (customers find it costly to shop around and learn about alternatives)
- Lack of comparable information across suppliers (difficult and costly to compare products or services across suppliers)
- High switching costs (difficult and costly to switch supplier)[236]
- Asymmetric information between customers and firms (product characteristics are not fully observable increasing the role of past experience with the supplier or supplier reputation)

Any remedy capable of addressing these factors increases competition in the market and may also render entry more attractive.[237] Nevertheless, as is clear when considering the monopoly case, in order for such remedies to work, they rely on a minimum of alternative products to be available, something that may in fact not be the case in the more severe potential excessive prices cases.

8.1.3. Structural remedies

Structural remedies have been advocated by a wide range of authors. This finding is related to the more general view that it is better to address causes than symptoms.[238] As in all competition cases, it is

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234 United States vs. Trans-Missouri Freight Assn., 166 U.S. 290 (1897) cited after Gal (2004:352).

235 A detailed and enthusiastic discussion of such remedies can be found in Fletcher and Jardine (2008:542ff.) They also provide a listing of possible measures capable of addressing the demand side factors identified below.

236 When switching costs are high, these could be reduced, for example by obliging the dominant firm to provide information and prices on alternative suppliers or products. Information remedies were, for example, used in the EU Microsoft case and also the UK store cards case.

237 This approach has also been proposed for sector specific regulators, even in monopoly cases. Forrester (2008:552) argues that "the regulator could compel the monopolist (or holder of significant market power) to practice a policy of *transparency of terms, conditions and pricing*; or a policy of *non-discrimination in respect of commercial terms and conditions offered*; or to apply *separation of cost accounting rules* which accurately reveal the weighting of the various cost elements collectively exploited, thereby facilitating a transparent evaluation of specific cost elements and pricing strategies".

238 Similarly Siragusa (2008:644f) who rightfully emphasizes the need to go to the root of the problem and employ structural remedies. His discussion of excessive network access prices are, however, constructive

important not to confuse the abuse with the remedy and tackling the problem at its source instead of regulating price will always be preferable. According to Siragusa:

> *"If all of the conditions are indeed met for excessive prices to be considered an abuse, .. I would then argue that the firm should not simply be met with merely an order to return to 'normal' pricing, with all the difficulties of determining whatever that may be. As has been a long-standing policy in merger cases, the use of structural remedies should be the preferred option for uprooting the problem of excessive pricing under antitrust law."*[239]

In particular in some of the sectors likely to pass at least a subset of the proposed screens discussed in section 4, such as former state owned enterprises, structural remedies will be very much in tune with liberalization and de-regulation efforts as they are based on the "spirit of increasing the role of free markets".[240]

Structural remedies to address excessive prices can take two different forms. A horizontal break-up may allow the newly created firms to compete with each other. In contrast, structural remedies could be employed to lower barriers to entry for instance by the separation and subsequent break-up of the crucial bottleneck part of the firm that precluded entry. Vertically restructuring the market, separating the key stages of production with scale economies from the rest and allowing substantial parts of the company to function under competition may also lead to reduced prices.[241] In such a scenario, only the stages of production exhibiting scale economies, for example core network infrastructure (essential facility) would require price regulation. This will of course apply in particular to former government monopolies. Thinking of ways to facilitate entry that ideally attracts a financially well-endowed maverick firm, possibly with a track record in a similar product or neighbouring market (implying knowledge and experience) may be another solution that could be induced by a structural remedy.

A general difficulty with divestiture is that there is no clear direct relationship between market share and prices and hence it is not clear what level of assets should be transferred to competitors to achieve the desired downward effect on prices. Generally speaking it may also be difficult to conceive of a market that passes at least some of the screens discussed above where the economies of scale would not be such as to render a long term successful horizontal break-up difficult. As a result it may be more promising to focus on structural remedies capable of lowering entry barriers.

While the views of the South African Tribunal in the Mittal case (see Annex 1) were subsequently rejected, they suggest that competition authorities should not try to price regulate but to use instruments from their standard remedy toolbox:

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refusal to deal cases rather than excessive price cases. Going to the root of the problem may be much more difficult when dealing with "real" excessive price cases. On the possibilities of abuse shopping and framing cases as excessive price cases see section 7 above.

239 Siragusa (2008:645). According to Siragusa the choice of structural remedies would also be consistent with the respective roles of sector-specific regulators and competition authorities. It should be noted that in some jurisdictions there may be proportionality concerns when imposing such remedies in excessive price cases.

240 Siragusa (2008:648).

241 See OECD (2011b). See also the recent EU energy cases such as E.ON discussed in Hellström et al. (2009) or ENI discussed in Maier-Rigaud et al. (2011).

> *"If excessive pricing is to be identified and remedied by a competition authority rather than a duly empowered and appropriately resourced price regulator, then it must do so by recourse to its standard approaches and instruments"*[242]

It is in the nature of pure exploitative abuses that clear cut structural remedies, outside of those sectors that would traditionally be subjected to some form of regulation, will be difficult to devise.

8.2. Division of tasks

As competition authorities have been deemed to be ill-equipped for specific price regulation on the one hand and sector regulators have been considered too focussed on narrow details and not enough on the broader, more general aim of achieving effective competition in the sector[243] on the other, a combination of both authorities may allow addressing these respective drawbacks.[244]

One possible division of tasks is for a competition authority to decide on whether an infringement has been committed, then to hand over to a regulator the design, implementation, monitoring and adjustment of the remedy. In fact there exists at least one instance of a hybrid case involving both, a regulator and a competition authority.[245] While it may not be the best of all possible worlds as there are also costs of setting up the co-operation and co-ordinating the work, there may be instances where the respective specialisation of the different types of authorities can be successfully combined. This would imply that the competition authority, possibly already in close co-operation with a regulator, decides whether a particular intervention is warranted or not. Once this is decided positively, the design of the remedy itself and the ongoing monitoring of the remedy and possible adjustments[246] to it over time could be addressed by the regulator in consultation with the competition authority.[247]

In addition, in particular in light of the intricate relation between excessive prices as an antitrust and as a regulatory offense, there may be a substantial role for competition advocacy as remedy. Competition authorities may consider advocating in favour of a regulatory solution or a strengthening of the regulatory authority rather than to intervene on the basis of antitrust. As this often pre-supposes some knowledge of the feasibility of such proposals, a co-operative approach seems to be a warranted basis, allowing possibly

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242 The summary is due to Lewis (2009:587).

243 See Forrester (2008:574) and more generally section 3 above.

244 As previously discussed, there exits regulators with competition mandate and also competition authorities with regulatory functions where such co-operation may be particularly easy.

245 See the NMa decision of 25 March 2009, Case 6424/427 Ziekenhuis Walcheren – Oosterscheldeziekenhuizen, http://www.nma.nl/images/6424BCV22-154011.pdf. While this case may raise different issues and the remedies may not have been preferable to a prohibition as it concerns a hospital merger where the imposed price supervision remedy was delegated to the Dutch Healthcare Authority (NZa), it demonstrates that co-operation between regulators and competition authorities on a case level is possible. See Canoy and Sauter (2010) for a critical discussion of the case and also the accompanying paper by Misja Mikkers and Wolf Sauter for details on the co-operation between the authorities.

246 There may be legal limitations of implementing "dynamic" remedies, i.e. remedies that are conditional on company internal or external parameters.

247 As argued by Werden (2009:661), however, to avoid being in the role of a regulator it is not enough to reject regulatory remedies or delegate the supervision and design to a regulator, as already the determination of whether prices are excessive can require the development of special expertise.

also the withdrawal of the competition authority at a later stage if a formal division of tasks turns out to be less desirable.[248]

8.3. Fines, disgorgement and private damage claims

Some authors have argued that fines should not be imposed and also that private damage claims should not be permitted in excessive price cases.[249] The reasons for this proposal are the possible negative *ex ante* incentive effects of any expected *ex post* transfer from the firm for excessive price abuses that would add to the negative repercussions on investment incentives if prices are capped.[250] However, the advantage of imposing fines instead of a behavioural or structural remedy in these cases is that it may eliminate the need for a bright line test between what is an abusive and what is not an abusive price.[251]

In many countries, in addition to fines and behavioural and structural remedies, the enforcement of competition law is significantly supplemented by private actions. Even though regulators often take great care in involving third parties in their decision making, there is typically no equivalent possibility for private action in the regulatory context. To the extent that actions by the competition authority in the area of excessive prices are considered regulatory actions, there is some basis for arguing that this would then also warrant the exclusion of private actions in this area generally or at least for those cases that do not follow in the wake of enforcement actions by the authority. Besides being in line with a regulatory approach to excessive prices, this would have the additional advantage that the competition authority would have to be less concerned about the use of screens that would, as previously discussed, effectively only bind the authority (see section 4.5).[252]

While these arguments against the imposition of fines, in particular concerning the negative *ex ante* effects of expected sanctions, are plausible and imply that especially first time offenders should not be fined, they do not apply equally to disgorgement and private damage claims. The reasons are due to the fact that fines must be substantially larger than the illicit gains as they are otherwise not deterrent. The potential negative effects on investment incentives are therefore substantial. Disgorgement and damages will be the same order of magnitude as illicit gains even if the former are by definition larger than the latter. As a result, disgorgement and private damage claims have a substantially lower deterrent effect in contrast to fines and as long as private damage claims simply compensate the victims of the abuse for the damage suffered they seem difficult to deny.[253] So while the imposition of fines may be debated in particular for first time offenders, damages and disgorgement appear fully justified. In particular

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248 The UK Competition Commission's market investigation regime allow for two types of approaches: Advice to government and regulators and standard remedies imposed on companies.

249 See, however, Elhauge (2009a:513) arguing that private actions may be insufficient for disgorgement so that "another natural remedy" in excessive price cases (if restricted to gap cases) might be to "force the firm to disgorge the price excesses it earned because of its anticompetitive conduct".

250 See Fletcher and Jardine (2008:537) who argue that fines and private damage claims both strengthen "firms` incentives to abide by competition law" and that by "limiting available sanctions, firms are likely to be less concerned about breaching excessive pricing rules, and as such the associated distortions across the economy should be greatly reduced." It seems somewhat paradoxical to advocate a competition rule and at the same time hope for limited compliance.

251 Gal (2004:374).

252 An important caveat here is that if it is possible to make policy changes that indeed would preclude the filing of private damage actions, it would certainly also be possible to formalize the use of screens in the competition law.

253 In fact denying compensation to those that suffered harm is somewhat in contradiction to the finding of an abuse to begin with.

disgorgement may be an appropriate remedy in those jurisdictions where private damage claims are unlikely to exhaust the illicit gains of the infringing firm.

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ANNEX 1: THE SOUTH AFRICAN MITTAL STEEL CASE

1. Facts of the case

In 2007, the South African Competition Tribunal found that *Mittal Steel* abused its dominant position by charging excessive prices in the domestic market for flat steel products to the detriment of consumers.[1] At the time, the company's supply of steel exceeded the national demand, and as a result, part of its production was exported. To optimise its export activities, the company chose to merchandise its steel in the international steel market through a special joint venture, Macsteel International, owned jointly by the company itself and Macsteel Holdings. The joint venture purchased flat steel products from Mittal on the condition that it would not be resold in the domestic market. In return, the export price of Mittal steel was set at a lower level than the domestic price.

Although in May 2009 the appeal before the Competition Appeal Court was upheld, the case was remitted to the Tribunal, and subsequently settled by the parties, the reasoning presented by the Court is very informative as it lays down the legal test that is to be applied in determining whether a given price is excessive. The case, moreover, is interesting, as the Tribunal, whose judgement was set aside, sought to determine whether price charged by Mittal was excessive without examining the company's costs, pricing structure and without carrying out any price comparison despite the fact that extensive evidence was available.[2] Lastly, it is interesting to note that while the case effectively deals with allegations of excessive prices, the Tribunal refused to declare that Mittal's practice of employing import parity pricing (IPP) constituted the charging of excessive prices. Instead, the Tribunal held that the abuse of a dominant position resulted from the practice of reducing the supply of flat steel on the domestic market through the imposition of a resale prohibition. The Appeal Court explained that in the absence of a finding that the price in question was excessive, the Tribunal would not have been in the position to grant any relief under section 8(a). It is therefore to be understood that the Tribunal's decision characterised the practice of supply reduction by Mittal through the imposition of resale conditions as the charging of an excessive price.[3]

2. Legal test

Under Section 8(a) of the South African Competition Act a dominant firm is prohibited from charging an "excessive price to the detriment of consumers". Excessive prices are defined in Section 1(1)(ix) of the South African Competition Act as "a price for a good or service which (aa) bears no reasonable relation to the economic value of that good or service, and (bb) is higher than the value referred to in subparagraph (aa)".

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1 Mittal Steel South Africa Ltd & Macsteel International BV & Macsteel Holdings (pty) Ltd vs. Harmony Gold Mining Company Ltd & Durban Rooderpoort Deep Ltd, Case No. 70/CAC/Apr07, available at: http://www.comptrib.co.za/assets/Uploads/Case-Documents/70CACApr07.pdf. The complaint was lodged in 2002 by Harmony Gold Mining Company Limited and Durban Roodepoort Deep Limited, two gold mining companies which acquire a variety of flat steel products from Mittal Steel.

2 For a more detailed overview of the case see Mackenzie and Langbridge (2010).

3 Competition Appeal Court judgement [2009], para. 8.

In its decision the Tribunal approached the prices in question by applying a two-stage test, where the first leg of the test dealt with market structure, while the second with a specific type of conduct. In the Tribunal's view, section 8(a) can only apply where "the structure of the market in question enables those who participate in it to charge excessive prices".[4] This "structural test" in the Tribunal's view requires not just "mere", but rather "super-dominance", approximating a 100% market share. In such a market, moreover, there should be no "realistic prospect of entry". In other words, the power to charge excessive prices according to the Tribunal requires that the market "be both uncontested and incontestable".[5] Once, the requisite of super-dominance has been fulfilled, the authority must establish whether a given firm has actually engaged in conduct designed to take advantage of such structural market features. This, in turn, would require the Tribunal to examine available evidence. The Tribunal, however, emphasized that it

> *"will not approach this enquiry by considering that evidence relating to actual price levels which effectively requires us, first, to identify a particular level as unlawful ('excessive') and then to impose a level of price that would be lawful ('non-excessive'). This, we stress, is an approach consistent with the practice of price regulation – it is not commonly found in the principles and practice of competition law and economics."*[6]

By referring to Section 8(d)(iv) of the Act, which explicitly identifies marginal or average variable cost as the cost measurement applicable to the evaluation of predation, The Tribunal further explained that, in its view, Section 8(a) does not refer to the relationship between an excessive price and cost, but rather between price and economic value.[7] The concept of "economic value", however, "has no intrinsic, quantifiable meaning", and as the term "'reasonableness' is also a product of context, and that context is competition".[8] Referring to Evans and Padilla, the Tribunal stated that the price will bear a reasonable relationship to the economic value of the good in question if it is determined by "cognisable competition considerations". In the absence of such considerations, *a contrario*, price will be deemed excessive as "it will not have been determined by the free interaction of demand and supply in a competitive market".[9]

The Competition Appeal Court, however, did not agree with the reasoning of the Tribunal and held that it does not find any support in the Act.[10] According to the Court, the determination of excessive prices requires: (1) the determination of the actual price of the good or service in question, (2) the determination of the "economic value" of the good or service in monetary terms, (3) if the actual price is higher than the economic value, whether the difference is unreasonable, and (4) a detriment to the consumers.[11] The concept of "economic value", as interpreted by the Court refers to "the notional price of the good or service under assumed conditions of long-run competitive equilibrium",[12] and as such it cannot be linked to the

4 Tribunal decision, para. 83.

5 Tribunal decision, para. 96.

6 Tribunal decisión, para. 134. Also, in other part of its decision, the Tribunal pointed out that "We eschew the role of price regulator, and so the vast quantum of the evidence and much of the argument submitted to us is simply irrelevant", para. 81.

7 Tribunal decision, para. 146.

8 Tribunal decision, para. 144.

9 Tribunal decision, para. 147.

10 Competition Appeal Court judgement [2009], para. 32

11 Ibid.

12 Competition Appeal Court judgement [2009], para. 40.

specific circumstances of an individual firm.[13] The firm's individual cost structure, however, becomes relevant when the price charged exceeds the economic value, and it is necessary to determine whether the relation between the two values is unreasonable.[14]

13 Competition Appeal Court judgement [2009], para. 43: "[…], in determining the economic value of a good or service, the cost savings to the firm resulting from the subsidised loan or the lower than market rental – or indeed any other special advantage, current or historical, that serves to reduce the particular firm's costs below the notional competitive norm should be disregarded".

14 Ibid, "It would seem sound, when considering whether the higher price bears a reasonable relation to economic value or not, to take into account the benefits flowing to the firm from the subsidised loan, long-term low rental, or other special advantage which may serve to reduce its own long-run average costs below the notional norm".

ANNEX 2: THE KOREAN CREDIT CARD CASE

1. Facts of the case

From the fourth quarter of 1997 to the third quarter of 2000, BC Card Company (with its 12 member banks), LG Capital Company and Samsung Card Company steadily increased their cash advance interest rate, their installment interest rate and the customer default penalty rate. These increases were accompanied with steady decreases in their respective financing and other supply costs.[1]

Their interest rates, financing costs and other supply costs for the period were as follows:

Table 1: BC Card Co.(with its 12 member banks)(%)

	January 1997	February in 1998	3/4 quarter in 2000
Cash advance interest rate	20.3	22.9	23.5
Installment interest rate	12~14.5	15~19	13.5~18
Overdue payment penalty rate	23	27~28	13.5~18
Financing rate(average) (Proportion of overdue payments) (Customer defaults rate)	9.0~12.37 (14.1~30.53) (0.52~7.60)	9.0~12.75 (12.6~24.1) (0.14~12.5)	7.0~9.25 (4.5~8.6) (0.36~2.8)

Table 2: LG Capital Co. (%)

	4/4 quarter in 1997	1/4 quarter in 1998	4/4 quarter in 2000
Cash advance interest rate	24.9	29.9	28.1
Installment interest rate	12~15	16~19	14.5~19
Overdue payment penalty rate	25	35	29
Financing rate(average) (Proportion of overdue payments) (Customer defaults rate)	12.1 (19.6) (1.1)	12.6 (22.3) (1.0)	9.4 (5.0) (2.6)

[1] See KFTC decision no. 2001-40, 28/3/2001.

Table 3: Samsung Card Co. (%)

	4/4 quarter in 1997	1/4 quarter in 1998	3/4 quarter in 2000
Cash advance interest rate	24.48	29.47	28.16
Installment interest rate	12~15	16~19	14.5~19
Overdue payment penalty rate	25.0	35.0	29.0
Financing rate(average)	12.44	15.18	9.82
(Proportion of overdue payments)	(22.5)	(26.46)	(3.61)
(Customer defaults rate)	(2.9)	(3.6)	(1.7)

2. Market structure and governmental regulation

Although multiple credit companies operated in Korea in the late 1990ies, the Korean credit card service market exhibited an oligopolistic structure with the three largest firms mentioned above combining a market share of 70.8% and the seven largest companies combining a market share of 93.6%.

As government approval is a legal prerequisite for entering the credit card service market, the oligopolistic market structure was considered to be the outcome of government interventions. In fact, there had been no entry for more than 6 years since 1995.

In the time period under consideration, Asian economies including the Korean economy were hit by the financial crisis requiring most banks to recapitalize or reduce loans. As the substitutability between bank loans and cash advances and other financial services by credit companies were found to be low, the demand elasticity of credit card based financial services were lower than before.

3. Legal test

The companies' financing costs decreased significantly during the period and the proportion of overdue payments and customer default rates that influence supply costs also decreased. Despite these cost reductions, the three companies increased the cash advance interest rates significantly and maintained or decreased installment interest rates or overdue payments rates at a lower rate than the decreases in their financing and other supply costs.

4. Outcome

By administrative order the three companies were forced to readjusted their rates on the basis of a reasonable assessment of the changes in financing costs, proportions of overdue payments and customer default rates during relevant periods. Administrative fines (surcharges) were imposed.

ANNEX 3: THE EU PORT OF HELSINGBORG CASES

1. Facts of the case

In July 2004, the Commission adopted two decisions rejecting parallel complaints of Scandlines Sverige[1] and Sundbusserne AS,[2] ferry operators providing services on the Helsingborg-Elsinore route (HH route) between Sweden and Denmark. Both companies claimed that Helsingborgs Hamn AB (HHAB) charged discriminatory and excessive port fees for services provided to ferry operators operating the HH-route, and that such pricing resulted from HHAB's consideration of the port as a whole, single operational and economic unit.

In the process of examining whether the submitted allegations were well-founded the Commission carried out a systematic analysis of the analytical framework set out by the ECJ in *United Brands*, and in particular provided some clarification of the concept of the 'economic value' of a service or product. Scandlines lodged an appeal before the General Court claiming that "HHAB has been making returns, on its ferry business, of over 100% the value of the equity employed in this business".[3]

2. Legal test

To assess whether the port charges were unfair, the Commission embraced the test laid down by the ECJ in para. 252 of the *United Brands* judgement. First, the Commission had to determine the costs actually incurred by HHAB and compare them with the prices actually charged to establish whether the difference between the two values was excessive, and second, if it was, to determine whether the prices were unfair in themselves or when compared to other prices.

The Commission found that HHAB's revenues derived from the ferry operations "would seem to exceed the costs actually incurred".[4] To reach this conclusion the Commission first had to determine which costs were to be allocated to ferry operations. As the ECJ pointed out in *United Brands*, cost allocation may involve "considerable and at times very great difficulties […] which may sometimes include a discretionary apportionment of indirect costs and general expenditure […]". In the case at hand, the Commission had to engage in such a complex exercise, as the information provided by the HHAB was in the Commission's view unrealistic.[5]

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1 Case No Comp/A.36.586/D3 *Scandlines Sverige v Port of Helsingborg*, Commission decision of 23 July 2004 rejecting the complaint of Scandlines Sverige, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/36568/36568_44_4.pdf

2 Available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/36570/36570_39_5.pdf

3 Case T-399/04, *Scandlines Sverige v Commission*, not decided yet.

4 *Scandlines Sverige v Port of Helsingborg,* para. 139.

5 The Commission considered that the allocation of costs presented by HHAB could not be realistic and reflect the level of costs actually incurred since it would imply that the company was actually facing bankruptcy, which according to the audited financial reports was not the case. *Scandlines Sverige v Port of Helsingborg,* para. 108

In the absence of reliable information on the actual cost allocation, the Commission could only make an approximate cost allocation. This task was further complicated by the fact that most of the costs were fixed and had to be treated as common or distributed costs.[6] On the basis of its analysis the Commission concluded that the revenues obtained seemed to exceed the costs actually incurred, but that this in itself was not sufficient to conclude that the difference was excessive. It was therefore necessary to carry out the second step of the *United Brand* test and determine whether the price in question was unfair either in itself or when compared to the price of other competing products. To that end, the Commission compared prices in question to (i) prices charged to other port users (i.e. cargo vessels), (ii) prices charged by the port of Elsinore, and (iii) port fees charged in other ports. The Commission pointed out that "a comparison of the prices must be made on a consistent basis", implying that (i) the products/services provided must be comparable, and (ii) the charging systems must allow a meaningful comparison.[7] However, in the present case, such comparisons were not conceivable because (i) most of the services provided to the different categories of port users differed considerably, (ii) the cost structure of the port of Helsingborg and Elsinore were different, and (iii) charging systems in use at each port were different. Despite these difficulties, the Commission nonetheless carried out comparisons, which led it to the conclusion that there was insufficient evidence to support the claim that port fees charged by HHAB were unfair.

3. Economic value

Focal to the Commission's analysis of the allegedly excessive nature of the port charges was the relation those charges bore to the economic value of the product. The Commission pointed out that the ECJ had not provided further guidance on how "economic value" of the provided product/services shall be calculated. According to the complainant, the economic value should be determined by adding to the cost incurred in the provision of a service, a reasonable profit accounting for a percentage of the production costs. Consequently "any price exceeding the so-determined economic value […] should then be found unfair".[8] While the Commission acknowledged that "the question whether a price is unfair may be assessed within a cost-plus framework",[9] it has nonetheless rejected the complainant's view and held that determination of the economic value must be undertaken on a case-by-case basis and shall take into account other non-cost related, in particular demand-side, factors.[10] Having analysed the relevance of very high sunk costs, opportunity costs, but most importantly an intangible value represented by the excellent location of the Helsingborg port, the Commission concluded that on the basis of the collected evidence it was not possible to determine that port charges had "no reasonable relation to the economic value" of the services and facilities provided by HHAB to the ferry operators.

4. Conclusions: outcome

While the two-pronged legal test to be used to determine whether prices are excessive was established by the ECJ in the *United Brands* case, the concept of "economic value" and in particular the second leg of the test lacked clarification. In both decisions, having considered that the main question at stake was whether the price bore a reasonable relation to the economic value of the service, the Commission provided

6 *Scandlines Sverige v Port of Helsingborg*, para. 118.

7 *Scandlines Sverige v Port of Helsingborg*, para. 175.

8 *Scandlines Sverige v Port of Helsingborg*, para. 219.

9 *Scandlines Sverige v Port of Helsingborg*, para. 221.

10 The Commission explained in para. 227 of the decision that: "The demand-side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However, it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service".

guidance as to how an “economic value” of a product or service should be determined and in particular that demand-side factors may be taken into consideration.

ANNEX 4: THE EU UNITED BRANDS CASE

1. Facts of the case

In December 1975, the Commission issued a decision finding that United Brands Company (UBC), the largest importer of bananas, who supplied Europe through two main ports – Bremerhaven and Rotterdam, applied various trading and pricing conditions, which fell afoul of Article 102 TFEU (ex. Art. 82 EC). Although the Court of Justice of the European Union (ECJ), annulled[1] the decision in the part concerning excessive prices having found that the Commission's economic analysis was flawed and incomplete, it nonetheless acknowledged that "*..charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied..*"[2] can constitute an abuse. *United Brands* has over time become one of the leading and most frequently cited cases in the EU on excessive prices.

The Commission found that United Brands had a dominant position in the relevant market which comprised Belgium, Luxembourg, Denmark, Germany, Ireland and the Netherlands, and that it had violated Article 102 TFEU by (1) preventing its distributors/ripeners from reselling its bananas while still green, (2) charging dissimilar prices for equivalent transaction, (3) imposing unfair, (excessive) prices on its customers, and (4) refusing to supply its bananas to Olesen, one of its customers who also sold bananas from competing brands.[3] UBC appealed the decision before the ECJ challenging the product and geographic market definition and the finding of dominance. It further claimed that it had not charged discriminatory and excessive prices, while its other trading conditions and its refusal to supply were objectively justified. The ECJ upheld the Commission's decision on all grounds except excessive prices, where it found that the Commission had failed to apply appropriate reasoning and analysis. The fine was reduced from 1 million to 850,000 ecus.[4]

2. The Commission's reasoning on the imposition of unfair prices

In its assessment of excessive prices the Commission looked at price differentials between: branded and unbranded bananas (20-40%), bananas supplied by UBS and those supplied by its competitors (around 7%), and lastly price differentials between EU Member States forming part of the relevant market (15-100%), to which it gave most weight. Having found that the lowest prices were charged for bananas that were to be sold in Ireland, but without analysing UBC's cost structure, the Commission concluded that prices charged to Irish customers were representative, while those charged outside Ireland were excessive as they produced 'a substantial and excessive profit in relation to the economic value of the product

1 Case 27/76, United Brands Company and United Brands Continentaal BV v Commission [1978] ECR 207, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0027:EN:HTML

2 Ibid, para. 250.

3 Commission Decision of 17 December 1975 relating to a proceeding under Article 86 of the EEC Treaty (IV/26699 – *Chiquita*), 76/353/EEC, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976D0353:EN:HTML

4 The abbreviation ecu is short for european currency unit, an internal accounting unit used by EU Member States between March 1979 and January 1999 when it was replaced by the Euro (EUR) at parity.

supplied'.[5] In the Commission's view, it was 'the policy of partitioning the relevant market' that allowed UBC to charge excessive prices.[6] In addition to imposing a fine of 1 million ecus, the Commission required United Brands to end the identified infringements without delay. Required to give the firm sufficiently clear indications on how the infringement could be terminated, the Commission informed that reduction of prices outside of Ireland by 15% would be sufficient to comply with the decision.[7] However, there is no reasoning in the published decision that would explain how the Commission arrived at the 15% reduction figure.

In its appeal before the ECJ, United Brands disputed the representative nature of the Irish prices on the grounds that the company had actually incurred losses in Ireland. While the Court pointed out that the company's statements were not supported by any accounting documents, it acknowledged that the choice of Ireland as a cost benchmark was open to criticism, especially given that "for nearly 20 years banana prices, in real terms, have not risen on the relevant market".[8] On this last point, it is noteworthy that AG Mayras, whose opinion was, however, not cited by the Court, advised to consider a general proposition that banana prices had actually "dropped compared with what they were ten or twenty years ago".[9] The Advocate General emphasized that to determine whether a given price is unfair, "it is not enough to examine its trend at one particular stage; it is necessary to go further and take into account the trend of costs at the preceding stages". Furthermore, while the decline in retail prices may have been beneficial to consumers, nearly all the profits realised from cost reductions "have maintained if they have not increased the difference between the price paid to the planters and the price charged by United Brands and, have therefore in the end kept up, if they have not augmented, the profits of this undertaking"[10] while the producers/exporters did not gain anything.

3. Legal test

On appeal lodged by UBC, the ECJ refuted the methodology applied by the Commission, and choose instead to use a two-pronged test to determine whether UBC's prices bore *"no reasonable relation to the economic value of the product"*. This, according to the Court, could be done by showing first that the difference between the costs actually incurred and the price actually charged is excessive. If it is, then in the second step it would have to be determined whether a price is unfair in itself or when compared to competing products.[11] The Court also noted that other methodologies could be devised to determine whether prices are unfair. In the case at hand, however, the Commission had clearly failed to prove its case. First, it did not satisfy the first prong of the test as it did not even analyse UBC's cost structure. While the ECJ recognised that in certain circumstances evaluation of production costs is likely to pose considerable difficulties, it pointed out that it was not the case here as "the production costs of the banana

5 Case 27/76, United Brands, para. 239.

6 Case 27/76, United Brands, para. 236.

7 Commission Decision, *Chiquita* [1975], part II.C.

8 Case 27/76, *United Brands*, para. 265.

9 Case 27/76, Opinion of Mr Advocate General Mayras delivered on November 1977, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CC0027:EN:PDF

10 Ibid.

11 Case 27/76, *United Brands*, para. 251: "This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin […]". Para. 252: "The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer" to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products".

do not seem to present any insuperable problems". Second, the difference between prices of UBS and of its competitors, which amounted roughly to 7% could not in any case be considered excessive.

4. Conclusions: outcome

As it turned out the Commission's finding of excessive prices was annulled by the Court since the Commission did not produce sufficient evidence in support of its position. Nonetheless, the judgment of the ECJ in *United Brands* provides the most comprehensive insight into the analytical framework that is to be used by the Court when it comes to the assessment of allegedly excessive prices.

ANNEX 5: THE GERMAN HOUSEHOLD GAS CASE

1. Facts of the case

In March 2008 the Bundeskartellamt opened procedures against 35 gas distribution companies based on Sec. 19 ARC and Sec. 29 ARC (on both, see Box 2 in the main text) for alleged abusively excessive gas prices.[1] By the end of 2008, the Bundeskartellamt successfully concluded the proceedings finding that the prices of 30 of the companies were indeed abusively excessive.

The relevant product market was defined as the market for delivering natural gas to all standard profile customers as defined in the German gas grid directive[2] buying natural gas for their own use. Geographically, the market was found to be regional and identical to the areas of supply in which the companies assume basic supply functions as determined by law. In these regional markets substantial entry barriers were identified. For example, tenants, a substantial part of all households, were often excluded from switching supplier as the responsibility for doing so resides with the owner who has no incentive to change supplier as he can fully pass on the costs to the tenant. In addition, research referred to by the Bundeskartellamt indicated that at the time of the investigation only 14% of gas customers were willing to switch supplier. It further found that, while a certain degree of substitution between gas, electricity, district heating and oil existed, this did not affect the product market definition.

2. The Legal background and methodology used

In investigating the practices of the concerned gas distribution companies, two methodologies based on the comparative market concept were used. The concept of quantity weighted net-revenue comparison was employed to analyze the year 2007 and. revenue figures not yet being available, the Bundeskartellamt – based on the newly introduced Sec. 29(1) ARC – compared quantity weighted tariffs for 2008 .

The Federal Court of Justice had previously found that a comparison of revenues was an appropriate method in line with Sec. 19(4) no. 2 ARC. In this method, a comparision by way of benchmarking is made between the net revenues of sales to the relevant customer group of the company under investigation and those obtained by a comparable company in another geographic market. This approach allows the Bundeskartellamt to determine how the comparable company would have behaved in the market of the alleged infringer.

The comparison of revenues in these specific cases took two separate aspects into account: First of all, each unit of gas sold in 2007 was valued at the price at which it was actually sold. This ensured that any changes in prices were automatically factored in. Second of all, the comparison of revenues allowed the Bundeskartellamt to take all tariffs and special contracts and their respective quantities into account as the revenue results from the price and the quantity sold at that price.

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1 The decisions of all 30 cases can be found at: http://www.bundeskartellamt.de/wDeutsch/archiv/EntschMissbrauchaufsichtArchiv/2008/EntschMissbrauchsaufsichtW3DnavidW2660.php. An English summary of the case can be found in Bundeskartellamt (2008).

2 § 29 Gasnetzzugangsverordnung (of 25. July 2005, BGBl. I S. 2210).

For 2008 the method mentioned explicitly in Section 29 ARC, namely a comparison of tariffs, was used. The major reason for choosing a tariff comparison was that revenue comparisons were not feasible as the corresponding data had not yet been available.

In the tariff comparisons, the tariffs were compared on the basis of 5 consumption patterns considered as typical by the Bundeskartellamt and the regional (Länder) cartel offices. In order to make an appropriate forecast for the year 2008, the prospective gas consumption was calculated (and quantity-weigthed) on the basis of historic monthly temperature dates which then determined the expected amount of gas consumption in a particular month.

Further, the Bundeskartellamt subtracted the grid fees from the quantity weighted tariff (net of taxes) calculated over the 5 typical consumption patterns for 2008 and the revenues for 2007 (net of taxes). Subtracting grid fees was considered justified for two reasons. First of all, the grid fees are determined by a regulator in an *ex ante* procedure so that a reassessment of these fees was considered both unnecessary and undesirable. Second of all, subtracting the grid fees eliminated the structural differences between the concerned company and the benchmark company, ensuring the reliability of the benchmarking exercise.[3] As benchmark, the Bundeskartellamtchose two different municipal utility companies[4], one for each year.

Finally, the Bundeskartellamt determined a substantiality margin to be subtracted from the established differentials, since the jurisprudence of the Federal Court of Justice provides that only appreciable differences in price between the benchmark company and the targeted company can be considered abusive. The level of the substantiality margin was determined, following the jurisprudence of the Federal Court of Justice, on the basis of the intensity of the residual competition in the relevant regional markets. This intensity of residual competition was measured based on the switching rate of customers in the relevant market. Accordingly, in markets with higher levels of competition, the substantiality margin was increased, resulting in a higher intervention threshold. This was also justified as a possibility to account for the inherent tension between interventions in price abuse cases and the negative impact of such interventions on the incentives of potential entrants.[5] According to the decisions, the average switching rate across all gas distribution companies amounted to approximately 1% in 2007 but was significantly higher in certain areas in 2008.

To the benefit of the concerned companies the Bundeskartellamt effectively subtracted this substantiality margin, implying that only revenues or prices that substantially exceed the benchmark company's are to be considered abusive. In the decisions the Bundeskartellamt also mentioned that it had verified that the maximum price or revenue threshold did effectively not lie below the cost of the company.[6] The Bundeskartellamtdistinguished between H and L gas[7] in its decisions and did not accept as cost purchase prices above the average gas prices in the concerned or comparable market areas. The average gas purchase prices of other companies in the market or in comparable markets upstream of the

3 Structural differences are essentially given by the particular grid and gridzone.

4 For 2007 the municipal utility company in Jena-Pößneck and for 2008 the municipal utilities company in Stade.

5 See on this point, which cannot be found in the decisions, the report to parliament: Deutscher Bundestag – 16. Wahlperiode, Drucksache 16/13500, page 30.

6 This is in line with the decision of the federal court in BGH, 22.07.1999 - KVR 12/98 – Flugpreisspaltung concerning the route Frankfurt Berlin. It should be noted, however, that this concern expressed in the case law only becomes pertinent if costs have been allocated correctly and possible efficiency reserves have been fully exploited, leaving the Bundeskartellamt with the possibility to adjust costs it considers exaggerated.

7 H and L stand for different compositions of natural gas where H=High calorific and L = low calorific gas

gas distribution business were considered a reasonable benchmark as these costs are independent of the degree of competition in the market for gas distribution itself.

3. Remedies and conclusion of the case

The remedies consisted in financial commitments to return almost 130 Million Euro to customers via price reductions and deferred price increases. [8] The consumers were also spared approx. 230 million Euros because the gas suppliers subsequently refrained from passing on increased gas procurement costs.[9] Under the commitment, the supply companies were also not allowed to use subsequent price measures in order to compensate for the agreed price cuts.

8 The remedies only concern 30 companies as three procedures were closed as no abuse could be found, one was used as a benchmarking case and another was left to be treated by a regional cartel office.

9 See also the report to parliament: Deutscher Bundestag – 17. Wahlperiode, Drucksache 17/6640, page 120, tob e found at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf

ANNEX 6: THE ALBANIAN MOBILE TELEPHONY CASE

1. Facts of the case

In November 2007 following a market investigation launched *ex officio* in 2005, the Albanian Competition Authority imposed on AMC (Albanian Mobile Communications) and Vodafone a fine amounting to 454,185,000 Lek (approximately 3.2 million EUR, which equalled to 2% of each firm's annual turnover in the relevant product market).[1] The Competition Commission found that both companies held a jointly[2] dominant position in the mobile telephony market in Albania and that both firms abused their dominant position by applying unfair prices from 2004 to 2005.[3]

2. Legal test

Article 9(2)(a) of the Albanian Law on Protection of Competition identifies unfair prices as one of the main forms of abuse of dominance.[4] According to the competition authority a price is deemed unfair if it is higher than a price in a competitive market.[5] To decide whether this is the case, it is first examined whether the price charged bears any reasonable relation to the economic value of the product, which essentially means that the price is compared with production costs. Second, where it is impossible to determine the costs, the actual price and the profit rate are compared to price and profit levels of similar products or identical products in other geographical markets. According to the authority, such analysis relies on three different approaches: (i) establishing that the high price bears no reasonable relation to the economic value of the product, (ii) assessing profits, (which led to the conclusion that AMC's and Vodafone's profits would be lower in a presumably competitive market), and (iii) comparing prices of a given product with prices applied in other geographical markets.[6]

In the case at hand, the analysis of the relation between the actual price and the economic value of the product was short: the decision itself is 22 pages long. The relation that the price bears to the economic value of the product in question is dealt with in three paragraphs, included in the assessment of the alleged abuse that starts on page 16. The Competition Commission stated that "the service prices applied by [AVC and Vodafone] do not have any reasonable relation with their cost"[7] and based this conclusion on the fact

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1 Albanian Competition Authority, Decision No. 59 on abuse of dominant position in the mobile telephony market by Albanian Mobile Communication sh.a and Vodafone Albania sh.a, 9 November 2007, available in English at http://www.caa.gov.al/file/vendimet/Decision%2059%20AMC%20VOD.pdf

2 The Competition Commission did not expressly state that AMC and Vodafone were jointly dominant, but that they occupied 100% of the market.

3 Both firms appealed the decision before the District Civil Court of Tirana.

4 Law No. 9121 on Protection of Competition of 28.07.2003.

5 Decision No. 59, para. 63.

6 Albanian Competition Authority, Annual Report 2007 and Main Work Objectives for the year 2008, available at http://www.caa.gov.al/file/publikimet/English-annual%20rep.2007-08.pdf

7 Decision No. 59, para. 65.

that both companies implemented a national termination fee for mobile telephony at a higher level than the threshold recommended by the Albanian Telecommunications Authority.[8] As far as the profits are concerned, the Albanian Competition Commission pointed out that whereas in competitive markets profit rates usually decrease, both firms had "high and increasing EBITDA and profit rates". Also, comparison of ARPU (Average Revenue per User per Minute of Usage) with Western European countries showed that mobile tariffs in Albania were high. Lastly, the comparison of Albanian prices with prices in other geographical markets essentially relied on the conclusion drawn in Cullen Report,[9] according to which "Albania *represents an exception with regard to pricing; she is placed among EU countries that apply the highest prices"*.[10]

3. Outcome

In the aftermath of the investigation, the Competition Commission adopted decision no. 61, in which it recommended to the Council of Ministers and the Regulatory Agency for Telecommunications that immediate measures (in particular the introduction of the third mobile operator 'Eagle Mobile' and the initiation of licensing procedures for a fourth operator) should be taken in order to effectively liberalise the mobile telephony market.[11]

8 In its decision No. 179, Albanian Telecommunications Authority recommended the threshold of 22 Lek/minute and 28 Lek/minute as a benchmark for 2004 and 2005 respectively for national termination rate.

9 Cullen Reports are published on a regular basis by Cullen International. Reports include benchmarking data on developments in telecommunications, media and electronic commerce regulation across European and non-European countries.

10 Decision No. 59, para. 71, citing Cullen Report 2 – Country Comparative Report (2006).

11 Decision No. 61 *"On Some Recommendations Regarding the Mobile Telephony Market"*. In the Decision, the Competition Commission also suggested to the Telecommunications Regulatory Agency that the national law *On Telecommunications in the Republic of Albania* should be brought in line with the European Union Telecommunications Regulatory Framework 2002, and that Chapter XII (concerning inspection, supervision and administrative procedures) should be revised in order to strengthen sanctions (fines) against violations of administrative procedures by the undertakings. Annual Report 2007, p. 16.

PRIX EXCESSIFS

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[*] Ce document a été rédigé par Frank Maier-Rigaud. Les annexes 1,3,4 et 6 one été préparées par Anna Pisarkiewicz et l'annexe 2 par Jung Won Song.

1. Introduction

Le concept d'abus visant à exploiter autrui – et plus précisément l'interdiction de pratiquer des prix excessifs[1] –, est de toute évidence l'un des sujets les plus controversés de la politique de la concurrence. De prime abord, cela paraît paradoxal car l'atteinte aux consommateurs et l'efficience sont considérées comme deux des principaux motifs d'intervention en droit de la concurrence. Le concept d'atteinte aux consommateurs a été qualifié de « clé de voûte intellectuelle de la politique de la concurrence »[2]. L'allocation efficiente des ressources, pour sa part, est jugée comme sa pierre d'angle économique[3]. Nombreuses sont les autorités de tutelle qui consacrent une part considérable de leur temps et de leurs ressources à déterminer si les prix sont « trop élevés ». Pourtant, lorsque les autorités de la concurrence interviennent pour s'attaquer directement à ces problèmes, leur action soulève la controverse, voire de vives critiques.

Parmi les nombreuses raisons qui expliquent cette réticence à intervenir, on notera la volonté marquée de préserver la fonction allocative des prix comme signaux de rareté, notamment si ces signaux entraînent l'arrivée de nouveaux entrants ou d'autres formes d'investissement et d'innovation. Pour bien cerner pourquoi les interventions des autorités de la concurrence et autorités de tutelle sont si controversées en cas de prix excessifs et comprendre les avantages et les inconvénients de ces interventions et les difficultés qu'elles soulèvent en pratique, il était nécessaire d'adopter un vaste champ d'étude dans le présent document. Ce dernier aborde les prix excessifs à la fois sous l'angle de l'infraction au droit de la concurrence et sous l'angle d'un problème réglementaire au sens le plus large possible.

1.1. Prix excessifs : un bref retour en arrière

Le problème des prix excessifs est aussi ancien que la pensée économique elle-même. S'il est impossible de brosser en détail l'histoire des courants économiques pertinents, une description certes brève

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1 Dans les publications sur la concurrence, on rencontre à la fois les termes anglais « *excessive pricing* » et « *excessive prices* », toutes deux traduites en français par « prix excessifs ». L'expression « *price abuse* » est par ailleurs d'usage en Asie, où elle désigne également des « prix excessifs » et non pas un concept plus large qui embrasserait divers abus liés aux prix, tels que la pratique de prix d'éviction et l'étranglement des marges. En anglais, l'expression « *excessive prices* » semble préférable à « *excessive pricing* » d'un point de vue sémantique, la seconde qualifiant d'excessif non pas les prix eux-mêmes, mais leur fixation. Elle est sans doute née d'une analogie indue avec « *predatory pricing* », soit la fixation de prix de vente d'éviction. Si les deux expressions sont employées de manière interchangeable et sans équivoque pour un spécialiste de la concurrence, « *excessive pricing* » peut être mal interprétée dans le contexte d'un plaidoyer par un public peu familier du jargon de la concurrence.

2 Williams (2007:131).

3 Dans le contexte de l'exploitation par les prix, notons que l'exploitation due à l'exercice d'un pouvoir de monopsone, et qui se traduit par des prix excessivement faibles ne permettant par exemple pas aux exploitants agricoles de vendre leurs produits à des prix convenables, nécessitera vraisemblablement une approche axée sur le bien-être total. Dans ce document, les prix excessifs ou inéquitables seront réputés exclure les pratiques d'exploitation par des prix excessivement bas. On pourra toutefois se référer à la décision de la Cour dans l'affaire 298/83 CICCE contre la Commission, [1985] ECR 1105, [1986] 1 CMLR 486 : le rejet d'un recours engagé à l'encontre de la Commission européenne pour avoir refusé de condamner, faute de preuves suffisantes, des sociétés accusées d'avoir profité d'une position dominante pour imposer des prix très bas (inéquitables). Voir également The Association of British Travel Agents and British Airways plc, décision de l'OFT du 11 décembre 2002, [2003] UKCLR 136. À propos du choix entre critère de bien-être du consommateur et critère de bien-être total, voir Elhauge (2009b) et l'examen intéressant du rapport de Barry Nalebuff, Paul Seabright et d'autres dans Competition Policy International, Vol. 5(2), 2009 ainsi que la réponse d'Elhauge dans le Vol. 6(1), 2010.

mais nécessaire des origines des prix excessifs semble indiquée, non seulement pour comprendre leurs racines historiques, mais aussi pour toucher du doigt l'évolution des concepts sous-jacents et la manière dont la pensée économique a été façonnée par le souci d'équité des prix et le débat sur l'origine de la valeur économique.

L'idée d'un prix juste, équitable ou naturel, et avec elle le concept de valeur économique et les notions rudimentaires d'équilibre, remontent à la Grèce ancienne et occupent donc les philosophes politiques et les économistes depuis bien plus de 2000 ans[4]. À cette époque, déjà, les auteurs s'intéressaient à la forme d'exploitation par des prix inéquitables et ont tenté de définir la valeur économique, et avec elle la notion de prix juste. En fait, la théorie moderne des prix, domaine clé de l'économie, est le fruit de plusieurs siècles de réflexion menée par de nombreux philosophes politiques et économistes sur ces questions.

Dans leurs ouvrages économiques, des auteurs tels que Platon, Aristote[5] ou Adam Smith, en passant par des auteurs scolastiques tels que Saint Thomas d'Aquin[6], ont présenté la valeur économique comme un élément inhérent au bien lui-même[7]. La notion originale selon laquelle la valeur est une qualité objective indissociable d'un bien a imprégné la pensée économique sous une forme ou une autre, menant, par exemple, à la théorie objective (marxiste) de la valeur par le travail et à la théorie objective de la valeur par les coûts de production de Ricardo[8]. Ces théories de la valeur objectives ont finalement cédé la place à la théorie de la valeur subjective lors de ce que l'on a baptisé la révolution marginale[9]. Par la suite, les publications classiques de Chamberlin et Robinson ont posé les jalons de la théorie moderne des prix[10].

Le concept de juste prix est lui-même étroitement lié à la notion d'équilibre, laquelle est apparue pour la première fois dans sa forme la plus rudimentaire sous les traits de l'équivalence : ce que l'on a cédé lors d'une transaction économique doit avoir une valeur intrinsèque équivalente à ce qui a été reçu[11]. Le lien

4 Voir, par exemple, Denis (1990:82 sq.)

5 Aristote a été le premier à définir le monopole et à aborder ce sujet (Politique, I, 11 et Éthique, V, 5), condamnant les prix monopolistiques comme « inéquitables ». Voir Schumpeter (1954:60 sq.).

6 Saint Thomas d'Aquin (1225-1274) aborde le concept de prix juste dans son traité *Summa Theologica*. Le prix juste ou équitable était censé être un prix tout juste suffisant pour couvrir les coûts de production et permettre au travailleur et à sa famille de subsister. Saint Thomas d'Aquin jugeait immoral, de la part des vendeurs, d'augmenter les prix au simple chef que les acheteurs avaient instamment besoin d'un produit : « Dès lors qu'une personne tirerait grand bénéfice d'une chose appartenant à autrui, sans que le vendeur ne subisse un préjudice comparable en se défaisant de ladite chose, le vendeur ne doit pas augmenter son prix : en effet, l'utilité de la chose pour l'acheteur ne provient pas du vendeur, mais du besoin de l'acheteur : nul ne doit vendre un bien qui ne lui appartient pas. »

7 Selon Schumpeter (1954), Smith a achoppé sur le concept de valeur économique. C'est en fait le paradoxe de la valeur, à savoir – pour reprendre l'exemple d'Adam Smith – le fait que l'eau, malgré son utilité, n'ait généralement pas de valeur d'échange, à l'inverse des diamants, pourtant inutiles la plupart du temps, qui l'a poussé à rejeter une approche du concept de la valeur basée sur le degré d'utilité.

8 La théorie de la valeur basée sur les coûts est encore pertinente de nos jours pour la politique de la concurrence, comme l'ont suggéré les Cours européennes lors de la première étape du test *United Brands*. Voir plus loin section 5.

9 Selon Pribram (1983:614), « L'émergence de l'analyse d'utilité marginale a révélé le triomphe du raisonnement hypothétique sur le concept de substance des biens et la conviction scolastique traditionnelle selon laquelle la valeur d'un bien doit être déterminée par quelque qualité qui lui serait intrinsèque ».

10 Voir à ce sujet Robinson (1933/1969), qui invente le terme monopsone et Robinson (1934) ainsi que Chamberlin (1933/1962).

11 Pribram (1983:612).

entre le prix naturel et le concept d'équilibre devient plus évident chez Adam Smith, pour qui, selon Schumpeter (1954:308), le prix normal n'est autre que celui auquel il est possible, sur le long terme, de fournir chaque ressource dans des quantités égales à la « demande effective » à ce prix. En d'autres termes, c'est le prix qui, sur le long terme, couvrira simplement les coûts.

Schumpeter implique qu'Aristote, en son temps, n'était peut-être pas loin des solutions proposées par certains auteurs contemporains au problème des prix excessifs :

> *« Il n'est pas tiré par les cheveux de dire que, pour Aristote, les prix monopolistiques correspondent à ceux que certains individus ou groupes d'individus ont fixés à leur propre avantage. Les prix appliqués à l'individu sans que ce dernier n'ait de pouvoir dessus, à savoir les prix concurrentiels qui émergent dans un marché libre dans des conditions normales, eux, ne s'attirent pas sa condamnation. Et il n'y a rien d'étrange à penser qu'Aristote ait pu considérer les prix concurrentiels réguliers comme normes de la justice commutative ou, plus précisément, qu'il ait été prêt à accepter comme « juste » toute transaction entre individus effectuée à ces prix*[12] *».*

Que l'interprétation d'Aristote par Schumpeter soit juste ou non[13], l'extrait est intéressant car il pose une question fondamentale, celle de trouver un étalon approprié pour déterminer si des prix sont inéquitables, injustes ou excessifs, question qui, aujourd'hui encore, cherche réponse.

1.2. Pratiques d'exploitation et pratiques d'éviction

La théorie du préjudice la plus controversée du droit de la concurrence en général, et des abus par exploitation en particulier, est celle de l'application de prix excessifs. Si les arguments avancés contre toute intervention des autorités de la concurrence dans les affaires de prix excessifs sont pléthore, nombreux sont ceux qui plaident aussi en faveur de ces interventions. On constate par ailleurs que la réglementation et les interventions des autorités visant à endiguer les prix excessifs sont répandues non seulement dans les pays où cet abus est couvert par le droit de la concurrence, mais aussi dans des pays où il ne constitue pas une infraction à ce droit[14]. Des enquêtes menées sous la pression des pouvoirs publics sur des allégations de prix excessifs ont en outre révélé que les prix en question résultaient en fait de pratiques d'éviction.

Dans le cas des pratiques d'exploitation par les prix, c'est le prix élevé lui-même qui est jugé problématique, tandis que dans le cas des pratiques d'éviction, ce sont généralement les mesures d'éviction qui font grimper les prix. En réalité, tout comportement anticoncurrentiel comprend un volet d'exploitation puisque toutes les pratiques anticoncurrentielles se soldent par l'exploitation d'une contrepartie[15]. Bien

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12 Schumpeter (1954:61).

13 Voir notamment l'analyse inverse d'Aristote par Pribram (1983:14 sq.) à la section « *The Doctrine of the Just Price* ». Quoi qu'il en soit, toute théorie cherchant à définir ce qu'est un prix « juste » requiert un certain nombre de critères d'évaluation permettant de distinguer les prix « justes » des prix « injustes ».

14 Aux États-Unis, par exemple, bien que la jurisprudence proscrive les poursuites pour prix excessifs, il existe des lois contre les augmentations de prix et l'usure dans certains États et plusieurs organismes fédéraux de tutelle détiennent des pouvoirs de réglementation des prix. Si l'application de sanctions publiques (par opposition aux sanctions privées prenant la forme d'actions en dommages et intérêts) en vertu du Robinson Patman Act semble avoir sensiblement régressé, cette loi interdit la discrimination par les prix, qui constitue une pratique abusive. Voir Davidson (2011:49ff).

15 D'après Röller (2008:525 sq.), « En fait, l'unique objectif des entreprises qui se livrent à des pratiques d'éviction est d'accroître leur pouvoir de marché, ce qui leur permettra ensuite d'accroître leurs prix ». Il en va toutefois de même de comportements favorables à la concurrence. Pour reprendre ses termes : « s'il

qu'une nette distinction soit généralement faite entre ces différents types de pratiques abusives, le fait d'exploiter autrui est commun aux deux. La frontière entre ces deux pratiques n'est par ailleurs pas hermétique. Lors de poursuites, il est en effet possible, dans une certaine mesure, de décider quel type d'abus sera poursuivi, tout du moins dans les pays considérant les pratiques d'exploitation comme des abus[16].

1.3. Les erreurs de décision et leurs implications

Contre la qualification des prix excessifs comme abus, d'aucuns objectent, entre autres, qu'une telle mesure risquerait de brider les incitations à l'investissement (pour les entreprises déjà présentes sur le marché comme pour les nouveaux entrants) et de faire planer une incertitude juridique due au caractère flou de ce concept[17]. Elle risquerait en outre de pousser les autorités de la concurrence en particulier (voir section 7) à outrepasser leur mandat sous la pression politique.

Tous les commentateurs ne voient toutefois pas les interventions d'un mauvais œil. Parmi les exemples plaidant en faveur d'une interdiction des prix excessifs et de leur classement comme infraction au droit de la concurrence, on retiendra les cas dans lesquels le marché est peu susceptible de s'autocorriger en raison d'importantes barrières à l'entrée et de l'absence d'autorité de tutelle ou de mesures efficaces de la part d'une autorité existante. L'un des arguments phare en faveur de l'intervention consiste à souligner que les prix excessifs portent le préjudice le plus direct aux consommateurs, alors même que ces derniers sont la plupart du temps au cœur des préoccupations du droit de la concurrence.

À eux tous, ces arguments laissent présager un risque d'erreur élevé dans un cas comme dans l'autre : intervention des législateurs ou des organismes chargés de faire appliquer la loi lorsqu'aucune intervention n'aurait été indiquée (erreur de type I) et non-intervention lorsqu'il aurait été nécessaire d'agir (erreur de type II).

Si la probabilité d'erreurs de type I et de type II a été jugée plus élevée dans les cas de prix excessifs que pour les autres infractions présumées au droit de la concurrence, l'asymétrie des coûts associés à chaque erreur pose un problème supplémentaire. En effet, il est fort probable que les coûts d'une erreur de type I, à savoir d'une condamnation indue, soient supérieurs à ceux d'une erreur de type II, à savoir d'un acquittement indu. Pourquoi ? Lorsqu'on s'abstient d'intervenir, on espère voir le marché s'autocorriger grâce à l'arrivée de nouveaux entrants, ce qui renforcerait la concurrence et les bénéfices qu'elle apporte généralement – baisse des prix, augmentation de la qualité et diversification de l'offre –, le tout s'accompagnant « seulement » d'une distorsion de l'efficience allocative en raison de l'effet sur les prix[18]. Une intervention, en revanche, n'a d'effet « que » sur la détermination des prix, c'est-à-dire l'efficience allocative, alors qu'elle menace l'efficience dynamique et peut même aller jusqu'à une fermeture du marché aux nouveaux entrants.

Ce document aborde les sujets suivants :

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n'était aucunement possible d'exploiter son pouvoir de marché, il n'y aurait aucune incitation à la concurrence. »

16 Voir section 7. Certaines affaires ont en outre regroupé à la fois des abus relevant de prix excessifs et d'autres types d'abus.

17 Bien entendu, lorsque les règles sont vagues, les incitations sont faibles, le flou du concept est donc ambivalent.

18 Veuillez toutefois noter que la théorie du *hold-up* appliquée aux pratiques d'exploitation en matière de brevets peut également avoir des répercussions sur la dynamique et affecter la présentation stylisée des coûts d'erreur décisionnelle escomptés ci-dessus.

- les arguments pour et contre l'intervention en général (section 2) ;
- le rôle respectif des autorités de la concurrence et des autorités de tutelle si les motifs d'intervention sont suffisants (section 3) ;
- les filtres appropriés permettant d'établir une liste d'éligibilité des affaires (section 4) ;
- les tests juridiques et un échantillon d'affaires intéressantes et (tristement) célèbres (section 5) ;
- les différentes méthodes visant à considérer le concept de façon objective (section 6) ;
- le « chalandage d'abus » (*abuse shopping*), la qualification abusive de certains dossiers en affaires de prix excessifs et les « raccourcis » procéduriers (section 7) ;
- la délicate question des mesures correctives, des actions privées et de la restitution des profits mal acquis ainsi que les amendes (section 8).

« Déterminer un effet d'exploitation implique donc nécessairement de porter un jugement subjectif sur le niveau approprié des prix et de la production dans un marché donné »[19], nous dit-on. On verra dans ce document que la tâche est ardue et que les auteurs sont divisés sur la question de savoir s'il convient de demander aux autorités de tutelle et à celles de la concurrence plus particulièrement de porter un tel jugement.

2. Faut-il intervenir en cas de prix excessifs ?

La présente section résume les principaux arguments avancés dans la littérature économique pour et contre l'intervention en cas de prix excessifs (voir le tableau 1). La question de savoir qui devrait intervenir, si toutefois une quelconque intervention est justifiée, est examinée à la section 3.

[19] Esteva-Mosso et Ryan (1999:189). La critique selon laquelle les affaires de prix excessifs seraient subjectives tient plus probablement de la plus grande objectivité théorique des autres abus que de l'absence de subjectivité dans la conduite d'une affaire donnée par une autorité de la concurrence.

Tableau 2. Principaux arguments pour et contre l'intervention

Raisons en faveur de la non-intervention	Raisons en faveur de l'intervention
Les marchés s'autocorrigent	Les marchés ne s'autocorrigent pas toujours (les défaillances du marché existent)
La défaillance de la réglementation peut aggraver la défaillance du marché	Les prix excessifs ont pour effet de diminuer le bien-être du consommateur
Le coût de l'intervention est supérieur à ses avantages, même si l'intervention corrige la défaillance du marché	Les prix excessifs ont pour effet de diminuer le bien-être total (perte sèche)
L'intervention est superflue dans la mesure où la concurrence élimine progressivement les prix excessifs	L'intervention peut combler une lacune du droit de la concurrence et offrir une deuxième chance si l'autorité n'a pas décelé la pratique d'exclusion
La réglementation des prix/les interventions sont difficiles à mettre au point	L'intervention rend la population plus favorable à la politique de la concurrence
Le concept d'excessivité est arbitraire et incertain (il est difficile de déterminer ce qui excessif)	Le lien entre l'entrée et le prix excessif avant l'entrée est illusoire
Interdire les prix de monopole revient à interdire le monopole	Les abus de prix excessifs sont une atteinte au droit de la concurrence
L'intervention fausse les investissements et le comportement de la firme et favorise peut-être la recherche d'un haut de gamme superflu	Considérations de politiques publiques /volonté du législateur/pressions politiques (primauté du politique)

Les opinions exprimées en faveur ou à l'encontre des interventions reflètent parfois des divergences dans les préconceptions fondamentales relatives au fonctionnement des marchés. Comparant les États-Unis et l'Union européenne, Gal (2004:345f.) écrit :

> *« Les États-Unis considèrent qu'une économie non réglementée est par essence concurrentielle si l'on y interdit la création de barrières artificielles. Dans cette optique, on met (fortement) l'accent sur les rouages du marché et l'on considère que les situations de monopole autres que celles qui résultent de barrières artificielles ont relativement peu d'importance. Une telle approche reflète également le rôle limité imparti aux pouvoirs publics dans la réglementation directe des marchés ainsi que les valeurs morales, sociales et politiques conférées au mécanisme de la concurrence. Le droit de l'Union européenne, quant à lui, se fie moins à la capacité des marchés à éliminer les monopoles et davantage à l'aptitude de l'autorité de tutelle à intervenir, à fixer avec efficience les paramètres commerciaux des firmes qui opèrent sur le marché. Il accorde également une plus grande importance à la justice distributive. »*

Les préconceptions fondamentales auxquelles Gal fait référence sont plausibles, mais il est probable qu'elles n'ont pas émergé spontanément. Les préconceptions observées dans une économie initialement constituée de secteurs pour la plupart concurrentiels, très souple et très dynamique, seront probablement différentes de celles qui sous-tendent une économie constituée depuis le début d'un nombre considérable de sociétés exerçant un pouvoir de marché. Il est clair que d'une économie à l'autre, le rôle et la perception des pratiques abusives diffèreront et que la (réponse à la) question de savoir s'il est souhaitable d'adopter des dispositions relatives aux prix excessifs variera et évoluera peut-être même sur le long terme.

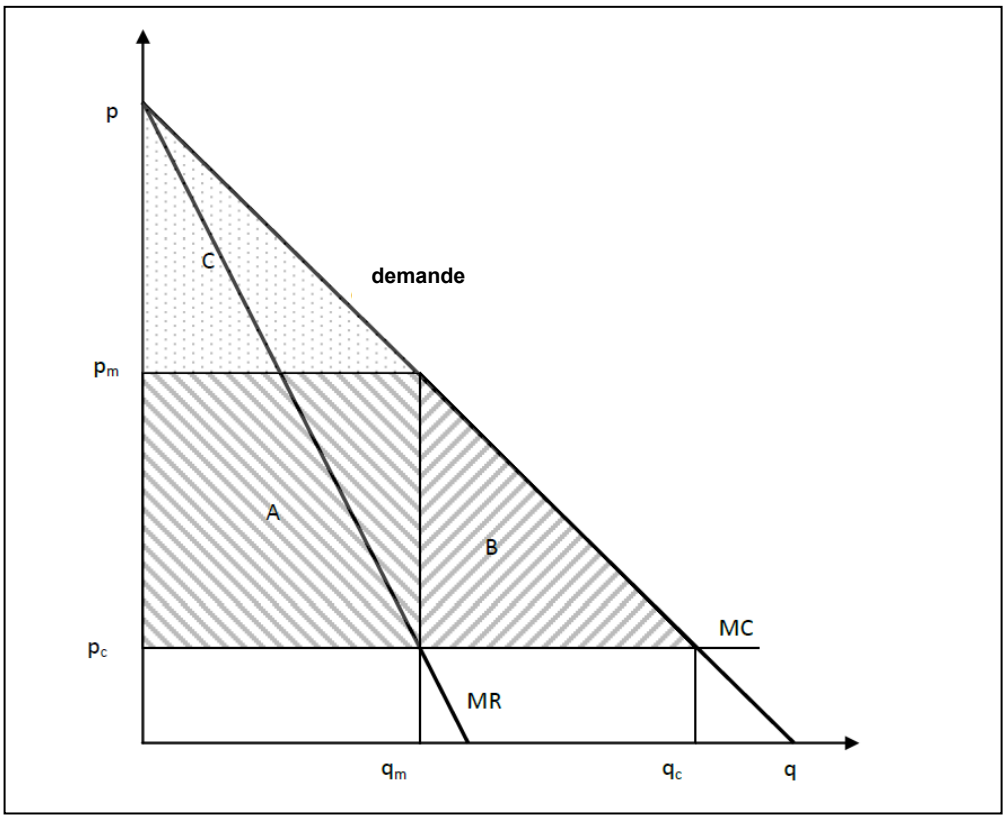
2.1. Le phénomène des prix excessifs

Pour déterminer si un prix est ou non excessif, on considère souvent que le prix concurrentiel est la bonne référence. Le concept de prix concurrentiel ne reposant pas sur une base économique solide, il faut,

pour comprendre ce qu'il peut signifier, commencer par comprendre le mécanisme de la formation du prix et des prix d'équilibre.

Le graphique 1 montre les prix d'équilibre en situation de concurrence parfaite et en situation de monopole dans le cas simple d'un coût marginal constant (MC)[20]. En situation de monopole, le prix d'équilibre p_m est sensiblement supérieur au prix d'équilibre concurrentiel p_c[21]. La zone A représente le surplus du consommateur qui est « transféré » au monopoliste pour les quantités vendues tandis que la zone B représente la perte de surplus du consommateur subie lorsque l'on passe du prix concurrentiel au prix de monopole. Cette perte, aussi appelée « perte sèche » s'accompagne d'une diminution de la quantité de q_c à q_m dans la mesure où certains consommateurs qui achetaient au prix p_c n'accordent pas au bien une valeur suffisante pour l'acheter au prix p_m.

Graphique 1. Prix en situation de monopole et en situation de concurrence parfaite



Le graphique 2 introduit une légère modification et montre les prix d'équilibre en situation de concurrence parfaite et en situation de monopole dans le cas d'un coût marginal croissant (MC). Comme précédemment, nous voyons que le monopoliste n'établit pas son prix indépendamment du coût et de la demande. Ici, contrairement à la situation décrite dans le graphique 1, nous voyons que les firmes opérant

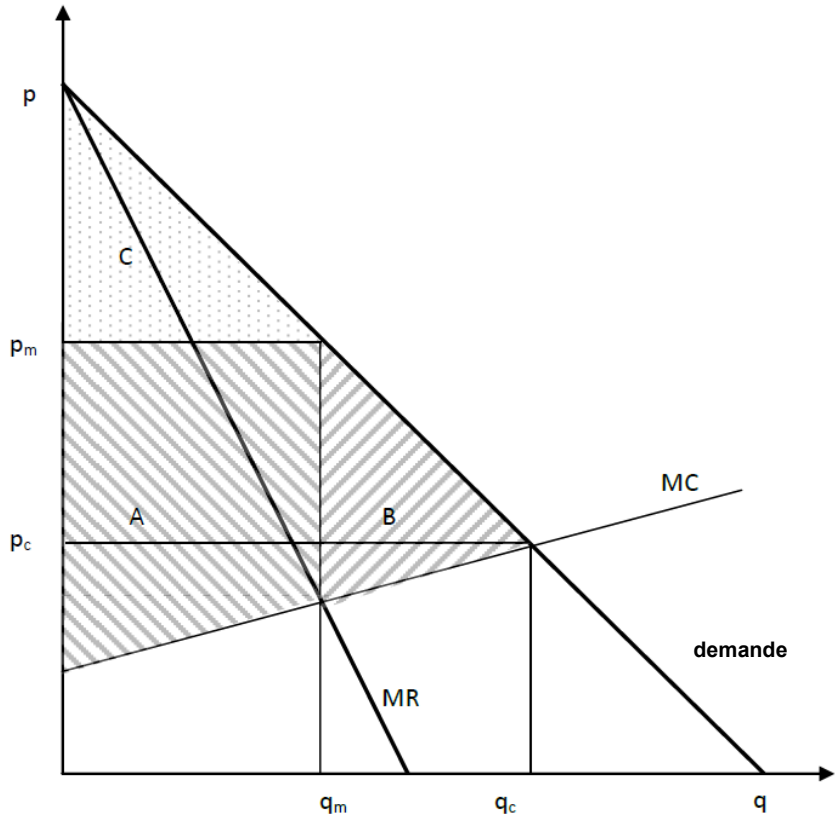
20 Le coût marginal est le coût supplémentaire total pour la firme induit par la production d'une unité supplémentaire.

21 Les hypothèses nécessaires à la réalisation d'un équilibre concurrentiel parfait sont assez restrictives et sont notamment les suivantes : faibles économies d'échelle relativement à la taille du marché, parfaite information et production homogène, alignement des prix des firmes sur celui du marché (*i.e.* les firmes ne peuvent pas influencer le prix du marché), enfin absence de barrières à l'entrée et à la sortie.

dans une situation de concurrence parfaite pourront peut-être couvrir leurs coûts fixes ou irrécupérables dans la mesure où elles font un profit sur les unités produites à un coût inférieur au coût marginal. Le graphique 2 illustre de façon intuitive comment des déplacements de la demande peuvent entrainer des variations du niveau des prix sur des marchés parfaitement concurrentiels lorsque le coût marginal varie en fonction de la quantité. Les variations ou augmentations des prix observées sont donc compatibles avec une structure de marché parfaitement concurrentielle, même lorsque les nouveaux prix sont considérablement supérieurs aux anciens.

Dans le contexte des prix excessifs, le cas le plus pertinent est celui des économies d'échelle réalisées sur les coûts, dans lequel la courbe de coût marginal est décroissante, et non constante ou croissante. La raison en est que des économies d'échelle croissantes sont une barrière naturelle à l'entrée. Dans ce cas, nous obtenons l'effet inverse et un prix égal au coût marginal ne couvrira ni les coûts fixes ou irrécupérables, ni les coûts variables (on trouvera à la section 6 une introduction et une analyse des différents concepts de coût). Dans ces conditions, il est possible que les prix soient sensiblement supérieurs au coût marginal sans que cela implique une absence de concurrence rigoureuse sur le marché[22].

Graphique 2 : Prix en situation de monopole et en situation de concurrence parfaite. Coût marginal croissant



Après avoir présenté aux graphiques 1 et 2 les prix d'équilibre en situation de concurrence parfaite et en situation de monopole pour différentes courbes de coût marginal, il est important de souligner qu'il convient de distinguer entre l'équilibre et sa caractérisation. Si dans une situation de concurrence les prix ont tendance à converger vers l'équilibre, l'équilibre obtenu dépend du type de situation concurrentielle. Les deux types d'équilibre qu'illustrent les graphiques 1 et 2 sont l'équilibre prix et quantité (p_m, q_m) en

22 Cela a conduit à passer de la référence à la concurrence parfaite à une norme de concurrence fonctionnelle. Voir l'article classique de Clark (1940).

situation de monopole (en l'absence de discrimination par les prix) et l'équilibre prix et quantité (p_c, q_c) qui serait atteint en situation de concurrence parfaite[23]. Il faut donc distinguer la situation d'équilibre effectivement atteinte de celle résultant de la convergence prévue (instantanée) vers l'équilibre, toutes deux étant tirées par la maximisation du profit. Le fait que l'équilibre atteint soit dans les deux cas tiré par la maximisation du profit a conduit certains auteurs à affirmer que les prix excessifs n'existaient pas d'un point de vue économique[24].

Le concept de prix concurrentiel n'étant pas défini, on pourrait considérer que tout prix obtenu dans une situation d'équilibre, y compris le prix de monopole, est un prix concurrentiel. Dans ce cas, le terme « concurrentiel » se réfèrerait au processus de maximisation du profit sous contrainte et serait simplement synonyme d'équilibre. On peut également interpréter le prix concurrentiel comme étant le prix d'équilibre dans une situation de concurrence. Dans ce cas, tout prix d'équilibre à l'exception du prix de monopole est considéré comme concurrentiel – qu'il y ait situation de duopole, d'oligopole ou de concurrence parfaite.

Dans l'affaire Napp, le Bureau britannique de la concurrence (OFT) a indiqué que le prix serait considéré excessif s'il était supérieur au prix qui se formerait sur un marché concurrentiel[25]. Comme le marché parfaitement concurrentiel ne représente que l'une des nombreuses formes de marchés concurrentiels possibles, il est peu probable que l'on utilise comme référence le prix égal au coût marginal. À l'autre extrême, il est peu probable que l'on utilise comme référence la formation du prix d'équilibre sur un marché proche du monopole[26]. Dans la mesure où le pouvoir de marché, au sens économique strict, existe sur un continuum entre ces deux extrêmes, il n'est pas indifférent de trouver le « prix concurrentiel ».

Dans l'affaire Mittal (voir l'annexe 1), la Competition Appeals Court (Cour d'appel sur la concurrence) d'Afrique du Sud a proposé une définition du prix concurrentiel qui rappelle l'interprétation que donne Schumpeter du prix « normal » selon Adam Smith, citée plus haut. En cherchant à déterminer le sens que le législateur avait voulu donner au terme « valeur économique » emprunté au droit de l'Union européenne, la Cour a déclaré que la « valeur économique » était le prix notionnel d'un bien ou d'un service dans l'hypothèse de *conditions d'équilibre concurrentiel à long terme*. Cela suppose qu'à long terme les firmes peuvent entrer dans le secteur si le taux de rendement du capital y est supérieur à la moyenne ou bien quitter le secteur pour éviter un taux de rendement du capital inférieur à la moyenne. Cela n'implique pas une situation de concurrence parfaite à court terme, mais plutôt une concurrence suffisante pour éliminer à long terme ce que les économistes appellent « le profit pur » – c'est à dire une

23 Outre la concurrence parfaite, il existe bien sûr d'autres théories du marché qui produisent un prix d'équilibre égal au coût marginal. Par exemple la concurrence statique de Bertrand qui s'applique dans le cas d'un produit homogène et en l'absence de contrainte de capacité. Même dans un modèle de monopole avec un marché parfaitement contestable, le prix d'équilibre peut être égal au coût marginal.

24 On trouvera aux annexes 3 et 4 et à la section 5 un examen du test United Brands appliqué dans les affaires Port of Helsingborg.

25 Affaire CA98/2/2001 Napp Pharmaceuticals Holdings Ltd and Subsidiaries, Decision of the Director General of Fair Trading (Décision du Directeur du commerce équitable) du 30 mars 2001, para. 203.

26 Il est à noter que l'affirmation selon laquelle les prix ne seront jamais supérieurs au prix de monopole (souvent liée à l'idée que les abus de prix excessifs peuvent donc être assimilés à une infraction de monopole) n'a de valeur théorique que dans le contexte de pratiques abusives. Dans un contexte d'exclusion, il est fort possible que le seul prix d'exclusion effectif soit sensiblement supérieur au prix de monopole. Même si ce prix ne maximise pas le profit du monopoleur sur ce marché, il est possible que la stratégie d'exclusion maximise le profit sur l'ensemble des marchés, par exemple sur les marchés situés en amont et en aval dans le cas de verrouillage vertical. Cette stratégie de refus constructif d'offre peut conduire le monopoleur rationnel à établir un prix supérieur au prix de monopole sur l'un des marchés. Voir dans Maier-Rigaud *et al.* (2011) un exemple de refus d'offre où de tels prix peuvent être observés.

rémunération des facteurs de production supérieure à la norme de rémunération dans des conditions d'équilibre concurrentiel à long terme, applicable au secteur ou à la branche de production[27]. Cette définition ramène au coût moyen à long terme de la firme efficiente. Comme nous le montrerons à la section 6, il s'agit du prix auquel une firme efficiente couvre exactement son coût total.

2.2. Les raisons de ne pas intervenir

De nombreux commentateurs ont fait valoir que des prix élevés ne devaient pas forcément être considérés comme abusifs ou excessifs. Ils avancent des arguments allant des caractéristiques du marché, de la nature de la réglementation et de difficultés d'ordre pratique à des considérations d'ordre général, telles que l'équité. Ces arguments ne remettent pas forcément en question la nécessité généralement reconnue d'une intervention par la voie réglementaire dans certains domaines spécifiques tels que les services collectifs.

La principale justification, rarement développée, de la non-intervention que l'on trouve dans la littérature économique porte sur les propriétés d'autocorrection inhérentes au marché. Bien que l'on considère de façon générale que le marché est capable de s'autocorriger dans le cas de pratiques abusives, cet argument est évoqué en particulier dans le cas de prix excessifs[28].

Dans le résumé qui suit, Gal rend bien compte de l'évolution de l'approche suivie aux États-Unis :

> *« Au début, l'approche du laissez-faire se fondait sur la conviction que les marchés ont tendance à s'autocorriger et que les pouvoirs publics n'ont qu'un rôle limité à jouer dans la réglementation des marchés. Le paradigme moderne s'appuie sur une analyse dynamique du marché et des effets économiques de la réglementation des prix de monopole. L'hypothèse de base reste que la plupart des marchés sont concurrentiels et que le monopole tend à s'autocorriger. Mais même lorsque les marchés ne sont pas concurrentiels, on estime que les coûts de la réglementation sont supérieurs aux avantages qu'elle présente*[29]*. »*

L'opinion selon laquelle les mécanismes du marché sont capables de remédier à une défaillance (temporaire) du marché est souvent confortée par la probabilité (que l'on considère élevée) d'une défaillance de la réglementation. En d'autres termes, même si les mécanismes du marché n'éliminent pas rapidement les prix excessifs, ou ne les éliminent qu'incomplètement, l'intervention par la voie réglementaire n'est peut-être pas une solution car une défaillance de la réglementation est possible[30]. Ce scepticisme concerne en particulier la réglementation des prix. Il est bien sûr inextricablement lié à la difficulté de déterminer ce qu'est un prix « raisonnable », par opposition à un prix « excessif » dans un environnement caractérisé par une asymétrie de l'information. Même dans le cas où l'autorité de tutelle a la capacité de concevoir une approche cohérente, on considère généralement que, compte tenu de la forte incertitude qui subsiste, l'intervention n'est pas justifiée[31].

On explique normalement la capacité d'autocorrection par la possibilité d'entrer sur le marché, ou dans un sens plus large, par la contestabilité du marché. De ce point de vue, l'intervention par la voie

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27 Competition Appeals Court (Cour d'appel sur la concurrence) d'Afrique du Sud, 70/CAC/Apr07, §40 (en italiques dans l'original).

28 Voir Lowe (2003).

29 Gal (2004:358).

30 Voir Gal (2004:355).

31 Outre la défaillance de la réglementation, le coût d'une réglementation efficace peut tout simplement être supérieur à celui d'une défaillance du marché.

réglementaire est superflue dans la mesure où les prix excessifs seront progressivement éliminés avec l'entrée de nouvelles firmes sur le marché[32]. On considère souvent que la probabilité d'entrée sur le marché est directement liée au niveau du prix, des prix plus élevés, et peut-être excessifs, entrainant des entrées plus nombreuses[33]. Au contraire, une réglementation abaissant les prix peut empêcher l'entrée, et/ou l'expansion, de firmes concurrentes[34].

L'effet potentiellement paralysant d'une réglementation visant à abaisser les prix a conduit certains auteurs à concevoir des filtres supplémentaires[35] pour exclure le risque de fixer des prix excessifs dans des secteurs où l'innovation et l'investissement sont importants[36].

Le risque de paralyser les investissements et par là même l'innovation est probablement évoqué par analogie avec les secteurs ayant des contraintes de capacité. Certes, des profits élevés dus à une insuffisance de capacité ne le resteront probablement pas longtemps dans la mesure où ils seront nivelés par le jeu de la concurrence au fur et à mesure de l'ajout de nouvelles capacités sur le marché. Dans ce cas, des prix élevés peuvent effectivement atteindre leur objectif de base qui est de signaler la rareté et d'induire une réallocation des ressources.

Plus bas dans la hiérarchie des raisons de ne pas intervenir, on avance les difficultés (techniques) qu'il y a à bien identifier, puis à corriger les prix élevés. Évaluer les prix *ex post*, mais plus encore *ex ante*, est difficile tant pour les autorités de la concurrence que pour les autorités de tutelle[37].

Certaines de ces difficultés peuvent tenir au caractère cyclique de la demande ou à des chocs de la demande qui peuvent avoir des effets temporaires sur les prix, comme nous l'avons vu lors de l'analyse du modèle simple présenté plus haut au graphique 2. Elles peuvent aussi être liées à l'existence de marchés

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32 Voir Ezrachi et Gilo (2008), qui sont toutefois en désaccord avec cette évaluation.

33 L'importance de prix élevés en tant que signal du marché n'est presque jamais contestée. Voir par exemple Elhauge (2009a:512) « Des prix élevés sont un signal du marché important qui encourage d'autres firmes à entrer, ce qui crée de la concurrence. » ou Furse (2008:78) « Contraindre une entreprise occupant une position dominante à abaisser ses prix a notamment pour effet de réduire l'incitation à entrer sur le marché ». Voir cependant Ezrachi et Gilo (2008) qui soulignent, parmi d'autres aspects, le fait que les prix pratiqués après l'entrée sur le marché sont la variable déterminante de cette entrée. Voir aussi Ezrachi et Gilo (2010a) et (2010b).

34 Si l'entrée, ou l'expansion, de firmes concurrentes peut devenir plus difficile lorsque la réglementation a pour effet d'abaisser les prix, il est clair qu'elle n'est pas liée aux prix en vigueur avant l'entrée mais aux prix pratiqués après l'entrée ou l'expansion. Dans la mesure où le plafond de prix ne s'applique pas au prix que la firme dominante choisirait d'appliquer après l'entrée ou après l'expansion, la réglementation du prix ne peut empêcher l'entrée ou l'expansion. On trouvera à la section 2.3 une analyse plus détaillée de cette question.

35 Les filtres proposés s'ajoutent à la condition d'établissement de la position dominante lorsque cela est exigé dans toutes les juridictions où les prix excessifs sont considérés comme abusifs aux termes du droit de la concurrence.

36 Voir la section 4. Ce type d'argument suppose une relation causale claire entre R-D et innovation. Cette relation est cependant contestée et il est généralement admis que l'innovation est rarement observée sur les catégories de marchés où la concentration des entreprises est forte et où des pratiques abusives de fixation de prix excessifs sont susceptibles de se produire. En général, l'innovation est le fait d'individus plutôt que d'entreprises qui réinvestissent. Voir Davidson (201162ff.) et l'état des travaux effectué par Solow, Denison Jewked, Sawers et Stillerman qui figure ici. :

37 Fletcher et Jardine (2008:535) par exemple énumèrent certaines de ces difficultés, mais soulignent plus positivement que «*s'il est vrai qu'il est parfois difficile de déterminer si certains prix sont excessifs, on aurait tort de surestimer ces difficultés.*» (p.541)

biface ou multi-face sur lesquels les « profits excessifs » réalisés sur la vente d'un produit ou d'un service ou sur l'un des marchés peuvent être redistribués sur un autre[38]. Ainsi donc, s'il est certainement possible qu'une plateforme biface ou multi-face abuse de son pouvoir de marché et fasse payer des prix excessifs, il faut pour déterminer si ces prix sont excessifs considérer simultanément toutes les faces du marché. « Des prix apparemment excessifs d'un côté du marché peuvent n'être que le reflet de prix apparemment prédateurs de l'autre côté, et ces deux prix peuvent résulter de l'exercice d'équilibre que doit faire la plateforme pour attirer les deux côtés du marché[39] ».

Une autre difficulté concerne les secteurs où les droits de propriété intellectuelle jouent un rôle important car la relation entre prix et coûts est alors beaucoup plus difficile à mesurer.

Toutes ces difficultés ont conduit certains auteurs à conclure « qu'il pourrait être très difficile à des autorités et tribunaux sans grande expérience de traiter de règles complexes en matière de formation des prix[40] ».

Déterminer, après avoir fait les calculs nécessaires, qu'un prix est inéquitable ou excessif[41], est difficile. Même si elle est de règle dans la tarification des services d'utilité publique, cette tâche reste ardue tant pour les autorités de tutelle que pour les autorités de la concurrence. Indépendamment de ces difficultés (et qu'elles soient symétriques ou non), la réglementation est par définition *ex ante* et a donc pour effet de réduire les craintes relatives à la sécurité juridique, ce qui n'est pas le cas pour une intervention *ex post* en matière de prix.

Une intervention en matière de prix excessifs risque de paralyser l'innovation si elle affecte les revenus escomptés et réduit les chances de récupérer de façon satisfaisante le coût des investissements dans la recherche et le développement. Selon la façon dont elle est conçue, la norme d'intervention peut également encourager la recherche d'un haut de gamme superflu, c'est à dire diminuer l'incitation à la réduction des coûts et augmenter les inefficiences-X[42]. L'imposition de plafonds en matière de prix risque de fausser les incitations à investir d'une façon générale et plus spécifiquement les incitations à l'efficience[43] et à la réduction des coûts ainsi que les incitations à l'innovation[44]. Elle fausse aussi les incitations en matière de prix[45].

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38 Voir OCDE (2009) ou bien Fletcher et Jardine (2008:534) qui donnent l'exemple d'un producteur de brosses à dents électroniques détenant des droits de propriété exclusive sur les têtes de brosses à dents. Ces droits confèrent sans doute à cette firme un monopole sur le marché des têtes de brosses à dents et la possibilité d'obtenir des profits élevés. Toutefois ces « profits excessifs » seront probablement progressivement éliminés par le jeu de la concurrence, même dans le cas où les consommateurs n'effectuent aucune analyse du cycle de vie du produit, à condition que la firme soit en concurrence effective sur le marché primaire des brosses à dents électroniques.

39 OCDE (2009:13 seq.). On notera que dans certaines juridictions, il est important que les consommateurs qui paient des prix élevés d'un côté du marché biface soient aussi ceux qui reçoivent des avantages de l'autre côté.

40 Voir Terhechte (2010) qui voit dans l'affaire Mittal un exemple de ce type (voir l'annexe 1).

41 Voir Lowe (2003) ou Ezrachi et Gilo (2008).

42 Voir cependant Paulis (2008:518) qui, sans le dire explicitement, se place dans une perspective d'économie comportementale dans l'analyse de la probabilité de tels effets quand il suggère que «*(de nombreux innovateurs sont tout aussi motivés par la joie et la stimulation que leur procure le processus d'innovation en lui-même*».

43 Selon la façon dont on calcule les prix excessifs, on risque de pénaliser les firmes ayant un bon rapport coût-efficacité. On suppose que les coûts propres à la firme sont utilisés et aussi qu'une firme de référence

Une intervention visant à réglementer des prix excessifs risque d'outrepasser ses objectifs en matière de concurrence et d'aboutir à un monopole réglementé. Cela peut amener la firme à plafonner son niveau d'activité juste au-dessous du seuil d'intervention apparent[46].

Si l'on considère que la concurrence est un processus auquel les firmes participent, mais que seule « la firme la meilleure » réussit à devenir un monopoleur, les lois qui qualifient « d'inéquitables » les prix perçus par la firme gagnante risquent de la priver injustement d'une rémunération légitime[47]. Bien sûr, cet argument suppose que les conditions ci-après sont remplies : les conduites d'exclusion sont interdites et cette interdiction est effectivement appliquée ; le mécanisme de contrôle des fusions fonctionne bien ; et les monopoles sont considérés comme des abus, c'est-à-dire que le mécanisme de la concurrence ne subit pas de distorsions du fait d'un comportement anticoncurrentiel.

Plus préoccupant encore en matière de contrôle des prix excessifs est l'argument selon lequel interdire des prix élevés parce qu'ils sont « excessifs » revient à interdire les prix de monopole, et donc le monopole lui-même[48].

2.3. Les raisons d'intervenir

La concurrence est souhaitable car elle entraîne de meilleurs résultats pour la société. Les effets négatifs des défaillances du marché et des monopoles sont bien connus. Les prix excessifs sont la manifestation la plus simple et la plus claire de ces effets négatifs, ce qui conduit naturellement à proposer que le corps social les interdise purement et simplement. La plupart des non-spécialistes sont presque tous d'avis que les autorités de la concurrence ont pour tâche principale d'éliminer les prix élevés.

La réticence des autorités à intervenir contre les pratiques abusives a été qualifiée de paradoxale[49]. Après tout, l'un des principaux objectifs de la politique de la concurrence est d'empêcher la constitution et

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a des coûts beaucoup plus élevés. On pourrait alors trouver que les prix pratiqués par les firmes les plus efficientes sont excessifs dans la mesure où leurs marges et leur rentabilité sont plus élevées.

44 *Ex ante*, il est important de prendre en compte dans le calcul de la rentabilité des investissements toute restriction potentielle qui empêcherait la firme de récupérer le coût des investissements effectués au moyen de prix élevés. Une telle mesure peut notamment affecter la participation à des concours, tels que les courses aux brevets ou la mise aux enchères de bandes de fréquence, dans lesquels il n'y a qu'un seul gagnant. Si l'on veut que les firmes puissent concourir, il faut qu'elles puissent compter sur des profits positifs et donc qu'elles aient des marges considérables pour compenser la faible probabilité de « gagner »

45 Fletcher et Jardine (2008:537) donnent l'exemple d'une réglementation du prix moyen pratiqué sur deux marchés. Si la firme se trouve en concurrence sur l'un des deux marchés, elle peut alors abaisser ses prix sur ce marché, décourageant ainsi l'entrée sans sacrifier ses profits, dans la mesure où elle peut augmenter ses prix sur l'autre marché et donc maintenir ainsi le prix moyen réglementé.

46 On considère toutefois que la probabilité qu'une réduction délibérée des dépenses de recherche et développement entraîne une perte de part et de position de marché pèse plus lourd que le risque de réglementation des prix. Voir Areeda et Hovenkamp (2002:58 seq.).

47 Voir Gal (2004:353 seq.)

48 Voir Lowe (2003). Alors que le contrôle des prix excessifs peut empêcher le monopoleur de faire payer le prix maximisant le profit, l'interdiction des pratiques d'exclusion abusives impose une contrainte qualitativement similaire au comportement de maximisation du profit de la firme dominante, ce qui rend cet argument quelque peu dénué de logique.

49 Lyons (2007:70) résume ainsi ce paradoxe : *« il est bon de n'interdire que les pratiques d'exclusion qui devraient logiquement entrainer (directement) des abus, mais dans le même temps il est mauvais d'interdire directement des pratiques abusives ! »* ()

l'abus du pouvoir de marché, au bénéfice des consommateurs. L'élimination des pertes sèches et des « restrictions » quantitatives ainsi que celle des inefficiences-X du monopole sont les principales raisons invoquées pour justifier l'intervention par la voie réglementaire. Le monopole étant la forme ultime du pouvoir de marché (du côté de l'offre), la politique de la concurrence vise directement les effets économiques défavorables de cette structure de marché. Il en va de même de la réglementation puisque le monopole est l'exemple classique utilisé pour expliquer les avantages de la réglementation. En matière de monopole ou de position dominante, les principaux problèmes mis en avant dans les manuels économiques sont l'exploitation des consommateurs et l'inefficience de l'allocation des ressources[50]. D'ailleurs, le cas d'école sur les pratiques monopolistiques abusives concerne les prix élevés[51].

Le problème fondamental est qu'en confisquant les profits on prive le marché de la principale incitation à produire des avantages pour le corps social. Par conséquent, pour être crédible, une intervention doit chercher à remédier aux défaillances du marché concurrentiel de façon nuancée, sans enrayer les moteurs essentiels des marchés efficients.

L'une des principales raisons d'intervenir dans les cas de prix excessifs est l'absence d'autocorrection du marché, ou du moins l'absence d'autocorrection dans un laps de temps raisonnable. Selon l'économie moderne, de nombreuses défaillances du marché sont à l'origine de ce problème. Les autorités de la concurrence, en tant que gardiennes du fonctionnement du marché, connaissent bien les conditions nécessaires pour que les marchés produisent des effets avantageux pour le corps social. Le pouvoir de marché peut tenir à d'autres facteurs qu'une efficience ou une performance supérieure, par exemple, dans une industrie de réseaux, à la situation avantageuse du premier arrivé.

Dans de petites économies, c'est à dire des économies qui ne peuvent accueillir qu'un petit nombre de firmes dans la plupart des secteurs, du fait des barrières à l'entrée et des conditions naturelles du marché, il est peut-être plus facile d'acquérir et de maintenir une situation de monopole même en l'absence de performance supérieure[52].

La même observation s'applique au pouvoir de marché issu des anciens monopoles d'État ou bien du favoritisme politique ou de la corruption. Lorsque ces entreprises sont dotées d'actifs en infrastructure importants (dont on leur a parfois fait don), un long délai peut s'écouler avant que le marché n'érode leurs positions.

Dans de tels cas, il est possible que la structure du secteur n'évolue pas, que le marché ne soit pas capable de s'autocorriger et que les positions dominantes ne soient donc pas érodées. Ceux qui défendent ce point de vue ne nient généralement pas la possibilité d'autocorrections, ni le fait que celles-ci se produisent dans la majorité des cas. Toutefois, lorsqu'il semble peu probable que le marché s'autocorrige dans un laps de temps raisonnable, on considère que l'intervention est justifiée.

Bien qu'une réglementation des prix dans le sens de leur baisse diminue l'incitation à entrer sur le marché, on se souvient que l'entrée dépend des prix attendus après l'entrée et non des prix pratiqués avant l'entrée. Ezrachi et Gilo (2008) ont développé cet argument et montré que dans la majorité des cas, quelque soit le niveau des barrières à l'entrée, les prix excessifs en eux-mêmes ne suffisent pas à attirer de

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50 Voir par exemple Lyons (2007:65 seq.) ou Williams (2007:129). Pour un cas d'école voir Church et Ware (2000).

51 Lyons (2007:67) souligne à juste titre qu'il n'y a aucune raison de limiter l'analyse des pratiques abusives aux prix alors que l'ensemble de choix des firmes dominantes contient également d'autres variables telles que la qualité du produit, le niveau de service et la gamme de produits.

52 Voir Gal (2003) et Gal (2004).

nouveaux entrants. Ils démontrent ensuite, de façon plutôt contre-intuitive, qu'une intervention visant les prix excessifs peut encourager, plutôt que décourager, l'entrée dans la mesure où elle permet généralement aux entrants potentiels de mieux appréhender les prix après entrée[53].

Un autre argument clé en faveur de l'intervention visant les prix excessifs, et plus spécifiquement de l'intervention des autorités de la concurrence, est lié aux cas dits de lacune de la réglementation ou de « deuxième chance ». Peeperkorn (2009:613) souligne que « la possibilité qu'offre le droit des États-Unis d'intervenir effectivement contre l'établissement d'une position dominante explique pourquoi la loi Sherman et les autres lois antitrust des États-Unis ne prévoient pas la possibilité d'intervenir contre les pratiques abusives ». En d'autres termes, les affaires relatives aux prix excessifs permettent peut-être de compenser une lacune de la réglementation en matière « d'acquisition d'une position dominante » dans les juridictions où il est possible d'atteindre légalement une telle position par des pratiques d'exclusion[54]. Bien que Röller (2008:529) ait déclaré qu'il s'agissait là d'une « importante lacune », il semble que cet argument ait perdu un peu de sa force, au moins dans l'Union européenne, dans la mesure où la version européenne de l'affaire Rambus[55], qui concerne bien les prix excessifs, n'a pas été présentée comme telle. Aux États-Unis, l'affaire Rambus a été traitée comme une affaire de monopole. De son côté la Commission européenne, alors que les deux affaires portaient essentiellement sur le même type de comportement, a apparemment trouvé le moyen de pallier la réglementation manquante sans pour autant reconnaître explicitement que l'objet de cette affaire était les prix excessifs.

D'autres arguments en faveur d'interventions visant les prix excessifs ont trait à la façon dont elles sont perçues. Tout d'abord, les abus de prix excessifs peuvent inciter le public à soutenir davantage les mesures prises en matière de concurrence[56]. Indépendamment des mérites réels de l'intervention ou de ses effets à long terme, la réglementation des prix excessifs peut avoir pour effet d'accroître le soutien du public pour l'autorité de la concurrence et le pouvoir politique de cette dernière. Ce phénomène est particulièrement marqué lorsque les prix des denrées essentielles et des matières premières de base sont en

53 Leur argument repose essentiellement sur les signaux que les entrants potentiels peuvent lire dans les prix avant l'entrée, avec ou sans réglementation des prix excessifs, dans un jeu d'entrée à deux niveaux où l'entrée est rationnelle si la firme déjà installée a des coûts élevés. Il y aura indubitablement entrée si les firmes déjà installées font payer des prix différents de ceux des firmes à coûts moins élevés en situation d'équilibre (équilibre de séparation). Ils montrent qu'une réglementation des prix excessifs risque de réduire les chances d'atteindre un équilibre de regroupement, c'est-à-dire une situation dans laquelle les firmes à bas coûts et à coûts élevés font payer le même prix, ce qui ne laisse pas la possibilité à l'entrant potentiel de déduire ses coûts. Cela renforce la probabilité de parvenir à un équilibre de séparation révélant si la firme installée a des coûts faibles ou élevés, ce qui permet d'évaluer le niveau des prix après l'entrée et la rentabilité et donc d'augmenter le nombre d'entrées. Bien que la prudence s'impose dans l'application de modèles abstraits de la théorie des jeux à l'élaboration des politiques, on fait souvent appel à ce type d'analyse pour justifier la non-intervention. Voir également Ezrachi et Gilo (2010a) et (2010b).

54 Sur cette question, voir aussi Lyons (2007:82f.), Röller (2008:528f.), Elhauge (2009a:513), Paulis (2008:519) et Werden (2009:661).

55 La décision de l'Union européenne sur les engagements offerts par Rambus évite d'utiliser les termes « prix excessifs » et souligne au contraire que Rambus s'est livrée à une duperie en ne révélant pas l'existence des brevets et appliquait « des redevances excessives » (Voir Case COMP/C-3/38626 Rambus sur le site http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1192_5.pdf et le communiqué de presse IP/09/1897 sur le site http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1897&format=HTML&aged=1&language=FR&guiLanguage=en. Ni la décision, ni le communiqué de presse ne se réfèrent à des termes tels que « exploitation », « pratiques abusives » ou « excessives » (sauf dans le sens différent de « demandes excessives en matière de responsabilité »).

56 Autre possibilité, peut-être plus logique : les autorités de la concurrence peuvent craindre de perdre l'appui de la population si elles ne font rien lorsque des prix élevés suscitent la colère de l'opinion publique,.

forte baisse[57]. Selon Terhechte (2010), « la réglementation des prix excessifs pourrait devenir une stratégie de relations publiques pour les autorités de la concurrence ou encore leur conférer une visibilité qui pourrait contribuer à créer une culture de la concurrence ».

Un autre argument, qui porte sur la façon dont les autorités de la concurrence, et non plus l'opinion publique, perçoivent la réglementation des prix excessifs, est que contrairement à cette perception même, cette réglementation se retrouve dans de nombreux cas, et est prévue dans de nombreux textes législatifs et réglementaires, en dehors du contexte habituel des textes qui s'appliquent aux services collectifs[58]. On trouve également la référence à des prix justes et raisonnables dans d'autres domaines du droit de la concurrence, par exemple dans le contexte d'accords horizontaux qui stipulent que l'accès des tierces parties à une norme doit être juste, raisonnable et non-discriminatoire. On peut citer l'exemple de l'affaire UK Link dans laquelle le Bureau britannique de la concurrence a conclu qu'un accord passé entre toutes les banques du Royaume-Uni concernant les guichets automatiques ne pourrait bénéficier d'une exemption que si les frais perçus ne dépassaient pas le montant du recouvrement des coûts[59]. Un autre exemple concerne la réglementation sur les clauses contractuelles injustes, exigeant que les frais dissimulés soient « justes »[60].

Dans le cadre de ses enquêtes sur le marché du Royaume-Uni, la Commission de la concurrence du Royaume-Uni examine régulièrement la situation des marchés sur lesquels certains prix sont jugés excessifs et bien qu'elle n'ait généralement pas recours à la réglementation des prix, cette option reste ouverte[61].

Au bout du compte, on peut faire valoir un argument de bon sens. Il repose sur la simple constatation que de nombreuses juridictions sont dotées d'une législation sur les prix excessifs. Là où les prix excessifs relèvent du droit de la concurrence, l'autorité de la concurrence peut souvent avoir à intervenir[62] et ne pourra donc éviter d'avoir à « d'enquêter de temps à autre, sur les plaintes relatives à d'éventuelles pratiques de prix abusives[63] ».

3. Réglementation et droit de la concurrence

Le débat sur les avantages respectifs du recours au droit de la concurrence plutôt qu'à la réglementation porte surtout sur le rôle du droit de la concurrence dans les cas où une réglementation sectorielle spécifique est applicable, laissant au deuxième plan les infractions spécifiques ou encore les

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57 Cet argument est sans doute plus fort dans les juridictions qui n'ont qu'une culture de la concurrence limitée, où l'autorité risque de paraître incapable de s'attaquer à ce que le grand public perçoit comme un problème de concurrence évident, ce qui compromettra peut-être les efforts qu'elle déploie dans d'autres secteurs.

58 Voir la section 5.

59 Décision de l'OFT (Bureau britannique de la concurrence) du 11 mai 2000, Link Interchange Network Ltd, Case No. CP/0642/00.

60 Dans cet exemple, l'OFT s'était élevé contre les frais de retard que faisaient payer les organismes émetteurs de cartes de crédit, largement supérieurs au coût. Voir OFT (2008). Pour une affaire similaire relative à des prix excessifs voir l'affaire Korean Credit Card décrite à l'annexe 2.

61 Voir Fletcher et Jardine (2008:540) qui relèvent que, dans la pratique, la Commission a préféré d'autres solutions que la réglementation des prix.

62 Même dans ces juridictions, les autorités gardent bien sûr un certain pouvoir discrétionnaire quant aux interventions et à l'évaluation technique de ce qui constitue un abus de prix excessifs.

63 Forrester (2008:551).

théories du préjudice[64]. Par ailleurs, il y a bien sûr un débat important, mais qui reste pour l'essentiel au niveau du plaidoyer, sur l'évaluation de la concurrence et sur la façon d'améliorer et de simplifier les règles et la réglementation[65].

Par ailleurs, l'OCDE, dans une optique sectorielle, avait déjà analysé lors d'une précédente table ronde les facteurs que les décideurs publics devraient prendre en compte dans l'établissement d'une division du travail adéquate entre les autorités de la concurrence et les autorités de tutelle dans les industries de réseaux et dans les secteurs ouverts à une plus grande concurrence[66].

Le débat sur la défense des pratiques réglementées est principalement axé sur la question de savoir si c'est la réglementation et ou le droit de la concurrence qui l'emporte et dans quelles conditions les sociétés peuvent invoquer le respect de la réglementation comme circonstance atténuante dans un contexte de droit de la concurrence. Dans le contexte spécifique des prix excessifs, le débat sur les avantages respectifs du droit de la concurrence et de la réglementation est plus vaste et analyse de façon plus objective les rôles respectifs des autorités de la concurrence et des autorités de tutelle dans la mesure où il se préoccupe moins des questions de primauté dans les domaines où leurs compétences se recoupent. Débattre de ces rôles respectifs dans le contexte des prix excessifs apparaît particulièrement justifié étant donné que certains auteurs, voire des juridictions entières, ont estimé que ces prix échappent au domaine du droit de la concurrence.

Bien que le titre de la présente section donne à penser que le traitement des prix excessifs est confié soit à l'autorité de la concurrence, soit à une autorité de tutelle sectorielle, ce qui impliquerait que les frontières conceptuelles correspondent aux frontières institutionnelles, la réalité est souvent plus complexe. Et il est vrai que le droit et les principes de la politique de la concurrence sont souvent au cœur des réglementations[67]. Or il est généralement et implicitement admis que lorsque le droit de la concurrence n'atteint pas son objectif ou a peu de chance d'y parvenir, il est opportun qu'une autorité de tutelle spécialisée mette en place une réglementation des prix. À l'inverse, il arrive que l'on supprime la réglementation des prix lorsque des tests appropriés révèlent une situation de concurrence satisfaisante[68].

On sait bien sûr que le droit de la concurrence n'offre pas toujours les outils nécessaires pour lutter contre les défaillances du marché. La réglementation sectorielle spécifique, quant à elle, ne peut ni cibler ni corriger efficacement toutes les défaillances de marché.

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64 Voir OCDE (2011a).

65 Voir OCDE (2010a), (2010b) et (2009b).

66 Voir OCDE (1999). Le rapport soulignait que l'analyse ne porterait pas sur l'évolution possible à long terme (des autorités de la concurrence et les autorités de tutelle) compte tenu des tâches qui leur sont dévolues et des modifications appropriées qu'ils souhaiteront éventuellement apporter eux-mêmes à leur lettre de mission, leurs pouvoirs et leurs structures (OCDE,1999:17). Il en va de même ici.

67 Dans le cadre des Directives de l'Union européenne relatives aux télécommunications, par exemple, la réglementation applique le critère de puissance significative sur le marché (PSM). De la même façon, l'Australie et dans une certaine mesure la Nouvelle Zélande ont intégré la réglementation dans le cadre général de la concurrence, ce qui implique que l'on supprime les réglementations lorsque l'on peut démontrer qu'il existe une concurrence suffisante.

68 En ce qui concerne le marché interétatique de l'électricité aux États-Unis, par exemple, la Federal Energy Regulatory Commission (FERC) supprime certaines réglementations des prix si les producteurs d'électricité apportent la preuve qu'ils sont en concurrence, sur la base du test de concurrence de la FERC.

L'échec de la réglementation tient parfois à une inadéquation entre les instruments utilisés et les problèmes qu'ils sont censés régler[69]. On peut en effet incriminer certains instruments réglementaires spécifiques, mais, pour bien appréhender le problème des prix excessifs, il faut poser la question plus vaste de savoir qui, des autorités de la concurrence où des autorités de tutelle, est susceptible de disposer de la meilleure palette d'instruments et de la meilleure expertise en la matière. Évidemment, cela suppose au préalable que l'on considère que les prix excessifs posent un problème qui doit être résolu et qui peut l'être de façon satisfaisante. Alors que, d'une façon générale, on ne remet pas en question la nécessité d'une intervention par la voie réglementaire, par exemple en matière de services collectifs, et que pour assumer ces fonctions, les autorités de tutellesectorielles sont censées être mieux placées que les autorités de la concurrence, il n'en va pas de même en matière de prix excessifs.

Bien sûr, la question de la répartition du travail entre les autorités de la concurrence et les autorités de tutelle (sectorielles) ne se pose pas dans les juridictions où les prix excessifs ne sont pas en infraction avec le droit de la concurrence. Toutefois, comme, dans ces juridictions, les autorités de tutelle peuvent néanmoins détenir des pouvoirs similaires au niveau sectoriel, il peut être très utile que celles qui exercent dans des juridictions présentant une répartition du travail différente comprennent les raisons qui sous-tendent cette répartition (extrême) du travail. Il en va de même en ce qui concerne l'examen des conflits éventuels entre autorités de tutelle et autorités de la concurrence.

Dans les cas de « lacune de la réglementation » ou – dans une moindre mesure – les cas de régime de « deuxième chance », la division du travail est simple dans la mesure où des affaires de ce type relèvent clairement du droit de la concurrence. Il n'en va pas nécessairement de même en ce qui concerne les autres arguments avancés en faveur d'une intervention. Selon Blumenthal, la question de la répartition du travail semble *a priori* exclue, au moins quand un suivi constant s'impose :

> *« Les gouvernements disposent d'un certain nombre d'outils réglementaires pour corriger les défaillances apparentes du marché. Lorsque l'existence d'un monopole particulier pose un problème si grave et si difficile à résoudre que les autorités ne voient d'autre solution efficace qu'un mécanisme de suivi et de surveillance des prix, il faut se poser la question de savoir s'il existe une autorité de tutelle sectorielle dotée des compétences nécessaires. Dans la négative, il faut se demander si la défaillance du marché est réellement de nature à justifier la mise en place d'une nouvelle autorité de tutelle*[70]*. »*

Il existe d'importantes différences entre le droit des États-Unis et, par exemple, les droits applicables dans l'Union européenne, s'agissant de qualifier des prix excessifs en infraction au droit de la concurrence. En dépit de ces différences, la Commission européenne semble partager la même réticence (que les États-Unis) en matière de « réglementation des prix » :

> *« Or, dans sa pratique décisionnelle habituelle, la Commission ne contrôle ni ne condamne un niveau de prix élevé. Elle examine le comportement de l'entreprise en position dominante cherchant à maintenir cette position en général au détriment direct des concurrents ou des*

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69 Breyer (1982:191) note : « la réglementation n'atteint parfois pas ses objectifs parce qu'on ne trouve pas le bon instrument pour régler le problème » .

70 Blumenthal (2008:580). Il remarque toutefois que « (dans la perspective de l'ensemble de l'économie, l'application du droit de la concurrence... est l'instrument réglementaire par défaut.. » Blumenthal (2008:576).

nouveaux venus sur le marché, qui seraient normalement à l'origine d'une concurrence effective, ainsi que le niveau des prix qui en résulte[71]*. »*

D'autres juridictions semblent également partager ce point de vue :

« Il est important de ne pas perturber les mécanismes naturels du marché grâce auxquels des prix et des profits élevés mènent à de nouvelles entrées ou à des innovations opportunes, intensifiant ainsi la concurrence. Il est particulièrement important que le droit de la concurrence ne freine pas les incitations à l'innovation[72]*. »*

Comme cela été souligné avec raison « combiner le droit de la concurrence et la réglementation est une erreur fondamentale »[73], mais on peut aussi craindre que les autorités de la concurrence, désireuses de se débarrasser de lourdes responsabilités, préfèrent renvoyer les affaires concernant des prix excessifs présumés aux organismes de tutelle sectorielle pertinents. Rechercher une bonne division du travail est certes souhaitable, mais cela ne signifie pas pour autant que les autorités de la concurrence n'ont pas de rôle à jouer, surtout si le droit de la concurrence leur confère des responsabilités spécifiques. Jenny fait un commentaire plutôt provocateur sur ce sujet épineux de la répartition du travail :

«... Sommes-nous prêts à déclarer officiellement que nous ne pouvons combattre la manipulation des prix de peur de décourager l'investissement ? Dans ce cas, les politiques diront : « Eh bien, puisque les autorités de la concurrence ne servent à rien, légiférons donc contre la manipulation des prix[74]*. »*

Aux fins de la présente étude, les autorités de tutelle sont définies comme les autorités chargées d'un secteur où d'un petit nombre de secteurs. En effet, les pouvoirs publics estiment que, dans ces secteurs, l'intérêt public ne serait pas servi adéquatement par le marché privé, sous la surveillance de l'autorité de la concurrence. Ils confient donc à une personne ou à une institution la responsabilité de spécifier directement des variables telles que le prix et la qualité[75].

Le tableau 2 contient un aperçu des principales différences entre les autorités de la concurrence et les autorités de tutelle.

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71 XXIV[e] Rapport sur la politique de concurrence 1994, Commission européenne, § 207 (1994), Voir également le Ve Rapport sur la politique de concurrence 1975, Commission européenne, § 76 (1975) et le XXVII[e] rapport sur la politique de concurrence 1997, Commission européenne, § 77 (1997).

72 Voir OFT (2004). On notera une fois de plus que ce ne sont généralement pas les prix et les profits avant l'entrée qui incitent à l'entrée. Cependant, dans certaines circonstances, les prix avant l'entrée contiennent des informations relatives à la rentabilité après l'entrée. Cela est vrai en particulier lorsque des prix élevés avant l'entrée s'expliquent par des contraintes de capacité ou d'autres contraintes sur l'offre. Plus simplement, les prix après l'entrée ne sont pas supérieurs aux prix avant l'entrée.

73 Furse (2008:83).

74 Jenny (2008:498).

75 (OCDE 1999:18).

Tableau 2. Comparaison entre le droit de la concurrence et la réglementation[76]

	Droit de la concurrence/ Autorité de la concurrence	Réglementation/Autorité de tutelle
Objectifs des politiques suivies	efficience, bien-être du consommateur, protège le processus concurrentiel	efficience, protection du consommateur, investissement dans les infrastructures, service universel, objectifs environnementaux...
Seuil d'intervention	position dominante	variable
Fréquence de l'intervention	sélective	continue, universelle
Information	pas de suivi systématique du marché, l'autorité a la charge de la preuve	suivi systématique du marché, la charge de la preuve incombe aux sociétés
Connaissance du secteur	plus faible	élevé
Indépendance	forte	plus faible
Risque de captation de la réglementation	plus faible	élevé
Instruments	correctifs comportementaux et structurels, amendes	réglementation des prix[77]
Culture de l'entreprise	les marchés qui fonctionnent correctement sont la règle, les interventions sont l'exception	les interventions sont la règle, les marchés qui fonctionnent correctement sont l'exception
Effectif	plus faible	important
Contrôle judiciaire[78]	total	souvent limité

La littérature relative aux prix excessifs souligne souvent la distinction suivante :

> *« La réglementation est un processus* ex ante*, qui a pour objet de prescrire une conduite et un comportement commercial qui se substituent au jeu la concurrence jusqu'à ce que le marché fonctionne de façon adéquate. Le droit de la concurrence a pour objet d'interdire et de*

[76] Tableau établi et modifié sur la base de Haucap et Uhde (2008:255). Voir également OCDE (1999:24 et suivantes.). On suppose ici que le droit de la concurrence et les politiques de réglementation ne sont pas confiées à une autorité unique comme c'est le cas dans certains des pays de l'OCDE. Par ailleurs, on ne fait pas de distinction entre les caractéristiques qui sont sans doute de nature permanente et celles qui pourraient être modifiées, comme par exemple, d'un côté le seuil d'intervention et de l'autre, le savoir des experts.

[77] Avec le passage d'une réglementation fondée sur les coûts à une réglementation et un mécanisme fondés sur les incitations, les autorités de tutelle peuvent également réglementer la qualité de façon à éviter que les sociétés ne fassent un arbitrage entre la qualité et les prix.

[78] Voir Lavrijssen, Essens et Gerbrandy (2009).

sanctionner le comportement anticoncurrentiel. À l'exception du contrôle des fusions, il s'applique ex post[79]. *»*

Cette dichotomie entre le contrôle *ex post*, confié à l'autorité de la concurrence, et la réglementation *ex ante*, confiée aux autorités de tutelle, est quelque peu artificielle. Dans la réalité, on constate l'existence d'une bien plus grande diversité d'action au sein des institutions, au-delà de l'opposition simpliste entre intervention *ex ante* et contrôle *ex post*.

Cependant, l'une des raisons qui rend cette distinction pertinente est la question de la sécurité juridique. Toute règle juridique visant à interdire les prix excessifs, devrait pouvoir être raisonnablement appliquée ex ante par une firme dominante au moment où elle élabore sa politique de prix[80]. Il est clair que cette question concerne beaucoup plus les interventions fondées sur le droit de la concurrence que les approches réglementaires[81].

3.1. Légitimité et mandat

Il peut paraître superflu de débattre de la légitimité des autorités de la concurrence ou du mandat qui leur enjoint de faire appliquer les règles relatives aux abus de prix excessifs puisqu'il suffit de se référer aux dispositions du droit de la concurrence applicables dans leurs juridictions, si elles existent. Ainsi, il est clair qu'une autorité de la concurrence qui porte devant les tribunaux une affaire de prix excessifs conformément aux lois qui régissent les prix excessifs ou les prix abusifs dans sa juridiction est certainement mandatée à cet effet. Il faut toutefois, en matière de légitimité, faire une distinction entre les autorités de la concurrence d'une part, et les autorités de tutelle d'autre part, et, par analogie, peut-être aussi entre les autorités de la concurrence traitant d'une affaire d'abus de prix excessifs et les autorités de la concurrence appliquant des dispositions relatives au contrôle des fusions ou encore des dispositions contre les ententes.

Les autorités de tutelle ont habituellement un mandat sectoriel spécifique qui leur confère des pouvoirs étroitement circonscrits[82]. Dans le contexte des prix excessifs, ou plus généralement de la réglementation des prix, leur légitimité découle habituellement d'un mandat spécifique visant à réglementer un produit ou un service bien défini et à déterminer, sur la base d'une méthodologie particulière, le prix de ce produit ou service. Une autorité de tutelle sectorielle de ce type recueille constamment les données nécessaires, procède aux analyses requises, organise au besoin les auditions

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79 Forrester (2008:564 seq.). On notera que, dans certaines juridictions, le contrôle des fusions peut aussi s'appliquer *ex post*.

80 «..Même si l'on accepte... qu'il est nécessaire de contrôler les pratiques abusives en matière de prix, il est difficile de soumettre cette politique à un test juridique suffisamment réaliste. La règle juridique condamnant les prix abusifs doit être rédigée en des termes suffisamment précis pour permettre à la firme de savoir de quel côté de la loi elle se trouve. » (Whish 2003:689).

81 Selon Fletcher et Jardine (2008:537) « il semble que l'effet dissuasif des règles relatives aux prix excessifs -- qui conduit les firmes dominantes à s'efforcer de fixer des prix inférieurs au prix excessif, selon leurs estimations les plus plausibles -- risque d'être beaucoup plus problématique que la réglementation des prix *ex post* (les auteurs ont probablement voulu dire *ex ante*) appliquée à des firmes dominantes ayant pratiqué des prix explicitement reconnus comme abusifs. »

82 Cela est sans doute vrai en matière de réglementation des prix, mais probablement pas d'une façon générale, dans la mesure où les autorités de tutelle traitent chaque jour avec les grandes entreprises d'une large gamme de questions, ce qui leur donne un « pouvoir indirect ». En d'autres termes, les entreprises chercheront sans doute à rester dans les « petits papiers » de l'autorité de tutelle, ce qui lui confère un certain pouvoir discrétionnaire.

nécessaires, assure le suivi des procédures d'appel prévues et fait appliquer les prix conformément à son mandat spécifique.

En revanche, l'autorité de la concurrence a un mandat très vaste dans la mesure où elle est généralement chargée de faire respecter le droit de la concurrence dans tous les secteurs de l'économie. Bien que ce vaste pouvoir soit limité à l'application du droit de la concurrence et placé sous le contrôle du pouvoir judiciaire, il est plus ample que celui de l'autorité de tutelle[83].

Par exemple, il n'est pas de la compétence d'une autorité de tutelle sectorielle – qui part souvent de l'hypothèse qu'un prix doit être réglementé – de décider s'il y a, dans le cas d'un prix donné, abus de prix excessif[84] . En effet, lorsqu'il a été établi que l'intervention est justifiée, l'autorité de tutelle comme l'autorité de la concurrence peuvent toutes deux agir sur un prix ou ordonner une réparation, mais dans le cas de l'autorité de tutelle sectorielle, la décision d'intervenir est prise par le législateur et non par l'autorité elle -même.

En revanche, le choix du secteur, de la méthodologie utilisée et de la réparation imposée sont à la discrétion de l'autorité de la concurrence, mais presque jamais à celle de l'autorité de tutelle[85]. Dans le cas de l'autorité de tutelle, c'est (habituellement) le législateur qui décide s'il est souhaitable d'intervenir et dans quel secteur. Ce dernier n'essaie pas de déterminer si un prix excessif est abusif, mais intervient pour des raisons générales de politique publique[86].

Cette différence entre les pouvoirs de l'autorité de la concurrence et de l'autorité de tutelle revêt une importance particulière pour ceux qui pensent que le contentieux des prix excessifs ne peut pas se régler sur la base de critères objectifs, tels que la marge entre le prix et le coût, qui peut être chiffrée. C'est sans doute ce que Fox vise quand elle écrit :

> *« Le droit américain repose sur le principe que la détermination du prix doit être laissée au libre jeu du marché, sauf si le Congrès a effectivement déterminé que le marché ne fonctionne pas et a mis en place une commission réglementaire*[87]*. »*

Dans la mesure où l'on pense qu'il est difficile de définir objectivement des concepts tels que « valeur économique » ou « prix excessifs », on peut préférer adopter une approche normative. On se rapproche alors de la situation que le juge Stewart décrit en 1964 dans son test d'acceptabilité applicable à la « pornographie intégrale » :

> *« Je n'essaierai pas aujourd'hui de définir davantage le type d'éléments que recouvre cette description elliptique ; et je ne réussirai peut-être jamais à le faire de façon intelligible. Mais je*

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83 Bien qu'on puisse aussi considérer qu'il est plus limité dans la mesure où le seuil d'intervention est beaucoup plus étroit.

84 Ainsi qu'on l'a déjà suggéré, par exemple dans le contexte de la réglementation du secteur des télécommunications (PMS), ces lignes de démarcation traditionnelles sont mouvantes.

85 Les enquêtes de marché aux Royaume-Uni sont une exception possible.

86 Dans le cas de l'autorité de la concurrence, le texte législatif est très général dans la mesure où il ne spécifie par exemple ni le secteur visé, ni la méthodologie à utiliser.

87 Fox (1986:993).

sais les reconnaître quand je les vois (souligné dans le texte) et le film concerné par cette affaire ne les contient pas[88]*. »*

On considère habituellement que des décisions normatives de ce type devraient être prises par le législateur plutôt que par les tribunaux et c'est en partie pour cette raison que l'on cite souvent le juge Stewart. On voit aussi dans la citation de Fox ci-dessus que de nombreux auteurs, même ceux qui sont défavorables à toute intervention qui se ferait exclusivement sur la base du prix, préféreraient, et de loin, que les décisions relatives aux prix excessifs, et notamment aux secteurs, produits et services dans lesquels il faut contrôler les prix, soient prises par le législateur plutôt que par les tribunaux ou par l'autorité de la concurrence.

Entre les deux cas « extrêmes » que nous venons de décrire, on se trouve parfois dans une situation où les abus de prix excessifs relèvent du droit de la concurrence, mais où le législateur indique néanmoins qu'il souhaite voir ces dispositions appliquées dans des cas particuliers. L'Allemagne, par exemple, a ajouté des dispositions spécifiques temporaires à son droit de la concurrence. Les dispositions de l'article 29 de la loi allemande sur les restrictions à la concurrence complètent le droit de la concurrence. Elles concernent les pratiques abusives des sociétés de gaz et d'électricité et seront analysées de façon plus détaillée dans la section 5 et à l'annexe 2. Comme l'introduction de ces nouvelles dispositions a, semble-t-il, pour objet d'étendre les pouvoirs de l'autorité de la concurrence, en mettant l'accent sur les domaines qui intéressent spécifiquement le législateur, elle peut certainement contribuer à calmer les inquiétudes exprimées plus haut en matière de légitimité.

Outre l'attribution de missions de réglementation aux autorités de la concurrence, de nombreux pouvoirs ont été donnés aux autorités de tutelle sectorielles[89] en matière de concurrence. Aux États-Unis par exemple, certaines fonctions relatives à l'évaluation de la concurrence sont confiées à des autorités de tutelle sectorielles dans les secteurs de l'aéronautique (le pouvoir d'autoriser les fusions et acquisitions de compagnies aériennes) et des chemins de fer (le pouvoir d'autoriser les conférences). De ce fait, les frontières institutionnelles sont sans doute moins strictes que ce qui est suggéré ici.

3.2. Lacune du droit de la concurrence et intervention de deuxième chance

Une des raisons parfois invoquée de faire de la lutte contre les abus de prix excessifs un instrument actif dans la panoplie des moyens d'application du droit de la concurrence, est que les actions intentées pourraient servir à corriger des erreurs commises par le passé dans ce domaine[90]. De même que les actions intentées contre l'abus de position dominante permettent de rectifier *a posteriori* des erreurs faites en matière de contrôle des fusions, les affaires relatives aux prix excessifs peuvent permettre de corriger des

88 Voir l'opinion convergente du juge Potter Stewart dans Jacobellis vs. Ohio 378 U.S. 184 (1964). Cette affaire concernait le caractère éventuellement obscène d'une scène du film « les Amants » de Louis Malle. Voir également Gewirtz (1996). L'idée que certaines choses peuvent être difficiles à décrire, mais sont néanmoins immédiatement reconnaissables, est aussi appelée « le test de l'éléphant ».

89 C'est le cas par exemple au Royaume-Uni pour les marchés du gaz et de l'électricité (Ofgem) et dans les télécommunications (Ofcom) ainsi qu'à Singapour pour l'autorité des télécommunications (iDA). Outre les dispositions spécifiques qui complètent le droit de la concurrence allemand, des pouvoirs réglementaires plus étendus ont parfois été attribués aux autorités de la concurrence, par exemple en Australie, à l'autorité de tutelle de l'énergie, entité semi-autonome au sein de la Competition and Consumer Commission (Commission de la concurrence et du consommateur) (ACCC), qui fixe les prix pour le réseau d'infrastructure énergétique. Le pouvoir réglementaire le plus étendu accordé à une autorité de la concurrence est probablement celui que confère l'instrument d'enquête de marché de la Commission de la concurrence du Royaume-Uni.

90 Voir Röller (2008:529).

erreurs de type II (acquittements erronés) relatives aux comportements d'exclusion (et au contrôle des fusions)[91]. L'idée est que l'autorité de la concurrence n'est pas toujours informée des comportements d'exclusion, ou encore, que dans une situation d'incertitude, elle sous-estime peut-être les effets d'exclusion de certains comportements. Dans ce cas, et si la position dominante de la firme est renforcée alors que la pratique abusive d'exclusion qui a permis ce renforcement n'a pas fait l'objet de poursuites, l'autorité peut fonder son intervention sur la pratique de prix excessifs[92]. Régibeau (2008:653) utilise également cet argument. Évoquant les incertitudes qui entourent les affaires d'exclusion et de contrôle des fusions, il souligne la valeur ajoutée qu'apporte une règle contre les pratiques de prix abusives, en tant qu'instrument supplémentaire de lutte contre les pratiques des firmes dominantes.

Un autre argument clé avancé en faveur d'un instrument de lutte contre les abus de prix excessifs est que cette intervention peut pallier ce que l'on a qualifié de « lacune » du droit de la concurrence[93]. Dans les juridictions où le droit de la concurrence n'a pas de prise sur l'acquisition d'un pouvoir de monopole, les poursuites concernant les abus de prix excessifs offrent peut-être un moyen de remédier à cette lacune. Dans les juridictions où le droit de la concurrence régit effectivement le pouvoir de monopole, cette intervention de « deuxième chance » peut être utile lorsque l'autorité de la concurrence a *de facto* laissé passer l'occasion de poursuivre une firme ayant acquis une position dominante par des pratiques d'exclusion abusives.

3.3. Connaissances sectorielles spécialisées du secteur et captation de la réglementation

Une des principales raisons d'ordre pratique pour lesquelles les autorités hésitent à intervenir contre les abus de prix excessifs, est le fait qu'en s'engageant dans ce genre d'affaires, elles risquent d'avoir à traiter au quotidien de questions de réglementation des prix. Or elles n'ont tout simplement pas les connaissances sectorielles spécialisées qui leur permettraient d'intervenir avec compétence dans ce domaine[94].

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91 C'est essentiellement ce qui s'est produit en ce qui concerne les frais d'itinérance dans le cadre de l'UE. Voir Maier-Rigaud et Parplies (2009).

92 « De ce fait, on peut faire valoir que deux instruments valent mieux qu'un. En d'autres termes, il est possible de mettre fin à des pratiques d'exclusion abusives chaque fois que ces dernières ont réellement eu des effets négatifs, même si cela semblait improbable auparavant. » (Röller 2008:530). Röller avertit cependant qu'on peut légitimement se demander s'il ne serait pas préférable d'éviter les erreurs plutôt que de compter sur la deuxième chance qu'offre, en cas d'abus, la théorie du préjudice. Pour reprendre l'analogie avec le contrôle des fusions, on considère généralement qu'il est préférable d'interdire une fusion ou d'exiger des désinvestissements plutôt que d'en combattre ensuite les effets anticoncurrentiels dans le cadre d'actions menées contre les monopoles.

93 Cette interprétation des actions contre les abus de prix excessifs présente également l'avantage d'expliquer en partie les différences entre les approches suivies aux États-Unis et dans l'Union européenne. Voir Paulis (2008:519).

94 Siragusa (2008:646) signale que cette réticence est liée au fait de l'on s'attend à ce que la solution retenue en cas d'abus de prix excessifs soit réglementaire : « L'une des raisons de la réticence des autorités à faire appliquer les dispositions de l'article 82 relatives aux prix non équitables (article 102 du Traité sur le fonctionnement de l'Union européenne), est la crainte que l'autorité de la concurrence ne s'immisce dans le suivi au jour le jour du comportement des firmes en matière de fixation des prix. Cette crainte tient à la conviction qu'en matière d'abus de prix excessifs, l'imposition d'un « prix équitable » est *la* solution pour réparer le préjudice causé par l'infraction. Si l'on choisissait en revanche la solution structurelle, cette crainte ne serait certes pas fondée. L'autorité de tutelle resterait chargée de la fixation des prix, tandis que l'autorité de la concurrence serait chargée de réformer la structure de marché. En fait, les solutions structurelles peuvent utilement compléter l'arsenal des instruments dont dispose l'autorité de tutelle. » On

Blumenthal, qui partage cette opinion, se demande si, eu égard à la mission et à la structure de chaque institution, « les autorités de la concurrence possèdent les compétences nécessaires pour assumer les tâches de réglementation classique des prix et des profits du type de celle qui est appliquée dans le secteur des services collectifs. En tant qu'organismes généralistes, nous n'avons pas le personnel adéquat. Nous ne disposons pas de la palette de compétences requise. Nous n'avons pas l'expertise sectorielle convenable. L'expérience montre que chaque fois que nous avons essayé de d'assumer le rôle de l'autorité de tutelle traditionnelle, nous nous en sommes mal tirés[95]. »

Cette inquiétude relative à l'absence de connaissances sectorielles spécialisées est peut-être plus aigue encore dans les systèmes de droit de la concurrence qui s'en remettent à des tribunaux non spécialisés pour la décision finale. Certes, de nombreuses autorités de la concurrence sont tenues de s'adresser au tribunal pour obtenir des ordonnances ou percevoir des amendes. En revanche, dans les systèmes de droit administratif, les divergences entre l'application du droit de la concurrence et celle de la réglementation sont moins marquées et peuvent plus facilement être résolues par des décisions en matière de dotation en personnel. Dans ces systèmes, les autorités de la concurrence exercent à la fois des fonctions d'enquête et de poursuite, leur rôle ne se distinguant de celui de l'autorité de tutelle que par l'absence d'une fonction quasi judiciaire[96].

En outre, même lorsque les décisions des autorités de tutelle sont soumises au contrôle judiciaire, elles inspirent sans doute un plus grand respect que les décisions des autorités de la concurrence. Cela tient à ce que les autorités de la concurrence sont chargées de faire exécuter une loi d'application générale, et non d'élaborer ni de faire appliquer des règles spécifiques soit à un secteur, soit même à une firme, s'appuyant probablement sur une somme d'information et d'expertise que les tribunaux n'ont pas les moyens d'apprécier ni de mettre en œuvre[97].

L'argument relatif à l'insuffisance des connaissances sectorielles spécialisées comporte plusieurs éléments. En effet, pour y remédier, il ne s'agit pas seulement de recruter un personnel spécialisé, ce qu'une autorité de la concurrence pourrait faire, mais il s'y ajoute le fait qu'une spécialisation sectorielle limite l'éventail des problèmes possibles et permet à l'autorité de tutelle de comprendre plus rapidement le dossier lorsqu'elle passe d'une décision réglementaire à une autre[98].

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trouvera à la Section 8 ci-après un examen des différents types de réparation du préjudice appliqués dans les affaires d'abus de prix excessifs.

95 Blumenthal (2008:578). On notera que c'est l'unique argument qu'avance Blumenthal lorsqu'il met en garde contre une intervention, même limitée, des autorités de la concurrence contre des prix élevés.

96 Fox (1986:992) examine la question des prix excessifs dans l'Union européenne et écrit que le droit européen « part de l'hypothèse que les prix élevés ne sont pas équitables, que les tribunaux sont capables de repérer les prix inéquitables, et donc que les tribunaux sont un meilleur mécanisme de correction des prix élevés que le marché. La règle européenne n'est pas un modèle de clarté » . Dans une partie au moins de l'argument relatif aux tribunaux, il semble y avoir une confusion entre le système européen et le système des États-Unis.

97 OCDE (1999:27s).

98 Il faut aussi noter que la comparaison entre les autorités de la concurrence et les autorités de tutelle révèle souvent non seulement que ces deux entités ont des compétences différentes, mais aussi que les autorités de tutelle ont des effectifs beaucoup plus importants.Voir tableau 2 ci-dessus.

Les autorités de la concurrence pourraient bien sûr développer ou acquérir des compétences sectorielles en matière d'abus de prix excessifs[99]. Cependant :

> *« Certains ont proposé que les autorités de la concurrence se dotent des compétences nécessaires et suggéré qu'elles pourraient alors être mieux armées que les autorités de tutelle pour intervenir en cas d'abus de prix excessifs dans les secteurs qui, traditionnellement, ne sont pas règlementés. S'il en était ainsi, la portée des interventions des autorités de la concurrence s'en trouverait limitée. Plus que les autorités de tutelle, elles examineraient les mécanismes du marché avant de prendre des mesures intrusives, elles seraient conscientes des distorsions qu'elles causent et elles seraient disposées à mettre fin à l'intervention lorsque la correction du marché est adéquate. Elles seraient aussi moins exposées au risque de captation de la réglementation. Toutes ces suggestions ont leur mérite, mais leur mise en œuvre aurait un coût inacceptable*[100]*.»*

Il est capital que les autorités de la concurrence comme les autorités de tutelle soient indépendantes des firmes qu'elles supervisent, mais il y a des raisons de penser que la captation de la réglementation pose un véritable problème. Plus précisément, on admet généralement que les autorités de tutelle, du fait de leur meilleure connaissance du secteur, sont davantage exposées à ce risque que les autorités de la concurrence. En revanche, le personnel et les dirigeants des autorités de la concurrence qui supervisent l'ensemble de l'économie n'ont probablement ni les connaissances sectorielles approfondies, ni les contacts, ni l'attitude qui pourraient leur procurer des emplois en tant que salariés, agents d'affaires ou consultants, chez ceux sur lesquels ils exercent maintenant une influence. En général les autorités de tutelle, qui ont des contacts fréquents et répétés avec les firmes qu'ils supervisent, sont plus exposées au risque de captation de la réglementation[101].

Avec le temps, les autorités de tutelle, qui partagent les mêmes informations que les firmes de leur secteur, risquent de finir par épouser aussi les mêmes vues. Elles pourraient de ce fait hésiter à prendre des mesures pour intensifier la concurrence, qui les empêcheraient de mettre en œuvre des mécanismes de subventionnement croisés ou de promouvoir des mesures de protection de l'environnement et de sécurité énergétique. À long terme, ces tâches des autorités de tutelle pourraient s'avérer aussi importantes pour leur survie que la mission consistant à assurer qu'un large groupe de consommateurs peu organisés aient accès à des services de qualité raisonnable, à un prix raisonnable[102].

Ainsi, l'absence de spécificité sectorielle des autorités de la concurrence qui apparaît comme un obstacle majeur à l'efficacité de la réglementation des prix a pour contrepartie un moindre risque de « captation de la réglementation »[103].

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99 Les décisions prises par la Commission européenne de lancer des enquêtes sectorielles sont une reconnaissance implicite du caractère limité des connaissances sectorielles des autorités de la concurrence. Dans le même temps, les enquêtes sectorielles sont un bon exemple des moyens par lesquels les autorités de la concurrence peuvent acquérir ces connaissances. Les enquêtes sectorielles de l'Union européenne ont aussi l'avantage de disposer d'un outil de collecte de l'information beaucoup plus puissant que celui dont dispose la plupart des autorités de tutelle. Les enquêtes menées sur les secteurs de la pharmacie et de l'énergie, par exemple, ont permis d'établir des bases de données uniques en Europe, contenant des données auxquelles les autorités de tutelle n'ont pas accès.

100 Blumenthal (2008:579).

101 OCDE (1999:28).

102 OCDE (1999:28).

103 OCDE (1999:21).

3.4. Les autorités de la concurrence en tant qu'autorités de tutelle résiduelles

Les autorités de la concurrence peuvent sans doute jouer le rôle d'autorités de tutelle résiduelles ou d'autorités de tutelle en dernier ressort, en particulier dans les secteurs qui n'ont pas besoin d'une autorité de tutelle permanente.

Il se peut que les autorités de la concurrence soient tentées, en dépit des dispositions de la loi sur la concurrence, de renvoyer la décision aux autorités de tutelle ou au législateur. Cette solution ne favorisera pas forcément une approche nuancée en matière de réglementation et d'intervention sur les marchés. En effet, il n'est pas toujours nécessaire pour résoudre les problèmes de surveiller ou de réglementer en permanence les prix excessifs[104].

Comme le souligne Lyons, « il n'est pas rare d'entendre l'argument selon lequel les prix élevés ne devraient pas relever de l'article 82 (devenu 102), mais devraient être sous le contrôle d'instances de tutelle spécialisées. Mais sur quelles bases choisir les secteurs qui seront soumis à un contrôle des prix[105] ? ». En particulier, dans les cas où il n'y a pas *ex ante* de raisons majeures de réglementer, il peut être beaucoup moins contraignant de laisser les firmes se livrer concurrence, sans leur imposer de réglementation, sachant que l'autorité de la concurrence pourrait intervenir *ex post* si la concurrence ne s'établit vraiment pas et si les prix deviennent, ou restent, abusifs. *Ex ante,* il se peut qu'il n'y ait aucune bonne raison de mettre en place une instance de tutelle spécialisée soit parce que le problème n'est pas récurrent, soit par ce qu'il ne se produit que rarement[106].

Une réglementation qui aurait un caractère définitif peut présenter des inconvénients. Rares sont les autorités de tutelle qui ont effectivement réussi à supprimer progressivement certaines règles, puis fermé leurs portes lorsque le marché, devenu concurrentiel, n'avait plus besoin d'être réglementé[107]. Une autorité de la concurrence, en revanche, du fait des différences de culture mentionnées au tableau 2 (ci-dessus), se

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104 Il existe aussi le risque d'évincer une réglementation plus efficiente. Par exemple quand l'autorité de la concurrence intervient alors qu'elle est mal placée pour le faire, ou encore quand elle n'intervient pas alors qu'une intervention de l'autorité de tutelle n'est pas appropriée. Alors que l'autorité de la concurrence se croit parfois obligée de s'attaquer à certains problèmes en tant qu'autorité de tutelle de dernier ressort, par exemple en l'absence d'autorité de tutelle sectorielle spécifique, une intervention même maladroite de l'autorité de la concurrence risque d'inciter le législateur à ne pas intervenir comme il le devrait, ce qui peut à long terme freiner l'avènement d'une solution mieux adaptée. Ce problème est analogue à celui de l'inversion des rôles en cas d'éviction volontaire – quand l'autorité de la concurrence décide de ne pas intervenir alors que son intervention devrait être préférée à tout autre.

105 Lyons (2007:84).

106 Une variante pourrait s'appliquer, semble-t-il, à des cas comme celui du port de l'UE de Helsinborg (voir l'annexe 3). Dans ce cas, il s'agit d'un problème transnational concernant plusieurs juridictions de façon asymétrique, alors qu'il est politiquement impossible de créer une autorité de tutelle supranationale. Bien que les réseaux de autorités de tutelle nationales puissent contribuer largement à résoudre ces problèmes, comme le montre l'exemple de l'Union européenne, cela n'est pas toujours possible , en particulier si le problème concerne des produits et services spécifiques plutôt que des secteurs industriels habituellement réglementés.

107 Selon Forrester (2008:554) « les autorités de tutelle ont du mal à admettre qu'il peut y avoir une concurrence effective et durable en l'absence de réglementation » . Il s'inquiète ensuite du manque d'expertise et d'autonomie des instances de tutelle nationales des télécommunications en se référant à des rapports annuels de la Commission européenne sur la réglementation et les marchés européens des communications électroniques (du 10e au 12e rapport).

débarrassera plus facilement de compétences réglementaires qu'elle ne souhaite généralement pas assumer dès qu'il y aura une concurrence suffisante[108] .

Dans les économies en transition, il peut y avoir dans certains secteurs des situations de monopole significatives, mais de caractère temporaire, sous forme d'investissements fixes hérités du passé, effectués à une époque où on ne fondait pas les décisions relatives à la taille des équipements et à la propriété sur des considérations de marché. Dans ce cas, les firmes peuvent conserver une part de marché considérable longtemps après la libéralisation. Si les prix restent longtemps excessifs, il peut être opportun de réglementer temporairement les prix, sans avoir à créer une instance de tutelle sectorielle spécialisée.

Faire de l'autorité de la concurrence l'autorité de tutelle de dernier ressort présente cependant un inconvénient. En effet, charger ces autorités des questions de réglementation, et notamment « de décisions qui ont des effets très importants non seulement en termes d'efficience, mais aussi en termes de distribution »[109] risque de poser un problème car « il s'agit de décisions qui, par nature, ont un caractère plus politique que ce que l'on considère optimal pour une instance qui doit, dans l'exercice de ses fonctions de supervision, se considérer et apparaître comme un observateur impartial, soucieux de faire progresser le bien-être public et non de partager le gâteau entre des groupes d'intérêts concurrentiels[110]. »

4. Filtres applicables aux poursuites des cas de prix excessifs

On trouve dans les publications plusieurs filtres visant à restreindre le champ juridique d'action contre les prix excessifs dans les juridictions où ils constituent une pratique abusive aux yeux de la loi[111]. L'extrait ci-dessous d'un discours de l'ancien directeur général de la DG Concurrence qui souligne les différences opposant l'UE et les États-Unis dans ce domaine, démontre les difficultés rencontrées par des juridictions dotées de dispositions relatives aux prix excessifs tout en essayant d'en restreindre le champ d'application à certaines conditions :

> *Dans la législation américaine, la pratique de prix excessifs par le détenteur d'un monopole n'engagera pas sa responsabilité. Les pratiques abusives sont réputées s'autocorriger car l'exercice du pouvoir de marché en vue d'augmenter les prix devrait en principe attirer de nouveaux entrants.*
>
> *En ce qui concerne les pratiques abusives, nous savons naturellement qu'une autorité de la concurrence n'aura le plus souvent pas besoin d'intervenir sur les marchés. Nous sommes aussi conscients de l'extrême difficulté d'apprécier de quoi est fait un prix excessif. Dans la pratique, nous nous attachons donc principalement, comme les États-Unis, à réprimer les abus visant à l'élimination d'un concurrent, autrement dit les pratiques qui cherchent à porter un préjudice indirect aux consommateurs en modifiant la structure ou le jeu de la concurrence sur le marché.*

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108 Il a de même été suggéré que les autorités de la concurrence pourraient réglementer les prix temporairement dans des cas de manipulation des prix. Par exemple en cas de catastrophe naturelle, l'autorité de la concurrence pourrait temporairement assumer le rôle d'instance de réglementation des prix, étant à même de prendre des mesures dans l'urgence, et déterminer rapidement l'existence de prix excessifs, par rapport à leurs niveaux antérieurs à la catastrophe. La durée de son intervention serait relativement courte. Lewis (2009:588, note 4)

109 OCDE (1999:22).

110 OCDE (1999:22).

111 Citons Blumenthal (2008:577) qui se demande à quelles circonstances restreintes particulières ou conditions préalables générales il faudrait satisfaire pour pouvoir justifier une intervention. On trouvera dans Motta et de Streel (2006) et Motta et de Streel (2007), outre leurs propres suggestions, un aperçu des filtres proposés.

> *Nous n'avons pas le pouvoir de changer le Traité. Je crois, pour ma part, qu'il convient de continuer à poursuivre ces pratiques dont le caractère abusif ne s'autocorrige pas, à savoir les cas où les barrières à l'entrée sont fortes, voire insurmontables. La logique voudrait aussi probablement que l'on applique ces dispositions dans les secteurs récemment ouverts à la concurrence dans lesquels les positions dominantes existantes ne sont pas le fruit de l'excellence passée*[112].

Vu les difficultés inhérentes à la notion de prix excessifs, on a cherché, comme il fallait s'y attendre, des conditions pour en limiter sensiblement la portée. Au nombre de celles-ci, des filtres ayant vocation à définir les 'circonstances exceptionnelles[113]' qui autorisent l'application de prix excessifs jusqu'aux filtres plus globaux s'intéressant aux seules barrières à l'entrée[114]. Ils concernent, pour certains, directement le cadre réglementaire ou, dans un sens plus large, la libéralisation et la privatisation. D'autres portent sur la manière dont la position dominante a été acquise et incluent la notion d'« écart » ou les cas d'« erreur ».

L'examen des filtres envisageables vise essentiellement à déterminer les marchés sur lesquels on pourrait éventuellement agir contre les prix excessifs pratiqués par une entreprise dominante. La présente section traite principalement les conditions prises isolément plutôt que de façon cumulée qui sont proposés. L'accent y sera mis sur les trois conditions les plus souvent évoquées, sachant que toutes les autres propositions seront néanmoins examinées dans une sous-section distincte.

Nous examinerons aussi les difficultés juridiques concrètes liées à l'utilisation de filtres en tant que règle contraignante dépourvue de caractère « officiel » dans les affaires de prix excessifs. Ces problèmes potentiels sont liés au cadre réglementaire particulier dans lequel joue la concurrence et peuvent par conséquent toucher diversement les différentes juridictions.

4.1. Barrières fortes et durables à l'entrée

104. Ce critère repose sur le principe fondamental selon lequel les autorités de la concurrence ne devraient pas intervenir sur les marchés où le jeu normal de l'offre et de la demande devrait, avec le temps, supprimer les occasions pour une entreprise dominante de pratiquer des prix élevés[115].

On peut distinguer en principe trois types de barrières à l'entrée. Les barrières *juridiques* ont trait aux dispositions légales relatives au monopole ou autres droits et conditions spéciaux imposés par la réglementation ou la loi. Les barrières *structurelles* concernent la situation de base d'un secteur comme les coûts et la demande, par exemple. En revanche, les barrières stratégiques sont créées ou renforcées délibérément par les entreprises en place sur le marché, essentiellement dans une optique de dissuasion. De toute évidence, les autorités de la concurrence peuvent s'attaquer directement à ces dernières en agissant contre le comportement d'exclusion correspondant. Le filtre proposé s'intéresse donc aux deux premiers types de barrières à l'entrée, notamment les barrières structurelles.

Selon toute probabilité, la présence de fortes barrières structurelles durables à l'entrée est réputée être le principal critère justifiant en tant que tel une action contre des prix excessifs[116]. C'est le seul filtre

112 Lowe (2003).

113 Evans et Padilla (2005:120).

114 Voir Paulis (2008). Par ailleurs, des auteurs comme Werden (2009) ou Fox (1986) ont rejeté purement et simplement l'idée de poursuivre en justice les prix abusifs.

115 Voir Motta et de Streel (2007:22 seq.).

116 Evans et Padilla (2005:119). Cela pourrait aussi être considéré comme le plus petit dénominateur commun des diverses grilles proposées.

proposé par Paulis (2008:522) qui va d'ailleurs dans le sens de la déclaration du juge Scalia dans l'affaire américaine Trinko si l'on met suffisamment l'accent sur les mots « au moins pendant une courte période » :

> *La simple détention du pouvoir de monopole et la fixation simultanée de prix monopolistiques sont non seulement légales, mais aussi un aspect important d'un régime de libre marché. La possibilité de fixer des prix monopolistiques — **au moins pendant une courte période** [souligné dans le texte] — est ce qui attire au premier chef les personnes dotées du « sens des affaires » ; elle encourage la prise de risques qui crée l'innovation et la croissance économique. Afin de défendre l'incitation à innover, la détention du pouvoir de monopole ne sera pas jugée illicite à moins qu'elle ne s'accompagne d'un élément de comportement anticoncurrentiel*[117].

La définition des barrières à l'entrée ainsi décrites suppose en substance que l'autorité de la concurrence n'a ni des moyens efficaces pour s'y attaquer directement ni l'espoir que ces barrières n'auront qu'un caractère transitoire. Dans ce cas, elle peut régler le problème indirectement en plaidant pour la suppression des barrières juridiques et l'ouverture du secteur à la concurrence (en présence de barrières légales à l'entrée) ou, dans le cas de barrières structurelles, conseiller une solution réglementaire.

Afin, non seulement d'améliorer l'efficacité du travail de plaidoyer, mais aussi pour disposer d'une solution de repli s'il n'aboutissait pas, il a été suggéré de procéder en deux temps, en y associant l'ouverture, par l'autorité de la concurrence, d'une action contre les prix excessifs[118].

4.2. Position dite superdominante et son origine

L'une des principales conditions de base examinées dans les publications est la nécessité d'une situation de monopole ou quasi monopole ou, encore, de position superdominante[119]. Alors que toutes les juridictions exigent, pour commencer, l'existence d'une position dominante[120] afin de constater l'abus, l'un des filtres proposés place plus haut la barre des exigences. L'explication en est bien sûr liée au fait que plus le scénario du monopole est délaissé au profit d'une structure oligopolistique du marché, moins le pouvoir de marché détenu par une entreprise dominante lui permettra de fixer des prix excessifs. Par ailleurs, plus fort est le pouvoir de marché et moins grandes seront les chances qu'une autocorrection n'intervienne dans le délai voulu. Si le filtre proposé n'a pas été jusqu'à réduire le cadre d'action aux situations monopolistiques, il oblige les autres entreprises présentes sur le marché à jouer les seconds rôles, sans pouvoir peser efficacement sur l'entreprise dominante. L'autre argument en faveur d'un renforcement des exigences peut aussi trouver son origine dans l'incertitude juridique qui est créée à l'endroit d'entreprises qui seraient encore considérées comme dominantes mais ne répondraient clairement pas au critère de la superdomination[121].

Un filtre distinct qui a été proposé dans ce contexte concerne l'origine de la position dominante. De manière générale, Vickers (2003) défend l'idée qu'une politique publique adaptée aux entreprises

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117 *Verizon Commc'ns Inc. vs Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, p. 407 (2004). http://law.onecle.com/ussc/540/540us398.html

118 Proposition de Paulis (2008:521).

119 Voir par exemple van der Woude (2008:619) qui parle de la structure monopolistique ou quasi-monopolistique du marché ou Motta et de Streel (2007:24f.).

120 Pour une analyse de la position dominante collective dans le contexte des prix abusifs, voir la section 7 ci-après.

121 Voir, aussi, la sous-section 4.5 ci-après pour un examen des contraintes générales de ces grilles et de la sécurité juridique limitée qui en découle.

détentrices d'un pouvoir de marché effectif ou potentiel est déterminée par les éléments qui en sont à l'origine. Alors que des auteurs comme Paulis (2008:520) ne croient pas en l'utilité d'inclure dans l'équation les raisons de la position dominante ou superdominante, d'autres font valoir que cet aspect est une façon concrète de lier les affaires de prix excessifs aux abus visant à éliminer un concurrent et de mettre en évidence les secteurs susceptibles d'en être l'objet.

L'argument le plus fréquemment avancé en faveur de l'examen de l'origine de la position dominante vient des droits spéciaux ou exclusifs, existants ou passés. Sont clairement visés les anciens monopoles publics ou autres entreprises ayant tiré parti, par le passé, de ce que l'on pourrait considérer comme des barrières légales à l'entrée[122]. L'idée semble aussi particulièrement pertinente dans les pays asiatiques dont les lois sur la concurrence contiennent des dispositions sur les prix excessifs ou non équitables (souvent traduites par prix abusifs)[123]. Le seuil d'intervention au motif de « prix abusif » est beaucoup plus bas si la création de l'entreprise est consécutive à une ancienne stratégie de développement économique menée par les autorités et que sa position est par conséquent davantage imputable à l'intervention de ces dernières qu'à une concurrence axée sur le marché. Cela vaut aussi pour les secteurs dont la structure est, pour l'essentiel, le fait de l'action des pouvoirs publics[124].

On a évoqué des situations dites de « carence » ou d' « erreur » également fondées sur l'origine de la position dominante, car elles présentent l'intérêt direct de lier les prix excessifs aux comportements passés visant à éliminer un concurrent, ce qui permet d'éluder la question épineuse de la définition théorique des prix excessifs et de leur traduction dans les faits[125].

Ces cas de carence ne peuvent exister que dans les juridictions où la monopolisation ne constitue pas une infraction puisque l'existence d'une position dominante est impérative pour pouvoir constater l'abus comme dans la législation de l'UE, par exemple. Par ailleurs, les cas d'erreur reposent sur une mauvaise appréciation des effets ou sur l'ignorance du comportement d'exclusion de l'entreprise par le passé[126]. Une

122 Evans et Padilla (2005:119) indiquent, notamment, que l'entreprise tire parti d'une position de (quasi-) monopole sur le marché qui ne découle pas d'investissements passés ni d'innovations, et que protègent des barrières juridiques infranchissables à l'entrée. À l'évidence (2005:120) le fait qu'il s'agisse, ou pas, d'un ancien monopole public leur paraitrait superflu, puisque seuls les obstacles légaux encore en place compteraient. Les anciennes barrières ou le fait de savoir si les investissements ont été financés par des fonds publics n'entrent pas en ligne de compte dans cette appréciation. En plus des conditions cumulatives qu'ils proposent comme critères, les auteurs restent critiques, déclarant ignorer encore pourquoi il ne serait pas préférable de réglementer simplement *ex ante* et d'instituer des instances de tutelle spécifiques à chaque secteur qui maitriseraient mieux les paramètres fondamentaux des marchés en question et seraient mieux à même d'en contrôler la conformité. (Evans et Padilla, 2005:122).

123 Ainsi la Corée, la Chine, la Mongolie et le Taipei chinois ont inclus des dispositions spéciales en matière de prix abusifs dans leur droit de la concurrence. Il faut clairement les distinguer des lois plus générales relatives à la fixation de prix non équitables qui couvrent, par exemple, ce qu'on appelle souvent un comportement choquant. On peut faire jouer ces lois quand une entreprise profite de l'incapacité d'une autre personne à défendre de manière satisfaisante sa propre position et cela, indépendamment du fait que l'entreprise occupe ou non une position dominante. Sur cette question, voir la section 5 ci-après.

124 Sur ce point, voir l'examen de l'affaire coréenne, à l'annexe 2.

125 Cela serait faire montre d'un optimisme exagéré car on peut contester que l'acquisition d'une position dominante par l'élimination des concurrents, par exemple, suffise à démontrer le caractère excessif des prix pratiqués ultérieurement. Il en va de même pour les affaires de récidive dans lesquelles la règle *ne bis in idem* peut ajouter un surcroît de complication.

126 Là encore, cela pourrait viser les entreprises en position dominante et celles qui cherchent à exercer un monopole en menant une stratégie en vue d'éliminer les concurrents.

procédure pour prix excessifs peut alors donner l'occasion de « corriger » *ex post* l'absence d'intervention au moment où ce comportement s'est produit.

Un lien existe entre ces affaires et l'argument selon lequel les cas d'abus de position dominante ne devraient être examinés qu'au regard d'anciens monopoles publics qui, s'ils n'ont pas acquis cette position en éliminant leurs concurrents, ne l'ont certes pas gagnée en faisant jouer la concurrence[127].

4.3. Carences ou inexistence de l'autorité de tutelle sectorielle

La proposition tendant à conditionner la démarche à l'existence d'une autorité de tutelle sectorielle présentant des carences ou à l'inexistence d'une telle autorité est liée à l'argument du plaidoyer évoqué plus haut[128]. Autrement dit, en présence d'une autorité de tutelle sectorielle spécifique, il semble raisonnable, voire nécessaire, de laisser à cette instance la tâche de régler le problème. Il devrait en principe en aller de même si l'autorité de tutelle n'a pas (encore) reçu le mandat *ad hoc* requis pour traiter le problème de prix excessifs, auquel cas l'appui de l'autorité de la concurrence pourrait l'aider à l'obtenir.

La recommandation de l'autorité de la concurrence de créer une instance de tutelle s'il n'en existe pas actuellement peut certes être une solution, mais les chances d'y parvenir dans un délai raisonnable sont faibles et ces efforts devraient vraisemblablement s'accompagner de l'ouverture d'une procédure à l'encontre des prix excessifs, comme on l'a vu précédemment. Il faudrait aussi probablement que les autorités prennent des dispositions en vue de faire respecter le droit de la concurrence si la mise en place d'une instance de tutelle ne se justifie guère, par exemple, en raison du caractère occasionnel de ces problèmes[129], ou que cela n'est tout simplement pas réalisable.

La situation dans les pays en transition d'une économie planifiée à une économie de marché peut présenter un intérêt particulier. Dans ces pays, la privatisation des anciens monopoles publics peut avoir eu lieu dans des conditions initiales difficiles et, s'il est permis d'espérer que le marché corrigera ces problèmes, l'intervention passagère de l'autorité de la concurrence peut être préférable à la mise en place d'une nouvelle autorité de tutelle[130].

La situation se complique si le filtre va jusqu'à inclure le cas des autorités de tutelle présentant des carences[131]. Cela soulève fatalement toute une série de questions, y compris mais pas seulement, celle de la

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127 Röller (2008:529; 531) rangerait donc les anciennes entreprises publiques, toujours en place, dans la catégorie des situations de carence.

128 Voir Motta et de Streel (2007:26 seq.).

129 Dans certaines circonstances, comme les cas de prix abusifs transnationaux, par exemple, entre les États membres de l'UE, il peut être extrêmement difficile de trouver une solution réglementaire en l'absence de prérogatives correspondantes au niveau européen. C'est particulièrement vrai si le problème ne concerne pas de manière égale toutes les juridictions concernées ou qu'il y a clairement des gagnants et des perdants.

130 L'intervention temporaire de l'autorité de la concurrence dans de telles situations peut aussi notamment se justifier au vu de l'importance particulière des secteurs concernés pour les consommateurs et de la nécessité de conserver un soutien public à une économie de marché.

131 L'expression 'autorité de tutelle présentant des carences n'est pas utilisée au sens strict et nous entendons y englober à la fois les autorités qui enregistrent des résultats médiocres au regard de leur mandat et les autorités efficaces mais qui exercent leurs activités avec des pouvoirs limités.

répartition adéquate des missions entre autorités de tutelle et autorités de la concurrence en cas de conflit de compétences et, également, celles qui relèvent du comportement réglementé[132].

Dans les secteurs récemment ouverts à la concurrence notamment, ou dans le cadre de la privatisation des services publics de certains des nouveaux États membres de l'UE, les autorités de tutelle n'ont peut-être pas encore pu acquérir une assise solide et réglementer d'anciens monopoles d'État ayant conservé des liens étroits avec le pouvoir en place.

Les affaires récentes dans le secteur de l'énergie semblent indiquer que la Commission européenne ne s'interdit pas en principe, au moins très généralement, de faire respecter les règles de la concurrence dans les secteurs réglementés, puisque le droit européen de la concurrence mais aussi la réglementation au niveau européen priment sur le droit national[133]. C'est le cas, notamment, lorsqu'une autorité de tutelle nationale a, soit décidé de ne pas intervenir, soit soutenu le comportement de l'entreprise dominante[134].

4.4. Conditions supplémentaires

On trouve d'autres filtres dans les publications[135].

En examinant les filtres pertinents, Evans et Padilla (2005:119) proposent d'imposer comme condition à l'exercice d'une action contre des prix excessifs, le risque que ces prix empêchent de nouveaux biens ou services de voir le jour sur les marchés voisins et aussi, sur un plan plus technique, que les prix pratiqués par l'entreprise dominante soient très largement supérieurs au coût moyen total des entreprises[136].

Craignant les effets éventuels d'une dynamique défavorable, O'Donoghue et Padilla (2006), suggèrent de soumettre l'intervention à la condition que l'investissement et l'innovation jouent un rôle mineur dans le secteur. Ils font valoir aussi qu'aucune action ne devrait être engagée contre des prix excessifs ou un nouveau produit pendant toute la durée de son brevet[137].

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132 Sur cette dernière question du comportement réglementé, on trouvera dans OCDE (2011a) un examen approfondi.

133 Voir par exemple l'affaire UE/ENI décrite dans Maier-Rigaud *et al.* (2011).

134 Décision de la Commission 2003/707 du 21 mai 2003, Deutsche Telekom AG obtient gain de cause en appel [2003] JO L263/9 ; arrêt du tribunal de première instance du 10 avril 2008 - Deutsche Telekom Ag/Commission (Affaire T-271/03). Voir aussi la décision de la Commission du 4 juillet 2007 - Wanadoo Espana/Telefonica, (Affaire COMP/38.784), Telefonica SA et Telefonica de Espana (Affaire T-336/07).

135 Ces filtres sont aussi examinés, pour certains, par Motta et de Streel (2007) et Motta et de Streel (2006).

136 C'est en fait l'un des critères utilisés dans la disposition australienne réglementant l'accès au marché – il n'est pas prévu d'intervention sauf si l'intervention peut effectivement favoriser la concurrence sur un autre marché (voir la partie IIIA de la loi sur la concurrence et la consommation (Competition and Consumer Act) qui peut être consultée à http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/s44g.html).

137 Pour Fletcher et Jardine (2008:542), cela suppose d'évidence que le droit de monopole accordé en application du droit des brevets, plus précisément sa portée et l'étendue de sa protection, permet de peser convenablement les avantages de mesures visant à encourager l'investissement *ex ante* (y compris le risque d'échec) et l'inconvénient de limiter la concurrence, avec tous ses effets, pendant la durée du brevet. Sur la possibilité d'un conflit systémique entre droit de la propriété intellectuelle et droit de la concurrence, voir Régibeau (2008:661 seq.).

Autre condition proposée, il faudrait que le bien ait un caractère indispensable[138], autrement dit, qu'il soit absolument nécessaire aux consommateurs comme les denrées alimentaires ou des produits médicaux, par exemple, contrairement aux produits de luxe[139]. Á ce critère d'absolue nécessité, van de Woude ajoute par ailleurs les intrants nécessaires aux activités en aval ou l'accès à des installations essentielles.

4.5. Limites potentielles des filtres

Les restrictions appliquées par les autorités de la concurrence quand elles mettent en œuvre des filtres « informels », voire « tacites », peuvent créer des problèmes juridiques concrets qui ne disparaîtront pas tant que ces filtres n'auront pas été intégrés en bonne et due forme dans les dispositions juridiques de base ou qu'elles ne feront pas partie intégrante de la jurisprudence. Jouissant d'un pouvoir discrétionnaire substantiel en matière de poursuites, non seulement au titre de leurs activités *ex officio* - à savoir les procédures que le ministère public cherche à engager es qualité - mais aussi de l'examen des plaintes, de nombreuses juridictions ont tout loisir d'appliquer ces filtres quand elles procèdent à l'établissement général des priorités de l'autorité. Dans la mesure où les filtres 'informels' sont cependant censés déterminer le seuil pertinent de répression, une telle approche risque d'aboutir à une surrépression, car les filtres ne seraient, au mieux, que contraignants pour l'autorité sans, pour autant, constituer une loi ou une politique acceptée.

Dans ces cas, un plaignant pourrait engager une procédure privée en s'appuyant sur la loi elle-même qui lui permettrait d'évoquer des affaires de prix excessifs, quand bien même les conditions énoncées dans ces filtres non contraignants (peut-être même connus de la seule autorité) ne seraient pas remplies.

Le problème pourrait s'aggraver puisque ces affaires ne seraient plus traitées par l'autorité de la concurrence elle-même[140]. Si la complexité des affaires de prix excessifs, notamment l'élaboration de solutions satisfaisantes, représente déjà une gageure pour les autorités de la concurrence, elle ne ferait que s'accroître si leur traitement était confié à des tribunaux non spécialisés qui pourraient ne pas être pleinement conscients de la nécessité de procéder à une analyse économique approfondie et des difficultés en jeu. Cela étant, les plaideurs privés seraient plutôt enclins à demander principalement des dommages-intérêts et un contrat de fourniture pour l'avenir à des conditions particulières, ce qui devrait être plus facile à réaliser pour les tribunaux que de trouver une solution à l'échelle du marché.

Force est de considérer que les raisons exposées plus haut constituent un inconvénient majeur des filtres, tout au moins « informels » ou de toute politique explicite ou tacite de ne pas traiter en priorité les affaires de prix excessifs. Ainsi, Whish (2003:690) fait observer que la décision de la Commission européenne de ne pas faire usage de ses pouvoirs de poursuite pour prendre le contrôle des prix, ne signifie pas que l'Article 82 (102) n'est pas applicable. L'adhésion forcée à des filtres informels risquerait d'obliger une autorité de la concurrence intervenant dans un dispositif de contrôle administratif, à rendre compte de la régularité de ses actes contrairement à une autorité tenue d'engager des poursuites devant les tribunaux.

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138 van der Woude (2008:620).

139 Le fondement théorique est que le prix augmente à mesure que l'élasticité de la demande diminue (caractère indispensable). Cela étant, on ignore ce que van der Woude a à l'esprit quand il écrit que le fournisseur ne verra pas le volume de ses ventes baisser en augmentant ses prix, même au-dessus du niveau des prix monopolistiques (2008:620). Par définition, la quantité et le prix ne peuvent manifestement pas dépasser le prix et la quantité en situation de monopole.

140 Dans une certaine mesure, c'est déjà le cas des juridictions qui n'ont pas adopté l'approche administrative et où le problème se pose par conséquent aussi dans les affaires « normales ».

5. Quelques dispositions juridiques relatives aux abus de prix excessifs

Dans la présente section, nous examinerons certaines bases juridiques sur lesquelles les autorités de la concurrence fondent leur action contre les prix excessifs. Les dispositions légales et la jurisprudence jouent un rôle bien plus important que les filtres examinés dans la précédente section, car elles rendent l'intervention obligatoire, même si les tribunaux ont moins d'occasions de s'exprimer à cet égard dans d'autres domaines du droit sur la concurrence. Par ailleurs, face à des théories moins éprouvées, il leur a fallu trancher entre des approches économiques radicalement opposées.

Si la législation européenne sur la concurrence est le principal sujet traité ici puisqu'elle a influencé les dispositions sur les prix excessifs dans de nombreuses juridictions, nous nous pencherons aussi sur la loi allemande dont les dispositions en la matière ont été élaborées de pair avec les règles européennes et sont potentiellement les plus développées. En plus de ces textes, nous examinerons d'autres approches réglementaires de l'action publique dictées généralement par une logique différente comme les lois sur les hausses brutales de prix et celles relatives à l'usure, par exemple. On trouvera une sélection d'affaires sur le sujet en annexe[141].

5.1. La fixation de prix non équitables en droit européen

L'article 102 a) du Traité sur le fonctionnement de l'Union européenne (TFUE) dispose que le fait d'imposer de façon directe ou indirecte des prix d'achat ou de vente ou d'autres conditions de transaction non équitables, constitue un abus de position dominante (voir l'encadré 1). Les tribunaux européens et la Commission ont jugé, pour leur part, que l'expression « non équitable » englobe les prix excessifs[142]. Selon la jurisprudence, les prix excessifs sont des prix sans lien raisonnable avec la valeur économique. Ce que l'on entend par là n'a pas été définitivement arrêté, et on a noté dernièrement que 30 ans et plus après que l'interdiction ait été sanctionnée pour la première fois, il n'existe toujours pas de définition concrète suffisamment plausible de ce qu'est un prix excessif[143].

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141 On trouvera en annexe plusieurs affaires qui se situent en Afrique du sud, en Corée, en Albanie, en Allemagne et deux dans l'UE. Elles ont été choisies pour donner un bref aperçu des décisions existantes et ne devraient pas être considérées comme un échantillon représentatif de la jurisprudence.

142 Voir par exemple Sirena contre Eda [1971] Recueil de la jurisprudence p. 69 ; selon Gal (2004:358), dans la première affaire, il a été jugé que des prix monopolistiques sans effets préjudiciables sur la concurrence, constituaient un abus; Affaire 27/76 United Brands contre Commission [1978] Recueil de la jurisprudence p. 207 (concernant cette affaire, voir aussi l'annexe 4); Affaire 30/87 Corinne Bodson contre Pompes funèbres [1998] Recueil de la jurisprudence p. 2479; affaire 110/99 Lucazeau contre Sacem [1989], Recueil de la jurisprudence p. 2811 et les décisions de la Commission COMP/C-1/36915 British Post office contre Deutsche Post AG [2001] JO L331/40; COMP/A 36568/D3 Scandlines Sverige AB contre Port de Helsingborg and Sundbusserne AS vs. Port of Helsingborg [Jul 23,2004] (concernant ces deux affaires, voir aussi l'annexe 3).

143 Gal (2004:373).

Encadré 1. Article 102 - Traité sur le fonctionnement de l'Union européenne

"Est incompatible avec le marché intérieur et interdit, dans la mesure où le commerce entre États membres est susceptible d'en être affecté, le fait pour une ou plusieurs entreprises d'exploiter de façon *abusive* une position dominante sur le marché intérieur ou dans une partie substantielle de celui-ci.

Ces pratiques abusive peuvent notamment consister à :

a) imposer de façon directe ou indirecte des prix d'achat ou de vente ou d'autres conditions de transaction non équitables ;

b) limiter la production, les débouchés ou le développement technique au préjudice des consommateurs ;

c) appliquer à l'égard de partenaires commerciaux des conditions inégales à des prestations équivalentes, en leur infligeant de ce fait un désavantage dans la concurrence ;

d) subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats."

Les actions engagées par la Commission européenne se caractérisent, pour un grand nombre d'entre elles, par leur lien important avec l'agenda du marché unique[144]. Plus généralement, on a fait observer que les mesures d'application du droit en matière d'abus de prix excessifs, par l'application de la méthode comparative, empêche effectivement une entreprise qui occupe une position dominante sur un marché de fixer des prix sensiblement différents des prix pratiqués sur d'autres marchés, par d'autres entreprises, pour des biens ou services comparables, contribuant aussi – au moins dans l'optique d'égalité des prix – à réaliser l'objectif de l'intégration[145]. Ces considérations sont utiles à l'examen des prix excessifs puisque de nombreuses juridictions, aujourd'hui[146], se sont inspirées de ces dispositions ou, comme l'Allemagne, ont élaboré leurs lois sur la concurrence de pair avec la législation de l'UE, en y associant les mêmes personnes[147].

144 Voir par exemple - Général Motors Continental NV contre Commission. - Affaire 26-75 [1975] Recueil de la jurisprudence p. 1367 et British Leyland contre Commission - Affaire 226/84 [1986] Recueil de la jurisprudence p. 3263 qui comportaient toutes deux des restrictions aux transactions parallèles.

145 Voir Gal (2004:362) pour qui cet objectif de l'intégration explique, en grande partie, l'absence, dans un premier temps, de réglementation visant à encadrer les concentrations d'entreprises, même si un certain contrôle était réalisé en application de l'article 102 du TFUE avant que n'entre en vigueur, le 21 septembre 1990, le premier règlement CE (Règlement (CEE) n° 4064/89 du Conseil) sur les concentrations. En fait, les fusions transfrontalières au sein du marché intérieur étaient accueillies favorablement et clairement encouragées, ce qui peut expliquer, notamment, que l'acquisition d'une position dominante (monopolisation dans la terminologie américaine) n'a jusqu'à présent jamais été interdite dans l'UE.

146 Voir par exemple Israël ou l'Afrique du sud. En ce qui concerne cette dernière voir en particulier l'examen de l'affaire Mittal, à l'Annexe 1.

147 Voir Maier-Rigaud (2012).

Avant l'affaire United Brands (voir l'annexe 4), on avait déjà évoqué l'éventualité que les prix excessifs soient considérés comme une pratique abusive, mais ce n'est qu'ultérieurement que la Cour a été un peu plus précise sur ce qui constitue un prix non équitable[148].

Dans l'affaire United Brands, elle a conclu « qu'il convient donc de rechercher si le détenteur de cette position a utilisé les possibilités qui en découlent pour obtenir des avantages commerciaux qu'il n'aurait pas obtenus en cas de concurrence praticable et suffisamment efficace »[149]. On considère que tel est le cas si l'entreprise en position dominante fixe un prix excessif au sens où il est sans lien raisonnable avec la *valeur économique* du bien fourni. Selon la Cour, deux conditions cumulatives sont nécessaires pour en faire la démonstration. Il faudrait premièrement établir que l'écart entre les coûts réels et les prix effectivement pratiqués est abusif. Si la preuve en est apportée, il faudrait ensuite déterminer le caractère non équitable des prix, en tant que tels ou par rapport aux produits concurrents. Elle a souligné aussi que d'autres méthodes pourraient être appliquées à chacun des deux volets de la démonstration.

Les dernières décisions de la Commission européenne, à savoir les deux décisions relatives au port de Helsingborg, ont ravivé l'intérêt pour ce raisonnement. On a abondamment débattu, en particulier, de la valeur économique dont on affirme qu'elle doit être déterminée en fonction des circonstances de l'espèce et prendre également en considération tous les aspects non liés aux coûts comme la demande pour le bien ou le service[150]. Certains auteurs en ont conclu qu'en donnant une importance décisive à la question de savoir si les prix ont « un lien raisonnable avec la valeur économique du bien offert », la Commission a jugé en fait que les prix sont équitables s'ils visent à tirer parti du consentement des consommateurs à payer[151]. Cela laisse entendre pour Werden (2009:656) que tous les prix pratiqués par les entreprises dominantes auront un rapport raisonnable avec la valeur économique du bien offert car, même en situation de monopole, une entreprise fixe toujours ses prix en fonction de la demande, et ses clients attribuent aux biens ou services qu'ils achètent au moins une valeur identique au prix auquel ils les paient[152]. Autrement dit, toutes les décisions indiquent implicitement que le prix payé tient compte des caractéristiques du bien dont ils déterminent la valeur économique[153]. Si cela se vérifiait, la voie serait e fait ouverte à une circularité à laquelle il ne peut y avoir d'échappatoire[154].

L'idée que la Commission européenne ait « aboli » la qualification d'abus appliquée aux des prix non équitables au détour des deux jugements par lesquels elle rejette les plaintes, n'est pas convaincante. La Commission a certes la possibilité d'interpréter la loi et la capacité de changer sa politique comme elle l'a fait à l'issue d'un long processus de consultation dans le cas des pratiques abusives visant à éliminer un

148 L'affaire United Brands a été postérieure aux affaires Sirena S.r.l contre Eda S.r.l., 40/70, 1971- Recueil de la jurisprudence p. 69, paragraphe 17 ; Deutsche Grammophon GmbH contre Metro-SB-Großmärkte GmbH, 78/70, 1971- Recueil de la jurisprudence p. 487, paragraphe 19. Dans l'affaire 26/75, Général Motors Continental NV/ Commission, 1975- Recueil de la jurisprudence p. 1367, paragraphe 16-2, la perception d'une redevance « dont le montant était largement exagéré par rapport à la valeur économique de la prestation fournie... » mais qui n'était facturée qu'au besoin et pendant une durée limitée, n'a pas été contestée.

149 United Brands, paragraphe 249.

150 Voir Scandlines, paragraphes 226-228, 232-233 et Sundbusserne paragraphes 204-208.

151 Voir Werden (2009:654 seq.). Voir aussi Akman et Garrod (2011).

152 Voir aussi Fletcher et Jardine (2008:536) qui avancent le même argument, évoquant l'arrêt du 2 février 2007 de la Cour d'appel d'Angleterre et du Pays de Galles (Chambre civile), Attheraces (RU) Limited contre The British Horseracing Board Limited, affaire n° A3/2006/0126, [2007] EWCA Civ 38.

153 Furse (2008:72 seq.).

154 Furse (2008:73).

concurrent, par exemple, mais on peut s'attendre à ce qu'une n'agisse de la sorte que dans le cadre d'un débat de politique publique[155]. Par ailleurs, la Commission ne peut, en aucun cas, modifier le traité. Force est donc d'interpréter différemment la référence aux facteurs de la demande dont Werden souligne le caractère essentiel évident pour la notion économique (par opposition à la conception des juridictions communautaires) de valeur économique déterminée par l'offre et la demande.

En vérité, tout plaide en faveur d'une interprétation qui permettrait de tenir compte des aspects de la demande ayant une incidence sur les prix sur un marché de référence également plus concurrentiel (hypothétiquement). Comprendre dans ce sens les décisions relatives au Port de Helsingborg présente l'avantage de justifier la démonstration en deux volets dans l'affaire United Brands. Si le raisonnement n'avait comporté qu'une seule partie, il aurait été possible d'établir l'existence de prix excessifs sur la base du seul critère de la rentabilité dont le niveau élevé apparait dans l'écart considérable entre les coûts et les prix qui est décrit. Dans la seconde partie il s'agit donc d'essayer de découvrir une raison pouvant justifier la forte rentabilité virtuelle constatée. En examinant les aspects de la demande, on cherche effectivement à mettre en évidence les particularités du bien ou du service en question qui présentent un « avantage » pour l'acheteur, tout en n'entrant pas en fait dans le coût de production et peuvent ainsi constituer une raison valable de pratiquer un prix plus élevé[156].

En fait, selon l'interprétation qu'en font les décisions concernant le Port de Helsingborg (voir l'annexe 3), la démonstration permet dans sa seconde partie de prendre en compte d'autres particularités du produit ou du service dans l'analyse et de les utiliser pour justifier le prix plus élevé. Les résultats de la comparaison prix-coût de la première partie indiquent que les prix pourraient être excessifs avant de démontrer, en fin de compte, qu'ils ne le sont pas puisque certains aspects spécifiques du bien ne sont pas pris en compte dans les coûts. Même si elles ne reposent pas sur des coûts en proportion, ces estimations plus élevées de la valeur peuvent exister, mais ne doivent pas être confondues avec le consentement à payer un prix excessif. L'idée est que la majoration correspondante par rapport aux coûts se serait retrouvée dans une structure de marché concurrentielle[157]. Pour reprendre les mots des personnes en charge du dossier :

> *La Commission a considéré toutefois que la valeur économique devait être déterminée en fonction des circonstances particulières du cas d'espèce et prendre en compte également les éléments non liés au coût, comme la demande du bien ou service.*
>
> *Á cet égard, il est noté dans les deux décisions que les exploitants de transbordeurs tirent avantage de l'excellent emplacement du port de Helsingborg et que cela devrait être pris en compte dans l'évaluation de la valeur économique du service fourni par le port et de son prix. Le fait que les services portuaires soient assurés à cet endroit particulier permet aux passagers comme aux exploitants de transbordeurs de traverser rapidement le détroit d'Øresund, ce qui est*

155 En fait, la décision de rejeter les deux plaintes a coïncidé avec la révision de l'Article 102, rendant donc peu probable l'élaboration d'une politique concernant des affaires particulières pendant cette période. Si cet examen n'a porté, en définitive, que sur les pratiques abusives visant à éliminer un concurrent, cela n'était pas encore perceptible au moment où les deux décisions ont été rendues, et tout changement d'orientation qui aurait empêché le débat, aurait donc été reporté à une date ultérieure.

156 Contrairement aux produits de marque, par exemple, qui, tout en permettant effectivement de pratiquer des prix plus élevés que pour les autres produits tout en ayant des coûts de production identiques au sens strict, n'en occasionnent pas moins des coûts plus élevés au sens large, à savoir les coûts nécessaires pour forger l'image de la marque. En principe, cet actif incorporel devrait être aussi inclus dans le calcul des coûts dans le premier volet de la démonstration.

157 Sur un marché de biens différenciés mais avec des coûts identiques, on peut imaginer que les prix ne soient pas fixés sur la base du coût marginal et puissent aussi être différents.

> *en soi appréciable, crée et soutient la demande sur le marché en aval (le marché des services de transport par transbordeurs) comme sur le marché en amont (le marché des prestataires de services portuaires aux exploitants de transbordeurs). Cette particularité n'entraine pas nécessairement des coûts de production plus élevés pour le prestataire de services portuaires. Elle est néanmoins appréciable pour le client et aussi pour les prestataires et accroît, par là, la valeur économique du bien ou du service*[158].

On retrouve ce raisonnement dans l'affaire Albion Water qui introduit toutefois une curieuse terminologie en opérant une distinction entre les « prix excessifs » qui ne posent pas de problème et les « prix élevés non équitables » qui déclenchent une intervention :

> *Dans certains cas la 'valeur économique' peut être supérieure aux coûts d'approvisionnement lorsque ceux-ci ne reflètent pas des avantages additionnels existants. Un prix excessif constitue donc une condition nécessaire mais pas suffisante pour établir l'existence d'un prix élevé non équitable*[159].

Lorsqu'une entreprise qui produit de multiples biens fait l'objet d'une enquête, des informations liées à la demande sont nécessaires pour déterminer la répartition optimale, d'un point de vue social, des coûts communs entre l'ensemble des produits[160]. L'élasticité-prix de la demande est un facteur essentiel qu'il faudrait examiner dans l'analyse des coûts liés à l'offre[161]. Une analyse traditionnelle des coûts ignorant l'élasticité de la demande, peut donner lieu à une définition non fondée des prix excessifs dans le cadre d'une entreprise multiproduits[162].

5.2. Les prix excessifs en droit allemand

Le bilan récent du Bundeskartellamt en matière d'exécution de la législation, comparable à celui de l'UE, indique que les autorités des pays ayant une culture éprouvée de la concurrence, exercent des actions contre les prix excessifs avec des moyens coercitifs de grande envergure. Dans certaines circonstances, il peut être plus efficace de faire appliquer la loi sur la concurrence en réglant un problème bien circonscrit de prix excessifs et beaucoup plus rapide d'intervenir de la sorte que de mettre en place une autorité de tutelle. La méthode fondée sur la notion de marché comparable appliquée en Allemagne démontre que, tant que le dispositif permettant d'établir le caractère excessif des prix n'apparait pas comme le moyen d'action ordinaire de réglementation des prix fondée sur les coûts ou sur les incitations, les autorités de la concurrence sont peut-être mieux armées que les autorités de tutelle pour effectuer l'analyse. L'affaire

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158 Lamalle *et al.* (2004:42).

159 Paragraphe 7 dans Albion Water Ltd. and Albion Water Group Ltd. vs Water Services Regulation Authority, affaire n° 1046/2/4/04 [2008] CAT 31.

160 Cette information est aussi nécessaire en vue de maximiser les bénéfices de l'entreprise même, ce qui peut ou ne pas coïncider avec la répartition socialement optimale des coûts entre les différentes lignes de produits.

161 La détermination des prix selon la méthode de Ramsey pose évidemment la question théorique de savoir s'il convient d'aligner la répartition des coûts dans le contexte des entreprises multiproduits sur le modèle utilisé par l'entreprise pour élaborer sa stratégie en matière de prix « excessifs » ou de l'apprécier dans une optique d'optimisation sociale.

162 Examinons, par exemple, une entreprise qui fabrique deux produits et se trouve face à des valeurs différentes des élasticités de la demande de chacun. Une stratégie optimale de fixation des prix peut obliger à couvrir les coûts liés au produit y avec le prix du produit x. Le prix du produit y, soutenu par x, ne peut pas être pris en compte dans les coûts communs liés, lesquels sont intégrés dans le prix du produit x qu'une analyse « traditionnelle » des coûts pourrait juger excessif.

allemande présentée à l'annexe 5 repose sur un constat classique d'abus de position dominante mais aussi, en partie, sur une disposition juridique particulière (provisoire) qui confère des pouvoirs spéciaux au Bundeskartellamt. Cet exemple est intéressant car il peut apporter une réponse à la question de la légitimité d'interventions revêtant un caractère « quasi réglementaire ».

L'affaire exposée à l'annexe 5 concerne l'approvisionnement régional en gaz naturel des clients résidentiels. En 2007 et 2008, on a observé en Allemagne une forte hausse du prix du gaz et, dans certains cas, des écarts de prix importants entre les différents fournisseurs. En plus de ces augmentations et contrairement au secteur de l'électricité, les consommateurs n'avaient pas partout la possibilité de changer de fournisseur de gaz. En 2008, le Bundeskartellamt, associé aux autorités de la concurrence du Land, a lancé une enquête de grande envergure sur 35 fournisseurs de gaz. Des actions ont été engagées contre ces derniers suspectés d'avoir pratiqué, en 2007 et 2008, des tarifs excessifs sur le marché résidentiel. Les procédures ouvertes en 2008 reposaient sur le nouvel article 29 de la loi relative aux restrictions de concurrence (voir l'encadré 2) qui était appliqué pour la première fois à ce titre.

Adoptée à la fin 2007, le nouvel article 29 de la loi s'applique au secteur de l'énergie et restera en vigueur jusqu'en 2012[163]. Cette disposition permet aux autorités de la concurrence de poursuivre en justice plus facilement les affaires de prix excessif sur les marchés du gaz et de l'électricité. Elle permet notamment de reporter la charge de la preuve sur les entreprises soupçonnées de l'infraction[164].

163 Alors que ce papier est en cours de publication, sa prorogation est toujours à l'examen.

164 Voir Bundeskartellamt (2011:25).

Encadré 2. Extrait de la loi allemande relative aux restrictions de concurrence[165]

Article 19
Abus de position dominante

[...]
4) Il y a abus en particulier dès lors qu'une entreprise qui occupe une position dominante sur le marché en tant que fournisseur ou qu'acheteur d'un certain type de marchandises ou services commerciaux:
[…]
2. exige des rémunérations ou autres conditions commerciales différentes de celles qui existeraient, selon toute probabilité, s'il y avait une concurrence effective ; dans ce contexte, il convient notamment de considérer les pratiques des entreprises sur des marchés comparables caractérisés par une concurrence effective ;
[…]

Article 29
Secteur de l'énergie

Il est interdit à une entreprise qui fournit de d'électricité ou du gaz acheminé par gazoduc (entreprise de services d'utilité publique) sur un marché où elle occupe, seule ou avec d'autres entreprises de services d'utilité publique, une position dominante, d'exploiter cette position de manière abusive en

1. exigeant des rémunérations ou autres conditions commerciales moins favorables que celles des autres entreprises de services d'utilité publique sur des marches comparables, à moins que l'entreprise de services d'utilité publique n'apporte la preuve que cette différence est objectivement justifiée, le renversement subséquent de la charge de la preuve et de la démonstration (Darlegungs- und Beweislast) ne s'appliqué que dans les procédures engagées auprès des autorités de la concurrence, ou
2. facturant des redevances qui dépassent les coûts de manière déraisonnable.

Les coûts qui seraient largement différents s'il y avait eu concurrence, ne doivent pas être pris en considération pour constater l'existence d'un abus au sens de la phrase 1. Les articles 19 et 20 demeurent inchangés.

En 2007, les procédures étaient fondées sur l'interdiction générale d'exploiter abusivement une position dominante (article 19 de la loi relative aux restrictions de concurrence, encadré 2). Conformément à la « notion de marché comparable », explicitement mentionnée à l'article 19, l'enquête s'attache à établir si les prix du gaz diffèrent de manière sensible de ceux qui sont pratiqués par des entreprises comparables. En 2008, elles reposaient sur les nouveaux pouvoirs attribués en application de l'article 29 de la loi relative aux restrictions de concurrence.

5.3. Lois sur les hausses brutales des prix et l'usure

En plus des dispositions réputées traiter, en principe, le problème des prix excessifs, à savoir la loi allemande sur la concurrence, l'Article 102 du Traité de l'UE et la législation sur la concurrence qui s'en inspire, d'autres textes ont également vocation à encadrer ces prix. Á la réglementation classique concernant les services publics, viennent s'ajouter les lois relatives aux hausses brutales de prix et à l'usure dictées le plus souvent par des logiques d'action publique différentes de celle qui consiste à interdire la pratique de prix excessifs que l'on trouve dans les lois sur la concurrence.

165 En allemand : Gesetz gegen Wettbewerbsbeschränkungen (GWB).

Les lois relatives aux hausses brutales de prix ont pour objet de protéger les consommateurs vulnérables de l'accroissement du pouvoir de marché exercé à court terme sur des produits de première nécessité. Les taux d'intérêt légaux ont aussi vocation à défendre les consommateurs pauvres et mal informés contre des créanciers peu scrupuleux. Il s'agit en particulier de prémunir contre d'éventuels problèmes liés aux dispositions sur le crédit, les consommateurs qui ne comprennent pas ce qu'est un juste prix ou qui présentent un risque de défaillance trop élevé pour être acceptés par les prêteurs qui comptent sur le remboursement de leur prêt (contrairement aux prêteurs qui ne chercheraient qu'à percevoir des intérêts élevés et à saisir les biens remis en garantie).

5.3.1. Lois sur les hausses brutales de prix aux États-Unis[166]

Aux États-Unis, les lois relatives aux hausses brutales de prix ont fait dernièrement l'objet d'un regain d'attention au lendemain du passage de l'ouragan Katrina. Vingt neuf États[167] se sont dotés de lois visant à interdire la pratique de prix excessifs sur certains produits de base pendant les périodes de perturbations anormales de l'approvisionnement[168]. Ces lois prévoient des sanctions civiles, pénales ou les deux et, pour la plupart mais pas toutes, leur application est déclenchées par la déclaration de l'état d'urgence par le Président, le gouverneur ou les responsables publics locaux[169].

Il s'agit en substance de comparer un prix « normal » (fictif) à des prix potentiellement excessifs pendant les périodes de perturbations anormales de l'approvisionnement. On a utilisé toute une série de définitions pour déterminer le prix « normal ». Si, dans certains États des États-Unis, ce prix n'est pas précisé, dans d'autres, il correspond au prix moyen pendant une période donnée ou au prix qui était en vigueur immédiatement avant la désorganisation de l'approvisionnement ou la déclaration de l'état d'urgence.

Des écarts positifs limités par rapport au prix « normal » sont autorisés et ne déclenchent pas systématiquement de sanctions. Ainsi, certains États acceptent les augmentations conformes à la hausse des coûts de gros, d'autres fixent un pourcentage d'augmentation, tandis que d'autres encore ne précisent pas le seuil au-delà duquel le prix deviendrait excessif, mais tous reçoivent l'argument fondé sur le renchérissement des coûts.

La FTC note dans son rapport que les juges, à qui la question a été posée, ont tranché au cas par cas et que leurs décisions ont été singulièrement discordantes[170], et aussi que la définition incertaine de ce qu'est un prix abusif, excessif ou exorbitant ainsi que l'indigence des décisions sur le sujet, devraient rendre difficile l'application des lois fondées sur l'un ou l'autre de ces termes[171].

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166 Pour un examen plus approfondi, voir FTC (2006). La présente sous-section s'inspire largement de ce rapport.

167 Selon FTC research (FTC 2006:192), 42 États ont pourtant annoncé des enquêtes indépendantes ou participé à un groupe de travail réunissant plusieurs d'entre eux afin d'examiner les prix de l'essence fixés peu de temps après le passage de l'ouragan Katrina.

168 Le terme « excessif » qualifiant un prix, peut être remplacé par « exorbitant », « déraisonnable », « abusif » ainsi que « injustifié ».

169 Davis (2008) note que les lois relatives aux hausses brutales de prix ne sont pas des mesures symboliques et inefficaces, faisant observer par ailleurs que les représentants officiels de l'État paraissent consacrer des ressources importantes à les mettre à exécution.

170 FTC (2006:191).

171 FTC (2006:192).

Dans son rapport, la FTC rappelle expressément que si les signaux tarifaires venaient à faire défaut ou qu'ils soient faussés par des mesures législatives ou réglementaires contraignantes, l'efficacité des marchés pourrait bien s'en trouver compromise et les consommateurs en pâtir. En dépit de ces préoccupations, notamment la question de la définition du « prix raisonnable », par exemple, et les incertitudes sur l'avantage net que pourrait représenter pour le consommateur une législation fédérale sur les hausses brutales de prix, la FTC propose une liste de facteurs qu'il conviendrait d'examiner si le Congrès devait malgré tout entreprendre d'adopter une loi fédérale dans ce domaine. Bien que la réglementation vise peu ou prou à créer un choc économique sur le court terme, au lendemain d'une crise, plus généralement les critères proposés n'en sont pas moins intéressants dans le contexte de prix excessifs.

> *« Toute loi relative à la hausse brutale des prix devrait en premier lieu définir clairement l'infraction. Elle aurait pour objectif principal notamment d'indiquer aux entreprises ce qui est interdit. Une réglementation ambiguë ne ferait qu'induire en erreur les consommateurs et les entreprises et son exécution serait difficile et arbitraire.*
>
> *Un projet de loi relatif à la hausse brutale des prix devrait aussi tenir compte du renchérissement des coûts, notamment des coûts prévisionnels, auxquels les entreprises sont confrontées sur le marché. Les entreprises qui ne rentrent pas dans leurs frais ne restent pas longtemps en activité et leur élimination ne ferait qu'accentuer les difficultés au niveau de l'offre. Par ailleurs, l'augmentation des coûts ne devrait pas être limitée aux coûts historiques, car ces restrictions pourraient empêcher les détaillants de se réapprovisionner à des prix de gros plus élevés.*
>
> *La loi devrait aussi prévoir de prendre en compte les conditions du marché local, national et international qui peuvent contribuer à la contraction de l'offre. Au plan international, le renchérissement du brut se répercutera normalement en aval sur le prix de l'essence à la pompe. Les entreprises locales ne devraient pas être pénalisées par des facteurs qu'elles ne maitrisent pas.*
>
> *Enfin, toute loi relative à des hausses brutales de prix devrait chercher à étudier un prix d'équilibre du marché. Le maintien des prix à un niveau trop bas pendant trop longtemps en présence de difficultés d'approvisionnement passagères risque de fausser les signaux de prix donnés par le marché qui permettront, à terme, de redresser la situation. Si les réactions de l'offre et le prix d'équilibre du marché sont ignorés, les grossistes et les détaillants manqueront d'essence et les consommateurs en pâtiront. »*

5.3.2. Encadrement des taux d'intérêt dans les États membres de l'UE[172]

Une récente étude sur l'usure et l'encadrement des prix du crédit à la consommation, réalisée pour la Commission européenne[173], a dressé un inventaire complet des types de restrictions liées au crédit à la consommation recensées dans les 27 États membres de l'Union, accompagné d'une évaluation de leurs incidences à la fois sur le marché du crédit et sur les consommateurs (potentiels). L'intérêt de cette étude est qu'elle s'emploie, notamment, à évaluer empiriquement les effets de ce contrôle par le plafonnement des prix tels que décrits dans une série d'hypothèses classées en trois catégories : « plausible », « non probant » et « improbable ». Le tableau 3 ci-après donne un aperçu des résultats.

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172 Pour un examen plus approfondi, voir iff/ZEW (2010). La présente sous-section s'inspire largement de cette étude.

173 Voir iff/ZEW (2010). Si elle porte essentiellement sur les 27 États membres de l'UE, l'étude n'en passe pas moins en revue les publications décrivant la situation aux États-Unis, notant qu'il est difficile d'établir des comparaisons eu égard au fait que le plafond des taux d'intérêt américains est relativement bas par rapport à ce que l'on observe dans l'UE où ils sont souvent beaucoup plus élevés.

Tableau 3. Encadrement des taux d'intérêt – Évaluation empirique des hypothèses

Plausible	L'encadrement des taux d'intérêt limite l'accès au crédit, en particulier des emprunteurs à faible revenu. Sans encadrement des taux d'intérêt, on trouve une plus grande diversité de produits sur le marché. L'encadrement des taux entraine une augmentation des frais car les fournisseurs essayent de compenser la baisse des revenus perçus en relevant les intérêts.
Non probant	L'encadrement des taux d'intérêt ouvre la voie à des crédits provenant de sources autres que les banques, comme les retards de règlement des factures. L'encadrement des taux est à l'origine de nombreuses pratiques illicites sur le marché du crédit. Le non-encadrement des taux d'intérêt a un impact particulièrement préjudiciable sur le taux de défaut/surendettement en période de repli économique. Le consommateur moyen – d'autant plus celui qui présente de faibles risques – obtiendrait un crédit meilleur marché quand les taux sont encadrés. L'encadrement des taux d'intérêt fait obstacle à l'intégration du marché du crédit à la consommation. L'encadrement des taux concentre l'ensemble des taux du crédit à la consommation à des niveaux proches du plafond.
Improbable	L'encadrement des taux d'intérêt entraine une contraction du montant des crédits consentis aux consommateurs. Le non-encadrement des taux est à l'origine d'une augmentation du surendettement. L'encadrement des taux fait baisser l'intensité de la concurrence dans le secteur du crédit à la consommation.

On trouve un autre exemple intéressant, également lié aux taux d'intérêt, en Allemagne où les contrats comportant des clauses, notamment de prix ou taux d'intérêt, jugées non éthiques, sont *ipso facto* frappés de nullité. Á la suite d'une décision rendue en 1990[174] par la Cour fédérale, un écart de plus de 12 % des taux d'intérêt du marché par rapport aux taux contractuels rend le contrat « sittenwidrig », c'est-à-dire non éthique, choquant ou immoral selon la traduction que l'on préfère donner au terme juridique. La Cour ne semble pas avoir eu de difficultés pour établir ce pourcentage.

6. Méthodes d'évaluation des prix excessifs

Les autorités de la concurrence et les autorités de tutelle ont eu recours à plusieurs méthodes pour évaluer les prix excessifs et fixer les plafonds. En principe, ces méthodes peuvent être regroupées selon le mode de construction de l'indicateur de référence, le type d'information nécessaire à son calcul et l'objet concret de la mesure.

Nous nous sommes appuyés sur plusieurs sortes de critères pour déterminer si un prix est excessif. Ces critères peuvent être géographiques, historiques (temporels) ou liés à d'autres fournisseurs de produits ou de services analogues ou identiques. L'indicateur de référence peut aussi être composé d'une combinaison de ces données ou être lié à la notion de rentabilité raisonnable.

174 Décision du 13 mars 1990 de la Cour fédérale (BGH), AZ: XI ZR 252/89.

Le critère est géographique quand la comparaison est établie à partir de produits ou de services analogues fournis sur d'autres marchés géographiques (analogues). Il est historique quand la comparaison repose sur des variables actuelles ou passées, concernant éventuellement la même entreprise. L'indicateur de référence comprend des données sur d'autres entreprises lorsque l'on compare des variables d'entreprises analogues situées sur des marchés identiques ou analogues qui fournissent des produits et services identiques ou analogues.

Ces indicateurs pourraient être établis à partir d'une comparaison directe des prix, de la rentabilité ou des majorations de prix et de coûts[175]. On peut comparer directement les prix avec ceux pratiqués par un fournisseur analogue de produits analogues sur un autre marché géographique connaissant une concurrence plus intense. De la même manière, il est possible d'analyser la rentabilité ou les majorations de prix et de coûts à partir des données analogues d'autres entreprises opérant sur d'autres marchés géographiques plus concurrentiels. Il reste que l'analyse de la rentabilité révèle déjà le caractère potentiellement excessif du prix en tant que tel puisqu'elle intègre une notion de rentabilité raisonnablement normale du capital.

Dans les lignes suivantes, nous analyserons d'abord la rentabilité qui est sans doute la notion économique la plus importante bien que la plus technique, puis la marge bénéficiaire avant d'entreprendre une comparaison directe des prix. Dans la section concernant ce dernier point, nous reviendrons aussi à la question des indicateurs de référence, en comparant et examinant les critères géographiques et historiques ainsi que l'ensemble des entreprises concurrentes ou analogues.

Toutes ces méthodes présentant des difficultés considérables, on proposera de les appliquer toutes ou le plus grand nombre possible d'entre elles, dans chaque cas[176]. La démarche axée sur « l'abondance des éléments d'appréciation » a été adoptée dans l'affaire Napp[177]. Elle sous-entend qu'aucun critère ne peut être jugé suffisamment fiable à lui seul et que la comparaison de plusieurs critères donne des résultats agrégés plus fiables. Bien que certains se demandent pourquoi les réponses à plusieurs critères imprécis – même si elles se confortent mutuellement – seraient plus crédibles que les réponses à un critère unique imprécis[178], le doute n'est pourtant pas permis puisque, tant que les critères utilisés ne sont pas foncièrement erronés, le manque de fiabilité du critère isolé n'est pas corrélé et les critères en eux-mêmes sont indépendants. En principe, les différentes erreurs constatées en l'occurrence dans les différentes méthodes s'annuleraient alors réciproquement, améliorant l'efficacité globale.

6.1. Analyse de la rentabilité[179]

L'analyse de la rentabilité est pertinente dans ce contexte puisque les prix excessifs sont en principe liés à des profits abusifs[180]. Quand les prix sont jugés potentiellement excessifs d'un point de vue juridique mais qu'ils ne génèrent pas des profits particulièrement élevés, l'analyse de la rentabilité sera superflue.

175 La méthode des prix/coûts majorés semble être l'une des plus répandues. Elle permet certes de mesurer la rentabilité, mais la démarche méthodologique suivie est distincte de l'analyse de la rentabilité.

176 Voir Röller (2007).

177 Cette approche semble avoir recueilli l'assentiment de la CAT (à l'époque la CCAT) pour qui ces comparaisons, considérées globalement, vont largement dans le sens des conclusions des directeurs selon lesquelles les prix de Napp.., paragraphe 397 dans l'affaire n° 1001-1/1/01 Napp Pharmaceutical Holdings vs Director-Général of Fair Trading, UK Competition Commission, cour d'appel, 15 janvier 2002.

178 O'Donoghue et Padilla (2006:633). Voir aussi Williams (2007:145) et Evans et Padilla (2005:109).

179 Voir aussi le document spécial de méthodologie d'Alan Gregory, présenté en parallèle à celui ci.

180 Voir Baumol et Swanson (2003) pour un examen de l'analyse de la rentabilité en tant que méthode pour déterminer le pouvoir de marché, notamment dans les secteurs avec des coûts fixes ou des coûts communs irrécupérables, élevés et récurrents autrement dit, un coût marginal moyen décroissant.

C'est le cas quand les coûts d'une entreprise performante sont pris comme critère de référence juridique et que le contrevenant virtuel se caractérise par une production inefficace entrainant des coûts bien plus élevés. Plus généralement, la méthode est infiniment plus délicate à appliquer lorsque les coûts à examiner ne sont pas ceux de l'entreprise étudiée[181].

L'analyse de la rentabilité repose essentiellement sur la notion de coût et de rentabilité du capital. Il y a en principe deux manières de l'effectuer qui, dans certaines conditions, ont donné concrètement des résultats identiques[182]. Toutes deux sont fondées sur le fait que toute activité économique demande un investissement initial qui génère ensuite un flux de revenus.

Dans une optique purement comptable, la rentabilité est évaluée à l'aune du rendement des capitaux employés (RCE). Le RCE mesure les résultats d'exploitation de l'entreprise (RE) divisés par le capital engagé pendant une période donnée. On y a habituellement recours pour encadrer les prix dans les secteurs du gaz, de l'électricité, du transport ferroviaire ou de l'eau, par exemple. Il vise à définir un rendement normal qui est en principe égal au coût moyen pondéré du capital (CMPC) sur la base estimée des actifs.

La méthode financière de calcul de la rentabilité tourne autour de la notion de valeur actuelle nette et de taux de rendement interne[183]. Contrairement au RCE, pour calculer le taux de rendement interne (tronqué), il faut disposer de données sur les flux de trésorerie et d'estimations de la valeur des actifs engagés, à la fois au début et à la fin de la période considérée[184].

L'analyse de la rentabilité n'est pas chose aisée pour quatre raisons[185] au moins :

- Les bénéfices comptables varient souvent suivant le mode de calcul de l'amortissement
- La répartition des coûts et des recettes des entreprises multi-produits qui exercent un large éventail d'activités, est particulièrement difficile
- La comptabilité des entreprises multinationales dépend des arrangements en matière de prix de transfert.
- Les facteurs de risque sont étroitement tributaires des estimations des investisseurs qui peuvent varier considérablement dans le temps.

181 Cet aspect sera examiné de manière plus approfondie, ci-après. Il porte sur les tensions inhérentes aux démarches concurrentielle et réglementaire.

182 Voir Fisher et McGowan (1983), Martin (1984) et Salamon (1985) pour un examen de la fiabilité des méthodes comptables de calcul des bénéfices.

183 Selon OFT (2003:5) citant Graham et Harvey (2001), le taux de rendement interne est la méthode la plus couramment utilisée par les milieux d'affaires pour mesurer la rentabilité.

184 On trouvera dans OFT (2003) un examen complet de l'analyse de la rentabilité fondée sur la notion de taux de rendement interne et de valeur actuelle nette, adaptée aux besoins d'une autorité de la concurrence. Voir Lind et Walker (2004) pour une étude du recours pertinent et abusif de l'analyse de la rentabilité

185 Voir par exemple Williams (2007:133) ou OFT (2003:12).

6.1.1. Le coût du capital[186]

Le coût du capital est l'estimation du prix à payer par une entreprise pour lever le capital qu'elle emploie, ou encore le coût d'opportunité du prochain investissement optimal ou la rémunération du capital s'il avait été placé ailleurs, neutralisant les risques de l'investissement en cours. En particulier, le coût du capital découle de deux sources différentes de financement, les emprunts et les fonds propres. Dès sa création, le capital de l'entreprise est constitué de capitaux empruntés, autrement dit des fonds d'investisseurs qui ont acheté les obligations émises par l'entreprise, et de fonds propres obtenus en vendant de nouveaux titres émis en contrepartie des fonds versés par les investisseurs. On appelle capitaux permanents, le montant total du capital correspondant aux fonds propres et aux capitaux empruntés cumulés. L'entreprise est contrôlée par ses actionnaires ou les détenteurs de ses fonds propres qui cherchent à rentabiliser leurs investissements. On appelle coût des capitaux propres ce qu'il en coûte pour empêcher les actionnaires de retirer leurs fonds, autrement dit la rentabilité à dégager pour inciter les détenteurs de participations à conserver leurs actions[187].

Le coût du capital est ensuite déterminé en tant que coût moyen pondéré du capital (CMPC), habituellement estimé par l'application du modèle d'évaluation des actifs financiers (MEAF)[188]. Ce modèle permet d'obtenir principalement le taux de rentabilité (TR) d'un projet donné, représenté par la formule suivante :

$$TR = \text{taux d'intérêt sans risque} + \beta * (\text{rendement du marché} - \text{taux sans risque}) \qquad [1]$$

Le taux d'intérêt sans risque est normalement celui de l'obligation du Trésor et β le paramètre qui mesure le risque non diversifiable de l'entreprise au regard du risque présenté par les titres en général[189]. En principe, l'écart de rendement entre le marché et le taux d'intérêt sans risque est appelé la prime de risque d'action. Les autorités de la concurrence étant rarement intéressées par l'entreprise β à moins qu'elle ne fabrique un produit unique, β devra en principe être calculé au regard du produit ou du service concerné.

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186 Voir Williams (2007) pour un examen plus approfondi, notamment d'exemples de coût et de rendement du capital. Les deux sections qui suivent s'inspirent largement de son article.

187 Contrairement aux détenteurs d'obligations qui perçoivent un intérêt fixe à taux préalablement déterminé (sans tenir compte du risque de défaut), les actionnaires sont les créanciers résiduels des bénéfices avec un rendement par conséquent davantage soumis à fluctuations. La gestion des portefeuilles permettant d'éliminer les risques diversifiables, les détenteurs de parts ou les actionnaires exigeront un rendement supérieur au titre des risques non diversifiables liés aux fluctuations générales de la bourse.

188 Ainsi, NMa a appliqué le MEAF dans l'affaire KLM (Vereniging Vrije Vogel contre KLM et Stewart contre KLM, 8 novembre 2000. Pijnacker Hordijk (2002) décrit les affaires KLM (page 484) et aéroport de Schiphol (page 486). Par ailleurs, il critique vivement la méthode axée sur la rentabilité, notant que le MEAF et le CMPC n'ont pas plus vocation à apprécier l'adéquation, ni même la légalité, des profits effectivement réalisés par les différentes entreprises, qu'ils ne sont capables de le faire. Le simple fait qu'une entreprise ou une activité commerciale puisse être plus rentable que l'ensemble d'un secteur d'activité ou la moyenne des entreprises, ne justifie pas d'un point de vue économique l'argument que les bénéfices réalisés sont « excessifs ».

189 Si $\beta=1$, le cours de l'action fluctue conformément à l'ensemble du marché boursier. $\beta<1$ suppose une dégradation de l'évolution du cours, et $\beta>1$ des résultats meilleurs que le marché dans son ensemble. Ainsi, $\beta>1$ correspond en principe au cours de l'action des fabricants de produits de luxe dont la consommation se ressent davantage de l'évolution générale du marché alors que $\beta < 1$ correspond à celui des producteurs de denrées alimentaires car les gens continuent d'acheter de la nourriture même en période de récession. Voir Williams (2007:136 seq.)

6.1.2. Rentabilité du capital

La comparaison entre le coût du capital et certains tarifs pratiqués n'est pas chose aisée, aussi a-t-il fallu calculer un indicateur de rentabilité du capital comme le RCE qui a été ensuite comparé au CMPC. Comme on l'a vu, on applique normalement la méthode qui consiste à comparer le coût du capital à son rendement pour réglementer les entreprises de services d'utilité publique. Après avoir établi le coût moyen pondéré du capital de l'entreprise, on fixe le tarif qu'elle est autorisée à appliquer de manière à obtenir le RCE escompté, égal au CMPC. Si ce qu'il est convenu d'appeler l'encadrement du taux de rentabilité peut aussi être appliqué dans le contexte des prix excessifs, les investissements réalisés par des entreprises de services d'utilité publique contrôlées par l'État ou des entreprises de services d'utilité publique travaillant sur des marchés protégés n'ont rien à voir avec les investissements effectués sur un marché ouvert à la concurrence, confronté à de gros risques *ex ante* de cessation d'activité. Alors que ces risques peuvent probablement être ignorés dans le cadre d'entreprises de services d'utilité publique qui ont, peut-être même, bénéficié en toute légalité de situations monopolistiques, le risque *ex ante* de cessation d'activité doit être rémunéré *ex post* sur un marché concurrentiel[190].

La rémunération que les actionnaires exigent pour accepter de conserver les actions de l'entreprise est égale à un pourcentage de la valeur de marché de l'action de l'entreprise et non des actifs qui y ont été effectivement investis. Il reste que la mesure appropriée de la rentabilité et, indirectement, des prix, est la rentabilité de la base d'actifs investis et non le rendement actuel de la valeur de marché de l'action. L'autre raison importante de s'intéresser aux apports de départ est que cela empêche le « blanchiment » des prix excessifs. De nombreuses raisons peuvent expliquer qu'un prix d'acquisition soit supérieur à la valeur des actifs de l'entreprise, comme l'image, les accords de distribution, la structure de l'entreprise, le savoir-faire, etc. Le coût que représente la création de ces « actifs incorporels » est une composante légitime de l'assise financière de l'entreprise. Pourtant, le prix d'acquisition peut aussi dépasser la valeur de ses actifs pour d'autres raisons, moins innocentes, qui ne seraient rien d'autre que la valeur attachée à la capacité de pratiquer des prix excessifs. Pour résumer, une entreprise pourrait simplement vendre son pouvoir de marché, empêchant ainsi que l'acquéreur puisse être accusé de pratiquer des prix excessifs puisqu'il aurait été contraint d'acheter la valeur capitalisée de ce pouvoir.

6.2. Comparaisons entre prix et coûts

Quand il est impossible d'avoir recours à une analyse de la rentabilité, les comparaisons entre prix et coûts peuvent constituer une méthode de rechange efficace.

La marge bénéficiaire est définie par :

$$p\text{-}c/p \qquad [2]$$

Par exemple, si le prix est 10 et le coût 5, la marge est ½, soit 50 %. Bien que cette mesure de la marge puisse paraitre sommaire, il est non seulement difficile de calculer effectivement les marges dans tel ou tel cas, mais aussi de choisir une mesure appropriée des coûts.

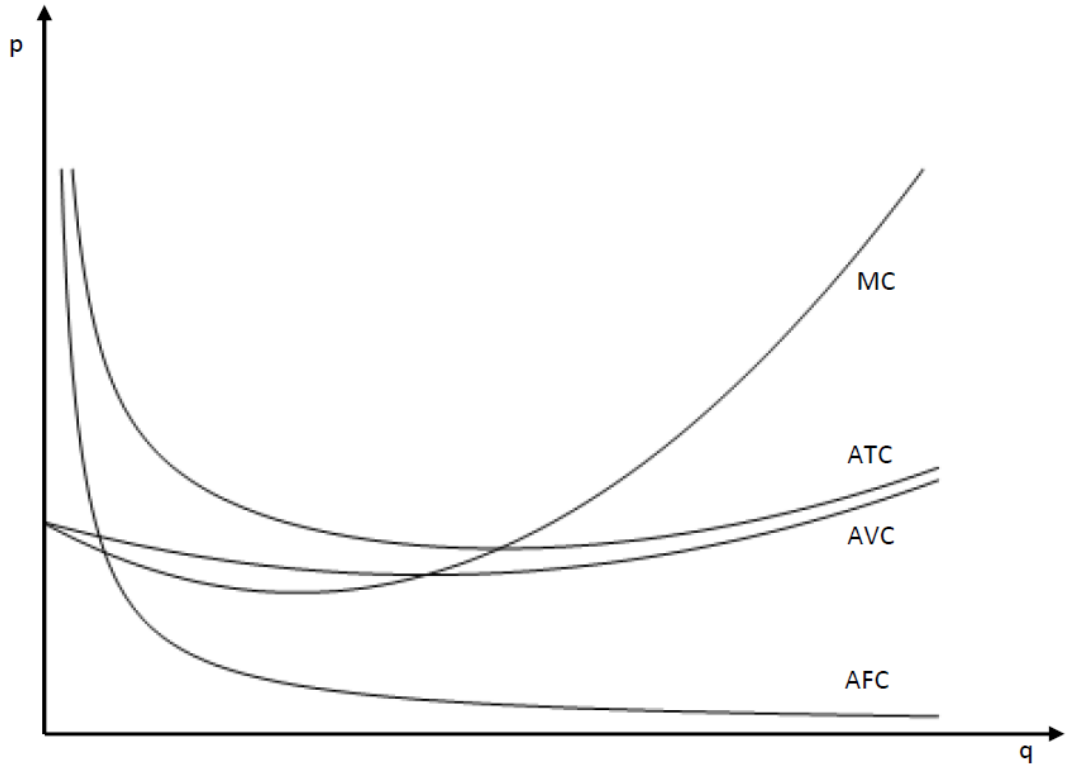
L'intérêt d'utiliser les marges bénéficiaires pour mesurer la rentabilité et, en fin de compte, le caractère excessif, repose selon toute probabilité sur les résultats théoriques illustrés par les graphiques 1 et 2, en situation de concurrence parfaite. Dans ce modèle de concurrence parfaite, le prix d'équilibre des

190 Est inclus le risque associé à l'incertitude de la demande qui n'a que récemment pris de l'importance aussi dans les secteurs ouverts à la concurrence mais réglementés.

entreprises est égal au coût marginal, de sorte que tout écart vis-à-vis du prix fixé correspondant au coût marginal mesuré par la marge bénéficiaire, est réputé représenter tout simplement le pouvoir de marché[191].

Pour pouvoir mener à bien une analyse de la marge bénéficiaire, il faut une posséder une certaine maitrise des notions de coût, dont les plus courantes sont résumées dans les deux graphiques suivants.

Graphique 3. Coût marginal, coût total moyen, coût variable moyen et coût fixe moyen



Les courbes de coût à court et à long terme, décrites dans les graphiques 3 et 4, reposent sur des hypothèses précises concernant le type de technologie utilisée pour la production et n'auront donc pas forcément les formes dessinées ici[192]. Les coûts fixes sont des coûts stables quelle que soit la quantité produite, contrairement aux coûts variables qui varient selon le volume de la production. Les coûts marginaux (CM) sont les coûts supplémentaires supportés par unité supplémentaire produite.

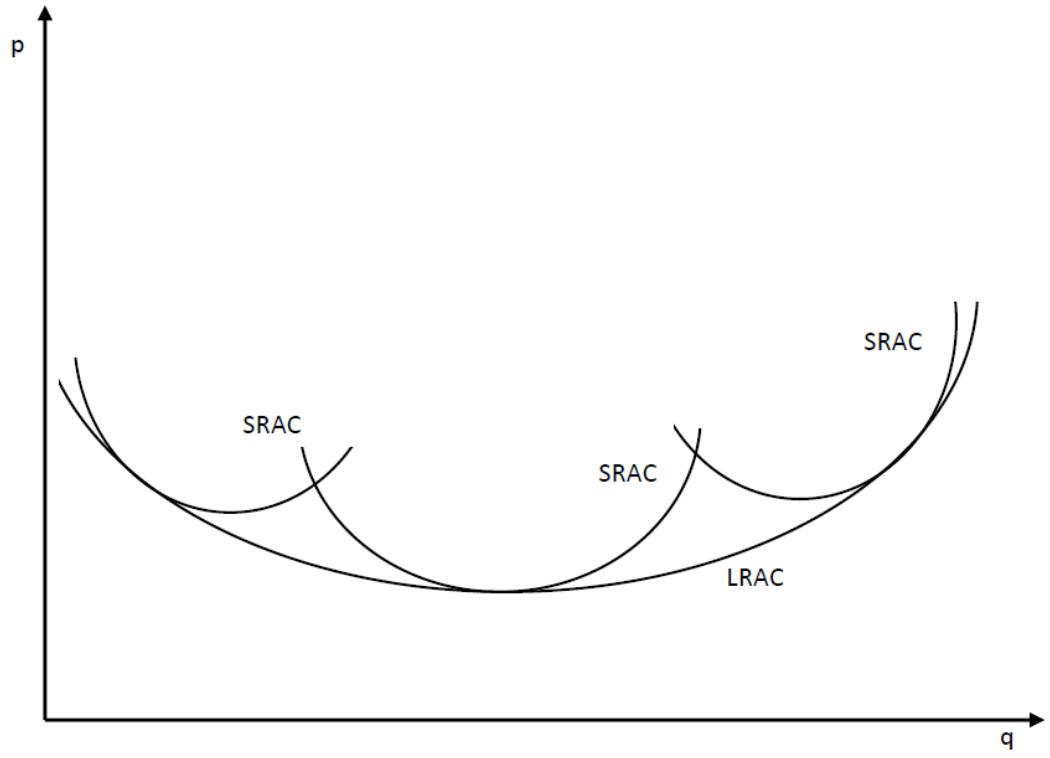
Le coût fixe moyen (CFM) décroit avec la quantité produite puisqu'il s'agit simplement du coût fixe divisé par la quantité. Là encore, le coût variable moyen (CVM) qui dépend de la technologie utilisée pour la production, est déterminé en tant que coût unitaire du/des facteur(s) de production. La courbe en U du coût moyen total (CMT) est simplement le produit des courbes CVM et CFM. La courbe CM coupe les

191 Ainsi, le caractère hasardeux de cette généralisation a été démontré par Baumol et Swanson (2003), pour lesquels la règle qui veut que le prix soit égal au coût marginal, revient à obliger chaque entreprise ayant réalisé des économies d'échelle, indépendamment de la compétitivité du marché, à se sacrifier pour que ses prix soient jugés « compétitifs ». (682)

192 En principe, la technologie de production en arrière-plan est représentée par une fonction avec un facteur de production variable qui indique d'abord une augmentation, puis une diminution de la productivité marginale. La productivité marginale croissante est directement associée à la partie à pente négative de la courbe de coût marginal, tandis que la productivité marginale décroissante l'est à la partie à pente positive.

courbes CVM et CMT à leurs points le plus bas. Le CMT décroît en raison de la dispersion des coûts fixes sur des quantités plus élevées et, qui plus est, aussi à des niveaux de quantité plus faibles du fait de l'augmentation de la productivité marginale. On constate une hausse du CMT sous l'effet de la productivité marginale décroissante, qui neutralise les effets de la dispersion des coûts fixes.

Graphique 4. Coût total moyen à court et à long terme



Le graphique 4 décrit la courbe du coût moyen à long terme (CMLT). CMLT dessine un arc dans lequel s'inscrivent les courbes du coût moyen à court terme (CMCT), qui fait apparaitre des rendements d'échelle d'abord croissants puis décroissants. Il est disposé sous ou à la tangente des courbes du coût moyen à court terme[193].

Les caractéristiques d'entrée et de sortie à long terme de la courbe CMLT présentent un intérêt théorique particulier dans le contexte des critères de prix excessifs. Si le prix est supérieur au CMLT, une concurrence efficace le ramènera à son niveau. S'il est inférieur, les entreprises seront éliminées du marché sur le long terme. Ainsi tout prix égal ou supérieur au CMLT est viable pour l'entreprise[194].

Si ces notions de coût sont bien définies en théorie, il n'en demeure pas moins que le calcul des marges bénéficiaires peut s'avérer très complexe dans la pratique. Les choses ne peuvent que se compliquer quant on examine les stratégies de détermination des prix visant à augmenter au maximum les

193 L'explication intuitive de la relation entre CMCT et CMLT, en particulier le fait que les courbes CMCT ne soient pas disposées à la tangente de la courbe CMLT à leurs points les plus bas respectifs, veut que les contraintes à court terme de l'entreprise ne lui permettront pas de produire à coûts plus bas que sur le long terme où il n'y a pas de contraintes.

194 Voir l'annexe 1 sur l'affaire Mittal et la section 2.1 plus haut.

ventes d'un ensemble de biens et de services connexes au lieu d'un produit unique, ou quand un produit est fabriqué par les multiples divisions de l'entreprise, éventuellement dans différents pays, pendant plusieurs années, voire en mettant à profit les secrets commerciaux et les marques déposées par le passé pour un produit différent issu d'importants efforts de R-D[195]. La difficulté vient de ce que le prix de maximisation du bénéfice décidé par ces entreprises est supposé couvrir la totalité des coûts de production y compris les coûts communs ou liés, ce qui entraine des marges bénéficiaires différentes pour des produits dont la demande a une élasticité variable. Par conséquent, il a été proposé d'examiner dans sa globalité la politique d'une entreprise multiproduits en matière de fixation des prix[196].

Afin d'éviter les problèmes associés au CMLT en présence de coûts communs ou liés indirects, on examine parfois le coût marginal moyen à long terme (CMMLT). Le CMMLT s'entend comme la totalité des coûts liés à l'entrée sur un marché et au lancement d'une offre de biens ou services, en moyenne sur la production totale. Sont exclus de la mesure les coûts communs puisque seuls les coûts imputables au bien ou service concerné sont pris en compte. On peut aussi expliquer le CMMLT en le renvoyant au coût évitable moyen à long terme (CEMLT) et au coût irrécupérable supporté à l'entrée puisque le CEMLT est la valeur totale des coûts qui seront évités à long terme s'il est mis un terme à l'offre du bien ou service, en moyenne sur la production totale. Tandis que le CMLT prend en compte l'ensemble des coûts variables et fixes, le CMMLT ne concerne que les coûts variables et fixes spécifiques au produit. Ainsi, le CMMLT devrait normalement être inférieur au CMLT parce qu'il ne comprend pas les coûts communs (non imputables) mais supérieur au coût évitable moyen (CEM)[197] puisqu'il englobe tous les coûts fixes spécifiques au produit[198].

Après avoir choisi la mesure de coût adéquate, il faudra répondre à la question supplémentaire de l'origine des coûts à examiner, à savoir les coûts effectivement supportés par l'entreprise considérée ou ceux d'une entreprise performante, peut-être même de la plus performante[199].

Les coûts pouvant être aisément et artificiellement augmentés dans le cadre de ce que l'on appelle aussi une démarche de surenchère réglementaire[200], il a été proposé d'utiliser la notion de coût au sein d'une entreprise efficace plutôt que les coûts réels de l'entreprise dominante[201]. Qui plus est, il serait hasardeux de s'appuyer sur les coûts réels de l'entreprise dominante dans le cas d'une entreprise

195 Voir Evans et Padilla (2005:102).

196 Bien que le CAT ait écarté cette suggestion dans l'affaire Napp.

197 Le CEM correspond à la totalité des coûts variant en fonction de la quantité produite, divisée par la quantité produite. En sont exclus tous les coûts fixes.

198 Voir par exemple la Commission européenne (2005) ou le chapitre 4 de département de la Justice (2008).

199 Voir O'Donoghue et Padilla (2006:616) et l'affaire 110/99, Lucazeau contre Sacem [1989], Recueil de la jurisprudence p. 2811.

200 Cette question est très importante dans les publications juridiques et constitue selon toute probabilité la principale raison pour laquelle le contrôle des prix fondé sur les coûts y a été abandonné au profit de l'élaboration d'une réglementation et de dispositifs fondés sur les aides. Voir Laffont et Tirole (1993) et Vogelsang (2002).

201 Cela s'est aussi produit dans d'autres affaires d'abus. L'OCDE (2000:17) note qu' « Il est toutefois aussi possible que les prix et les coûts soient excessifs, révélant un manque d'efficience, et dans ce cas les profits ne sont peut-être pas excessifs et peuvent donc amener à tempérer le jugement porté sur le niveau abusif des prix ». Voir aussi Pijnacker Hordijk (2002:492) qui affirme que rien ne permet à une autorité de la concurrence ou à une instance judiciaire de substituer sa vision de ce qui est « raisonnable » en matière de coûts à celle des dirigeants d'une entreprise.

particulièrement inefficace car cela ferait grimper considérablement le prix de référence[202]. Si l'on se fonde sur les coûts d'une entreprise efficace, il n'est pas nécessaire que ce soit la plus performante pour ne pas sanctionner inutilement une entreprise dominante particulièrement efficiente (en faisant baisser le prix de référence), et créer éventuellement un problème puisque le prix de référence ne permettrait plus à une entreprise particulièrement inefficace de rentrer dans ses coûts.

Il y a plusieurs possibilités pour calculer concrètement les coûts d'une entreprise performante. Le coût d'approvisionnement moyen peut, dans certains cas, fournir une variable approximative acceptable pour les coûts d'une entreprise efficiente[203]. Une solution de rechange qui a aussi le mérite de préserver les incitations dynamiques pour améliorer l'efficacité, consiste à prendre comme référence les coûts de la deuxième entreprise la plus performante. Bien que pas toujours pertinent dans le contexte d'un cas ponctuel de prix excessif, cela permet de maintenir les aides aux entreprises dont les coûts sont plus élevés ainsi que d'encourager les deux entreprises les plus efficaces à réduire leurs coûts[204].

6.3. Comparaisons de prix

Si on peut, en analysant la rentabilité et la marge bénéficiaire, qui plus est dans le temps, comparer deux entreprises situées sur un même marché ou sur d'autres marchés géographiques, cela se fait en principe au regard de comparaisons directes de prix. La présente section concerne donc les différents critères permettant de comparer les prix et, quand ces critères reposent sur d'autres indicateurs comme l'analyse de la rentabilité ou des marges bénéficiaires, des éléments analogues sont naturellement utilisés.

On a affirmé que toute comparaison de prix ou presque peut être contestée, hormis peut-être les prix prétendument excessifs facturés aux autres clients[205]. Il peut donc être utile de rappeler et d'examiner rapidement les trois principales méthodes de comparaison utilisées lors de décisions antérieures concernant les prix excessifs au regard de la concurrence.

6.3.1. Comparaisons géographiques

L'idée de base sur laquelle reposent ces comparaisons veut que l'on examine deux marchés géographiques suffisamment comparables pour pouvoir y comparer les prix (comparaisons de prix et de coûts ou de rentabilité) de manière valable[206]. Ainsi, des comparaisons de ce type ont été effectuées au sein

202 Ce sont les principales conclusions de Neven, Röller et Zhang (2006) qui analysent le secteur du transport aérien européen. Établie à partir de données de 1976 à 1994, leur étude indique que si les prix ont été proches du niveau de prix monopolistique, les marges bénéficiaires étaient compatibles avec un résultat plus concurrentiel.

203 Le coût d'approvisionnement moyen pourrait ou pas être pondéré par le volume, tel que calculé dans l'affaire allemande d'approvisionnement régional en gaz (voir l'annexe 5), dans laquelle le prix moyen d'approvisionnement a servi d'indicateur de coût.

204 En Australie, cette approche a été en fait adoptée par l'autorité de tutelle dans le contexte des commissions d'interchange. Elle peut toutefois avoir ses limites dans un secteur où l'échelle minimale d'efficience est relativement élevée. Encore que l'on pourrait faire valoir qu'il ne s'agit pas tant d'un problème dans le cadre d'une entreprise multiproduits, considérant que celle-ci accorderait des « subventions croisées » au produit ou service particulier concerné ; mais le problème est bien réel dans le cas des marchés de créneau.

205 Furse (2008:81f.). La discrimination par les prix se différencie naturellement des prix excessifs même s'il s'agit dans les deux cas d'abus choquants.

206 Dans l'affaire SACEM II, sa première affaire, l'UE a jugé que la comparaison directe des tarifs pouvait se substituer au critère coût-prix. Le cas Deutsche Grammophon montre que l'écart de prix entre le marché intérieur et le marché comparable peut révéler un abus en matière de prix, renversant ainsi la charge de la preuve. Voir aussi à l'annexe 5, l'examen de la notion de marché comparable utilisée en Allemagne.

d'United Brands (voir l'annexe 4), dans les affaires sur les tarifs régionaux du gaz en Allemagne (voir l'annexe 5) et dans les deux décisions relatives au Port de Helsingborg (voir l'annexe 3).

En 2006, l'OCDE a débattu des comparaisons géographiques au regard du pouvoir de marché:

> *"Faire des prix excessifs les indicateurs du pouvoir de marché, présente certaines insuffisances observées dans les mesures de la rentabilité. Il sera en principe difficile de déterminer un niveau de prix compétitif de référence à l'aune duquel mesurer des prix prétendument excessifs. Un commentateur a toutefois fait observer que l'on pouvait, dans certain cas, trouver un critère acceptable en procédant à une comparaison transversale, autrement dit quand le même produit est vendu sur deux marchés distincts, dont l'un semble être structurellement compétitif contrairement à l'autre. Dans une telle situation, on pourra comparer le prix compétitif à celui pratiqué par une entreprise sur un marché dont les caractéristiques semblent indiquer qu'une entreprise y détient un pouvoir de marché substantiel. Cette comparaison transversale pourrait constituer un indicateur pertinent du pouvoir de marché lorsque les marchés concernés tendent à avoir une base locale, tel le marché de la distribution par exemple. Pour autant, comparer simplement les prix pratiqués par deux entreprises ou par une même entreprise sur des marchés distincts, ne donnera pas d'indications fiables du pouvoir de marché. Il ne sera pas toujours aisé de déterminer si les prix plus élevés constatés sur un marché sont imputables au pouvoir de marché exercé par une entreprise ou s'ils pourraient s'expliquer aussi par d'autres facteurs, comme des coûts plus élevés*[207]*."*

Dans les affaires du Port de Helsingborg, la Commission a indiqué que les ports présentaient d'importantes différences du point de vue de la structure des activités, du volume des actifs et des investissements, de leur mode de financement, du niveau des recettes et du coût de chaque activité. Des différences existaient aussi dans le processus de décision interne concernant le mode de rémunération des actionnaires. Par ailleurs, les pertes enregistrées par certaines activités portuaires pouvaient occulter les bénéfices réalisés par d'autres. L'ensemble de ces éléments montrait la difficulté d'examiner la rentabilité d'un port en le comparant à un critère qui soit acceptable, composé d'autres ports.

Il n'est pas facile de trouver des marchés géographiques comparables auxquels se référer en raison, notamment, des écarts de taux d'intérêt, de change, de niveau de revenu général des clients et d'élasticité de la demande. L'autre grosse difficulté peut aussi venir du taux de pénétration du bien ou service concerné, puisqu'il y a toutes les chances pour que le prix appliqué aux produits récemment lancés sur un marché soit différent de celui du même produit sur un marché parvenu à une relative maturité où son utilisation se sera généralisée. Pour terminer, il faudrait que le prix de référence ne puisse pas être jugé excessif et/ou d'éviction.

6.3.2. Comparaison dans le temps

On peut aussi examiner l'évolution dans le temps de la rentabilité, des marges bénéficiaires et des prix. C'est l'approche adoptée par la Commission européenne dans l'affaire British Leyland, par exemple, et aussi, dans une certaine mesure, dans l'affaire United Brands[208].

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207 OCDE (2006a:42)

208 Voir l'affaire 226/84 British Leyland contre Commission [1986], Recueil de la jurisprudence p. 3263 et l'affaire 27/76, United Brands Company et United Brands Continentaal BV contre Commission [1978] Recueil de la jurisprudence p. 207, qui peut être consultée à : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0027:EN:HTML.

6.3.3. Comparaison entre concurrents

De la même manière que l'on a établi des critères de référence par rapport à d'autres marchés géographiques, il est possible d'effectuer des comparaisons au sein d'un même marché. Si des prix excessifs laissent supposer en principe que l'auteur prétendu de l'infraction détient des parts de marché importantes et occupe une position dominante, on ignore pour autant le rôle que pourraient jouer les entreprises secondaires en tant qu'indicateurs de prix plus compétitifs. Dès lors que ces dernière ne font que suivre la décision de l'entreprise dominante en matière de fixation des prix, de telles comparaisons seraient superflues et, dans le cas contraire, la question reste posée de savoir pourquoi on n'observe pas d'incidence sur la part de marché quand des entreprises qui y sont présentes, proposent des biens ou services à des prix sensiblement plus bas que l'entreprise dominante.

7. Chalandage d'abus et raccourcis

Les autorités de la concurrence ont parfois le choix entre plusieurs catégories de poursuites judiciaires contre une pratique ou une société donnée. Lorsque le comportement ou les conditions de marché leur paraissent litigieux, elles choisiront dans certains cas d'agir en suivant l'axe des prix excessifs, estimant qu'il est plus aisé de traiter directement les conséquences que le comportement lui-même. L'expression « chalandage d'abus » désigne le choix auquel se livrent les autorités de la concurrence lorsqu'il est possible de classer un abus particulier dans différentes catégories juridiques, chacune assortie de règles différentes en matière de preuve.

Bien entendu, les autorités peuvent choisir parmi divers outils juridiques pour chaque affaire, et le font en toute légitimité. Du point de vue des procédures juridiques, cela n'a rien de troublant. Du point de vue économique, cependant, il peut paraître curieux que les critères d'évaluation importants utilisés pour prouver le caractère abusif d'une seule et même pratique varient selon l'outil employé, une divergence qui a aussi des conséquences évidentes sur la prédictibilité du droit de la concurrence[209].

Le terme de « raccourci » est employé pour décrire les cas extrêmes de chalandage d'abus qui seront généralement jugés illégitimes.

S'il n'existe pas de consensus sur la frontière exacte entre un chalandage d'abus légitime et un raccourci, on peut estimer qu'un chalandage d'abus entraînant une réduction de la charge de la preuve pour l'autorité doit être considéré comme un raccourci procédural et/ou substantiel illégitime.

Lorsque les consommateurs semblent gravement lésés, les autorités peuvent être tentées d'employer les prix excessifs comme une « théorie universelle du préjudice » pouvant être rapidement mise en œuvre et ne nécessitant que des preuves restreintes. Néanmoins, comme nous l'avons montré, mener à bien des affaires de prix excessifs comporte de telles difficultés et se caractérise par une telle complexité que cette stratégie devient problématique.

De nombreuses affaires menées sous l'angle des prix excessifs auraient pu être répertoriées et jugées comme affaires de discrimination par les prix, voire de pratique d'éviction. Le chalandage d'abus est donc une réalité qui tend à brouiller la frontière entre les affaires relevant de pratiques d'exploitation et celles

209 Ce dernier argument est moins convaincant lorsqu'un abus est réputé avoir été décelé en vertu de chacune des deux catégories juridiques. Il peut toutefois affecter l'estimation, par la société, du risque de condamnation qu'elle encourt en cas d'infraction, puisque ce risque dépend des éléments que les autorités devront prouver.

liées à des pratiques d'éviction, ce qui a semé la confusion dans le débat sur les affaires de prix excessifs[210].

7.1. Chalandage d'abus

Le chalandage d'abus donne aux autorités de la concurrence une certaine marge de manœuvre pour choisir de manière stratégique la catégorie juridique en vertu de laquelle l'affaire sera jugée, ce qui entraîne souvent des conséquences non négligeables. Cette possibilité s'offre lorsqu'il n'existe pas de cartographie directe des effets économiques, voire même des théories du préjudice, dans les qualifications juridiques. Dans de telles circonstances, faire le bon choix – déterminer correctement les exigences légales à satisfaire et, parfois, la procédure à suivre – peut faire la différence entre une affaire gagnée et une affaire perdue[211]. Les autorités de la concurrence peuvent alors se trouver en situation de « chalandage d'abus »[212].

Le chalandage d'abus peut être considéré comme une sorte d'éclairage. Comme il a été souligné à propos de l'affaire Napp : « Bien que l'OTF ait choisi de traiter l'affaire comme deux abus distincts, dans ce cas bien précis de prix excessifs, il aurait été possible de traiter la pratique non pas comme un abus en soi, mais comme la récupération, par Napp, des pertes engendrées par sa stratégie de prédation. [213]» Des propos similaires pourraient être tenus sur les affaires British Leyland[214] et General Motors[215], toutes deux ayant été abordées sous l'angle des barrières artificielles au commerce parallèle, ou encore sur l'affaire Albion Water[216], qui aurait pu être jugée comme un refus constructif de vendre[217].

7.2. Raccourcis de fond et de procédure

Bien que le chalandage d'abus soit jugé légitime, le terme de raccourci est réservé aux cas où il y a peu de chances que le chalandage d'abus soit considéré comme pouvant soulever des objections. Si le chalandage d'abus consiste à donner un éclairage particulier à l'infraction, le raccourci, quant à lui, réduit les exigences de fond et de procédure pour prouver l'infraction.

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210 Fletcher et Jardine (2008:534) indiquent par exemple que « dans la pratique, de nombreuses affaires de prix excessifs relèvent essentiellement de pratiques d'exclusion plutôt que d'exploitation et [que], de plus, la frontière entre les deux peut parfois être floue ».

211 Il est une stratégie qui, bien que liée au chalandage d'abus, s'en distingue néanmoins. Il s'agit d'élaborer une théorie du préjudice reposant sur deux arguments distincts et, dans l'idéal, entièrement indépendants, ou de caractériser une infraction comme étant composée d'éléments distincts. Bien que cette stratégie n'affecte en rien la charge de la preuve pour chaque infraction, elle permet de continuer à plaider une affaire même si le tribunal juge l'une des infractions peu convaincante.

212 Voir OCDE (2007:95). L'expression anglaise « *abuse shopping* » semble avoir été inventée par Margaret Bloom, qui lui prêtait cependant plutôt le sens de raccourci.

213 Fletcher et Jardine (2008:541).

214 Voir l'affaire 226/84 British Leyland contre la Commission [1986] ECR 3263.

215 Voir l'affaire 26/75 General Motors Continental NV contre la Commission, [1975] ECR 1367.

216 Voir l'affaire Albion Water Ltd. et Albion Water Group Ltd. contre Water Services Regulation Authority, n° 1046/2/4/04 [2008] CAT 31.

217 Il existe des exemples de chalandage d'abus qui n'impliquent pas de prix excessifs, comme c'est le cas des affaires d'étranglement des marges, lesquelles pourraient être jugées comme des affaires de prédation ou de refus (constructif) de livrer. Prouver un refus de livrer ou une prédation demande davantage d'éléments de la part de l'autorité compétente que pour prouver un étranglement des marges, ce qui tendrait à faire de ces deux catégories plutôt des raccourcis.

On peut s'attendre à des raccourcis tout particulièrement de la part de jeunes autorités de la concurrence opérant au sein de systèmes juridiques peu matures et dans des environnements caractérisés par une expérience limitée du droit de la concurrence et une culture de la concurrence encore peu développée. Les raccourcis peuvent être imputés à des contrôles internes insuffisants, mais aussi à un manque de supervision et de contrôle de la part des tribunaux. Dans un tel environnement, il peut naturellement être très tentant pour les autorités de la concurrence d'engager des poursuites sur la base de prix excessifs comme raccourcis ou substituts à des axes de procédure plus ardus, plus difficiles et plus compliqués.

L'annexe 6 évoque une affaire qui pourrait entrer dans cette catégorie. Il s'agit de prix excessifs sur le marché de la téléphonie mobile en Albanie, où les deux seuls opérateurs ont été jugés être conjointement en position dominante. Bien que cette affaire démontre comment des concepts délicats comme la position dominante conjointe et les prix excessifs peuvent être traités quelque peu superficiellement pour atteindre les objectifs visés, elle n'est probablement pas dénuée de valeur (réglementaire) car les marchés de la téléphonie mobile sont réglementés dans d'autres pays[218]. La manière dont l'autorité de la concurrence albanaise s'est attaquée au problème de la téléphonie mobile est donc un exemple de raccourci de fond mais peut également être considérée comme un raccourci de procédure puisqu'il s'agissait probablement du moyen le plus rapide de le traiter.

Les raccourcis peuvent aussi être employés comme des outils de négociation efficaces malgré une étroite surveillance des tribunaux, à condition que la société contrevenante, bien consciente du stratagème, ne prenne pas l'autorité au mot. Comme les procédures qualifiées de raccourcis sont moins fastidieuses et entraînent une charge de la preuve moins lourde, elles sont plus faciles à engager sur la base d'éléments factuels minces. Dans le cas des prix excessifs, ces quelques éléments permettent alors de négocier une certaine réduction des prix avec la société en position dominante[219].

Bien entendu, le problème des raccourcis de procédure ou de fond n'est pas un problème d'étiquette. Il n'y aurait en effet aucune objection (à part, peut-être, la confusion que cela peut momentanément causer) à requalifier par exemple une théorie du préjudice relevant de l'exclusion et portant sur un refus constructif de fournir l'accès à des prestations fondamentales comme une affaire de prix excessifs, tant que l'analyse de la pratique d'exclusion ne disparaît pas de l'affaire[220]. Bien évidemment, une simple reclassification ne constituerait pas un chalandage d'abus puisqu'elle exigerait de l'autorité qu'elle respecte toutes les étapes

218 Voir les affaires d'itinérance dans l'Union européenne, finalement abandonnées au vu de la vaste réglementation des prix dans l'UE.

219 Il ne s'agit pas là de mettre en doute l'utilité des décisions d'engagement en général ou de celles obtenues par exemple dans le contexte des enquêtes réalisées sur le marché britannique, bien que dans un cas comme dans l'autre, des questions se soient posées sur les procédures. Les enquêtes réalisées sur le marché britannique, contrairement aux enquêtes sectorielles réalisées dans l'UE par exemple, ne servent pas uniquement les intérêts du droit de la concurrence. Elles ont souvent été employées pour résoudre efficacement des problèmes (réglementaires) à l'aide de mesures correctives issues du droit de la concurrence, grâce à une approche qui serait considérée comme un raccourci procédural du point de vue strict du droit de la concurrence. Oxera (2008) commente brièvement les 5 premières années d'enquêtes sur le marché britannique. D'une manière plus générale, il est reproché aux décisions d'engagement, dans les affaires liées à l'énergie dans l'UE par exemple, de n'avoir été possibles qu'en contraignant les sociétés à trouver un accord avec les autorités, sous peine d'amende. Certains peuvent également y voir un raccourci procédural.

220 Il y a toutefois une certaine tension inhérente entre les prix d'éviction et les pratiques d'exploitation par les prix, les premiers pouvant excéder le prix économiquement rationnel permettant de maximiser les bénéfices que l'on obtiendrait par le biais des pratiques d'exploitation. Dans le cas d'un verrouillage vertical par exemple, on observera dans le segment aval des pratiques d'exploitation par les prix basées sur des prix d'éviction en amont.

généralement requises dans ces affaires de pratiques abusives d'exclusion[221]. L'attrait des raccourcis, comme leur nom l'indique, réside cependant dans le fait qu'ils réduisent les exigences de procédure et/ou de fond. Si tel n'est pas le cas, il n'y a aucun intérêt à modifier l'éclairage des infractions.

7.3. Position dominante conjointe et collusion

Cette sous-section aborde deux différents aspects liés à la position dominante conjointe et à la collusion tacite et explicite. Elle examine tout d'abord le raccourci sans doute le plus extrême : traiter une affaire d'entente classique comme une affaire de prix excessifs liés à une position dominante conjointe. Dans un second temps, sur la base de cet exemple, elle s'intéresse à la possibilité, en théorie, d'attaquer la collusion *tacite* comme une affaire de prix excessifs liés à une position dominante conjointe.

7.3.1. Entente contre prix excessifs liés à une position dominante conjointe

L'exemple sans doute le plus flagrant de raccourci est celui d'une affaire d'entente qui serait traitée comme une affaire de prix excessifs liés à une position dominante conjointe[222]. Aujourd'hui comme hier, les autorités de la concurrence consacrent encore une part importante de leur temps et de leurs efforts à faire appliquer le droit de la concurrence contre les ententes, le type d'infraction à ce droit sans doute le moins controversé, et l'un des plus difficiles à prouver.

Des saisies sont effectuées à l'aube pour réunir des preuves, les présidents des sociétés sont invités à répondre sous serment aux questions des enquêteurs, les lignes téléphoniques sont mises sur écoute, des politiques de dénonciation et d'indulgence très élaborées sont mises sur pied et une analyse économique est menée pour déceler et prouver l'existence d'accords d'entente. Tous ces efforts sont coûteux pour l'autorité, et arrêter les ententes est devenu une tâche de plus en plus ardue maintenant que la technologie moderne devient de plus en plus sophistiquée et répandue chez les membres des ententes.

Étant donné les ressources considérables qu'il faut déployer et la lourde charge de preuve qu'il faut satisfaire pour poursuivre efficacement les ententes, il peut être particulièrement tentant de prendre un raccourci, d'infliger des amendes aux membres de l'entente et de mettre fin à cette pratique en se basant sur des prix excessifs liés à une position dominante conjointe, une théorie du préjudice qui ne requiert guère plus que d'établir la position dominante conjointe et des prix excessifs.

Les dispositions de lutte contre les prix excessifs peuvent poser de réels problèmes lorsqu'elles sont employées par des autorités et tribunaux inexpérimentés. En effet, non seulement les éventuelles erreurs de type I qui peuvent se produire lors de « véritables » affaires de prix excessifs portent préjudice au bien-être,

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221 Peut-être peut-on également interpréter ainsi la disposition relative aux prix non équitables de l'article 102 du TFUE et de certains autres textes de loi. Cette interprétation serait probablement jugée contraire à la jurisprudence actuelle, mais elle ferait honneur à l'argument selon lequel l'article 102 du TFUE visait à l'origine les pratiques d'exploitation par les prix. Après tout, débattre des éléments exigés pour prouver l'existence d'un abus n'a rien à avoir avec la manière dont cet abus sera finalement qualifié. Étant donné que tous les abus d'éviction comportent un volet d'exploitation, souvent sous la forme de prix élevés, cette requalification ne revêt cependant pas un grand attrait.

222 Les affaires de prix excessifs, tout comme celles de position dominante conjointe, comptent probablement parmi les plus délicates à mener à bien. Les secondes disposent par exemple d'une jurisprudence peu fournie et sont donc loin d'être un exercice mécaniste. Néanmoins, c'est justement parce que les méthodes clairement établies et les approches solides sont rares que ces affaires paraissent attrayantes aux autorités inexpérimentées. Le flou relatif permet de les traiter très rapidement en se contentant presque d'établir que les prix ne sont ni purement basés sur les coûts, ni significativement différents d'une société à l'autre, des preuves clairement insuffisantes pour conclure à la pratique de prix excessifs et de position dominante conjointe.

mais employer ce type de poursuite comme un raccourci permet de réduire les exigences procédurales et substantives d'autres domaines du droit de la concurrence, et accroît donc considérablement le risque d'erreurs de type I dans ces domaines. Les exigences procédurales et substantives strictes prévues dans les affaires d'entente sont par exemple délibérément imposées par le droit et les tribunaux pour trouver le juste équilibre entre les conséquences économiques néfastes d'une application trop rigide du droit et celles liées à une application insuffisante des dispositions[223]. Au final, les raccourcis portent atteinte à la primauté du droit.

7.3.2. Position dominante conjointe et collusion tacite ou explicite

Comme évoqué ci-avant, une entente ne doit pas être considérée comme une affaire de prix excessifs liés à une position dominante conjointe. La question se pose toutefois de savoir si des affaires de prix excessifs liés à des positions dominantes conjointes ne pourraient pas permettre d'agir contre les collusions tacites.

Bien que l'application du droit en matière de collusion tacite puisse être jugée lacunaire, il existe de bonnes raisons de ne pas poursuivre une telle approche non plus. Tant qu'il sera impossible d'effectuer une distinction claire entre la collusion tacite et la collusion explicite (apparemment tacite) dans les affaires réunissant des preuves insuffisantes pour poursuivre l'entente présumée, ces affaires ne pourront qu'exacerber le problème des raccourcis évoqué ci-avant.

Il existe toutefois une autre théorie du préjudice, peut-être plus réaliste et impliquant une position dominante conjointe, qui pourrait être plus aisée à épingler sous l'aspect d'accords anticoncurrentiels : les prix excessifs facturés par les communautés de brevets et les sociétés de perception et de répartition des droits.

8. Mesures correctives, amendes, restitution des profits mal acquis et actions privées en dommages-intérêts.

8.1. Mesures correctives

Dans chaque affaire de concurrence, il est difficile d'élaborer des mesures correctives adéquates et efficaces[224], tout particulièrement dans les affaires de prix excessifs[225]. Si réglementer en permanence les prix ou la rentabilité est une tâche délicate qui ne manque pas de soulever des problèmes, il peut être tout aussi difficile de trouver d'autres mesures correctives structurelles ou comportementales efficaces.

Étant donné leurs disparités dans les approches de base, dans les calendriers et dans la fréquence des interventions mentionnées à la section 3, il n'est guère surprenant que les autorités de la concurrence et celles chargées de la réglementation sectorielle adoptent des démarchent largement différentes en matière de mesures correctives[226].

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223 Cette argumentation est bien évidemment une simplification qui occulte des questions telles que les droits fondamentaux de procédure.

224 À propos des mesures correctives et sanctions dans les affaires d'abus de position dominante, voir généralement OCDE (2006b).

225 Comme l'a souligné Blumenthal (2008:580), une « mesure corrective impliquant une réglementation continue des prix et bénéfices par les tribunaux ou les autorités de la concurrence est presque vouée à l'échec... ».

226 Forrester (2008:566ff) examine un certain nombre d'affaires d'éviction et d'abus d'exploitation dans l'UE lors desquelles des mesures correctives sur les prix ont été employées.

8.1.1. Plafonnement des prix et de la rentabilité

Pour corriger un prix excessif, il semble évident de le plafonner (ou de plafonner la rentabilité), puisque la conduite jugée illégale porte sur la fixation du prix. Comme la plupart des mesures correctives comportementales, la réglementation des prix ou de la rentabilité exige une surveillance et, éventuellement, des ajustements en continu. Elle peut donc se révéler inappropriée pour une autorité de la concurrence qui recherche une mesure corrective unique et ponctuelle. Il n'est toutefois pas impensable de concevoir des règles plus générales qui pourraient s'appliquer d'elles-mêmes – par exemple si elles peuvent être conçues de manière à permettre aux consommateurs d'effectuer la surveillance[227].

En supposant qu'il est possible d'identifier un certain niveau de prix au-delà duquel ces derniers deviennent excessifs, il serait possible d'élaborer une mesure corrective comportementale qui obligerait la société contrevenante à ne pas proposer ses produits au-dessus de ce prix. Cette solution n'est toutefois pas sans poser certains problèmes. Tout d'abord, il est difficile, dans la pratique, de déterminer un seuil au-delà duquel un prix devient excessif. Comme évoqué dans la section 6, les méthodes disponibles pour déterminer si un prix est excessif ou non comportent toutes leur lot de difficultés. Quand bien même une méthode semblerait utile pour identifier clairement des prix excessifs (notamment en voyant s'ils sont largement supérieurs à toute mesure de coûts), il est plus difficile de déterminer précisément quel devrait être le niveau de prix adéquat.

Deuxièmement, imposer mesure corrective *statique* sur les prix n'est approprié que tant que les conditions de marché (coûts, nombre de sociétés, demande...) ne changent pas sensiblement. Si l'un de ces paramètres change, il est nécessaire de modifier le plafond de prix. Par exemple, si les coûts augmentent, le niveau de prix jugé excessif au moment de la décision peut devenir acceptable[228]. Dans ce cas, il serait nécessaire de relever le plafond afin d'éviter les divers effets négatifs évoqués. À l'inverse, si les coûts baissent, il est possible que le plafonnement initial des prix doive être revu à la baisse[229]. Si la société en position dominante est bien sûr parfaitement en droit de répercuter la baisse des coûts sur les prix à la consommation même si le plafond n'a pas été abaissé, elle est peu susceptible de le faire. En fait, presque autant de ressources peuvent être nécessaires pour analyser le bien-fondé d'un ajustement de la mesure corrective que pour établir l'infraction elle-même. À cet égard, tenir compte d'une évolution des coûts pourrait même être relativement simple comparé à la prise en considération d'une évolution provisoire ou permanente de la demande, par exemple.

Les simples mesures de fixation statique des prix ont un autre défaut : il est possible de les contourner. Puisqu'une seule dimension de la concurrence est réglementée, une société en position dominante peut adopter une stratégie dans laquelle elle respecte la mesure corrective mais change d'attitude dans d'autres dimensions de la concurrence, ce qui revient à avoir le même effet que celui réputé illégal. C'est là un problème récurrent de la réglementation : les sociétés dont les prix sont plafonnés sont incitées à réduire la qualité. Or, cette dernière peut être difficile à mesurer, et rogner sur la qualité est une stratégie qui permet à la société d'accroître le prix ajusté de la qualité tout en suivant la lettre, sinon l'esprit, d'une mesure de plafonnement corrective. La société en position dominante n'aura généralement aucune difficulté à justifier ces ajustements en évoquant toutes sortes de raisons apparemment recevables. Il peut donc être très difficile pour l'autorité de la concurrence de prouver le non-respect de la mesure corrective.

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227 Paulis (2007:517) suggère que les règles de fixation des prix pourraient réduire les problèmes de surveillance.

228 Cela entraîne bien entendu souvent une recherche de haut de gamme superflu, comme nous l'avons vu, mais ce peut être une conséquence juridique nécessaire selon le test employé pour établir l'abus.

229 Certes, il est possible de soutenir que cette approche risque de sanctionner les sociétés qui réduisent leurs coûts, mais le test employé pour établir l'abus peut révéler que les prix sont excessifs dès le départ.

Il existe une autre mesure corrective, toutefois plus discutable encore[230] : une fixation dynamique des prix, assortie dans une certaine mesure d'un mécanisme intégré d'ajustement du plafond. Par exemple, le prix maximum pourrait être automatiquement ajusté en cas de modification des coûts. Toute hausse des coûts entraînerait un relèvement du plafond, et vice versa. Outre le fait qu'un désaccord constant entre la société en position dominante et l'autorité de la concurrence sur l'existence ou non d'une évolution des coûts puisse soulever une difficulté pratique[231], il faut également souligner que ce type d'ajustement ne tient pas compte des fluctuations de la demande. En cas d'augmentation de la demande sans mouvement parallèle des coûts, la société ne pourrait pas accroître ses prix[232].

Dans la même veine que les mesures correctives dynamiques sur les prix, il est possible de prévoir une mesure touchant au taux de rentabilité. La société en position dominante pourrait être forcée d'ajuster ses prix de manière à ne pas dépasser un certain taux de rentabilité de l'investissement ou taux de rentabilité économique. Elle serait alors contrainte d'abaisser son prix en cas de réduction des coûts et le plafond virtuel serait relevé en cas d'augmentation des coûts.

Une réglementation basée sur le taux de rentabilité pose toutefois plusieurs problèmes. Tout d'abord, ce taux est influencé non seulement par les variations des coûts mais aussi par les fluctuations de la demande, auquel cas la société en position dominante serait amenée à ajuster ses prix afin de maintenir le taux de rentabilité fixé. Cependant, un tel ajustement peut se révéler inapproprié à la fois du point de vue de l'entreprise et du point de vue du bien-être. Comme les autorités de tutelle ont été de plus en plus nombreuses à en prendre conscience, les mesures correctives basées sur le taux de rentabilité peuvent entraîner des incitations pernicieuses. Elles n'incitent pas à l'efficience. La société étant autorisée à générer un certain retour sur investissement, elle peut trouver rationnel de surinvestir inefficacement. Outre d'être contre-productive, une telle stratégie peut même, à long terme, si ces investissements permettent à l'entreprise de diminuer ses coûts accroître son pouvoir de marché dans la mesure où l'accès au marché est rendu plus difficile aux nouveaux entrants.

Comme pour la réglementation des prix, il est difficile de déterminer le taux de rentabilité « approprié » et pécher par excès ou par insuffisance soulèverait des problèmes. Il convient également de noter qu'une réglementation basée sur le taux de rentabilité peut entraîner des distorsions dans l'allocation du capital si les marchés financiers jugent le taux imposé trop faible par rapport à la rentabilité du capital ajustée du risque qu'ils escomptent. Dans ce cas, la société en position dominante peut avoir du mal à lever des capitaux pour financer d'autres investissements nécessaires. Enfin, l'imposition de mesures liées aux taux de rentabilité pâtit des mêmes problèmes que ceux rencontrés généralement par les interventions basées sur les prix excessifs : les sociétés peuvent estimer que des investissements fructueux pourraient accroître le risque de subir une mesure *ex-post* sur le taux de rentabilité, ce qui entraîne des inefficiences dynamiques. Dans ce cas, les incitations à investir *ex-ante* sont artificiellement réduites, entraînant vraisemblablement un sous-investissement[233].

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230 En fait, l'approche dynamique pose les mêmes problèmes que son homologue statique, à la différence que tout est établi à l'avance et que le risque de voir la société contourner ou manipuler la mesure corrective est plus élevé.

231 Comme évoqué à la section 6, les règles comptables laissent aux sociétés une grande liberté dans la manière dont elles imputent les coûts. C'est notamment le cas lorsque certains services ou biens sont achetés auprès d'une autre ligne d'activité de la même entité, puisque la détermination de prix de transfert offre aux sociétés de nombreuses possibilités de « manipuler » les coûts en toute légalité.

232 Comme nous l'avons vu à la section 2, ces effets dépendent essentiellement du type de fonction de production.

233 C'est par exemple l'argument qui a été avancé par RBB (2002:2 seq.) dans le cadre de l'affaire britannique Napp. Voir aussi ERG (2004:90).

L'autorité de la concurrence pourrait aussi réglementer les prix ou le taux de rentabilité différemment, en commençant par poser des exigences de prix ou de taux de rentabilité relativement peu sévères, tout en requérant une collecte d'information draconienne. Une telle mesure permettrait de résoudre le problème de l'information de deux manières. Tout d'abord, la réglementation des prix, peu sévère, sera moins susceptible de porter préjudice et, ensuite, en cas d'infractions répétées, l'autorité pourrait fonder une nouvelle décision sur des éléments factuels solides.

Les difficultés, mentionnées en particulier dans un contexte de droit de la concurrence, ont été identifiées très tôt par les tribunaux américains :

> *« ...déterminer un taux raisonnable est une tâche empreinte d'une grande incertitude... [M]ême une fois la norme fixée, une telle variété d'éléments entre en ligne de compte pour établir ce qu'est un taux raisonnable que, quelle que soit la norme adoptée, toute société de transport préférerait dans la plupart des cas renoncer à démontrer le caractère déraisonnable d'une poursuite plutôt que de risquer d'investir un temps et des sommes considérables pour le prouver... Ainsi, soutenir que la Loi exclut les accords qui ne restreignent pas le commerce de manière déraisonnable... revient en substance à laisser aux sociétés elles-mêmes le soin d'apprécier où commence la déraison. »*[234]

Les différents ouvrages semblent s'accorder sur le fait que les mesures correctives autres que la réglementation des prix ou du taux de rentabilité s'inscrivent davantage dans la philosophie générale du droit de la concurrence, et qu'essayer d'imiter l'effet de la concurrence directement à l'aide de ce type de réglementation n'est pas aussi efficace que d'adopter des mesures correctives structurelles ou comportementales informationnelles à même de faire jouer pleinement les forces de la concurrence pour discipliner le marché.

8.1.2. Autres mesures correctives comportementales

Dans les affaires de prix excessifs, il est également possible de se concentrer sur la demande pour élaborer des mesures correctives – en réduisant les barrières à l'entrée créées par le comportement de clients potentiels[235]. Ces barrières sont notamment :

- la difficulté à réunir des informations sur l'existence de substituts (les clients trouvent coûteux de faire plusieurs magasins et de se renseigner sur les solutions alternatives) ;
- le manque d'informations comparables entre les différents fournisseurs (il est difficile et coûteux de comparer les produits ou services des différents fournisseurs ou prestataires) ;
- les coûts de changement élevés (il est difficile et coûteux de changer de fournisseur)[236] ;

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234 États-Unis contre Trans-Missouri Freight Assn., 166 U.S. 290 (1897) cité d'après Gal (2004:352).

235 Fletcher et Jardine (2008:542 seq.) fournissent un examen détaillé et enthousiaste de ces mesures correctives. Ils énoncent également une liste de mesures possibles pouvant aborder les facteurs liés à la demande identifiés ci-dessous.

236 Lorsque les coûts de changement sont élevés, ils peuvent par exemple être réduits en contraignant la société en position dominante à fournir des informations et prix sur des fournisseurs ou produits alternatifs. Des mesures correctives liées à l'information ont par exemple été employées dans l'affaire Miscrosoft dans l'UE et dans l'affaire des cartes de magasin au Royaume-Uni.

- l'asymétrie de l'information entre les clients et les sociétés (l'expérience passée avec un fournisseur ou la réputation de ce dernier jouent un rôle d'autant plus important que les caractéristiques des produits ne peuvent pas toutes être observées).

Toute mesure corrective pouvant aborder ces facteurs accroît la concurrence sur le marché et peut aussi rendre l'entrée plus attrayante[237]. Néanmoins, comme il apparaît clairement lorsqu'on examine une affaire de monopole, pour que ces mesures fonctionnent, il faut qu'il existe un minimum de produits alternatifs, ce qui n'est pas toujours le cas dans les cas les plus graves de prix excessifs présumés.

8.1.3. Mesures correctives structurelles

Les mesures correctives structurelles ont été recommandées par un vaste panel d'auteurs. Cette conclusion est liée à l'opinion plus générale selon laquelle mieux vaut s'attaquer aux causes qu'aux symptômes[238]. Comme c'est le cas dans toutes les affaires de concurrence, il est important de ne pas confondre l'abus et la mesure corrective. Et il sera toujours préférable de s'attaquer au problème à sa racine plutôt que de réglementer les prix. Selon Siragusa :

> *« Si toutes les conditions sont effectivement réunies pour considérer les prix excessifs comme un abus,... [j]e dirais que la société ne doit pas seulement se voir intimer l'ordre de revenir à des prix « normaux », avec toute la difficulté qu'il y a à déterminer ce que seraient des prix « normaux ». Comme cela se fait depuis longtemps déjà dans les affaires de concentration, le recours à des mesures correctives structurelles doit être privilégié pour résoudre le problème des prix excessifs en droit de la concurrence. »*[239]

En particulier dans certains des secteurs – comme celui des sociétés privatisées – susceptibles de passer au moins un sous-ensemble des filtres proposés évoqués à la section 4, les mesures correctives structurelles s'inscriront largement dans la lignée des efforts de libéralisation et de déréglementation puisqu'elles reposent sur la « tendance à accroître le rôle des marchés libres »[240].

Les mesures structurelles permettant de corriger des prix excessifs peuvent prendre deux formes distinctes. Un démantèlement horizontal peut permettre aux entités nouvellement créées d'entrer en concurrence. À l'inverse, les mesures correctives structurelles pourraient être employées pour abaisser les

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237 Cette approche a également été proposée pour les autorités chargées de la réglementation sectorielle, même dans les affaires de monopole. Forrester (2008:552) soutient que « l'autorité de tutelle pourrait obliger le détenteur d'un monopole (ou d'un vaste pouvoir de marché) à pratiquer une politique de *transparence des conditions et des prix* ; ou une politique de *non-discrimination dans les conditions commerciales proposées* ; ou encore d'appliquer des *règles comptables d'imputation des coûts* qui révèlent précisément la pondération des divers éléments de coût exploités collectivement, ce qui facilite une évaluation transparente des éléments de coût particuliers et des stratégies en matière de prix. »

238 Voir de même Siragusa (2008:644f), qui souligne légitimement le besoin d'aller à la racine du problème et d'employer des mesures correctives structurelles. Son examen des prix excessifs d'accès aux réseaux porte toutefois davantage sur des affaires de refus constructif de vendre plutôt que sur des affaires de prix excessifs. Aller à la racine du problème peut être une tâche plus ardue lorsque l'on est confronté à de « véritables » cas de prix excessifs. Au sujet des possibilités de chalandage d'abus et de changement d'éclairage permettant de présenter les affaires comme des cas de prix excessifs, voir la section 7 ci-dessus.

239 Siragusa (2008:645). Selon Siragusa, le choix de mesures correctives structurelles serait par ailleurs en accord avec les rôles respectifs des autorités chargées de la réglementation sectorielle et des autorités de la concurrence. Il convient de noter que, dans certains pays, il est possible que l'imposition de telles mesures dans les affaires de prix excessifs pose des soucis de proportionnalité.

240 Siragusa (2008:648).

barrières à l'entrée, en scindant puis en démantelant par exemple la partie cruciale de la société qui faisait obstruction à l'entrée sur le marché. Une restructuration verticale du marché consistant à séparer du reste les grandes étapes de production générant des économies d'échelle, et à permettre à de vastes pans de l'entreprise d'exercer en concurrence les uns avec les autres, peut également réduire les prix[241]. Dans un tel scénario, seules les étapes de production présentant des économies d'échelle, comme par exemple les principales infrastructures réseau (prestation fondamentale), exigeraient une réglementation des prix. Ceci s'appliquerait bien sûr tout particulièrement aux anciens monopoles d'État. L'une des solutions apportées par une mesure corrective structurelle consiste également à faciliter l'entrée sur le marché en attirant idéalement une société franc-tireur dotée de moyens financiers considérables, qui a éventuellement déjà vendu un produit similaire ou exercé dans un marché avoisinant (ce qui implique des connaissances et une expérience préalables).

L'une des difficultés générales du désinvestissement est qu'il n'existe pas de relation directe claire entre la part de marché et les prix. Il n'est donc pas évident de déterminer la part d'actifs devant être transférée aux concurrents pour obtenir la baisse souhaitée des prix. D'une manière générale, il peut également être difficile d'imaginer un marché qui passerait au moins certains des filtres que nous avons évoqués précédemment et dont les économies d'échelle ne seraient pas de nature à compliquer la réussite d'un démantèlement horizontal sur le long terme. Il peut donc être plus prometteur de se concentrer sur les mesures correctives structurelles à même d'abaisser les barrières à l'entrée.

Bien que la position du tribunal sud-africain dans l'affaire Mittal (voir Annexe 1) ait été ultérieurement rejetée, elle suggère que les autorités de la concurrence ne devraient pas tenter de réglementer les prix mais plutôt utiliser les outils classiques de leur arsenal de mesures correctives :

> *« Si des prix excessifs sont décelés par une autorité de la concurrence et qu'il incombe à cette dernière d'y remédier plutôt qu'à un organisme de réglementation des prix dûment habilité à cet effet et doté des ressources nécessaires, cette autorité doit agir en recourant à ses approches et instruments classiques »*[242]

Par nature, il est difficile d'élaborer des mesures structurelles clairement définies permettant de corriger les abus d'exploitation purs, en dehors des secteurs traditionnellement soumis à une certaine forme de réglementation.

8.2. Répartition des tâches

Puisque, d'une part, les autorités de la concurrence sont réputées être mal armées pour réglementer spécifiquement les prix et que, d'autre part, les autorités chargées de la réglementation sectorielle sont jugées trop axées sur les détails et pas assez concentrées sur l'objectif plus vaste et plus général d'améliorer l'efficacité de la concurrence dans le secteur[243], l'alliance des deux types d'autorité pourrait permettre de pallier ces inconvénients[244].

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241 Voir OCDE (2011b). Voir également les affaires récentes de l'UE dans le domaine de l'énergie, comme celle d'E.ON examinée dans Hellström et al. (2009) ou celle d'ENI examinée dans Maier-Rigaud et al. (2011).

242 Ainsi résumé par Lewis (2009:587).

243 Voir Forrester (2008:574) et plus généralement la section 3 ci-dessus.

244 Comme nous l'avons précédemment vu, certaines autorités de tutelle disposent de mandats ayant trait à la concurrence et certaines autorités de la concurrence ont des fonctions de réglementation, ce qui peut rendre une telle coopération particulièrement aisée dans ces cas.

L'une des répartitions possibles des tâches serait que l'autorité de la concurrence décide si une infraction a été commise, puis qu'elle passe la main à l'autorité de tutelle, qui doit concevoir, mettre en œuvre, surveiller et ajuster la mesure corrective. De fait, il existe au moins un cas d'affaire hybride impliquant à la fois une autorité de tutelle et une autorité de la concurrence[245]. Bien que cette solution ne soit pas une panacée puisque la mise en place de la coopération et la coordination des travaux entraînent des coûts, il est possible, dans certains cas, que l'alliance des domaines de spécialité respectifs de chaque type d'autorité puisse porter ses fruits. Cela impliquerait que l'autorité de la concurrence, qui travaille peut-être déjà en étroite collaboration avec une autorité de tutelle, décide si oui ou non une intervention est justifiée. Une fois l'intervention décidée, l'élaboration de la mesure corrective elle-même, sa surveillance constante et les ajustements éventuels[246] à y apporter au fil du temps pourraient être pris en charge par l'autorité de tutelle, en consultation avec l'autorité de la concurrence[247].

Par ailleurs, la promotion de la concurrence peut jouer un rôle de premier plan en tant que mesure corrective, notamment au vu des liens complexes entre l'infraction au droit de la concurrence et l'infraction réglementaire que constituent les prix excessifs. Les autorités de la concurrence pourraient envisager de privilégier une solution réglementaire ou un renforcement du pouvoir de l'autorité de tutelle plutôt que d'intervenir au nom du droit de la concurrence. Pour ce faire, il faut souvent connaître à l'avance la faisabilité de telles propositions. Une approche collaborative semble donc tout indiquée, qui permettrait éventuellement aussi le retrait de l'autorité de la concurrence par la suite si une répartition formelle des tâches apparaît moins souhaitable[248].

8.3. Amendes, restitution des profits mal acquis et demandes de dommages-intérêts des acteurs privés.

Selon certains auteurs, il ne faudrait pas infliger d'amendes ni permettre aux acteurs privés de demander des dommages-intérêts dans les affaires de prix excessifs[249]. D'après eux, tout transfert *ex-post* escompté de la part de la société ayant pratiqué des prix excessifs aurait *ex-ante* des effets d'incitation

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245 Voir la décision du NMa du 25 mars 2009, affaire 6424/427 Ziekenhuis Walcheren – Oosterscheldeziekenhuizen, http://www.nma.nl/images/6424BCV22-154011.pdf. Cette affaire peut certes soulever des questions d'un autre ordre et il est possible que les mesures correctrices n'aient pas été préférables à une interdiction étant donné qu'elle concerne une concentration hospitalière dans le cadre de laquelle la mesure corrective – la surveillance des prix imposés – a été déléguée à l'autorité néerlandaise de la santé (NZa), mais elle démontre qu'une coopération des autorités de tutelle et des autorités de la concurrence est possible à l'échelle d'une affaire. Voir Canoy et Sauter (2010) pour un examen critique de l'affaire, ainsi que la contribution annexe de Misja Mikkers et Wolf Sauter pour obtenir des détails sur la coopération entre les autorités.

246 Il peut exister des limites légales à la mise en place de mesures correctives « dynamiques », c'est-à-dire de mesures conditionnées par des facteurs internes ou externes à la société.

247 Comme le soutient Werden (2009:661), cependant, il n'est pas suffisant, pour éviter de se trouver dans le rôle d'une autorité de tutelle, de rejeter les mesures réglementaires ou de déléguer la surveillance et l'élaboration des mesures à une autorité de tutelle, car le fait même de déterminer si oui ou non des prix sont excessifs peut exiger la maîtrise de compétences particulières.

248 Les procédures d'enquête de marché de l'autorité de la concurrence britannique prévoient deux types d'approche : les conseils prodigués aux autorités gouvernementales et de tutelle d'une part, et les mesures correctives standard imposées aux sociétés d'autre part.

249 Voir cependant Elhauge (2009a:513), pour lequel les actions intentées par les particuliers et les entreprises (actions privées) peuvent ne pas suffire à assurer la restitution des profits mal acquis. Ainsi, il existerait une « autre mesure corrective naturelle » aux prix excessifs (si l'on se restreint aux affaires passées entre les mailles du filet) : « forcer la société à restituer les profits indûment tirés de prix excessifs en raison d'une conduite anticoncurrentielle ».

indésirables qui viendraient s'ajouter aux répercussions néfastes sur les incitations à l'investissement d'un éventuel plafonnement des prix[250]. Néanmoins, infliger des amendes plutôt que d'imposer des mesures comportementales ou structurelles dans ces affaires aurait l'avantage d'éliminer le besoin de définir une démarcation nette au-delà de laquelle un prix devient abusif[251].

Dans bien des pays, outre les amendes et les mesures correctives comportementales et structurelles, les actions des acteurs privés viennent largement compléter l'application du droit de la concurrence. Bien que les autorités de tutelle veillent souvent à impliquer des tiers dans le processus de décision, il n'est généralement pas possible d'entreprendre des actions privées similaires dans un contexte réglementaire. Si les mesures prises par les autorités de la concurrence dans le domaine des prix excessifs sont considérées comme des mesures réglementaires, il est possible de soutenir que, de ce fait, les actions privées devraient être exclues de ce domaine en général, ou du moins des affaires ne faisant pas suite à des mesures d'application prises par l'autorité. Non seulement cela respecte une approche réglementaire des prix excessifs, mais l'autorité de la concurrence n'est alors plus tant préoccupée par l'utilisation de filtres qui n'auraient d'effet contraignant que pour l'autorité elle-même, comme évoqué précédemment (voir section 4.5)[252].

Bien que ces arguments contre l'imposition d'amendes, notamment en raison des effets *ex-ante* indésirables que peuvent avoir les sanctions escomptées, soient plausibles et laissent à penser qu'il ne faudrait pas infliger d'amendes, notamment lors d'une première infraction, ils ne s'appliquent pas de la même manière à la restitution des profits mal acquis et aux demandes de dommages-intérêts des acteurs privés. En effet, les amendes doivent être considérablement supérieures au gain illicite, faute de quoi elles n'auront pas d'effet dissuasif. Les effets néfastes sur les incitations à l'investissement peuvent donc être substantiels. La restitution des profits mal acquis et les dommages-intérêts, quant à eux, seront du même ordre que les gains illicites même si, par définition, la première sera supérieure aux seconds. Par conséquent, la restitution des profits mal acquis et les demandes de dommages-intérêts des acteurs privés ont un effet dissuasif bien inférieur à celui des amendes. Les actions privées en dommages-intérêts semblent par ailleurs difficiles à refuser puisqu'elles se contentent de dédommager les victimes du préjudice qu'elles ont subi en raison de l'abus[253]. Ainsi, si les amendes peuvent être sujettes à discussion, notamment en cas de première infraction, les dommages-intérêts et la restitution des profits mal acquis paraissent quant à eux pleinement justifiés. Cette dernière peut être une mesure corrective tout particulièrement indiquée dans les pays où les demandes de dommages-intérêts des acteurs privés sont peu susceptibles de couvrir l'intégralité des gains illicites enregistrés par la société contrevenante.

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250 Voir Fletcher et Jardine (2008:537), selon lesquels aussi bien les amendes que les actions privées en dommages-intérêts « incitent plus fortement les sociétés à respecter le droit de la concurrence ». À leurs yeux, par ailleurs, « limiter les sanctions disponibles devrait vraisemblablement rendre les sociétés moins inquiètes des répercussions en cas d'infraction aux règles sur les prix excessifs, permettant de largement réduire les distorsions connexes au sein de l'économie ». Il semble quelque peu paradoxal de plaider en faveur d'une règle de concurrence et d'espérer parallèlement qu'elle ne soit suivie que de façon limitée.

251 Gal (2004:374).

252 Il convient à cet effet d'émettre une importante mise en garde : s'il est possible d'instaurer des changements de politique qui empêcheraient effectivement l'engagement d'actions privées en dommages-intérêts, il serait aussi certainement possible de formaliser l'emploi des filtres en droit de la concurrence.

253 Pour commencer, refuser un dédommagement aux victimes d'un préjudice est d'une certaine manière en contradiction avec l'identification d'un abus.

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ANNEXE 1 : L'AFFAIRE MITTAL STEEL - AFRIQUE DU SUD

1. Faits de l'affaire

En 2007, le tribunal de la concurrence d'Afrique du Sud a jugé que Mittal Steel avait abusé de sa position dominante en pratiquant des prix excessifs sur le marché national des produits sidérurgiques plats au détriment des consommateurs1. À l'époque, l'offre en acier de la société dépassait la demande nationale et une partie de sa production était donc exportée. Pour optimiser ses activités d'exportation, la société a décidé de commercialiser son acier sur le marché international par le biais d'une coentreprise créée spécialement, Macsteel International, détenue conjointement par la société elle-même et par Macsteel Holdings. La coentreprise achetait des produits sidérurgiques plats auprès de Mittal à la condition qu'ils ne soient pas revendus sur le marché intérieur. En échange, le prix à l'exportation de l'acier de Mittal était fixé à un niveau inférieur au prix intérieur.

Même si le recours devant la Cour d'appel chargée de la concurrence a été accueilli en mai 2009, et si l'affaire a fait l'objet d'un renvoi devant le Tribunal et d'un règlement ultérieur par les parties, le raisonnement de la Cour est très instructif en ce qu'il définit le critère juridique applicable pour déterminer si un prix donné est excessif. L'affaire est par ailleurs intéressante car le Tribunal, dont le jugement a été annulé, a cherché à déterminer si les prix pratiqués par Mittal étaient excessifs sans étudier les coûts ni la structure tarifaire de l'entreprise, et sans procéder à aucune comparaison des prix, malgré l'existence de nombreux éléments de preuve[2]. Enfin, il est intéressant de noter que, bien que l'affaire porte effectivement sur des allégations de prix excessifs, le Tribunal a refusé de déclarer que la pratique de Mittal consistant à recourir au prix de parité à l'importation (PPI) constituait une pratique de prix excessifs. Au lieu de cela, le Tribunal a jugé que l'abus de position dominante résultait de la réduction de l'offre d'acier plat sur le marché intérieur par le jeu d'une interdiction de revente. La Cour d'appel a expliqué que s'il n'avait pas constaté que le prix en question était excessif, le Tribunal n'aurait pas été en mesure d'accorder un allègement au titre de l'article 8 a). Il y a dès lors lieu de comprendre que, dans sa décision, le Tribunal a défini la pratique de Mittal de réduire l'offre en imposant des conditions de revente comme une pratique de prix excessifs[3].

2. Critère juridique

Aux termes de l'article 8 a) de la Loi sud-africaine sur la concurrence, il est interdit à une entreprise dominante de pratiquer des « prix excessifs au détriment des consommateurs ». Un prix excessif est défini à l'article premier, paragraphe 1, ix) de la Loi comme « le prix pour un bien ou un service qui aa) est sans

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1 Mittal Steel South Africa Ltd & Macsteel International BV & Macsteel Holdings (pty) Ltd c. Harmony Gold Mining Company Ltd & Durban Rooderpoort Deep Ltd, affaire 70/CAC/Apr07 ; consultable à l'adresse : http://www.comptrib.co.za/assets/Uploads/Case-Documents/70CACApr07.pdf. La plainte a été déposée en 2002 par Harmony Gold Mining Company Limited et Durban Roodepoort Deep Limited, deux sociétés aurifères qui achetaient certains produits sidérurgiques plats auprès de Mittal Steel.

2 Pour une présentation plus détaillée de l'affaire, voir Mackenzie et Langbridge (2010).

3 Arrêt de la Cour d'appel chargée de la concurrence (2009), point 8.

rapport raisonnable avec la valeur économique de ce bien ou service, et bb) est plus élevé que la valeur visée à l'alinéa aa) ».

Dans sa décision, le Tribunal a examiné les prix en question à la lumière d'un double critère, dont le premier volet portait sur la structure du marché, et le deuxième sur un type de comportement particulier. De l'avis du Tribunal, l'article 8 a) ne peut s'appliquer que lorsque « la structure du marché en question permet à ses acteurs de pratiquer des prix excessifs »[4]. Selon le Tribunal, ce « critère structurel » n'exige pas seulement une « simple » position dominante, mais plutôt une « position superdominante », avoisinant les 100 % des parts de marché. Par ailleurs, un tel marché ne doit laisser aucune « perspective réaliste d'entrée ». En d'autres termes, la faculté de pratiquer des prix excessifs, d'après le Tribunal, exige que le marché « soit à la fois incontesté et incontestable »[5]. Une fois remplie la condition préalable d'une position super-dominante, l'autorité doit déterminer si une entreprise donnée a réellement adopté une conduite visant à tirer profit des caractéristiques structurelles du marché. Cela exigerait ensuite du Tribunal qu'il examine les preuves existantes. Toutefois, le Tribunal a insisté sur le fait que :

> *« il n'examinera pas cette demande sur la base des preuves relatives aux niveaux effectifs des prix qui [lui] font en effet obligation, d'abord de reconnaître un niveau particulier comme étant illégal ('excessif'), puis d'imposer un niveau de prix qui serait légal ('non excessif'). Comme cela a été souligné, cette approche est conforme à la pratique de réglementation des prix – même si elle apparaît rarement dans les principes et pratiques du droit de la concurrence et de l'économie ».*[6]

En se référant à l'article 8, d) iv) de la Loi, qui identifie expressément les coûts variables marginaux ou moyens comme constituant la mesure des coûts applicable à l'évaluation des prix d'éviction, le Tribunal a en outre expliqué que, de son point de vue, l'article 8 a) ne faisait pas référence au rapport entre un prix excessif et un coût, mais plutôt entre un prix et une valeur économique[7]. Cela étant, la notion de « valeur économique » « n'a pas de signification intrinsèque, quantifiable », et comme le terme « 'caractère raisonnable', [elle] dépend aussi du contexte, qui est celui de la concurrence»[8]. Se référant à Evans et Padilla, le Tribunal a déclaré que le prix est en rapport raisonnable avec la valeur économique du bien en question lorsqu'il est défini en fonction de « considérations de concurrence observables ». En l'absence de telles considérations, le prix sera *a contrario* réputé excessif du fait qu'« il n'aura pas été déterminé par la libre interaction de l'offre et de la demande sur un marché concurrentiel »[9].

La Cour d'appel chargée de la concurrence n'a cependant pas suivi le raisonnement du Tribunal et a jugé que la Loi n'offrait aucun fondement à une telle solution[10]. D'après la Cour, pour déterminer si les prix sont excessifs, il est nécessaire : 1) de déterminer le prix réel du bien ou du service en question ; 2) de déterminer la « valeur économique » du bien ou du service en termes monétaires ; 3) lorsque le prix réel est plus élevé que la valeur économique, de déterminer si la différence est excessive ; et 4) de déterminer si le

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4 Arrêt du Tribunal, point 83.

5 Arrêt du tribunal, point 96.

6 Arrêt du tribunal, point 134. De la même façon, dans une autre partie de sa décision, le Tribunal a indiqué : « nous évitons d'officier en tant qu'e régulateur tarifaire, de sorte que la grande quantité de preuves et la majeure partie des arguments qui nous ont été soumis sont simplement sans objet », point. 81.

7 Arrêt du tribunal, point 146.

8 Arrêt du tribunal, point 144.

9 Arrêt du tribunal, point 147.

10 Arrêt de la Cour d'appel chargée de la concurrence (2009), point 32

prix est préjudiciable aux consommateurs[11]. La notion de « valeur économique », telle qu'elle est interprétée par la Cour, fait référence au « prix théorique du bien ou du service dans des conditions présumées d'équilibre concurrentiel à long terme »,[12] et, à ce titre, elle ne saurait être liée à la situation particulière de telle ou telle entreprise[13]. Cela étant, la structure de coûts particulière de l'entreprise prend son sens lorsque le prix pratiqué dépasse la valeur économique, et il est alors nécessaire de déterminer si le rapport entre les deux valeurs est excessif[14].

11 Ibid.

12 Arrêt de la Cour d'appel chargée de la concurrence (2009), point 40.

13 Arrêt de la Cour d'appel chargée de la concurrence (2009), point 43: « […], pour déterminer la valeur économique d'un bien ou d'un service, il convient de faire abstraction des économies de coûts que l'entreprise tire d'un prêt à taux réduit ou d'un loyer inférieur aux taux du marché – ou même de tout autre avantage particulier, actuel ou passé, permettant de réduire les coûts de l'entreprise donnée en deçà de la norme concurrentielle théorique ».

14 Ibid, « Il semble judicieux, pour déterminer si le prix le plus élevé est ou non en rapport raisonnable avec la valeur économique, de prendre en compte les bénéfices pour une entreprise découlant d'un prêt à taux réduit, d'une location à long terme à faible coût, ou de tout autre avantage particulier susceptible de lui permettre de réduire ses propres coûts moyens à long terme en deçà de la norme théorique ».

ANNEXE 2 : L'AFFAIRE DES CARTES DE CRÉDIT - CORÉE

1. Faits de l'affaire

Du quatrième trimestre 1997 au troisième trimestre 2000, BC Card Company (avec ses 12 banques adhérentes), LG Capital Company et Samsung Card Company ont régulièrement augmenté le taux d'intérêt de leurs avances de fonds, le taux d'intérêt de leurs crédits à tempérament, et le taux de pénalité en cas de défaillance des clients. Ces hausses se sont accompagnées de baisses régulières de leurs frais financiers respectifs et d'autres frais d'approvisionnement[1].

Leurs taux d'intérêt, frais financiers et autres frais d'approvisionnement étaient alors les suivants :

Tableau 1 : BC Card Co. (avec ses 12 banques adhérentes)(%)

	Janvier 1997	Février 1998	3e trimestre 2000
Taux d'intérêt des avances de fonds	20,3	22,9	23,5
Taux d'intérêt des crédits à tempérament	12~14,5	15~19	13,5~18
Taux de pénalité pour retard de paiement	23	27~28	13,5~18
Taux de financement (moyen) (Part des retards de paiement) (Taux de défaillance des clients)	9,0~12,37 (14,1~30,53) (0,52~7,60)	9,0~12,75 (12,6~24,1) (0,14~12,5)	7,0~9,25 (4,5~8,6) (0,36~2,8)

Tableau 2 : LG Capital Co. (%)

	4e trimestre 1997	1er trimestre 1998	4e trimestre 2000
Taux d'intérêt des avances de fonds	24,9	29,9	28,1
Taux d'intérêt des crédits à tempérament	12~15	16~19	14,5~19
Taux de pénalité pour retard de paiement	25	35	29
Taux de financement (moyen) (Part des retards de paiement) (Taux de défaillance des clients)	12,1 (19,6) (1,1)	12,6 (22,3) (1,0)	9,4 (5,0) (2,6)

[1] Voir la décision de la Korean Fair Trade Commission (KFTC) n° 2001-40, du 28/3/2001.

Tableau 3 : Samsung Card Co. (%)

	4e trimestre 1997	1er trimestre 1998	3e trimestre 2000
Taux d'intérêt des avances de fonds	24,48	29,47	28,16
Taux d'intérêt des crédits à tempérament	12~15	16~19	14,5~19
Taux de pénalité pour retard de paiement	25,0	35,0	29,0
Taux de financement (moyen) (Part des retards de paiement) (Taux de défaillance des clients)	12,44 (22,5) (2,9)	15,18 (26,46) (3,6)	9,82 (3,61) (1,7)

2. Structure du marché et réglementation gouvernementale

Même si plusieurs sociétés de crédit exerçaient leurs activités en Corée à la fin des années 90, le marché coréen des services de carte de crédit présentait une structure oligopolistique, les trois plus grandes entreprises mentionnées ci-dessus représentant 70,8 % des parts de marché et les sept plus grandes entreprises réunissant 93,6 % des parts de marché.

L'autorisation de l'État étant le préalable obligatoire à l'entrée sur le marché des services de carte de crédit, il a été considéré que la structure oligopolistique du marché était la conséquence de l'intervention de l'État. À dire vrai, à partir de 1995, aucun concurrent n'est entré sur le marché pendant plus de 6 ans.

Au cours de la période envisagée, les économies asiatiques, dont l'économie coréenne, ont été frappées par la crise financière, qui a conduit la plupart des banques à se recapitaliser ou à réduire leurs prêts. La substituabilité des prêts bancaires avec les avances de fonds et d'autres services financiers fournis par les sociétés de crédit ayant été jugée faible, l'élasticité de la demande de services financiers fondés sur les cartes de crédit s'était réduite.

3. Critère juridique

Les frais financiers des entreprises ont considérablement diminué pendant cette période et la part des retards de paiement et des taux de défaillance des clients, qui influent sur les frais d'approvisionnement, a également baissé. En dépit de ces réductions de coût, les trois entreprises ont augmenté les taux d'intérêt des avances de fonds de manière significative tout en maintenant les taux d'intérêt des crédits à tempérament ou des retards de paiement ou en les réduisant à un rythme inférieur à la baisse de leurs frais financiers et autres frais d'approvisionnement.

4. Résultat

Par voie d'ordonnance administrative, les trois entreprises ont été contraintes de réajuster leurs taux sur la base : d'une évaluation raisonnable des évolutions des frais financiers ; de la part des retards de paiement ; et des taux de défaillance des clients au cours des périodes concernées. Des amendes administratives (amendes majorées) ont été infligées.

ANNEXE 3 : LES AFFAIRES DU PORT D'HELSINGBORG - EUROPE

1. Faits de l'affaire

En juillet 2004, la Commission a adopté deux décisions rejetant les plaintes parallèles de Scandlines Sverige[1] et Sundbusserne AS[2], des exploitants de transbordeurs fournissant des services sur la liaison Helsingborg-Elsinore (liaison HH) entre la Suède et le Danemark. Les deux entreprises prétendaient que Helsingborgs Hamn AB (HHAB) imposait des redevances portuaires discriminatoires et excessives pour les services fournis aux exploitants de transbordeurs opérant sur la liaison HH, et que ces conditions de prix tenaient au fait que la HHAB concevait le port comme une unité opérationnelle et économique unique et à part entière.

Lors de l'examen du bien-fondé des allégations qui lui avaient été présentées, la Commission a procédé à une étude systématique du cadre analytique défini par la Cour de justice de l'Union européenne (ci-après « la Cour ») dans son arrêt *United Brands*, et a notamment apporté quelques précisions sur la notion de « valeur économique » d'un service ou d'un produit. Scandlines a formé un recours devant le Tribunal, soutenant que « la HHAB avait obtenu dans le cadre de ses activités relatives aux transbordeurs un retour sur investissement de plus de 100 % »[3],

2. Critère juridique

Pour déterminer si les redevances portuaires étaient non équitables, la Commission a appliqué le critère défini par la Cour au point 252 de l'arrêt *United Brands*. La Commission devait tout d'abord définir les coûts effectivement supportés par la HHAB et les comparer avec les prix effectivement pratiqués pour déterminer si la différence entre les deux valeurs était excessive, puis, dans l'affirmative, examiner si les prix étaient non équitables, soit dans l'absolu, soit par comparaison avec d'autres prix.

La Commission a estimé que les recettes de la HHAB tirées des services de transbordeurs « semblaient dépasser les coûts effectivement supportés »[4]. Pour parvenir à cette conclusion, la Commission a d'abord dû établir quels coûts devaient être attribués aux services de transbordeurs. Comme la Cour l'a indiqué dans l'arrêt *United Brands*, la répartition des coûts peut entraîner des « difficultés non négligeables et quelquefois très grandes [...] et comporter parfois une répartition discrétionnaire des coûts indirects et des frais généraux […] ». En l'espèce, l'exercice s'est avéré difficile pour la Commission, tant selon elle, les informations fournies par la HHAB étaient peu réalistes[5].

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1 Affaire Comp/A.36.586/D3 *Scandlines Sverige contre Port d'Helsingborg,* décision de la Commission du 23 juillet 2004 rejetant la plainte de Scandlines Sverige, consultable à l'adresse*:* http://ec.europa.eu/competition/antitrust/cases/dec_docs/36568/36568_44_4.pdf

2 Consultable à l'adresse: http://ec.europa.eu/competition/antitrust/cases/dec_docs/36570/36570_39_5.pdf

3 Affaire T-399/04, *Scandlines Sverige/Commission*, pas encore entendue.

4 Point 139 de la décision *Scandlines Sverige contre Port of Helsingborg.*

5 La Commission a considéré que l'attribution des coûts présentée par la HHAB ne pouvait pas être réaliste ni refléter le niveau des coûts effectivement supportés dans la mesure où cela impliquerait que l'entreprise

En l'absence d'informations fiables sur la répartition réelle des coûts, la Commission ne pouvait procéder qu'à une répartition approximative des coûts. Cette tâche a par ailleurs été compliquée par le fait que la plupart des coûts étaient fixes et devaient être considérés comme des coûts communs ou répartis[6]. Sur la base de son analyse, la Commission a conclu que les recettes obtenues semblaient dépasser les coûts effectivement supportés, mais que cela ne suffisait pas en soi à prouver que la différence était excessive. Il était donc nécessaire de recourir au deuxième volet du critère défini dans l'arrêt *United Brand* et de déterminer si le prix en question était non équitable dans l'absolu ou en comparaison des prix des autres produits concurrents. À cet effet, la Commission a comparé les prix en question : i) aux prix facturés aux autres usagers du port (à savoir aux navires de charge) ; ii) aux prix facturés par le port d'Elsinore ; et iii) aux redevances portuaires pratiquées dans d'autres ports. La Commission a indiqué qu'« une comparaison des prix doit être effectuée sur une base homogène », ce qui suppose : i) que les produits ou services fournis soient comparables ; et ii) que les systèmes de tarification permettent une comparaison utile[7]. Cela étant, dans la présente affaire, de telles comparaisons n'étaient pas possibles du fait que : i) la plupart des services fournis aux diverses catégories d'usagers des ports étaient très différents ; ii) la structure de coûts des ports d'Helsingborg et d'Elsinore était différente ; et iii) les systèmes de tarification en place dans chaque port étaient différents. Malgré ces difficultés, la Commission a néanmoins procédé à ces comparaisons, qui l'ont amenée à la conclusion qu'il n'y avait pas suffisamment d'éléments probants à l'appui de l'allégation selon laquelle les redevances portuaires pratiquées par la HHAB étaient non équitables.

3. Valeur économique

Dans son analyse de la nature prétendument excessive des redevances portuaires, la Commission s'est particulièrement intéressée au rapport entre ces redevances et la valeur économique du produit. La Commission a fait valoir que la Cour n'avait pas amplement précisé la façon dont la « valeur économique » du produit ou du service fourni devait être calculée. D'après la plaignante, la valeur économique devrait être définie en ajoutant au coût supporté pour fournir un service un bénéfice raisonnable représentant un pourcentage des coûts de production. En conséquence de quoi « tout prix dépassant la valeur économique ainsi définie [...] devrait donc être jugé non équitable »[8]. Tout en reconnaissant que « la question de savoir si un prix est non équitable peut être évaluée dans le cadre d'un système de coût majoré »[9]. la Commission a cependant rejeté le point de vue de la plaignante et a considéré que la définition de la valeur économique devait être déterminée au cas par cas et prendre en compte d'autres facteurs non liés aux coûts, en particulier des facteurs liés à la demande[10]. Après avoir analysé la pertinence des coûts irrécupérables et des coûts d'opportunité très élevés, et surtout la valeur incorporelle de l'emplacement privilégié du port d'Helsingborg, la Commission a conclu que les éléments collectés ne

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ait vraiment été au bord de la faillite, ce qui, d'après les états financiers certifiés, n'était pas le cas. Point 108 de la décision *Scandlines Sverige contre Port of Helsingborg*

6 Point 118 de la décision *Scandlines Sverige contre Port of Helsingborg.*

7 Point 175 de la décision *Scandlines Sverige contre Port of Helsingborg.*

8 Point 219 de la décision *Scandlines Sverige contre Port of Helsingborg.*

9 Point 221 de la décision *Scandlines Sverige contre Port of Helsingborg.*

10 Au point 227 de sa décision, la Commission a expliqué que « [l]a demande est pertinente du fait principalement que les consommateurs sont de toute évidence disposés à payer plus cher pour une particularité du produit ou du service qu'ils jugent intéressante. Cette spécificité n'entraîne pas nécessairement des coûts de production plus élevés pour le fournisseur. Cependant, elle est intéressante pour le consommateur et pour le fournisseur, et augmente par là même la valeur économique du produit ou du service ».

permettaient pas d'établir que les redevances portuaires étaient « sans rapport raisonnable avec la valeur économique » des services et des installations fournis par la HHAB aux exploitants de transbordeurs.

4. Conclusions : résultat

S'il est vrai que le double critère juridique servant à déterminer si les prix sont excessifs a été établi par la Cour dans l'arrêt *United Brands*, la notion de « valeur économique », et en particulier le deuxième volet du critère, manquait de précision. Dans ses deux décisions, après avoir considéré que la principale question en cause était de savoir si le prix était en rapport raisonnable avec la valeur économique du service, la Commission a donné des indications sur la façon dont la « valeur économique » d'un produit ou d'un service devrait être définie et sur le fait notamment que des facteurs liés à la demande pouvaient être pris en considération.

ANNEXE 4 : L'AFFAIRE UNITED BRANDS - EUROPE

1. Faits de l'affaire

En décembre 1975, la Commission a rendu une décision aux termes de laquelle elle a considéré que United Brands Company (UBC), le plus grand importateur de bananes, qui approvisionnait l'Europe *via* deux ports principaux – Bremerhaven et Rotterdam – appliquait diverses conditions d'échange et de tarification qui constituaient un manquement à l'article 102 du TFUE (anciennement l'article 82 CE). Bien que la Cour de justice de l'Union européenne (ci-après « la Cour ») ait annulé[1] la partie de la décision relative aux prix excessifs, ayant estimé que l'analyse économique de la Commission était erronée et incomplète, elle a cependant reconnu que « (...) *la pratique d'un prix excessif sans rapport raisonnable avec la valeur économique de la prestation fournie* »[2] pouvait constituer un abus. L'affaire *United Brands* est au fil du temps devenue l'une des affaires européennes les plus importantes et les plus fréquemment évoquées sur la question des prix excessifs.

La Commission a jugé que United Brands occupait une position dominante sur le marché en cause, qui comprenait la Belgique, le Luxembourg, le Danemark, l'Allemagne, l'Irlande et les Pays-Bas, et qu'elle avait enfreint l'article 102 du TFUE : 1) en empêchant ses distributeurs-mûrisseurs de revendre ses bananes à l'état vert ; 2) en appliquant des prix inégaux à des prestations équivalentes ; 3) en imposant des prix non équitables (excessifs) à ses clients ; et 4) en refusant de livrer ses bananes à Olesen, l'un de ses clients qui vendait également des bananes de marques concurrentes[3]. UBC a interjeté appel de la décision devant la Cour, contestant la définition du marché géographique et du produit, ainsi que la reconnaissance de l'existence d'une position dominante. UBC a par ailleurs prétendu qu'elle n'avait pas imposé de prix discriminatoires et excessifs, et que ses autres conditions d'échange et son refus de fourniture étaient objectivement justifiés. La Cour a confirmé la décision de la Commission en tous ces motifs à l'exception des prix excessifs, pour lesquels elle a jugé que le raisonnement et l'analyse de la Commission n'étaient pas adaptés à la situation. L'amende a été réduite de 1 million à 850 000 écus[4].

2. Raisonnement de la Commission sur l'imposition de prix non équitables

Dans son appréciation des prix excessifs, la Commission a observé les écarts de prix entre : les bananes marquées et non marquées (20-40 %), les bananes fournies par UBC et celles fournies par ses concurrents (environ 7 %) et enfin, entre les États membres de l'UE faisant partie du marché en cause (15-100 %), ces derniers écarts étant ceux auxquels elle a accordé le plus de poids. Après avoir constaté que les prix les plus bas bénéficiaient aux bananes vendues en Irlande, mais sans avoir analysé la structure des

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1 Arrêt du 14 février 1978, United Brands Company et United Brands Continentaal BV contre Commission des Communautés européennes, Affaire 27/76, Rec. p. 207, consultable à l'adresse : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0027:FR:HTML

2 Ibid, point 250.

3 76/353/CEE : Décision de la Commission, du 17 décembre 1975, relative à une procédure d'application de l'article 86 du traité CEE (IV/26 699 - Chiquita), consultable à l'adresse : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976D0353:FR:HTML

4 L'abréviation écu désigne l'unité monétaire européenne, unité de compte utilisée par les États membres de l'UE de mars 1979 à janvier 1999, époque où il a été remplacé à parité par l'euro (EUR).

coûts d'UBC, la Commission a conclu que les prix pratiqués aux clients irlandais étaient caractéristiques, tandis que les prix pratiqués en dehors de l'Irlande étaient excessifs en ce qu'ils comportaient « un profit très élevé et exagéré par rapport à la valeur économique de la prestation fournie »[5]. De l'avis de la Commission, c'est la « politique de cloisonnement du marché en cause » qui avait permis à UBC de pratiquer des prix excessifs[6]. Outre l'imposition d'une amende de 1 million d'écus, la Commission a enjoint à United Brands de mettre fin sans délai aux infractions constatées. Tenue de donner à l'entreprise des indications suffisamment claires sur la façon de mettre un terme à l'infraction, la Commission a fait savoir qu'une réduction de 15 % des prix pratiqués en dehors de l'Irlande satisferait aux obligations de la décision[7]. Cela étant, dans la décision publiée, aucun raisonnement ne vient expliquer la façon dont la Commission est parvenue au chiffre de 15 % de réduction.

Dans son recours devant la Cour, United Brands a contesté la nature caractéristique des prix irlandais au motif que l'entreprise avait effectivement subi des pertes en Irlande. La Cour a fait valoir que les déclarations de l'entreprise n'étaient étayées par aucun document comptable, mais elle a reconnu que le choix de l'Irlande comme référence convenable en matière de coût était sujet à critique, et ce d'autant plus que « depuis près de 20 ans les prix de la banane, exprimés en prix constants, n'[avaient] pas augmenté sur le marché en cause »[8]. Sur ce dernier point, il est à noter que l'avocat général Mayras, dont les conclusions n'ont cependant pas été reprises par la Cour, recommandait de prendre en compte la thèse générale selon laquelle le prix des bananes avait en fait « chuté par rapport aux prix pratiqués il y a dix ou vingt ans »[9]. L'avocat général a souligné que pour apprécier le caractère inéquitable ou non d'un prix donné, « il ne suffit pas d'examiner l'évolution de ce prix à un même stade ; il faut encore tenir compte de l'évolution des coûts aux stades antérieurs ». De plus, s'il est vrai que la baisse des prix de détail a pu bénéficier aux consommateurs, presque tous les bénéfices tirés des réductions de coûts « ont maintenu, quand ils n'ont pas creusé, la différence entre le prix versé aux planteurs et le prix facturé par United Brands et, ont donc finalement soutenu, quand ils ne les ont pas augmentés, les bénéfices de cette entreprise »[10] alors que les producteurs/exportateurs n'en ont tiré aucun avantage.

3. Critère juridique

Statuant sur l'appel introduit par UBC, la Cour a rejeté la méthode appliquée par la Commission et a plutôt choisi d'utiliser un double critère pour déterminer si les prix d'UBC étaient *« sans rapport raisonnable avec la valeur économique du produit »*. D'après la Cour, il suffit pour ce faire de mettre d'abord en évidence que la différence entre les coûts effectivement supportés et le prix effectivement pratiqué est excessive. Dans l'affirmative, la deuxième étape consiste alors à déterminer si un prix est non équitable dans l'absolu ou en comparaison des prix des produits concurrents[11]. La Cour a également

5 Affaire 27/76, *United Brands*, point 239.

6 Affaire 27/76, *United Brands*, point 236.

7 Décision de la Commission *Chiquita* [1975], partie II.C.

8 Affaire 27/76, *United Brands,* point 265.

9 Affaire 27/76, conclusions de M. l'avocat général Mayras, présentées en novembre 1977, consultables à l'adresse : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CC0027:FR:PDF

10 Ibid.

11 Affaire 27/76, *United Brands,* point 251 : « Cette exagération pourrait, entre autres, être objectivement appréciée si elle pouvait être mesurée en comparant le prix de vente du produit en cause à son prix de revient, comparaison d'ou se dégagerait l'importance de la marge bénéficiaire […] ». Point 252 : « Il s'agirait alors d'apprécier s'il existe une disproportion excessive entre le coût effectivement supporté et le prix effectivement réclamé et, dans l'affirmative, d'examiner s'il y a imposition d'un prix non équitable, soit au niveau absolu, soit par comparaison avec les produits concurrents ».

indiqué que d'autres méthodes pouvaient être élaborées pour déterminer le caractère inéquitable ou non des prix. Or, en l'espèce, la Commission n'a manifestement pas prouvé le bien-fondé de son argumentation. Premièrement, elle n'a pas satisfait au premier volet du critère en ce qu'elle n'a même pas analysé la structure des coûts d'UBC. Si la Cour a reconnu que dans certaines circonstances, l'évaluation du prix de revient peut éventuellement poser de grandes difficultés, elle a indiqué que cela n'était pas le cas dans la présente affaire dans la mesure où « le prix de revient de la banane ne parait pas présenter de problèmes insurmontables à résoudre ». Deuxièmement, la différence entre les prix d'UBC et de ses concurrents, qui représentait approximativement 7 %, ne pouvait en aucun cas être considérée comme excessive.

4. Conclusions : issue

Finalement, la Cour a annulé la conclusion de la Commission retenant l'existence de prix excessifs dans la mesure où la Commission n'a pas produit suffisamment d'éléments probants à l'appui de sa position. Cela étant, l'arrêt de la Cour dans l'affaire *United Brands* donne une idée très précise du cadre analytique qui doit servir à la Cour pour procéder à l'estimation de prix prétendument excessifs.

ANNEXE 5 : L'AFFAIRE DU GAZ DOMESTIQUE - ALLEMAGNE

1. Faits de l'affaire

En mars 2008, le Bundeskartellamt a ouvert des procédures contre 35 sociétés de distribution de gaz sur la base des articles 19 et 29 de l'ARC, la loi contre les restrictions de concurrence (voir l'encadré 2 dans le texte principal), pour des prix du gaz prétendument très excessifs[1]. Fin 2008, le Bundeskartellamt avait achevé la procédure et conclu que les prix de 30 de ces sociétés étaient en effet excessifs.

Le marché de produits en cause a été défini comme le marché de la fourniture de gaz naturel à l'ensemble des clients de profil classique, selon la définition donnée par la directive allemande sur le réseau de transport de gaz[2], qui achètent du gaz naturel pour leurs propres besoins. Géographiquement, le marché a été considéré comme régional et identique aux zones d'approvisionnement dans lesquelles les sociétés assurent l'approvisionnement de base déterminé par la loi. D'importants obstacles à l'entrée ont été identifiés sur ces marchés régionaux. Par exemple, les locataires, qui représentent une grande partie des ménages, avaient rarement la possibilité de changer de fournisseur, la décision appartenant au propriétaire, lequel n'a aucun intérêt à changer de fournisseur puisqu'il peut entièrement répercuter le coût sur le locataire. Par ailleurs, il ressortait de l'étude mentionnée par le Bundeskartellamt qu'à l'époque de l'enquête, seuls 14 % des clients du gaz souhaitaient changer de fournisseur. Il a par ailleurs été jugé qu'il existait une certaine substituabilité entre le gaz, l'électricité, le chauffage urbain et le gazole, mais que cela était sans incidence sur la définition du marché de produits.

2. Contexte juridique et méthodologie utilisée

Pour enquêter sur les pratiques des sociétés de distribution de gaz en cause, deux méthodes ont été utilisées, qui reposent sur le concept de marché de comparaison. Le concept de comparaison des recettes nettes pondérées par la quantité a été utilisé pour analyser les chiffres de l'année 2007 que le Bundeskartellamt – sur la base du nouvel article 29, paragraphe 1, de l'ARC – a comparé aux tarifs pondérés par la quantité de 2008, les chiffres des recettes n'étant pas encore disponibles.

La Cour de justice fédérale avait précédemment jugé que la méthode de comparaison des recettes était appropriée au regard de l'article 19, paragraphe 4, alinéa 2 de l'ARC. Cette méthode consiste à examiner, sous forme d'analyse comparative, les recettes nettes des ventes au groupe concerné de clients de la société faisant l'objet de l'enquête par rapport aux recettes enregistrées par une société équivalente sur un autre marché géographique. Cette approche permet au Bundeskartellamt de déterminer la façon dont la société équivalente se serait comportée sur le marché du prétendu auteur de l'infraction.

Dans ces cas spécifiques, la comparaison des recettes a tenu compte de deux aspects distincts. Tout d'abord, chaque unité de gaz vendue en 2007 a été évaluée au prix auquel elle a été effectivement vendue,

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1 L'ensemble des décisions relatives aux 30 affaires sont consultables à l'adresse : http://www.bundeskartellamt.de/wDeutsch/archiv/EntschMissbrauchaufsichtArchiv/2008/EntschMissbrauchsaufsichtW3DnavidW2660.php. Un résumé de l'affaire en langue anglaise est disponible auprès du Bundeskartellamt (2008).

2 § 29 de la Gasnetzzugangsverordnung (25 juillet 2005, BGB1. I S. 2210).

ce qui a permis la prise en compte automatique de toute modification du prix. Ensuite, la comparaison des recettes a permis au Bundeskartellamt de prendre en compte tous les tarifs et tous les contrats spéciaux avec leurs quantités respectives, sachant que les recettes sont le résultat du prix et de la quantité vendue à ce prix.

En 2008, c'est la méthode figurant expressément à l'article 29 de l'ARC, à savoir la comparaison des tarifs, qui a été utilisée. Cette méthode a été privilégiée au motif que la comparaison des recettes n'était pas matériellement possible, les informations correspondantes n'étant pas encore disponibles.

Les tarifs ont été comparés sur la base de 5 modes de consommation considérés comme typiques par le Bundeskartellamt et par l'office régional des ententes (au niveau des Länder). Afin de faire une prévision fiable pour l'année 2008, la consommation de gaz future a été calculée (et pondérée par la quantité) sur la base des données mensuelles de température qui ont alors déterminé le niveau attendu de consommation de gaz pour un mois donné.

Par ailleurs, le Bundeskartellamt a décompté les tarifs d'accès au réseau du tarif pondéré par la quantité (net de toute taxe), calculé sur les 5 modes de consommation typiques pour 2008 et les recettes de 2007 (nettes de toute taxe). Il a été jugé que la déduction des tarifs d'accès au réseau était justifiée et ce, pour deux raisons. Premièrement, les tarifs d'accès au réseau sont fixés par un organisme de tutelle dans le cadre d'une procédure d'évaluation *ex ante* de sorte qu'une réévaluation de ces tarifs a été jugée à la fois inutile et peu souhaitable. Deuxièmement, la déduction des tarifs d'accès au réseau a permis de supprimer les différences structurelles entre la société concernée et la société de référence, garantissant ainsi la fiabilité de l'analyse comparative[3]. Le Bundeskartellamt a choisi d'utiliser comme référence deux entreprises publiques municipales différentes pour chaque année[4].

Enfin, le Bundeskartellamt a défini une marge de signification à déduire des différences établies, sachant que la jurisprudence de la Cour de justice fédérale dispose que seules des différences de prix sensibles entre la société de référence et la société ciblée peuvent être considérées comme abusives. Le niveau de la marge de signification a été défini, conformément à la jurisprudence de la Cour de justice fédérale, sur la base de l'intensité de la concurrence résiduelle sur les marchés régionaux concernés. Cette intensité de la concurrence résiduelle a été évaluée en fonction du taux de changement de fournisseur sur le marché en cause. En conséquence, sur les marchés connaissant une concurrence plus intense, la marge de signification a été augmentée, ce qui a eu pour effet d'élever le seuil d'intervention. Cela a par ailleurs été justifié comme moyen de rendre compte de la tension inhérente entre les interventions dans les affaires de prix abusifs et l'incidence négative de ces interventions sur les motivations d'éventuels nouveaux concurrents[5]. D'après les décisions, le taux de changement moyen à travers toutes les sociétés de distribution de gaz a avoisiné 1 % en 2007 mais était nettement plus élevé dans certains secteurs en 2008.

Dans l'intérêt des sociétés concernées, le Bundeskartellamt a effectivement décompté cette marge de signification, laissant supposer que seuls les recettes ou les prix dépassant largement ceux de la société de référence devaient être considérés comme abusifs. Dans ses décisions, le Bundeskartellamt indique également qu'il avait vérifié que le seuil maximal de prix ou de recettes était effectivement inférieur aux coûts de la société[6]. Le Bundeskartellamt a établi une distinction entre le gaz H et le gaz B[7] et n'a pas

3 Les différences structurelles sont pour l'essentiel issues du quadrillage donné et de la zone de quadrillage.

4 Une entreprise publique à Jena-Pößneck pour 2007 et une entreprise publique à Stade pour 2008.

5 Voir sur ce point, qui n'est pas abordé dans les décisions, le rapport adressé au parlement : Deutscher Bundestag – 16. Wahlperiode, Drucksache 16/13500, page 30.

6 Cela est conforme à la décision de la Cour fédérale (BGH) dans son arrêt du 22 juillet 1999, KVR 12/98 - Flugpreisspaltung, concernant la liaison Francfort-Berlin. Cependant, il faut également noter que cette préoccupation exprimée dans la jurisprudence ne devient pertinente que si les coûts ont été correctement

reconnu comme coûts les prix d'achat supérieurs à la moyenne des prix du gaz sur les marchés concernés ou comparables. Les prix moyens d'achat du gaz d'autres sociétés sur le marché ou sur des marchés comparables en amont de la distribution de gaz ont été considérés comme un critère de comparaison raisonnable du fait que ces coûts étaient indépendants de l'intensité de la concurrence sur le marché de la distribution du gaz lui-même.

3. Mesures correctives et conclusion de l'affaire

Les mesures correctives ont consisté en engagements financiers de restituer aux clients près de 130 millions EUR par le biais de réductions de prix et du report des hausses[8]. Les consommateurs ont également économisé près de 230 millions EUR grâce au fait que les fournisseurs de gaz se sont ensuite abstenus de répercuter la hausse des coûts d'achat du gaz[9]. Aux termes de cet engagement, il était par ailleurs interdit aux fournisseurs d'utiliser les mesures tarifaires subséquentes pour compenser les réductions de prix convenues.

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imputés et si les éventuelles réserves d'efficacité ont été pleinement exploitées, laissant au Bundeskartellamt la faculté d'ajuster les coûts qu'il considère exagérés.

7 H et B désignent différentes compositions du gaz naturel, pour lesquelles H = Haut pouvoir calorifique et B = Bas pouvoir calorifique.

8 Les mesures correctives ne concernent que 30 sociétés puisque trois procédures ont été clôturées sans qu'aucun abus ne puisse être établi, une a servi d'affaire de référence et une autre a été examinée par un office régional des ententes.

9 Voir également le rapport adressé au parlement : Deutscher Bundestag – 17. Wahlperiode, Drucksache 17/6640, page 120, consultable à l'adresse : http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf

ANNEXE 6 : L'AFFAIRE DE LA TÉLÉPHONIE MOBILE - ALBANIE

1. Faits de l'affaire

En novembre 2007, à la suite d'une enquête sur le marché lancée *ex officio* en 2005, l'autorité albanaise de la concurrence a infligé à AMC (Albanian Mobile Communications) et à Vodafone une amende d'un montant de 454 185 000 ALL (environ 3,2 millions EUR, correspondant à 2 % du chiffre d'affaires annuel de chacune de ces entreprises sur le marché de produits concerné)[1]. La Commission de la concurrence a jugé que les deux entreprises avaient occupé une position dominante conjointe[2] sur le marché de la téléphonie mobile en Albanie et qu'elles avaient abusé de leur position dominante en appliquant des prix non équitables de 2004 à 2005[3].

2. Critère juridique

L'article 9, paragraphe 2, sous a), de la Loi albanaise sur la protection de la concurrence considère les prix non équitables comme l'une des formes principales de l'abus de position dominante[4]. D'après l'autorité de la concurrence, un prix est réputé non équitable s'il est plus élevé qu'un prix sur un marché concurrentiel[5]. Afin de déterminer si tel est le cas, on examine tout d'abord si le prix pratiqué est en rapport raisonnable avec la valeur économique du produit, ce qui revient essentiellement à dire que le prix est comparé au coût de revient. Ensuite, s'il est impossible de déterminer le coût de revient, le prix réel et le taux de profit sont comparés aux niveaux des prix et des bénéfices de produits similaires ou identiques sur d'autres marchés géographiques. D'après l'autorité, une telle analyse repose sur trois approches différentes : i) établir que le prix élevé est sans rapport raisonnable avec la valeur économique du produit ; ii) évaluer les bénéfices (ce qui a conduit à la conclusion que les bénéfices d'AMC et de Vodafone seraient inférieurs sur un marché apparemment concurrentiel) ; et iii) comparer les prix d'un produit donné avec les prix appliqués sur d'autres marchés géographiques[6].

Dans la présente affaire, l'analyse du rapport entre le prix réel et la valeur économique du produit a été succincte : la décision compte 22 pages, et le rapport entre le prix et la valeur économique du produit en question est étudié en trois paragraphes, inclus dans l'analyse de l'abus allégué qui débute à la page 16. La Commission de la concurrence a déclaré que « les prix de services appliqués [par AMC et Vodafone]

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1 Autorité albanaise de la concurrence, décision n° 59 relative à l'abus de position dominante sur le marché de la téléphonie mobile de Albanian Mobile Communication sh.a et Vodafone Albania sh.a, du 9 novembre 2007, disponible en anglais à l'adresse : http://www.caa.gov.al/file/vendimet/Decision%2059%20AMC%20VOD.pdf

2 La Commission de la concurrence n'a pas expressément indiqué qu'AMC et Vodafone détenaient conjointement une position dominante, mais qu'elles occupaient 100 % du marché.

3 Les deux entreprises ont interjeté appel de la décision devant la Cour de district de Tirana.

4 Loi n° 9121 sur la protection de la concurrence du 28.07.2003.

5 Décision n° 59, paragraphe 63.

6 Autorité albanaise de la concurrence, Rapport annuel 2007 et principaux objectifs de travail pour l'année 2008, consultable à l'adresse : http://www.caa.gov.al/file/publikimet/English-annual%20rep.2007-08.pdf

[étaient] sans rapport raisonnable avec leur coût »[7] et a fondé cette conclusion sur le fait que les deux entreprises avaient appliqué à l'échelle nationale des frais de résiliation pour la téléphonie mobile à un niveau plus élevé que le seuil préconisé par l'Autorité des télécommunications[8]. S'agissant des bénéfices, la Commission albanaise de la concurrence a indiqué que, alors que le taux de profit était généralement en baisse sur les marchés concurrentiels, les deux entreprises avaient « des EBE et des taux de profit élevés et en progression ». De la même façon, la comparaison de l'ARPU (recette moyenne par utilisateur par minute d'utilisation) avec les pays d'Europe occidentale a mis en évidence que les tarifs de services mobiles en Albanie étaient élevés. Enfin, la comparaison des prix albanais avec les prix sur d'autres marchés géographiques s'est essentiellement fondée sur la conclusion tirée par le Rapport Cullen[9], selon lequel « *l'Albanie constitue une exception en matière de tarification ; elle se situe au niveau des pays de l'Union européenne qui appliquent les prix les plus élevés »*[10].

3. Résultat

À l'issue de l'enquête, la Commission de la concurrence a adopté la décision n° 61, dans laquelle elle a engagé le Conseil des ministres et l'organisme de tutelle des télécommunications à prendre des mesures immédiates (notamment l'introduction du troisième opérateur mobile « Eagle Mobile » et le lancement de procédures de licences pour un quatrième opérateur) de manière à libéraliser efficacement le marché de la téléphonie mobile[11].

7 Décision n° 59, paragraphe 65.

8 Dans sa décision n° 179, l'Autorité albanaise des télécommunications a préconisé un seuil de référence de 22 lek/minute et 28 lek/minute pour 2004 et 2005 respectivement, pour le tarif national de résiliation.

9 Cullen International publie régulièrement des rapports, dans lesquels figurent des données comparatives sur les évolutions de la réglementation dans les secteurs des télécommunications, des médias et du commerce électronique dans les pays européens et non européens.

10 Décision n° 59, paragraphe 71, citant le Rapport Cullen 2 – Rapport comparatif par pays (2006).

11 Décision n° 61 « *Quelques recommandations concernant le marché de la téléphonie mobile »*. Dans sa décision, la Commission de la concurrence suggère également à l'organisme de réglementation des télécommunications de mettre la loi *sur les télécommunications dans la République d'Albanie* en conformité avec la réglementation européenne pour les télécommunications de 2002 et de réviser le chapitre XII (relatif aux procédures d'inspection et de contrôle et aux procédures administratives) de manière à renforcer les sanctions (amendes) infligées aux entreprises en cas de violation des procédures administratives. Rapport annuel 2007, p. 16.

AUSTRALIA

Generally speaking, Australia does not regulate prices and has no legal concept of "excessive prices" as a breach of competition law. Instead, Australia relies on promoting competition and efficiency in markets in Australia to keep prices at reasonable levels. Where markets are not likely to become competitive, for example due to natural monopoly characteristics or insurmountable barriers to entry, Australia relies upon a range of ex-ante regulatory interventions to address market power problems, including access and price regulation.

1. National Competition Policy

In 1992, Australian Federal State and Territory governments commissioned the Independent Committee of Inquiry into a National Competition Policy (known as the *Hilmer Report*), which reported in 1993.

The *Hilmer Report* recognised that competition policy was a broad topic comprising rules governing the conduct of firms such as those in Part IV of the *Competition and Consumer Act 2010* (the Act)[1] and a range of legislation, policy and government action. Competition policy affects sectors of the economy in different ways, depending upon the nature and level of competition existing in each sector.

In 1995 all Australian governments agreed to implement a range of competition reforms under the National Competition Policy (NCP) framework. The underlying principle behind NCP is that competitive markets will generally serve the interests of the wider community, and therefore arrangements that detract from competition should only be retained if they can be demonstrated to be in the public interest.

The resulting NCP is underpinned by three intergovernmental agreements — the Competition Principles Agreement; the Conduct Code Agreement; and the Agreement to Implement the National Competition Policy and Related Reforms — which outline the reforms all governments undertook to put in place under the NCP process. The main areas of reform included:

- The extension of the anti-competitive conduct provisions in the *Trade Practices Act 1974* (now known as the *Competition and Consumer Act 2010)* to unincorporated enterprises and government businesses;

- Reforms to public monopolies and other government businesses, including structural reforms and competitive neutrality requirements.

- The creation of independent authorities (including the Australian Competition and Consumer Commission (ACCC) and the National Competition Council (NCC)) to set, administer or oversee prices for monopoly service providers;

[1] Previously the *Trade Practices Act 1974*, which unless distinction is necessary will also be referred to throughout this paper simply as "the Act".

- The introduction of a national regime to provide third-party access on reasonable terms and conditions to essential infrastructure services with natural monopoly characteristics; and

- The introduction of a Legislation Review Program to assess whether regulatory restrictions on competition are in the public interest and, if not, what changes are required.

Related reforms in the electricity, gas, water (until 2005) and road transport industries also formed part of the package.

1.1. Legislative review

Governments across Australia undertook legislation review and reform which has proven pivotal in removing unwarranted barriers to competition (where there was not a net public benefit from restricting competition) across a diverse range of activities. In its 2005 inquiry into NCP reforms, *Review of National Competition Policy Reforms*, the Productivity Commission found that implementation of NCP has delivered substantial benefits to the Australian community which, overall, have greatly outweighed the costs. The Productivity Commission found that observed productivity and price changes in key infrastructure sectors in the 1990s — to which NCP and related reforms have directly contributed — have increased GDP by 2.5 per cent, or $20 billion.

1.2. Structural reform

As part of the intergovernmental Competition Principles Agreement (one of the three agreements underpinning the NCP), governments agreed to principles regarding the structural reform of public monopolies. In particular it was agreed that before any Party to the agreement privatises a public monopoly, it will undertake a review into the proposed privatisation. The review is intended to canvass the appropriate commercial objectives for the public monopoly, examine the proposal on its merits, and consider the most effective means on implementing the competitive neutrality principles set out in the Agreement, amongst other things.

The NCP led to major structural reforms in several Australian sectors. For example, there were substantial vertical and horizontal separation of government owned gas and electricity businesses in all states. Following these reforms, governments also established gas and electricity markets with the necessary institutions and regulations to make the markets work.

1.3. Competitive Neutrality between government and private businesses

To reduce barriers to effective competition stemming from government run or controlled enterprises, governments in Australia:

- corporatised major government business enterprises;

- exposed significant businesses to competitive neutrality principles;

- established competitive neutrality complaints units;

- generally removed regulatory functions from government businesses; and

- reviewed the merits of separating monopoly elements before privatising their public monopolies or introducing competition.

2. Rules governing the conduct of organisations generally

The Act provides the legal framework for Australia's competition and consumer policy rules. Competition and consumer laws are designed to make markets work efficiently for the benefit of consumers.

More specifically, Part IV of the Act prohibits businesses from engaging in certain anticompetitive conduct. Rather than seeking to directly regulate particular outcomes of a market, such as price or output levels, the Act instead prohibits behaviour which would substantial lessen competition in an otherwise competitive market. In some cases, certain conduct which would otherwise be a breach of the Act may be authorised provided there is a public benefit (Part VII).

The competition rules which govern organisations more generally include prohibitions against:

- the misuse of market power (similar to abuse of dominance);
- the imposition of certain vertical restraints;
- cartels; and
- other contracts, arrangements or understandings, including mergers and acquisitions, that will or are likely to substantially lessen competition.

Organisations or individuals found to have contravened or been knowingly concerned in the contravention of these prohibitions are exposed to very substantial penalties including, in the case of individuals involved in cartels, sentences up to ten years imprisonment. While only Australian Government bodies[2] have power to bring legal proceedings seeking pecuniary penalties or imprisonment, private individuals and organisations have power to apply to the Court seeking damages caused by anti-competitive conduct prohibited by the Act.

3. Rules governing specific industries or organisations

As noted above, Australia's approach to preventing excessive prices is generally to promote competition and efficiency in markets within Australia and to protect consumers from unlawful anticompetitive conduct and unlawful market practices. It is considered that competition will generally improve economic efficiency and community welfare.

However, where there are natural monopolies, externalities, network effects or associated 'market failures', sector specific economic regulation may be imposed by Government. These regulations operate in addition to the general rules preventing anti-competitive conduct under Part IV of the Act, providing the ACCC, NCC and Australian Energy Regulator (AER) with a range of tools to address problems with competition in regulated sectors.

3.1. Sector specific wholesale regulation

Where competition from local competitors or imports is not possible, prices oversight and regulatory arrangements to secure third–party access to 'essential' services may be necessary to curb the market power of monopoly infrastructure and excessive pricing. The ACCC and AER have economic

[2] The ACCC or, in the case of criminal proceedings, the Director of Public Prosecutions

infrastructure regulatory roles in certain network industries – such as communications, energy, water, post and transport.

Administering access regimes for monopoly infrastructure assets is a major area of regulation by the ACCC and AER. For example,[3] the *Competition Policy Reform Act 1995* introduced Part IIIA to the Act as a means of regulating access to such infrastructure that may otherwise create a bottleneck to competition. Part IIIA enables third parties to access infrastructure in three ways:

- access declarations, whereby the NCC recommends to the Minister that a service be 'declared', establishing a right to binding arbitration of the terms and conditions of access;
- industry-specific access regimes, introduced by State or Territory governments, which apply certain nationally-agreed consistent principles for access regulation; and
- access undertakings, where a person who expects to provide a service may give a written enforceable undertaking to the ACCC setting out the terms and conditions on which it will provide access to the service, which the ACCC may accept or reject having regard to a number of matters.

In the communications sector the ACCC has a regulatory power to make access determinations, which specify default[4] terms and conditions to apply between the provider of access to declared services[5] and downstream service providers. The ACCC prices these services based upon the costs of supply, inclusive of a normal return on capital employed, which guards against a monopoly return to the access provider.

3.2. Price monitoring and inquiries

Under Part IIVA of the Act, the Minister can ask the ACCC undertake prices surveillance. The object of the part is to "have price surveillance applied only in those markets where, in the view of the Minister, competitive pressures are not sufficient to achieve efficient prices and protect consumers.

At the direction of the Minister under Part IIVA of the Act the ACCC monitors the retail prices of certain products (such as unleaded petrol) in Australia. Where there is sufficient evidence that a business has misled or behaved in an anti-competitive way to the detriment of consumers, the ACCC can take action in the courts under the Act to remedy such behaviour.

However, this information is also used to inform consumers. For example, in relation to fuel, price monitoring undertaken by the ACCC is designed to provide information about the performance of a firm or an industry to stakeholders, including governments and users of services, that would not otherwise be available. In relation to airports, the ACCC monitors charges for airport car parking which is directly provided by airports to consumers[6] and publishes information in an annual monitoring report.

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3 The ACCC/AER also has specific economic infrastructure regulation roles under the Act and other legislation, including Parts XIB and XIC of the Act and the *Water Act 2007*.

4 These default terms and conditions apply unless the access provider and access seeker commercially agree other terms and conditions.

5 An access determination can only apply to those services which the ACCC has 'declared' – these are access services which the ACCC has found through a public inquiry process to be economic bottlenecks. This is a different process to the Part IIIA access declarations.

6 In addition to aeronautical services, which are typically provided to airlines or to passengers in combination with airlines.

The ACCC can also be directed to hold a price inquiry by the relevant Minister. For example, in 2008 the ACCC conducted an inquiry into the competitiveness of retail prices for standard groceries.[7]

3.3. Price controls

In very rare circumstances governments in Australia may regulate prices.

As part of the structural reforms of the energy sector, Australia established conditions for contestability in energy retail markets, with both new wholesale markets and full retail contestability which allow retailers to compete for customers. When this occurred, state governments in Australia established price caps on end prices. These caps were largely seen as transitional arrangements in place while markets developed and matured with the States and Territories agreeing to phase out retail price regulation where effective competition has been demonstrated. Reviews of retail competition by the Australian Energy Market Commission (AEMC), which precede consideration of the removal of retail price regulation, have been completed for Victoria and South Australia. In Victoria the price caps have been removed. Reviews by the AEMC will follow in other states.[8]

Similarly, there have been direct government controls against excessive pricing in communications services. These have taken the form of retail price controls that government has imposed on Telstra. Traditionally, these controls have sought to achieve:

- an economic efficiency objective, being to ensure that productivity gains were passed through to consumers in the form of lower real prices; and

- social policy objectives, to ensure users in regional areas gain access to services at prices broadly similar to those in metropolitan areas.

These price controls are periodically revised and they presently provide only that average real prices for fixed voice services not increase. The controls provide a 'safety net' and generally do not drive the prices that are observed in the market.

In relation to postal services, the prices for certain monopoly letter services provided by Australia Post have been subject to price notification under the Act. The ACCC will assess any proposed price increases and decide whether to object or not object to the proposed charges. The assessment is made by reference to the efficiency of Australia Post's cost base and the rate of return it is seeking.

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7 The Grocery Inquiry Report is at http://www.accc.gov.au/content/index.phtml?itemId=838251

8 For more information on price caps in energy markets in Australia, see the AER's *State of the Energy Market 2010* report, available at http://www.accc.gov.au/content/index.phtml/itemId/961581.

CHILE

1. Principles of pricing regulations in Chile

Where a pricing regulation scheme is in force, regulation is justified from an economic point of view and regulation is actually enforced or at least likely to be enforced by a regulator, Chilean competition authorities' intervention is unlikely. The absence of any of the said conditions or their weakness turns intervention more likely.

Even though a free price system is the general principle in Chilean economy, exceptionally, several products and services are regulated by legislation or derivative regulation[1]. These products and services belong nowadays mainly to the following sector utilities: telecommunications, electricity distribution, water distribution, sewage and disposal, infrastructure concessions and ports.

The most commonly used regulation model is known as the 'efficient company model', a mechanism that tries to emulate prices fixed by a company producing the demanded quantity at the minimum possible technical costs[2]. There are some exceptions: for example, in the case of infrastructure concessions, tariffs for users are the outcome of the competitive process among the bidders at the auction, provided that bids are under maximums fixed by tender conditions on the basis of historical records.

Competition authorities have a major role in pricing regulation. Sector regulations in different fields mandate that the Competition Tribunal (hereinafter, "TDLC") issues a report in order to define whether these products or services are provided on competitive or monopoly terms[3]. Only if provided on monopoly terms, regulation is justified. Several TDLC decisions have been issued on these grounds having also considered a technical report by Fiscalía Nacional Económica (the competition agency, hereinafter, "FNE"). A report of this kind is described in the following paragraph[4].

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1 By and large, regulation adopts different forms. Price regulation is one of these forms. Other means for regulation in Chile include entry restrictions, regulating market structure (e.g. limits to integration), ensuring open access and/or regulating interconnection duties, ensuring efficient allocation of limited resources and quota determination.

2 The main feature of the model is that company sustainability is directly considered for calculating tariffs. This translates into pricing at long term medium costs. This is the optimum when the company should self-finance and it is similar to the conditions defining prices in competitive markets. For details about this regulation model compared with others, Bustos, A., and Galetovic, A., "Regulación por Empresa Eficiente: ¿Quién es realmente Usted?", 86 Estudios Públicos, 2002.

3 Examples of these regulations are contained in gas regulations (DFL N° 23, 1931, article 31); telecommunications regulations (Act. N° 18.168, 1982, article 29 h)); water distribution and sewage regulations (DFL N° 70, 1988, article 12 A); electricity regulations (DFL N° 4, 2007, articles 147 and 184).

4 A similar task has been played by the TDLC even in decisions regarding adversarial excessive pricing cases. In this sense, TDLC recommended access price regulations in *Sanitarias* and amendments to internal regulations on tariffs in *Efe*. See summary of cases chart in Annex 1.

Local telephony tariffs **(TDLC, Report N° 2, January 30th, 2009)**[5]. The telecommunications regulator requested a report from the TDLC in order to obtain its technical assessment on whether local telephony services were provided under competitive or under monopoly terms, aiming at moving forward on tariff liberalization. The TDLC's report performs an extended overview of the sector, incorporates into its evaluation the development of technological convergence and defines as desirable the promotion of both inter-network and intra-network competition. The TDLC also held that mobile telephony is an actual and effective discipliner of fixed telephony, not considering the same regarding VoIP services. The broad and comprehensive analysis performed by the TDLC allowed it to conclude that even though companies identified as dominant in local services are still dominant, current market conditions do not make indispensable pricing regulations (maximum caps) for services related to local telephony. However, since their dominance still allows companies to incur in anticompetitive exclusionary conducts, behavioral regulations are still needed. TDLC's report additionally issued several recommendations to the regulator in order to promote competition in the sector.

In addition, the TDLC in different proceedings has criticized the corresponding regulation model[6] or, in order to assess defendants' arguments, has had to review the grounds behind pricing regulations[7]. A similar role has been played by the FNE when reporting on these cases.

2. Enforcement of pricing regulations by regulators

By and large, when a pricing regulation is in force, it is among the legal duties of the regulator to enforce the corresponding regulations.

However, it may be possible that the regulator holds that there is no infringement or for other reason refuses to enforce price regulations. In such a case, experience shows that the FNE would be reluctant to bring a suit grounded on excessive pricing infringement against the service provider and the regulator,

5 The report is available in this URL link: http://www.tdlc.cl/DocumentosMultiples/Informe_02_2009.pdf

6 For example, in *SCL parking AE 2011* case, the TDLC's decision (May, 19th, 2011) approving the non-judicial settlement between the FNE and Santiago Airport Concessionaire (SCL) held that an ex – post amendment to a concession contract in matters such as its duration or tariff liberalization may be considered as an anticompetitive act, which may justify, at least, an ex – ante assessment of its potential anticompetitive risks. For the TDLC, these amendments alter in fact the tender object which had been considered by competitive bidders. In another case known as *Celulink* –a margin squeeze case- (TDLC Ruling N° 88, October 15th, 2009), the TDLC criticizes distortions in access charges tariffs regulations that have led companies to price discriminate between on-net and off-net calls and at the same time have triggered technology companies to develop arbitrage mechanisms to avoid this discrimination (Rc. 54°-56°).

7 For example, in *Voissnet I*, an exclusionary abuse case, the defendant argued that the alleged anticompetitive restrictions that had prevented the development of VoIP services were needed in order to protect revenues allowed by the proceedings for regulating tariffs. The TDLC dismissed the argument, holding that regulations provide for maximum caps and not for minimums: the purpose of regulations was to avoid excessive pricing and monopoly rents but not to ensure revenues in order to promote investment. (TDLC Ruling N° 45, October 26th, 2006, Rc. 54°-55°). In *PTLAndes,* the TDLC evaluated the methodology for costs calculation used in a report prepared by an expert witness, since the defendant had argued that tariffs charged were based on the costs of providing the corresponding services. The TDLC dismissed the argument disagreeing in part with the expert testimony by reasoning that costs that are explicitly related in the concession contract to other revenues and tariffs should not be considered among the costs of providing the questioned services. (TDLC Ruling N° 100, July 21st, 2010, Rc. 77°-80°). In *Edelmag* the TDLC held that the regulation of the monopolist energy distributor, i.e. tender conditions, do not guarantee a prefixed amount of benefits for the tender winner and nor cover effective cost, being both elements part of the inherent business risks. (TDLC Ruling N° 73, August 28th, 2008, Rc. 30°)

however, private parties may submit a complaint directly before the TDLC and such scenario has motivated a few TDLC's decisions on excessive pricing in regulated sectors[8]. In some excessive pricing cases, however, such as *Edelmag, Sanitarias* or *Emelat*, the FNE has filed a complaint against the regulated entities, but not against the regulator.

3. Excessive pricing under competition law jurisdiction. Experience in Chile

The Competition Act in Chile does not consider a specific provision on excessive pricing but includes pricing infringements among the many means an abuse of dominance may take place[9]. These broad grounds for excessive pricing infringement do not help too much with regards to the elements of the infringement or the criteria leading to intervention and those leading to refrain from any intervention. It is only by reviewing recent experience on excessive pricing enforcement by competition authorities that some light can be brought[10].

An active role of the FNE is indeed identified in 4 of the 7 excessive pricing cases summarized in the chart in Annex 1. In 2 of them, final consumers were directly harmed by excessive prices (*Edelmag* and *SCL Parking*) whereas harm to final consumers in the other 2 cases was more indirect. In the remaining 3 cases where the FNE played a role issuing a technical report, harm to final consumers was indirect too. The FNE has filed complaints against concessionaries of electricity distribution services and against concessionaries of water distribution & sewage services; it has settled with a concessionaire of infrastructure (airport) through a non judicial settlement approved by the TDLC. But in the other three cases, private claims against concessionaires and against a state owned company have not motivated FNE's intervention as a complainant.

As to the TDLC, since it is a judicial body in charge of adjudication, unless it dismisses its competence for adjudicating on a specific case at the beginning of a trial[11], it should decide on an excessive pricing case issuing either a condemnatory or acquittal ruling. From the 7 cases summarized in the chart in Annex 1, 5 TDLC's decisions are condemnatory[12], 1 decided on acquittal and 1 is a decision approving a non-judicial settlement. The decision on acquittal was based in the circumstance that the items challenged had a reasonable economic justification which excluded its abusive or excessive character. The following paragraphs describe the main common features of the 5 condemnatory TDLC's decisions, in order to identify what are the frequent grounds for enforcement.

3.1. Entry Barriers

Most of TDLC's condemnatory decisions on excessive pricing identify the corresponding entry barriers that grant market power to the defendant(s).

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8 In these cases, the TDLC may request a technical report by the FNE, and this has been usually the case, but the legal action is handled and defended by the private plaintiff.

9 The wording provides as follows: "*Among others, the following shall be considered as acts, agreements or conventions that hinder, restrict or impede free competition, or which tend to produce said effects: b) Abusive exploitation by an economic agent or a group of economic agents, of a dominant position in the market*, **fixing sale or purchase prices***, tying the sale to the purchase of another product, allocating territories or market quotas or imposing other similar abuses*". Article 3, Competition Act (DL 211, 1973).

10 The main excessive pricing cases in the last years are summarily described in the chart in ANNEX 1.

11 The TDLC has never dismissed its competence for adjudicating on an excessive pricing case.

12 Among these five cases, one was overruled by the Supreme Court.

For instance, in *Sanitarias* the TDLC held that the defendants had economies of scale and scope that constitute entry barriers even beyond their concession area, particularly in geographic areas close to the concession area[13].

In *Edelmag* the TDLC identified that geographic conditions –an isolated region, impossibility of interconnection with other electric systems and its small size –low demand and small network, made unfeasible having more than one company serving the market[14].

In *Atrex* an excessive tariff imposed by the concessionaire for 'transit users', made economically unviable the operation of courier companies located outside the concession area[15].

In *PTLAndes*, the defendant being a concessionaire, legal entry barriers of its exclusive privilege were mentioned in broad terms and assumed rather than identified[16].

3.2. Dominant position

There are no condemnatory excessive pricing cases in Chile without the concrete identification of market power, dominant position or monopoly power.

This identification took place in Sanitarias in the following terms: a water distribution concessionaire has market power in those areas where it has scale and scope economies that cannot be replicated by entrants and its market power extends until the point where economies are completely compensated by the costs of extending its networks. All the real estate projects that were part of the trial where located within those areas where defendant had market power in the above terms[17].

In *Edelmag* the TDLC held that the grant of a contract to the defendant linked with its ownership of relevant facilities for generation and transmission of electricity gave the defendant a monopolistic position only restrained by the contractual obligations of the concession[18].

In *Atrex* as well as in *Efe* the exclusive rights over a facility or its ownership, its indispensability for the plaintiff, and the absence of alternative or substitute sites were considered factors giving the defendant a dominant position; sites in the first case were considered an essential facility for plaintiffs whereas in the second case essential facilities doctrine was explicitly discarded[19].

In *PTLAndes,* the defendant was a concessionaire, thus having an exclusive legal privilege for the exploitation of a service. The absence of substitutes economically viable was identified. Besides, the services provided by the concessionaire were required by law as mandatory for imports, hence turning

13 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 76°-81°)

14 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 9°)

15 TDLC, Ruling N° 75, September 30th, 2008. (Rc. 36°). And, by this mean, alternative sites were not substitutes to the sites within the concession area.

16 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 24°). Overruled by Supreme Court, January 28th, 2011, docket number 6100-2010.

17 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 86°-87°)

18 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 10°)

19 For *Atrex*, TDLC, Ruling N° 75, September 30th, 2008 (Rc. 37°). For *Efe*, TDLC, Ruling N° 76, October 14th, 2008 (Rc. 24°-25° and 31°-33°).

demand into a completely inelastic one. All these factors were considered as giving defendant an 'absolute market power'[20].

3.3. Benchmark for competitive prices

From a formal point of view, if there are regulations setting up caps for tariffs or other tariffs regulations, these will be the first source as a benchmark for evaluation on the excessive or abusive character of tariffs. Two complements must be added to this statement. First, the TDLC clearly distinguishes between a breach to the concession contract or infringement to regulations on the one hand and an infringement to the competition law on the other hand; the first not automatically causing the second[21]. Secondly, in some cases, in addition to the absence of regulations that deems for grounds for imposing the challenged tariffs, the TDLC evaluates more extensively whether the challenged tariffs have justifications from an economic point of view, and hence it builds a second benchmark -a substantive one- for assessment.

As mentioned above, corresponding regulations were the first source for evaluation in *Edelmag, Atrex, Efe* and *PTLAndes*. Defendants in *Edelmag*, *Atrex* and *PTLAndes* were concessionaires that had obtained their concessions through a competitive tender process. Thus, regulations were contained in the tender conditions and in the concession contract as well as in other related norms. In *Efe* the defendant was a state owned company that had issued by its own an internal regulation on tariffs. In this case, rather than an infringement to its internal regulation, the problem was the criteria followed by the said regulation. Adjudicating in favor of the plaintiff, the TDLC held that these criteria lacked economic justifications and thus the internal regulation unduly discriminated among equivalent customers.

In Edelmag, for instance, the TDLC summarizes the controversy as the following: we should determine whether the price increase was justified according to tender conditions or there is an abuse of defendant's monopolistic position by means of infringement to tender conditions and breach of concession contract. The case was relevant and not a mere breach of contract because price increases had been borne by final consumers that were not part of the contract and hence lacked standing for claiming a breach of contract [22]. Then, the TDLC analyses the indexation structure of tariffs that tender conditions provided for, concluding that a specific tax reimbursement claimed by the defendant was not covered by the regulated structure and also discarding that the enhancement in service quality could compensate price increases, since enhancement corresponded to defendant's contractual duties[23]. So an infringement to the regulations contained in tender conditions had been the mean for an excessive pricing abuse of dominance.

In *Atrex,* the TDLC took into account the options on tariffs that tender conditions provided for. It easily concluded that the criteria for tariffs effectively imposed by the defendant to plaintiffs lacked of basis in tender conditions. In addition, the TDLC analyzed the tariffs charged in fact by the defendant, concluding that this mechanism was inappropriate and impracticable. Differences between the charged tariffs and maximum tariffs allowed by tender conditions were considered the basis for determining the fine[24]. Another benchmark used in this case was built by comparing the tariffs charged to other users in

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20 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 24°, 29° and 42°). Overruled by Supreme Court, January 28th, 2011, docket number 6100-2010.

21 Such a holding can be found, for example in *Edelmag* and in *Atrex*. For *Edelmag,* TDLC, Ruling N° 73, August 20th, 2008. (Rc. 21°). For *Atrex* TDLC, Ruling N° 75, September 30th, 2008. (Rc. 43°).

22 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 14°, 21°, 22°).

23 TDLC, Ruling N° 73, August 20th, 2008. (Rc. 24°-28°, 32°).

24 TDLC, Ruling N° 75, September 30th, 2008. (Rc. 40° - 49°)

similar conditions; this evidenced an arbitrary price discrimination against the plaintiffs[25]. Again, an infringement to the regulations contained in tender conditions has been the basis for an excessive pricing infringement.

In *PTLAndes,* again, what is provided by the tender conditions sets the first approach of the TDLC for evaluating defendant pricing behavior. The case presents several additional insights. First, it was identified that the defendant was charging the maximum tariff allowed by the tender conditions for a service that it was in fact not supplying; this was considered abusive in itself[26]. At the same time, however, the TDLC held that charging the maximum tariff allowed by the concession regulations, even if this maximum is evidently anticompetitive -if the service was effectively supplied- could not be considered abusive and punishable, without disregarding other TDLC's powers in such a situation[27]. Secondly, in order to evaluate whether the tariffs imposed were or not justified from an economic point of view, the TDLC evaluated the methodology for cost calculation used in an expert report. The TDLC agreed in part with the report but the assessment allowed it to determine the lack of justification from an economic point of view, since tariffs evidenced duplications and even triplications in costs charged. The lack of legal and economic basis for the tariffs imposed in fact led to a condemnatory decision for abuse of dominant position[28].

In *Efe,* the evaluation was slightly different. The formal benchmark was an internal regulation on tariffs issued by the defendant company. There was no infringement to this regulation, so the TDLC analysed the criteria behind regulated tariffs. Plaintiff claims were, on the one hand, that prices charged lacked objective criteria, uniformity and that they unduly discriminated. On the other hand, it claimed that charged prices were excessive. What the TDLC identified was a price discrimination system implemented by the defendant whose grounds were not differences in costs but differences in the willingness to pay among customers. The absence of grounds for differences in costs led the TDLC to qualify the discrimination criteria as unreasonable and arbitrary, and then the ruling was condemnatory regarding this claim[29]. However, on the basis of the information available, the TDLC was not in conditions to hold that defendant's prices were excessive in magnitude[30].

In *Sanitarias,* the TDLC confronted the only case where he had no regulation to use as a benchmark for regulation. The services in question were provided by regulated companies (water distribution & sewage concessionaires) but beyond their regulated areas and under unregulated terms. The only item that was considered excessive by the TDLC was a factor or item charged by defendants with the alleged purpose of compensating reductions in their revenues for services in concession areas as a result of supposed displacements of customers in concession areas towards new real estate projects located in unregulated areas. The TDLC analyzed the mechanisms and regulations in place for financing water distribution facilities for new real estate projects beyond concession areas and then concluded that imposing such an item would be a duplication of charges for real estate developers for which there were no

25 TDLC, Ruling N° 75, September 30th, 2008. (Rc. 53°)

26 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 46° and ff.)

27 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 47°)

28 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 88°-90°). The Supreme Court (January 28th, 2001, docket number 6100-2010) overruled TDLC's ruling.

29 TDLC, Ruling N° 76, October 14th, 2008 (Rc. 44°-51°).

30 TDLC, Ruling N° 76, October 14th, 2008 (Rc. 54°-56°).

justifications[31]. In order to hold that other items were also anticompetitive, the TDLC used as a basis their unduly discriminating character instead of its excessiveness[32].

The review of these cases regarding the benchmark used as competitive prices allows to conclude that the assessment used by the TDLC for building the corresponding benchmark are rather simply and formal, mainly because of the nature of the cases and the available information. The regulations in force provide the benchmark in most of the cases and the comparison commonly performed is between tariffs imposed in fact and tariffs allowed by regulations. It is only when defendants have presented arguments regarding economic justifications that in depth reviews of costs have been made by the TDLC. These economic analyses tend to identify duplications in charges that prove the lack of justification or excessiveness. However, in order to ground a condemnatory decision, the TDLC has used the basis of unduly discrimination (i.e. lack of objectivity, uniformity, etc.) rather than excessive pricing[33].

3.4. Remedies and the role of advocacy

The imposition of fines is the common remedy in excessive pricing cases. Indeed, fines were imposed in the five condemnatory cases described above (*Edelmag, Atrex, PTLAndes, Efe* and *Sanitarias*)[34].

The basis for calculating the amount of the fine to be imposed is the wrongful benefits or unjustified revenues obtained during the excessive pricing period[35]. For evaluating the seriousness of the conduct, a reference to a 'particular duty of the legal monopolist' is contained among decisions' grounds[36]. Recidivism is considered as an aggravating factor as well[37]. Deterrence effect of fines is also an explicitly

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31 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 95°-103°)

32 TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 128°-130°)

33 To underline this conclusion, in *Emelat* the TDLC held: "*[T]his Tribunal considers that the mere fact of having a company charging excessive prices without intervening its abusive behavior is not an abuse of dominance infringement [according to the wording of the Competition Act]. / [T]he role of this Tribunal while punishing restraints to competition is to try to keep those conditions by which free market will constraint companies having market power in order to restrict prices in such a way that they will charge a price the closest to the competitive levels and to induce them to optimal production. It is wrong to argue that this Tribunal -by determining in a specific case whether prices are excessive or not- would be turning itself into a retail prices regulator, because such a regulation may take place only by an explicit legal provision in those markets in need of, for instance, in cases of natural monopolies with significant market power, such a regulation proceeding having all the guarantees that sector legislation grants to the regulated company, guarantees not available in an adversarial proceeding such as this one"*. TDLC, Ruling N° 93, January 6th, 2010. (Rc. 30°-31°) The Supreme Court, (August 18th, 2010, docket number 1022-2010, Rc. 3°), reviewing TDLC's decision granted more scope for the excessive pricing anticompetitve infringement, holding: "*One of the modalities an abuse of a monopolistic position may adopt is charging excessive prices that have no economic justification. If such an unfair charge has been imposed by a company having this position due to the pressure on the counterpart who lacks an alternative supplier, it should be punished by the antimonopoly court"*.

34 For the amount of fines imposed, please refer to chart in Annex 1.

35 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008. (Rc. 37°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008. (Rc. 72°). For *Sanitarias*, TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 188°). For *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 105°-106°).

36 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008 (Rc. 38°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 74°). For *Sanitarias*, TDLC, Ruling N° 85, July 2nd, 2009. (Rc. 189°). For *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 108°).

37 For instance, in *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 75°).

justification for the imposition of a fine higher than benefits obtained or expected[38]. In some cases, a reduction of the amount of the fine is based on the regulator's behavior whose deficient enforcement of regulations made defendants believe they were acting legally[39].

A cease and desist order or the warning that prices should comply with regulations usually complement remedies in condemnatory rulings on excessive pricing[40].

The TDLC has not the authority to grant damages to plaintiffs. Plaintiffs should claim for damages before civil judges[41].

In some cases, the TDLC has defined more elaborated remedies, such as the following.

In *Efe* the defendant was ordered to amend its internal regulation on tariffs within 60 days deadline considering objective and non-discriminatory criteria and to communicate to the FNE the content of the amended regulation for its supervision[42].

In *Sanitarias* the TDLC's ruling considered the imposition of duties to defendants regarding their negotiations with real estate developers for financing new projects, recommending to the sector regulator the effective monitoring on the conditions for issuing negotiable instruments by defendants in these transactions[43]. In addition, the TDLC proposed regulatory amendments aimed at providing open access to facilities for water distribution, including access tariffs regulation and, additionally, changes on the mode of calculating interest rates[44]. A private plaintiffs' request regarding the imposition of downstream tariffs regulations was dismissed by the Supreme Court which also overruled the regulatory modifications recommended by the TDLC[45].

Finally, in a case settled between the FNE and the party, the company also agreed in modifying its tariffs structure[46].

Some of the remedies mentioned above have an inherent advocacy character. The power of the TDLC for issuing recommendations for regulatory amendments is provided by the Competition Act, but

38 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008 (Rc. 39°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 76°). For *Sanitarias*, TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 193°).

39 For instance, in *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 67°, 74°) and in *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 110°).

40 For *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008 (cease and desist order, remedy number 4°). For *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (order to comply with tariffs provided by tender conditions, remedy number 5°). For *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 104°, cease and desist order, remedy number 6°).

41 In *Edelmag*, TDLC, Ruling N° 73, August 20th, 2008, (Rc. 40°) the TDLC, instead of ordering disgorgement of profits, makes reference to the provision regulating damages actions following a condemnatory decision by the TDLC. The provision (art. 30 Competition Act) grants competence for damages actions to civil judges.

42 TDLC, Ruling N° 76, October 14th, 2008 (remedy number 6°).

43 TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 186° and remedy number 8°).

44 TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 155°, 186° and remedy number 9°).

45 Supreme Court, May 18th, 2010, docket number 5443-2009.

46 SCL Parking AE 04-2011 Case. Settlement between the FNE and SCL (Santiago Airport Concessionaire) apporve by the TDLC's decisión of May 19th, 2011.

recommendations are not binding for the addressee who does not have the duty to explain its decision if reluctant to adopt any initiative to follow the recommendation[47].

The FNE may advocate before the corresponding regulator before deciding to file a complaint for excessive pricing in order to explore a possible solution that may be adopted by the regulator on its own powers. But unless these efforts succeed at a very early stage, they usually reveal a reluctance of the regulator to adopt the views of competition authorities.

3.5. TDLC views about regulator and regulation's roles

The TDLC has made explicit its views on the role of the regulator and the regulation in its decisions. The TDLC, for instance, has criticized the weak performance of regulators monitoring the compliance with competition law by the regulated entity. It has held that this performance is not a circumstance that hinders the TDLC from holding a violation to competition law or imposing a fine. However, such a situation has been taken into account as a factor for reducing the amount of the fine imposed[48].

The TDLC assesses carefully petitions regarding tariff regulation. Such a petition, if approved by the TDLC, would translate into a remedy consisting in a recommendation for regulating prices, unless sector legislation grants the power to the FNE of issuing a report about whether pricing regulation is or not justified. In neither case this will mean that the TDLC will be actively involved in the corresponding price regulation proceedings, a duty of the corresponding regulator. The petition for recommending regulating prices has been dismissed in some of the cases reviewed[49] and admitted in others[50].

In addition, the TDLC may issue recommendations to regulators to effectively perform their duties regarding competition law compliance[51].

Even though concession contract regulations consider the remedy of bringing the concession to an end in case of serious infringements -such as infringements to competition law- the TDLC has never invoked such a remedy, which may be considered as a deference attitude regarding regulator's powers. Another demonstration of deference was a TDLC's holding that charging the maximum tariff allowed by the concession regulations, even if this maximum is evidently anticompetitive, could not be considered abusive and punishable, without disregarding other TDLC's powers in such a situation[52].

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47 According to article 18 number 4) of the Competition Act, the TDLC has the power and duty to "*propose to the President of the Republic, through the relevant State Minister, the modification or derogation of any legal and regulatory precept that the Tribunal deems contrary to free competition, as well as the dictation of legal and regulatory precepts necessary for promoting competition or regulating the exercise of certain economic activities that are provided in non-competitive conditions.*"

48 For instance, in *Atrex,* TDLC, Ruling N° 75, September 30th, 2008 (Rc. 67°, 74°) and in *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 97-100°, 110°).

49 Thus was in *Efe* TDLC, Ruling N° 76, October 14th, 2008 (Rc. 61°- 63°), *Sanitarias*, Supreme Court, May 18th, 2010, docket number 5443-2009, and *PTLAndes,* TDLC, Ruling N° 100, July 21st, 2010. (Rc. 114°)

50 Thus was in *Sanitarias* TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 155°, and remedy number 9°), overruled by the Supreme Court.

51 Regarding a specific obligation, in *Sanitarias*,TDLC, Ruling N° 85, July 2nd, 2009 (Rc. 186° and remedy number 8°).

52 TDLC, Ruling N° 100, July 21st, 2010. (Rc. 47°)

4. Final remarks

In preparing this contribution we had the opportunity of reviewing Chile's recent experience on excessive pricing cases.

OECD's Competition Committee has taken a praiseworthy initiative by organizing this roundtable and would fruitfully contribute to the FNE's tasks if, as an outcome of the meeting, some orientations are achieved in order to define policy criteria on intervention and priorities regarding excessive pricing cases. At the same time, a discussion on the remedies in these cases would be very interesting since literature questions not only the convenience of the enforcement of excessive pricing infringements in general, but also the reasonableness of considering fines as a remedy.

ANNEX 1: CHART SUMMARIZING RECENT CASES ON EXCESSIVE PRICING

Case	Who led the legal action	Defendant	Services affected by excessive pricing	Grounds for excessive pricing/competitve pricing benchmark	TDLC's decision (C: condemnatory; A: acquittal	TDL remedy	Supreme Court review
Edelmag 73/2008	FNE	Concessionaire of electricity distribution services	Electricity distribution	Maximum tariffs fixed by tender conditions (infringement to the tariffs fixed by tender conditions)	C	Cease and desist order Fine USD$350.000.-	Upholds TDLC decision; reduces fine in 25%
Atrex 75/2008	Private plaintiff	Concessionaire of infrastructure (airport)	Leasing of spaces and facilities for courier services within the concession area	Maximum tariffs fixed by tender conditions (infringement to the tariffs fixed by tender conditions)	C	Order to comply with tariffs of concession regulations Fine USD$1.5 m..-	Upholds TDLC decision
Efe 76/2008	Private plaintiff	State owned enterprise (train & railroad)	Services of providing facilities for crossing the railroad required by network companies	The company internal regulations on pricing for these services, issued by the company itself, allow charges that unduly discriminate and lack a reasonable economic justification	C	Order to modify internal regulations and to communicate new regulations to FNE Fine USD$9.000.-	Upholds TDLC decision

Sanitarias 85/2009	FNE & private plaintiff	Concessionaire of water distribution & sewage	Services and facilities charged to real estate developers and construction companies, in the rural area (beyond the regulated area of concession)	One among the items charged by defendants ('factor nuevo consumo') implies duplicity in charge and lack economic justification Other charges imply undue discrimination	C	Several proposals of amendments in regulations and recommendation to regulators Two defendants were fined: USD$4.5 m.- (in total)	Upholds in part and overrules in part (reduces fine)
Emelat 93/2010	FNE	Concessionaire of electricity distribution services	Services of providing security on the power network allowing the circulation of big trucks	Items challenged do have a reasonable economic justification	A	-----	Upholds
PTLAndes 100/2010	Private Plaintiff	Concessionaire of infrastructure (inland port)	Services of providing support to customs and other administrative agencies monitoring freight vehicles in the concession area	Charging the maximum tariff allowed by the concession contract for a service that is not provided in fact Tariffs charged are not based on concession regulations Expert report on costs for services is also assessed by the TDLC	C	Order to refrain from charging a specific tariff Fine: USD$300.000	Overrules TDLC decision (in total)
SCL Parking AE 2011	FNE	Concessionaire of infrastructure (airport)	Parking services within the concession area	Tariffs structure that not considers parking periods inferior to 2 hours	Settlement	Agreement on a new parking tariffs structure and new alternatives for users	-----

CZECH REPUBLIC

1. Introduction

The Czech Competition Authority – the Office for the Protection of Competition (hereinafter referred to as "the CCA") has issued only a few decisions on excessive pricing in so far. However it has been addressed with many complaints concerning this conduct. Since there is also a specific regulation of pricing practices supervised by the Ministry of Finance of the Czech Republic, the competence of the CCA has been challenged before courts, so far unsuccessfully.

This contribution will describe the regulatory environment in the Czech Republic, discuss the relationship between the CCA and other regulators and outline the conditions under which, in the view of the CCA, excessive pricing requires intervention by competition authorities.

2. Regulation of Excessive Pricing in the Czech Republic

Czech competition law is enacted in the Act on the Protection of Competition;[1] Article 11 prohibits abuse of dominant position and lists a few supposedly abusive practices. These include "*direct or indirect enforcement of unfair conditions in agreements with other participants in the market, especially enforcement of performance, which is at the time of conclusion of contract conspicuously inadequate to the counter-performance provided*".[2]

Czech competition law is fully harmonised with the EU competition rules and has to be interpreted in accordance therewith, even in cases which are purely national and the EU law is not applied at all. Therefore, the Article 11 of the Competition Act ought to be interpreted in accordance with Article 102 TFEU and the relevant case law of the Court of Justice. This contribution will however not discuss the EU law but only relevant Czech experience.

Apart from the Competition Act, pricing practices, to a certain extent, are regulated also by the Act on Prices,[3] which sets out rights and obligations of natural and legal persons, central state authorities and other parties concerning fixing, regulation and supervision of prices. In particular, the Act on Prices obliges undertakings with advantageous economic position not to abuse it by, among other practices, charging excessively high prices.[4]

The "advantageous economic position" is defined as a position of an undertaking in the market enabling it to negotiate prices without being subject to significant price competition; such a position is to be assessed according to the market share of the undertaking in question, its financial and economic strength,

1 Act. No. 143/2001 Coll. on the Protection of Competition and on Amendment to Certain Acts (Act on the Protection of Competition), as amended, hereinafter referred to as "the Competition Act".

2 Art. 11(1)(a) of the Competition Act.

3 Act No. 526/1990 Coll., on Prices, as amended.

4 Sec. 2 (3) of the Act on Prices.

barriers to enter the market and the extent of horizontal and vertical integration with other undertakings.[5] The pricing is considered excessive when it includes – compared to normal price – unjustified costs or undue gain; pricing is also excessive when it exceeds the limits of regulated prices.[6]

The Act on Prices is generally enforced by Financial Directorates and the Ministry of Finance, in sectors subject to specific regulation the sectoral regulator, e.g. the Energy Regulatory Authority (hereinafter referred to as "the ERA") in the energy sector; all of these authorities are generally referred to as "pricing authorities".[7]

Jurisprudence concerning these provisions of the Act on Prices is rather limited, the courts however tend to interpret the "advantageous economic position" similarly to the dominant position.[8] On the other hand, where the courts were to rule on the possible conflict of competences between the CCA and the pricing authorities, the Supreme Administrative Court concluded that the notions of advantageous economic position and dominant position are distinct and that the authorities pursue different aims while enforcing the respective Acts, in particular since the Act on Prices may be breached even when the pricing practice does not distort competition.[9]

3. Under what conditions does excessive pricing require intervention?

In this chapter, we will focus on the conditions under which shall excessive pricing addressed by competition authorities and the respective conduct may be found in breach of competition law. We put forward that these considerations are purely hypothetical since the CCA has not opened any excessive pricing proceedings recently; there is only one case where excessive pricing was found and approved by courts, concerning the *UPC* (formerly *Dattelkabel*) cable TV, but since the reasoning in that case was rather formal, it will not be further discussed.[10]

Excessive prices may essentially be either too high prices in final markets (exploitative abuse) or too high prices in intermediate markets (exclusionary abuse). Our submission is focused on exploitative abuse, i.e. too high prices in the final markets which directly exploit the consumers.[11] We neither submit nor analyse the standard of proof as regards recognition of excessive price (price cost analysis, comparison between prices, margin analyses).[12] For the reasons explained below, the CCA takes the view that the standards for the antitrust intervention should be stricter concerning exploitative excessive pricing and less strict regarding exclusionary excessive pricing.

The CCA went through internal discussion what should be suitable approach and when the authority should intervene concerning excessive pricing. We also drew on substantial economic literature concerning

5 Sec. 2 (4) of the Act on Prices.

6 Sec 2 (5) (a) of the Act on Prices.

7 Sec. 1 (6) of the Act on Prices.

8 See e.g. Supreme Administrative Court 6 A 45/2000

9 Decision of the Supreme Administrative Court No. Komp. 3/2006-511 (*RWE Transgas*).

10 Office's decision from 22. 12. 2000, Ref. No. S 85/00 (*Dattelkabel*).; Decision of the Regional Court of Brno Ref. No. 31 Ca 44/2003 (*UPC*); Supreme Administrative Court decision No. 7 As 58/2006 (*UPC*)

11 As regards the exclusionary excessive prices which often take the form of margin squeeze, the analysis should in our view be primarily focused on the assessment of exclusionary effects and consumer harm.

12 Anyway, it is obvious the dominant undertaking's price has to exceed relevant cost measure to justify antitrust intervention.

the issue in question.[13] First and foremost, we submit the effect-based approach and economic analysis is required to prove excessive prices correctly.

As regards appropriate competition approach towards excessive pricing above all we think following arguments stemming from economic theory should be taken into account. Firstly, price signalling is key tool of market economy and pursuing excessive pricing may distort price signals in sectors where market forces are free to operate. In such a case in the long-run it may deter entry and reduce variety and innovation to the detriment of competition and consumers. We may assume a sector not subject to regulation is the sector where market forces and competitive process may work (more or less) well.

Secondly, it is essential for undertakings to be rewarded for their efforts, investments and efficiency. To deprive undertakings of that reward may ex ante negatively affect their effort and investment to the detriment of competition and consumers. Essentially, it is the expectation of charging high prices and earning high profits which gives reason for undertakings to invest and innovate. When undertaking acquires monopoly position due to superior efficiency, incurring risky investment or inventing new product it should not be punished for setting the price at profit maximizing although monopoly level. Such a supracompetitive profits may encourage the entry and trigger process of effective competition on the market which is basically the way how markets work. Hence, the mere acquisition of monopoly power and charging of monopoly prices is not only unlawful but it is important element of the free market economy. There is high probability of making type I error (i.e. intervention when it should not be) concerning excessive pricing intervention which is far higher than probability of making type II error (i.e. no intervention when it should be).

Thirdly, the remedy in the form of continuous monitoring is not conceivable and only structural remedy may be available and efficient. To sum up, excessive pricing intervention may be justifiable exceptionally and in some circumstances only. We suggest set of criteria which should be analysed and if these criteria would be fulfilled then antitrust intervention would be justifiable.

As it was mentioned primary key argument against excessive pricing intervention is that market forces are free to operate through price signals. This process drives markets and allocation of sources to be efficient. Thus, intervention is justifiable only when there are high and non-transitory barriers to entry (e.g. market failures, legal barriers). Furthermore, market forces are hardly free to operate when there is monopoly position, i.e. when there is very strong market power which is not likely to be challenged and when the market is not contestable. Hence, intervention is justifiable only when there is monopoly or position near to monopoly (quasi-monopolistic[14], super dominance[15]).

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13 e.g. Motta M. and de Streel A. (2007), Excessive Pricing in Competition Law: Never say Never?, The Pros and Cons of High Prices, Swedish Competition Authority.

Evans D.S., Padilla A.J. (2005), Excessive Prices: Using Economics to Define Administrative Legal Rules, Jour. of Competition Law and Economics 1(1). O'Donoghue R. and Padilla A.J. (2006), The Law and Economics of Article 82 EC, Hart Publishing.

Fletcher A., Jardine A. (2007), Towards an Appropriate Policy for Excessive Pricing, European Competition Annual 2007: A reformed Approach to Article 82.

Paulis E. (2007), Article 82 EC and Exploitative conduct, European Competition Annual 2007: A reformed Approach to Article 82.

14 As regards concept of quasi or near to monopoly position – see decision of Court of Justice in Case C-333/94P, Tetra Pak International SA v Commission, 1996, points 28–31 or in Case Case T-228/97, Irish Sugar plc v Commission, 1999, point 185.

Further key argument against excessive pricing intervention is that undertakings should not be deprived of getting reward for their effort, (risky) investment, innovation and efficiency. There should not be intervention when market power is acquired through greater efficiency and past (risky) investments and innovations, i.e. due to competition on the merits. Undertaking that acquires market power through greater efficiency, (risky) investment or innovation should be free to set prices at monopoly levels. Hence, intervention is justifiable only if particular market conditions regarding acquisition of market power are present. Such situations need not to be exhaustively named but they may be instructively specified to get clear intuition behind the approach. It mainly concerns the situations when market power is acquired through exclusive or special rights, concessions, legal monopoly, public source of funding, government actions or past anticompetitive practices, i.e. due to the lack of competition. Furthermore, usually there should be no intervention when (risky) investment and innovation play important role on the market. Otherwise it may undermine incentives to invest and innovate and it may have ex ante negative effects. This approach eliminates all possible cases where high and non-transitory barriers to entry and monopoly position exist but it is the result of (risky) investment and innovation in the past.[16] Anyway, excessive pricing intervention should never undermine the IPR and products protected by IPR should not usually be subject to excessive price action during patent period.

Foregoing circumstances often lead to the introduction of sector specific regulation often including price regulation. Anyway, when there is sector specific regulator and price regulation above all in the form of price ceiling then sector specific regulator should be best placed for intervention regarding excessive pricing. It may be assumed that if there is cost based oriented price regulation then sector specific regulator is enough qualified and has deep knowledge to assess the cost structure and reasonable margin properly. In the case of price ceiling regulation it also might be difficult to label dominant undertaking´s prices as excessive and its conduct as exploitatively abusive if specific sector regulator had previously authoritatively approved the price range including maximum price. Moreover in that case national competition agency would have to demonstrate that sector specific regulator was wrong and subsequently infringement procedure against its Member state should be open.

Generally we presume that in the case of exploitative abuse the competition agency should refrain the intervention when sector specific regulator has power to act. It is necessarily not the case regarding exclusionary abuse (it is possible the same prices could be regarded as exclusionary abusive - e.g. price discrimination, margin squeeze, preventing parallel imports).

It should be also taken into account how the problem might be solved and what remedies are at disposal. If structural remedy is not available then probably only permanent price regulation would be possible. But this is basically the task for sector specific regulator not for competition agency. In addition competition agency should never be in the position to determine which prices the undertakings should charge. If structural remedy is available then the problem may be solved by structural solution (e.g. divestment, unbundling, eliminating switching costs, remove legal barriers). As it implies from previous circumstances the excessive pricing reflects more the problem in market structure than in the dominant undertaking´s behaviour. Hence, the structural remedy should ensure the change in market structure and it should be necessary condition for antitrust intervention.

Eventually let us summarize the CCA's approach concerning cumulative circumstances when excessive pricing intervention is justifiable (which markets are candidates for the intervention):

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15 As regards concept of superdominance see Opinion of Advocate General Fenelly in Joined Case C-385/96P and C-396/96P Compagnie Maritime Belge, 2000, point 137 or Robert O'Donoghue and A Jorge Padilla, The Law and Economics of Article 82 EC, Hart Publishing, part 3.5.

16 It may be result of the competition for the market and there may exist such barriers to entry as large sunk cost, high switching cost, economies of scale and scope or network effects.

- high and non-transitory barriers to entry exist (excluding patent period)
- there is monopoly or position near to monopoly (superdominance)
- market power was not acquired through competition on the merits
- (risky) investment and innovation are insignificant
- sector specific regulator and price regulation (price ceiling) doesn´t exist
- efficient structural remedy is available

4. Conclusions

In the Czech Republic, the division of competences between pricing authorities and the CCA is not entirely precise; the jurisprudence only suggests that the Act on Prices does not preclude the CCA from enforcing competition law with respect to pricing activities, including the sectors subject to sector specific regulation.

The CCA however takes the view that in regulated sectors, it would be, as a matter of principle generally, the regulator who is the best place to address the problem of allegedly excessive prices. Even in non regulated areas, intervention against exploitative excessive pricing should be taken only in exceptional circumstances; the criteria which the CCA will take into account are outlined in the previous section.

On the other hand, when the excessive pricing is part of an exclusionary practice, the mere fact that the sector is subject to specific regulation cannot prevent the CCA from intervening.

DENMARK

1. Introduction

The Danish Competition and Consumer Authority (DCCA) have in the past prosecuted excessive pricing cases and finds that actions against exploitable abuses can be part of an effective enforcement of Article 102.[1] Exploitative abuses – including excessive pricing – are the most direct violation of the consumers' interest. As result the prohibition of excessive pricing can protect consumer welfare.

Yet, the DCCA also recognize and take in consideration the challenges – theoretical as well as practical – which stem from the prosecution of excessive pricing.

First of all, it is very difficult and complex to calculate what amounts to an unreasonably high price. In addition, an analysis of excessive pricing may very well place the competition authority as a quasi price regulator second guessing the "correct" competitive price level.

Second, the analysis may posses a legal uncertainty problem since the dominant firm may have little insight into the economics methodology of the competition authority – as a consequence it may be difficult to know when prices are too high. On the other hand, one could argue that such uncertainty is some what similar to the uncertainty that exist on competitive markets where the firm cannot know the reaction of its competitors from price increases.

Third, there is the theoretical issue of prohibiting 'commercially reasonable' behaviour of firms with market power – since firms with market power inevitable charge higher prices than firms that operate on competitive markets. From a dynamic perspective it is important to notice that firms often innovate in order to escape competition and gain market power. If innovation is not adequately rewarded it may distort firms innovation decision.

Fourth, the fact that a dominant – incumbent – firm is charging high prices will in principle attract new competitors to the market which in turn may increase consumer welfare. An intervention from the antitrust authority may distort investment decisions by causing uncertainty to price signals.

As regard to the third and fourth challenges they stress the importance of including a reasonable rent to the dominant firm (and herein also a reasonable rent for the risk of taking on e.g. innovative investments) and also the importance of conducting a thorough investigation of potential competitors to the firm.

All together, the issues give rise to – at least – three important questions in relation to excessive pricing. *First*, under what circumstances should antitrust authorities take actions against excessive pricing? And *second*, given the decision to take action what economic methodology should be applied in order to establish that a dominant firm is charging excessive prices? *Third*, what remedies should be applied on excessive prices?

[1] All the cases have involved the wholesale market for electricity.

2. Under what circumstances should antitrust authorities take actions against excessive pricing? DCCA experiences of excessive pricing cases

There is a particular need for action against the dominant player's excessive prices on markets with very high entry barriers (making it – close to – impossible for new competitors to enter). With very high entry barriers the market mechanisms that would normally put downward pressure on the incumbent's prices, do not operate effectively. Moreover, it is important that there exist a solid theory of harm containing a considerable consumer loss. On such markets there is a particular need to take actions against the exploitable behaviour of the dominant firm – taking into careful consideration any objective explanations of the dominant firm – which leads to excessive pricing. Such actions are in accordance with the terms of TFEU Article 102 and the Danish Competition Act §11.

In 2005 the DCCA found that there was a particular need to investigate excessive pricing on the Danish wholesale markets for electricity in Western and Eastern Denmark.[2] The DCCA launched an investigation of the pricing behaviour of the dominant electricity production companies Elsam and E2 who operated on the Western and Eastern markets respectively. The objective of the investigation was to establish if the incumbents had infringed the Danish Competition Act (§ 11) and TEUF Article 102 by charging excessive prices.

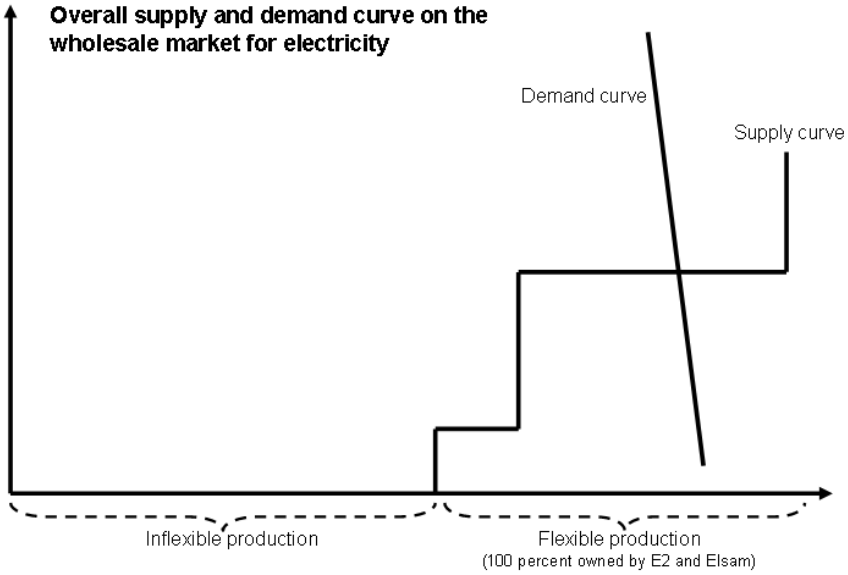
On the wholesale electricity market physical electricity is sold directly between market participants (OTC - over the counter) or as hourly power contracts for physical delivery in the coming 24-hour period of the next day on the Nordic Power Exchange (the spot market). The Nordic exchange area consists of a number of trade zones. The Western and Eastern Danish market constitute two separate price-areas (trade-zones) in the Nordic exchange area. The price mechanism of Nord Pool serves the purpose to direct the flow of power from trade-zones with low prices to trade-zones with high prices. This way prices are attempted to be levelled within the limits of interconnection capacity levels. The Danish wholesale markets are connected to the Swedish, Norwegian and German markets through transmissions cables. However, due to capacity constraints between the markets the prices do vary in hours with very high demand for electricity.

There were several reasons for DCCA's decision to take on investigations of excessive pricing on the Danish wholesale markets for electricity, many of which were closely related to market structures that one would expect to find in cases for which one would see a potential for intervention.

First of all, both the Eastern and Western market consist of one large incumbent who owns all flexible production technologies and a handful of small players who operates inflexible production technologies. Producers with flexible production facilities are able to adjust the production in accordance to expected consumption (demand), whereas producers of with inflexible production facilities (e.g. wind power) are not. Consequently the inflexible production units are bid into the bottom of the general supply curve and the flexible production units are bid in the top, see figure 1.

[2] Both investigations were initiated on the grounds of complaints from customers of the incumbent.

Figure 1: E2 and Elsam owned all flexible production facilities in Western and Eastern Denmark respectively



Energi E2 and Elsam were the only producers with flexible production facilities (on their respective markets) and hence the only producers that were able to adjust the outcome in accordance with actual consumption (demand).[3] As result E2 and Elsam were able to determine the price of electricity in the vast majority of the time on the market.

Second of all, it is important to realize that the wholesale electricity market in Eastern and Western Denmark primarily works as a 'whistle stop' between the Nordic area (Sweden, Finland and Norway) and Germany. The production technology in the Nordic area consists primarily of hydropower and to some degree of nuclear power, while the production in Germany mainly consists of coal, wind and nuclear power. The difference in production technology cause significant transmission of electricity in the northbound direction during night hours (when consumption and hence prices are low), while there is significant transmission of electricity in the southbound direction during daytime (when consumption and hence prices are high).[4] The Eastern and Western Danish wholesale market is thus characterized as a transit area between the Nordic region and Germany.

Yet, limited transmission capacities to the neighbouring countries and the significant amount of transit caused a heavily reduced net competitive pressure from foreign producers (Germany, Norway and Sweden). The limited transmission capacity caused transmission to be often congested thereby eliminating all foreign competitive pressure.

As a result of the limited capacity on the transmission cables and transit (which together caused a limited amount of imported electricity), Elsam and E2 was – in a substantial number of hours – the sole electricity providers capable of meeting the demand in Western and Eastern Denmark respectively.

3 Elsam and E2 owned all central power plants in Western and Eastern Denmark respectively and a number of local heating and power plants and windmills.

4 The reason being that producers of hydropower (in the northern areas) allocate the production in order to obtain more lucrative prices during the daytime this sort of flexibility is, however, not possible for the less flexible power stations (in the southern areas) who are constantly producing electricity (nuclear power) even though prices are lower at night time

Consequently, E2 and Elsam were both considered to be residual monopolists on the market thereby making it possible for them to determine the market price.

In continuation of above E2 and Elsam also had a unique possibility to influence transmission flows by bidding in units of production just below (ensuring exports) or above (ensuring imports) the expected prices of the neighbour countries.

Third, it is very difficult – close to impossible – to find new sites for flexible power plant in Denmark. In addition, there are very high capital expenditures associated with the establishment of the plants. This means that it is not possible for new competitors to enter the market – unless they buy the production facilities from Elsam or E2.

Fourth, demand (i.e. consumption of electricity) is relatively inelastic and thus almost constant regardless of the price offered in the market. Electricity is a necessity that can not be deselected, and many customers (e.g. households) do not know the price of electricity at the time of purchase.

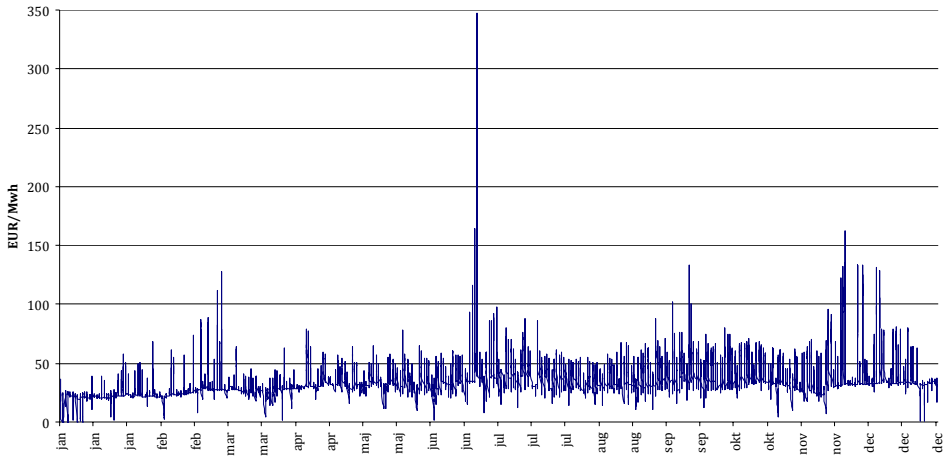
Moreover, consumers can not opt out of the dominant producer (E2 or Elsam) on the market and instead buy cheaper electricity from another producer. The reason being, that E2 and Elsam were the only producers that were able to cover consumption in hours with high demand. This means that the production of E2 and Elsam typically represents the final and thus often price determining quantity on the marketplace.

Finally, prior to the investigation of Elsam the DCCA had received complaints regarding an alleged abuse by Elsam in 2000 and 2001. As the electricity market had recently been liberalized and was still in a state of development and adjustment the Danish Competition Council chose to solve the matter by agreeing to certain commitments from Elsam concerning bids placed by Elsam on the Nordic Power Exchange Nord Pool thereby closing the first case. Elsam did not honour the commitments, however, and the DCCA terminated the agreement on June 23rd 2005.

Summing up, the wholesale market for electricity had the characteristics under which actions could be taken against excessive pricing.

Figure 2 illustrates the extreme price fluctuations that took place on the Western Danish Wholesale market in 2005. Especially, extreme prices were observed in June 2005 as well as in September till December 2005. The following investigations of the DCCA showed that the price fluctuation was entirely out of stroke with the cost of producing electricity.

Figure 2: Price fluctuations on the Western Danish wholesale market in 2005



On an administrable matter, the DCCA decided to postpone the investigation on the Eastern Danish market and to go forward with the investigation concerning the Western Danish market – hence the pricing behaviour of electricity production company Elsam A/S.

In 2005 and 2007 the Danish Competition Council (DCC) found (which was later confirmed by the Tribunal Court) that Elsam had infringed competition law by imposing excessive prices on the Danish wholesale market in the period from July 1st 2003 till July 1st 2006.[5]

On the basis of the Elsam decisions the DCCA launched a follow-up investigation of the pricing behaviour of the incumbent Energy E2 A/S. Yet, on December 22nd 2010 the DCC decided that Energy E2 did not infringe Competition law by abuse of dominance by imposing excessive prices on the wholesale market for electricity in Eastern Denmark in the period from July 1st 2003 to December 31st 2005. We will revert to the economic methodology of the investigations which lead to different outcomes in the following.

3. What economic methodologies may be applied to establish if a dominant firm is charging excessive pricing? Experiences of the DCCA

In order to determine whether E2 or Elsam had abused its dominant position by charging excessive pricing the DCCA followed the principles of the United Brands judgement of the Court of Justice of the European Communities. As to the assessment of whether a price is excessively high the Court of Justice has stated that

"... the charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be an abuse […]

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.

The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products" (United Brands v. the Commission, February 14, 1978, case 27/76)

5 The decision is currently pending at the Maritime and Commercial Court

Overall the DCCA applied the same economic framework in both the E2 and Elsam cases. The overall economic assessment consisted of two parts.

The first part consisted of an analysis of the overall profitability of Elsam and E2 from producing electricity to the wholesale market – referred to as the *"profitability analysis*".

The second part consisted of an analysis of the companies' actual bidding behaviour on the spot market (i.e. an analysis of the actual bid-curves which was entered into the spot market) – referred to as the *"actual bid analysis"*.

Neither the so-called *"profitability analysis"* nor the *"actual bid analysis"* should be interpreted independently but should be seen as indicators that – together – form part of a general assessment.

3.1. First part of DCCA assessment: The Profitability Analysis

The profitability analysis consisted of a fairly rough comparison of the actual prices on the market – hour by hour – to Elsam's and E2's average total cost of production including an allowance ensuring cost of capital. The comparison required both a thorough understanding of the mechanism of a central heating power plant (necessary to derive the cost of electricity production), and a thorough understanding of the general mechanisms at play on the electricity market (e.g. the difference between flexible and inflexible production facilities).

The average total cost (ATC) was calculated from the average variable costs (AVC) and average fixed costs (AFC). With regard to first, the cost was made up by the actual market value of the production inputs (e.g. actual market prices of oil and gas etc.). This way the cost benchmark ensured that daily cost fluctuations as well as seasonal fluctuations were embedded in the costs function. With regard to the AFC, the DCCA relied on accounting data provided by Elsam and E2. This, of course, was not a perfect estimator of 'true' fixed costs. Yet, antitrust authorities should in a certain sense be able to use accounting data as an indicator of costs when investigating competition cases.

The cost of capital was estimated on the basis of CAPM. Yet, there was no Danish electricity production beta value available. Instead the DCCA applied an American electricity beta value as an approximation for the 'true' Danish beta value.

In the case of Elsam the profitability analysis pointed out a substantial number of hours in which the prices had exceeded Elsam's cost of production (including an allowance ensuring cost of capital). Moreover, the analysis showed that Elsam had obtained a return to equity well above the average of Danish industries. As result, the DCCA found that the analysis could indicate an abuse of dominance.

With regard to E2, the results of the profitability analysis were inconclusive. *On the one hand* the comparison showed that the profit of E2 was low in the investigated period. *On the other hand,* the analysis also identified a number of hours in which E2 obtained very high profit margins which could potentially indicate that E2 in some hours manipulated the prices upward.

Consequently, the profitability analysis supported the allegations against Elsam but was not conclusive as regard to E2.

3.2. Second part of DCCA assessment: The Actual Bid Analysis

Based on the hours in which E2 and Elsam had obtained the highest profit margins the actual bid analysis compared (hour by hour) the production costs of electricity – for each of E2's and Elsam's production units (marginal costs) – to the companies' actual bids on the electricity spot market.

The actual bid analysis indicated that Elsam did in fact possess market power in Western Denmark (residual monopolist). This fact was made evident by the lack of connection between the bids made by Elsam and the marginal production costs. The bid-strategy, furthermore, indicated that Elsam was able to cause or prevent bottlenecks on the transmission cables. This means that in some hours – when highly profitable – Elsam caused bottlenecks on the connections to Norway and Sweden effectively making Western Denmark a separate high-price area on Nord Pool.

Based on the analysis – and an internal note discovered at a dawn raid – the DCCA found that Elsam had successfully managed to manipulate the market price by placing bids out of touch with the company's marginal costs of electricity.

With regard to E2, the actual bid analysis pointed out that the bids entered by E2 did cause very high prices in a relatively small amount of hours (102 hours). Viewed in isolation, such behaviour may point in the direction of abuse of dominance. Yet, E2 was able to present objective and documented cost-related reasons for the behaviour in some of the hours. As result, the actual bid analysis did not indicate an overall strategy that intended to manipulate the market place and hence exploit consumers. Hence the actual bid analysis did not indicate any abuse of dominance.

In all, the DCC found that Elsam's bidding practice resulted in excessive prices in 1,484 hours in the investigated period and that the abuse has inflicted a loss of 111 million DKK upon the end consumers. The decision of the DCC has been followed by a class action suit from more than a 1,000 companies with a claim of more than a billion DKK.

As goes for the case of E2 the DCC found that E2 did not abuse its dominant position by operating a price strategy on Nord Pool that resulted in excessive pricing. In its decision the DCC gave it weight **(i)** that E2 did not earn high profits, **(ii)** that E2 was able to present objective and documented cost-related reasons for the behaviour in some of the hours with high prices, and in continuation, **(iii)** that the behaviour of E2 only directly caused prices increases in 48-52 of the identified hours, and finally **(iv)** the fact that other factors in the market (the abusive behaviour of Swenska Krafttnät) limited the transmission capacity from the Swedish wholesale electricity market causing a upward pressure on prices.

4. What remedies should be applied on excessive prices?

Overall, a proportionate remedy should aim at eradicating the structural problems on the market that formed part of the foundation of the abusive behaviour. Stated otherwise, the fundament source of market power is some form of entry barrier, and the basic principle of intervention should be to remove the problem at source.[6] The reason is that the remedy should reduce (or even eliminate) the risk of future excessive prices on the market. Price regulation should only be applied as a last resort remedy.

As elaborated above the Western Danish market is characterized by structural problems causing limited transmission capacities and hence a limited competitive pressure. Consequently, an effective remedy would be to increase the transmission capacities to the neighbouring markets.

Yet, it is the national transmission system operator (TSO) who owns – and operates – the transmission capacity. Hence the DCCA advocated that the government should conduct further transmission investments in order to reduce the market barriers.

6 "The Pros and Cons of High Prices", p. 77, Swedish Competition Authority 2007

FINLAND

1. Introduction

1.1. General

Ten years ago, court decisions shaped the assessment of excessive pricing in Finland considerably. In its decisions, the Finnish Competition Council[1], dismissed the submissions of the FCA to impose fines[2] on some undertakings, and set the burden of proof as well as the threshold of intervention on a relatively high level in excessive pricing cases. Since those days, the Finnish Competition Act has been renewed, and according to the legislative history of the law applicable today, the application of the provision that tackles the abuse of dominant position shall conform to the application of Article 102 of the Treaty of the Functioning of the European Union. Therefore, the case law of the EU Courts is to be followed to a greater degree than previously in the interpretation of the provision today.

The Finnish Competition Authority (FCA) has been faced with an increasing number of excessive pricing cases recently. The FCA has initiated some of these cases on ex-officio basis but a number of complaints have been initiated by undertakings too. Ex-officio cases include investigations on products and services such as district heating, wood pellets and a connection to a fixed telecom network. The complaints have related to products such as peat, fertilizers and terrestrial television/radio transmission services. The last one is in fact a service that is already under price regulation in Finland. This indicates that regulation, when adopted, is not necessarily able to come to a solution that satisfies the customers. Therefore, regulation would need to be as open as possible, follow very clear-cut rules and, at the same time, ensure a reasonable price level. The regulator, however, has tools that are more appropriate and efficient for price regulation than the tools available to a competition authority.

In this paper, the challenging subject of excessive pricing will be approached in such a way that conclusions will be drawn from the experiences and knowledge that the FCA has gained in some of the recent ex-officio cases. The first group of cases explored here relates to the installation charges collected by telecom operators for connecting a house to a fixed telecom network. The second subject matter explored is a sector inquiry conducted in the district heating industry. The FCA initiated the inquiry with the aim of forming an opinion of whether the pricing of the companies involved could be considered as a potential abuse of dominant position.

By taking all aspects - conditions for intervention, economic methods and remedies - into account, the installation charges of telecom operators represent cases where the weighing between type I error (i.e. a false condemnation) and type II error (i.e. a false acquittal), and the costs related, seemed clearly to favour an intervention. The district heating example, on the other hand, involves much risk assessment between type I and II errors, and the costs related. This assessment is still partly ongoing within the FCA. Subsequently, many of the conclusions below relating to district heating are presented rather in the form of questions than as final conclusions.

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1 Nowadays Market Court.

2 According to Finnish Competition Act, the Competition Authority submits the imposition of fines to the Market Court .

1.2. Installation charges of telecom operators

The FCA examined the pricing of four telecom operators[3] as potential abuses of dominant position, in relation to the installation charges they collected for connecting a house to a telecom network. The investigation of four telecom operators was begun following price increases by each of them which multiplied the referred installation charges. Due to the price increase, a single-family / detached house connected to the telecom network was obligated to pay, as an installation charge, a bigger proportion of the expenses caused by the construction of a fixed telecom network than previously. Incorporated into the actual costs of connecting a house to a telecom network the operators also collected other, unrelated costs. These unrelated costs were mainly considered problematic from the point of view of the Competition Act, and in some cases, double cost allocation was in fact detected.

The FCA only intervened in the pricing of the traditional copper based network. This infrastructure was possessed by an incumbent operator, and as a consequence, especially in the neighbourhoods relevant for the cases referred to, there were no other infrastructure providers available and entry barriers were high. Thus, the dominance of the incumbent operator seemed very obvious. In green field areas, a new infrastructure is nowadays built based on optical fibre. Entry barriers are usually lower in the green field areas than in the existing neighbourhoods.

In three out of four cases, the FCA ordered the operator to comply with the remedy whereby the operator committed to change its pricing practice regarding the installation charges (commitment decision)[4]. In one of the cases, the operator changed its pricing itself after the FCA had initiated the investigation, and the FCA concluded that the new pricing removed the detected problem. This case was also closed.

1.3. Sector inquiry in the district heating industry

The sector inquiry conducted by the FCA in the district heating sector covered the years 2004 – 2008 and involved the ten biggest district heating companies in Finland, i.e. two-thirds of the sales of the entire industry. District heating markets are geographically shared between the companies, and altogether, there are around 150 local district heating companies in Finland. The share of district heating is about half of the entire heating market in Finland, which makes it, in financial terms, a significant industry. District heating companies have traditionally been municipal companies, which applies to most of them even today.

The FCA has completed the screening stage of the sector inquiry. The aim of the screening stage has been to answer the question whether there is need for more in-depth company-specific analyses. At this stage, the intention was not yet to collect firm evidence about abuse relating to individual undertakings. Therefore, the FCA aimed for a simplified analysis based on the figures derived from the book values.

Profitability, when taking the business risk of the industry into account, proved to be high in these observations. The profitability of the companies, however, did not improve during the period of inspection, which meant that the price increase corresponded to the rise in the cost level of companies during that period. The conclusion from this finding was that the price increases, despite being considerable during the

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3 In Finland, there are approximately 30 local telecom operators, each of which used to have a legal monopoly in the provisioning of telecom subscriptions and local service in its area until 1993. These former monopolies still have a very strong position in the provisioning of the fixed network infrastructure today.

4 The commitment decision is based on 13(3) of the Competition Act, under which the FCA may order that the commitments shall be binding on the business undertakings or associations of business undertakings involved in an alleged competition restraint, if these commitments are such that they may eliminate the restrictive nature of the conduct.

period, did not seem to provide indication of the excessive price increases. Thus, after the screening stage, the scope of possible excessive pricing will be limited only to the question about price level.

Based on the results of the screening stage, the FCA concluded that the situation may not be considered wholly unproblematic as far as the price level is concerned. The result of the screening stage indicated well above 10 per cent excess (but less than 20 per cent) compared to the reference price level[5] that allows for a relevant a risk adjusted return on capital. It is to be noted, however, that the simplified analysis[6] used at the screening stage, as stated above, may have led to quite a strict assessment criterion. In this assessment, the FCA considered that 10 per cent excess vs. reference price level would have represented the threshold for the need of further measures. In these conditions, the risk for type II error (a false acquittal) was considered low.

The outcome of the screening stage proved to be ambiguous, because even though the result exceeded the threshold level, the margin was not very extensive, and, moreover, the FCA was not able to make a clear distinction between the companies involved. Having received feedback from the companies involved, the FCA is now assessing the need for further measures in the project.

2. Conditions for intervention

The cases explored in this paper provide somewhat different examples, when the requirement for intervention under competition law is concerned. The cases which related to the installation charges of telecom operators seem to provide examples of conditions that would enable pure exploitation, whereas the conditions of the district heating sector did not seem quite as unambiguous.

2.1. Telecom infrastructure: an example of conditions enabling exploitation

The most obvious conditions requiring a competition law intervention on excessive pricing are probably such that the monopoly price is not able to attract competitors to the market and customers do not have real alternatives to a monopoly product available. In those circumstances, constraints for pricing are almost non-existent. With reference to the cases that dealt with the telecom operators' installation charges for connecting a house to a traditional copper based telecom network (chapter 0), the product in question seemed to fulfil these characteristics.

The FCA found that the service in the copper based fixed broadband network was still significant to the supply of broadband services. The mobile network service was considered supplementary, rather than substitutive, to the fixed network service. Optical fibre connections, on the other hand, were primarily built on new residential areas. Thus, for the single-family and detached houses built in established neighbourhoods, the copper based fixed broadband network was considered, in most cases, as the only way to obtain broadband services sufficient to meet the users' data transmission needs.

Furthermore, only a telecom operator that possesses local loop infrastructure is able to offer the product in question, i.e. to connect a house to a telecom network. Traditional telecom network infrastructure is commonly considered to be an example of a natural monopoly. When further partitioning the infrastructure market, the conclusion may be drawn that the single-family and detached houses built in established neighbourhoods represented the extreme end of the market where competition was least likely to emerge. As it was not foreseeable that even high prices were to induce competitors to this part of the

5 Reference price represents a competitive price level when the profitability is concerned, but may include costs of X-inefficiency related to monopoly or near-monopoly position.

6 Based on the figures derived from the book values.

infrastructure market, excessive pricing in this sort of market can be considered as purely exploitative conduct.

The favourable conditions for intervention under competition law in the "installation charge" cases were strengthened by the fact that it was possible for the FCA to intervene in the conflict in a cost allocation (refer to chapter 0).

2.2. District heating: do the conditions have to be static to justify the intervention?

The starting point for the assessment of the district heating industry is the FCA's finding that the sector enjoys relatively high profitability and the fact that the industry is characterised by heavy infrastructure investments[7] and considerable economies of scale. These circumstances do not exclude an intervention under competition law, at least. However, there are also signs in the industry that might indicate the opposite conclusion on the appropriateness of intervention.

2.2.1. Market conditions of the district heating industry

According to sector inquiry, the following market conditions seemed to characterise the district heating industry:

- District heating represents about half of the heating markets in Finland, and there is no sector regulator,
- Profitability, when taking the business risk of the industry into account, proved to be high,
- Entry barriers are extremely high in the district heating market, but potential competitive pressure existed in the neighbouring markets,
- Potential competitive pressure in the neighbouring markets (especially electric heating) is being discouraged by regulatory means,
- Environmental policy may be intensifying the competitive pressure coming from environmentally friendly heating forms (especially heat pumps), and, as a consequence, it is possible that the market conditions are undergoing a change.

Thus, the district heating industry presents less obvious conditions for intervention than the installation charges above. The market conditions are not absolutely static. There are aspects that would favour an intervention, but also some aspects that, at least, make the issue less clear.

In addition, it is to be noted that there is no price benchmark available from the competitive market with similar conditions. It would mean that the evaluation, provided that district heating forms its own relevant market, would be based on the cost plus model. As there is no clear benchmark, this is a challenging way to assess pricing (refer to chapter 0).

2.2.2. Effect of potential competition

The existence of alternative heating methods assists in controlling the prices of district heating at least to some extent. This would indicate that the justification for the intervention is not self-evident, at least.

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7 Lifetimes of the investments in the industry are typically between 25 and 50 years.

On the other hand, the results of the screening stage seem to indicate that the pricing pressure coming from the alternative heating methods was not very intensive. As a consequence, the district heating companies were able to charge the prices that led to a high profitability of the sector. This may, in itself, already indicate that district heating forms its own relevant market. These types of conditions increase the economic justification of the intervention under competition law.

2.2.3. Environmental policy and regulatory means

Environmental policy, by means of raising the unit costs of district heating, may lead to more favourable competition conditions in the future with intensified competitive pressure coming from the potential sources. This will apply, however, only to some green technologies, and the policy has had an opposite effect to the competitive position of other heating methods, especially electric heating.

District heating itself is favoured on environmental grounds too. The already firm position of district heating in the heating market strengthened further in 2009 when a provision was added to the Land Use and Building Act on the basis of which an obligation may be imposed on new buildings to join in the district heating network (with some exceptions). The construction regulations have also been recently under reform, and will weaken the position of electric heating in relation to district heating.

Moreover, there are signs that even the potential competitive pressure induced by the heat pumps (green technology) may be disturbed by regulatory means in the future. The reason offered is typically that, after they have become more common, there is also increased need to control and regulate the construction of the heat pumps.

As a conclusion, the market conditions are not static, and it is not entirely clear how the markets will change in the future. However, even if the conditions may in some aspects develop in favour of increased competition, there are forces having the opposite effect too.

3. Roles of competition authorities and regulators

Basically the same questions should be raised when the need for regulation is assessed as when the conditions of intervention under competition law were discussed. The establishment of the regulatory regime, however, is a relatively heavy measure, which should affect this assessment. Unnecessary regulation is to be avoided. Regulation provides, in principle, better tools to handle the problems with excessive pricing. This chapter focuses on this aspect only, based on what was learnt from the district heating sector inquiry. In other words, experience of the investigation under competition law revealed certain difficulties, which could probably be handled more effectively by regulation.

The experiences from the district heating sector inquiry raise the question of whether the provision on excessive pricing in the Competition Act is an appropriate means in the first place to solve the excessive pricing cases which relate to the price level problems. The question is even more obvious when the potential problem applies to an entire sector, and especially in such cases, the idea of sector regulator may arise to safeguard the benefit of the consumers. Making the necessary investigations under competition law and bringing the potential company-specific competition infringement fine proposals before the Market Court would be a slow and heavy process, the outcome of which could not be predicted.

Based on the experiences of the district heating sector inquiry, the following issues or conditions can be considered to favour regulation instead of intervention under competition law in the excessive pricing cases:

- By regulation, it is possible to impose accounting separation obligation on undertakings and define predefined, clear-cut rules for accounting separation, whereby under competition law, availability of reliable cost information is a common problem,

- By regulation, it is possible to define predefined rules / instructions for repurchase and current values of capital, whereby under competition law, reliable information on the repurchase and current values of the assets may not be available,

- The regulator is able to assign a "fair" price level, but under competition law, even if the pricing could be defined as excessive and unfair, the appropriate level of a "fair" price is not a clear concept,

- The tasks of the regulator may be broader than price control, and regulators are in a better position to intervene in the X-inefficiency related to a monopoly position,

- Where there is a persistent industry-wide problem with high prices and several dominant undertakings (geographically shared markets), allocative inefficiency may be considerable, and it is possible that no other ways exist than regulation to safeguard the benefit of the consumers.

Regulation does not necessarily imply full-scale price regulation, and some of the above difficulties may be alleviated by some sort of partial regulation, for example an accounting separation obligation.

4. Economic methodologies used in the cases explored

The suitability of different economic methodologies for the assessment of excessive pricing varies with the circumstances of each case. In this respect, the cases explored here provide two quite different examples. It probably goes without saying that the aim is not to provide any exhaustive presentation of possible methods here.

4.1. Detecting a conflict in cost allocation

There were certain aspects in the cases relating to the installation charges collected by telecom operators that made them more straightforward, compared to an average excessive pricing investigation, for intervention under competition law.

First of all, there was the question about the price increase which multiplied the installation charges: it was possible to make a comparison between the new and previous pricing structures. In addition, the FCA found and intervened in the cost allocation problem. The operators collected, incorporated into the costs of connecting a house to a telecom network, also other, unrelated costs. These unrelated costs were mainly considered problematic for the Competition Act, and in some cases, double cost allocation was in fact detected.

Therefore, it was possible in these cases for the FCA to intervene in the conflict in cost allocation. There was no need to consider, in a detailed manner, questions such as the size of a "fair" profit margin or return on capital employed.

4.2. Cost plus framework

4.2.1. General remarks

The cost plus framework is a challenging way to assess excessive pricing. First of all, the question as to what will characterise abuse is not a simple one. Case law[8] refers to conduct where the price exceeds the economic value of the product, in a manner that would not be possible in the conditions of normal and sufficiently effective competition. In addition, there are several parameters that need to be defined case-by-case in the model, and cost allocation as well as capital valuation may cause much uncertainty in the results.

The definition of the relevant markets is a critical factor in the process of deciding the appropriate economic methods to assess excessive pricing in each individual case. A mistake in the market definition may lead to a price comparison with an incorrect benchmark. Too broad a market definition, for example, may lead to benchmarking with a product that is not a real competitor.

In the district heating sector inquiry, the FCA decided to make an evaluation based on the cost plus framework, because, first of all, there were no benchmark prices available from the competitive market with similar conditions. In addition, according to Finnish case law, the provision of district heating forms a relevant market of its own, when the existing customers connected to the network, are concerned. Moreover, the high profitability of the sector, which was the conclusion from the screening stage of the sector inquiry, supports the conclusion that the district heating and the alternative heating methods would not belong to the same relevant market.[9] Thus, the prices of the alternative heating methods do not seem to serve as reliable benchmarks to district heating. It is to be noted that these conclusions lead to an assessment where excessive and unfair prices are a possible outcome even when the district heating prices do not exceed the prices of the other heating methods.

The district heating is a very capital intensive industry, and thus, the profitability of the industry was assessed by evaluating the return on capital employed[10]. The capital employed was determined in this evaluation, however, in a case-specific way by including to the capital base the value of the assets required to operate the business in question. Reliable information in such a form that is required in a standard ROCE calculation was seldom available as such, because the book keeping of the companies did not necessarily produce a complete balance sheet for the district heating business entity. All of the companies that were investigated had other business activities too, and normally at least the Common Heat and Electricity Production (CHP) was separated from the rest of the district heating business within the company structure.

4.2.2. Screening stage

When conducting the sector inquiry, the FCA found the need to establish, at the first stage, relatively simple model and criteria to make conclusions on the possibility of excessive pricing. The FCA did not consider repurchase/current values at the screening stage, but aimed for a simplified analysis based on the figures derived from the book values which may have led to quite a strict assessment criterion. In this assessment, the FCA chose the criterion in such a way that less than 10 per cent excess vs. reference price level would not yet indicate the excessive pricing. In addition, because there were no individual companies

8 Judgment of the European Court of Justice 27/76, United Brands Company, paragraphs 249 and 250.

9 According to SSNIP (Small but Significant Increase in Price) test, a 5 - 10 per cent profitable price increase should not be possible.

10 Cost of capital was used as a benchmark to the return on capital, and in this assessment, cost of capital was defined based on WACC/CAPM model (Weighted Average Accumulated Cost of capital / Capital Asset Pricing Model).

that would have stood out in the assessment, this figure was applied as a criterion to assess the industry as a whole.

The reference price level referred here allows for a relevant risk adjusted return on investments. The model does not, however, take the variations in the investment cycle into account very well. Companies may be in different phases in their investment cycles, which means that the results between the companies, based on a five-year period, are not necessarily comparable. Furthermore, the assessment model does not necessarily address the economic value of the product as required by the case law. The figures derived from the book values serve well at the screening stage, when the FCA needed to make conclusions about the industry as a whole, but alone, they seem not to provide sufficient evidence for showing the possible abuse of an individual company.

4.2.3. Full-scale model

The FCA is now considering the next steps of the process, and as a part of this assessment, the question about the appropriateness in the first place of competition law as means to solve pricing problems in the district heating market has to be assessed. In other words, the assessment has to be made, taking into account the appropriate threshold for intervention under competition law, whether or not the FCA is able to influence the price level of the industry. The uncertainty of the results may, for example, raise the threshold for intervention in practice. For this purpose, the FCA has conducted an initial analysis based on the repurchase and current values of capital too[11]. The FCA had collected these figures, too, at the early stage of the sector inquiry but concluded that the figures based on the book values provided a more reliable basis for the screening stage assessment.

If the outcome of the above assessment is affirmative, the FCA has to make a decision on individual companies, for which the evidence seems to provide strong enough indication of excessive pricing, which would justify more detailed investigations, with the aim, finally, to submit to the Market Court the imposition of fines.[12]

The most essential question concerning the further measures relates to the size of excess in pricing that would be big enough, in this type of assessment, to be considered as abusive conduct. It is to be noted that the reference price level, in this assessment, tries to simulate that of perfect competition. However, this simulation is not able to take the efficiency aspect into account, and consequently, the reference price level may be affected by the X-inefficiency related to a monopoly position. Thus, the reference price level, in practice, is likely to be somewhat higher than the price level of perfect competition. If the question of the uncertainties relating to the results is set aside for a while, the question can be raised as to what is the size of excess in percentage terms in the assessment like this that may be considered abusive conduct in the first place? To what extent should this assessment be affected by the characteristics of the industry (refer to chapter 0) and the fact that the inquiry covered five years?

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11 As far as the details of the assessment based on repurchase and current values are concerned, the FCA has chosen the following principles:
- Techno-economic lifetimes for the components are used instead of the lifetimes used in bookkeeping,
- Current value is derived from the repurchase value of the capital (i.e. price of the investment today) by deducting from it the depreciation that corresponds to the age of the assets,
- Depreciation base includes the assets the current value of which is more than zero,
- Cost of capital (WACC percentage) is defined in real terms, because the revaluation of capital employed each year includes the inflation factor already.

12 According to Finnish Competition Act, the Competition Authority submits to the Market Court the imposition of fines.

4.2.4. Challenges in cost allocation

The prerequisite for the assessment of pricing by using the cost plus model is the availability of reliable cost data. The costs that the product incurs are a critical part of the assessment. In case of district heating business, the most of the companies involved did have some level of accounting separation available, which provided a fairly good basis for assessment.

Even the availability of separated accounting did not, however, remove all the problems related to the cost allocation. In district heating sector, the most important question in this respect is the cost allocation within the common heat and electricity production (CHP). In this arrangement, two products, intended to be sold in very different types of markets, are produced within the same production plant and process. Electricity produced is being sold in the competitive market[13], and heat, arguably, in the monopoly market. The cost allocation method in this process turned out to be the most important individual factor in the assessment of the pricing of the district heating sector. This causes major difficulties for the assessment, because the companies use different methods, and thus, the results do not appear to be very well comparable.

There are basically four main types of cost allocation methods that were encountered in the sector inquiry:

- methods that aim to provide both products with a fair share of a benefit that results from the common production as compared to the situation of separate production plants (or purchase),
- methods that allocate the costs within the production process based on the use of resources, without assessing the alternative production costs in the separate production plants,
- methods that allocate the costs simply based on the volumes, and
- methods that do not have clear, transparent rules.

The most important characteristic of heat compared to the electricity, when considering the above questions, is, that heat is only meant for one purpose, but electricity has many uses. As a consequence, heat only includes an appropriate amount of value added, and its production process does not require as heavy production equipment as does electricity. The main idea of the common production is that the condensation water in electricity production is recovered in the process and used for heating instead of being wasted. Back in the 1990's, the industry association of the district heating industry published a study that considered the methods of the 1st category above as a fair way to allocate costs in the common production.

The FCA is now considering the possibilities and criteria under competition law to intervene in a cost allocation problem referred to above. When the different cost allocation methods are assessed, at least three out of the four above seem to have certain criteria for cost allocation if assessed purely from the accounting perspective. However, it is possible that the second and third one lead to a situation in which, compared to separate production plants, the district heating business does not enjoy such cost benefits as electricity does from the arrangement. In the extreme case, the district heating business may even suffer from the arrangement. In such case the electricity business would not bear even the additional costs it incurs comparing to a situation where heat is produced in separate plants. The FCA is considering the threshold of intervention, and related to this, there is also a question about the potential effect of the arrangement on

13 Electricity produced in a CHP plant is normally sold in the power market (exchange), but most of the companies (if not all) having common production are present in the retail electricity market too.

competition on the electricity markets. In this respect, is the fact that the electricity business gets excessive economic benefit from the arrangement sufficient basis for intervention?

Finally, a question can be raised that is the cost allocation problem referred here just an example for the need of regulatory intervention?

5. Conclusions

The conclusion that can be drawn from the very different types of cases explored above is that the assessment of excessive pricing with all its aspects cannot be fitted into one and the same framework. Sometimes intervention based on competition law may be straightforward and appropriate, but in the other cases, the situation may be quite the opposite. Many times, however, excessive pricing cases are based on the economic evidence, which normally means laborious investigation and potentially leads to a relatively high level of uncertainty and the burden of proof in the cases.

The imposition of fines represents the normal procedure in cases of infringement of the competition law, and is naturally a possible remedy in a situation where excessive pricing has been detected as well. However, taking into account the role of economic evidence and its consequences, the commitment decision could have an important role as a remedy in excessive pricing cases too. The key question in using commitments to remedy excessive pricing is, however, how to avoid the situation where the competition authority takes the role of a price regulator. In the case of installation charges of telecom operators, the FCA found commitment decisions to be an appropriate remedy, particularly because it was possible to find a remedy that did not lead to a control or regulation of a price level.

GERMANY

1. Introduction

The practice of excessive pricing, i.e. the selling of goods or services at an unfair price, is defined as an anticompetitive conduct in a number of jurisdictions,[1] although the enforcement of its prohibition has often been a demanding task for competition authorities worldwide. Despite the difficulties inherent in such complex proceedings, recent efforts of the German Competition Authority (hereinafter: *Bundeskartellamt)* illustrate that the control of excessive pricing may generate benefits for consumers. The potential drawbacks on competition e.g. by diminishing incentives to enter the market can be avoided by using this tool with care and by focussiong on the most obvious cases,.

This paper illustrates the activity of the *Bundeskartellamt* in the prosecution of excessive pricing in Germany. The first part describes the legal framework on excessive pricing as established in the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter: ARC)[2] and the relevant case law.[3] The second part describes the experience gained by the *Bundeskartellamt* in this field on the basis of a few cases, which in particular concern the energy sector. The third part provides a short description of a private action for damages due to excessive pricing.

2. Statutory basis

Even though there is no explicit definition in the ARC of what constitutes excessive pricing as an anticompetitive conduct, it is prohibited under Section 19 ARC, which generally prohibits the abuse of a dominant position. Amongst other examples of abusive conduct laid down in Section 19 (4) ARC, Section 19 (4) no. 2 defines abusive conduct by a dominant undertaking as the demand of "payment or other business terms which differ from those which would very likely arise if effective competition existed". Therefore, Section 19 (4) no. 2 ARC does not identify a specific conduct as abusive, but prohibits dominant players business practices which deviate (too far) from those expected to occur if they were in "effective competition" (so called *Als-ob-Wettbewerb*). This also applies to their pricing strategy. Although this, at first glance, may be read as a prohibition of any pricing above the hypothetical competitive level, the difference between the actual price in question and the hypothetical conduct in a market where effective competition prevails must be substantial (*erheblich*) to establish an abuse.[4] The ARC does not exclude the

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1 E.g. in the European Union, Article 102 of the Treaty on the Functioning of the European Union (TFEU). The English version of the Treaty is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF.

2 An English translation of the ARC is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf.

3 Some cases of abuse of a dominant position, like an alleged margin-squeeze in the telecommunications sector in 2009, have been based on national law as well as Art. 102 TFEU. Excessive pricing cases, however, so far have mostly concerned regional markets and therefore proceedings were based only on national law.

4 See *Bechtold*, KARTELLGESETZ GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN [ANTITRUST: ACT AGAINST RESTRAINTS OF COMPETITION] (Rainer Bechtold ed. 6th ed. 2010) at

use of methods other than the comparative market concept to establish the hypothetical competitive price, but Section 19 (4) no. 2 ARC stipulates that "particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account". [5] The fact that the only method explicitly mentioned in Section 19 (4) no. 2 is the comparative market concept has occasionally been interpreted as an indication that other possible methods of proving excessive pricing – such as a cost mark-up approach or a profit-limitation approach – are subsidiary concepts and only applicable under special circumstances.[6]

Comparative markets can be other geographic markets, product markets with similar products or services, or the same market in the past - which typically means the former prices of the dominant undertaking under investigation. Actual prices found on the comparative market are taken as a basis for the benchmark against which the allegedly excessive prices are compared. Deviating conditions on the dominated market, which a comparative competitor would also have to take into account if he entered that market, must be qualified, quantified and provided for in the benchmark via mark-ups (*Zuschläge*) on and deductions (*Abschläge*) from the actual price used for comparison.[7] To encompass the element of uncertainty inherent in the analysis, either the individual factors should be interpreted to the benefit of the companies, or a security mark-up (*Sicherheitszuschlag*) should be added to the final amount, which then forms the benchmark.[8]

A specific mark-up (so called *Erheblichkeitszuschlag),* is used to account for the requirement of a **substantial** deviation of the allegedly excessive price from the benchmark price, determining the threshold only above which the price is considered excessive and constitutes an abusive practice.[9] As postulated in the case law,[10] that mark-up can be linked to the degree of competitive pressure remaining in the dominated market with the consequence that the threshold for classifying prices as abusive is higher the more competition still remains in the market. The sum of all these necessary adjustments, however, must not account for the major part of the calculated benchmark price, to insure that suitable comparable markets or

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§ 19, para 74 and 80; Bundesgerichtshof (BGH) [Federal Court of Justice] WuW/E DE-R 375 ff., 379f. - *Flugpreisspaltung.*

5 Although it has been established by the Federal Court of Justice that, lacking alternatives, also monopolists may be taken as a benchmark, see BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*

6 *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011) at § 19 GWB para 107. Stating that the comparative market concept is an important, but neither the only nor the primarily admissible methodology to establish excessive pricing (however requiring a justification of the specific concept used): Oberlandesgericht (OLG) [Higher Regional Court] Düsseldorf, decision of 22.4.2002, Kart 2/02 (V) – *Netznutzungsentgelt*. When introducing Section 29 (2) into the ACR, the German legislator declared that the concepts of profit limitation and cost control to establish excessive pricing practices already were accredited methods in the case law for Section 19 (4) 2 ACR and Art. 82 EC Treaty (now Art. 102 TFEU) without any reference to subsidiarity, see Deutscher Bundestag [German Federal Parliament] – 16. Wahlperiode, Drucksache 16/5847, page11.

7 BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*

8 *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1,(Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para124.

9 *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1,(Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para 117 f.

10 BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*

prices are chosen for the comparative market analysis.[11] Any substantial deviation from the hypothetical competitive price established according to these principles must be proven to be objectively unjustified to be classified as an abuse.[12] Particularly the last requirement occasionally made the establishment of excessive pricing a very complex task and difficult to prove before the courts for the *Bundeskartellamt*.

Following the European Commission`s lead investigation of the European gas and electricity sectors, which showed that the energy markets in Germany were highly concentrated and characterized by vertical integration as well as high prices,[13] the German government took several measures to strengthen abuse control in the German gas and electricity markets. One of these was the introduction of a sector-specific provision, Section 29 ARC, in 2007 to facilitate the prosecution of excessive pricing in the energy sector. The provision applies to companies with a dominant market position in the electricity and gas markets. Originally, the provision was introduced for a five-year-period that was supposed to end in 2012. Currently, discussions to prolong the provision are ongoing.

Section 29 ARC differs from the general anti-abuse-provision of Section 19 ARC in several aspects. Under Section 29 s. 1 no. 1 ARC the requirements for a company to be suitable for comparison are lower than under the general provision. This is because the prices of a dominant energy provider can be compared with those of other public utility companies, irrespective of whether these are active on a market in which competition prevails, or not.[14] This is connected to a reversal of the burden of proof to a certain degree, as the dominant companies have to demonstrate why the rejected behaviour was not abusive or that the comparative market concept applied by the *Bundeskartellamt* was erroneous, i.e. that the alleged deviation of their prices is objectively justified.[15] Furthermore, Section 29 s. 1 no. 2 ARC establishes that an abuse of dominance can also be constituted by demanding prices that "unreasonably exceed the costs", thereby explicitly codifying the concepts of cost mark-up (cost control) and, respectively, profit limitation.[16] Moreover, while in general proceedings the enforcement of an issued order is usually delayed by judicial recourse the decisions of the competition authorities were made immediately enforceable in course of the introduction of Section 29 ARC.[17] The application of Section 29 ARC has facilitated the investigation of a number of cases of allegedly excessive pricing in the energy sector.

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11 BGH [Federal Court of Justice], WuW/E 1445 ff., 1454 - *Valium II.*

12 The range of possible objective justifications is very limited and subject to debate, see Nothdurft in Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para 119 ff. The case law accepts cost deficits as an objective justification, but only insofar as costs have been duly allocated and all rationalisation reserves have been exhausted (BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz*).

13 See *Lücke* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 29 GWB para 1.

14 Although case law had already established that this was also possible under Section 19 (4) ARC, see BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz*.

15 This shift in the burden of proof applies only to agency proceedings, not to private damages actions.

16 See *Lücke* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol.1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 29 para 37 ff. See also footnote 6 and acc. text.

17 The general suspensive effect of an appeal against a decision of the competition authority on the basis of Sections 19, 20 and 20 ACR, regulated in Section 64 (1) ACR (old version), was abolished.

3. Practical experience

3.1. Earlier Cases

During the 1970s, the *Bundeskartellamt* gained some early experience in the prohibition of excessive pricing practices, particularly in the pharmaceutical sector. The experience illustrated the theoretical and practical difficulties to establish benchmarks through the comparison with other markets and to determine hypothetical competitive prices. The most representative case is the so called *Valium* case.[18] In 1974 the *Bundeskartellamt* investigated allegedly excessive prices charged by a pharmaceutical company for two different products. To establish whether the prices in Germany were excessive, they were compared with those that could be achieved on several other European markets for pharmaceuticals. The price comparison was complimented by a comparison of profits and, within limits, also costs. The analysis led to the conclusion that prices were excessive by approximately 35 % and 40 %.[19]

The decision of the *Bundeskartellamt* was appealed and generally upheld by the Higher Regional Court of Berlin (*Kammergericht*) with regard to the finding of excessive pricing, but the amount by which the prices were considered to be excessive was reduced. The court did not follow all methods and comparative markets used by the *Bundeskartellamt* in its analysis, but based its own estimation of the excessive price, using the comparative market concept, mainly on a benchmark price taken from one particular market it considered most adequate for comparison. The case was again appealed and in its final decision the German Federal Court of Justice (*Bundesgerichtshof*) judged in favour of the company.[20] The court concluded that the market used as a benchmark and particularly the hypothetical competitive price established by the Higher Regional Court of Berlin (*Kammergericht*) were not adequate for a number of different reasons, in particular the fact that contribution made to the benchmark price by the mark-ups ultimately exceeded the component of the benchmark price made up from the actual competitive price. This led the court to the conclusion that the benchmark market used in the comparative market analysis was unsuited.[21]

3.2. Recent Cases

After the introduction of the new provision Section 29 ARC in 2007 and the establishment of a specific decision division with a focus on cases of abuse of a dominant position in the energy sector in 2008, the *Bundeskartellamt* successfully initiated a number of proceedings against companies in the energy sector on account of alleged abusive practices.

3.2.1. Gas Suppliers

In 2008, the *Bundeskartellamt* analysed the prices of 35 suppliers of natural gas. The companies were suspected of having charged abusively excessive prices in the years 2007 and 2008 in the markets for the supply of household customers with heating gas. The proceedings were conducted under both Section 19 and Section 29 ARC. Proceedings concerning the year 2008 were subject to Section 29 ARC which could then be applied for the first time.

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

19 BGH [Federal Court of Justice], decision of 16. 12. 1976, KVR 2/76 – *Valium.*

20 BGH [Federal Court of Justice], WuW/E 1445 ff., 1454 - *Valium II*.

21 *Ibidem.*

In its investigation the *Bundeskartellamt* examined whether the respective gas prices differed considerably from those of comparable companies. Incorporating elements of the profit limitation concept into its comparative (geographic) markets approach, the *Bundeskartellamt* checked net revenues[22] for 2007 against those of other public utility companies. This approach enabled the *Bundeskartellamt* to analyse price changes over time, take into account the importance of specific tariffs in the portfolio of the individual companies, and compare prices irrespective of their specific form. Revenue diminishing factors that could not sufficiently be controlled by the companies, such as taxes or the (regulated) grid fee, were deducted. For 2008, quantity-adjusted net tariffs, which were considered the best proxy for revenues, were compared.[23]

As required, the *Bundeskartellamt* also added a mark-up (*Erheblichkeitszuschlag*) to the compared revenues and tariffs to account for the requirement of a substantial deviation. The amount of that mark-up was calculated depending on the degree of competition in the market. This approach was also expected to defuse the conflict between the objective of prosecuting excessive pricing and not diminishing incentives for newcomers to enter the market, as consequently price control conducted by the *Bundeskartellamt* would subside in markets characterised by increasing competition. As a possible objective justification for price differences, particularly cost deficits (*Kostenunterdeckung*) were accepted, provided that costs had been duly allocated and rationalisation reserves had been fully exhausted.[24] Especially relevant in this context were differing procurement costs, which the *Bundeskartellamt* accepted as justified up to the average procurement costs of companies in the same or comparative markets.[25]

The proceedings could be concluded quickly with commitment decisions[26] whereby the suppliers under investigation offered commitments in all cases that were investigated in-depth after the initial stage. This might be explained by the stricter instruments established in Section 29 ARC. Apart from financial compensation of consumers, the commitments made by the companies also included commitments to stimulate competition, for example by making it easier for new suppliers to win customers by granting these suppliers access to a detailed map of the gas system.

In 2010 the *Bundeskartellamt* verified that the gas companies had abided by their commitments and estimated that consumers had received financial compensation amounting to a total of € 444 million.[27] Consumers were compensated by direct financial re-imbursement in the amount of around € 130 million; the rest consisted of financial easement when numerous companies refrained from passing on cost increases

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22 The revenues are calculated by price times quantity and are adjusted for factors that cannot be influenced by the company.

23 Quantity-adjusted net tariffs were used to predict revenues for 2008 as the relevant data were not available for the year 2008 at the time of the decisions. Tariffs were compared on the basis of several archetype consumption patterns, adjusted for temperature-dependent differences in monthly gas consumption based on historical data. See for example Bundeskartellamt, decision 01.12.2008, WuW/E DE-V 1704 – *RheinEnergie*.

24 With this the *Bundeskartellamt* followed the case law, see BGH [Federal Court of Justice] WuW/E DE-R 375 ff. - *Flugpreisspaltung*, stipulating that a dominant firm may not be forced to sell its goods and services at prices below costs, provided that costs have been adequately allocated and all rationalization reserves have been exhausted.

25 See Bundeskartellamt, Activity Report (Tätigkeitsbericht) 2007/2008 = Deutscher Bundestag [German Federal Parliament] – 16. Wahlperiode, Drucksache 16/13500, page 30. Available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf.

26 On the basis of Section 32 b ACR, making the commitments binding on the undertaktings.

27 See Bundeskartellamt, Activity Report 2009/2010 = Deutscher Bundestag [German Federal Parliament] – 17. Wahlperiode, Drucksache 17/6640, page 120. Availabe only in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf.

in the two years following the proceedings. Moreover, the evaluation showed that competition on the end-consumer level was not stifled but had consistently gained momentum after the proceedings.[28]

3.2.2. Heating current

In 2009, the *Bundeskartellamt* initiated proceedings under Sections 19 and 29 ARC against 18 suppliers of electricity for heating purposes (electrical heat pumps, night storage heating). The proceedings focused on end consumer prices charged by the suppliers in the years 2007, 2008 and 2009. In total, 25 companies were investigated.

The *Bundeskartellamt* applied a comparative market concept that was consistent with the one used in its proceedings against gas suppliers. The *Bundeskartellamt* established net revenues per year and compared these to those of other companies active on different geographic markets. Factors with an impact on the revenues that could not be influenced by the companies, e.g. taxes or licence and grid fees, were deducted from the comparative net-revenues and a substantiality mark-up (*Erheblichkeitszuschlag*) added. The *Bundeskartellamt* regarded higher procurement and distribution costs as possible objective justifications, but only as far as they were justifiable under efficiency considerations.[29] In its calculation, the *Bundeskartellamt* accepted quantity-adjusted average procurement costs of all investigated companies, while with regard to distribution costs it accepted the average costs of the five most efficient companies - incorporating elements of a cost mark-up approach into its analysis[30] .

As in the gas price cases, most of the cases could be closed with committment decisions when the companies offered commitments that included lower prices, financial compensation of customers and measures to increase transparency in the market. Financial compensation amounted to a total of more than € 27 million and consumers received at least another € 20 million when companies, not least with regard to the then ongoing proceedings, refrained from raising prices in 2010 despite rising costs.[31] In addition, the electricity suppliers made further comprehensive commitments. The companies promised a transparent publication of electric heating tariffs on the Internet; the establishment of temperature-dependent load profiles by the network operator and transparent publication of load profiles on the Internet by the network operator. It is expected that these commitments will decrease market entry barriers for new competitors and make it easier for consumers to switch providers, thereby stimulating competition in the market.

3.3. Private Enforcement

In addition to public enforcement activities by the *Bundeskartellamt*, excessive pricing by a dominant undertaking has occasionally been successfully challenged in civil law suits, recently in an action for damages in 2010.[32]

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28 *Ibidem.*

29 In line with the case law, BGH [Federal Court of Justice] WuW/E DE-R 375 ff., 377 - *Flugpreisspaltung*. See for example Bundeskartellamt, case B10-13/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/archiv/EntschMissbrauchaufsichtArchiv/2010/EntschMissbrauchsaufsicht.php.

30 See *Bundeskartellamt* 2010, Heizstrom – Marktüberblick und Verfahren, p. 6. Availabe only in German at http://www.bundeskartellamt.de/wDeutsch/publikationen/Diskussionsbeitraege/Stellungnahmen.php.

31 Bundeskartellamt, Press release of 29 September 2010, available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2010/2010_09_29.php.

32 OLG [Higher Regional Court] Frankfurt a.M., decision of 21.12.2010, 11 U 37/09 (Kart) – *Arzneimittelpreise.*

The circumstances of the case were however quite specific and may not be suited as a model for other cases. A seller of pharmaceuticals had claimed excessive pricing by its contract manufacturer, which, after moderate price increases over several years, suddenly had raised prices by 400 % without sufficient objective justification, as the court established. Therefore, the claimant was entitled to damages, which the court calculated as (equalling) the difference between the price paid by the claimant and the price that would have been demanded under competition. To estimate that difference, the court applied a (temporal) comparative market concept, comparing the allegedly excessive price of the contract manufacturer with prices the company had asked in the past. An accepted moderate price increase of 10% and a mark-up to account for a substantial deviation (*Erheblichkeitszuschlag*) of 20% were added to the hypothetical competition price. Compared to the resulting benchmark, a price increase of 400 % was seen to "undoubtedly" exceed the threshold of a substantial deviation.[33]

Although several aspects in the reasoning of that judgment may be questioned,[34] including the market definition used and the method applied to estimate the competitive price, it shows that under certain conditions excessive pricing can also be successfully challenged by private parties in civil law suits, even without a prior public proceeding by the *Bundeskartellamt*. It is important to note, however, that in civil proceedings the court has considerably larger discretion in assessing the amount of damages (in this case the part of the price that was deemed abusively excessive) than the *Bundeskartellamt* has in estimating the excessive proceeds in its own proceedings concerning excessive pricing.

4. Conclusion

Despite the difficulties raised by complex excessive pricing cases, the experience in Germany shows that by pursuing such abusive practices, even when cautiously focusing only on the most exorbitant excessive pricing cases, benefits for consumers can be achieved reasonably quickly and other tools available to competition authorities can be deployed to foster the emergence of competition in dominated markets.

33 *Ibidem*, para 30.

34 See Wiemer, „Der `reine´Preishöhenmißbrauch – das unbekannte Wesen", WuW vom 05.08.2011, Heft 07-08, p. 723 ff.

GREECE

1. General remarks

In excessive prices cases, the dominant undertaking takes advantage of its dominant position by extracting profits from the consumers which do not correspond to the true value of the product or service provided by it. The dominant company has a special responsibility to refrain from such wealth transfers and from exploiting consumers.

The scenario at issue comes to play, *inter alia*, prominently, where the products of the dominant company are priced significantly higher than in another area where competition functions, without valid objective justification. The prohibition of unfair terms, in general, can address the inexistence of countervailing buyer power at consumer level and issues of inequality between producers, intermediaries and consumers which have a strong impact at the marketplace, especially in small, concentrated markets and with regard to SMEs.

Exploitative abuses as a whole, and in particular the prohibition of excessive prices as an antitrust offence, represent nowadays an increasingly controversial legal basis and subject of intense debate. In the markets where one firm is dominant, the prices are normally much higher than in competitive markets, due to the fact that the dominant undertaking may behave independently from its competitors, customers and consumers (as it does not face sufficient competitive pressure). In these cases, high entry barriers and/or other market-specific conditions may often act as a serious disincentive for other companies to enter the market, despite the prevalence of high prices.

Criticism against intervention in such cases usually revolves around two key themes:

- First, that markets tend to be self-correcting, and
- Second, that competition authorities, when applying the excessive prices prohibition, become *de facto* price regulators, a function for which they are ill-suited.

Despite severe criticism against excessive prices being pursued as an antitrust offence, there may well be valid public policy/general interest reasons for competition authorities to intervene, especially in times of economic crisis, which in turn explains the use of competition law-based prohibitions in many jurisdictions [see point (a) below]. The same may be true, albeit not to the same degree, with regard to other types of regulatory intervention aiming at suppressing excessive prices (the latter often being used by regulators as a 'last resort').

Under EU law and practice, there is no indication that the analysis of excessive prices should be contingent upon the existence of abusive exclusionary conduct. Consequently, the tying and/or merging of the two do not seem to be justified. Indeed, fairness considerations encompassed by the said provision do not always entail foreclosure.

1.1. Under what conditions do excessive prices require intervention?

Intervention may be necessary in situations where there is limited potential for market self-correction (or self-correction within a reasonable time-frame). This may be particularly the case where high entry barriers and the aggressive signalling of the dominant firm costs will often prevent entry and, therefore, high prices do not function in practice as an incentive for the entry of other companies. Indeed, the paradigms of self-correcting excessive prices do not appear to be the norm. In smaller economies, the problem can be more acute due to market size limitations, which facilitate in practice the preservation of monopoly power. Especially in cases of durable monopolies or hidden entry/expansion barriers, where the infringement may easily perpetuate, the prohibition of excessive prices may, thus, assume particular importance.

Furthermore, excessive prices are widely perceived to exert the most direct negative impact on consumers. Given the perceived ensuing detriment to consumers, there is often popular support for regulatory intervention, which in turn may increase its legitimacy.

As an aside, competition authorities, especially in smaller economies, have very limited resources and, hence, are likely to concentrate their efforts only to markets and prices where there is a manifest dysfunction. In other words, type II errors, even if we accept that they have a higher potential to damage the marketplace, are likely to be more rare, because typically the authorities will concentrate their efforts in markets that are highly problematic. In this context, the probability for type II errors and the costs associated with it appear to be overstated. Moreover, the fact that the prohibition targets supra-competitive profits reduces the risk of undermining *legitimate* investment incentives. In any event, it has not been empirically shown that providing immediate relief in favour of short-term consumer welfare through the prohibition of excessive prices has, in fact, undesired effects for the consumers.

In essence, excessive prices require intervention whenever prices charged either to consumers, or to intermediate customers, represent an amount that is significantly higher than a 'normal' [reasonable] profit margin that would be obtained in competitive markets. This criterion constitutes the basis of all the individual tests devised for assessing the excessive nature of the prices. Its application may be fairly straightforward in cases, for example, of monopolies (especially temporal or location-specific) charging prices that are in themselves excessive in the sense that they are multiples of the prices charged for exactly the same product under different circumstances – bearing no substantial influence on costs. However, not all situations are so clear-cut and the said criterion may be very complex to apply in practice.

The fact that the prohibition refers to supra-competitive profits is essential to the understanding of the concept. The raising (or maintenance) of prices significantly above a competitive level by a dominant company may be both a symptom of dominance and an illegal unilateral practice. Obviously, under EU competition law, the possession of dominance is not as such condemned. Nonetheless, the capacity derived from dominance to raise the prices to supra-competitive levels cannot serve as an objective justification for such conduct.

1.2. Should excessive prices be dealt with by competition authorities or rather by regulators?

Based on the above considerations, namely on the assumption that unfair prices, significantly higher than a reasonable benchmark, may indeed warrant intervention and given, moreover, that competition law may attempt to reproduce competitive conditions in [quasi-] monopolistic environments ('*als ob*' competition), it is our view that excessive prices can be dealt with – at least concurrently – by competition authorities.

Competition authorities may be better placed to assess the impact both of the dominant firm's conduct and of intervention, having a global perception of the market structure. Furthermore, they are likely to intervene in a more selective, targeted and cautious way, while respecting the basic underpinnings of a functioning market economy. Application of the prohibition by competition authorities, albeit to a limited degree in practice, has generally proven to be beneficial to the general interest. On the contrary, abolition of the prohibition of excessive prices as antitrust offence might possibly have detrimental effects to the dynamics of the market, and, finally, to consumers.

On the other hand, other regulators may indeed have higher expertise in specific sectors of economy exhibiting special characteristics and/or sustained inefficiencies, as well as the ability to monitor relevant market developments and compliance in a more systematic way.

1.3. What are the different economic methodologies for assessing excessive prices?

The reasonable application of the prohibition is usually achieved through the use of various benchmarks, both the need for intervention and the unreasonable nature of the price as compared with the economic value of the product/service concerned. The price level of a product constitutes a reliable indication for the existence of an abuse of dominant position. Excessive prices may be founded when the price is disproportionate with reference to the economic value of the product / service and the difference between production costs and the final price of the product is significantly higher than a reasonable profit margin for the dominant company. At EU level, even a difference of 25% between final price and economic value may be deemed unfair in particular circumstances,[1] although in most cases a significantly higher differential is warranted in order to substantiate an abuse in the form of excessive prices.

Competition authorities and regulators have attempted to use various methodologies to detect and verify excessive prices, usually involving price-cost, direct price and/or profitability benchmarks. In practice, enforcers often proceed to comparisons with appropriate reference points ('yardstick competition'). Such reference points may include:

- competing products or equivalent transactions / services in other appropriate (local or foreign - in the same or in other states) geographical markets where competition functions, i.e. the pricing of other appropriate / similar undertakings in the same or in comparable markets ['benchmarking'],

- products or equivalent transactions / services of the company under examination in other appropriate geographical markets where competition functions,

- comparison of the profit of the dominant firm derived from the commercial activity in question to the normal profits, derived in a competitive environment or to the profits of competing undertakings in other geographical (similar) markets,

- a commonly accepted economic index (average annual price of the product in question in the reference jurisdictions).

There are, hence, no strict, clear-cut rules as to a specific 'blanket' reference point to decide the excessive nature of the price. This could depend on the available evidence, the appropriate reference points and the peculiarities of each case. The yardsticks should refer, however, to comparable, similar products or services (with identical or similar characteristics and quality in a relevant time-period), with a view to ensuring the reliability of any such price comparisons. Given the inherent limitations of profitability, price-cost and direct price comparisons, some authorities apply as many methodologies as possible in any given

[1] Deutsche Post 2001 (COMP/C-1/36.915, par. 166 et seq.).

case, with a view to ensuring the reliability of the overall assessment (see e.g. the UK paradigm of the Napp case, which applied the so-called "*predominance of evidence*" test based on different benchmarks).

It would be conceivable for a legislator to adopt a quantitative benchmark, i.e. a kind of a cost-plus threshold, over which the price is presumed (rebuttable presumption) excessive. Nonetheless, this option could lead to an umbrella pricing situation, whereby many companies raise their prices slightly under the said threshold, to the overall detriment of competition in the marketplace. On the other hand, the dominant company might already be pricing higher than the cost-plus threshold, the latter price thus serving as the price-umbrella in any event.

The fact that the dominant company does not, or would not, impose to its subsidiaries these exploitative terms, conferring to itself unfair economic benefits, is a criterion that could also be used to assess the unfair nature of the terms in question.

The difference between the exploitative price and the price that is (or would be) paid in a competitive reference market, represents the loss of the consumers, their wealth transferred to the dominant company.

Under EU competition law, it is settled case-law that charging a price which is excessive because it has no reasonable relation to the economic value of the product or service supplied may be an abuse of a dominant position. 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[2]. In order to assess the level of the profit margin, enforcement authorities should have as reference *reasonable* costs. 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 unfair either in itself or when compared to competing products[3].

Finally, the price is checked against any valid objective justification that the dominant company might argue. In order to assess whether an abuse of dominant position may have taken place, the appropriate costs to be taken into account and compared to the price may be those of a hypothetical, efficient company, instead of the actual costs of the dominant undertaking in question, which may exhibit signs of the monopolist's inertia. The existence of an excessive or disproportionate cost (e.g. unjustifiably high operational costs, excessive salaries, inefficient management etc) cannot be a decisive factor in the assessment of the unreasonable nature of the prices.

1.4. What could be appropriate remedies in excessive prices cases?

Devising the appropriate remedies in excessive prices cases may be particularly challenging. In this context, enforcers have attempted to impose profitability and/or price caps, to take measures aimed at reducing barriers to entry, while also imposing fines.

The HCC has used a number of remedies in order to address the issue (see Part B below): for example, it has ordered the dominant company to set the fees at the levels prevailing before the infringement had started with an annual adjustment at a rate equal to the weighted average increase of similar products/services, it has set a percentage as the dominant firm's maximum fee, it has increased transparency

2 See, inter alia, Case 226/84 British Leyland v Commission [1986] ECR 3263, par. 27, Case C-340/99 TNT Traco [2001] ECR I-4109, par. 46 and Case C-385/07 P Der Grüne Punkt – Duales System Deutschland GmbH v Commission of the European Communities [2009], par. 142.

3 See Case 27/76 United Brands Company and United Brands Continentaal BV v Commission [1978] ECR 207, par. 252.

by ordering the publication of all kinds of fees imposed. It has, furthermore, imposed significant fines and pecuniary penalty per day of non-compliance.

Ordering the dominant company to price below the benchmark price, as well as other structural and behavioural measures may also be explored. In addition, cost-oriented pricing may be the appropriate remedy in cases of access pricing, following the methods that have been tested in regulated sectors. Any remedies should, of course, be combined with measures aimed at eliminating barriers to entry, unjustifiable regulatory obstacles to competition and/or any underlying exclusionary conduct of the dominant company. Finally, disgorgement of illicitly gained profits through private enforcement is another measure that could be combined with public enforcement remedies.

2. Paradigms from the HCC's practice

A number of recent cases, some of them rejecting excessive prices complaints, have shaped HCC's approach to the issue in question. In principle, according to the HCC, in order to find an infringement of article 2 par. 2 a) l. 3959/2011 (the Hellenic antitrust legislation), fully aligned to article 102 TFEU, the main criterion is the unjustified imposition of prices not corresponding to the economic value of the product or service in question, or, in other words, the intensive, unjustified, asymmetry between the product or service and the fee paid in exchange, whilst, at the same time, the actions of the dominant company create economic benefits that could not have accrued in a normally functioning (competitive) market [see e.g. HCC Decisions 24/1982 and 433/V/2009].

2.1. HCC Decision 502/VI/2010

In its Decision 502/VI/2010 [investigation in refineries], the HCC acknowledged that Article 102 TFEU and its Greek equivalent provision aim, *inter alia*, at conducts resulting in the direct exploitation of consumers, such as the imposition of unfair prices. Dominant undertakings are under the obligation to refrain from the exploitation of their position to such an extent, or in such a way, that prices or other trading conditions which do not pertain to the normal functioning of the market, and could not have been imposed without the economic power accompanying dominance, are imposed. According to the case-law of the HCC, the abusive nature of the dominant firm's pricing is determined by comparing the said price to the one that would have prevailed under competitive conditions. The price in a different, competitive, geographic market or an 'artificial' price (cost plus reasonable margin) can be used as benchmark. The differences between the market at issue and the reference market may be taken into consideration by means of certain incremental increases to the comparative price. Nonetheless, a high price cannot be deemed to constitute an abuse every time that it exceeds the 'hypothetical' competitive price, but only when the resulting price differential is significant.

The Decision in question referred to the two-prong test originating from the seminal United Brands case[4]: in order to determine whether a price is excessive, the enforcer has to firstly assess whether the difference between the costs actually incurred and the price actually charged by the dominant firm is excessive, and, in the affirmative, whether a price has been imposed which is unfair, either in itself, or compared to competing products. The disproportionality prescribed by the first part of the test means that the profit margins of the dominant firm are excessive. As to which cost measure is appropriate for such a comparison, it would be plausible to use marginal cost (MC), long-run average incremental cost (LRAIC), or the average total cost (ATC). However, large profit margins are not decisive, *per se*, whereas, also, the quantifiable production costs may not be the actual ones, since it may not include the risk factor. In order for the second part of the test to be fulfilled, the HCC considered that an analysis of costs and profits of the

4 Judgment of the Court of 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, Case 27/76, ECR 207, par. 252.

dominant company, as well as a competitive analysis of markets exhibiting similar characteristics should be undertaken. In the case at hand, due to the peculiarities of the market and the inability to calculate the cost measures, the first part of the test could not be fully assessed. However, the HCC considered that the second part of the test could not be deemed to be met to the requisite legal standard. Following the Port of Helsingborg[5] dictum on the concurrent nature of the two parts of the test, the HCC thus concluded that an abuse of dominance in the form of excessive prices could not be established.

2.2. HCC Decision 489/VI/2010

The HCC had followed exactly the same reasoning in its decision 489/VI/2010 [Aeroclubs vs EKO - supply of aviation gas]. In order to assess whether the conduct of the defendant constitutes an abuse of dominant position, the HCC compared (a) the cost with the final price (first part of the United Brands test) and (b) the pricing policy of EKO in the three markets where it was active, on the one hand, and the pricing policy of another company, BP Hellas, in the airports where the latter is active, on the other hand (second part of the United Brands test). In the case at hand, the HCC accepted ATC as a proxy. From the comparison of the annual ATC of the EKO (per airport, for 2008) and the sale price of the fuel to its clients, it occurred that the latter did not have to pay a price significantly higher as compared to the cost. Furthermore, based on a comparative analysis of different geographic markets, it was found that the cost-plus differential was not at levels so high that it could be deemed excessive (especially in view of the excessive prices European courts case-law). According to the Decision, the profit margins of the EKO were not, at any rate, excessive. In addition, its gross profit margins had been declining over time. Thus, it was not possible to substantiate a significant difference between the cost and the price of the fuel, or excessively high profit margins (i.e. the first part of the United Brands test was not fulfilled). Since the two parts are cumulative, the second part did not have to be examined.

However, the HCC proceeded with examining the pricing policy of EKO in the three markets where it is active as against the pricing policy of competitor BP Hellas in the airports were the latter was also active. Indeed EKO priced differently the product at issue, however, the divergence was deemed relatively low as between the relevant airports. These amounts were further considered significantly lower by comparison to the standard used in excessive prices cases. According to the HCC's findings, these occurrences of higher pricing appeared to have been objectively justified, on the basis of e.g. special geographical conditions, the seasonality of demand, the transportation cost of the fuel and the sale volumes, which, in the Greek regional airports, are lower. The comparison between prices imposed by the dominant firm in the relevant market and the prices of the other firms in different geographic markets, did reveal that EKO's prices tended to be higher than those of BP Hellas. However, these differentials were also considered to be objectively justified (different VAT coefficient, the seasonality of demand, the transportation cost). In any event, the general divergence in retail prices between EKO and BP Hellas was found to be largely due to the lower supply cost which BP Hellas enjoyed as importer of the product, whereas EKO in fact operated as a retailer. The level of the ensuing differentials could not substantiate allegations of abuse of dominance (by reference to either prongs of the United Brands test). Overall, it could not be alleged that the price imposed to the final consumers was *per se* unfair and not corresponding to the economic value of the product supplied, since, to calculate the final price, the high, external sunk costs required for the activity of the undertakings concerned (besides the supply cost), should also be taken into consideration. The complaint was therefore rejected.

2.3. HCC Decision 456/V/2009

In Decision 456/V/2009, pertaining to a request by the Center for the Protection of Consumers about the fees of the parking lots at Macedonia airport, the HCC issued an interim decision, finding that the

5 23.7.2004 - COMP/A.36.568/D3 Port of Helsingborg.

monopolist managing the parking lots at the airport (CS&R) has proceeded to excessive increases (multiplicates of inflation) in the prices of the three parking lots, which substantially harmed the consumers.

2.4. HCC Decision 317/V/2006

In another example of application of the said legal basis [HCC Decision 317/V/2006], the HCC examined the complaint against Periandros S.A., a company dominant in the market of sea excursions in the area of the Isthmus of Corinth. Periandros S.A. had been awarded through a concession agreement the exclusive right to manage the canal (the Isthmus), to set the amount of the dues (fees) and collect them, whereas it also had the right to buy and operate bateaux mouches in the strait. According to the complainant, Periandros S.A. used its exclusive rights in order to reinforce its operation in the market for sea excursions by introducing its own excursion ship named Canal Vista, while applying an excessive increase of the dues that complainants had to pay for the passage of the canal. In particular, Periandros S.A. gradually increased the dues for the passage of the strait by 852% from 2001 to 2004. The dominant company claimed that the increase took place in order for the dues to be assimilated to boats of the same category of other registers. However, the increase was disproportionately high for the boats of the complainants, which went through the canal with greatly increased frequency, compared to the boats of other registers, in order to reach nearby destinations. The HCC found that the said increase was too onerous for the complainants who transited the canal regularly and that the assimilation of dues for different categories of boats transiting the canal in different frequencies and for different reasons was unjustified. It concluded that Periandros S.A. abused its dominant position by excessively increasing of the dues for the passage of the canal, which in turn created extremely onerous conditions for the commercial activity of the complainants, thus, foreclosing the latter in the market for sea excursions. The HCC ordered the dominant company to set the dues for professional yachts providing regular sea excursion services along the canal and in its vicinity at the level of 2001, while providing for an annual adjustment at a rate equal to the weighted average increase of the dues of the other categories of boats.

2.5. HCC Decision 245/III/2003

In a case dating from 2003, AEPI [HCC Decision 245/III/2003, Xarhakos and others vs AEPI (Hellenic Society for the Protection of Intellectual Property)], the HCC found, *inter alia*, the fees on the mechanical rights to be excessive. It was also concluded that AEPI has abused its dominant position by imposing other unfair terms on the contracting artists. In its ruling, the HCC fixed a maximum fee calculated on the amount collected by AEPI for the mechanical rights of its members, recommended that AEPI publish in its website all kinds of fees applied and imposed a significant fine and a pecuniary daily penalty in case of non-compliance. According to the said Decision, abusive, excessively high prices are not only those that incorporate excessive profit, but also those that result because of the extremely and unjustifiably raised operational costs of the dominant company. The HCC opted for using, as a benchmarking, comparisons with foreign collective management organizations operating in different geographic markets, instead of attempting to assess the 'artificial' price /cost + reasonable profit margin. This choice was, in part, due to the difficulty in determining both costs and 'reasonable' margins. It was further based on the assumption that collective management organizations, which are typically monopolistic, operate under comparable situations in different geographic markets; furthermore, in such a monopolistic-type scenario, it is not necessary that the price under examination be significantly higher than the price which is taken as a benchmark. At the case at hand, AEPI had imposed a commission rising to 21%, whereas in the reference market (fully comparable with regard to scale), the corresponding collective management association only imposed a 10% commission.

However, upon appeal, the Court of Appeals referred the case back to the HCC, essentially requiring it to undertake a more in-depth cost analysis. The Court considered that the appropriate criterion for assessing the rate of the commissions paid to AEPI should consist in the cost of the service provided in Greece, since,

in case of non-similar markets, the cost analysis represents the safest method which allows for the peculiarities of the Greek market to be taken into account.

3. Conclusion

There are valid public policy/general interest considerations for intervening in cases of abusive excessive prices, particularly in times of economic crisis, when consumer power is weakened. This is indeed the case in situations where market self-correction is unlikely to occur within a reasonable time-frame, notably due to sustained high barriers to entry.

Competition authorities are often well placed to deal – at least concurrently – with such cases, despite the inherent difficulty in devising and applying the appropriate methodologies and benchmarks to substantiate the abusive conduct of a dominant undertaking in that respect. Cases of abusive excessive prices are indeed still pursued, particularly in smaller economies where there may be an increased need for action, with a view to procuring immediate benefits for consumers through direct intervention.

Nonetheless, caution is required when applying the prohibition of abusive excessive prices. Competition authorities should strive to enhance and diversify the tools available in their disposal for detecting and verifying the unreasonable nature of the price as compared with the economic value of the product/service concerned. In this context, the use of several methodologies (pertaining to profitability, price-cost and direct price comparisons) and benchmarks with appropriate reference points ('yardstick competition') can be used.

Finally, it might be helpful to explore further the relationship between, on the one hand, excessive prices and imposition of unfair terms, and on the other hand, discrimination, constructive refusal to supply, margin squeeze and the imposition of FRAND obligations. Looking closer on the intertwining between the above legal bases would help to avoid double standards (i.e. the imposition of dissimilar standards to similar situations).

HUNGARY

1. Introduction

Article 21 of the Hungarian Competition Act (similarly to TFEU 102) prohibits the abuse of a dominant position, and explicitly mentions a prohibition to set unfair selling prices.[1] Excessive pricing comes under this heading, and therefore excessive pricing cases are investigated by the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH).

Excessive pricing may be either an exploitative or an exclusionary abuse. In the former case, excessive pricing is a direct exploitation of existing market power, where the dominant firm charges a high price to its customers. In the latter case, the excessive price forms part of an exclusionary strategy, where the dominant firm aims to strengthen or maintain its market power through putting its rivals at a disadvantage.[2] Exploitative and exclusionary excessive prices are based on different legal and economic principles. In this essay, we focus only on *exploitative excessive pricing*.

The following table shows the number of (closed) cases of exploitative excessive pricing where the Competition Council of the GVH made a decision,[3] and also the number of cases where the GVH intervened, either through accepting commitments or declaring an infringement.

	2002	2003	2004	2005	2006	2007	2008	2009	2010
# Decisions	6	15	10	14	12	9	2	0	0
# Infringements	1	3	1	1	1	0	0	0	0
# Commitments	0	0	0	0	2	5	3	0	0

In our discussion we follow the four main questions posed in the call for contributions.

2. Under what conditions do excessive process require intervention?

A certain number of cases of alleged exploitative excessive pricing come to the attention of a competition authority, yet not all these cases are in fact investigated. In turn, not all cases that are

1 Article 21 reads as follows: "It shall be prohibited to abuse a dominant position, particularly: a) in business relations, including the application of standard contractual terms, to set unfair purchase or selling prices or to stipulate in any other manner unjustified advantages or to force the other party to accept disadvantageous conditions; …"

2 For example, the dominant firm in an upstream (wholesale) market may set the price of its product so high that the margin between its price and the retail price is insufficient for an efficient firm to operate profitably in the downstream market (this is also known as a margin squeeze).

3 This number is lower than the total number of cases investigated, since cases can, under certain circumstances, be closed by the case team, and thus no formal decision is taken by the Competition Council. This occurs, for example, when dominance cannot be demonstrated or excessive pricing obviously cannot be proven.

investigated eventually lead to intervention – in some cases, it turns out that no abuse has taken place, the alleged abuse cannot be proven, or the firm is not in a dominant position. The decision on which cases should be pursued is often based on so-called *screening criteria*.[4] In this section we describe the GVH's stance towards screening and screening criteria.

It is important to acknowledge that exploitative excessive pricing raises many difficulties, conceptual as well as methodological. The investigation of excessive pricing cases is also quite resource intensive. These factors might necessitate the implementation of some kind of screening.

Based on Article 21 of the Hungarian Competition Act, the GVH has a duty to investigate cases of possible exploitative excessive pricing. Several possible cases, however, may be minor in the sense that they influence the welfare of only very few consumers, or only to a small degree; furthermore, proving that pricing was excessive may be extremely time-consuming and costly. In these cases the costs of conducting (or completing) an investigation could outweigh the benefits (even taking into account the possible deterrence effect), which means that it may not be in the public interest for the investigation to be launched, or for it to continue. The Preamble of the Hungarian Competition Act acknowledges the significance of the public interest in this way,[5] and in some exploitative excessive pricing cases, this has been referred to as an important factor.[6]

The GVH does not officially use screening criteria *per se*. However, the GVH tends to agree with general view that in the presence of certain factors investigations into excessive pricing are more validated Specifically, the most often cited screening criteria are the following:

- There should be high entry barriers on the market in question. This is typically regarded as the most important criterion; since in the absence of entry barriers, it can be reasonably expected that exploitative excessive pricing will induce entry and thus eliminate the need for intervention.

- The firm under investigation should have large market power: an especially strong form of dominance should be asserted. It is also more warranted to investigate a firm whose dominant position is not merited by its market conduct (for example, derives from former legal monopoly).

- There should be either no regulation regarding the investigated price or conduct of the firm (or there should be regulatory failure on the market). This leads to the next question: whether excessive prices should be dealt with by competition authorities rather than regulators.

3. Should excessive prices be dealt with by competition authorities or rather by regulators?

Two main questions can be posed regarding the relationship between regulators and competition authorities: first, what the allocation of tasks should be between the sector regulators and the competition authorities in regulated markets, and secondly, which markets should be regulated at all.

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4 Sometimes it is hard to verify whether the criteria are met before a case is actually launched. This means that "screening" can actually take place even after an investigation has started, possibly causing the case to be closed.

5 The Preamble states: "The public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers require the state to protect by law fairness and freedom of economic competition. …"

6 Case Vj-156/2005 concerning exploitative excessive pricing by an electricity operator towards one single customer, for example, refers to the public interest and cites the Preamble.

A core difference between dealing with excessive prices by competition authorities or by regulators is the nature of the intervention: competition authorities intervene *ex post*, that is, after an abuse has taken place, whereas regulation takes place *ex ante*, that is, prices are regulated in a way to ensure that abuse does not take place. Both *ex ante* and *ex post* intervention have advantages and disadvantages:

- In general, preventing abuse is preferred to punishing or remedying abuse.

- Furthermore, *ex post* intervention often takes a significant amount of time. By the time the investigation has taken place and all court appeals have been settled, many important factors may have changed on the relevant market. This means that *ex post* intervention may be less than efficient, especially in quickly changing markets.

- On the other hand, *ex ante* regulation is extremely difficult to plan and implement in an efficient way, and also needs to be constantly monitored, which renders it costly. Therefore, price regulation should be used in relatively few markets, specifically those where there is market failure (externalities, a natural monopoly, information asymmetry etc).

There is no general rule concerning the allocation of tasks between various regulators and the GVH. In the case of regulated sectors of telecommunications and media, the GVH does not have the mandate to investigate exploitative excessive pricing cases.[7] In other (partially regulated) markets, such as energy, water etc, the GVH has the mandate to investigate such cases even if regulation exists – although, of course, firms cannot be condemned for simply adhering to regulated prices.[8]

4. What are the different economic methodologies for assessing excessive pricing?

Methods for assessing excessive pricing all require a benchmark price with which to compare the allegedly excessive price. Methods differ from each other in the chosen benchmark.

Furthermore, in each case it must be decided by how much the price should exceed the benchmark before being deemed excessive, that is, a threshold must be chosen. The choice of threshold is typically dependent on the market in question, can be based on academic papers or case law, but is ultimately always to some degree arbitrary.

Before discussing specific methods, we think it is important to acknowledge three general rules.

- In order to show that an abuse has occurred, it is necessary to prove dominance. However, it is important to note that establishing dominance is not sufficient: a dominant firm's prices will naturally be higher than prices under effective competition, but this is not an abuse in itself. In order to establish an abuse, there is a higher standard of proof and a larger deviation needed from the effectively competitive level than what is needed to assert dominance.

- Whenever possible, more than one method should be used in assessing excessive pricing. Firstly, because neither method is perfect, neither is exact enough. Secondly, because it is especially important in exploitative excessive pricing cases to avoid a Type I error. The GVH tends to agree with the view that when the price of the product can be well compared both to its economic value

7 For example, termination charges are regulated and thus excessive pricing cases cannot be investigated by the GVH in this market. On the other hand, cable television programme packages are unregulated, and therefore cases can be launched.

8 Such investigations, however, are extremely rare.

and to its production costs then both tests should point towards abuse in order for an infringement to be well founded.[9]

- Different tests and different benchmarks typically require different thresholds, depending on the specifics of the case and the industry. For example, if in one test, a 10% threshold is used in a given case then it cannot be assumed that a 10% threshold will be appropriate for a different test in the same case. Also, if a given test is conducted with a 10% threshold in on industry, this does not imply that a 10% threshold is appropriate in another industry.

The following is a list of possible methods. In each case, we cite cases investigated by the GVH where the method has been used.

- Comparison of the firm's prices to other firms' prices in the relevant market.[10]
- Comparison of the firm's prices to its rivals' prices in other markets.[11]
- Comparison of the firm's prices in the relevant market to its prices in other markets.[12]
- Comparison of the firm's current prices with its past prices.[13]
- Comparison of the firm's prices with prices on the commercial exchange.[14]
- Comparison of the firm's prices to its costs.[15]

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9 The European Commission's assessment of United Brands in the Port of Helsingborg cases is also along these lines: case 36.570 (Sundbusserne v. Port of Helsingborg) and case 36.568 (Scandalines Sverige AB v. Port of Helsingborg), date of decisions: 23 July 2004.

10 A large number of excessive pricing cases were investigated in markets where the dominant firm was in fact a monopoly, and therefore this method was seldom used by the GVH. However, in cases when there are rivals in the market, this method is typically a starting point. It was used, for example, in the case of the investigation concerning the wholesale prices of MOL, the Hungarian Oil and Gas Company (Vj-152/2000).

11 This method is typically used when there are several local geographic markets within Hungary, for example, in several cases relating to price increases in cable television programme packages. This method was not the primary method used, however.

12 This method was used in a case against a natural gas distribution service provider (Vj-116/2005), where the firm provided gas to two distinct sets of consumers: to one group, at a regulated level, and to another, in an unregulated market. The unregulated price was deemed excessive, since it was three times as large as the regulated price – and the regulated price had been calculated based on costs, and was therefore itself not an unprofitable price. Similarly, in a funeral service case (Vj-157/2007) the fee for funeral services for foreigners was more than 16 times the price for Hungarians.

13 Typically this method is used when the trigger for the investigation is a significant price rise. The GVH investigated a case (Vj-190/2004), for example, where an energy company increased its prices by 76 and 155% (towards two groups of consumers), and then, 6 months later, decreased them, resulting in prices which were 33 and 71% above the original prices. The Competition Council declared the prices excessive over the first 6 months. Similarly, past prices were used as a benchmark in a group of cases focusing on banking fees.

14 The GVH conducted an investigation into the pricing of MOL, the Hungarian Oil and Gas Company (Vj-152/2000). Among other methods, the GVH compared MOL's pricing with prices on various European stock markets.

- Comparison of the firm's product's profitability with some benchmark.[16]

In our experience, it is also important to determine *for how long* prices should stay (continuously) above the threshold for pricing to be considered abusive. Although this question if of potentially similar importance as the abusive price level itself (and raises similar issues of arbitrariness and the correct methods), it is seldom addressed in cases or even in the literature.[17] We believe that this time period should be "significant" (encompassing at least a few months), but the exact time period should depend on the industry in question.

5. What could be appropriate remedies in excessive pricing cases?

In this section, we discuss the ways in which a competition authority can *intervene* in an excessive pricing case.

We believe it is useful to differentiate between three parts of a possible intervention.

- Adherence: any intervention should prescribe that the dominant firm *cease its abusive conduct*. For example, this could mean lowering prices, or ceasing price discrimination.[18] This may be complemented by explicit indications as to "correct" pricing – something close to price regulation.

- Deterrence: a deterrence effect can primarily be achieved through the levying of a fine.[19] The deterrence effect can be further strengthened through private actions or other specific measures.[20]

- Remedying: we believe that an intervention should only be called a "remedy" in the proper sense if it fixes the root of the problem, ensuring that a similar problem cannot develop again in the market (where this is not only due to the deterrence effect). Examples of such remedies could be

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15 Comparison with costs is used often by the GVH, although typically in conjunction with other methods. For example, the GVH investigated a large number of cases (36 in total) relating to cable television markets; usually the price increases of programme packages at the beginning of the year. As a first step, increases in costs were taken into account (due either to increases in direct costs and inflation). The cases were further investigated if the price rise was significantly above that induced by increases in cost.

16 In the above mentioned cable television cases, the GVH analysed firms' profitability in those cases where the investigated price increase was significantly above that induced by increases in cost. If profitability was excessively large, the price was deemed excessive. If profitability was large, but did not surpass a 15% threshold, then further tests were implemented: among others, the comparison of profitability with previous years' profitability.

17 Specifying a too short space of time result in an unwanted increase in Type I errors.

18 Adherence was the only intervention in the case of the National Office of Translation and Attestation (Vj-141/2007), which committed to decreasing its prices.

19 Two out of the three cable television cases where an abuse was proven resulted in a fine, and fines have been applied in a few other cases as well.

20 For example, in the banking fee cases (eg. Vj-12/2006) parties offered (committed to) reimbursing customers who had paid the higher price.

structural remedies involving divestitures, or behavioural (sometimes called demand-side) remedies in which key features of the firm's behaviour change.[21]

In some cases, major commitments made by firms during the investigation result in a case being closed with commitments rather than resulting in a condemnation.[22]

Finding effective ways to intervene is of course fraught with difficulties. We list only a few of the concerns:

- When a firm must cease its abusive conduct, the question immediately arises as to what the correct conduct (the correct price) should be. Competition authorities (as opposed to sector regulators) may not have the information or the capacity to determine what a "good" price would be.

- Most modes of intervention require a certain amount of monitoring, which may be very costly.

- If a remedy leads to explicit or implicit price regulation, it could decrease the incentives for entry, or innovation.

The adherence requirement is basically automatic; and deterrence might be necessary. But, whenever possible, we believe that the root of the problem should be addressed, through a real "remedy" in the above sense.

Competition advocacy is another way to fixing problems on given markets, that applies to an entire market or markets rather than to a given case. Advocacy can take many forms, for example, the competition authority may advocate the implementation of certain regulations (which influences the supply side of the market), it can attempt to decrease search costs and / or asymmetric information in the market (which primarily influences the demand side of the market), or it could conduct investigations into certain industries to assess the possible competition problems present. The GVH participates in competition advocacy in several ways.[23]

21 No such structural remedies have been implemented by the GVH. For example, a firm could commit to always informing its customers of upcoming changes in its standard contracts. (In the GVH's practice, this took place for example in the banking fee cases.)

22 The banking fee cases were resolved in this way.

23 For example, the GVH has conducted industry investigations in certain key industries (for example, telecommunications and certain sectors of banking). It has also published leaflets explaining certain financial and banking issues in order to decrease asymmetric information between banks and their customers. The GVH also has the mandate to present its opinion on proposed regulations that may have on effect on competition.

ISRAEL

The Israeli Restrictive Trade Practices Act of 1988 includes a prohibition of the abuse of a dominant position. This prohibition is, for the most part, translated from Article 102 of the EC Treaty. Accordingly, one of the instances of the abuse of dominant position is the imposition of unfair prices. In Israel, the rules applying to dominant firms are phrased as rules applying to a "monopoly", where a "monopoly" is defined as a firm controlling over half of the relevant market. Section 29A(a) of the act provides that a monopoly may not abuse its dominant position in a manner that may lessen competition or harm the public. Section 29A(b) lists four cases in which, in particular, a monopoly shall be deemed to have abused its dominant position in a manner that may harm competition or the public. The first such case concerns unfair prices: Section 29A(b)(1) includes the prohibition of charging purchasing or selling prices which are unfair. The antitrust tribunal has generally emphasized in the past that section 29A encompasses both exclusionary abuse and exploitative abuse.[1]

In Israel, abuse of a dominant position is considered a criminal offence, if accompanied by intent to harm competition or the public. Furthermore, it is considered a tort. In two tort cases, brought via consumer class actions, class actions claiming excessive pricing were approved by the Israeli district court. One of them was brought in 1998 against two Israeli credit card companies: C.A.L, which until 1998 had been the sole issuer and acquirer of Visa cards, and Isracard, which was then the sole issuer and acquirer of Mastercard and Isracard (the latter is Isracard's proprietary credit card).2 The class action, which as noted was approved by the district court, argued that the considerable drop in merchant fees following the entry of a new credit card company, Visa Alpha, into the Visa market, indicates that the pre-entry merchant fees set by C.A.L and Isracard were excessive.3 Ultimately, the class action was disapproved by the Supreme Court in March 2005, on the grounds that Visa Alpha collapsed shortly after its entry, and the plaintiff failed to rebut the claim that post-entry prices were below cost rather than competitive.4 Absent a cost-based benchmark, or another reliable benchmark, aimed to prove that defendants' prices were excessive, the Supreme Court ruled that there was no alleged merit to the class action.

The second class action that has been approved by the Israeli district court, in December 2003, argued that the 400% drop in the prices of international phone calls to and from Israel following the opening up of the market for competition indicates that the pre-entry prices of the former monopoly provider, Bezeq international, were excessive.[5] Here too, however, the Supreme Court ultimately overruled the district

1 See monopoly case 1/93 Director General of the Antitrust Authority v. Dubek; appeal 7/95 Bezeq v. Director General of the Antitrust Authority, paragraph 8. These two cases did not explicitly address an excessive pricing claim.

2 See B"SHA 106462/98 Howard Rice v. C.A.L. Ltd. (date of decision 29/1/2003.)

3 See R"AA 2616/03 Isracard v. Howard Rice (date of decision 14/3/2005.)

4 Due to its final decision against the class action, the Supreme Court did not reach a conclusive decision regarding the general question of whether "unfair selling prices" include excessive pricing.

5 See A 2298/01 Kav Machshava Ltd. v. Bezeq Beinlumi Ltd. (date of the decision 25/12/2003.)

court's decision. The reason was that prices for international phone calls had been regulated in the relevant period.[6]

A third class action was brought against a cable television company, Matab, on the basis of its substantial price cuts following the entry of a new satellite television provider, YES, into its market. The court in this case was reluctant to apply the "post entry price-cut" benchmark used in the previous two class actions, and demanded a direct comparison between prices charged by the dominant firm and its costs. Accordingly, the class action was dismissed by the district court.[7] In all three cases, the alleged damages were equal to the difference between the pre- and post-entry prices multiplied by the pre-entry output level.

In all of the above-mentioned cases, the plaintiffs attempted to use a post-entry price cut benchmark. That is, they tried to show that pre-entry prices were excessive by comparing the price the monopoly charged before entry into its market and the price it charged in response to new entry. Allegedly, the post-entry price serves as a reasonable benchmark because it reflects competitive pressure that occurred after entry and hence approximates the competitive price.[8]

At first blush, an antitrust agency faced with competitive post-entry prices may hesitate to intervene, since by definition the excessive price no longer exists after entry. When the antitrust agency is concerned also with deterrence of violations, however, and not only with the correction of existing violations, a post entry price cut benchmark may regain its appeal. Furthermore, the use of a post-entry price cut benchmark for showing excessive prices seems typical to an antitrust regime that accommodates private plaintiffs suing for tort damages and claiming an antitrust violation.

In particular, a private plaintiff could claim that the damage inflicted on consumers due to excessive pricing is at least as large as the difference between the pre- and the post-entry price, multiplied by the dominant firm's pre-entry output level.[9]

The policy of the IAA is that the prohibition of unfair selling prices includes both predatory pricing and excessive pricing. Indeed, under certain circumstances, both predatory prices and excessive prices are difficult to assess. However, in cases where a suitable benchmark approximating the competitive price is obtainable, the IAA will not hesitate to address excessive pricing by monopolies.

Israel is a small economy in which many markets are concentrated and characterized by high barriers to entry. There are currently 67 declared monopolies in Israel,[10] some of which hold a dominant position in

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6 Here too, due to the outcome of the case, the Supreme Court refrained from holding conclusively whether "unfair prices" include also excessive prices. It also did not reach a decision regarding the appropriateness of the plaintiff's attempt to prove that prices were excessive by using a post-entry price cut benchmark.

7 See BSH"A 36128/99 Avrahami v. Matab Telecomunication Cable Systems Ltd (date of decision 26.2.2006.)

8 For an analysis of the pros and cons of a post-entry price cut benchmark see "The Darker Side of the Moon–The Assessment of Excessive Pricing and Proposal for a Post-entry Price-cut Benchmark" in Studies of the Oxford Institute of European and Comparative Law (Hart publishing). (2010) (David Gilo & Ariel Ezrachi).

9 Such a measure of consumers' damages from excessive pricing is understated, because it does not take account of the harm to consumers who, due to the excessive price, did not participate in the market.

10 Under Israeli law, the director general may declare a firm a monopoly when this firm holds over 50% of a relevant market. The declaration is not required for a firm to be considered a monopoly, however, but only creates a prima facie case for the claim that it constitutes a monopoly.

up to four relevant markets. Due to the size of the economy and the lack of significant regional trade, entry of new firms is often unprofitable and import is often costly or non-existent. Hence it is difficult to rely solely on the competitive process to prevent the inefficiencies stemming from monopoly pricing. Indeed, in various Israeli markets, prices are substantially higher than in similar markets in Europe or the US.

Accordingly, the IAA's position is that while promoting the competitive process and the competitive structure of the market constitutes its most favored tool for improving the welfare of consumers, it will not restrain itself from holding excessive pricing by monopolies as an abuse, in appropriate cases, and where there are no feasible tools to promote the competitive process or structure of the market.

KOREA

ANTITRUST ENFORCEMENT AGAINST EXCESSIVE PRICING

1. Background

With rising inflationary pressure[1] in the Korean economy, there are calls for strengthening action against excessive pricing of dominant companies in the market from the media and National Assembly. There is also a dispute whether charging higher prices on redesigned version of a product than its previous one can be controlled under the regulation on abuse of market dominance of the Monopoly Regulation and Fair Trade Act (MRFTA), Korea's competition law. Moreover, multiple civil petitions are filed to the KFTC alleging that prices of specific products are higher in the domestic market than in the overseas markets.

To address these questions, this report is going to look into the scope, validity and practical enforceability of excessive pricing regulations prescribed in the competition law by providing theoretical and practical analysis on antitrust enforcement against excessive pricing.

2. Provisions on Excessive Pricing of Korea' s Competition Law

The MRFTA defines excessive pricing broadly as an act of determining, maintaining or changing prices unreasonably by a market-dominating company. Excessive pricing is considered an exploitative abuse that inflicts direct harm on consumer benefits by charging prices unreasonably higher than a competitive price. The Enforcement Decree of the MRFTA provides that judgment on excessive pricing should be made by assessing price changes compared to cost changes.

Article 3-2 of MRFTA

No market-dominating enterpriser shall commit acts falling under any of the following subparagraphs:

1. an act of determining, maintaining or changing unreasonably the prices of goods or services

Article 5 of Enforcement Decree of MRFTA

1. Unreasonably determining, maintaining or changing price as per Item 1, Clause 1, Article 3-2 of the MRFTA pertains to a significant increase or insignificant decrease in prices of goods or services relative to the change in the supply and demand or in the supply cost (ordinary level in general or similar business) without justifiable reason.

The Guidelines for Review of Abuse of Market Dominant Position also provide that the extent of price changes should be compared to the cost changes to decide whether a concerned act constitutes abuse of market dominance or not. In order to decide on "significance" of price changes, the Guidelines stipulate,

[1] Consumer Price Index (CPI) rose from 2.8% in 2009 to 2.9% in 2010 and to 4.7% in July 2011.

concerned prices should be analyzed based on comparison with other factors such as Producer Price Index (PPI) and export prices.

Guidelines for Review of Abuse of Market Dominance

IV. 1.

an act of significantly raising or insignificantly reducing prices of goods or services relative to the change in the supply and demand or in the supply cost without justifiable reason

(6)

"Act of significantly raising or insignificantly reducing prices" shall be judged based on comprehensive assessment of various factors such as recent price movement, condition of supply and demand and Producer Price Index of a concerned product, price increase rate in export of a concerned enterpriser, whether a concerned enterpriser is in a position that lead price hike, etc.

3. Enforcement Action on Excessive Pricing

After the enactment of the MRFTA, the KFTC took action against excessive pricing in 2 cases in 1992 and 2001.

In 1992, the KFTC decided that confectionery manufacturers' reduction in volume of their goods constituted excessive pricing given that their conduct was considered as virtually raising prices. The KFTC found that the practical price hike caused by reduced volume[2] was 5.6%p ~ 7.7%p higher than the cost increase rates, which stood at 10.3% ~13.5%, and issued an order against the concerned companies to correct such excessive pricing schemes. (The respondent companies did not challenge the KFTC decision.)

In 2001, the KFTC found that BC card and 12 banks decreased their transaction fees disproportionately compared to the drop in borrowing costs, or did not reduce the fees at all. The KFTC saw their conduct as excessive pricing and took corrective measures against them. Between the 1st quarter in 1998 and 3rd quarter in 2000, the borrowing rates dropped from 15.18% to 9.82%, but their cash advance fees were reduced only negligibly from 29.47% to 28.16%.[3]

Since 2001, there has been no case in which the KFTC enforced against excessive pricing. In November, 2009, a complaint was filed to the KFTC alleging that Hyundai Motor engaged in excessive pricing practices by selling automobiles at high prices in the domestic market, and at low prices in the U.S and Japanese markets. But the KFTC found that domestic prices were not significantly higher than in the overseas markets in a comparison of manufacturing costs and sales prices of Hyundai automobiles, and decided there was no illegality in the company's pricing practice.

2 Respondent confectioners reduced their product volume by 15.9%~20.7% without changes in prices.

3 The Supreme Court ruled against the KFTC on the grounds that the respondents were independent businesses thus could not be considered as single market-dominating enterprise. The Court did not make a determination on whether their conduct constituted an excessive pricing scheme (Dec. 2005).

4. Analysis of Excessive Pricing Regulation

4.1. Theoretical aspects

Intervention by a competition authority on the price-setting or price change should remain at a minimum level. Nonetheless, a competition authority needs to take an active approach against collusive acts such as cartel, since such conduct is aimed at eliminating competition itself. Given that pricing practices of a monopolist in pursuit of maximized profits is its way of ensuring economic incentives, prohibiting such pricing practices could end up harming consumers. Price regulation of the government, therefore, should be limited to industries[4] in which natural monopoly is formed or legal (regulatory) barriers to the market are high.

Correcting excessive pricing through direct intervention of the government could undermine corporate autonomy and raise a concern on unreasonable government intervention. Furthermore, as price is decided based on supply and demand in a competitive market, a simple analysis on supply factors such as costs would cause negative side effects.

4.2. Practical aspects

It is hard to take enforcement action against excessive pricing in real life for several reasons.

Assessing illegality of a company's price-setting behavior under the excessive pricing regulation requires a prerequisite that the government knows the "reasonable price level". When a product is made by multiple companies, however, estimating a reasonable price level is practically impossible due to complex calculation process including allocating common costs, choosing a comparison period and calculating cost hike rates. Furthermore, assessing significance of a price change is also hard given that price is set and changed based on numerous factors such as product differentiation, facility investment or R&D and other compensation on risk-taking activities of a company. This process becomes especially daunting when a company sets prices based on its unique comparative advantages such as patent or brand value. In such case, even if a company's price-setting is decided as abusive conduct, devising corrective measures is not easy because there could not be clear-cut standards for deciding to what extent prices need to be decreased in order to correct excessive pricing.

Moreover, in the market economy "reasonable level of profits" cannot be uniformly set by rules.

Even if it were possible to calculate reasonable cost or profits, "reasonable price" is not a combination of "reasonable cost" and "reasonable profit", because other factors including brand value are taken into consideration when setting prices. In addition, given that Profit ratio is different among companies due to different nature and the level of maturity in each industry and product, the government cannot decide the reasonable level of profit of a specific industry.[5]

5. Price Regulation by Industrial Regulatory Authority

Regulatory authorities of each industry turn to *ex ante* or *ex post* regulation to intervene in the price-setting of products or services.

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4 Examples of these industries are gas, communications and aviation industries.

5 Assessment on adequacy of a price requires analysis on both demand factors such as consumer preference and possibility of choosing from products and supply factors including cost, profit ratio and market dominance or brand value of a product.

For instance, in industries where entry barrier is high or provision of universal service is important to ensure public benefits, prices are set based on approval by regulatory authorities. In some industries, prices are subject to *ex post* regulation under which companies' prices are declared to a competent authority or adjusted through administrative guidance.

Major price regulation by government

Name of Regulation	Applicable Act	Competent Authority	Content
Approval on pay-tv service fees	Broadcasting Act	Korea Communications Commission	- Broadcasting operators, cable TV relay service operator, cable music channel operators who provide pay-TV services are required to make a declaration to the Korea Communications Commission on adhesion contracts on fees and other conditions for using their services, and get approval on the service fees from the Commission.
Approval on fees of internet multimedia broadcast service	Internet Multimedia Broadcast Service Act	Korea Communications Commission	- Internet multimedia broadcast service operators are required to make a declaration to the Korea Communications Commission on rules governing service fees and conditions, and gain approval on the service fees from the Commission.
Approval or declaration on adhesion contracts on communications service	Telecommunications Business Act	Korea Communications Commission	- Communications business operators are required to make a declaration to the Korea Communications Commission on fees and conditions for each service they provide. Where a communications service is subject to certain standards in business size and market share, the service providers should seek approval on fees and conditions for using the service.
Approval on gas supply conditions	Urban Gas Business Act	Ministry of Knowledge Economy	- Urban gas business operators are required to seek approval on their prices or other supply conditions from the Minister of Knowledge Economy or Mayor or Governor of their business territories.
Approval on rates and fairs of international airline service	the Aviation Act (Article 117)	Ministry of Land, Transport and Maritime Affairs	- International airline service operators are required to set rates and fairs of passenger flight or air cargo (except for mail) in according to air service agreements on operation of international airline service and make a declaration to or seek approval from the Minister for Land, Transport and Maritime Affairs on such rates and fairs.

6. Future Direction

Competition authority's regulation of excessive pricing should be limited to exceptional cases.

That is because the foremost mission of a competition agency is to ensure well-functioning market through intensive monitoring on cartel, anticompetitive merger, deceptive advertising, etc, and this way prices can be decided normally in the market. Antitrust enforcement against excessive pricing should be restricted to, for instance, areas in an entire or near monopoly where high barriers block new entry to the markets or consumers have no rights to choose due to entrenched monopolistic structure. In addition, direct

intervention through approval- or declaration-based price setting should remain at a minimum possible level, since such intervention could harm public benefits, causing adverse impact such as market distortion.

Instead, competition agencies need to improve corrective measures on excessive pricing to enhance effectiveness of the enforcement action. This matter of exploring how to make improvement on enforcement action against excessive pricing needs to be discussed in the international occasions like OECD conference.

Under Korea's competition law, only behavioral measure, i.e. regulating price level, is possible for corrective measure against excessive pricing. As mentioned before, directly regulating prices can cause several theoretical and practical problems. In this aspect, structural measures[6] aimed at improving monopolistic structure, the cause of excessive pricing, can be a fundamental and effective enforcement action.

However, in some countries, there is a controversy on whether structural measures can be taken in an excessive pricing case under the current law. Therefore, there need to be active legal review and international discussion to find an effective way (e.g. establishing enforcement guidelines) to enforce against excessive pricing schemes.

6 For example, in the case where excessive pricing results from an anticompetitive merger, a competition agency can withdraw approval or order divestiture of business.

MEXICO

1. Introduction

In Mexico, excessive pricing practices are neither condemned nor sanctioned under the 1992 Federal Law of Economic Competition (FLEC) and exclusionary conducts are the only practices conceived as a violation of the law in the context of an abuse of dominant position. More precisely, Article 10 of the FLEC only contemplates as a competition offense those conducts by dominant firms that have the aim or effect of impeding or preventing a firm entering into, or expanding within, a market (unless the firm engaging in these acts can show countervailing pro-competitive gains that outweigh the anticompetitive effects of the conduct in question). Among these conducts, the article in question list the following: a) exclusive contracts, b) tying and bundling, c) refusals to deal, d) boycotts, e) predatory pricing, f) loyalty discounts, g) cross subsidization, h) price discrimination, and i) raising rival´s cost.

In general terms, the Federal Competition Commission (CFC) is pleased with the decision to exclude excessive pricing from the antitrust offences contemplated in the Mexican competition law. Indeed, although the CFC is fully aware that excessive pricing is the most direct violation of the consumers' interest and there could be instances where the structure of the market and the institutional design would lead to an excessive price that could only be remedied by competition law,[1] the Commission is also of the view that in most cases the risks and costs associated to the application of competition law to excessive pricing are so high that they justify a non-interventionist approach by competition authorities.

The costs and risks mentioned above are summarized in an article by Motta and de Streel (2007)[2]. Among others, these authors point out the following:

2. Excessive pricing actions may undermine investment incentives of new entrants.

Competition law applies to sectors where in principle market forces are free to operate and, therefore, where one can presume that free entry should be able to erode over time dominant positions. To some extent, prices also play an important role in this process, as they convey signals to potential entrants: in particular, high prices may indicate that a market is profitable, and trigger entry into the industry, thereby reducing the market power of a dominant firm and decreasing prices. Excessive pricing actions may therefore have the effect of breaking this process, and while in the short run they might be beneficial in that they could reduce prices, in a long run perspective they would be detrimental because they may impede entry that could otherwise take place.

1 According to Motta and de Streel (2007), these conditions would be: a) high and non-transitory entry barriers leading to a super-dominant or quasi-monopolistic position; b) the super-dominant or quasi-monopolistic position is due to current/past exclusive/special rights or to un-condemned past anticompetitive practices; and c) no sector-specific regulator has jurisdiction to solve the matters.

2 Motta, Massimo and Alexandre de Steel. (2007). "Excessive Pricing in Competition Law: Naver say Never?". *The Pros and Cons of High Prices.* Swedish Competition Authority. Sweden. Pag. 14.

3. Excessive pricing actions may undermine the investment incentives of dominant firms.

High prices and profits should be seen in general as the reward for a firm's efforts, innovation and investments, and firms indeed invest and innovate precisely because they are able to appropriate the benefits from their risky investments. Hence, however beneficial excessive price interventions may be ex post, if a competition authority pursued a policy of resorting to excessive pricing actions, this policy would have important negative effects *ex ante*, by lowering returns, and therefore discouraging firms´ investments in all the economy.

4. It is extremely difficult to determine whether a price is excessive.

There has been different possible tests to prove an excessive price, for example: comparison between costs of production and prices; comparison between prices charged by the dominant firm in the different markets; comparison between the prices charged by the dominant firm and those charged by other firms either in the same market or in other market; and the comparison between the profits of the dominant firm with a normal competitive profit or the profits of other firms. The lack of consensus on how to identify excessive prices could lead to unclear criteria for the standard of proof and therefore, an important legal uncertainty for the firms, which may in turn undermine investment incentives.

5. Excessive prices actions may lead to price regulation which is difficult to implement.

Intervening in an occasional way on the price set by a dominant firm does not solve the problem forever. On the contrary, to the extent that it may discourage entry, it may even exacerbate it and make it permanent. As a result, either the competition authority or the court continues to monitor the industry – but in this way it would convert itself into a de facto regulator and would have to sacrifice important resources- or would have to resign to see its intervention as ineffective, since market conditions change over time and the dominant firm would adjust its prices to them. Moreover, competition authorities – unlike sectoral regulators – have no experience and role in telling firms which prices they should charge. In addition, price regulation may have a strong political dimension.

In sum, the CFC shares the view of Motta and de Streel (2007) that an antitrust excessive price action presents a high risk of type I (false condemnation) and type II (false acquittal) errors, as well as a relatively high cost of type I error (because the market may self-correct and error will lead to dynamic inefficiency: low investments and innovation) and a relatively low cost of type II errors (allocative inefficiency).

Having said that, it is important to note that the CFC does not reject the possibility that a careful calibrated policy could alleviate some of difficulties above mentioned. However, one should also bear in mind that the experience, expertise and political capital required to implement such a policy not only take time to be developed but also are very resource intensive. As in most developing countries, thus, these conditions are probably not yet in place in Mexico.

The discussion above does not mean that the competition law in Mexico lacks provisions intended to address excessive pricing. Indeed, as in other jurisdictions, the FLEC allows the CFC to block (or approve under certain conditions) those mergers that could result in competition between products of the merging firms being eliminated, allowing the merged entity to unilaterally exercise market power. One of the aims of the merger provisions in the FLEC, thus, is to prevent the merging entity from profitably raising the price of one or both merging parties' products.

As it has already been mentioned in this submission, Article 10 of the FLEC also contemplates as a competition offense those exclusionary conducts undertaken by dominant firms that have the aim or effect of unduly displacing competitors form the market or preventing a firm entering into, or expanding within, a market. Therefore, it could be argued that by preventing a dominant firm from impairing the opportunities

of competitors based on considerations other than competition on the merits, the provisions in the FLEC regarding exclusionary conducts aims at promoting free entry and eroding over time the source of excessive pricing: dominant positions.

In addition, the competition law in Mexico includes other provisions that by some means address excessive pricing and that are relatively innovative by international standards. One of these provisions involves the regulation of Article 28 of the Mexican Constitution, which stipulates that, in order to avoid their scarcity and price increases, the government is allowed to set the prices of those products and services of first need for the popular consumption and the country´s economy. In this regard, Article 7 of the FLEC specifies that the price regulation of these products and services is in the exclusive realm of the executive branch and that it can only be introduced in those markets where it the CFC previously declared the absence of effective competition in the relevant market. This article also provides that the competition authority is empowered to issue an opinion on the terms of the price regulation introduced for these products and services and that the latter shall minimize its effects on competition and free access to the markets involved.

The intervention of the CFC is also contemplated in the legislation involving the regulation of prices of several key sectors of the economy such as telecommunications, aviation, airport/port services, railroads services, road passenger transport, maritime services, LP and natural gas, etc. As with the arrangements discussed above concerning the regulation of Article 28 of the Mexican Constitution, in these sectors the CFC is not called to intervene in the regulation of prices itself but in determining whether competition in the markets involved is effective and justifies (or not) direct intervention by sectoral regulators. In these sectors, moreover, the sectoral legislation also concedes the CFC an important role both in the granting of concessions and in divestiture of public assets. This role not only involves assessing whether the specific rules governing those processes are pro-competitive but also qualifying prospective participants. Similar to what happens in mergers control, these arrangements are aimed at avoiding markets structures that can later be a fertile ground for excessive pricing, among other conducts.[3]

Last, but not least, it is important to note that a common feature of most markets where the CFC has detected the existence of prices significantly higher than those which would result from effective competition is the existence of government regulations or practices that artificially create market power or reduce competitive rivalry. In the light of this, since its creation in 1993 a great of the Commission's efforts and resources have been devoted to advocacy actions aimed at persuading policymakers on the need to include principles of competition in the design and implementation of economic policies and regulation.

Particularly useful in this regard has been the CFC's power to issue opinions on draft laws and secondary regulation initiatives, regulations, rules, agreements, circulars and other administrative acts, as well as, adjustments to programs and public policies, when they can have adverse effects to competition. In addition, the CFC can issue and opinion to promote the principles of competition on current regulatory framework such as laws and regulations.

[3] Within the framework of these arrangements, for example, in July of 2010 the CFC intervened in the auction of spectrum for mobile communications. As a result of this intervention, and with the aim of preventing the creation of market power or reduce competitive rivalry, the rules of the auction were modified and caps that restricted the amount of spectrum that be accumulated by operator were adopted.

SWITZERLAND

1. Introduction: The Current Situation in Switzerland

Switzerland is a small and open economy in the middle of Europe. Despite openness, it is sometimes termed as an island of high prices ("îlot de cherté"). Price levels for consumer goods and services in Switzerland are indeed considerably higher than in other OECD countries.[1] This comparatively high level of prices raises serious issues for the national economy and its competitiveness. Some of the factors which are often mentioned as the causes of this phenomenon are a lack of competition, the large number of prices set by the government, agricultural protection and technical barriers to trade. Due to the Swiss francs' strength against the euro and the US dollar the problem of high prices grew acute again and attracts great attention in Switzerland. The Swiss franc's appreciation poses a considerable risk to the Swiss economy, in particular to the export-oriented industries.

To fight high prices has for long been a priority in Switzerland. It is supported by several tools:

- The Competition Commission (ComCo) has the legal power to act against high prices in the context of restrictions to competition. On the one hand, the Swiss Cartel Act expressly states that the enforcement of excessive prices by dominant firms constitutes an abusive practice (see section 3). On the other hand, the elimination of trade barriers due to vertical restraints is an important antitrust instrument to fight high prices, since the possible resort to parallel imports allows the economic actors to profit from lower prices of imported goods and to increase competition in Swiss markets.

- A rather unique institution in international comparison is the Price Surveillance Authority (or Price Supervisor). Installed by a popular initiative back in the 80ties its field of intervention was initially very broad. When revising competition legislation in 1995, the legislator narrowed the fields where the Price Supervisor may intervene. Today, he can essentially advance his opinion to administered prices set by the government (including providers of public services). In addition, he may intervene in areas where it is established (usually by ComCo) that a provider holds a dominant market position or where a cartel is designated by law.[2]

- In July 2010 Switzerland unilaterally adopted the "Cassis de Dijon"-Principle by means of a revision of the Technical Barriers to Trade Act. According to this principle, goods that are legally produced or marketed according to standards applying in the European Union (EU) can also lawfully be imported from the EU. This measure is supposed to eliminate import barriers and to lead to significant price decreases.

- Switzerland has concluded free-trade agreements (FTA) with the EU, the European Free Trade Association (EFTA) and partners outside the EU to provide Swiss companies with an unobstructed, stable and non-discriminatory market access in these countries. Market

1 See http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-28062011-AP/EN/2-28062011-AP-EN.PDF

2 This may for example be the case in the market for books, where the Parliament decided to introduce mandatory resale price maintenance. The new law is however subject to an upcoming referendum.

liberalization covers goods and services as well as productive factors (investment, labor force and intellectual property).[3] Markets are opened on the basis of reciprocity. Thus, FTAs, by facilitating imports, increase competition in the domestic market. In order to compete with imported products, national companies have to improve their productivity continuously.

- Domestic market policy aims to promote competition in sheltered sectors, characterized by below-average productivity. The most effective way to achieve this objective is via trade liberalization to allow for international competition. However, this is not possible to the same extent in all sectors. Therefore, internal market policy, by strengthening the internal forces of competition, aims at improving the competitiveness in the domestic market.

2. Price Regulation in Switzerland

Non sector-specific price regulation in Switzerland is performed by ComCo and the Price Supervisor. ComCo intervenes on the basis of the Cartel Act (see section 3) and the Internal Market Act which applies to all liberalized sectors. The Price Supervisor on the other hand steps in where effective competition is not working or where effective competition is considered not to be in the public interest. The primary mandate of the Price Supervisor is to examine prices set by authorities or companies (public or private) which benefit from exclusive rights: he can make recommendations to the authorities who are deciding or approving such prices and also publicize his opinion. In case a firm holds a dominant position and sets abusive prices he may also intervene and eventually pronounce a sanction up to CHF 100,000.[4] However, there is a primacy of negotiations, i.e. the Price Supervisor tries to achieve an agreement with the parties. Only if an agreement cannot be concluded, he/she can recommend or even decide price decreases and pronounce sanctions. According to article 15 of the Price Surveillance Act, the Price Supervisor has however not the competences to intervene in sectors subject to specific regulations. He/she may however address recommendations to the sector specific regulators in charge.

In sum, there is a certain overlap of competences between ComCo and the Price Supervisor. As the guiding principle of coordination it may be considered that ComCo investigates selected markets when market outcome justifies an investigation (no recurrent intervention). The Price Supervisor, on the other hand, has his established "clients" with whom he often discusses on an annual basis the price increases they intend to put into effect (e.g. chimney sweepers holding a cantonal monopoly for a certain area).

For sector-specific regulation, several authorities are responsible in Switzerland. The most important sector regulators are the Federal Electricity Commission (ElCom), the Federal Communications Commission (ComCom) and the Postal Services Regulation Authority (PostReg).

2.1. Federal Electricity Commission (ElCom)

Based on the Electricity Supply Act, one of the main tasks of ElCom is to supervise the electricity prices for the basic supply. ElCom has the possibility to prohibit unjustified price increases or may retroactively reduce excessively high tariffs. For small-scale consumers the Swiss electricity market will not be liberalized before 2014. ElCom supervises therefore electricity tariffs for these consumers in their entirety: on their invoices, electricity supply companies are required to separately indicate the costs for

[3] In 2010 Switzerland exported 39.8 percent of domestically produced goods and 16.6 percent of the services. On the other hand, Switzerland imported 37 percent of the goods consumed in the country and 8 percent of the services (see data on the following website: http://www.seco.admin.ch/themen/00374/00456/00458/index.html?lang=fr).

[4] Note however that the importance of this sanction is limited compared to the sanctions that can be inflicted based on the Cartel Act.

energy, use of the electricity network and any applicable fees and charges. Since January 2009, large-scale consumers (i.e. those consumers whose annual consumption exceeds 100 megawatt hours) can freely choose their electricity supplier. Once large-scale consumers have however opted for the free market, ElCom no longer supervises the electricity tariff, since consumers in this category have the option of changing to another supplier if the prices charged by their present supplier are perceived as being too high. However, ElCom still monitors the remuneration for network use for all providers. ElCom takes the necessary action on its own initiative or in response to reports or complaints.

2.2. Postal Services Regulation Authority (PostReg)

According to the Postal Act, the universal post service has to be provided at fair prices. However, the legislation does not include precise rules regarding the regulation of prices (e.g. price setting according to costs) and the regulation procedure. The regulation of prices in the postal sector is divided between the monopoly sector and the liberalized sector. According to article 14 of the Postal Act, the prices of the services on the reserved market (i.e. the monopoly sector) are subject to formal approval by the Federal Department of the Environment, Transport, Energy and Communications (DETEC). PostReg is handling the price approval requests of Swiss Post on behalf of the Department. Regarding the liberalized part of the market, the Swiss Post is free to determine its prices. If abuses are observed, the Price Surveillance Authority may eventually intervene.

2.3. Federal Communications Commission (ComCom)

In the telecommunications sector, the Telecommunications Act establishes the primacy of negotiations regarding interconnection prices on the existing grid. This implies that, unlike in the postal and electricity sectors, a purely *ex post* regulation regime is effective. Furthermore, ComCom is only able to intervene at the request of a market player and has no rights to independently take action. In case of anti-competitive behavior, like illicit agreements between telecommunications providers or abuses of dominant position, only ComCo (and not ComCom) can intervene and open a procedure according to the Cartel Act. This regime differs from the other regulatory regimes mentioned, i.e. telecommunications regulation in Switzerland is a special case (also with respect to other EU member states). The question whether this *ex post* regulation regime is effective has been taken up by the Federal Council in its Evaluation Report on the Telecommunications Act, published in September 2010.[5] The Federal Council concluded and recommended to Parliament not to impose *ex ante* regulation at this stage. The report is still pending in Parliament, which has mandated the Federal Council to supply a complementary report by Spring 2012.

3. Excessive Pricing and the Swiss Cartel Act

From an economic point of view it is highly debatable whether excessive pricing should be subject to intervention by competition authorities or not. Broadly speaking, on the one hand, the prohibition to charge high prices may be seen as an unfair penalization of a dominant firms competitive success. On the other hand, the exploitation of consumers – due to unfairly high prices set by dominant firms – may be an argument in favor of such intervention. In the context of smaller economies an additional argument in favor of the concept of excessive pricing can be found in the literature.[6] The argument is related to the claim that markets in small economies are more concentrated than in large economies which implies that in a small economy there are comparatively more (natural) monopolies and dominant firms. Therefore,

[5] Available on the following website: http://www.bakom.admin.ch/dokumentation/gesetzgebung/00512/03498/index.html?lang=fr

[6] See e.g. Gal MS (2003) Competition Policy for Small Market Economies, Harvard University Press.

excessive prices may raise more concerns in a small economy, i.e. excessive pricing in a small economy may cause a comparatively higher welfare loss than in a large economy.

Concerning the price setting of dominant firms, Art. 7 Para. 2 Lit. c of the Swiss Cartel Act (CartA) states that any imposition of unfair prices or other unfair conditions of trade is considered unlawful. ComCo is thus allowed to intervene in cases of excessive pricing and to impose sanctions. An explicit debate whether such a provision is economically sensible seems not to have taken place in Switzerland at the time of its adoption. Rather, the legislator simply seems to have strived for a provision which is comparable to EU competition law.

Art. 7 Para. 2 Lit. c CartA seeks to prevent the exploitation of other market participants by a dominant firm, where other participants may include firms or consumers. In the context of excessive prices this provision implies – next to the determination of a dominant position – an analysis of the following elements: (1) The alleged behavior must concern *prices*, which (2) can be *enforced* in the market and (3) are *excessive,* and which (4) cannot be justified by *legitimate business reasons*.

In particular the assessment whether a price is excessive may pose serious problems in practice. Conceptually, a price may be considered as excessive if it bears no reasonable relation to the economic value of a good or service. However, such a definition leaves undefined terms such as "reasonable" or "economic value". To assess the appropriateness of a specific price in practice, ComCo therefore often refers to the criteria mentioned in Art. 13 of the Price Surveillance Act (PüG), i.e. the law applied by the Price Supervisor. These criteria are (1) price developments in comparable markets, (2) the necessity of a firm to earn appropriate profits, (3) cost developments, (4) the particularity of the firms goods and services and (5) the specific market characteristics.[7]

Neither the CartA nor the PüG specifies however concrete methods which may be used to assess these criteria. In principal, ComCo is therefore free to choose on a case-by-case basis the method that it judges best suited. Such methods may *inter alia* include:

- *"But for"-method*, i.e. comparing the alleged excessive price to a simulated competitive price.

- *Benchmark method*, i.e. comparing the alleged excessive price to historic prices, to competitive prices for identical good and services in other geographic markets or to the prices of other firms providing similar goods and services.

- *Cost method*, i.e. comparing the alleged excessive price to an estimation of the production costs (including an appropriate profit margin) of the considered good or service.

Concerning remedies in excessive pricing cases, ComCo – due to the limited jurisprudence in this area (see below) – has no experience yet. Theoretically, it is however *prima vista* not excluded that ComCo could impose remedies to restore effective competition, although ComCo does not see itself as a price regulator. However, since the assessment of excessive prices regularly requires some benchmark, the analysis of the competition authority may in many cases be sufficient to indicate what a "reasonable" price may constitute. Further, as noted above, with the Price Surveillance Authority, there is a second authority concerned with excessive prices in Switzerland. Since this authority is specialized in price regulation it may be a possibility to delegate the implementation of a remedy or even the elaboration of remedies in excessive pricing cases to the Price Surveillance Authority – in particular if a remedy involves the determination of a "reasonable" price and/or ongoing monitoring.

7 Note that these criteria are neither exhaustive nor hierarchical.

4. Recent Experience with Excessive Pricing

As in most other countries, the Swiss competition authority has in the past been rather contained in accepting excessive pricing cases. Since 1999 there are roughly ten cases where the practice in question involved excessive pricing. In many of these cases excessive pricing was however only an ancillary element of the investigation, i.e. the investigation primarily focused on other practices such as discrimination. Furthermore, the excessive pricing provision was sometimes used in cases where dominance results from potentially anti-competitive practices which are not specifically covered by other provisions in the competition law. In other words, excessive pricing and the imposition of other unfair conditions of trade are occasionally used as "catchall provision" for practices that cannot be subsumed otherwise.

There is however one recent "pure" excessive pricing case in Switzerland: *Terminierung Mobilfunk*.[8] The subject-matter of this investigation was the termination rates between domestic telecommunications operators in the Swiss mobile sector. Termination rates are the charges which one telecommunications operator charges to another for terminating calls on its network. In particular, ComCo investigated whether Swisscom – the historical monopolist and current dominant telecommunications operator in Switzerland – charged other domestic operators excessive termination rates. Several price, profit and cost benchmarks were analyzed:

- A comparison between prices for Swisscom "on-net" calls and termination rates charged to other operators revealed that "on-net" prices were significantly lower than the termination rate itself. This is rather surprising, since an "on-net" call causes as well costs for termination.

- In Switzerland termination rates in the fixed network are – based on a LRIC-model – regulated. From a technical point of view there is not much difference between terminating a call in a fixed and a mobile network. The termination rates in the mobile network were however roughly 25 times higher than in the fixed network.

- In 1999 ComCom fixed the termination rate for international calls in the mobile sector. This international termination rate was roughly 50% lower than domestic termination rate charged by Swisscom.

- The termination rate charged by Swisscom was more than 100% higher than in other comparable European countries (e.g. Austria, Norway or Sweden).

- The profits of Swisscom were – in international comparison – extraordinary high.

- Cost estimations for termination by sector regulators in other European countries indicated that the true costs for termination are massively below the rates charged by Swisscom.

Being well aware of the sometimes complex price setting strategies in network industries such as the telecommunications sector, ComCo came to the conclusion that the found evidence was sufficient to establish that the termination rates charged by Swisscom indeed were excessive and pronounced a sanction of CHF 333 Mio.

The decision was appealed and first struck down by the Federal Administrative Court and subsequently by the Federal Court. The appeal courts did however not primarily criticize the test(s) used by ComCo to determine whether the termination rates were excessive, which often seems to be the main point

[8] LPC 2007/2, pp. 241-399.

of criticism in other countries. Rather, they argued that the element of "enforcement" was missing in this specific case. In essence, the appeal courts came to the conclusion that the other domestic telecommunications operators had the legal option to call upon ComCom and ask ComCo to fix the termination rates charged in the market. Therefore, the allegation of unilaterally enforced termination rates by Swisscom was dismissed. Given the – in international comparison – somewhat special *ex post* regulatory regime in the Swiss telecommunications sector (see above), it must however be assumed that the incentives for other telecommunications operators to call upon ComCom are very weak if not inexistent. The threat to file such a complaint may at most be strategically used in private negotiations with other operators. A cost-based regulation of termination rates by ComCom is however not in the interest of any of the domestic telecommunications operators.

In general, the decision by the appeal courts seems to have increased the legal hurdles in excessive pricing cases considerably: whenever there is a faint (theoretical) possibility to evade an excessive price, such a price cannot be considered as "enforced" by the dominant firm. While excessive pricing cases never were a first priority of ComCo, this decision has confirmed that a contained policy towards such cases is a recommendable strategy. The Secretariat of ComCo has formulated the following internal policy: (1) Pure excessive pricing cases will only exceptionally be accepted. As a general rule, such cases will be passed on to the Price Surveillance Authority. (2) The Secretariat will however continue to investigate excessive pricing, if a case primarily involves other potential abusive practices. (3) By all means, the Secretariat will check in the future whether the element of "enforcement" – as interpreted by the Federal Court – is present in a case.

TURKEY

This contribution handles the following issues with respect to the practices of the Turkish Competition Authority (TCA):

- Excessive pricing as a means of abuse of dominance,
- Relevant case law.

1. The Legal Framework

Act on the Protection of Competition No. 4054 (the Competition Act) sets the basic framework in terms of antitrust rules. The provisions of the Competition Act are generally compatible with Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) and Merger Regulation of the EU as part of Turkey's aim and commitments towards becoming a member of the EU. Moreover, the principles contained in the case-law of the European Commission, General Court (former Court of First Instance) and the European Court of Justice are taken into account as precedent in the decisions of the Competition Board, the decision making body of the TCA.

Within this framework, Article 102(a) of the TFEU explicitly prohibits a dominant firm from directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. Although the Competition Act does not overtly cite unfair prices as a form of abuse, as indicated below it is considered that excessive price is a form of abuse in the decisions of the Competition Board, the decision making body of the TCA.

Excessive price actions by the TCA have been relatively rare; the case law of the TCA below has shown that the TCA prefers not to visit the concept; it has preferred to use competition advocacy instead.

2. Abuse of Dominance

The term dominance is defined in the Competition Act as "the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers." Article 6 of the Competition Act entitled "Abuse of Dominant Position" does not prohibit dominance because it is desirable for an undertaking to gain dominant position as a result of its growth through its own internal dynamics. However, the abuse of a dominant position is prohibited when a dominant undertaking abuses its dominant position if the object or the effect of its behaviour is to prevent, restrict or distort competition. The object of the dominant undertaking is overtly mentioned apart from effect in the reasoning of Article 6, therefore intent of the dominant undertakings can also be decisive in the analysis of abusive behaviour. Article 6 of the Competition Act cites some non-exhaustive abusive practices as complicating the activities of competitors in the market or preventing new entry; discrimination; tying; distorting competition in another market by abusing dominance in a certain market and restricting production, marketing or technological development to the prejudice of consumers. The Competition Act does not openly refer to "excessive pricing" as abuse under Article 6. However, as the list of practices considered as abuse under Article 6 is not exhaustive; excessive pricing is considered as a form of abuse by the Competition Board.

As the reasoning of Article 6 implies, any conduct by a dominant firm as a result of its internal dynamics will not be prohibited even if the competitors in the markets face difficulties in remaining in the market or they are obliged to exit the market. To determine whether a conduct is caused by internal dynamics of a dominant firm or by anticompetitive object or effect is a delicate matter and requires sensitive analysis of the market conditions in each case. However, while determining abuse, in principle, it is accepted that dominant undertakings have a special responsibility not to impair competition in the market and this causes some conduct to be deemed abusive when pursued by a dominant firm, whereas it is not regarded so when conducted by a non-dominant one.

3. Case Law of the TCA

3.1. BELKO[1] – a milestone case

The *Belko* decision is the first ever decision of the Competition Board regarding violation of the Competition Act through excessive pricing. Thus, it has been clarified in this case that excessive pricing can be assessed under the Competition Act. *Belko* decision is also the first example of imposition of a fine on a public entreprise for the infringement of competition rules.

Belko is the public entreprise which has been granted a monopoly right to operate as the sole retailer of coal -consumed for house-heating- in Ankara. It was alleged that the prices it charged were excessive and therefore constituted abusive practice in violation of Article 6 of the Competition Act. The investigation has proven the fact that the prices charged by Belko were on average 50 to 60% higher than the prices in the competitive markets. In the course of the investigation, cost analysis and market comparisons have been the two main streams reaching the conclusion towards the finding of excessive pricing.

The Competition Board took into account as the most important criterion the prices (charged by the dominant enterprise, that is Belko) and compared them with the prices of identical or equivalent products in other geographical markets, that were relatively more competitive but otherwise had comparable market characteristics to establish monopolistic price. The Competition Board also analysed cost-price relationship and ruled that " *... while, along with high prices, a large margin between the sale price and the total cost (excessive profit) could be considered a sign of excessive pricing, monopolistic pricing is also possible in situations where the profit margin turns out low or even negative due to establishment of real or fictitious costs in excessively large magnitudes (along with prices set at relatively high levels).*"

On the other hand, monopolistic price was defined in *Belko* decision as "*the price set above competitive prices as a consequence of the use of one's market power*" while stating that there does not exist a rule for determining what level of the price should be qualified to be excessive and therefore it should be assessed on a case-by-case basis and many factors like the degree of barriers to entry; positions of other enterprises; and prices of relevant products in different geographical markets should come into play.

Cost analysis in this case focused on the comparisons between the price and cost figures of the last 5 years. The short-coming of this comparison was that the costs were inflated by irrelavent activities and ineffective operation of Belko which was owned by Ankara municipality. A considerable amount of capital transfer to the subsidiaries and losses from irrelavent activities were being reflected to the cost figures. On the other hand, a 50 to 60% price gap was determined between the close geographical markets and Ankara. The Competition Board has made the assessment that the 50 to 60% higher price charged by *Belko* for the coal sales due to increased costs resulting from inefficient management as abuse of dominance under the

[1] *Belko*, dated 6.4.2001 and numbered 01-17/150-39.

Competition Act. The point to be underlined is that the prices fixed by companies can be assessed as excessive pricing though the situation is one where benefit or profit obtained is not excessive, and even the companies suffer form losses.

The Competition Board in this case mentioned that a firm in a dominant position had special responsibilities and cited prudent and efficient management as the leading one. In contrast to that special responsibility, the state of affairs surrounding the case, especially the concession granted to Belko to sell coal in Ankara without necessary legal checks against abuses in the form of pricing, led to lack of maximum care and diligence in protecting Belko's interests in making purchases; overstaffing; costs higher than what they should have been, due to ineffective style of management; and finally high prices. Therefore, the high levels of the costs incurred by Belko stemmed to a large extent from failure to act with care and diligence in coal purchases and from company operations other than the coal trade. As a result, it has been established that Belko's sale prices have been set at levels 50 to 60% higher on average, relative to prices for the same or equivalent coal being sold in other geographic markets that were open to competition and the undertaking was held responsible for abusing its dominant position. The Competition Board dismissed the theory that monopolistic prices would attract new entry in the long run and therefore they should not be condemned as abusive due to the fact that there was absolute barrier to entry to the coal market in Ankara in the form of legal concession.

In preventing excessive pricing, the Competition Board presumed that there would be improvement in income distribution as well as allocative efficiencies that could contribute to betterment of social welfare. The practice of monopolistic pricing was seen as within the scope of the Competition Act due to its exploitative character especially at consumer level while not directly harming the competitive environment in the relevant market.

The Competition Board, in this case, accepted that the special responsibility of the dominant firms obliges them to avoid cost-increasing practices and that excessive profits that might come as a result of efficient management and effective cost control along with price levels that could be considered normal as not incompatible with the Competition Act. Moreover, prices charged by dominant firms 50-60% higher than those in comparable competitive markets are excessive enough to be abusive when the peculiarities of the case is taken into consideration.

The Competition Board has notified to the relevant public authorities the opinion that it could not be a fair basis to grant an exclusive right and the same aim could be reached by an effective detection policy. The exclusive right granted to Belko was removed and the market was opened to competition in line with the opinion of the Competition Board.

3.2. BOTAŞ-EGO-IZGAZ-İGDAŞ[2]

In this decision, the TCA concluded that 66-67% profit could not be taken as an indicator of excessive pricing. As for EGO, IZGAZ and IGDAS the Competition Board concluded that since the lower and upper limits of the prices exercised by the distribution companies were regulated by the Ministry of Energy and Natural Resources, the said companies never had the freedom to set the prices they charged. Thus, the companies covered by the regulation could not be charged with excessive pricing claims.

With this decision, the Competition Board openly preferred not to evaluate excessive prices when the pricing conduct was subject to a particular regulation. It is possible to depict that the Competition Board was looking for a "freedom of pricing" criterion for the companies which could be subject to excessive pricing analysis.

2 *BOTAŞ-EGO-İZGAZ-İGDAŞ*, dated 8.3.2001 and numbered 02-13/127-54.

The Competition Board followed a similar approach in another excessive pricing complaint related to gas distribution companies[3]. In the complaint, it was alleged that two gas distribution companies were abusing their dominant position strengthened by a recent merger. In its preliminary decision, the Competition Board said that since the prices applied to independent consumers by distribution companies were subject to the (energy) regulation, there was no need to open up a further competition case.

In another preliminary decision[4], responding to a complaint made against the pricing system of a (dominant) telecommunications company (Türk Telekom), the Competition Board decided that an investigation based on excessive pricing of a dominant firm wasn't necessary relying on the fact that Türk Telekom's pricing schemes were approved by the Board of the then Telecommunications Authority, the sector regulator; in other words, since the prices of the undertaking were regulated.

However, there have been some cases based on excessive pricing by a dominant undertaking although the prices set by undertaking in question were approved by a state body. In *Ataköy Marina*[5] case, the Competition Board deciding upon a comparative prices scheme of two marinas concluded that since there was no dominance, excessive prices were not the issue. What was interesting in this specific case was that an in-depth comparative prices analysis was made although there was no dominance.

3.3. ASKI II[6]

In this specific case, the Competition Board preferred to use "competition advocacy" and went through a detailed analysis of prices which were concluded to be excessive. Responding to a complaint based on excessive pricing of a legal water monopoly company run by Ankara municipality, a due diligence was carried out in relation to cost-price, comparative prices in various cities and financial tables. Especially relying upon the price comparisons of big cities, it was found that Ankara municipality was exercising very high prices. Nevertheless, there was a specific provision in the relevant legislation enabling the relevant undertaking to profit no less than 10%. This provision was found to be inappropriate for the markets which had legal and natural monopolies. According to the findings:

> *"…in these types of markets in order to ensure a cost-based pricing, it is expected that a pricing formulation based on "the most" profit should be preferred to "the least" profit share. In markets where no competition exists, setting prices of services on a cost-base plays a crucial role to overcome the consequences which would be to the detriment of consumers."*

Although the preliminary inquiry report was insistent on taking the case to a further step, the Competition Board was reluctant to use "excessive pricing". An opinion was sent to the state authorities pointing out that pricing mechanism of the undertaking should be redesigned to overhaul the excessive price levels and to ensure consumer benefit.

In its *Bereket Jeotermal*[7] decision, the Competition Board changed its "hands off" attitude towards excessive pricing. Up until to this case, the Competition Board adopted in principle that in markets where there were no price regulations but excessive prices were likely to occur, solutions should be sought by competition advocacy. However in this case, commenting on the findings of the case, the Competition

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3 *Amity Oil & Trakya Gazdaş*, dated 29.6.2006 and numbered 06-46/601-172.

4 *Türk Telekom*, dated 20.6.2007 and numbered 07-53/571-187.

5 *Ataköy Marina*, dated 24.4.2008 and numbered 08-30/373-123.

6 *ASKI II*, dated 20.12.2006 and numbered 06-92/1176-354.

7 *Bereket Jeotermal*, dated 14.2.2008 and numbered 08-15/146-49.

Board preferred a different remedy instead of using competition advocacy. Although the analysis relevant to the excessive pricing was found to be inadequate, it was decided that since there was the "risk" of a potential excessive pricing, the market in question should be monitored for 5 years.

In the subsequent case, *Izmir Jeotermal*[8], the Competition Board changed its attitude into "competition advocacy" again. Stressing the risk of a potential excessive pricing, the Competition Board sent its opinion to the Prime Ministry and to the Ministry of Energy and Natural Resources in order that they would take steps to regulate the sector.

4. Conclusion

As seen from the abovementioned case law of the TCA, "excessive pricing by a dominant firm" is a very seldom used concept. Indeed, to date there has only been one investigation, *Belko*, based on the concept. Most of the excessive pricing cases have been closed at the preliminary inquiry stage. Still in principle, the TCA considers the excessive pricing and the excessive pricing stemming from cost inefficiency (even though it does not result in excessive profits) as a way of abuse of a dominant position. Nevertheless in markets where there is competition, it refrains from intervention and limits itself to markets where there are natural or legal monopolies or to markets where there is no price regulation. In its milestone *Belko* decision, the Competition Board, while deciding on the excessive pricing, refrained from suggesting the appropriate price level and stated that the prices should be lowered to a level "comparable to prices in competitive markets". Since the ambiguity of competitive price levels created further problems, the Competition Board chose not to take the cases to further step of investigation and suggested alternative ways via its opinions which would eliminate the causes of high prices.

As for the sectors where there exists price regulation, the TCA generally prefers not to interfere at all. To sum up, the TCA's intervention in excessive pricing has been rare and in cases where it decides there is excessive pricing, it never tells what the competitive level should be.

[8] *Izmir Jeotermal*, dated 15.7.2009 and numbered 09-33/739-176.

UNITED KINGDOM

The United Kingdom has limited experience of considering issues of excessive pricing under the UK and EU rules prohibiting abuse of dominance.

However, the UK competition authorities have considered issues of prices being too high, or higher than the competitive level, a number of times under the UK market study and Market Investigation regime, for example in relation to markets for Store Cards, Home Credit, Classified Directory Advertising Services and Payment Protection Insurance. These examples were Market Investigations in which the Competition Commission examined the functioning of the market for the reference products to establish whether adverse effects on competition arose from features of the structure of the market or the conduct of both suppliers and customers.

The attached paper, produced by the Chief Economist of the Office of Fair Trading, may be of interest to delegates and contribute to the discussion in WP2.

ANNEX

TOWARDS AN APPROPRIATE POLICY FOR EXCESSIVE PRICING*

1. Introduction

In the US, competition law does not cover excessive pricing. In the EU, the Commission has typically exercised its prosecutorial discretion not to take excessive pricing cases, and has often stated that it is not its role to become a price regulator.

Nevertheless, there have been strong hints that the forthcoming EC draft guidelines on Article 82 of the EC Treaty will provide guidance on exploitative abuse – which most typically equates to 'excessive pricing'[1] – alongside the expected guidance on exclusionary abuse. This clearly raises the issue of what the appropriate policy to excessive pricing should be under Article 82. This brief paper examines this question.

The paper sets out the key arguments for and against a relatively *laissez faire* approach towards high pricing. A number of conclusions are drawn from this discussion as to an appropriate policy approach to excessive pricing.

The paper then argues that, while it may sometimes be appropriate to intervene against excessive pricing, the authorities should wherever possible endeavour to address the causes of the abuse - that is, the market circumstances that allow the excessive pricing to occur - rather than using price regulation to address the symptoms. Such interventions arguably have more in common with consumer policy than with traditional competition policy, but the objective is the same; to improve the functioning of competition, to the benefit of consumers.

It should be noted that this paper focuses on exploitative excessive pricing, which is not in itself harmful to the structure of competition in the relevant market. It does not cover situations in which excessive pricing may be exclusionary, such as margin squeeze or constructive refusal to supply. However, it should be noted that in practice many excessive pricing cases are essentially about exclusion rather than exploitation, and moreover the line between the two can sometimes be unclear.[2]

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* This paper was prepared the context of the 2007 UEI Competition Workshop on Article 82 EC by Amelia Fletcher and Alina Jardine, Chief Economist and Economic Advisor in the UK Office of Fair Trading (OFT). The views expressed are their own and do not necessarily reflect those the OFT.

1 Article 82(2)(a) gives as a specific illustration of abuse: 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'. While there has been at least one case based on the unfair trading conditions part of this clause (*1998 Football World Cup,* OJ [2000] L 5/55, [2000] 4 CMLR 963), cases have more usually revolved around 'unfairly high' - or 'excessive' - pricing.

2 For example, the recent *Albion Water* case in the UK, which was argued in terms of excessive pricing, was essentially about the exclusion of a potential intermediate supplier (Albion Water), rather than a straight exploitation case. Competition *Appeals Tribunal Albion Water Limited v Water Services Regulation Authority*, December 2006, 1046/2/4/04.

2. Arguments for a *laissez faire* approach to high prices

In many jurisdictions, exploitative pricing is either not proscribed by competition law or rarely prosecuted. This reflects the fact that there are a number of arguments against intervening against high prices through competition law.

2.1. High prices may be an important market signal

First, if a dominant firm in a market is earning excessive profits, this will typically act as an important market signal to attract new entrants into the market. In the absence of substantial barriers to entry, therefore, any intervention that reduces the profits of an incumbent might not only be unnecessary but could actually prolong the monopoly situation by blocking efficient market signals to potential entrants.

For this reason, it would be a sensible policy approach not to intervene against high prices if one expects them to stimulate successful new entry within a reasonable period.

2.2. High prices in one market may be given away elsewhere

Secondly, for multi-product firms, or firms in multi-sided markets, it will often be the case that a significant proportion of the 'excessive profits' that are made in one market are, in practice, given away in another market. Consider, for example, an electric toothbrush manufacturer, whose toothbrushes are designed so that they can only be used with the manufacturer's proprietary brush heads. The manufacturer is effectively a monopolist in the supply of its own brush heads, and accordingly will typically price them fairly high. However, so long as the manufacturer faces effective competition in the primary electric toothbrush market, we should expect it to compete much of this 'excess profit' away. This will be true even if consumers do not engage in any form of 'life cycle' assessment of product pricing.

This does not necessarily mean that it will always be inappropriate to intervene against high prices in markets where a substantial proportion of the profits from those high prices are effectively passed back to consumers. In some cases, such a pricing structure may nevertheless be inefficient, for example if the consumers who receive the passed-back profits are not the consumers that pay the high prices, or if the pricing structure substantially distorts consumers' choices (which can in turn affect the nature and degree of competition).

However, it does suggest that a sensible policy approach would be not to intervene against high prices for one element of a firm's product portfolio without careful consideration of the extent of competition the firm faces on the other elements of its portfolio, the extent to which any 'excess profits' are effectively returned to the consumer, and the extent to which the pricing structure substantially distorts consumers' choices.

2.3. Assessment of excessive pricing is difficult

Thirdly, excessive pricing can be extremely difficult to assess. This is true *ex post* when examining a particular case, but the issues are still more extreme when trying to set clear rules that allow *ex ante* competition law compliance by firms.

The key problem here is that it is not clear what the appropriate benchmark should be. One obvious option is the 'competitive price'. But how does one define the competitive price in a market that is not competitive? Should dominant firms really be required to price at levels which would obtain under vigorous (Bertrand) price competition, when such prices would not be observed in non-cooperative oligopolies not subject to Article 82?

In *United Brands*[3], the European Court of Justice used the alternative concept of 'economic value':

> *"charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is […] an abuse."*

But there are serious problems with this test too. In economic terms, if a person is willing to pay a given price for a product, then the economic value of that product to that person must be at least as high as that price. It is noteworthy that the UK Court of Appeal recently overturned a High Court finding of excessive pricing, on the basis that the 'economic value' of a product should take account of its value to the buyer.[4] Since this latter concept equates economically to what a buyer would be willing to pay for the product, this line of reasoning taken to its logical conclusion would seem to suggest that – based on the 'economic value' test - excessive pricing cases cannot be brought if the buyer ever actually buys the product.

One can, of course, look at historic margins, margins in other regions/ countries for comparison or margins earned in similar industries. But - say the advocates of a *laissez faire* approach to excessive pricing - none of these are perfect and sometimes none is possible. Moreover, even if one does observe differences in margins, should this necessarily imply abuse, or should some degree of differential margin be acceptable?

2.4. Price regulation is highly distortive

Fourthly, and perhaps most importantly, it is argued that fines for excessive pricing effectively equate to price regulation. Indeed, sometimes such regulation is explicit.

The concern here is that price regulation can distort competition, investment and R&D, to the detriment of consumer welfare. In particular, ongoing price regulation of a dominant firm can:

1. *Inhibit entry/expansion by competitors*: Potential competitors are less likely to enter or expand in the market if they find it hard to compete against the low prices of the regulated firm. This is especially likely to be a problem where a dominant firm has important incumbency advantages, since new entrants would typically seek to win market share in such circumstances by undercutting the incumbent's high prices.

2. *Distort incentives for efficiency:* Suppose a firm has higher profits than its competitors primarily because it is highly efficient, for example perhaps because it has adopted state-of-the-art production processes. If such a firm runs the risk of being penalised for having excessive profits, and having its productivity gains expropriated by being forced to lower its prices, this could potentially discourage firms from improving efficiency (and productivity) in the first place.

3. *Distort investment incentives, including on innovation:* More generally, a dominant firm's market position will often derive partly from its past investments. And in some cases, the firm will require the high prices associated with its dominant position to recoup these past investments, and to incentivise such investments in the first place. This incentives issue is likely to be especially important for R&D investments, which can be highly risky, costly, and slow to generate revenues. Intellectual property rights are specifically designed to provide innovating firms with a degree of market power, and so incentivise upfront R&D investment through the

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3 Case 27/76 United Brands v Commission, [1978] ECR 207, [1978] 1 CMLR 429.

4 UK Court of Appeal Attheraces (UK) Limited v. The British Horseracing Board Limited, Case No: A3/2006/0126. February 2007.

'prize' of higher than normal future profits. Any reduction in future profits - or a greater risk of these profits being regulated - could clearly jeopardise such incentives.

4. *Distort pricing incentives:* Depending on the specific design of the price regulation, there is a risk that regulation can facilitate anti-competitive pricing. For example, suppose a dominant firm is regulated on its average price over two markets, and it faces potential competition in one of those markets. It will have an incentive to cut price in the contestable market to make entry unprofitable, and this predatory behaviour will be costless since it can be funded by raising price in the non-contestable market and preserving the average price at the regulated level.

In terms of these distortions, it seems likely that the 'deterrent' effect of excessive pricing rules – whereby dominant firms in the economy endeavour to keep prices below their 'best guess' as to what constitutes excessive pricing has the potential to be substantially more problematic than the ex *post* regulation of those dominant firms whose pricing has explicitly been found to be exploitative.

In the absence of excessive pricing rules, firms set prices to maximise profits. If they are concerned that their profit-maximising prices might be seen as exploitative under competition law, though, this could lead them to alter their pricing behaviour in all sorts of unpredictable and distortive ways. By contrast, where competition authorities engage in *ex post* regulation of infringing firms, any distortions can be taken into account on a case-by-case basis and to some extent avoided by careful intervention design.

The distortions associated with the 'deterrent' effect of excessive pricing rules provide a good policy argument for minimising this deterrent effect, in particular by steering clear of imposing fines for excessive pricing and of allowing private damages actions in respect of such behaviour, since each of these strengthens firms' incentives to abide by competition law. By limiting available sanctions to the imposition of *ex post* penalties, such as future price regulation, firms are likely to be less concerned about breaching excessive pricing rules, and as such the associated distortions across the economy should be greatly reduced.[5]

Another concern highlighted above was the risk that price regulation might inhibit entry or expansion by competitors, and so prolong the dominant firm's market position. This is potentially a serious issue. However, it is worth noting that it is less likely to arise in practice if the policy approach were adopted of only intervening in markets where one does not expect the high prices to stimulate successful new entry within a reasonable period. Under this policy, price regulation should not occur where competitors are realistically willing and able to enter or expand through undercutting the dominant firm's prices, and so become a real constraint on the dominant firm.

2.5. Summary of policy implications

In summary, one might reasonably conclude from the above arguments that a sensible policy approach towards excessive pricing would have the following characteristics:

- There should be no intervention against high prices if one expects them to stimulate successful new entry within a reasonable period.

[5] Given the very limited numbers of excessive pricing cases we observe (even in Europe), one might anyway expect there not to be a substantial *ex ante* deterrent effect on pricing in practice. However a recent (and as yet unpublished) study by the OFT on the deterrence effect of the UK competition regime found a not insignificant amount of deterrence of pricing behaviour due to concerns it might be found to unlawfully exploit dominance (although it is also notable that the deterrence levels for excessive pricing were substantially lower than for any other form of abuse).

- In examining high prices for one element of a firm's product portfolio, it is important also to consider carefully the pricing of other elements of its portfolio, the competition the firm faces in those other markets, and the impact on consumers' choices.

- In order to reduce deterrence, firms should not face fines for excessive pricing, and should not face the risk of private damages actions in respect of such behaviour.

None of the above are currently explicitly (or even implicitly) incorporated within EC competition policy. Their adoption would therefore go a long way towards meeting the concerns set out above. Of the three, the third would probably be the most controversial.

However, vigorous advocates for a *laissez faire* approach to excessive pricing would argue that the concerns set out above are so serious that it is wrong for competition law to proscribe high pricing at all. They would typically accept that there may need to be explicit regulation for certain areas of natural monopoly – such as the utilities – but argue that such regulation should be done carefully by specialist regulators. The rest of the economy should be left alone, not least because the risks of careless and ill-informed intervention outweigh any potential benefits.

3. Arguments for a degree of intervention against excessive pricing

Against this view, a number of arguments can be made as to why competition law *should* cover excessive pricing.

3.1. Good fit with the objectives of competition policy

Firstly, there is the simple philosophical point that there is a clear potential for consumer harm from excessive pricing. Indeed, it is arguable the primary rationale for competition policy is – in the end - to limit the potential for such exploitative behaviour, and in so doing benefit consumers. As such, there is a good fit between a law against excessive pricing and the overarching objectives of competition policy.

This point is given further weight by a recent paper by Akman (2007)[6] which reviews the travaux préparatoires (preparatory documents) associated with the initial drafting of Article 82 (then Article 86) in order to find out the legislative intent of the provision. Akman concludes that:

> *"…the provision was intended to apply to only 'exploitative' abuses and not 'exclusionary' abuses. Their main worry being 'increasing the size of the pie'…."*[7]

3.2. Price regulation of this sort occurs elsewhere in competition and consumer law

Secondly, it is pointed out that certain forms of high pricing are already proscribed under other parts of competition and consumer law. For example:

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6 Akman, P. (2007) *"Searching for the Long-Lost Soul of Article 82EC"* (CCP Working Paper 6-5). http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP07-5.pdf.

7 Akman also provides evidence that there was dispute during the early years of Article 82 implementation as to whether it applied to only exploitative abuses or included exclusionary abuses as well. For example, Joliet (later a judge of the ECJ) was of the view that it merely covered exploitative abuses, the test of legality being not the interference with other firms' freedom to compete and the use of 'exclusionary' practices to achieve and hold power, but rather whether there is monopolistic exploitation of the market. (See Joliet, R. *Monopolization and Abuse of Dominant Position,* 1970). Joliet apparently reached this conclusion by studying the examples listed in Article 82.

i) The law on exclusionary abuse of dominance can require dominant suppliers to ensure that their pricing is fair and reasonable: High prices charged by an upstream supplier to a downstream firm can constitute constructive refusal to supply or margin squeeze if they restrict or distort the ability of the latter to compete on the relevant downstream market.

ii) Exemptions of anti-competitive agreements (under Art 81(3)) can require fair and reasonable pricing: Such requirements are most often observed for exemptions of horizontal agreements. There may be two possible rationales for such requirements:

- To ensure that the horizontal agreement does not eliminate competition. An example here is the requirement in the European Commissions *Guidelines on Horizontal Cooperation* Agreements, in respect of standard-setting organisations, that:

  "To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms."[8]

- To ensure that the restriction to competition is no greater than is required to achieve the benefits. An example here is the UK LINK case (2000)[9], in which the OFT concluded that an agreement between UK banks, relating to the cross-charge levied for the use of each others' ATM machines, would qualify for exemption so long as the charge was set no higher than required for cost recovery.

iii) *Unfair contract terms regulations require that hidden charges are 'fair':* Where consumers face additional charges that are not covered by the 'core terms' of a standardised contract with a supplier, these may contravene consumer law if they are not 'fair'. 'Fair' in this situation has regularly been interpreted as 'cost-reflective'. A recent example in the UK was the OFT's threatened action against the default fees charges by credit card issuers for late payment of invoices, which were considered to be substantially above cost.[10]

In addition, in the UK, the Enterprise Act 2002 empowers the authorities to carry out market investigations where there are 'features' of a market that prevent, restrict or distort competition. Such investigations regularly examine markets in which prices are found to be excessive, and one potential outcome is to impose price regulation remedies. However, in practice the UK Competition Commission[11] has typically preferred remedies designed the make the markets involved work more effectively, which should in turn lead to lower prices, as opposed to regulating prices directly. This alternative approach to addressing excessive pricing is discussed further below.

3.3. Assessment difficulties are over-stated

Thirdly, while it is true that assessment of excessive pricing can sometimes be difficult, it would be wrong to over-state these difficulties. On the one hand, they do mean that it can be difficult to set out

8 OJ [2001] C 3/2, [2001] 4 CMLR 819. Paragraph 174.

9 Office of Fair Trading, Case CP/0642/00 *LINK Interchange Network Ltd* (11 May 2000).

10 See http://www.oft.gov.uk/news/press/2006/credit-cards. In the event, the credit card companies reduced their charges in order to avoid action, so the case did not go to court.

11 Market investigations are carried out by the UK Competition Commission, following a reference from the OFT or another designated body.

guidance that draws a clear line between excessive pricing and lawful pricing. On the other, there will nevertheless be cases where the excessive pricing is sufficiently extreme that it is relatively easy to demonstrate, based on a variety of different measures.

An example here is the OFT's *Napp* case (2001)[12], which related to the excessive pricing of a sustained release morphine product. This case was arguably not a typical excessive pricing case since there were two elements to the case: exclusionary low pricing to the hospital sector and excessive pricing to the community sector. While the OFT chose to run the case as two separate abuses, this particular instance of excessive pricing could instead have been framed as ongoing recoupment from Napp's predatory strategy, rather than as an abuse in its own right.

Nevertheless, the case demonstrates well how one can sometimes observe clear water between 'excessive' pricing and 'competitive' pricing. In assessing Napp's pricing, the OFT benchmarked Napp in several different ways:

- *Price-cost margins* were compared both across activities and with those of competitors.
- *Prices* were compared not only across activities and with those of competitors, but also across countries and over time.

Napp's prices and margins were found to be high – and by some margin - relative to all of these different comparators. On this basis, and without facing any serious difficulties in assessment, the OFT found Napp to have exploited its dominant position.

3.4. Potential distortions from price regulation are over-stated

Fourthly, the policy approach set out at Paragraph 0 above would go a long way towards addressing the potential distortions highlighted as arising from price regulation. In particular, the deterrence effect would be greatly reduced, as would the risk of price regulation inhibiting a realistic prospect of entry or expansion by competitors.

Of continuing concern, however, are the potential distortive effects of *ex post* price regulation on upfront investment. Especially important here is investment in R&D, since R&D can play a crucial role in improving consumer welfare over the long term, and intellectual property rights are specifically designed to generate a degree of apparently 'excessive' profits in order to incentivise firms to engage in costly and risky R&D in the first place.

To some extent, these various concerns can be ameliorated so long as competition authorities are aware of the risks, and intervene carefully with careful consideration of the potential distortive impact of any proposed regulation, and ensuring appropriate returns to sunk investments.

However, in the case of R&D, the importance of ensuring incentives for dynamic competition may mitigate in favour of a stronger policy approach: specifically, that there should be no intervention against excessive prices for an innovative product within that product's patent life. It is noteworthy that in the *Napp* case, the OFT argued that the patent period provides opportunity for recoupment of *ex ante*

[12] Office of Fair Trading, Case CA98/2/2001 *Napp Pharmaceutical Holdings Ltd* (30 March 2001). Competition Appeals Tribunal judgment, following appeal: *Napp Pharmaceuticals Holdings Limited and Subsidiaries and Director General of Fair Trading*, January 2002, 1001/1/1/01.

investment. While not made explicit, the tenor of this discussion suggests that the OFT would not have brought the case had the drug still been within patent.[13]

3.5. Price regulation is not the only remedy!

Finally (and one of the key messages of this paper), it is important to recognise that price regulation is not the only possible remedy to a finding of excessive pricing. In the following section, we discuss an alternative approach to addressing exploitative abuse, which aims to address the causes of high prices, rather than the symptoms, and as such is less likely to result in market distortions.

The approach is grounded in the 'demand side' of the market, and thus arguably has more in common with consumer policy than with traditional competition policy, or even sectoral price regulation. As such, for some competition authorities it may tread relatively new ground and involve new thinking. However, the benefits are potentially large, not least in terms of limiting the extent of ongoing price regulation.

4. An alternative approach to remedying exploitative abuse

As a general rule, exploitative abuse over a prolonged period occurs only where there are barriers to entry or expansion, preventing competitors from undercutting the dominant firm and eroding its market position.

Sometimes these barriers relate purely to the supply side of the market. For example, potential competitors may lack access to crucial IP or they may face insurmountable regulatory barriers to entry.[14]

Often, however, the most serious barriers to entry and expansion will be to some extent related to the demand side of the market: that is, related to the characteristics and behaviour of buyers. These include:

i) *High switching costs*: whereby buyers find it difficult or costly, or generally lack the incentive, to switch between suppliers.

ii) *Lack of shopping around by customers*: whereby buyers find it difficult or costly, or generally lack the incentive, to shop around between suppliers.

iii) *Lack of comparable information across suppliers:* such that buyers are unable to make rational decisions across suppliers.

iv) *Asymmetric information between firms and customers:* whereby buyers cannot observe all product characteristics (most usually, product quality) and therefore are overly reliant on supplier reputation or past experience with a given supplier.

In such situations, the authorities may be able to put in place remedies which alleviate the relevant demand side problems and in doing so activate buyers to drive up the degree of competition in the market. This should in turn lead to lower prices and eliminate any need for price regulation. A non-exclusive list of possible interventions is provided in Box 1 below.

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13 Note that this argument assumes that the patent regime is well designed in terms of achieving the right balance between positive effects for dynamic efficiency and negative effects for competition, or at least that it is not for competition policy to try and ameliorate any design failures of the patent regime. This assumption, however, is clearly controversial and will be addressed in Panel VI of this Workshop.

14 It should be noted that where competition problems arise due to regulatory barriers to entry, competition authorities have an important competition advocacy role to play in trying to reduce such barriers.

As mentioned above, in the UK, the Enterprise Act 2002 empowers the Competition Commission to carry out market investigations. These are specifically designed to take a holistic approach to looking at why markets are not working well, examining causes of problems as well as symptoms, and reviewing demand side issues of the type above alongside supply side issues. The Competition Commission also has a wide range of sanctions available, the main constraint being that its interventions must be proportionate to the problems it identifies in the market.

However, other Member States do not have such wide-ranging powers. The ability to bring excessive pricing cases under Article 82 would seem therefore to provide a useful and important avenue for other authorities to bring the sort of interventions listed in Box 1.[15]

Such interventions – where effective – have the potential to generate far greater benefits for consumers than price regulation, since enhanced competition will typically be more effective at driving up quality, service and innovation and driving down costs. At the same time, they do not have the downsides of price regulation described above.

5. Conclusions

Having set out the arguments for and against a *laissez faire* approach towards excessive pricing, this paper proposes that a sensible policy approach would have the following characteristics:

i) There should be no intervention against high prices if one expects them to stimulate successful new entry within a reasonable period.

ii) In examining high prices for one element of a firm's product portfolio, it is important also to consider carefully the pricing of other elements of its portfolio, the competition the firm faces in those other markets, and the impact on consumers' choices.

iii) In order to reduce deterrence, firms should not face fines for excessive pricing, and should not face the risk of private damages actions in respect of such behaviour.

iv) There should be no intervention under Article 82 against the high prices of an innovative product within its patent period.

v) More generally, competition authorities should consider carefully the effect of any *ex post* intervention on *ex ante* investment incentives.

vi) Competition authorities should seek alternative remedies to price regulation, which are designed to address demand side problems and so activate competition in the market.

While these various changes to policy would not overcome all of the concerns raised by advocates of a *laissez faire* approach to excessive pricing, they would go a long way towards doing so.

In the view of the authors, adoption of such an approach would tip the balance towards maintaining a policy of intervening against excessive prices under Article 82. One important factor in reaching this conclusion is that many jurisdictions do not have other levers to press in order to seek alternative demand side remedies designed to market markets work more effectively, of the sort set out in Box 1.

[15] An alternative would clearly be for other jurisdictions to adopt a market investigation law similar to that in the UK, but this would clearly require far-reaching legislative change.

Box 3. Possible demand-side interventions to enhance entry/expansion

1. Interventions to facilitate switching

- Cancellation rights (improved, clearer, easier to apply)
- Number (or similar) portability - for where customers are attached to an element of their present product
- Customer information portability - for where new suppliers face information asymmetries/ disadvantage relative to current suppliers
- Improved ease/speed of switching

2. Interventions to facilitate shopping around

- Cooling off periods (improved, clearer, easier to apply)
- Written quotations, lasting for a fixed period
- Search routines and price comparison websites
- Consumer education and advocacy (about the benefits that shopping around could bring)

3. Interventions to facilitate comparisons between offerings

- Clear upfront prices (for all elements of the package)
- Standardised prices (eg APRs for credit products)
- Standardised products (eg in insurance – base line cover)
- Price comparison tables (eg as provided for loan products on the website of the UK Financial Services Authority)

4. Interventions to overcome asymmetric information problems

- Warranties schemes
- Complaints/redress schemes
- Minimum quality standards
- Licensing schemes
- Legislation that encourages the use of independent advisors (as in financial services)
- Codes of practice

UNITED STATES

This paper responds to the Working Party No. 2 Chair's letter of 11 August 2011, inviting submissions for the Working Party's upcoming roundtable on excessive pricing. The U.S. Federal Trade Commission ("FTC") and Antitrust Division of the U.S. Department of Justice ("DOJ") (collectively, "the Agencies") are pleased to provide our perspective on this issue, and explain why U.S. antitrust law does not proscribe excessive pricing as an independent antitrust violation, although high prices may be indicative of other anticompetitive activities.

1. U.S. antitrust law does not prohibit "excessive pricing" in and of itself

U.S. antitrust law allows lawful monopolists, and *a fortiori* other market participants, to set their prices as high as they choose. This central tenet of U.S. antitrust law is well supported by court decisions that have held, for example, that "[a] pristine monopolist…may charge as high a rate as the market will bear"[1] and that "[a] natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of 'monopolizing' in violation of the Sherman Act…and can therefore charge any price that it wants,… for the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute."[2] The reasons that U.S. law does not deem "excessive pricing" to be an antitrust violation are examined below.

1.1. Limiting the Freedom to Set Prices Would Diminish Incentives to Compete and Innovate

Denying a lawful monopolist the fruits of its monopoly can diminish its incentive to compete in the first place. As Judge Learned Hand aptly put it: "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[3] The Supreme Court further elaborated on this notion in its 2004 *Trinko* decision, noting that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth."[4] Therefore, limiting the freedom to set prices may well conflict with the underlying premise of antitrust policy, *i.e.* promoting a robust competitive process that produces high-quality, innovative goods at low prices.

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

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

3 *Aluminum Co. of America*, 148 F.2d at 430 ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the [Sherman] Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.").

4 *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

1.2. Institutional Difficulty in Determining What Constitutes An "Excessive" Price

An equally important reason for not condemning "excessive" pricing, as such, is institutional. U.S. courts and antitrust agencies have found that determining the reasonableness of prices charged by a lawful monopolist goes beyond their competence. This notion goes back to early U.S. antitrust jurisprudence, when then Court of Appeals Judge William Taft suggested that basing antitrust decisions on the reasonableness of the prices charged by an alleged monopolist or cartel would be to "set sail on a sea of doubt."[5] A more recent rejection of the proposition that courts construing competition laws are not sufficiently equipped to determine what constitutes a "fair" or "excessive" price, can be found in the Supreme Court's 2009 decision in *Pacific Bell Telephone Co. dba AT&T v. linkLine Communications, Inc.*[6] In that case, which involved what is called a "price-cost squeeze," the plaintiffs offered high-speed DSL Internet service. The U.S. Federal Communications Commission's regulations required AT&T to provide interconnection service to competing DSL providers, such as linkLine. Plaintiffs alleged that AT&T squeezed their profit margins by charging a high wholesale price for DSL transport and a low retail price for DSL service.

Earlier lower court cases suggested that a vertically integrated monopolist, such as AT&T, should be required to leave a "fair" or "adequate" margin between the wholesale price and the retail price, and that failure to do so could be viewed as illegal exclusionary conduct.[7] Dismissing the price squeeze claims, the *Pacific Bell* Court, quoting an earlier opinion by Justice Breyer, asked rhetorically:

> *"[H]ow is a judge or jury to determine a 'fair price?' Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition 'would have set' were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit,' no matter how inefficient they may be? . . . And how should the court respond when costs or demands change over time, as they inevitably will?"*[8]

Antitrust agency officials have similarly expressed skepticism as to their agencies' ability to determine which prices constitute "excessive prices." For example, former FTC General Counsel, William Blumenthal, has noted that:

> *"[I]n cautioning against even limited intervention by competition agencies against high prices, I am focusing…principally on considerations of institutional design…. Simply put, we need to question whether competition agencies have the competence to engage in classical price-and-profits public-utility-style regulation."*[9]

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5 *United States v. Addyston Pipe & Steel Co.,* 85 F. 271, 283-284 (6th Cir. 1898) *("It is true that there are some cases in which the courts, mistaking...the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt....").*

6 *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009), 129 S. Ct. 1109 (2009).

7 *Pacific Bell*, 129 S. Ct. at 1121, citing See *Town of Concord, Town of Concord v. Boston Edison Co*., 915 F.2d 17, 23-25 (1st Cir. 1990); and *United States v. Aluminum Co. of America,* 148 F.2d at, 437-438.

8 *Pacific Bell* 129 S. Ct. at 1121, quoting *Town of Concord v. Boston Edison Co*., 915 F.2d at 25.

9 William Blumenthal, FTC General Counsel, DISCUSSANT COMMENTS ON EXPLOITATIVE ABUSES UNDER ARTICLE 82 EC, Remarks before the European University Institute Twelfth Annual Competition Law and Policy Workshop: "A Reformed Approach to Article 82 EC" (June 9, 2007), *available at*

The difficulty in determining what price constitutes an "excessive" price means that it is inherently difficult to set up an accurate "excessive pricing" antitrust enforcement standard that will guide agencies both as to when to intervene and, if intervening, how to set up a remedy for that price.[10]

1.3. Interfering With Market Pricing Mechanisms Interferes with the Proper Functioning of Markets to the Detriment of Consumers

A third rationale for not intervening in firms' pricing is related to the crucial role prices play in determining the allocation of scarce resources among competing uses. One common definition of economics is "the study of how societies use scarce resources to produce valuable commodities and distribute them among different people."[11] In a free market economy, prices determine these allocations in two ways. First, they serve a signaling function, demonstrating where more resources are required and where they are not. For example, rising consumer demand typically raises prices, thus signaling to suppliers to expand their production (output) to meet the growing demand. High prices also typically attract new market entry, by producers lured by the lucrative profits to be made, thus promoting output. Conversely, lower demand typically results in falling prices, signaling suppliers to reduce production or allocate resources to other uses. In other words, prices allow consumers to express their preferences, thus sending important information to producers about the changing nature of their needs and wants. Second, prices serve to **ration scarce resources** when demand exceeds supply in a market. Under such **shortage** conditions, the price of the product at stake typically rises – leaving only those who are sufficiently **willing and able to pay** for it to purchase the product. Thus, the market price acts as a **rationing device** ensuring that market demand and supply are at the same levels, and preventing shortages.

This market pricing mechanism promotes the most efficient allocation of resources in a free market economy, and this same efficient allocation of resources is the bedrock of antitrust policy and enforcement in the U.S., as well as other OECD member jurisdictions. "There is general consensus that the basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation of resources—and thus efficient market outcomes—in free market economies."[12] In the U.S., the concern is that proscribing "excessive pricing" may interfere with markets' price-setting mechanism, and with the important signaling and rationing functions it carries out.[13]

2. The Difficulty of Crafting an Antitrust Remedy for "Excessive Pricing"

If excessive pricing were an antitrust violation, the Agencies would need a procedure for determining what constitutes an "excessive" price. A similar procedure would also be necessary for crafting a remedy, which presumably would require firms to set prices that the authority would not consider excessive. The Agencies are not in a good position to determine these prices. For example, the theoretical "best" price for society in a market with competing firms balances the consumer benefits of lower prices against the need

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http://www.ftc.gov/speeches/blumenthal/070731florence.pdf.

10 See further treatment of the remedies issues below in ¶ 9.

11 Paul A. Samuelson and William D. Nordhaus, *Microeconomics* 3 (McGraw-Hill, 14th Ed. 1992).

12 See Organization for Economic Co-operation and Development, COMPETITION POLICY AND EFFICIENCY CLAIMS IN HORIZONTAL AGREEMENTS, OECD/GD (96) 65, Paris (1996), *available at* http://www.oecd.org/dataoecd/1/4/2379526.pdf.

13 See, e.g., Blumenthal, *supra* note 9, "[c]onsidered in terms of the particular market, high prices are a signal indicating that the market may currently be characterized by undersupply, and suppressing that signal will deprive the economy of warranted entry and capacity expansion."

to provide firms with incentives to invest and enter the market. These prices generally depend on cost and demand factors that the Agencies cannot observe.[14] Absent evidence of collusion, there is no reason to believe that the prices that arise from the competitive process among firms will exceed the theoretical "best" prices. Therefore, any remedial action the authority takes to lower prices could easily discourage entry and investment and harm consumers.

3. Some Higher Prices May Be Addressed as an Anti-Competitive Effect of Other Underlying Antitrust Violations, and Help the Agencies Prove These Violations

Although prices lawfully set by market participants, no matter how high they are, generally do not raise antitrust concerns among U.S. enforcers, high prices may be a potential result of conduct that otherwise violates the antitrust laws. In such cases, the remedy prescribed for the underlying antitrust violation typically also results in lowering the price. The U.S. approach to antitrust analysis is based on a conduct's potential to create anticompetitive effects. The most powerful evidence of such potential occurs when a price increase (not associated with a quality increase) actually comes about. Thus, although a high price charged by a law-abiding market participant does not violate U.S. antitrust law in and of itself, the existence of a high price can be an important element in proving a separate antitrust violation (for example an anticompetitive merger, or monopolistic and other exclusionary unilateral practices).[15] The following paragraphs give a few examples.

In the context of unilateral conduct, for example, the *Berkey* court decision notes: "[T]here can be no unfairness in preventing a monopolist that has established its dominant position by **unlawful** conduct from exercising that power in later years to extract an excessive price. After all, it is only a pristine 'origin,'…that may save a monopoly so long as it continues to refrain from anticompetitive activity from the condemnation of *§ 2* [of the Sherman Act]. The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it."[16]

In the context of an action based on the FTC's authority under Section 5 of the FTC Act,[17] that did not amount to a Sherman Act Section 2 violation, the FTC's majority statement accompanying the complaint against N-Data[18] focused on the company's reneging on its prior licensing commitment to a standard-setting body, which enabled it to increase the price of a specific Ethernet technology used by almost every American consumer owning a personal computer. The price increase was an important element in the majority opinion's characterization of N-Data's conduct as an "unfair method of competition" in violation of Section 5 of the FTC Act. The case settled through a consent agreement.[19]

In the merger review context, predicted anticompetitive effects such as higher prices similarly play a key role in the agencies' analysis and decision to challenge anticompetitive mergers under Section 7 of the

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14 Technically, the optimal prices under (potentially imperfect) competition and free entry depend on the *global properties* of the firms' cost and demand functions. The Agencies do not have access to this information

15 Setting a very high price could also theoretically amount to a refusal to deal.

16 *Berkey Photo, supra* note 1, at 296 [emphasis added], quoting *Aluminum Co. of America*, 148 F.2d at 429.

17 15 U.S.C. §45. Section 5 of the FTC Act prohibits, and gives the FTC enforcement authority against "unfair methods of competition," and "unfair or deceptive acts or practices.

18 *Available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf; dissenting statements *available at* http://www.ftc.gov/opa/2008/01/ethernet.shtm.

19 Press release announcing the consent *available at* http://www.ftc.gov/opa/2008/01/ethernet.shtm.

Clayton Act.[20] For example, the FTC's objection in 1997 to a proposed merger of Staples and Office Depot was based on a "competitive problem that would lead to…higher prices," and on data showing that "in markets where three superstores compete, prices are significantly lower than in two chain markets."[21]

4. Examples of High and Rising Prices as Potential Indicators of Anticompetitive Activities

While high prices are often simply a reflection of the market aggregate supply and demand curves, sustained high (or even rising) prices may serve as indicators of a possible competitive problem, especially if there does not appear to be a supply response from industry participants. Therefore sustained high prices may bring about an antitrust investigation. A few examples of where high prices have been a basis for antitrust investigations are described below. It should be noted that these investigations often do not uncover any anticompetitive activities which suggests that without these high prices, the lack of market signals could reduce economic efficiency.

4.1. The FTC Gasoline and Diesel Price Monitoring Project

In 2002, the FTC announced a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities.[22] Today, this project tracks retail gasoline and diesel prices in some 360 cities across the U.S. and wholesale prices in 20 major U.S. urban areas. The FTC's Bureau of Economics staff regularly receives and reviews data from a private oil price data collection company, as well as from the U.S. Department of Energy and other relevant information. An econometric model is used to determine whether current retail and wholesale prices each week are anomalous compared to historical data.

The Monitoring Project alerts FTC staff to unusual changes in gasoline and diesel prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to result from market-driven causes, staff consults with the Energy Information Administration of the Department of Energy. FTC staff also contacts the offices of the appropriate state Attorneys General to discuss the anomaly and appropriate potential actions, including the opening of an investigation.

4.2. A Pending Investigation in Light of Increases in Crude Oil and Fuel Product Prices and Profit Margins

On June 20, 2011, in light of recent increases in crude oil and refined petroleum product prices and profit margins, the FTC disclosed an investigation to determine whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged or are engaging in practices that have lessened or may lessen competition – or have engaged or are engaging in manipulation – in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency.[23] This pending investigation serves as an example of how pricing behavior may trigger an investigation of whether anticompetitive practices are involved.

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20 15 U.S.C. §18.

21 *See* "FTC Rejects Proposed Settlement in Staples/Office Depot Merger," Press Release, *available at* http://www.ftc.gov/opa/1997/04/stapdep.shtm; see more analysis of the price-raising effects of the proposed Staples/Office Depot merger in the Public version of the FTC's Memorandum of Points and Authorities in Support of Motions for Temporary Restraining Order and Preliminary Injunction, *available at* http://www.ftc.gov/os/1997/04/pubbrief.pdf.

22 *See* http://www.ftc.gov/ftc/oilgas/gas_price.htm.

23 *See* http://www.ftc.gov/os/2011/06/110620petroleuminvestigation.pdf.

4.3. The investigation into the spring/summer 2006 U.S. Gasoline Price Increase

In response to higher gasoline prices that occurred during the spring and summer of 2006, that also raised concern from Congress and the public, on April 25, 2006, President George W. Bush directed the "Department of Justice to work with the [Federal Trade] Commission and the Department of Energy to conduct inquiries into illegal manipulation or cheating related to [then-] current gasoline prices."[24] These targeted inquiries "revealed no evidence that refiners conspired to restrict supply or otherwise violated the antitrust laws" [25] finding, rather, that the "price increases were caused by a confluence of factors reflecting the normal operation of the market."[26]

5. Non-Antitrust Pricing Rules

5.1. Price Gouging and the FTC's Post-Katrina Gasoline Price Investigation

"Price gouging" is a term that lacks a formal definition, although the term usually refers to significant and rapid price increases, typically after some type of demand or supply shock.[27] One example of such a shock occurred in late summer 2005, when hurricanes Katrina and Rita (hereinafter referred to together as "Katrina") hit major portions of the U.S. Gulf Coast region, causing significant losses to the nation's crude oil production and refining capacity.[28] The immediate period following the hurricanes was characterized by a sharp increase in U.S. consumer fuel prices, leading the U.S. Congress to direct the FTC to investigate "whether these developments resulted from market manipulation or price gouging practices in the sale of gasoline."[29]

There is no Federal statute prohibiting price gouging. Twenty-nine States and the District of Columbia, however, prohibit excessive pricing of motor fuels and other commodities during periods of abnormal supply disruption (normally triggered by a declaration of emergency by the President, the governor, or local officials). These laws provide for civil penalties, criminal penalties, or both.[30] In the absence of any accepted definition of the terms "price gouging" and "price manipulation," the FTC post-Katrina Report defined "**price manipulation**" as:

> *"(1) all transactions and practices that are prohibited by the antitrust laws, including the Federal Trade Commission Act, and (2) all other transactions and practices, irrespective of their legality under the antitrust laws, that tend to increase prices relative to costs and to reduce*

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24 President George W. Bush, *Remarks to the Renewable Fuels Summit 2006* (Apr. 25, 2006), *available at* http://www.presidentialrhetoric.com/speeches/04.25.06.html.

25 Federal Trade Commission, *Report on Spring/Summer 2006 Nationwide Gasoline Price Increases*, at 3, *available at* http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf.

26 *Id.* at 26.

27 *Id;see* also Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Prices Increases,* iii [hereinafter: FTC Post-Katrina Report] *available at* http://www.ftc.gov/ftc/oilgas/competn_reports.htm.

28 *Id.* at 62-64.

29 *Id.* at 183. The FTC's mandate was based on (1) §1809 of the Energy Policy Act of 2005, which required the Commission to "conduct an investigation to determine if the price of gasoline is being artificially manipulated by reducing refinery capacity or by any other form of market manipulation of price gouging practices;" and (2) §632 of the Commission's appropriations legislation for fiscal year 2006, in which Congress directed the Commission to investigate nationwide gasoline prices and possible price gouging in the aftermath of Hurricane Katrina. See i*d.*, at i.

30 FTC Post-Katrina Report, supra note 27 at 190.

> *output. Transactions and practices that violate the antitrust laws include anticompetitive mergers, acquisitions, and joint ventures, collusion among competitors to fix prices or output, and monopolization or attempts to monopolize."*[31]

In the FTC Post-Katrina Report, Congress directed the FTC to define "**price gouging**" as:

> *"any finding that 'the average price of gasoline available for sale to the public in September, 2005, or thereafter . . . exceeded the average price of such gasoline in that area for the month of August, 2005, unless the Commission finds substantial evidence that the increase is substantially attributable to additional costs in connection with the production, transportation, delivery, and sale of gasoline in that area or to national or international market trends.'"*[32]

Based on these two definitions, FTC staff examining the post-Katrina U.S. oil market found no evidence of price manipulation,[33] and a very small number of price gouging incidents, only one of which was not explained by local or regional market trends.[34]

On the policy level, the FTC Post-Katrina Report highlighted a number of the propositions described earlier in this note. It recognized that, while consumers might be better off in the short run if they did not have to pay higher prices for the same quantity of goods, distortions caused by controls on prices would harm their economic well-being in the long run. Such harm would result from price controls' distortion of the price signaling mechanism described earlier,[35] which in turn may lead producers to manufacture and distribute an inefficient amount of goods and services and may deny consumers the information necessary to properly value one product against another.[36] In addition, the Report noted that even in periods of severe supply shock, such as during a major reduction in production or distribution caused by natural disasters, higher prices signal consumers to conserve and producers to reconfigure operations to better prepare for the next supply shock. Thus, the right price for a commodity is not necessarily the low price; rather, it is the competitively determined market price.[37] The Report explained that keeping prices artificially low will prevent consumers from curbing their demand, while eliminating other suppliers' incentive to send new supplies to areas affected by the disasters -- an incentive that would have existed had the price increased. The result of such dynamics, explained the Report, may be long gasoline lines and shortages.[38]

As former FTC Chairman Deborah Platt Majoras stated before the U.S. Senate Commerce Committee:

> *"[A]ny price gouging statute should attempt to account for the market-clearing price. Holding prices too low for too long in the face of temporary supply problems risks distorting the price signal that ultimately will ameliorate the problem. If supply responses and the market-clearing*

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31 FTC Post-Katrina Report, supra note 27, at ii-iii.

32 FTC Post-Katrina Report, supra note 27 at iii.

33 FTC Post-Katrina Report, supra note 27, at vi-viii.

34 FTC Post-Katrina Report, supra note 27 at x.

35 See ¶7 of this submission, supra.

36 FTC Post-Katrina Report, supra note 27, at 183.

37 *Id.*

38 FTC Post-Katrina Report, supra note 27, at 183.

price are not considered, wholesalers and retailers will run out of gasoline and consumers will be worse off."[39]

The Report also referred to the institutional difficulty of detecting "gouging," noting the challenge of distinguishing "gougers" from market players who are reacting in an economically rational manner to the temporary shortages resulting from the emergency.[40] In addition, the Report underscored that "[t]he antitrust laws are not designed to prevent prices from increasing; rather, they are designed to prevent firms from using market power to raise prices artificially."[41]

5.2. The FTC's Price Manipulation Rule

In August 2009, exercising authority granted to it by Congress under the Energy Independence and Security Act of 2007,[42] the Federal Trade Commission issued a rule prohibiting market manipulation -- that is, fraudulent or deceptive acts, practices, or courses of business -- in the wholesale petroleum industry.[43] The rule, which took effect on November 4, 2009, prohibits fraud or deceit in wholesale petroleum markets, as well as omissions of material information that are likely to distort petroleum markets. In presenting the new rule, FTC Chairman Jon Leibowitz said it "will allow [the FTC] to crack down on fraud and manipulation that can drive up prices at the pump," noting that the FTC "will police the oil markets – and if we find companies that are manipulating the markets, we will go after them."[44]

The rule prohibits any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, from a) knowingly engaging in any act, practice, or course of business – including making any untrue statement of material fact – that operates or would operate as a fraud or deceit upon any person; or b) intentionally failing to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort market conditions for any such product. Violators face civil penalties of up to $1 million per violation per day, in addition to any relief available to the Commission under the FTC Act.

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39 Deborah Platt Majoras, FTC INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES, Statement before the Senate Committee on Commerce, Science and Transportation (May 23, 2006), at 24, *available at* http://www.ftc.gov/os/testimony/0510243CommissionTestimonyConcerningGasolinePrices05232006Senate.pdf.

40 FTC Post-Katrina Report, supra note 27, at 183; See also the Statement of Deborah Platt Majoras, *id.* at 23, noting that "it can be very difficult to determine the extent to which price increases are greater than 'necessary.' Our examination of the federal gasoline price gouging legislation…. and enforcement efforts indicate that the offense of price gouging is difficult to define. Moreover, throughout antitrust jurisprudence, one area into which the courts have refused to tread is the question of what constitutes a 'reasonable price.'"

41 FTC Post-Katrina Report, supra note 27, at 185.

42 Pub. L. 110-140, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ140.110.pdf.

43 The full text of the rule is *available at* http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf; an FTC staff guide for complying with the rule is *available at* http://www.ftc.gov/os/2009/11/091113mmrguide.pdf.

44 *See* Press Release, *New FTC Rule Prohibits Petroleum Market Manipulation* (August 6, 2009), *available at* http://www.ftc.gov/opa/2009/08/mmr.shtm.

6. Regulatory Price Setting

While U.S. antitrust law typically does not constrain the pricing behavior of unregulated firms, U.S. legislative bodies have recognized that some industries are not conducive to competition and have chosen to regulate prices in these industries through an administrative legal process.[45] For example, most states regulate the distribution of electricity and natural gas to residential homes.[46] The rationale for price regulation in these industries is that they are considered *natural monopolies*, which means that a monopolist can provide service at a lower cost than can two or more firms. For example, running two or more power lines or gas pipelines to every home would involve an unnecessary duplication in costs. In such industries, competition might not materialize even when it is permitted, leaving customers with monopoly prices. Moreover, even if some competition were possible, allowing it would lead to higher industry costs than serving the market with a monopolist. Although the regulation process itself is costly, state legislative bodies believe the benefits of regulation (lower prices and production costs) outweigh the administrative costs of regulation in these industries.

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

U.S. experience has been that price regulation in markets that are conducive to competition, *i.e.*, not natural monopolies, has often harmed consumers. For example, the deregulation of airlines and long distance telecommunications led to lower consumer prices for both of these services. This shows that a regulator can also make mistakes – by setting prices too high or too low, or as a result of inability to adjust rapidly to changing market conditions. Therefore, for markets that are conducive to competition, there is no good reason to bear the risk of having the regulator set inefficient prices. Competition is more likely to generate efficient prices.

7. Conclusion

U.S. antitrust law does not recognize "excessive pricing" as an antitrust violation in and of itself, thus allowing legitimate market participants to set their prices as high as they choose. This policy choice stems from the difficulty in identifying what prices are excessive; as well as from concerns that antitrust enforcement against "excessive pricing" may chill incentives to compete and innovate in the first place, and interfere with the proper functioning of markets subject to such enforcement.

Market participants who otherwise violate the antitrust laws, may be subject to remedies that also affect their ability to charge supra-competitive prices. In addition, high or rapidly increasing prices often play an important role in the Agencies' antitrust investigations, to the extent they either constitute

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45 *See* generally, Michael Crew and Paul Kleindorfer, *The Economics of Public Utility Regulation, (*MIT Press, 1987).

46 *See* the web site of the Federal Regulatory Energy Commission*, available at* http://www.ferc.gov/about/ferc-does.asp; and DAFFE/CLP/WP2/WD(2000)11, *Competition in the Natural Gas Industry* (U.S. Submission to Working Party No. 2 on Competition and Regulation (2000) *available at* http://www.ftc.gov/bc/international/docs/compcomm/2000--Competition%20in%20the%20Natural%20Gas%20Industry.pdf.

anticompetitive effects of other alleged antitrust violations, or serve as potential indicators of anticompetitive practices that can lead to further an investigation.

EUROPEAN UNION

ARTICLE 102 AND EXCESSIVE PRICES

1. Introduction

This Roundtable is dedicated to excessive prices. This is not the first time that excessive prices or more generally exploitative conduct and its assessment under competition law are discussed, here in the OECD and in other forums. However, there still seems only limited experience with exploitative abuse cases and little agreement around the world on the issues involved.

This is in contrast with the assessment of exclusionary abuse. Guidelines and other documents, describing more or less elaborate frameworks for the assessment of exclusionary conduct in general and specific forms of conduct such as predation and exclusive dealing, have seen the light in recent years.[1] Based on a vast and growing number of cases, there seems a trend of convergence between jurisdictions, as exemplified by recent work and publications of the ICN in the area of unilateral conduct.[2]

In this paper we try to not only raise questions concerning the possible application of Article 102 of the TFEU to excessive prices but also to provide some answers. Given the limited experience of the Commission with cases concerning excessive prices, these answers will sometimes only answer part of the question and some questions will remain unanswered for the moment. This paper does not deal with other forms of exploitative conduct such as unfair non-price conditions and (price) discrimination.

2. Why intervene against exploitative conduct?

The first question that many seem to have when discussing exploitative conduct and thus also excessive prices, is whether competition authorities should at all be concerned with such conduct: whether it would not be better to focus enforcement activity exclusively on exclusionary conduct.[3]

In the EU context there are, at least, three main reasons to intervene against exploitative conduct. The first reason is that Article 102, its text and its history make it clear that exploitative conduct can be abusive. In particular Article 102(a) states that an abuse may consist in "directly or indirectly imposing unfair

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1 See for instance the 2009 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, which can be found at http://ec.europa.eu/competition/antitrust/art82/index.html Guidelines have also been adopted, for instance, by the Canadian Competition Bureau, the Korean Fair Trade Commission, the Japan Fair Trade Commission and the Competition Commission of Singapore.

2 See for instance the ICN Unilateral Conduct Working Group Documents at: www.internationalcompetitionnetwork.org/working-groups/current/unilateral.aspx

3 This and the next section are in good part based on E. Paulis, Article 82 EC and Exploitative Conduct, in European Competition Law Annual 2007: A Reformed Approach to Article 82 EC (C.D. Ehlermann & M. Marquis eds. 2008) and on Luc Peeperkorn, Price Discrimination and Exploitation, in Annual Proceedings of the Fordham Competition Law Institute - International Antitrust Law & Policy (Barry E. Hawk ed. 2009).

purchase or selling prices or other unfair trading conditions." This example of an abuse is generally understood to cover conduct such as charging excessive prices. In the early days of European competition policy, some commentators were even of the opinion that Article 102 from a legal perspective was exclusively concerned with exploitative abuses.[4] Also more recent research suggests that the legislative intent for Article 102 was to apply only to exploitative abuses and not exclusionary abuses.[5]

The second reason is linked to the goal of competition policy. Like many other competition authorities, the Commission claims that the central goal of competition policy is to protect consumer welfare. In this light it would be strange to protect consumers only indirectly, i.e. by intervention against exclusionary conduct to protect the competitive process, and not also directly by intervening against too high or unfair prices. Where there are two types of intervention possible to achieve a certain aim – in this case protecting consumer welfare - it is highly unlikely that under all circumstances one type of intervention is superior to achieve the aim. In other words, the relevant question seems to be how to find the right balance in allocating enforcement resources between prohibiting exclusionary conduct and prohibiting exploitative conduct.

The third reason concerns the so-called "gap" cases. Article 102 does not prohibit the acquisition of dominance. It only applies to abusive conduct of firms already having a dominant position. This means that there may be cases where intervention against unilateral exclusionary conduct is legally not possible. In such cases intervention against exploitative conduct may be the only possibility to effectively protect consumers. An example could be action taken against the charging of excessive royalties by a company who has obtained its dominant position as a result of not disclosing its patent when it was involved in discussions on setting a standard for the industry.[6] The possibility under U.S. law to effectively intervene against acquisition of dominance may also partly explain why the possibility to intervene against exploitative conduct is not included in the Sherman Act or other U.S. antitrust laws.

3. How to find the right balance between addressing exclusionary and exploitative conduct?

Finding the right balance in allocating enforcement resources between prohibiting exclusionary conduct and prohibiting exploitative conduct does not mean that both areas of enforcement have to be similarly prominent. It may very well be that there are good reasons to tilt the enforcement effort towards preventing exclusionary abuse, as many have argued in the recent debate on Article 102.[7]

The various arguments that have been brought forward to tilt the balance in favour of intervention against exclusionary conduct can be divided in two types. One type of argument focuses on the practical difficulties of competition authorities to intervene against exploitative conduct, in particular exploitative

4 See, for example, R. Joliet, Monopolization and Abuse of Dominant Position, 1970.

5 See P. Akman, Searching for the Long-Lost Soul of Article 82 EC, Oxford Journal of Legal Studies, Vol. 29, No. 2 (2009), p. 267-303.

6 See the Rambus case described later in this paper.

7 See for example D.S. Evans & A.J. Padilla, Excessive Prices: Using Economics to Define Administrable Legal Rules, Journal of Competition Law & Economics, Vol. 1 (2005), p. 97-122; B. Lyons, The Paradox of the Exclusion of Exploitative Abuse, Centre for Competition Policy Newsletter, (Spring 2007); M. Motta & A. de Streel, Exploitative and Exclusionary Excessive Prices in EU Law, in European Competition Law Annual (CD Ehlermann & I Atanasiu eds. 2003); R. O'Donoghue & A. Jorge Padilla, What Is an Abuse of Dominant Position? in The Law and Economics of Article 82 EC (Oxford 2006); M. Furse, Excessive Prices, Unfair Prices and Economic Value: The Law of Excessive Pricing under Article 82 and the Chapter II Prohibition, European Competition Journal, June 2008, p.59.

pricing conduct. The other type of argument focuses on what could be called the "positive effects" of high prices and high profits in a market economy.

The more extreme version of the "positive effects" argument has been expressed eloquently by Justice Scalia in his opinion in Trinko where he argued that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[8] The argument that can be drawn from this – at least if we ignore for the moment the qualification 'at least for a short period' – is that monopoly profits are good, perhaps even necessary, because that is what attracts the type of risk taking and investment that drives innovation and economic growth.

While it certainly seems true that much risk taking and investment are indeed done not just for the excitement of being innovative but (also) in the hope of achieving significant financial returns, this does not necessarily imply that the only - or the optimal - way of giving the correct incentives is allowing firms to charge monopoly prices without any possibility of intervention on the part of competition authorities. Competition law regularly intervenes to limit the possibilities of firms to maximise their profits. One notable area is the application of the competition rules to vertical restraints, also if these restraints "only" limit intra-brand competition. Otherwise resale restrictions agreed by a manufacturer with its distributors to support price discrimination and thereby enhance the manufacturer's and possibly also the distributors' profits, should be dealt with as per se legal. Taking the "positive effects" argument to its extreme, it would even seem difficult to justify interventions against cartels that fix the price and share markets. Prohibiting the cartel members to increase their joint profits could be argued to have a negative impact on the risk taking and innovation of the cartel members and possible entrants.

It is nonetheless important to recognise that high profits may often be the result of superior innovation and risk taking, which should not be penalised as this would work as a disincentive to innovate and invest. It should also be recognised that even where high profits do not result from superior innovation but from the exercise of market power, such profits will in most markets attract entry and expansion of competitors and taking away such profits may thus undermine the markets own mechanism to restore competition. However, this does not mean that intervention against exploitative conduct should necessarily be totally excluded but it indicates that it may be better to tilt the balance in favour of addressing exclusionary conduct.

Equally convincing to tilt the balance of enforcement away from exploitative conduct is the other type of argument, concerning the practical difficulties competition authorities face when intervening against exploitative conduct, in particular excessive prices. There are two sets of practical difficulties related to enforcement actions against excessive prices. The first is linked to establishing when a price is excessive, including establishing what price is acceptable as a remedy, and the second is linked to monitoring the implementation of the remedy over time.

Determining whether a specific price is excessive may involve difficult comparisons of prices with costs of production and investment and/or comparisons of the return on invested capital of the firm with the weighted average cost of capital of the sector or similar sectors. Determining whether a price is excessive may also involve comparisons with prices obtained in other markets or other periods that can be used as benchmarks. Some of the problems involved in these comparisons – for example, comparing the price to a particular cost benchmark and the issue of cost allocation in multi-product firms - are also present for other price based abuses, such as predation and margin squeeze. However, establishing an excessive price requires that also a second decision is taken, on how much deviation from the benchmark is

[8] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398, 407 (2004).

allowed, for instance how much the price or the profitability is allowed to exceed the cost level respectively the average cost of capital. This extra step is not required in other price abuse cases such as predation and margin squeeze, where in general the question is "simply" whether the price is higher or lower than the relevant cost benchmark.

The second set of practical difficulties is linked to monitoring the implementation of the remedy over time. Intervening against excessive prices may entail the risk of a competition authority finding itself in the situation of a semi-permanent quasi-regulator. The authority may have to come back time and again to the pricing of the dominant firm when cost or other conditions change in the industry, something that a "generalist" competition authority is much less equipped for than proper regulators with their deep knowledge of and continuous involvement in their industries. However, in a particular case an authority may be able to establish a simple price comparison rule that can avoid such a situation. An example of such a rule could be that the dominant firm cannot charge more (or only x % more) in market A than it does in market B where the freely determined price in market B for some reason is more acceptable than the freely determined price in market A. While the dominant firm may come back after a few years claiming that conditions have changed and the rule needs to be revised, the problems seem of lesser magnitude than a rule establishing a link between price and costs, as costs normally are less easy to monitor than other prices.

In other words, as can be expected with practical difficulties, their relevance in part depends on the specificities of each individual case. Again this is no reason to totally exclude intervention against exploitative conduct but this has influenced and will influence the balance in allocating enforcement resources between prohibiting exclusionary conduct and prohibiting exploitative conduct.

As a consequence the balance in the EU over the last 50 years has been tilted towards addressing exclusionary conduct, to prevent that exclusionary conduct leads to market conditions which allow exploitation of consumers, rather than intervening directly against exploitative conduct. This has resulted in a rather limited case law concerning excessive prices.

4. The EU experience

General Motors[9]*:* General Motors appealed a Commission decision which found that the company had infringed Article 102 TFEU by charging, for a period of four months, an excessive fee for conformity inspections of five vehicles manufactured in another Member State and imported in Belgium. The fee that General Motors charged for the conformity inspections of the imported European vehicles was at the amount usually charged for the conformity inspection of American cars despite the fact that the inspection of European vehicles was much less costly.

According to Belgium public law, the performance of the conformity inspection for each make of car was reserved exclusively to the manufacturer or its exclusive agent. Although the State entrusted the task of inspection to private undertakings it did not take measures to fix or limit the charge imposed for the service rendered. The Court therefore agreed with the Commission that General Motors enjoyed a dominant position as it had a legal monopoly for the inspection certification and freedom to determine prices.

The Court did not exclude the possibility that an undertaking in such a position may commit an abuse by charging prices which are excessive in relation to the economic value of the service provided and which

9 General Motors Continental NV v Commission Case 26/75 [1975].

has the effect of curbing parallel imports.[10] However, the Court did not find that on the facts of the case, General Motors had indeed abused its dominant position. The Court was persuaded by the arguments that the activity in question was an unusual activity for General Motors, as the company had assumed responsibility for it shortly before the alleged abusive conduct took place. It was also an occasional activity, as General Motors was performing inspections primarily for vehicles manufactured in Belgium and was not used to provide the service for imported European vehicles. In addition, the Court took into account the fact that General Motors very quickly had brought its rates into line with the real economic cost of the operation and had reimbursed the persons who had complained about the unfair price. The Court concluded that the Commission's intervention was unjustified in the actual temporal and factual circumstances in which it took place.

United Brands[11]*:* In its decision the Commission found that United Brands Company (UBC) had abused its dominant position in the market for bananas by, amongst other, charging unfair (excessive) prices for the sale of Chiquita bananas to customers in Belgium-Luxembourg, Denmark and Germany. The relevant geographic market consisted of several Member States: Germany, Denmark, Ireland, the Netherlands and Belgium-Luxembourg. The Court upheld the Commission's market definition and the finding that UBC enjoyed a dominant position. In considering whether UBC held a dominant position the Court took into account that UBC's market share was nearly 45% and several times greater than the share of its closest competitor, that UBC was vertically integrated to a high degree, that it was an unavoidable partner (distributors could not afford not to offer UBC's Chiquita bananas) and that owing to its advertising campaigns UBC had won customers' preference.

In the analysis of the abusive conduct the Commission compared UBC's and competitors' prices, as well as the prices for branded and unbranded bananas. However, the most important comparison was between UBC's prices in different Member States. In particular, the Commission found that the price in Ireland was half the price in Belgium, Luxembourg, Denmark and Germany. As internal documents of the company indicated that UBC made profits in Ireland, the Commission concluded that the prices in the other mentioned Member States, which were twice higher, were excessive. The Court did not agree with the Commission's analysis.

In the context of this case the Court set out a test for whether a particular price is liable to be considered abusive: "The questions therefore to be determined are whether the differences between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."[12] The Court's concern was that the Commission had not analyzed UBC's production costs, although it could have done so. It was doubtful as to whether the price in Ireland could be used as a relevant benchmark, especially in view of the fact that UBC presented documents indicating that prices in Ireland had produced losses. In addition, the Court noted that the price difference with UBC's competitors was only 7% which could not be automatically regarded as excessive and consequently unfair.

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10 In fact, a few years later in Case 226/ 84 British Leyland Public Limited Company v Commission [1986] the Court of Justice upheld the Commission decision finding that British Leyland, which enjoyed a legal monopoly in issuing national certificates of conformity for vehicles in Great Britain, had abused its dominant position by charging excessive prices. British Leyland charged significantly higher price (six times greater) for the issuance of certificates for left-hand drive cars than for right-hand drive cars, despite the fact that the cost of inspection for left and right hand drive cars were almost the same. The Court concluded that in those circumstances the fee was clearly disproportionate to the economic value of the service provided. The Court was convinced that the fee was fixed at that level solely with the aim to make the re-importation of left-hand drive vehicles more difficult.

11 United Brands Co. v Commission Case C-27/76 [1978].

12 Case 27/76 United Brands, paragraph 252.

Bodson[13]*:* In this preliminary ruling, one of the questions that the European Court of Justice had to consider was whether Pompes Funèbres, which had been given an exclusive concession to provide the "external services" for funerals (e.g. the carriage of the body after it has been placed in the coffin, the provision of hearses, coffins, external hangings of the house of the deceased, etc) in 2800 communes in France, could be held liable for abusing its dominant position by charging excessive prices in a particular town.

As regards the issue of dominance, the Court considered that although the exclusive concession was given for operating the services in less than 10% of the communes in France, the population of these communes accounted for more than one third of the total population of the country. The size of the population and thus the number of burials, rather than the number of communes, was relevant for determining the holding of a dominant position.

The Court then held that, given that more than 30 000 communes in France had not granted exclusive concessions but had left the services unregulated or operated it themselves, it should be possible to make a comparison between the prices charged by undertakings with exclusive concessions and other undertakings. The Court opined that such a comparison could provide a basis for assessing whether or not the prices charged by the concession holder were fair.

SACEM[14]*:* In this case the Court of Justice had to give a preliminary ruling on the question whether a dominant association of authors, composers and publishers of music in France, which is bound by reciprocal representation contracts with copyright societies in other counties of the EU, infringes Article 102 if it imposes aggregate royalties on the basis of 8,25% of the gross turnover of a discotheque and if that rate is manifestly higher than the rate applied by identical copyright societies in other Member States.

The Court held that Article 102 must be interpreted as meaning that a dominant undertaking imposes unfair conditions where the royalties charged to discotheques are appreciably higher than those charged in other Member States and where the rates are compared on a consistent basis. However, there would be no abuse if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States. In this particular case, the Court was not persuaded by the arguments put forward by the copyright society as a justification for the difference. These arguments pertained to high prices charged by discotheques in France, the traditionally high level of protection provided by copyright in France, the peculiar features of the French legislation and the customary methods of collection of royalties used in France. The Court considered that the mentioned factors could not account for a very appreciable difference between the rates of royalties charged in the various Member States.

Deutsche Post[15]*:* The case arose from a complaint from the public postal operator of the UK which alleged that Deutsche Post had frequently intercepted, surcharged and delayed international mail from the UK arriving in Germany. The dispute between the British Post Office and Deutsche Post stemmed from a disagreement how to identify the sender of international mailings. On the one hand, Deutsche Post argued

13 Corinne Bodson v SA Pompes funèbres des régions libérées Case 30/87 [1988].

14 F. Lucazeau v Societé des Auteurs, Compositeurs et Editeurs de Musique Cases 110/88, 241/88 & 242/88 [1989]. See also Case 395/87 Ministère Public v Tournier [1989] in which the Court was asked to rule on similar questions concerning the royalties charged by SACEM. See also Case 402/85 G. Basset v Societé des Auteurs, Compositeurs et Editeurs de Musique [1987], an earlier preliminary ruling case in which the Court stated that Article 102 can apply to a royalty which is unfair, but did not rule on possible assessment criteria.

15 Commission decision COMP/36.915 – Deutsche Post AG – Interception of cross border mail [2001].

that any incoming international mail containing a reference to Germany usually in the form of a German reply address should be considered as having a German sender, regardless of where the mail was produced or posted. Under the allegation that mailings of this type were in fact circumvented domestic mail (so-called A-B-A remail), Deutsche Post intercepted the mailings and refused to deliver the letters to its addressees unless the full domestic tariff applicable in Germany was paid. This refusal of Deutsche Post resulted in long delays, up to several weeks, and higher prices. On the other hand, the complainant argued that all outgoing mail produced and posted in the UK should be processed like international mail, regardless of its contents.

The Commission's investigation revealed that the disputed mailings did not have German senders. The mailings were produced and posted in the UK, or alternatively, produced in Sweden or in the Netherlands and posted to Germany via the UK. The mail was not circumvented domestic mail - as Deutsche Post maintained - and should therefore have been treated as normal international mail when entering Germany from the UK.

The Commission found that Deutsche Post abused its dominant position in the German market for the delivery of international mail in four ways, three of which (discrimination, refusal to supply and hindering the development of markets) were of an exclusionary nature. It also found that the price Deutsche Post charged for the delivery service was excessive and unfair. It established that the price charged exceeded the economic value (the average cost including a reasonable profit margin) by at least 25%.

During the course of the proceedings, Deutsche Post gave an undertaking to no longer intercept, surcharge or delay international mail of the type concerned by this case. In addition, for years the behaviour of Deutsche Post had consistently been condoned by German courts and at the time there was no Community case law that concerned international mail services. The legal situation therefore had been unclear. Bearing these considerations in mind, the Commission decided to impose only a symbolic fine of € 1,000 on Deutsche Post.

Helsingborg[16]*:* In this case the Commission examined a complaint against Helsingborgs Hamn AB (HHAB), a company wholly owned by the City of Helsingborg in Sweden and fully responsible for the running of the port of Helsingborg. The operating of the port included construction and maintenance of the port facilities, the provision of facilities and services to vessels using the port, such as ferries, and the determination of the fees that each user of the port has to pay for the use of those facilities and services. HHAB was the only provider of the services on the Swedish end of the Helsingborg-Elsinore route. The complainant alleged, amongst other, that HHAB had infringed Article 102 by levying excessive port charges for services provided to ferry operators. The complainant argued that the charges were excessive because they did not reflect the actual costs borne by HHAB.

The Commission followed the United Brands test and considered that the questions to be determined were (i) whether the difference between the costs actually incurred and the price actually charged is excessive and if the answer to this question is in the affirmative, (ii) whether the price is either unfair in itself or when compared to the prices of competing products.

As regards the first limb of the test, the Commission carried out an approximate cost/price analysis and reached the conclusion that the revenues from the port charges derived from ferry operations would seem to exceed the costs actually incurred by the port to provide services and facilities to these users. The ferry operations seemed to generate profits whereas in general the other operations of the port generated losses. The Commission did not decide whether the question of the first limb was answered affirmative, but proceeded to the second limb of the test.

16 Commission decision COMP/36.568 – Scandlines Sverige AB v Port of Helsingborg [2004].

As regards the second limb, the Commission compared HHAB's prices with the prices charged for the same services in other ports and in addition compared the prices of different services provided by HHAB in its own port. The comparison between different ports turned out to be full of difficulties as each port differed substantially in terms of activities, size of assets and investment, level of revenues and costs of each activity. However, based on such a comparison the Commission found that there was no evidence that the prices of HHAB stood out compared to other ports. Similarly, the comparison between prices for different services at the port of Helsingborg was hindered by difficulties as the facilities used for these services differed significantly and the other operations were run at a loss. The Commission found that also this comparison did not provide evidence that the port fees charged to the ferry operators were unfair.[17]

Finally, the Commission considered whether the price was unfair in itself. The Commission focused on the economic value of the service. It considered that the economic value of a service cannot simply be determined by adding to the approximate costs incurred in the provision of the service a profit margin which would be a pre-determined percentage of the costs. Rather, the economic value must be determined with regards to the particular circumstances of the case and take into account also non-cost related factors such as the demand for the product/service. In this case the excellent location of the port of Helsingborg which allows ferries to cross the Øresund in an expeditious way was deemed relevant. The Commission concluded that there was not sufficient evidence to establish that the port charges were unfair/excessive.

Rambus[18]*:* In the Rambus case, the Commission had preliminary concerns that Rambus could have abused its dominant position on the world-wide technology market for DRAM (Dynamic Random Access Memory) interface technology. A vast majority of DRAM chips sold worldwide comply with the synchronous DRAM standard developed by JEDEC, an industry wide US-based standard setting organisation. As Rambus asserts patents on all JEDEC-compliant synchronous DRAM chips and, in addition, owns its own proprietary DRAM technology, the percentage of worldwide DRAM production exposed to Rambus' patent claims was more than 90%. Rambus has been the only company asserting patents on DRAM interface technology.

The Commission's concerns were that Rambus may have engaged in intentional deceptive conduct in the context of the JEDEC standard-setting process for DRAM technology by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted standard (patent ambush). Rambus thus may have been abusing its dominant position by claiming royalties for the use of its patents from JEDEC-compliant DRAM manufacturers at a level which, absent its allegedly deceptive conduct, it would not have been able to charge.

In response to the Commission's preliminary conclusions expressed in a Statement of Objections, Rambus offered a package of commitments which addressed the Commission's concerns and in which it agreed, amongst others, for a period of five years (i) not to charge any royalties for DRAM chips based on JEDEC standards adopted when Rambus was a member of JEDEC, and (ii) to charge a maximum royalty

17 See also the decision to reject a complaint concerning alleged excessive rental charges in Commission decision COMP/37.761 – Euromax v IMAX [2004]. Euromax complained about alleged excessive rental charges of IMAX for the 15/70 mm format IMAX system for the projection of films on giant screens. In its decision the Commission, referring to the United Brands test as a two limb test, based its analysis only on the second limb of the test, because, even under the assumption that the first limb would be met, the second limb of the test was not fulfilled. In addition, the Commission concluded that the competition law issues could very appropriately be decided by national courts and it noted that the same issues were also subject in Germany to court procedures of which, at the time, some had been decided in favour of IMAX and others were still ongoing.

18 Commitment Decision of 09/12/2009, see the non-confidential version of the decision on the Commission's website: http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1203_1.pdf

rate of 1.5% for the subsequent DRAM chips standards adopted after Rambus was no longer a member of JEDEC (i.e. below 3.5% it had been previously charging).

5. Very high and long lasting barriers to entry and expansion as a pre-condition for intervention?

The case law described above shows that the Commission and European Courts addressed the question of excessive prices only in markets with an entrenched dominant position where entry and expansion of competitors could not be expected to ensure effective competition in the foreseeable future. In General Motors and Deutsche Post there was a legal monopoly, in Bodson the dominant position was based on an accumulation of exclusive concessions which shielded a significant part of the market from competition, in SACEM a national monopoly based on network effects, in Helsingborg a kind of natural monopoly and in Rambus a dominant position based on a lock-in effect once an industry standard has been adopted. The only exception is the United Brands case, which concerned the market for (green) bananas, but in the end the Court did not find excessive prices in this case.

This cautious enforcement practice fits the arguments described in section 3 above to concentrate enforcement on addressing exclusionary conduct. It seems that enforcement action against excessive prices has only been considered as a last resort, in markets where high prices and high profits do not have their usual signalling function to attract entry and expansion because of very high and long lasting barriers to entry and expansion. This recognises that even though in many markets prices may be temporarily high, due to a mismatch of demand and supply or the exercise of market power, it is preferable to give market forces the time to play out and entry and expansion to take place, thereby bringing prices back to more normal levels. We have not seen enforcement activity in such markets, recognising that it would be unwise to run the risk of taking a wrong decision and furthermore spend enforcement resources on solving a problem that would solve itself over time anyway. This is so even in markets characterised by sufficient entry barriers where there can be dominant firms. Of course, it may be that a dominant firm tries to prevent this process of entry and expansion taking place by artificially raising entry barriers. However, in such a situation it is more efficient for the competition authority to tackle the raising of these entry barriers directly since this will likely amount to an exclusionary abuse. If, however, the market is characterized by such entry barriers that it is unlikely that market forces over time will bring prices down, enforcement actions aimed directly against excessive prices may indeed be appropriate.[19]

6. The United Brands test

In United Brands the European Court of Justice has set out a test for whether a particular price is liable to be considered abusive: "The questions therefore to be determined are whether the differences between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."[20]

This test consists of two limbs. The first limb implies that high prices, even if compared to prices in other markets, are not abusive in themselves if they do not lead to an "excessive" difference between price and costs, i.e. if they do not lead to an excessive profit margin. Prices which are high by comparison with other comparable prices charged by the dominant company or by other undertakings could, for instance, be

[19] Also in other recent exploitative abuse cases, not concerning excessive prices, the markets were characterised by such high entry barriers: see the Commitment Decisions in Case 39.351 – Swedish Interconnectors [2010], Case COMP/39.388 – German Electricity Wholesale Market [2008] and Case COMP/39.389 - German Electricity Balancing Market [2008].

[20] Case 27/76 United Brands, paragraph 252.

explained by differences in cost conditions.[21] However, a very high profit margin may thus be indicative of abusive pricing.

Determining the magnitude of the profit margin requires an assessment of the true underlying costs incurred by the dominant company. High profit margins might be, for instance, the reward for taking risks and for innovating. When calculating the profit margin proper consideration should be given not only to the cost of capital but also to the investment risks involved in the industry concerned. Profit margins are typically calculated on the basis of the prices and costs of products that actually reach the market. Moreover, the products of a dominant company will often be among the most successful of those products that are brought to market. However, in many industries there are substantial risks involved in developing products before they reach the market. Indeed, there may be several unsuccessful products developed for each product that is successfully brought to market. These risks should be taken into account when assessing the costs and profit margin.[22]

The second limb of the test implies that it cannot be determined from a comparison of prices and costs alone whether prices are abusive. A high profit margin may result both from the exercise of market power by setting high prices and from superior efficiency of the dominant firm leading to low costs or a superior product. It is therefore necessary to find out whether a high profit margin originates from the exercise of market power due to a lack of effective competition or from superior efficiency in terms of costs or innovation, in other words whether it originates from high prices or from low costs/a superior product.

If the high profit margin results from the dominant company being very efficient, it cannot be said that the prices are unfair in themselves. To test this it may be useful to compare the prices of the dominant company with the costs of other companies, for instance with the costs of the next most profitable competitor. If the profit margin based on such a comparison is not high, it is likely that the high profit margin of the dominant company is a result of superior efficiency.

A number of price comparisons may be made in order to determine whether prices are unfair. Often several of such comparisons need to be performed. The following comparisons may be relevant.

A comparison of the prices charged by the dominant company with prices it charges in other markets. This comparison tries to compare the potentially excessive prices with prices charged in competitive markets. Other markets could be other geographic markets where the dominant company sells the same product, but does not possess substantial market power, or other product markets which are closely linked to the product in question. Care must here be taken to control for any difference in, for instance, product quality and distribution costs.

A comparison of the prices charged by the dominant company with prices other companies charge in other markets. This comparison is only valid if the products are identical or at least comparable. It would be particularly relevant if the prices of the dominant company can be compared to prices that other companies charge in competitive markets. Care must also here be taken to control for differences in, for instance, product quality and distribution costs.

A comparison of the prices charged by the dominant company over time. It may be possible to show that the dominant company increased its prices substantially after it became dominant. This comparison is

21 United Brands, paragraph 228.

22 Exceptionally it may be necessary to not take into account certain cost elements when these elements mask the profitability of the dominant firm, in particular when the dominant firm has grown very inefficient due to the lack of competitive pressure.

only valid if there are no other good explanations for the price increase, such as for instance a substantial increase in costs.

7. Application of the United Brands test to the EU case law

It is important to recall that the Court has made it clear that the test it developed in United Brands is not the only way to assess excessive prices: "Other ways may be devised – and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair."[23] However, it is nonetheless interesting to see how the different cases described earlier 'fit' the test.

In *General Motors* there is no explicit investigation of the Commission into the cost of conformity inspections or the profit margin obtained. However, while this case preceded United Brands, implicitly a price-cost comparison was made. It was established that the price charged was the same as the one charged for imported American cars while the conformity inspection of European vehicles was much less costly. It was suggested that the proper benchmark was the price charged for non-imported European cars. The (implicit) comparison made it obvious that the service did not correspond to the cost of the operation for the imported European cars.

In *United Brands* the Court developed its test because the Commission had not analysed UBC's production costs, although it could have done so. It was necessary to consider UBC's costs as the price in Ireland could not be used as a relevant benchmark to assess its profit margin in view of the fact that UBC presented documents indicating that prices in Ireland had produced losses. Similarly, the price difference with UBC's competitors could not be used as a benchmark as this difference was only 7% which could not be automatically regarded as excessive and consequently unfair.

In *Bodson* the Court seems to suggest that for finding unfair prices it is sufficient to establish that the prices of a legal monopoly are different from the prices charged in competitive conditions in other communes. Even assuming that to make a correct comparison such a higher price must be corrected for possible differences in the quality of the provided services, the Court seems to apply the United Brands test in a reduced way by concentrating only on the second limb. It is apparently considered that in case the exclusive concessionaire is asking a higher price than the one asked in a (more) competitive market, it can be taken for granted that the concessionaire will either make a high profit margin or sustain a high level of inefficiency as a result of its legal monopoly. While not being considered in this case, it seems likely that the Court would have taken into account possible cost justifications of the dominant undertaking as to why its prices are higher (see also the next case).

In *SACEM* the Court seems to suggest that prices charged by a monopolist in one Member State will be excessive, as long as they are appreciably different (being higher) from the prices charged by another monopolist in another Member State.[24] Although the test appears on its face to be based only on a comparison between prices (the second limb of the United Brands test), by considering that the copyright society is still able to justify the difference, the Court in fact accepts that an abuse will be established only if also the margin between cost and price is unreasonable (the first limb of the United Brands test). The

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23 Case 27/76 United Brands, paragraph 253.

24 See also Case 395/87 Ministère Public v Tournier [1989] in which the Court was asked to rule on similar questions concerning the royalties charged by SACEM and ruled along the same lines.

Court's reasoning however suggests that the burden of proof for the first limb of the United Brands test should be on the dominant undertaking in case of a (legal) monopoly charging higher prices.[25]

In its *Deutsche Post* decision the Commission referred to General Motors and United Brands. The decision states that the fairness of a certain price may be tested by comparing this price to the economic value of the product, where the latter is also described as the average cost including a reasonable profit margin. As Deutsche Post did not have a transparent cost accounting system for the relevant period, the Commission could not make a detailed cost analysis of Deutsche Post's average cost for the service in question. As an alternative cost benchmark the Commission used 80% of the domestic tariff, as Deutsche Post and other public postal operators, when notifying the Reims II agreement, had argued that the average cost of forwarding and delivering incoming cross-border mail (including a reasonable profit margin) may be approximated to 80% of the domestic tariff. By charging the full domestic tariff for this 'virtual' A-B-A remail, Deutsche Post obtained a price which was 25% above the estimated average cost and the estimated economic value of that service, while usual profit margins in this sector were only around 3% per item. If the terminal dues were set at 70% of the domestic tariff, as some public postal operators had agreed between themselves, the price of Deutsche Post was 43% above the estimated economic value. The Commission concluded that the tariff charged by Deutsche Post had no sufficient or reasonable relationship to real cost or real value of the service provided, exploited customers excessively and should therefore be regarded as an unfair selling price within the meaning of Article 102.

In its *Helsingborg* decision the Commission applied the United Brands test. By introducing demand side features in the assessment of the economic value of a product, some might say that it arguably went beyond the test, by making it more demanding then the Court might have intended it originally. The Court in its judgements described above has always based the economic value of a product on its costs of production including a necessary profit margin to attract sufficient capital. It is thus clear that a definition of economic value based on what customers are willing to pay would not be aligned with the case law, as it would define away any possible excessive price. The Commission's decision could be understood as an attempt to avoid that the port might be punished for providing a superior product. While the services

[25] A similar reasoning was followed in the more recent *Daft Punk* rejection of complaint decision. This case did not concern excessive prices but unfair conditions. Members of the Daft Punk music group claimed in particular that SACEM abused its dominant position by obliging its members to entrust all their rights to SACEM and thus not allowing them to manage certain types of their rights individually (without entrusting them to any other collecting society). SACEM argued that such limitation is aimed at protecting the authors who would individually have very weak negotiating position vis-à-vis music publishers. Further, SACEM argued that this limitation prevents "cream skimming", i.e. the practice that the authors would entrust to the collecting society only those rights where the management is particularly difficult and costly. However, the Commission considered that in view of the developments in the music industry, this limitation is indeed no longer indispensible and proportional and could be considered as an abuse of dominance by SACEM. The Commission found that (i) the technical progress had made it possible for the authors to manage at least some of their rights individually, (ii) a corresponding obligation had been removed by most collecting societies in other countries and was applied only by a very limited number of other collecting societies, (iii) the "cream skimming" was not a real issue as demonstrated by the fact that most collecting societies in other countries already for some time allowed individual management of rights without any apparent problems with "cream skimming". In reaction, SACEM decided voluntarily to change its statutes so that, on the basis of a reasoned request by the author, its Administrative Council could allow individual management of some authors' rights. This was considered by the Commission as sufficient to remove the possible abuse and the complaint was thus rejected (as the complainant insisted that this change of the statutes was not sufficient). See the non-confidential version of the decision on the Commission's webpage: http://ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf

See also Case 127/73 Belgische Radio en Televisie v SV SABAM and NV Fonior [1973], an early preliminary ruling case where the Court decided along the same lines.

provided by HHAB were not necessarily superior to the services provided elsewhere at other ports, the fact that the services were provided at Helsingborg allowed ferry operators to cross the Øresund in an expeditious way, which, according to the Commission, is in itself valuable.[26] This would fit the second limb of the test.

Although in *Rambus* no final decision was taken and thus no abuse was established, the concern of the Commission that Rambus charged excessive prices was based on a comparison between prices that would have prevailed had Rambus disclosed its patents, and prices that it charged following its deceptive conduct. The case thus suggests that in case of improper conduct of a dominant undertaking in a standard setting context, even though the conduct itself does not necessarily need to be illegal under the antitrust rules, excessive prices can be established if the price prior and after the deceptive conduct is (appreciably) different.[27] In other words, the focus is on the second limb of the United Brands test.

8. Conclusion

In view of the limited experience with cases concerning excessive prices, not all questions can be answered at this stage. At the same time, the relatively small number of cases that we have been able to deal with, may already indicate that addressing excessive prices is an area of antitrust where limited and very cautious intervention is warranted.

Indeed, the case law indicates that enforcement against excessive prices is generally only contemplated in markets with an entrenched dominant position where entry and expansion of competitors can not be expected to ensure effective competition in the foreseeable future, that is markets where high prices and high profits do not have their usual signalling function to attract entry and expansion.

In the case law the United Brands test has a central place, even though the Court has stressed that it is not the only way to assess excessive prices. In particular, the case law shows that, depending on the circumstances of the case, the assessment focuses more on the second limb of the test, especially where it is obvious that the dominant firm is not providing a superior product.

The United Brands test implies in essence that prices are only excessive if the profit margin is excessive and this is not the result of superior efficiency but of the exercise of durable market power. However, this does not answer the question how high the profit margin/price must be to be found excessive; just appreciably above the competitive level or significantly higher? The case law described above seems sometimes to indicate that any appreciable deviation from competitive levels could be deemed excessive. To the extent that cases are only pursued in markets where high prices and profits have lost their signalling function to attract entry, it could be argued that such a clear but strict comparator is not inappropriate. The enforcement practice indicates that generally only cases concerning large deviations from competitive levels are pursued. In view of the complexity of excessive pricing cases this is arguably a wise use of enforcement resources.

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26 Commission decision COMP/36.568 – Scandlines Sverige AB v Port of Helsingborg [2004], paragraph 242.

27 See also paragraphs 287-291 of the Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, p. 1-72, 14.1.2011 (also found at: http://ec.europa.eu/competition/antitrust/legislation/horizontal.html).

BRAZIL

1. Under what conditions do excessive prices require intervention?

There are several issues related to the characterization of excessive prices. In Brazil, both by the Brazilian Competition Protection System (BCPS) and the Judiciary have had to deal with this matter in the recent past.

1.1. The BCPS debate

The BCPS has not yet imposed any fine or conviction for excessive pricing. In fact, there is not even a consensus within the BCPS about what can characterize excessive prices, although there were interesting discussions, eminently theoretical.

Indeed, Law 8.884/94, in its art. 21, XXIV, considers that it is unlawful to charge excessive prices or to increase prices of goods or services in an unjustified manner, but this article has been construed in many different ways in the past years.

For many years, for instance, Commissioners of CADE understood this type of practice from the classical standpoint:

For example, the former President Elizabeth Farina held that a company may have become monopolistic and able to charge monopoly/excessive prices "through investments, innovation and differentiation of its own product. The price above its marginal costs (compared with the situation in which the company operates in perfect competition environment) represents the reward for successful investment. Prevent the firm to make its monopoly profits in this case would have the effect of discouraging the entrepreneur to take risks inherent in any investment, which is an undesirable outcome in any perspective" (Administrative Procedure 08012.007514/2000-79). So according to her point of view, punishing excessive price would discourage innovations in the market.

Similarly, Former Commissioner Luis Carlos Delorme Prado rejected the autonomous character of the conduct called “excessive price” (Administrative Procedure 08012.000966/2000-01). According to Prado, if a market operates in a competitive environment, an arbitrary increase in price will necessarily lead to loss of market share of the company to its competitors. Also, if the increase in price leads to excessive profits, other companies will be attracted to enter in this market to the point where prices will be reduced by the increasing supply, thus allowing profits to return to equilibrium., According to this reasoning, it would take a wrongful conduct, such as a cartel or an abuse of a dominant position to prevent this course of events to take place. In the absence of such conducts, companies should be free to define whatever prices they want of their own products, and not be threatened with lawsuits for using their inherent discretionary rights of stipulating prices. In sum, prices could be defined as a measure of equilibrium between supply and demand (and it is quite difficult to understand the existence of an excessive equilibrium).

Also, former Commissioner Paulo Furquim, (Preliminary Investigation 08012.005181/2006-376; Administrative Procedure 08012.000912/2000-73), found that – in some cases – charging extremely high prices for some important inputs may represent a refusal to sell or a conduct of raising rival costs in order to exclude a competitor in a downstream market.

More recently, this issue has been subject to a very interesting debate in which the appropriateness of antitrust interventions on excessive prices cases was the main question addressed.

In this debate, Commissioner Emmanuel Carlos Ragazzo (Preliminary Investigation 08012.000295/1998-92) suggested that no more cases should be opened to investigate the practice of excessive price. Ragazzo considered that if the price is high as a disguised form of "refusal to sell" or "raising rivals' costs" there was no need to investigate these conducts indirectly through an “excessive price” lawsuit.

In fact, according to his view, the effectiveness of the prohibition of "excessive price" is extremely limited, since: (i) there are several difficulties in measuring the competitive price and identifying what excessive price really is; (ii) there is a high risk of discouraging innovation by punishing excessive prices, and (iii) there is a mistaken belief in self-correction of the excessive price after its punishment. Ragazzo pointed out that there is no profit margin that surely represents an unlawful practice.

Former Commissioner Cesar Mattos and Commissioner Olavo Chinaglia agreed with Ragazzo, indicating that excessive prices should not be investigated by the antitrust authority anymore. The majority of the CADE, however, followed the understanding of Former Commissioner Vinicius Marques Carvalho, who argued that, in some specific cases, it may be possible and it may be desirable to investigate excessive price.

In this respect, Carvalho suggested to look at the discussion of the excessive prices, not only from the exclusionary point of view, but rather analyzing the exploitative character of prices against consumers. Has a company full freedom to dictate whatever prices it wants, if there is no exclusionary conduct/motivation involved? For example, a monopolist can impose different prices for consumers because of their race, their gender or their poor physical condition? Can a company that owns a patent on a drug essential to the life of all people, charge a price that - literally - no one can pay, representing a kind of wasting/discarding/misusing intellectual property? Or it can simply decide, without a rational explanation, not to produce this valuable remedy? Further on, a monopolist can use its market power to take undue benefits from consumers (such as unnecessary product bundling)? According to Carvalho, all these examples represent illegal practices regarding the establishment of prices, notwithstanding the absence of exclusionary conduct.

He quoted a case in which Ford Company charged higher prices for cars to disabled people compared to the price of cars to people without disabilities. It should be stressed that there was no difference in product (in the car), and there was no extra service that was offered that justified the difference in prices. In this case, the disabled people had a tax exemption provided for art. 1, IV, of Law 8.989/95, in order to foster their decision to purchase cars. However, the company tried to appropriate this tax benefit, by unduly increasing the price of the car for the disabled people. This practice was condemned by the Brazilian judicial system (see, for example, the judgment of the interlocutory appeal 70033960964, in the Rio Grande do Sul Civil Court, Judged on December of 2009).

Carvalho mentioned the Civil Appeal No. 70002644185, decided by the Eleventh Civil Chamber of the Rio Grande do Sul Civil Court. The Telephone Company - CRT, in the 90s, was a monopolist in fixed telephone lines in Rio Grande do Sul. Abusing its monopoly power, CRT sold its telephone lines together (bundled) with CRT´s overrated shares. While the real value of CRT´s share was Cr$ 3.17, the shares were sold to consumer by Cr$ 38.29. The Court of Rio Grande do Sul understood that thousands of consumers eager to get the fixed phone lines were held hostages of this company. CRT was aware that its consumers were not gamblers in the stock market and that – in order to acquire a fixed line - they needed to buy overvalued stocks, with unrealistic prices. The Company would never have succeeded in selling a single share on the stock market with the price of Cr$ 38.29, given the obvious economic disadvantage of the

proposed deal. Thus, the company was condemned not only by the undue bundling but also for the excessive prices of its shares.

Also, Carvalho understood that the non-observation of the parameters of price caps set out by Sector Specific Regulatory Authorities may represent an anticompetitive illicit behavior. In this matter, the 36th Chamber of Private Law of the Civil Court of São Paulo, judged the Appeal 992.09.055591-0, in which appellant was Pontal Cable S/C Ltda, against Companhia Paulista de Força e Luz - CPFL. In this case, the disobedience of a fair and reasonable price - negotiated by the parties and certified by the Regulatory Agency - was considered and punished by the Judiciary System as an excessive price.

Furthermore, he argued that there may be some concerns with respect to the creation of some very structurally concentrated markets that have huge barriers to entry, when such concentration is not formally presented to CADE's approval. In this situation, the investigation of excessive prices may help Antitrust Authority to perform some modification in the structure of this concentrated market (whose concentration was not subject to previous antitrust scrutiny).

Therefore, Carvalho understood that excessive pricing may sometimes be punished by competition authority as an anticompetitive practice and sometimes it may be a tool to intervene in undue concentrated markets.

Commissioner Ricardo Ruiz made a list of speculative reasons or conditions that he understood could be used to articulate some guidelines on how to conduct investigations that could detect what would be an abusive anticompetitive price. Ruiz agreed that the mere comparison of product prices would not be enough to condemn a practice like this. So, according to his view, in order to punish excessive pricing, it is necessary to have a long-term perspective, observing the following conditions:

- The firm must be dominant price setter in the relevant market. In this case, there is the possibility of carrying out the offense of excessive price;
- Products and services must be comparable in technological dimensions;
- The practice of excessive price should have some degree of generalization in the industry.
- The agent who charges abusive price must do so by a relevant time period. The intention is to eliminate cases where price changes are related to instabilities or seasonality that characterizes some industries.
- If the dominant firm has some uniqueness in offering its products and its services, there are stronger conditions for the practice of abusive prices.
- The existence of direct or indirect economic relations between the firm who sets excessive price and its vertical downstream/upstream competitor must be taken into account, in order to analyze exclusionary strategies.
- The practice of abusive price cannot be confused with price fluctuations related to exogenous shocks to the industry.

Commissioner Fernando Furlan also recognized the possibility of punishing excessive prices. However he stated that:

- It is preferable to adopt measures that do not involve direct control of prices;

- The antitrust authorities should avoid investigating this conduct in relation to prices in regulated markets;

- If the product sold is a result of irreversible investments in R&D, then the antitrust authority should avoid excessive price investigations, in order not to avoid discouragement of innovation;

- Only markets with high barriers to entry should be considered in excessive price investigations.

1.2. Judiciary decisions

The Brazilian Judiciary has intervened on excessive pricing cases in various occasions based, not only on the antitrust laws, but also on consumer protection laws (which also consider excessive pricing to be unlawful) and the Law of Popular Economy (Law 1.521 of December 26, 1951), which, goes on to establish that to make profits of more than 20% of standard market practice profits by abusing the pressing need, carelessness or inexperience of the other part is a crime (despite the many doubts as to the constitutionality of this profit limitation provision of the Law of Popular Economy, some courts do apply this awkward limitation).

Unlike it was to the case to the BCPS, judiciary interventions are generally focused on price control mechanisms. Indeed, the judiciary has limited the price of some products (such as hydrated ethyl alcohol) to the parameters of the Law of Popular Economy [see (i) Appeal of Interlocutory Appeal No. 41587/2007 - Class II - 15 - Capital District - Sixth House Civil - Rapporteur: Des. Juracy Persiani - (ii) interlocutory 116954/2008 - TJ / MT, (iii) Civil Appeal No. 71000567768, Class of Appeals Second Circuit, Remedial classes do Rio Grande do Sul, Rapporteur: Luiz Antonio Alves Capra, decided on 29/09/2004]. Similarly, judges have also limited profits of gas stations which were accused of excessive pricing in the midst of cartel investigations. This has even been made on a precautionary manner, and was decided based on the antitrust law and on consumer protection laws' provisions with forbid excessive prices. [see, for instance (i) Interlocutory Appeal No. 70019999630**,** TJRS, decided on 23/10/2007, (ii) Interlocutory Appeal No. 70018302786, TJRS, decided on 14/06/2007].

2. Should excessive prices be dealt with by competition authorities or rather by regulators?

As described above, this issue is still very controversial in Brazil. Recently (Preliminary Investigation 08012.000295/1998-92), the majority of CADE's commissioners took the view that there are certain circumstances in which competition authorities should deal with excessive prices. However, most commissioners understood that BCPS should avoid investigating this conduct in regulated markets.

3. What are the different economic methodologies for assessing excessive pricing?

Until this date there has been no case in Brazil condemning excessive pricing. Generally, it is fair to say that the discussions about the different economic methodologies available for assessing excessive pricing is still at its very initial stages in the country. As mentioned above, however, CADE has recently indicated that it may consider economic methodologies as only one among other different methodologies available to define what excessive price is. For example, discrimination among consumers based only on some discretionary characteristics (such as gender or race) may be an evidence of excessive prices, whereas there may be some kind of discrimination among consumers that could be allowed. Ultimately, the definition of what a good and a bad discrimination of consumer prices is may be a matter of Law rather than an established economic concept.

4. What could be appropriate remedies in excessive pricing cases?

As Commissioner Furlan mentioned, CADE's current understanding is that it is preferable to adopt measures that do not involve direct control of prices. For example, the antitrust authority could determine the reduction of barriers to entry instead of focusing on controlling prices.

Specific measures can, however, vary widely, according to the specificities of the case. Excessive prices could be punished with the imposition of fines, together with the obligation to observe the price cap set by the regulatory agency. Also, there may be cases in which the remedy of discrimination of prices among different consumers would be the isonomic treatment of consumers. Finally, when a company abuses of its intellectual property rights, by charging excessive prices, it is possible to determine the compulsory alienation of such rights.

BULGARIA

1. Introduction

The Bulgarian Commission on Protection of Competition (CPC) is empowered to enforce the Law on Protection of Competition (LPC). The provision of Art. 21 (1) LPC prohibits actions of companies with monopoly or dominant position, which have as their purpose or effect the prevention, restriction or distortion of competition and / or damage of the interests of consumers, such as directly or indirectly imposing prices to buy or sell or other unfair trading conditions. This requirenment is entirely with the composition of Art. 102 TFEU.

In its enforcement practice[1], the CPC has consistently held that unreasonably high prices are those that significantly exceed the cost of production and marketing of service provided by the dominant undertaking. The main criterion for the existence of "unreasonably high prices" is obtaining excessive profits, the amount of which is economically unjustified and largely exceeds the cost of the service. The practice[2] of the CPC related to unreasonably high prices is limited. The approach is different depending on whether the prices are in regulated sectors, where they are controlled by the sector regulator, such as the State Energy and Water Regulatory Commission (SEWRC) or the Communications Regulation Commission (CRC), or are rather the case of free pricing. In the first case, prices are determined and adjusted based on established methods based on cost and price transparency of the industry regulator. In this case, the CPC is not competent to carry out a study on the reasonableness of prices.

2. Competition advocacy

Competition advocacy includes CPC initiatives and opinion statements designed to promote market openness and foster competition by reforming and dismantling competitive restrictions.

2.1. Collaboration with Other Authorities

CPC's collaboration with sector regulators, law-enforcement institutions, other government agencies and business associations is an important precondition for efficient competition policy.

Pursuant to the Law on Protection of the Competition (LPC), the CPC is the authority that enforces the legislation on protection of competition related to all fields of the economy. At the same time, the special legislative framework empowers the sector regulators to exercise specific powers, among which imposition of regulatory measures aimed at establishing and maintaining the conditions necessary for the enhancement of competition in the relevant markets. For example, the Communications Regulation Commission is competent to research, analyze and prepare assessment on the level of competition of the relevant markets of electronic communication networks and/or services.

In order to avoid any acceptance of contradicting decisions of the competition authorities and the sector regulators, close cooperation between them is needed. In this regard, the CPC has signed

1 Decision No. 46/2001 of the CPC.

2 The new Rules of LPC, 2009, p.222.

Cooperation Agreements with the sector regulators. Efforts are being made to strengthen and intensify this collaboration through the exchange of information on the uniform and consistent enforcement of both the national and the European legislation. The CPC has also signed Cooperation Agreements with a number of other state bodies. The goal is to improve the exchange of information and coordination between the authorities which will contribute to the more effective exercise of their powers. The CPC has signed Cooperation Agreements with the State Energy and water Regulatory Commission; Financial Supervision Commission; Communications Regulation Commission; State Stock Exchange and Commodities Commission; Commission for Consumers Protection.

The cooperation with the business organizations aims at ensuring effective competition and free entrepreneurship expressed mostly in exchange of information and conducting joint initiatives to popularize competition rules.

According to the legislation, regulators are empowered to determine whether the price proposed by the dominant company is justified. The CPC holds that this is justified when the order for its formation and regulation is respected. In sectors where prices are formed freely, the CPC has the power to perform a detailed analysis to establish the imposition of excessive prices by a dominant undertaking on the market.

According to modern economic theory[3], the existence of unreasonably high prices can be observed when a dominant company increases prices of goods / services above competitive levels. In these cases the imposition of unreasonably high prices of the dominant firm is the most intuitive form of abuse by increasing its profits. The practice knows few clear cases of the imposition of unreasonably high prices of the dominant firm. In practice the dominant firm may transfer market power to related markets where unreasonably high prices will be charged to the end users that are bound (examples: video games consoles video games, cars, spare parts, printer- toner, etc.

3. CPC's advocacy role when facing high prices in unadjusted sectors

The CPC performs a sector inquiry in cases where the competition in a certain sector, branch, sub-branch or region may be prevented, restricted or distorted. In other words, a sector inquiry presupposes that there are indications for ineffective competition in a given sector and that there is a need for specifying the boundaries of the relevant market with a view to establishing in a systematic way the limitations that the participating undertakings face with regard to competition. Conducting sector inquiries of the competitive environment has been a competence of the CPC since 2003 when the provision of Article 7 (1) of the LPC (repealed) was supplemented. The Law on Protection of Competition provides the legal framework of the sector inquiries – as a material and legal order and as a procedure.

The sector inquiries as a tool to study the overall picture in a given sector aim to show competitive conditions in which the sector is functioning and whether the market characteristics suggest that there are conditions which facilitate the occurrence of anti-competitive practices. If the inquiry establishes that certain factors exert a negative effect on the competitive environment, such as the presence of anti-competitive practices, imperfections in the legislation or lack of a regulatory regime, the CPC shall formulate specific recommendations directed to improve the competitive environment on the relevant market.

A good example of the CPC's advocacy role is the sector inquiry on the fuel market which was launched on the occasion of a widespread increase in final prices of motor fuels in early 2011, as well as a continuing trend of price rises. The purpose of the inquiry was to present the main characteristics and trends in the fuel market in Bulgaria and to verify suspicions associated with any anti-competitive behavior

[3] The Economics of the EC Competition Law – Bishop & Walker (3rd Edition 2010).

of some participants in this market, which could be among the reasons for the increase in prices of certain products. The sector inquiry concluded with a proposal to initiate proceedings since the data gathered in the course of the inquiry showed the possibility that infringements of Article 15[4] and Article 21[5] of the LPC had been committed.

4. Methods used to prove excessive prices in the European practice, and applied of CPC

4.1. Comparing prices between different geographical areas.

In the United Brands case, the European Commission concluded that the company imposes excessive costs on the basis of a comparison between prices in different countries. It was found that prices of production were 80% higher in Belgium than in Ireland and 138% higher in Denmark than in Ireland. Comparing the prices of the same product in different geographical areas can be an instructional method for proving excessive prices by using price concentration studies. These econometric studies reveal the relationship between prices (or margins of profit) and the level of concentration between different regions in order to establish a correlation between higher levels of market concentration – higher prices, which may represent a link between the level of concentration and the presence of a dominant position.

The simple comparison of the prices of the same product in different regions is not reliable because in some cases, in the different regions, there are significant differences in the formation of costs that are to be taken into account. Furthermore, it should be borne in mind that the different prices in the different regions in which the dominant undertaking operates do not necessarily lead to damage to the end user, for such behavior is not necessarily an abuse of dominant position.

4.2. Comparing prices of different companies operating in the industry

This method is also recommended for establishing that unreasonably high prices were imposed by a dominant undertaking. It is also used in the United Brands case.

The assessment of economists to this method:

Economists consider this method not very reliable, because if a company had higher prices and consumers nevertheless continue to buy the same volume, it is evident that consumers consider the product as indispensable compared to the products of other companies. If so, this means that simply comparing prices could lead to a reliable conclusion. Only if users are bound (locked-in) to buy these more expensive products, it can be concluded that the simple comparison of prices will lead to reliable results.

4.3. Comparing the prices of various services offered by the dominant undertaking

In the Deutsche Post case the European Commission concluded that international prices of service items were excessive. In this case it was not possible to perform a detailed cost analysis, and to compare with the same services in the country. It was found that prices for international shipments were excessive.

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4 Art.15 (1) The following shall be prohibited : all types of agreements between undertakings, decisions by associations of undertakings as well as concerted practices of two or more undertakings having as their object or effect the prevention, restriction or distortion of competition on the relevant market, […] (2) Any agreements and decisions referred to in paragraph (1) shall be null and void.

5 Art. 21. The conduct of undertakings enjoying monopoly or dominant position, as well as the conduct of two or more undertakings enjoying a collective dominant position that may present, restrict or distort competition and impair consumers' interests, shall be prohibited […].

The assessment of economists to this method:

When a company produces / provides a different kind of goods / services there is a need to allocate fixed and variable costs between many different products. When a company has large fixed costs, typically is not possible to have the same prices for each product offering. In other words, the imposition of different prices could be a sign of an effective competition. Therefore, simple comparison of prices of various products manufactured by one manufacturer may give misleading conclusions about whether prices are excessive or not.

4.4. Investigation of the profit levels of the enterprise as evidence for the realization of excessive profits.

Theoretically there is a link between the presence of excess profits and the existence of market power in one company. In the case where in different regions different accounting standards are applicable carrying out a comparison of companies in different geographic regions can be misleading.

The methods used to prove the profitability of an enterprise are based on so-called rate of return on capital. The proper assessment of the capital, however, can be difficult because the bulk of assets is based on the grounds of materiality and some intangible assets such as human resources are not included in the cost of capital of an enterprise. Where intangible assets are not properly assessed and included in the cost of capital, the outcome may be unrealistic.

The difficulties faced to determine whether a price is unreasonably high or is formed in conditions of effective competition can be seen in a number of solutions. It should be noted that apart from the United Brands case there are a few more cases concerning the imposition of excessive prices as a form of an abuse. Economic theory and practice to date indicate that the establishment of unreasonably high prices is a difficult task. It is therefore necessary in every case to perform a detailed analysis of the characteristics of the market as a whole in view to determine whether the entity under investigation is subject to competitive pressures or not, and whether its conduct is likely to harm consumers' interests.

In terms of company profits, global economic theory concludes that not all firms' prices in an industry necessarily cover the average total costs but could mirror many of these costs. We have to give an example of industries where it is very difficult to make the link between costs and prices. For example, in industries that operate with intellectual property there is a very typical unit price that significantly exceeds the cost of production. This is because, besides production costs, the price should also cover costs related to the risk of investment associated with the introduction of the product to market. Pharmaceutical companies invest huge funds for studies and researches necessary to discover new drugs; in the music industry, companies make large investments in discovering new musical talent; software companies make investments to create new software. In all these examples, previously incurred costs should be recovered and this can only happen if the cost of production outweighs the costs incurred per unit. Given the dynamics of competition in these sectors it is impossible and impracticable to use a test for the validity of a price. On the contrary, the presence of excessively high prices in these industries is crucial for their existence.

Intellectual property rights are created precisely for this purpose, i.e. to allow companies to impose prices at levels significantly above the cost of unit production.

5. Kremikovci AD case (Decision No 628/2007 of the CPC) - Methods used by CPC to prove excessive prices

Kremikovci was the sole producer for granulated blast furnace slag that was a primary material used in industrial slag cement production. Granulated slag is a waste product, resulting from the production of

cast iron. Kremikovci had been imposing continuously increasing excessive sale prices to their clients (cement production factories).

Evidence:

- Analysis of the prime cost of the product – Unusual expenditure items were detected, and attached to the prime cost of the product. However, its nature of a waste product is by definition deprived of such production-related costs.

- Pricing analysis of the final sale price of the slag when transportation costs were included – it was established that the increase in transportation costs was in times less than the increase in sale prices.

- In the proceedings, a price comparison approach was used to prove the case for excessive pricing – the sale price offered to cement factories and the one provided to a long-term business partner - Cemeko, with whom Kremikovci had a contract for delivering slag.

- It was verified that the price, offered to the partner had been significantly lower than the one proposed to the rest of the customers.

The analysis led to the irrefutable conclusion that Kremikovci had imposed excessive prices and therefore committed a pricing abuse within the meaning of Article 21, p.1 of the LPC.

INDIA

1. Introduction

Excessive pricing remains one of the most contentious subjects in the realm of competition regulation. Arguably the primary motivation of competition policy is to prevent excessive prices. Nonetheless, it must be borne in mind at all points of time that excessive pricing is a resultant effect of some structural maladies of the market or outcome of anti-competitive behaviour by the market participants, rather than an independent issue in itself.

Among the many issues in the area of excessive prices that have invited protracted debate among regulators, academia and courts, the prominent ones are (i) whether and under what market conditions pricing by dominant firms warrants antitrust intervention, (ii) conceptually what constitutes 'unfair' or 'excessive' price, (iii) the practical challenges in applying the various tests that have been proposed by various commentators for assessing unfairness of prices and (iv) the choice of efficient remedies.

The Indian competition law condemns and prohibits imposition of 'unfair price' by dominant firms. While there is no case precedent pertaining directly to 'unfair price' so far, the Competition Commission of India (the "Commission") is cognizant of the importance of evolving an appropriate analytical framework for treatment of unfair price cases that may come up in the future so as to avoid the associated risks and costs to the consumers, industry and the economy. Principally, the challenge for the Commission would be to strike the right balance between static and dynamic efficiencies so as not to undermine investment incentives while ensuring that consumers' interest is protected.

2. Competition Act, 2002 and 'Unfair Price'

The Indian economy underwent a paradigm shift owing to the economic reforms that were undertaken in the nineties, moving away from 'command and control' economy to an economy reliant on free market principles. Consequently, the extant competition law regime governed by the Monopolies and Restrictive Trade Practices Act (MRTP Act) called for an overhaul in order for it to address the needs and challenges of the new economic paradigm. The new competition law, Competition Act, 2002 (the "Act") was enacted in 2003 and amended in 2007.

The broad objectives of the Act, as laid down in its preamble, are:

> "..to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of the consumers and to ensure freedom of trade carried on by other participants in markets in India.."

The new Act conforms closely to the principles of modern antitrust economics. Designed for the new economic environment, the Act does not target size or dominance of a firm as such. The emphasis has shifted from size to behaviour and effect on the market concerned. Section 4 of the Act prohibits abuse of dominant position by an enterprise or group, as defined in the Act. The important issue is whether the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably.

The prohibitions or the abusive conducts including both 'exclusionary' and 'exploitative' practices are set out in Section 4(2) (a), (b), (c), (d) and (e) of the Act. Imposition of unfair price has been explicitly stated as an abusive act under Section 4(2) (a) (ii): There shall be an abuse of dominant position, if an enterprise or a group "directly or indirectly imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or services". Evidently, a dominant firm, under the Act, abuses its dominance if it charges 'unfair prices' to its customers, which may include both unfairly high or excessive price and unfairly low or predatory price. *Thus, excessive price forms a subset of 'unfair price' in the Indian context. 'Unfair price' has however not been defined in the Act.*

The tests applied to conclude infringement of the provisions of Section 4 including that of the imposition of unfair price have two key elements: whether an undertaking is dominant in a relevant market; and, if so, whether it is abusing that dominant position by indulging into any of the conducts provided in Section 4(2).

Under the Act, dominance refers to a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to – (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. Section 19(4) of the Act stipulates that the Commission while inquiring whether an enterprise enjoys a dominant position or not should consider all or any of the following factors, namely:

- Market share of the enterprise;
- Size and resources of the enterprise;
- Size and importance of the competitors;
- Economic power of the enterprise including commercial advantages over competitors;
- Vertical integration of the enterprises or sale or service network of such enterprises;
- Dependence of consumers on the enterprise;
- Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sectoral undertaking or otherwise;
- Entry barriers including barriers such as regulatory barriers, financial risk, high
- countervailing buying power; capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- Market structure and size of market;
- Social obligations and social costs;
- relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- Any other factor which the Commission may consider relevant for the inquiry.

It is only after the dominance of the firm is established that the alleged abusive conduct is assessed. The underlying principle of the Act is not to control prices or profits but to strive to preserve conditions which would allow market forces to keep them in check.

3. Necessary conditions for intervention

There are various arguments both in favour and against antitrust intervention in excessive pricing. An argument in favour of intervention is that it directly increases consumer surplus, at least in the short run. Nonetheless, there are arguments against intervention too. First, an assessment of excessive price necessitates establishing a benchmark 'fair price'. Second, high margins in some industries are necessary for future productivity and dynamic efficiency. Some industries, such as network industries, have high fixed costs, low marginal costs and oligopolistic market structures. High margins are a natural outcome of market forces in such industries. Simple economic models, as illustrated by Brennan (2007), show that innovations that generate long-run benefits might outweigh short run welfare losses from output reductions.

Several necessary conditions with varying degrees of stringency have been proposed to identify markets that could be candidates for intervention against excessive or unfair prices (Motta and de Streel (2007)), which inter alia include the following:

- **High and non-transitory entry barrier:** Left to itself, high prices in a market without entry barriers should act as signal for entry which subsequently would reduce market power of the dominant firm and prices in the long run. Thus, the existence of high and non-transitory entry barriers is considered the first necessary condition for using unfair/excessive pricing actions. Such barriers limit the market's self-correcting ability and the dominant firm's position remains unlikely to be challenged as high profits would not stimulate successful new entry within a reasonable period.

- **Market power originating from current/past exclusive/special rights:** The second necessary condition relates to the origin/source of market power or dominance of the firm under scrutiny. High prices and profits in certain industries are the reward for firms' risky investments. This is especially the case in industries where innovation and investment plays a central role. Monopoly profits in such markets are thus deemed as the incentive and reward for innovation. As Brennan (2007) argues, if we both want to maximize short-run economic welfare by acting against anticompetitive practices and promote the efficient level of innovation, both objectives cannot be reached by competition law alone. It has therefore been suggested that such markets where dominance is a fallout of innovation and risky investments, excessive price intervention bears the risk of undermining dynamic efficiency.

It becomes evident that an action on excessive pricing is warranted only when:

- such excessive prices does not stimulate successful entry within a reasonable period, and

- dynamic incentives are not harmed

A cautionary note here, however, is that distortion of dynamic incentives as a blanket justification for not intervening in excessive pricing cases is not without its own pitfalls either. The assessment of dynamic benefits vis-à-vis the static inefficiencies of non-intervention is to be made in light of the specific industry under scrutiny.

Dynamic efficiency arguments, if they are vague or speculative or otherwise cannot be verified by reasonable means, should not be given due importance. As pointed out by Brennan (2007), "defendants in a competition case should be allowed to invoke such claims, but also be required to show that the dynamic effects are unlikely to be accomplished but for the practice and substantiate those claims so they are not vague or speculative. In particular, this would rule out simple assertions that 'dynamic trumps static'."

3.1. The Indian context

The Competition Commission of India is mindful of the fact that its intervention decisions should be guided by sound economic rationale. It is reassuring that the Indian competition law is premised on economic principles; in particular, the provisions in the Act relating to abuse of dominance contain in-built checks and balances to ensure a thorough evaluation of the market conditions prior to the assessment of the impugned actions.

The first test for abuse of dominance, i.e., establishing dominance of the firm, is reasonably stringent, wherein it is mandatory for the Commission to consider factors such as market structure, entry barriers including regulatory, technical, capital cost related barriers, monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise, commercial advantages etc.

It is understood that the threshold for intervention into excessive price cases should preferably be higher as compared to other abuse of dominance cases, given the downside risks it may pose to dynamic efficiencies. The Competition Act, 2002 provides the flexibility to the Commission to set thresholds by selecting all or a subset of factors listed in Section 19(4). Further, it allows the Commission to consider any other factor (not given in the list) that may be deemed relevant for the inquiry.

Equipped with these enabling provisions in the law and international jurisprudence on this issue, the Commission is well placed to design appropriate intervention criteria for unfair price cases that may come up in future.

3.2. Sectoral regulator or competition regulator?

The other important contention in unfair price cases is that it is the sectoral regulator (if existent), rather than the competition regulator which is best placed to intervene in markets satisfying the two necessary conditions discussed earlier. Particularly, in cases of exploitative abuses, antitrust authority should refrain when a sectoral regulator has jurisdiction to act.

In India, sectors such as Electricity, Petroleum and Natural Gas, Telecommunication, Insurance, Airports, Airlines are regulated by independent sectoral regulators. The functions/roles of these regulators are governed by their respective legislations. The general principles of competition are being promoted in each of the regulated sectors through creation of enabling environment for competition and free play of market forces. Direct price intervention is limited to natural monopolies like transmission of electricity and gas, where tariffs are ex-ante regulated by the sectoral regulators following a cost-plus method.

What is of interest in the Indian context is to recognise the fact that many of the regulated industries are undergoing significant structural transformation and the history of regulation in such sectors is relatively limited. There is likely to be unavoidable overlaps of jurisdiction between competition and sectoral regulation and at this nascent stage of regulatory development, we feel it is immature to come up with a rigid division of jurisdiction pertaining to issues such as unfair price.

4. Methodologies for assessing unfair price

There is no generally accepted definition of *unfair* and *excessive* price. Economists, competition authorities and courts have suggested various alternative methodologies that may be used to recognise and prove excessive price in practice, which albeit are not devoid of conceptual and estimation challenges.

- Price-cost comparison:

  The ECJ, in the United Brands judgement, held that the question in excessive price cases is "whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer is in the affirmative, to consider whether a price has been charged which is either unfair in itself or when compared to other competing products".

  The approach suggested in the judgement is to compare price with a relevant cost measure and if the difference exceeds some predetermined level, the price under observation may be deemed excessive. Evidently, this approach necessitates setting of a benchmark or threshold price with respect to costs against which the actual price can be compared.

  The practical difficulties in applying this methodology include determination of the threshold price for the given industry and assessing production cost. Assessing production costs is particularly difficult as there are various concepts of cost - there are often divergences between accounting costs and economic costs, many businesses are multiple-product businesses and data is only presented at an aggregate level in accounts. Further, there could be transfer pricing arrangements in the case of transnational corporations (Williams, 2007).

- Excessive profit

  An alternative approach for assessing excessive prices is to use rates of profit. Under this approach, the prices of a particular dominant firm are deemed excessive if the firm obtains profits higher than it could expect to earn in an otherwise identical competitive market (Evans and Padilla, 2004). Most attempts to measure profitability rely on accounting measures of profitability. Comparisons across firms, particularly across regions, can be biased by the use of different accounting conventions. Profitability measures are usually based on rates of return on some measure of capital. Measuring capital appropriately is difficult where a significant proportion of the asset base is not made up of physical assets, but of intangible assets such as human capital. If intangible assets are not properly accounted for it leads to estimates of supra-normal profits because of an improperly measured capital base.

- Competitors' prices

  Another approach sometimes suggested is to compare prices across different firms. Comparison of the prices charged by the firm under investigation with those of its competitors that supply the same product was used by the European Commission in General Motors and United Brands and by the UK OFT in Napp.

  However, it has its limitations. If one firm charges higher price than other firms and yet competitors are buying from it then it means that consumers consider the product in question to be superior to the products of other firms. However, if the consumers are locked in to buy the high priced product then such a simple price comparison makes sense.

- International price comparisons

In United Brands the EC concluded that United Brands was charging excessive prices based on a comparison of prices between different countries. The Commission found that prices were 80% higher in Belgium than in Ireland and 138% higher in Denmark than in Ireland (Bishop and Walker, 2010). Given that the level of fixed costs and capital intensity might be expected to be equal in the same industry though they might be differing widely across industries, it is considered possible to compare prices in a given industry across countries, and the average price across countries could be taken as a benchmark for price in an averagely competitive market.

However, international price comparisons are also not without limitations. Different prices may reflect price discrimination with welfare enhancing effect. It has to be borne in mind that a policy by a dominant firm of pricing differently across regions does not necessarily imply consumer harm and therefore does not necessarily represent abusive behaviour.

- Earlier prices of the dominant firm

  Comparison of the alleged excessive prices with the dominant firm's earlier prices has also been used as a test. In General Motors case, the car manufacturer had imposed a sharp increase in the price of type certificates. However, this test presumes that the prior price was not below the competitive level, and also requires forming a view about what increment above the competitive level counts as excessive. Further, the application of this test would imply that the competition law is directed less at excessive price levels but at price increases.

- Benchmarking if pricing is excessive & differential

  In some cases one can find differential prices wherein the segmentation of customers may give an evidence to identify excessive pricing. As per Competition Act, 2002, there could be overlap between unfair excessive pricing and discriminatory pricing, in certain cases.

4.1. The Indian perspective

The discussion above indicates that a "one size fits all" approach is not appropriate for dealing with unfair price cases. Rather, the exercise should be to identify the correct test for assessment of unfair prices or to evolve workable methodologies for each specific industry in light of the facts of the specific cases under investigation.

Availability of data, both at the industry level and company level is a necessary prerequisite for understanding the competitive dynamic of industries as also to carry out the exercise of determination of unfair or excessive price. This requires that the Commission works closely with other relevant government departments, private research organisations of international repute and organisations with special domain expertise to develop industry wise comprehensive databases.

5. Possible remedies and implications

As noted earlier, appropriate interventions by competition authorities in excessive price issues should primarily address the causes of the excessive prices. In the few instances of competition cases that have arisen within the purview of excessive pricing, direct price intervention has not been viewed as the only appropriate response.

Remedial measures are either structural or behavioural. The former depend on an understanding of the underlying structural glitches in the market, which vary from case to case and may require competition authorities to resort to advocacy especially in the cases where the cause of excessive pricing is market

power enjoyed as a result of regulatory provisions. Behavioural remedies address the issue of what is the correct price/profit/revenue directly and is also specific to the case at hand and it also amounts to direct intervention.

For instance, in the case of SME Banking (UK CC, 2002), the complaint of excessive pricing arose from restricted competition. There was a high concentration (4 banks accounted for 90 percent of the total supply of funds) and SMEs were reluctant to switch banks. Remedial measures consisted of making switching easier and quicker, limiting bundling of services and improving information and transparency. A price regulation was introduced but it was merely transitory in nature.

In the extended warranties case (UK CC, 2003), it was again observed that excessive prices were the fallout of lack of competition. Extended warranties on offer were usually from a single provider with poor price information regarding the warranty. Remedial measures, once again, consisted of measures aimed at boosting competition and information about the product. No price regulation was thought to be appropriate for this case.

In industries subject to large economies of scale, price regulation may still be the best option. The classic examples are in the utilities such as gas and electricity. Two important balancing factors here are cost attribution and incentives to invest. Access price regulation, for instance, requires a subtle balancing of long term incentives against short term rip-offs.

As noted by Lyons (2006), alternatives to price regulation might be vertical or horizontal restructuring. The former separates the key stages of production in which scale economies are prevalent. While areas like distribution networks which would be extremely inefficient to duplicate can be subject to price regulation, major parts of most industries could be left to market forces. This form of vertical restructuring can be effective, especially when the firms are created away from the market as in the privatized utilities.

An alternative form of restructuring is horizontal, whereby a dominant firm is broken up into multiple smaller units. This is a drastic remedy, and enormous caution is necessary because the efficiency consequences are very hard to predict. Quite generally, it would be far better to facilitate expansion by a small rival or entry by a new firm, preferably one with a track record in a neighbouring market so it has the appropriate experience, financial resources and skills to succeed. This requires a deep analysis of the source of current entry barriers.

More creative alternatives can be thought of in other instances. In particular, there are markets with several alternative suppliers, yet one long-standing incumbent remains dominant despite charging higher prices. This is common in gas and electricity distribution in the UK (Waddams and Wilson, 2010). Customer switching would soon encourage a dominant firm to reduce its prices, but domestic customers are remarkably slow to save even substantial sums of money for relatively little switching effort. However, a possible solution to this consumer could be to remove information asymmetry through provision of credible information.

In sum, identification of high/excessive prices does not imply that a natural remedy is to regulate prices. The fundament source of the problem is some form of entry barrier, and the basic principle of intervention should be to remedy the problem at source.

6. Conclusion

Regulatory intervention in *unfair* or *excessive* price cases is a non-trivial task, given the twin problems of estimation and the trade-offs between static and dynamic efficiency.

No case pertaining explicitly to unfair or excessive price has yet been filed with the Competition Commission of India. Nonetheless, the Indian competition law prohibits imposition of unfair price by a dominant enterprise or group. The Act mandates a rigorous analysis of dominance prior to investigating unfair price. This allows for an evaluation of the necessary conditions, as mentioned in Section 3 of this Paper, for intervention in excessive price cases.

On the issue of estimation, Section 4 summarises the standard approaches for assessing excessive price. None of these are without their own shortcomings. One has to be judicious in selecting a particular method, keeping in view the specific context of the case at hand. A 'one size fits all' approach is inappropriate.

As Section 5 mentions, remedial measures are either structural or behavioural. The latter mostly involve direct intervention and are rarely used as the first best remedy. Structural intervention addresses the underlying market malfunctions which are expected to lead to situations of excessive price.

The Indian competition law stands to benefit from international experience in excessive prices. At the same time, the conditions of the Indian market have to inform the nature of the analysis, which will evolve over time as excessive price cases arise.

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INDONESIA

1. Introduction[1]

Excessive pricing is a general term in the context of antitrust and competitive economy. The analysis of excessive price often invites intensive debate, especially from the academic point of view. In this context, the issue that arises is how relevant it is to require intervention in order to correct excessive price. Some other frequently arising issues include the question as to who should undertake such intervention, what are the impacts thereof on the market, whether or not such intervention is likely to cause the market to become more efficient?

In Indonesia, as a state which has implemented business competition law since 1999, the concept and analysis of *excessive pricing* have received attention and concern from various parties, particularly from academicians, economic observers as well as the business competition supervisory authority, namely the Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha*, hereinafter briefly referred to as "KPPU"). In this context, this Paper aims at providing information concerning the concept and analysis in regard to *excessive pricing*, with some related case studies which have been handled by KPPU as the competition supervisory authority in Indonesia.

2. The Definition of *Excessive Pricing*

Based on the definition of OFT (2004), *excessive pricing* is simply defined as a company action setting a price higher than the price rate which is applicable under competitive conditions on the market[2]. In some circumstances, excessive price is often described as monopoly price and/or price formed as a result of the existence of a cartel agreement. It is obvious that neither monopoly price nor cartel price reflect the ideal price at the level of perfect competition since such price contains abnormal profit reflected through P > MC. The greater the discrepancy between P and MC, the greater the abnormal profit will be, and automatically the higher or the more excessive such price is going to be. In other words, conceptually, *excessive pricing* can be considered as the impact of anti-competitive behavior such as monopoly practices, the abuse of dominant position and/or cartel agreement. Under market conditions with an entry barrier, either natural or caused by the regulation factor, there is a greater potential for the occurrence of excessive price as an impact of anti-competitive behavior.

Law No. 5 of 1999 as the business competition law in Indonesia does not directly provide for *excessive pricing*. This is quite reasonable, since Law No. 5 of 1999 places greater emphasis on provisions related to anti-competitive behavior especially in regard to price fixing. Some forms of behavior related to price fixing include, among other things, price fixing (article 5 *per se* illegal), price discrimination (article 6), resale price maintenance (article 8), tying in discount (article 15) as well as predatory pricing (article 20). In addition to the above, there are also regulations concerning production-marketing cartel (article 11), monopolistic practices (article 17) as well as the abuse of dominant position (article 25). Thus, if excessive

1 For further information, please kindly visit our website (http://eng.kppu.go.id) or email us at international@kppu.go.id. English news can be obtained through personal blog at http://indocomnews.wordpress.com.

2 Review of the Impact of the Financial Services and Markets Act 2000 on Competition (Office of Fair Trading March 2004).

price occurs in the market, KPPU conducts investigation focusing on the allegation of the violation of the aforementioned articles. Under such circumstances, excessive price serves as an initial indication of the alleged anti-competitive behavior.

3. Who deals with excessive price?

The need for intervention in *excessive pricing* cases is still under debate. There are several arguments supporting the view that no intervention is required in cases of *excessive pricing*. First, *excessive pricing* is a signal for potential and existing competitors to expand their output and enter the market. On the other hand, excessive price may reflect a shift in supply and demand, which brings return on previously made investment. Second, the practical difficulty in measuring competitive price and identifying excessiveness makes the actual enforcement of excessive price restriction difficult. Third, *excessive pricing* may implement a "self-correcting" mechanism based on the premise of the "invisible-hand" namely that non-intervention is likely to result in lower price and good quality products, and it constitutes an integral part of the competition process. However, this third reason is challenged by a study conducted by Erazhi and Gilo (2008) which principally concludes that "self-correcting" mechanism is unlikely to occur in *excessive pricing* condition, regardless of whether there are high entry barriers or low entry barriers and whether or not potential entrants, rather than incumbent company, are informed about relative efficiency.

Conceptually, the phenomenon of *excessive pricing* can be prevented and corrected by means of a combination between economic regulation intervention by the government and competition law enforcement by KPPU. In this matter, economic regulation by the government means intervention in rate regulation. Generally, the forms of regulation by the government or the sector regulator include the rate determination procedure (for example, drinking water price and toll road tariffs) and the determination of tariff cap (for example: air ticket price). Generally, price policy in the infrastructure sector and/or related to public services is fully determined by the regulator. The function and role of the government or the sector regulator clearly possess a strong legal basis since they are generally based on the relevant laws and regulations.

Meanwhile, KPPU's role and function are to implement the function of competition law enforcement against anti-competitive behavior resulting in the occurrence of excessive price. In this matter, KPPU functions as investigator and inquirer, and finally issues a ruling related to the allegation of violation of Law No. 5 of 1999. In the investigation and hearing process, the commission council frequently summons a representative from the sector regulator to act as expert witness to explain to the extent to which the allegation of anti-business behavior can impact excessive price.

With such a discrepancy in main duties and functions, there is a need for comprehensive coordination between KPPU and the Government (Sector Regulator). This coordination is in the form of separation of duties, by which KPPU focuses on the issue of anti-business competition practices while the government focuses on technical and economic issues. This is necessary since the same outcome is expected by both KPPU and the government/sector regulator, namely enhanced productivity and efficiency in the economic system. A common of vision and perception shared by KPPU and the government/sector regulator is an absoulte requirement.

Several anti-business cases related to *excessive pricing* have occurred in Indonesia, among other things, the cases of SMS rate cartel, market control by Temasek Group, pharmaceutical cartel and fuel surcharge cartel. In these cases, the commission council has found and proved the existence of elements of anti-business competition practice in the form of agreement among competitors which have bought an impact on price setting in the market. Moreover, the Commission Council has been of the opinion that such various behaviors significantly impact excessive price or generate abnormal profit for the relevant business actors. Such conclusion has been made based on the analysis conducted by the council and the opinion of

expert witnesses, as well as the study of various publications or academic journals both domestic as well as international, related particularly to cartel behavior, monopolistic practices and/or the abuse of dominant position.

4. Methodologies for Assessing *Excessive Pricing*

Economic and legal literatures have generally developed special standard in order to determine whether or not a company is conducting *excessive pricing* practice which may result in unfair competition. One of the literatures widely used as reference for *excessive pricing* assessment methodologies is the literature of Massimo Motta and Alexander de Streel (2007). They determine assessment methodologies based on the European Union Commission and its Tribunal Court. The first methodology is based on comparison between production cost and price[3]. This method is derived from the idea that there is supposed to be a threshold price which ensures an adequate margin related to price, and the price imposed by company above such threshold is excessive. The second method is comparing prices charged by dominant companies in different markets[4]. For example, a dominant company fixes price in market A at a higher level than the price in market B having the same products and services, so that the company will earn profit in the last market. This can be considered as unfair price fixing. However, the weakness of this method that the dominant company is determining different prices does not necessarily constitute an act of unfair competition. Such price difference can potentially increase sales and provide an opportunity to a part of society unable to afford to buy its product at a lower price. The third method is also referred to as benchmarking, namely by comparing price charged by the dominant company and price charged by other companies, either in the same[5] or in different[6] market. The fourth method focuses on the dominant company's profit and compares it to other profits, namely (i) normal competitive profit or (ii) other companies profit. According to method (i), excessive price occurs when the company's return on capital for the product concerned is higher than Weighted Average Cost of Capital (WACC)[7]. Method (ii) compares the level of dominant company's profit to the profit generated by a similar company in another geographical market.

Each type of these methods for detecting the existence of *excessive pricing* practices has weaknesses and raises certain issues especially in practical implementation. First, due to the availability of data and asymmetric information between KPPU as the competition supervisory authority and the relevant business actors. Second, while the company concerned does not commit anything, it can still be considered to have engaged in this practice. Therefore, the competition authority must prove it by using various methods and should seek strong evidence to prove that anti-competition practice resulting in *excessive pricing* has actually occurred.

In determining that an anti-competition practice has occurred resulting in *excessive pricing*, KPPU has used several methods for different cases. Referring to the method explained by Massimo Motta and Alexandre de Streel (2007), in the case of SMS cartel, KPPU used the method of cost structure approach. Meanwhile for the cases of pharmacy cartel and fuel surcharge cartel, KPPU uses benchmark method in

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3 More detail calculation for such method may refer to the paper of Williams (2007).

4 This method was followed, for instance, in , Case 26-75 *General Motors* [1975] ECR 1367 and Case 226/84 *British Leyland* [1986] ECR 3263, paragraph. 28.

5 This method was used in, Case 24/67 *Parke, Davis* [1968] ECR 55*,* Case 53/87 *Renault* 53/87 [1988]

6 This method was used in Case 78/70 *Deutsche Grammophon,* [1971] ECR 487; Case 30/87 *Bodson* [1988] ECR 2479.

7 This approach has been considered by the Commission in the *Port of Helsingborg* Decision but was not followed because of the insuperable difficulties in establishing valid benchmarks (see Point 156).

estimating whether or not excessive price had occurred. Meanwhile, for the case of Temasek, KPPU used the excess return/profit method.

In the case of SMS cartel, compensation for damages or consumer loss was calculated based on the difference of the lowest off net of SMS cartel price, namely Rp250 and the price estimated by the government and research institution, namely OVUM, based on a moderate cost structure assumption, namely Rp114 per off net SMS. Thus, a rather significant difference of price was arrived at, namely Rp100 per SMS. Thus, it can be stated that the SMS rate of Rp250 is excessive as referring to the estimation of reasonable rate by the government as regulator.

In the pharmacy cartel case, the Commission Council used international price comparison data or known as the MPR (Median Price Ratios) as a benchmark. According to WHO documentation and publication, MPR above 2.5x reflects excessive price, while the MPR ratio of the observed product in this case ranged between 49x-52x. This implies that the median price of the observed product in this case in Indonesia is 49x more expensive than compared to the median price of a comparable drug sold in some other states (the international market).

At the same time in the case of fuel surcharge, the Commission Council used the fuel surcharge rate calculation formula regulated by the government. By applying such standard formula by means of including various existing parameters, the figure of reasonable fuel surcharge rate can be obtained. By comparing the amount of reasonable fuel surcharge and the price movement of aviation turbine fuel as benchmark, commission council concludes that the price of FS imposed by the airline operator was unreasonable or excessive.

The Commission Council used the method of excess return/profit to calculate compensation for damages or consumer loss in the Temasek case. Such measurement was conducted based on the finding of excessive price represented by the level of actual ROE above reasonable ROE. The level of actual ROE of 45% - 55% during the period of 2003-2006 was considered excessive, whereby the inspection team calculated the level of reasonable ROE to be 20%-35% based on the comparison of the telecommunication sector ROE at the regional level. Based on the said excessive ROE, the inspection team estimated the excess revenue detained by the reported parties as well as the potential price decrease which could occur. For a reasonable ROE of 30%, the estimation of potential price decrease is 21.32% and for a reasonable ROE of 35%, the estimation of potential price decrease reaches 15%. The amount of such estimated potential price decrease was then multiplied by the actual revenue of the reported parties in to obtain the amount of excessive profits constituting consumer loss.

There are several points or common points in the above described various cases. First, the estimation of reasonable rate is extremely useful provided that KPPU has strong basis for its analysis. In this matter, the formula or the amount calculated by the government or the regulator can be used as the primary reference. In addition to that, other methods or indicators issued by international institutions can also be used as reference. The second point is that the use of estimation in determining the reasonable rate is likely to cause debate from the reported parties. In this matter, there is a need for fundamental understanding of the *excessive pricing* concept, not only by KPPU's analysts but also by District Court Judges and Supreme Court Justices reviewing KPPU's rulings at the appeal and cassation levels.

5. Remedies for Excessive Pricing

As one of business actors' actions or behaviors aimed at earning maximum profit, the practice of *excessive pricing* has been proven to be harmful to consumers in Indonesia. Therefore, there is a need for intervention both from the government (regulator sector) as well as the competition authority. Some literatures suggest certain remedies for this practice, among other things, issued by the European

Competition Law[8], according to which the remedy should be applied depending on the causes of the existing *excessive pricing*. Subsequently, price regulation is applied as the ultimate method.

If *excessive pricing* is caused by market power in the past and consumer inertia, the remedy applied will be encouraging consumers to shift to a lower offer by new entrants and providing them with information. If *excessive pricing* is caused by entry barriers strategy, the remedy applied will be removing and forbidding entry barriers. If *excessive pricing* is caused by the structure of entry barriers, the competition authority should be able to remove such entry barriers. If such entry barriers are created as a result of regulation, the competition authority should use its advocacy power to persuade the government to revoke such regulation posing a barrier and to effectively liberalize the relevant sector.

In Indonesia, remedies for *excessive pricing* practices are applied both by the government as well as KPPU. The government applies remedies from the regulation side which is of course more preventive in nature. If a regulation is violated, especially related to price fixing, the government is certain to take various corrective steps, including among other things, an instruction to make rate adjustments. KPPU plays a role from post-violation aspect or if the anti-competitive behavior causes excessive price. Indeed, the KPPU has the authority to impose remedies as regulated in Law No 5 of 1999, particularly in the form of administrative sanctions and fines.

In this context, KPPU and the government/sector regulator can cooperate in preventive manner by reforming competition policy. The objective is to cause a structural change in the market in the economic sector moving into more fair and competitive direction. KPPU is expected to be able to utilize the advocacy of competition policy, so that KPPU along with the government will be able to reduce entry barrier and eliminate various competition barriers. In such circumstance, the potency of anti-competitive behaviors impacting on excessive price can be driven down as minimal as possible.

6. Conclusion

The pros and cons on intervention related to excessive price may never end due to the dynamics in the business sector and the future development of economic concept. However, an important matter to be agreed is the necessity of cooperation and coordination between the competition supervisory institution and the sector regulator concerned. A clear division of duties and roles between those institutions will ensure legal certainty. In addition to that and more importantly, there is a need for coordination between the competition supervisory institution and the sector regulator in the reform of economic policy based on the principle of fair competition. It is in line with the commonly held economic principle, namely that an increasing efficient and competitive market minimizes the potential of excessive pricing.

8 Massimo Motta dan Alexandre de Streel, "Excessive Pricing in Competition Law: Never Say Never?", in The Pros and Cons of High Prices, Stockholm: Konkurrensverket – Swedish Competition Authority, 2007 (Chapter 2, pp. 14-46.), accessed from http://www.barcelonagse.eu/tmp/pdf/motta_excessivepricing.pdf

LITHUANIA

The Law on Competition of the Republic of Lithuania, hereinafter Law on Competition, as well as European Union law, among other abuses of dominant position, prohibits excessive pricing. Fines and/or behavioural remedies may be imposed for undertakings found guilty of this infringement. Some authors state that regulation of excessive prices might seem contrary to the functioning of integrated common market, because regulation of price levels does not reduce barriers to trade between the Member States. It might slow down the natural self-correcting tendency of market forces, if incentives to enter new markets and gain high profits are weakened[1].

On the other hand, excessive prices may cause harm to final consumers as have to pay more to producers who use the monopolist's products or services as input and to society, as it creates a deadweight loss[2].

There have not been many investigations concerning excessive pricing in the Republic of Lithuania therefore the Competition Council can only express its general opinion. The Competition Council would consider intervention only if the below mentioned conditions are met. The first condition for intervention is high barriers to entry. Usually in such cases market forces would be unable to challenge the dominant undertaking, thus correcting the abusive practices. Secondly, dominant position must be held due to current/past exclusive/special rights. And the last condition is the absence of a regulator or in exceptional cases the situation when a regulator does not exercise its powers. This last condition requires more attention and is related to the question, whether excessive pricing should be tackled by competition authorities or rather by regulators.

There are sectors in the Republic of Lithuania, where the regulatory authorities are given considerable powers, for instance natural gas, telecommunications, transport sectors. Regulator exercises ex-ante control in these sectors, whereas Competition Authority is entrusted with the exercise of ex-post control. For example, new edition of the Natural Gas Law states that the regulator in this sector has an obligation to conduct market researches, which in turn allows it to adopt legal rules in order to prevent an undertaking holding significant market power in the natural gas market from abusing its dominant position. The regulator is also obliged to publish the conclusions on natural gas prices and submit these conclusions to the Competition Council. Furthermore, the regulator has the right to regulate the natural gas prices, if the regulator's market research shows that the undertaking may apply excessive prices due to the absence of effective competition. If the research allows the regulator to establish that an undertaking has significant market power, the regulator can set reasoned and proportionate obligations for such undertaking. The Natural Gas Law defines the Competition Authority's functions quite laconically - according to the Law on Competition, the Competition Council exercises supervision of competition in the energy reservoir market. . It is also stated that regulator can consult with the Competition Council in some cases. So there is no clear distinction between division of powers of the regulator and the Competition Authority in this case. However, it is possible that Competition Council could execute the powers conferred by the Law on

1 Gal, M.S. (2004) "Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly?", *Antitrust Bulletin*, Vol. 49, Federal Legal Publications. http://ssrn.com/abstract=700863, P. 24.

2 Idem. p. 26.

Competition in those cases, when the undertakings have sufficient degree of freedom of economic activity and/or the relevant actions of the undertaking are not yet regulated.. However, such assessment would be carried out on an individual basis and would depend on existing circumstances. On the other hand, in terms of remedies, the regulator has a right to introduce a regulation of natural gas prices, while the Competition Authority does not enjoy such a right. The Competition Council can only apply fines and behavioural remedies, for instance, obligation to bring infringement (in this case, excessive pricing) to an end. However, these remedies are difficult to apply and control, as in cases like that the Competition Council is required to describe the level of a non-excessive price or a method to calculate it, which may be regarded as price regulation.

Problems often arise in practice when choosing the most suitable body for assessing excessive pricing and dividing competences in order to avoid situations of punishing an undertaking twice for the same infringement.

The Competition Council had one case, when the price regulator (municipality) failed to take appropriate measures seeking to intercept the way for the ongoing infringement of a dominant undertaking in the communication tunnels market. Municipality as the owner of its property (communication tunnels) had a right to settle the conditions of using this infrastructure (methodology and tariffs), change the order of using the infrastructure (to terminate or to amend the agreement with undertaking, which exploits communication tunnels). In this case, the municipality could regulate the prices of a dominant undertaking - to pass a new methodology (together with tariffs) and to control the application of the methodology. Thus, if the municipality had taken active measures (at once after it received complaints on excessive prices), it is likely, that there would have been no competition problems. However, in the absence of any active actions by the municipality, the Competition Council had to intervene.

Further attention should be paid to the methodology on establishing unfair prices (including the use of excessive prices). There was a case, where a dominant undertaking had the exclusive right to exploit communications tunnels, which belonged to municipality. Different volume of space of these communication tunnels were leased by the dominant undertaking for different leaseholders. There were no substitutes for these communication tunnels. The prices applied by the dominant undertaking were disproportionate to the factual space occupied by separate cables in the communication tunnels. This led to the conclusion that some leaseholders overpaid for the lease of communication tunnels, while others (including the dominant undertaking itself) did not fully cover the costs of the lease of communication tunnels.

The definition of excessive prices for the first time was scrutinized in the *United Brands* case.[3] Few models on assessing whether prices can be regarded as excessive were distinguished in this decision: 1) overpay can be established by making a comparison between the selling price of the product and its cost of production, which would disclose the amount of the profit margin; 2) unfair prices can be established after answering two questions: 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 the price imposed is either unfair in itself (*per se*) or when compared to competing products; 3) other ways for establishing unfair prices[4]. Second model is usually used in the newest jurisprudence of the Court of Justice. Also it is acknowledged that comparison between applied prices and costs is only the first step, seeking to establish whether the prices are excessive. In the *United Brands* judgement the Court of Justice also states that an

[3] ECJ judgment in case 27/76 United Brands Company and United Brands Continentaal BV v Commission of the European Communities, ECR [1978] 207.

[4] Idem. Para. 251-253.

abuse of dominance is established if the price has no reasonable relation to the economic value of the products or service.

According to the second model set out in the *United brands* decision, excessive prices can be established by calculating the difference between the costs incurred and the price charged and by comparing it with competing products or by assessing it as unfair *per se.*

The Competition Council had a case, where the alleged undertaking did not administer the separate financial accounting of communication tunnels costs. During the investigation, due to objective reasons, there was no possibility to compare the lease prices of dominant undertaking with the prices of other undertakings providing the analogical services. For this reason the Competition Council could not fully refer to the *United Brands* second model (comparison of the difference of income and costs with competing products).

On the other hand, in the exceptional circumstances profit margin of the dominant undertaking was fixed by methodology (legal act). So the profit of the dominant undertaking was fixed (10 percent) and could not be increased unilaterally. Therefore, in this case the Competition Council first of all applied the method assessing fairness of prices by deducting costs incurred in order to set up different leaseholders' communications from income and then assessing, whether the difference (profit) was unfair per se.

As mentioned above, according to the methodology, the profit margin of the dominant undertaking from this activity was 10 percent, but it was established that the actual profit received by the dominant undertaking ranged from more than 100 percent to 400 percent of profit from the applied lease fee for certain groups of leaseholders. Since the factual profit margin applied by the dominant undertaking to leaseholders could not be justified by any objective economical criteria, it was concluded that profit gained by the dominant undertaking was unfair per se – the leaseholders were forced to pay unjustifiably high prices for the service provided.

However, the Competition Council did not limit itself to the application of the model described above. According to the United brands third model, unfair (excessive) prices can be established in other ways. Because there was no possibility to compare the prices of communication tunnels applied by the dominant undertaking with the prices applied by other undertakings, the Competition Council decided to compare the lease fees applied by the dominant undertaking for the different groups of leaseholders (electric cables, communication cables, radio lines, heat tracks and warm water). During the investigation there was no possibility to compare directly the proportion of lease prices with the economical value of the service (lease prices were paid differently, depending on the space used for lease), so the Competition Council investigated prices paid by various leaseholders by invoking comparative unit - space (cross-section) area. In that way, the prices paid by the leaseholders of communication tunnels for 1 percent of lease of communication tunnel cross-section area were compared, seeking to estimate, whether these groups pay differently for the same space and whether this difference could be justified. Such rule was used by the Court of Justice in the *British Leyland* case[5].

Since the established circumstances did not allow to state that the exploitation costs of the communication tunnel differed according to particular space in the tunnel and the dominant undertaking

[5] ECJ judgment in case 226/84 British Leyland Public Limited Company v Commission of the European Communities, [1986], ECR 3263. In this case ECJ confirmed that European Commission reasonably recognized that undertaking abused its dominant position applying unfair prices. Undertaking collected the fee for the registration of left-hand-drive vehicles that was six times greater than that for right-hand-drive vehicles, though the costs of vehicle registration did not differ. European Commission assessed, whether the price of services which differed 6 times could be justified by costs incurred.

did not provide any proof justifying the differences in costs, it was concluded that 1 percent of communication tunnel bears the same amount of costs, irrespective in what area this 1 percent would be counted.

After calculation it was noticed that the lease price for 1 percent of space of communication tunnel significantly differed for the leaseholders of different areas. Thus, if all the buyers leasing 1 percent of cross-section receive the same value, the price paid by them to the dominant undertaking for 1 percent of cross-section was apparently disproportionate (price differed up to 28 times).

So the Competition Council applied these two different methods for establishing unfair prices. However, it must be mentioned that this case is still pending before the courts (Competition Council's decision was appealed).

Talking about appropriate remedies in cases of excessive pricing, first of all it should be noted that the Competition Council cannot apply structural remedies, it can only apply some behavioural remedies (for example to oblige to cease the infringement, etc.). However, the Competition Authorities can choose other appropriate remedies instead of price regulation. For example, if an excessive price is due to a strong past market power and consumer habits, the Competition Authority could employ competition advocacy (for example, to encourage consumers to switch to cheaper offers made by new entrants) in order to improve the situation on the market. In cases where excessive prices are due to entry barriers, the proposed remedy could be to prohibit/remove such barriers. During the investigation Competition Authorities may also submit proposals for amendments of legislation. Considering the before-mentioned case, active actions by the regulator (municipality) might be the most appropriate remedy. It is also important to mention, that tight cooperation between regulators and Competition Authority also plays an important role in finding the best solutions for dealing with excessive pricing practices.

RUSSIAN FEDERATION

1. Cases requiring interference of the competition authority in regulation of excessive pricing. Dilemma: consideration of cases on excessive prices is in the jurisdiction to the competition authority or to regulatory authorities.

In accordance with Clause 1 of the Regulation No. 331 of 30th of June 2004 on the Federal Antimonopoly Service adopted by the Regulation of the Government of the Russian Federation, the Federal Antimonopoly Service (the FAS of Russia) is a competent federal authority of executive power carrying on the duties of adoption of regulatory legal acts and control over compliance with antimonopoly legislation.

Article 10 of the Federal Law No. 135-FZ of 26.07.2006 "On Protection of Competition" (hereinafter referred as the "Law on Protection of Competition") prohibits actions (lack of action) by an economic entity holding a dominant position which result, or may result, in prevention, restriction or elimination of competition or infringement of other parties' interests, including the establishing and the maintaining of monopolistically high prices.

By summarizing the mentioned above one may come to the following conclusions:

- establishing monopolistically high prices breaches antimonopoly law of the Russian Federation;
- cases on such violations of antimonopoly law are examined by the FAS of Russia and the regional offices of the FAS of Russia.

It is worth of mentioning that the share of violations detected by the antimonopoly authority in the form of the establishing and the maintaining of monopolistically high prices is relatively low and in the first half-year of 2011, for an example, such share totaled 3.5% out of the aggregate amount of the detected violations of antimonopoly law.

2. Existing economic methodologies for evaluation of excessive pricing

In accordance with Part 1 Article 6 of the Law on Protection of Competition, the monopolistically high price of a product is a price established by an economic entity holding a dominant position provided that such price exceeds:

- the aggregate amount of expenses needed for production and distribution of such product and profit;
- a price formed in the conditions of competition at a different goods market which is comparable according to the structure of a product's buyers and sellers, conditions of a product's circulation, conditions of access to the goods market and state regulation, including taxation as well as customs and tariff regulation, granted that there is such a market on the territory of the Russian Federation and abroad.

In practice, as a rule, a monopolistically high price becomes detected with the aid of the analysis of companies' expenses and profit.

Furthermore, the Law on Protection of Competition lists some cases of establishing a monopolistically high price. Thus, a price is deemed to be monopolistically high, when it is established:

- by way of increasing a price established earlier, provided all of the foregoing conditions are met:
  - expenses needed for production and distribution of a product remain unchanged or their change is not consistent with the change of a product's price;
  - the structure of a product's sellers or buyers remains unchanged or the change in the structure of a product's sellers or buyers is insignificant;
  - the conditions of a product's circulation at the goods market, including those stipulated by the measures of state regulation, including taxation as well as tariff regulation, remain unchanged or their change is not coherent with the change of a product's price.
- by way of maintaining and non-reducing a price established earlier, provided all of the foregoing conditions are met:
  - expenses needed for production and distribution of a product are significantly reduced;
  - the structure of a product's sellers or buyers stipulates the possibility to change a product's price towards its reduction;
  - the conditions of a product's circulation at the goods market, including those conditioned with the measures of state regulation, including taxation as well as tariff regulation, provide with the opportunity to change a product's price towards its reduction.

3. Economic Methodologies for the Excessive Pricing Evaluation at the Oil Products Market

In order to determine a monopolistically high price for oil products it is necessary to prove that the price exceeds the level of expenses and profits needed for production and realization.

In particular, it is subject to determination whether the prices exceed the level of expenses and profits needed for production and realization, and whether such excessive prices are a result either of the increase of the excise, or of significant changes of the product as a result of innovations, or of significant decrease of the volumes of production either of the type of the product analyzed, or the product united with the analyzed product into one production row.

After it is proved on the basis of the data of the register of transactions or of comparison of prices with the prices at the markets of other regions that significant increase of prices took place, the following provisions of the Company's Regulation on Accounting Policies is analyzed:

- approaches to revenue accounting of the company and to expenses at production and realization of products;
- approaches to consolidation and segmentation of reporting;

- differences between the revenue and the expenses received for the purposes of accounting and taxation;

- modes of distribution of managerial and commercial expenses according to kinds of products or segments (for example, vertically integrated oil companies often divide accounting reports into segments “oil”, “oil products”, “internal market” and “export”).

On the basis of the analysis, the companies’ internal and external reports are requested. The practice shows, that, as the managerial (internal) reporting may be drafted on the basis of internal ratios of the company, and information received via this reporting may significantly differ from external reporting (audited financial reporting and the data submitted to the statistics authorities and the tax authorities), the company’s external reporting may be used in the majority of cases for the purposes of analysis.

In the course of analysis quantitative and qualitative methods are applied. With the use of quantitative methods the changing dynamics of separate types of expenses and profits is determined. Qualitative methods help analyze influence on the level of expenses, such as application of the accelerated depreciation, reporting of separate types of assets (write-downs of assets in the fourth quarter of the year which may have significant influence on expenses) as well as reporting and write-downs of different types of assets and facts of accelerated depreciation methods applied. In addition, the changing dynamics of the gross margin (before taxes, depreciation and dues) may be analyzed.

In order to analyze the reasons of establishing or maintaining the prices, information contained in the year quarter forms of statistics reporting is analyzed in relation to dynamics and structure of the company’s investing activity. Information on productive capacity balance is also analyzed. In addition, such methods, as comparison of cash flow in relation to investing activity before and during the violation suspected, is analyzed.

Moreover, properties of business operations are determined, which may significantly influence pricing and be a result of price increase without having significant influence on expenses reported within the period of a breach of law. For example, such properties may be distribution of expenses during the year due to seasonal fluctuations of demand, high necessity of floating capital due to length of the financial period and a high level of financial leverage or properties of the constant and variable expenses ratio.

After the analysis has been completed, an opinion is issued regarding a level of prices exceeded over the expenses and the profit needed for production and realization.

4. Measures for examining the cases on excessive pricing

First, in accordance with Part 1 Article 50 of the Law on Protection of Competition, the antimonopoly authority has the powers to issue the prescription to the case respondent based on the results of examining a case on violating antimonopoly law and on the grounds of the decision.

Second, the economic entity may be arraigned on administrative charges.

In accordance with Article 14.31 of the Code of the Russian Federation on Administrative Violations, actions, including, among others, the establishing and the maintaining of monopolistically high prices, carried on by the economic entity holding a dominant position at a goods market lead to:

- imposing an administrative fine upon officials from 20,000 to 50,000 Rubles, or disqualification for up to three years;

- upon legal entities – from one hundredth to fifteen hundredth of the proceeds gained by the violator from distribution of goods (works, services) at the market where the administrative violation was committed, but no more than one fiftieth of the overall proceeds gained by the violator from distribution of all goods (works, services) and no less than 100,000 Rubles, and if the proceeds gained by the violator from distribution of goods (works, services) at the market where the administrative violation was committed, exceed 75% of the total proceeds gained by the violator from distribution of all goods (works, services) – from three thousandth to three hundredth of the proceeds gained by the violator from distribution of goods (works, services) at the market where the administrative violation was committed, but no more than one fiftieth of the overall proceeds gained by the violator from distribution of all goods (works, services) and no less than 100,000 Rubles.

5. Summary of the case on violation of the antimonopoly legislation by OJSC TNK-BP

Grounds for initiation of a case were numerous of appeals by citizens to the President of the Russian Federation and the Prime Minister (over 120 pcs.) and applications by citizens and legal persons to the address of the FAS Russia, as well as weekly monitoring data on retail and wholesale prices for petroleum products (gasoline and diesel fuel), conducted by Regional Offices of the FAS Russia.

In those appeals received during the period from May to July 2008, a significant increasing in prices of all petroleum products including motor gasoline and jet fuel was indicated.

The data from the State Unitary Enterprise "Central Dispatching Office of Fuel and Energy Complex" was analyzed.

Analysis of the mentioned data revealed the following. For a long period (2007 – the 1st half of 2008) the relative sizes of shares of the mentioned economic entities were subject to insignificant changes, access to wholesale gasoline and jet fuel markets in Russia was difficult for new competitors, the facts of appearance of new competitors were not registered.

Goods sold or acquired by economic entities on a specified market could not be replaced by other goods for consumption.

The growth of wholesale prices for petroleum products (gasoline, jet fuel) from January 2008 to June 2008 from 20 to 35 percent (according to IC "Cortez") didn't define reducing of demand for these goods corresponding to such growth. The average monthly consumption of motor gasoline in 2008 compared with 2007, not only did not decreased, but increased by 2.1 percent, jet fuel - at 2.8 percent (data from "the Central Dispatching Office of Fuel and Energy Complex").

Information on price and terms of purchase of gasoline, diesel fuel, fuel oil and aviation fuel on the wholesale markets of the specified petroleum products in the Russian Federation was available to the public. Consequently, the terms of the paragraph 3 of Article 5 of the Federal Law of 26.07.2006 № 135 - FZ "On Protection of Competition" were carried out in the aggregate in the wholesale markets of the petroleum products with respect to OJSC Rosneft, OJSC LUKOIL, OJSC Gazprom Neft and OJSC TNK-BP Holding.

In accordance with the paragraph 3 of the Article 5 of the Federal Law of 26.07.2006 № 135-FZ "On Protection of Competition" the position of each economic entity of several economic entities is recognized as "dominant", if the conditions of the paragraph 3 of the Article 5 of the Federal Law of 26.07.2006 № 135 -FZ "On Protection of Competition" are fulfilled for these business entities

Thus, each of the economic entities OJSC Rosneft, OJSC LUKOIL, OJSC Gazprom Neft and OJSC TNK-BP Holding held dominant position in the gasoline and jet fuel wholesale markets.

In the Russian Federation, the wholesale prices for motor gasoline AI-92 (93) and their modifications, as well as A-95 (96), A-98 and their modifications, set by OJSC TNK-BP Holding, which had dominant market position began to significantly grow in October 2007, that growth was continued in November, in December it attained a maximum, in January 2008 prices of the OJSC TNK-BP Holding for these types of gasoline began to decline and in February 2008 almost equaled the values of September of the previous year. The maximum increasing in prices in December 2007 in comparison with October of that year was: A-92 - 18,2 percent, while for A-95 (96) and A-98 - 7,5 percent.

In February 2008, a significant increasing of wholesale prices already for all kinds of gasoline started again, continued over the next four months, reaching its peak in June - July 2008, having increased over this time the value of 32.2 per cent for A-92 and 24 per cent for other brands of gasoline. Total increasing of wholesale prices for motor gasoline from October 2007 till June 2008 amounted to: AI-76 - 31.4 per cent, A-92 - 33,2 percent, A-95 (96) and A-98 - 20.8 percent.

Wholesale prices of OJSC TNK-BP Holding for jet fuel during the reporting period began to grow significantly since October 2007, peaked in February 2008, declined slightly in March, but from April a significant increase in wholesale prices of jet fuel was continued, peaking in June - July 2008. During the period from October 2007 to June 2008 growth of wholesale prices of jet fuel was 91.1 percents.

At the same time such a significant and extended over time increasing of the price of OJSC TNK-BP Holding was not caused by any objective reasons and circumstances

In the first half of 2008, consumer price inflation, according to the Federal State Statistics Service, was amounted to 8.75 percent, while prices of industrial producers rose by 17%. Thus, prices of gasoline and jet fuel rose ahead of inflation.

Setting and maintenance of such high prices for motor gasoline and jet fuel by OJSC TNK-BP Holding could not be explained with changes in demand of these kinds of petroleum products, since the average price of motor gasoline by the end of June 2008 increased by 24-33 percent compared with the 1st January 2008, with monthly consumption of gasoline car in 2008 compared with 2007 increased by 2,1 percent (data from "the Central Dispatching Office of Fuel and Energy Complex").

Accordingly, the average jet fuel price in 2008 grew from January to June to 39.8 percent (the average price of TNK-BP Holding, according to IC "Cortez"), while the average monthly consumption of kerosene in 2008, compared to 2007 increased by 2,8 percent (data from "the Central Dispatching Office of Fuel and Energy Complex"). The growth in fuel prices led to slower growth in air traffic in the 2-nd half of 2008 in comparison with the first half of 2008.

The Commission considered that such actions were possible because of the presence of a dominant position of the company in the market of wholesale distribution of petroleum products and demonstrated the company's impact on the conditions of oil products circulation in the domestic market.

All the above indicated the presence of signs of monopolistically high wholesale price fixing by the OJSC TNK-BP Holding on the Russian market for motor gasoline in the period: October 2007 - January 2008 and March - June 2008, and jet fuel from October 2007 to June 2008.

According to the paragraph 1 of the Article 6 of the Federal Law "On Protection of Competition" monopolistically high price of goods is the price which exceeds the sum of expenses and returns required for production of the product.

In the noted cases growth in profits, which outrun growth of expenditures required for the production of goods of principal activity, confirmed the setting and maintaining of monopolistically high prices, allowing businesses to profit from abuse of dominant market position.

Significant increasing of wholesale prices of motor gasoline and jet fuel implemented by OJSC TNK-BP Holding, which occupies a dominant position in the gasoline and jet fuel markets, was not connected with changes in general conditions of commodity circulation. The case materials confirmed that price increasing coincides with the findings of excess of wholesale prices of motor gasoline and jet fuel over expenditures and profits required for production and sale of petroleum products, as well as testified establishing and maintaining monopolistically high prices during these periods of time, which was a violation of the paragraph 1 of the Part 1 of the Article 10 of the Competition Act.

The appeal of the International Association of Chiefs of Airlines Companies to the Chairman of the Russian Government also contained complaints for the alleged sharp price rising for fuel and other petroleum products and infringing interests of economic entities of civil aviation, as a systematic increase in the cost of aviation fuel has worsened the financial condition of airlines, led to a permanent increase of the cost of passenger and cargo traffic.

Thus, the actions of OJSC TNK-BP Holding, which had a dominant position in the wholesale markets of automobile gasoline and kerosene, led to infringement of interests of others and limited competition in other commodity markets.

These actions of OJSC TNK-BP Holding fully corresponded to the concept of discriminatory conditions laid down in the Article 4 of the Law" On Protection of Competition ", whereas conditions for sale of petroleum products were created by OJSC TNK-BP Holding, that disadvantaged several economic entities in comparison with other economic entities.

According to information provided by OJSC TNK-BP Holding, that company did not sell the motor gasoline to individuals unaligned OJSC TNK-BP Holding group of persons. These facts also evidenced creation of discriminatory conditions of access to the commodity market for economic entities unaligned OJSC TNK-BP Holding group of persons in the market wholesale gasoline business by OJSC TNK-BP Holding.

On the basis of the case file, it could be concluded that this policy of fixing different price and selectivity in conclusion or rejection of contracts, depending on whether the buyer included or not in the group of persons OJSC TNK-BP Holding, led to creation of discriminatory conditions of wholesale sales and purchase of aviation fuel and discriminatory conditions for access to the wholesale gasoline market by OJSC TNK-BP Holding, which has dominant position in the wholesale markets gasoline and jet fuel in Russia, which is prohibited by paragraph 8 of Part 1 of Article 10 of the Competition Act.

Consequence of OJSC TNK-BP Holding's policy was also setting different wholesale prices for the same commodity - jet fuel economically, technologically and otherwise unreasonable and not stipulated by the Federal Laws, which is a violation of the paragraph 6 of Article 10 of the Competition Act. Based on Article 23, Paragraph 1 of Article 39, parts 1-3 of Article 41, Article 48, Paragraph 1 of Article 49 of the Law on Competition, the FAS Russia recognized that OJSC TNK-BP Holding violated items 1, 6 and 8 of Part 1 of Article 10 of the Federal Law of 26.07.2006 № 135-FZ "On Protection of Competition" by setting monopolistically high wholesale prices for motor gasoline and jet fuel in the Russian Federation, through economically unreasonable setting different wholesale prices for aviation kerosene and discriminatory conditions in wholesale markets of gasoline and kerosene in the Russian Federation. Directions to OJSC TNK-BP Holding were issued on the basis of a Decision.

The Presidium of the Supreme Arbitration Court of the Russian Federation in its Determination of May 25, 2010 No. 16678/09 (http://www.arbitr.ru/bras.net/f.aspx?id_casedoc=1_1_cf7d0cbd-736a-43e5-9428-0605d59c0356) recognized Decision and Directions issued by the FAS Russia valid. The Presidium of the RF Supreme Arbitration Court determined that 'anti-monopoly authority's arguments on collective dominance of vertically-integrated subjects.

SOUTH AFRICA

1. Introduction

The South African Competition Act (Act 89 of 1998, as amended) addresses abuse of dominance under section 8, in which it states that 'it is prohibited for a dominant firm to: (a) charge an excessive price to the detriment of consumers'. An excessive price is defined under the Competition Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value (Section 1.(1) (ix) Definitions and interpretation). There is no definition of 'economic value' in the Act. The formulation appears to be taken from the EC's *United Brands* ruling, where reference was also made to trading benefits which would not have been 'reaped if there had been normal and sufficiently effective competition' (paras 249 & 250).

The first excessive pricing case heard by the Competition Tribunal under the amended Act was the complaint brought by Harmony Gold against Mittal Steel SA (now ArcelorMittal SA). This has been the subject of several journal articles, including five of those recommended for this Round Table, largely written by those involved in the case.

The Tribunal found that Mittal had contravened the prohibition of excessive pricing, placing emphasis on Mittal's super-dominance, that it exploited its market power to the full, and employed ancillary conduct to do this in the form of a single channel export JV. The Tribunal imposed a penalty equivalent to 5.5% of Mittal's flat steel turnover and struck down the conditions of the JV. Mittal appealed this decision to the Competition Appeal Court (CAC) which set the decision aside and remitted it back to the Tribunal.

There have been six abuse cases in South Africa relating in whole or part to charging excessive prices (out of the 20 abuse of dominance cases that have been referred to the Tribunal or have been settled over the past 12 years). In addition to Mittal these are:

- The complaint brought by Hazel Tau and others against GlaxoSmithKline (GSK) & Boehringer Ingelheim (BI), which was settled based on the firms licencing generic producers of ARVs.

- The settlement between the Commission and Sasol of the referral of the Nutriflo complaint which primarily dealt with exclusionary abuses, but also covered excessive pricing. The settlement involved divestiture of downstream operations and behavioural commitments to non-discriminatory pricing and supply.

- The settlement between the Commission and Foskor of excessive pricing of phosphoric acid. Although Foskor exported the great majority of its phosphoric acid it had priced to local buyers including notional transport costs as if the customers had been importing. The settlement involved Foskor charging the same prices on an fob basis to both local and export customers.

- Referral by the Commission against Telkom relating to the pricing of access link charges along with exclusionary practices, still to be heard.

- Referral by the Commission against Sasol for the pricing of propylene and polypropylene which relates to employing import parity pricing despite there being very large net exports of polypropylene, still to be heard.

It should be noted that, in all but the pharmaceuticals case, the respondents are former or current State Owned Enterprises (Foskor is owned by the state's Industrial Development Corporation), with quasi-monopoly positions in mature industries. The issues we discuss thus relate to addressing pricing in such cases. We mainly focus our discussion on the Mittal case as this is where the issues have been explored in greatest detail, as follows:

- Interpretation of the legal provision, including the definition of economic value;
- Methods to assess excessive pricing, particularly the use of indicators of pricing that would be expected under effective competition, price – cost mark-ups, and measures of profitability;
- The treatment of state-bequeathed special cost advantages;
- What the appropriate remedies are, and should competition authorities play a regulatory role; and,
- The industry and market conditions where excessive pricing should be addressed.

2. Interpretation of the excessive pricing provision and the determination of economic value

The Tribunal in the Mittal case addressed the way in which the firm priced to local customers given the structural conditions under which it found itself. The Tribunal found that the structural characteristics of the market meant that Mittal was an uncontested firm and in an incontestable position of 'super-dominance'. It found that Mittal charged the maximum possible prices, at the ceiling of its monopoly power, and ensured that it could reduce supply to the local market without reducing production by excluding product from the local market through an exclusive export channel. The Tribunal thereby inferred that the prices were not consistent with conditions of effective competition and were excessive.

In arriving at this conclusion it cited Mittal's own documents and the testimony of the Mittal witnesses. Mittal's own marketing manager was clear about what would happen in the absence of their arrangements to exclude product to be exported from the local market, namely that local prices would tend to export prices.[1]

Mittal's pricing of flat steel to most local customers was at import parity levels. The local price therefore included a base price for steel, such as the Black Sea fob price, plus notional costs associated with importing the product, such as sea freight, wharfage and other port and administration charges, agents commission of 2.5%, import duty of 5% (until 2006), the 'hassle factor' of importing (set at a further 5%), and the overland transport from Durban (harbour) to inland customers.

South Africa has been a net exporter of steel for decades, with around 40 per cent of domestic production being exported. This reflects its position as one of the lowest cost manufacturers of steel in the world, with low material input costs. Mittal has made substantial expansions to production, further

[1] ' Mr Dednam: Well, the lowest common denominator in the price would actually prevail. So, if you look at the prices that Macsteel International is basically paying [export prices] and one should argue that that is the price that should prevail for the whole local market, then prices will tend down towards than particular level.' Transcript of 6 April 2006, p1848-49, cited in Tribunal decision 13/CR/Feb04 para 195.

reducing its variable costs. This placed Mittal in the lowest operating cost quartile of all steel plants in the world for many years.[2]

The complainants had argued that conditions of effective rivalry was the appropriate benchmark for economic value and had put up evidence on comparators, including:[3]

- Mittal's pricing where there was competitive rivalry from direct substitute products (such roof tiles, beverage cans), with strict anti-arbitrage provisions
- Mittal's pricing where buyers had alternative options such as moving their investments (auto industry)
- Mittal's pricing in export markets, both directly and indirectly (where the buyer used the steel for value added exported product and received a 'secondary export rebate'), with strict anti-arbitrage provisions
- Prices in other, low cost and competitive markets, around the world.

Mittal's actual prices were compared to each of these and the mark-up was calculated (which was in the order of 66% when local, import-parity based prices were compared to export prices).[4]

Mittal contended that it was not profitable, even at the prices being charged, on the basis of returns calculated on replacement cost of capital. (It had recorded very large accounting profits.)

The complainants argued that the onus was on the respondent to prove that these, more competitive, prices were unsustainable for an efficient firm, that is, the prices would yield below normal profit. In this regard, the complainants pointed to Mittal's own decisions to substantially expand output (by around 30%) for sale into export markets, given the already existing large net exports, and evidence that Mittal had not been efficient over much of the relevant period. The complainants imputed the costs of an efficient firm by casting back efficiency improvements that Mittal had itself made. The Tribunal did not, however, engage with the extensive evidence presented on this, nor on the prices actually charged.

The CAC found that the correct approach was, in a literal reading of the South African Act, to: determine the actual prices charged for the good or service; specifically determine the economic value, in monetary terms; assess whether there was a reasonable relation between them; and, undertake a value judgment with specific reference to the amount by which the price exceeds the economic value to determine whether the prices are excessive and to the detriment of consumers.

By way of guidance, the CAC held that economic value should be determined in terms of 'the notional price of the good under assumed conditions of *long-run competitive equilibrium*', where entry and exit meant that only normal profits could be earned. It found that in cases such as Mittal, abuse only occurred when 'a domestic monopoly uses the shelter of distance to extract an *unjustifiable* amount of pure profit by charging an unreasonably high price. The unreasonableness of the price charged must be proved.'

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2 Note that MacKenzie and Langbridge (2010) observe that 'at the time of the complaint, Mittal's production of flat steel exceeded local demand. As a result, significant quantities of flat steel were exported.' This was not something that merely occurred 'at the time', but reflected South Africa's very low input costs and comparative advantage in steel production.

3 See das Nair (2008) and Roberts (2008).

4 See Calcagno and Walker (2010), export prices were around 40% below import parity prices charged by Mittal, meaning import parity was around 66% above export prices.

It thus found that the Tribunal had taken a short-cut and that, while a prima facie case had been established by Harmony, the Tribunal must deal with the facts in light of the appropriate tests and consider Mittal's arguments and evidence with regard to profits.

The CAC also suggested that 'where a dominant domestic producer maintains price differentiation between export and domestic customers, and embarks on an expansion of its production capacity wholly or mainly in order to increase its export sales, then it would be difficult to avoid the conclusion that its export price would be at or above economic value – at the expanded level of output intended.'[5]

The notional appeal to the 'long-run' competitive equilibrium rather than indicators of actual pricing in effectively competitive markets begged a number of questions as to the evidence with regard to profits and costs, including the evaluation of the firm's efficiency. The CAC also directed that 'special cost advantages' should not be included in the assessment (so that the firm's costs should be adjusted for these). Mittal's economic experts in the case have interpreted this as supporting the profit-based defence they had mounted, where they had found that Mittal had not been profitable over the period and hence could not have charged excessive prices (Calcagno and Walker, 2010).

While it may be clear what the 'long-run' means in simplified textbook models, in the real world it is far from evident what should be practically taken into account where, following Keynes, we certainly care about the market outcomes before we will all expire. In this regard we return to important distinctions between long-run incremental costs and replacement costs, and what is meant by special cost advantages in section 3 below.

The CAC did, however, acknowledge that judgment is required, and that the assessment cannot be done with 'scientific precision'. It further suggested that there may be circumstances when the need to quantify economic value more precisely would fall away if comparisons with prices of similar product suggest the price is 'utterly exorbitant'. Again, it is not clear what the threshold for exorbitant is, and whether this depends on the impact on consumers, including when the consumers are downstream firms and hence the economic effect may be potentially more damaging.

3. Different economic methodologies for assessing excessive pricing

We briefly consider the pros and cons of different methodologies. We argue that the appropriate methodology should depend on the facts of the specific case and, if possible, account should be taken of different approaches, mindful of the strengths and weaknesses of each.

3.1. Prices under effective competitive rivalry

Prices of the same firm into markets where there is effective rivalry may serve as comparators, to which the price deemed excessive can be compared. However, other factors which may explain the differential pricing need to be considered on a case by case basis when employing comparator methods to assess the extent of excessive prices.[6]

A range of comparators may be utilised, certain of which were used by the complainants to show that Mittal's local prices were excessive. For instance, pricing in relation to costs where pricing of two products with comparable cost show that the lower margin product is still profitable may suggest that the higher

5 Para 52 the CAC's decision in 70/CAC/Apr07

6 Roberts 2008

margin product is priced excessively.[7] However obtaining and accurately calculating costs may be difficult[8], with further complications such as inflated costs as a result of productive inefficiency.

A comparison of prices charged to different customer groupings in the same geographic market can be undertaken, where if the lower price is profitable, then the higher may be deemed excessive.[9] In the Mittal case, special industry deals were offered to certain customers of flat steel products based on buyer power. Favourable prices relative to IPP were given to the packaging and auto industries under such deals. Where there were threats from substitute products for certain other customer groupings, rebates were afforded, for instance in the steel tile roofing market, where steel roofing tiles had to compete with cement tiles.

Prices for the same product charged to customers in different geographic markets could also serve as a comparator, provided that the appropriate corrections are done for transport and related costs. This comparison undertaken by the complainants in Mittal showed that export prices of flat steel products were considerably lower than local prices. Important in such an assessment is that the lower price (the export price in Mittal's case) is profitable and there are no differences in costs of producing and supplying the two markets.[10] Pricing to export markets compared to local prices for phosphoric acid was also used to show the extent to which local prices were excessive in the Foskor settlement confirmed by the Tribunal.

Another approach is to benchmark prices of the dominant firm to prices of similar products in markets which can be identified as relatively competitive, also known as 'yardstick competition'.[11]

Comparators are more useful when costs of production and supply of the comparator product are similar to that of the product in question. In innovative and dynamic industries, such comparisons are more difficult.

3.2. Profitability

Measuring profitability means navigating through the different measures required to obtain the rate of return on capital, and then assessing it against different benchmarks. The challenges were starkly illustrated in the Mittal case where the main questions were the following:

- Measuring the capital base. There were three main options, the book value, the replacement cost (put forward by Mittal's economists) and the value of incremental capital investments.
  - The book value reflects the fact that the steel industry around the world consists of mills almost all of which (outside the USA) have been state built and owned, and have been bought up and expanded by the major steel companies.[12]

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7 As done in United Brands, CICCE, SACEM II, Ahmed Saeed (see Motta and de Streel, 2006).

8 See Deutsche Post II (see Motta and de Streel, 2006).

9 General Motors, and British Leyland (Motta & de Streel, 2006)

10 *United Brands* and *Deutsche Grammophon*, *Sirena*, *SACEM I* and *SACEM II* decisions (Motta and de Streel, 2006.)

11 *Corinne Bodson v Pompes Funebres,* and *Lucazeau v SACEM* (Whish, 2003: 691).

12 Mittal Steel SA itself was clear that 'our steel making capacity will never be replaced in its present form in terms of neither technology, geographical location, nor capacity'. Mittal Steel SA 2004 Annual Report, p.50.

- The calculations from an industry analyst firm (CRU) that Mittal used included an estimated 'sustaining capital charge' in the costs of steel plants, as the plants have in many cases been substantially depreciated and yet they are being maintained, as well as being upgraded and expanded.

- Replacement cost meant that Mittal was unprofitable and should close down (even with the prices it charged and having amongst the lowest variable costs in the world). As noted by David Lewis (2009:5) "Not only was this assessment at odds with Mittal SA's current performance and its own bullish, public assessments of its future prospects, but the complainants counsel lost little time in pointing out that were these criteria to be applied to other companies, most of the blue chip companies listed on the Johannesburg Securities Exchange would suffer from a similarly negative assessment.'[13]

- The incremental investments to add a substantial volume of output (around a 30% increase) were being made at very high calculated internal rates of return, of 29% on pessimistic export margins and 89% on optimistic margins.[14]

- What measure of firm return?

  - Industry and firm specific facts often mean that some of the profitability measures available are not possible to calculate, or might produce meaningless results. The interpretation of these factors, and hence determining which profitability measure is most appropriate to use in a given case, can be a major point of contention in excessive pricing cases. This was the case in Mittal where extensive evidence was led from accounting experts. The Tribunal decision, however, did not give clarity here.

  - Even once a measure, or a set of measures, can be identified, there remain challenges in estimation including what the appropriate capital base is (as discussed) and how to treat non-cash revenue and cost items, most notably depreciation. These issues are compounded when the analysis is for a business unit within a firm where certain assets and costs are shared.

- Is the dominant firm efficient? It is accepted that the low profits because of inefficiency could not be used to justify high pricing.

  - In this case Mittal's economists simply assumed efficiency. This assumption of efficiency over the previous years was contradicted by Mittal's own improvements that were being made including improved management and production efficiencies.

  - As a former SOE and entrenched monopolist there are good reasons why such a firm as Mittal is unlikely to be efficient, such as principal-agent problems in monitoring management performance. Many of the changes following Mittal assuming control were related to improving management performance (for example, on time delivery and quality performance had been very poor).

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13 When confronted with the evidence that using this approach (and applying a Weighted Average Cost of Capital, WACC) meant that top performers on the JSE had returns which implied they had no long-term future, as they did not make the minimum return required to remain in the industry in the long run, Walker, for Mittal, could only say 'I'm really sorry, but the finance theory is the finance theory' (at transcript p. 2219).

14 Tribunal hearing, transcript p.1216.

- What is the benchmark rate of return ('normal profit')?

  - While WACC is commonly used in the UK and Europe when conducting profitability analyses, it is not universally accepted. Even between proponents of pricing models there is debate on the best predictor, and hence the best estimator of systematic risk. For this reason the OFT (2003) discussion paper suggests using the Capital Asset Pricing Model method in conjunction with Fama-French and Arbitrage Pricing Theory models.

  - An overly capitalised firm will have a higher WACC because of an inefficient capital structure. This ought to be considered a type of inefficiency which firms could use to conceal excess profitability and hence needs to be accounted for if WACC is used.

In short, there are extensive difficulties inherent in the measurements of profits for the purposes of competition analysis.[15] These difficulties are discussed further in OFT (2003).

Finally, the perverse incentives of making profits the basis for assessing pricing are well known from the regulation literature on the effects of adopting rate-of-return regulation. There are incentives to 'gold plate' on the investments, increasing the value of the capital stock, and to be inefficient or to otherwise absorb profits through artificially higher costs, reducing the return.

3.3. Treatment of special cost advantages according to the CAC

Mittal (formerly Iscor) was established and run by the South African state until its privatisation in 1989. It continued to be highly protected and supported by the state until 1996, receiving tax breaks and subsidised loans, as well as inputs at highly favourable costs. These are cost advantages that a firm in a notionally competitive market would not have received and thus the CAC suggests that these should be excluded when conducting excessive pricing analysis:

> *"…in determining the economic value of a good or service, the cost savings to the firm resulting from the subsidised loan or the lower than market rental – or indeed any other special advantage, current or historical, that serves to reduce the particular firm's costs below the notional competitive norm ought to be disregarded."*

There are several problems with the CAC's suggestion in practice, such as how to measure cost advantages in practice, including against what counterfactual. In addition, the simple interpretation of the CAC's suggestion, where the value of cost advantages are added to the firm's actual costs, does not consider how the firm would have behaved were its costs different. This is an issue because firms use costs to decide what size and technology type plant to build (which cost curve to operate off) and how much to produce (at which point on the chosen cost curve should the firm operate). Retrospectively changing a firm's costs by adding special cost advantages will not necessarily result in a good approximation of costs under competitive conditions. Indeed, it is possible for the outcome of this calculation to be below, equal to, or higher than the average total costs had the industry been competitive. The extent of these differences would be determined by the relative scale of the cost advantages, their type and hence influence over plant size investment decisions, the shape of demand, and the shape of costs in this industry (economies of scale).

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15 Lind and Walker (2003) observe that 'measuring profitability in an economically meaningful way is virtually impossible to do for any complex business. The analysis of profitability in competition cases will not help us distinguish successfully between competitive and co-operative pricing.' And, 'the apparently simple and obvious relationship between profitability and the degree of competition within a market holds only rarely, and only by chance'.

Thus, while the CAC's suggestion does enjoy some intuitive appeal, its application is problematic and has significantly different consequences depending on industry and firm circumstances. Only under situations where average total costs are constant or demand is perfectly inelastic will adding cost advantages to the firm's costs approximate the counterfactual competitive costs. Industries where excessive pricing enforcement is most appropriate do not typically have these characteristics, and as such the appropriateness of this suggestion needs to still be tested before the Tribunal.

The CAC's approach does not appear to allow for distinguishing between different types of cost advantages. In particular, where state support is given to an industry (such as provision of infrastructure and cheap energy supplies) and there happens to be only one producer the appropriate counterfactual should not be to consider this a cost advantage for the firm. If there had been competitors all receiving such a cost advantage the competitive price so realised should be the appropriate benchmark. Intuitively, a special cost advantage ought to be limited to an innovation or decision made by the firm itself, lest we rule out from consideration former state-owned and/or supported firms which are exactly those that economists such as Evans and Padilla (2005) suggest are the most appropriate subjects for attention of competition authorities.

4. Appropriate remedies, and a regulatory role for competition authorities?

The Tribunal in Mittal steered clear of assuming the role of a price regulator, an entity duly empowered and more appropriately resourced to set and regulate prices. The CAC suggested, however, that it may have to perform such a role in particular cases given the requirements of the Act.

We argue that, as in the Mittal case and in some of the settlements, there may be alternatives to price-setting regulation.

At the outset, excessive pricing may be combined with exclusionary conduct, and addressing the latter may suffice as a remedy. This is the nature of the Sasol remedy regarding fertilizer, which essentially went to Sasol's ability and incentive to undermine buyers' countervailing power by undermining their incentive and ability to turn to outside options. This was further combined with ex-works pricing, not discriminating between customers by location. Alternatively, as in the settlement of the GSK/BI matter the remedy involved greater competition through licensing of generic producers of ARVs.

There may be remedies which relate to pricing but fall far short of the regulation required for natural monopolies. This characterised the Foskor settlement and the proposed approaches in Mittal. Foskor undertook not discriminate between local and international buyers on an fob basis (the plant is located close to the major export port). In the Mittal matter Harmony initially asked for a similar remedy in the form of ex-works pricing, preventing differential pricing according to the location of the buyer. The Tribunal was to impose a remedy preventing the single channel export mechanism that Mittal had used to segment export from local customers.

The issue of remedy in the cases with large net exports is relatively straightforward given the actual exports, unless the export price is viewed as being unsustainable. If the firms are competitive exporters the remedy only requires they be barred from differentiating customers by their location (in effect, offering the products on an ex-works basis). It also assumes firms can be prevented from by-passing the remedy by reducing output to shift to a net importing position.

The problem is likely to be where the transport and related costs in supplying export markets (or distortions in these markets) are so substantial it means that the ex-works export prices are unsustainably low even for a competitive firm. Mittal argued that they were particularly disadvantaged due to the amount

they had to export and the additional cost of exporting due to distance.[16] If this were the case, then an alternative benchmark could be chosen.

As is well recognised in the literature on regulation, such a remedy should be in place for a substantial period of time (such as the five years widely used in price cap regulation) to ensure incentives to be efficient are not undermined. Anything akin to rate of return regulation (such as might be suggested by a focus on profits for excessive pricing) runs into more substantial incentive problems.

There is also scope for the competition authorities to make recommendations as to the appropriate regulation by bodies other than themselves, where this regulation would benefit from the extensive interrogation of evidence and analysis that is involved in a competition case.

5. Where and when should excessive pricing be addressed?

Perhaps the greatest argument against intervention in excessive pricing cases arises from the possible chilling effect on investments and the associated costs of false condemnation, or Type 1 errors. However, as argued by David Lewis (2009), given the historic and structural features of South Africa and similar economies, the likelihood of Type 2 errors or under enforcement is likely to be greater than Type 1 errors.

As suggested by the Tribunal in Mittal, an appropriate focus for applying the excessive pricing provision is where firms are not constrained by a regulator (not absolute natural monopolies), but are nevertheless not constrained by entrants. Such a focus minimises the dangers of over-enforcement and the chilling effects that could result. This suggests a set comprising super-dominant firms in mature markets, and who did not acquire their position through innovation or risk-taking (at least not recent enough for the returns still be to be relevant given the appropriate discount rate). This set may be almost non-existent in economies such as the USA, but is likely to be somewhat bigger in a country such as South Africa. In the huge markets of the USA and EU it is difficult to think of single firm behaviour unconstrained by actual or potential competitors, in the absence of an advantage derived from innovation or a peculiar geographic market or regulatory limitation.

Many markets in South Africa, particularly intermediate industrial product markets, are highly concentrated and often monopolised by former state owned and/or supported enterprises. These are areas that even those who caution against excessive pricing enforcement consider may be appropriate for attention (Evans and Padilla, 2005).[17] The Tribunal in the Mittal case characterized the position as being uncontested and incontestable, consistent with addressing an entrenched dominant firm.

In such industries, there are also international benchmarks in the form of pricing in larger and more developed economies where there is effective competition. And, as with steel, the products may be tradable such that, in effect, the case amounts to dealing with the natural protection that is afforded by transport costs.

The Tribunal ruling drew a further characterization it deemed relevant to excessive pricing, of 'super-dominance' or 'quasi-monopoly'. In terms of the Competition Act, this raises an important hurdle in excessive pricing as the provision in the Act applies to dominant firms, where a presumption of dominance exists for firms with a market share of 45 per cent or more. That a super-dominant firm may bear a greater

16 Mittal had also suggested that steel firms generally priced significantly higher to local customers than into export markets, but this was not consistent with their own data for the EU, Japan and Russia.

17 Fingleton (2006) also notes 'It matters greatly whether monopolies have resulted from decades of state protection or from successful competition on the merits'.

burden in not abusing its position is something raised by Whish (2003: 189-190), as well as in the UK Napp Pharmaceuticals case.

The CAC, however, held that there was no reference in Section 8 of the Act to the concept of a super-dominant firm as used by the Tribunal and that the section applies equally to all dominant firms, as defined by the Act. Introducing the concept of 'super-dominance' ignores principles of statutory interpretation according to the CAC.[18]

[18] CAC decision, para 30

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CHINESE TAIPEI

1. Introduction

In preparing the present submission, the Fair Trade Commission (hereinafter "the FTC") consulted with various government agencies, including the agency in charge of economic development, the Council for Economic Planning and Development, and the competent authorities responsible for establishing measures to stabilize commodity prices in Chinese Taipei with regard to price regulation issues.

The paper will illustrate the issues related to the current position of the FTC toward excessive pricing, the competition authority or regulators with jurisdictions over excessive pricing, remedies in excessive pricing cases, enforcement cases implemented by the FTC, and the price regulation issue.

2. The Current Position of the FTC toward Excessive Pricing

How best to regulate excessive pricing by a monopoly has been a long-standing issue. Subparagraph 2, Paragraph 1, Article 10 of the Fair Trade Act states that monopolistic enterprises are forbidden from improperly setting, maintaining or changing the prices for goods or the remuneration for services. In other words, an enterprise abuses its dominant position in a relevant market by improperly setting, maintaining or changing the prices for goods or the remuneration for services to gain undue profits from its trading counterparts which constitutes a type of abuse of dominance prohibited by the Act. To apply the provision, the FTC takes the position that both predatory pricing behavior and excessive pricing behavior shall be prohibited.

However, while there are concerns over monopolistic enterprises with an overwhelming market position that have exercised their market power to deploy excessive pricing strategies to gain undue profits, it is difficult for the FTC to identify a specific case where this, i.e., excessive pricing behavior in conjunction with undue profits, has occurred. Over the past 19 years, the FTC has encountered only a few cases involving excessive pricing, among these few cases, it has been determined that some were illegal. The detailed information regarding the two cases handled by the FTC in 2002[1] will be described later in this paper.

The FTC is charged with implementing the Fair Trade Act; therefore, the FTC must play the leading role in dealing with the competitive conduct of enterprises, and not in regulating price. When enterprises make their respective pricing decisions through free competition in line with the supply and demand of the market as well as their marketing strategies, fluctuations in prices can be deemed to be the outcome of the operation of the market mechanism.

The objective of the Fair Trade Act is to maintain competition mechanisms and thus protect consumers' interests[2]. Only under special circumstances, such as the 921 Earthquake of Chinese Taipei in

1 Chinese Taipei Fair Trade Commission Decision at its 563rd Commissioners' Meeting on 22 August 2002.

2 Consumers' interests are not understood in terms of the personal interests of individual consumers. Rather, consumers' interests are protected to the extent that consumers have an opportunity to deal in open and free markets, benefiting from increased efficiency and innovation.

1999 or the global SARS attack, has the FTC investigated and taken actions against hoarding[3] and price-gouging behavior (facial masks, thermometers, for example) involving price hikes pursuant to Article 24[4] of the Fair Trade Act.

3. The Competition Authority or Regulators with Jurisdictions over Excessive Pricing

Article 46 of the Fair Trade Act states, "Where there is any other law governing the conducts of enterprises in respect of competition, such other law shall govern; provided that it does not conflict with the legislative purposes of this Law." Accordingly, the key point is that only when "it does not conflict with the legislative purposes of this Law", can other applicable laws have precedence. Consequently, the actions of enterprises related to competition regulation, albeit in response to or affected by specific economic policies, should still comply with the Fair Trade Act; if the basis is set out expressly in other applicable laws and does not conflict with the legislative purposes of the Fair Trade Act, then other applicable laws can have precedence. To some extent, the FTC recognizes that proper regulators are very well equipped with their expertise and continuous involvement in their respective industries.

In the event that a monopolistic enterprise engages in abuse of dominance associated with excessive pricing to improperly set, maintain or change the prices for goods or the remuneration for services (Article 10 of the Fair Trade Act) or horizontal competitors engage in concerted actions and thus make excessive profits (Article 14 of the Fair Trade Act), or such price-hiking behavior is considered obviously unfair conduct able to affect trading order (Article 24 of the Fair Trade Act), shall the Fair Trade Act apply. However, as explicitly provided for in Article 46 of the Fair Trade Act, its application may be excluded in deference to other regulatory authorities when such relevant laws include competitive effects as an element of interpretation and enforcement or are not in conflict with the legislative purposes of the Fair Trade Act.

In practice, the FTC deliberated over a request in 2009[5] from a broadcast business organization for interpretation of whether the collection of licensing fees and investigation and clamping down by a copyright intermediary organization involved abuse of dominance and inappropriate exercise of copyright. The detailed information of this case will be given later in this paper.

4. Remedies in Excessive Pricing Cases

As set forth in Article 41 of the Fair Trade Act, the FTC may order enterprises that violate any of the provisions of the Fair Trade Act to cease therefrom, rectify their conduct or take necessary corrective action within the time prescribed in the order, or impose an administrative penalty or continuously impose penalties until they cease therefrom, rectify their conduct or take the necessary corrective action. These administrative measures used by the FTC appear to be behavioral remedies instead of structural remedies that are more likely to achieve all the desired effects and thus reduce the ongoing cost of supervision borne by the competition authority. To increase the effectiveness of behavioral remedies, the administrative fines imposed may be adjusted to the equivalent; therefore, the intended deterrence should be achieved.

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3 Hoarding or price gouging in Chinese Taipei could be punished as a type of crime. With regard to the definition of hoarding and price gouging, please refer to Chen, A.C.M. (2011) "A market-based synthesized approach to controlling price gouging" Int. J. Private Law, Vol. 4, No. 1, pp.132

4 Article 24 of the Fair Trade Act states, "In addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order."

5 Chinese Taipei Fair Trade Commission Decision at its 903rd Commissioners' Meeting on 25 February 2009.

5. Cases

5.1 The Taiwan Stock Exchange Corporation and the Over-the-Counter Securities Exchange were alleged to use their dominance in improperly collecting user fees for providing trading information

The *Taiwan Stock Exchange Corporation* (TSE) and the *Over-the-Counter Securities Exchange* (the OTC Exchange) are both monopolistic enterprises that provide trading information in the securities and over-the-counter market, respectively. The TSE and the OTC Exchange concealed cost information when negotiating with information technology firms (IT firms) and inappropriately increased the cost burden of those firms without first reaching a consensus with them. Although their own costs did not increase in tandem with the range of transmission methods developed through the innovations and efforts of the IT firms, the TSE and the OTC Exchange levied monthly "fixed charges" on the IT firms tied to the various kinds of transmission methods, and also inappropriately collected "variable charges" per transmission approach (e.g., designated digital line, the Internet, FM subcarriers, mobile phones, mobile data etc.). This should be considered an extortion of the efforts and accomplishments of downstream IT firms to gain excessive profits and prevent IT firms from engaging in effective competition. The TSE and the OTC Exchange thus abused their monopolistic market position by improperly setting, maintaining or changing the price for goods or the remuneration for services in violation of Article 10(1)(ii) of the Fair Trade Act.

The Securities and Exchange Act and related laws do not authorize the TSE and the OTC Exchange to set up any information usage fee standards for collecting the "variable charges." Such standards are subject to the securities authority on a record for reference. However, since this is generally regarded a matter of formality, the securities authority normally does not substantially review the standards and is not responsible for evaluating whether the standards may affect the competition order in a relevant market. Therefore, the FTC initiated an investigation to assess the impact of the conduct in question on market competition.

The FTC made recommendations to the Securities and Futures Commission (since 2004 it has changed its name to the Securities and Futures Bureau under the Financial Supervisory Commission), the competent authority for administering and supervising securities business, that a "fee standards review committee" should be created to establish fair and objective charge standards and that the standards should be given the status of law in order to have binding force. As for this case, in a monopolistic/oligopolistic market structure, a market-dominating enterprise definitely has the ability to determine the pricing and can easily do so to increase its profits that generally has both direct and negative effects on consumers. In particular, the pricing behavior of state-owned enterprises has more of an impact on the public. Regulatory agencies need to structurally regulate specific industries by means of specific laws. However, if the regulatory measures are merely matters of formality or unable to achieve substantive results, it might be said that in light of the legislative purpose of the Fair Trade Act, the FTC could intervene.

In the same year, the TSE and the OTC Exchange appealed the FTC's decision to the Appeal and Petition Committee under the Cabinet, and the end result was that the Appeal and Petition Committee revoked the FTC's decision in 2003. This was based on the fact that: 1) The FTC had sanctioned the appellants for their abuse of dominance by inappropriately determining the remuneration for services to obtain excessive profits. How could a reasonable profit ratio be set since no reasonable profit ratio had been legally calculated? 2) According to the decision, the FTC calculated the appellants' profit ratio to be as high as 33.86% and 58% and the profit ratio was achieved by dividing net profit by costs. Whether such a calculation approach complied with Generally Accepted Accounting Principles called for a further review.

5.2 Request from a broadcast business organization for interpretation of whether the collection of licensing fees and investigation and clamping down by a copyright intermediary organization involved abuse of its monopolistic market position and inappropriate exercise of copyright

The FTC was of the opinion that if a certain intermediary organization is deemed to have a monopolistic position in a relevant market, then, in theory, it might be appropriate for the FTC to examine whether the licensing fees are justifiable in accordance with Article 10 of the Fair Trade Act. As to whether excessive pricing exists or not, it should be judged according to the rationality of the cost and profit ratio of the enterprise of concern. Nevertheless, as intellectual products are the result of the human mind, their cost and value are highly subjective. It is in fact impossible to apply objective standards to calculate the creative work cost as in the case of common products or services.

On the other hand, when intellectual products are completed, it is impossible to foresee whether intellectual products will be well received in the market or whether users will retain the economic benefits in using the intellectual products. Besides the related administrative expenditures and hardware that can be calculated objectively, the creative work cost of the intellectual products themselves is practically impossible to ascertain. Therefore, it is more appropriate for both parties to negotiate the copyright licensing fee based on their subjective recognition of what is reasonable. Hence, in fact, it is difficult for the FTC to judge whether excessive pricing exists in such pricing practices that are highly subjective and negotiable.

The FTC also considers that if the dispute between the intermediary organization and users only involves the amount of the licensing fee and not any competition restriction or unfair competition, the FTC will not intervene. This is because related provisions in the Copyright Act and Copyright Intermediary Organization Regulations provide for mediation and arbitration in such disputes. If the charges of an intermediary organization involve any competition restriction or unfair competition, such as discriminatory treatment or inappropriate blanket licensing, the FTC will need to evaluate whether such conduct is in violation of the Fair Trade Act. However, to ensure that the mediation system provided in the Copyright Act is put to good use, the FTC advises the parties to resolve disputes through the mediation system first. If the disputes remain unsolved, the FTC will then take action in accordance with the Fair Trade Act.

6. Price Regulation Issues

In response to the continuous surge in international oil and raw material prices since 2008 as well as to alleviate the considerable impact on domestic commodity prices, the Cabinet passed the “Action Plan for Stabilizing Current Prices” in May 2008. The principal measures included implementing the floating petroleum price mechanism, lowering domestic prices of daily necessities through coordination with suppliers, coordinating with manufacturers to set up designated locations to provide fair-priced goods, cracking down on illegal hording and price gouging, lowering taxes and freezing government charges and fees, etc. Meanwhile, the Cabinet established a “Commodity Price Stabilizing Task Force” which is headed by the vice premier and includes members from the Ministry of Economic Affairs, Ministry of Finance, Council of Agriculture, Fair Trade Commission, Consumer Protection Commission, and seven other government agencies. It is charged with keeping a close watch on the developments of commodity prices in and outside Chinese Taipei and working out corresponding measures to stabilize domestic commodity prices in a timely manner.

The FTC is in charge of the Fair Trade Act and has the responsibility to investigate and tackle any concerted actions. The FTC actively investigates and handles, upon complaints or *ex officio*, the purchase, inventory and sales records of suspected enterprises, and prevents related enterprises from engaging in concerted actions by means of mutual understanding to jointly determine the price increases. It is also the responsibility of the FTC to impose sanctions when any competition restriction or unfair competition

conduct is confirmed during investigations. In addition, the FTC collects market information regarding the prices of important daily commodities (such as wheat, flour, soybeans, cooking oil, petroleum products, liquefied petroleum gas, and agricultural and fishery products) and monitors the developments in the corresponding markets on a regular basis, comparing the prices with the international going rates. In addition, when natural disasters occur, the FTC will maintain a close watch on the fluctuations in the prices of agricultural and livestock products and relief materials.

As an example, the FTC in July 2011 received a written request from the Office of the Investigation Bureau under the Ministry of Justice in Yunlin County to investigate Yeedon Enterprise Co., Ltd. which was suspected of hoarding glutinous rice. To decide whether Yeedon Enterprise Co., Ltd. had violated the Fair Trade Act, the FTC conducted an investigation to ascertain whether irregularities existed in the purchases, sales and inventory of the respondent, whether there was concrete evidence that the respondent had the ability to manipulate market prices through hoarding, or whether there was evidence that the respondent engaged in concerted actions by means of contract, agreement or any other mutual understanding to jointly determine the prices of goods, restrict production and sales, or refuse to deal.

BIAC

1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party 2 on Competition and Regulation for its Roundtable on Excessive Prices.

The subject of this Roundtable is both urgent and topical. First, the treatment of excessive prices differs significantly among jurisdictions, particularly the EC and the US, where no comparable cause of action against "excessive prices" exists.[1] Second, the treatment of pricing policies of both dominant and non-dominant firms under competition law is particularly sensitive as it may have a direct and profound effect on the economic incentives of firms and, as a consequence, on consumer benefits. Third, as practice in several jurisdictions demonstrates, the assessment of pricing policies faces numerous conceptual as well as practical difficulties. Against this backdrop, BIAC is highly supportive of initiatives that seek to unveil the underpinnings of national regimes of antitrust law in the field of excessive prices, to discuss the pros and cons of "excessive" prices and antitrust enforcement policy in this field, to discuss the relationship with ex-ante price regulation[2] and to define the circumstances, if any, that may lend themselves for intervention by antitrust enforcement agencies. The OECD Competition Committee can play a very valuable role in this regard.

2. The Pros and Cons of Excessive Prices

The argument in favour of the application of competition law to excessive pricing is straightforward. Markets are most efficient when prices are set at the "competitive" level,optimising consumer welfare and allocative efficiency. When prices are set at higher levels, consumers are made worse off and overall welfare is reduced. Conversely, at prices lower than the competitive level, firms fail to receive an appropriate return on their investments, which results in inefficient entry and/or insufficient entry.[3] This implies that a policy that could identify and punish deviations from the competitive benchmark without error would increase consumer welfare unambiguously.[4]

However, there are also several important objections against the application of competition law to excessive pricing. Indeed, in practice it is virtually impossible to determine with any acceptable degree of certainty what the "competitive" market price is, and whether market prices are above or below that level.

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1 BIAC notes that apart from the EU and EU member states, countries whose competition agencies have power to prohibit excessive prices by dominant firms include Argentina, Brazil, China India, Russia and Turkey.

2 Ex ante is defined as meaning the prescription of prices in advance, as opposed to review and possible adjustment of pricing after the prices take effect.

3 See for instance Katz and Rosen, Microeconomics, (1998).

4 This implication is based on a static, single-incident analysis model that disregards innovation incentives.

Therefore the risks of both Type I and Type II errors in this field are significant[5]. In this respect, BIAC is most concerned about situations where market prices are deemed excessive while in reality they are competitive: as a result of intervention by antitrust agencies in those instances, profits of firms risk to be artificially capped, which diminishes the incentives to invest and innovate. This will eventually harm consumers: this harm consists in the foregone investment and introduction of valuable new products that would have been made had the agency not intervened. BIAC notes that excessive price actions may undermine both the investment incentives of incumbent firms and new entrants as (high) prices may no longer signal to potential entrants that the market is profitable.[6]

It has been argued that the cost of Type I (over-enforcement) errors is likely to be large in dynamic industries, such as the software and pharmaceutical sectors, where firms tend to compete for the market, in emerging industries such as the biotechnology sector, where firms are contemplating whether to start up, and in those mature industries (e.g., telecom) where, due to technological change, firms have an opportunity to upgrade their services. More generally, the cost of this type of enforcement error is large in fields where trial and error is common, but the return to succes potentially high.[7] Antitrust policy focusing exclusively on keeping down prices can also reduce product quality and services.[8] BIAC concurs with these positions.

BIAC does note however that different views exist on the relationship between static and dynamic effects. For instance, Brennan takes the position that it would not be correct to allow firms to exploit market power in the short run to stimulate innovation. The reason would be that it is, at minimum, uncertain whether innovation requires monopoly or otherwise supra-competitive profits; in his view, too little is known about the relationship between market power and innovation, hence there is no reason not to intervene in cases where prices would be "exploitative."[9] BIAC respectfully takes the opposite position: as many of the markets referred to above in point 5 demonstrate there are prima facie sufficient reasons to believe that in specific cases investment by dominant firms does fuel innovation. And it it is precisely because one cannot discard the possibilty that high returns are important for innovation that competition agencies should be reluctant to intervene against "excessive"prices.[10] But the second reason why BIAC believes that agencies should only exceptionally, if at all, intervene against "excessive" prices, is that it is extremely complicated - and in many cases impossible - to optimise (static) efficiency in the first place. As a result, in BIAC's view, there is a significant risk that the intervening agency does not only not "restore" the competitive price, but in addition, creates disincentives for firms to invest in innovative products and services.

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5 The difficulty of determining whether a price is excessive may be a factor in itself that contributes to unclear criteria for the standard of proof and therefore legal uncertainty. This legal certainty may in turn discourage investments.

6 Pursuing an excessive pricing policy in the event barriers to entry are relatively low may prevent market entry and in the longer run deprive consumers of variety because the signalling function of pricing is lost. In the case of high barriers to entry, pursuing such a policy may facilitate cartelisation.

7 See for instance Evans and Padilla, Excessive Prices: Using Economics to Define Administrable Legal Rules, Journal of Competition Law and Economics 1 (1), 97-122.

8 See Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), where the lifting of the ban of resale price maintenance was motivated by economic models showing that maintaining high retail prices may incentivise dealers to provide promotional services and invest in product reputation.

9 See Brennan, Should Innovation Rationalize Supra-Competitive Prices? A Skeptical Speculation, in: The Pros and Cons of High Prices, Swedish Competition Authority (2007).

10 See for example Motta, Competition Policy, Theory and Practice (2004), pp 56-57.

While BIAC is generally skeptical of general, ex-ante regulation of prices through sector legislation that is enforced by special regulatory agencies, it believes that in specific cases ex-ante price regulation, while still objectionable, may have certain advantages relative to ex-post price control by competition agencies. In particular, (i) ex-ante price regulation may impose specific (separate) accounting and financial reporting obligations that allow the regulator to gain a deeper insight in pricing and costs than a competition agency would normally have, (ii) special regulators enforcing the regulation may generally have a deeper insight in the sector at hand and (iii) may be able to take other policy priorities into account, (iv) sector regulation may be preferable in markets characterised by special types of market failures to address potential "excessive" pricing problems before they actually arise and (v) *ex ante* regulation may be more condusive to legal certainty and a stable, predictable investment climate.

3. Excessive Prices and Competition Law

There are wide divergences between the treatment under competition law of "excessive" prices from jurisdiction to jurisdiction.[11] In particular, in the EU, under Article 101(a) TFEU, a firm abuses its dominant position if it "directly or indirectly" imposes "unfair purchase or selling prices or other unfair trading conditions." Importantly, similar prohibitions are included in the competition laws of the UK, the Netherlands and other EU member states, as well as many other jurisdictions. Nowadays, many of the (relatively recent) competition law regimes of developing countries provide for a prohibition of exploitative abuses in the shape of "excessive" prices. In contrast, there is no comparable cause of action against "excessive" prices in the US. It is a fundamental tenet of US antitrust jurisprudence that "the successful competitor, having been urged to compete, must not be turned on when he wins."[12] Indeed, the view that the ability, if lawfully obtained, to charge whatever the market will bear is an important and beneficial part of the competitive market process. Moreover, a violation of U.S. law requires the presence of more than monopoly power and the ability to charge excessive prices:

> *"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only* ***not*** *unlawful; it is an imporant element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth."*[13]

Exclusionary conduct is a requirement of a monopolization offense in the U.S. and excessive pricing, arguably, is the antithesis of exclusionary conduct because it creates both incentive and opportunty for rivals to innovate and enter the market in question.

BIAC believes it is important to take account of the different historical background and motives for enacting (or not enacting) competition law provisions on excessive prices, as well as the varying objectives of competition law regimes and the actual enforcement record over the last few years. For instance, one can argue that at least part of the (early) enforcement history in the area of excessive prices in Europe is influenced by the Treaty establishing the European Coal and Steel Community, which preceded the EC Treaty and which had established a strict control of excessive pricing, as well as the EC Commission's wish to intervene particularly in cases that threatened the establishment of the common European market.[14] Countries characterised by economies in transition, smaller (isolated) economies, or economies with many formerly state owned monopolies sometimes argue that the specific nature of their economy necessitates

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11 There may also be significant differences among jurisdictions with respect to the enactment of ex-ante price control regulation.

12 U.S. v. Aluminum Corp. of America, 148 F.2d 416, 430 (1945) (L. Hand, J.)

13 Verizon Communications v. Law Offices of Curtis V. Trinko,540 U.S. 398, 407 (2004) (emphasis added).

14 Obviously, it would then be logical to ask whether the historical reasons would still apply.

intervention against excessive prices and that the risk of Type I errors is relatively small. These are often closely related to decisions that markets themselves must be regulated in order to operate efficiently. Indeed, there is literature suggesting that certain so-called "natural monopolies" require regulatory control. The history of market regulation has revealed, however, that the scope and magnitude of natural monopolies was often over-stated and the increase of internationalization of commerce undermined many of those national "natural monopolies" that remained. Thus, the underlying tenet that lead initially to the use of price regulation is greatly diminished. For that reason, particularly in the US, there has been an evolution away from regulatory price controls and toward the proposition that excessive prices are self-correcting. [15]

4. General Observations on the Treatment of Excessive Prices under EC Law

Article 102 (a) of the TFEU provides that a dominant firm may "abuse" its position by charging unfair prices. However, the concept of "unfair pricing" is not well- developed and there remains a large degree of ambiguity regarding the question when a price is "excessive" and therefore "unfair." The leading case under EC law is United Brands, a case that heavily relied on the dominant firm's differential pricing across various European countries, and where the Court held that a price is unfair if it bears no relationship with the "economic value" of the product. [16] According to United Brands judgment, this can be determined in two ways: (i) either the price-cost margin is excessive, or (ii) the price imposed is either unfair in itself or in relation to competing products. [17]

While there have only been few cases under European law dealing with excessive pricing, these precedents make clear that the application of the United Brands test is tainted with a number of difficulties.[18] First, the concept of "economic value" itself is undefined and may or may not be held to include various types of costs. This creates particular difficulties when firms are tempted to charge high prices to cover initial investments which, for instance relate to (basic) research and development or fixed installations. Second, while the United Brands judgment mandates an inquiry into the question whether the prices charged are "unfair" in relation to "competing products", it is silent on how that inquiry should be conducted. In particular, while price-costs comparisons have been performed in several cases, issues are likely to arise in connection with the choice of the appropriate cost measure, the definition of a reasonable profit margin, the comparison with multi-product firms and the provisions of incentives for cost reductions. [19] Similarly, comparisons across competitors, between prices charged in different member states, as well as comparisons of prices over time may give rise to methodological issues. [20]

The lack of clear guidance by the Community Courts and the difficulties involved in devising an effective test that provides sufficient ex ante legal certainty, is relatively simple to implement and does not deter dominant firms from desirable innovative activities have certainly played a role in the EC Commission's decision to not include excessive pricing in its 2008 Guidance on its enforcement priorities

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15 See for instance Verizon Communications inc. v. Trinco 540 U.S. 398 (2004) (*the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system*).

16 Case 27/76, United Brands Company v Commission (1978) ECR 250.

17 Id, paras 250-252.

18 To date, the precedents are Case 26/75, General Motors Continental NV v Commission (1975) ECR 1376, Case 226/84 British Leyland Plc. V Commission (1986) ECR 3263 and Case COMP/ A.36. 568/D3, Scandlines Sverige AB v Port of Helsingborg, Commission Decision of 23 July 2004.

19 See O'Donoghue and Padilla, The Law and Economics of Article 82 EC, Hart Publishing, 2006, p. 614.

20 Id, p. 616-620.

in applying Article 102 (EC) to abusive exclusionary conduct by dominant undertakings.[21] As a result, under EC Competition law, no effective general policy guidelines exist with respect to this field of the law. Further, the Commission has historically been reluctant to pursue cases that allege "excessive pricing" given the challenges in resolving such allegations, which are greatly magnified in cases involving intangibles such as IPR. In this respect, two influential Commission officials have recently confirmed the EC Commission's position on excessive pricing:

> *"It can be argued that absent exclusionary behavior, monopolistic rents should be of no concern to antitrust regulators or courts. Indeed the Commission and the Courts have explicitly stated that it is legal to hold a dominant or monopoly position. A profit maximizing firm in such position can be expected to charge higher than competitive prices. It would appear inconsistent to allow substantial market power but to prohibit its exercise. Not surprisingly, the Commission has been cautious in bringing excessive pricing cases."*[22]

Recently, however, the EC Commission has published new guidelines on the application of Article 101 TFEU to horizontal cooperation (the "Horizontal Guidelines").[23] The new guidelines contain a specific section on standardization and address standards that contain technology protected by intellectual property rights. The Commission believed such guidance would be useful partly in view of the theories about "patent hold-up" that have been the subject of recent debate. Importantly, the guidelines emphasize the generally pro-competitive nature of standardization and of the use of IPR in standards. The guidelines also emphasize the availability of contract remedies to address refusals of owners of essential patents, should these occur, to comply with their FRAND commitments.

Thus, despite the cautious approach avocated with regard to excessive prices, the Commission concluded in the Horizontal Guidelines that it has the authority to determine whether the prices charged for the use of intellectual property rights in the context of standardized products, is "reasonable" under FRAND provisions.[24] In particular, the Guidelines stipulate that:

> *"In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR [citation omitted]. In general, there are various methods available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents. Instead, it may be possible to compare the licensing fees charged by the company in question for the relevant patents in a competitive environment before the industry has been locked into the standard (ex ante) with those charged after the industry has*

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21 See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

22 Damien Neven and Miguel de la Mano, *Economics at DG Competition, 2009–2010*, Rev. Ind. Organ, Nov 2010 at 4.1

23 Guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements, 2011 OJ C 11/1, *available at* http://ec.europa.eu/competition/antitrust/legislation/horizontal.html.

24 See Paul Lugard, The New EU Rules for the Assessment of Horizontal Agreements, CPI Antitrust Chronicle, February 2011 (2), available at https://www.competitionpolicyinternational.com/the-new-eu-competition-rules-for-the-assessment-of-horizontal-agreements/

been locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner [citation omitted].

Another method could be to obtain an independent expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio. In an appropriate case, it may also be possible to refer to ex ante disclosures of licensing terms in the context of a specific standard-setting process. This also assumes that the comparison can be made in a consistent and reliable manner. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive."

In light of the foregoing, BIAC is concerned that the difficulties in establishing "reasonable" prices and the resulting potential chilling effects that can be traced back to the 1976 United Brands judgment are revived and imported into the domain of IPRs, with potentially greater harm given the intangible nature of IPRs and the significant risks that investment in the underlying R&D entails.[25] BIAC shares the criticism and concern that this trend has triggered and notes that it is inconsistent that the Commission has been most cautious in expounding an excessive pricing policy in traditional sectors, yet has sought to do so in a most sensitive area; one characterised by dynamic markets and covered by intellectual property rights intended to incentivise innovation.[26]

5. General Observations on the Different Tests to Prove Excessive Prices

The United Brands case illustrates the difficulties involved in establishing the existence of an "excessive" price and methodologies that may be used. BIAC submits that each of these methodologies presents several difficulties. For example, methodologies based on a comparison between production costs and prices necessarily involve an arbitrary view on whether profit margins are "reasonable". Moreover, the definition, identification and quantification of costs and the proper assessment of risks are often extremely complex, particularly in the case of multi-product firms.

Indeed, there is a real danger that the absence of objective and predictable methodologies for use by agencies in price setting can result in arbitrary considerations other than long-term consumer welfare and allocative efficiency coming into play.

Similarly, methodologies based on a comparison between the prices charged by the dominant firm and those charged by other firms in other markets may fail to take account of the fact that markets may operate under very different conditions of costs and demands. Comparisons between firms in the same relevant product and geographical market may overlook the fact that the dominant firm's products are merely perceived as superior and may therefore command a higher price. This latter type of comparison seems particularly difficult in differentiated product markets.

6. Remedies

While the proper test for establishing excessive prices is unclear and the proposed methodologies each give rise to a number of problems, intervention by competition agencies in the field of excessive prices gives rise to yet another complication: once it has been established that a given price is abusive, the

25 The EC Microsoft proceedings also demonstrate the administrability problems associated with the intervention in intellectual property- related cases.

26 See for instance Padilla, The Good, the Bad, and the Ugly: Comments to the Commission's Horizontal Guidelines—Standardization, available at https://www.competitionpolicyinternational.com/the-good-the-bad-and-the-ugly-comments-to-the-commission-s-horizontal-guidelines-standardization.

question arises which remedy should be imposed to resolve the competitive problem. This remedy is likely to be of a behavourial nature. However, these remedies are akin to price regulation, in which case the question can be raised whether competition agencies have the required skills to impose that remedy and whether the conduct at hand should not be better regulated by way of general (price) regulation as briefly discussed in paragraph 7 above.

7. The Case for Antitrust Intervention in Excessive Pricing Cases

In light of the above, BIAC submits that competition agencies should be particularly reluctant to intervene in cases of alleged excessive prices. Indeed, intervention in these cases tends to undermine the self-correcting nature of markets, is likely to distort firms' incentivies to invest and is fraught with practical difficulties.

BIAC believes that intervention may be justified, if at all, only in truly exceptional, narrowly defined cases. First, at a very minumum, the market at hand should be characterised by exceedingly high and non-transitory barriers to entry which protects the dominant company from competition by new entrants. Second, the incumbent company should have a dominant position that it derived from past exclusive or special rights. This second condition is intended to minimise intervention and the accompanying risks of overenforcement in cases where the dominant position is the result of the firm's own merits. Thirdly, the conduct must not otherwise be subject to specific, sectoral regulation; the role of general competition agencies should be limited if there is a sectoral regulator with adequate power to address the perceived competitive problem. Finally, intervention against excessive pricing should not occur in the field of intellectual property rights. Allowing excessive pricing action would undermine the very object of those intellectual property rights and the incentive schemes created by these laws.

EXCESSIVE PRICES AND THE ROLE OF PROFITABILITY ANALYSIS

By Alan Gregory

1. Introduction

This paper considers the assessment of excessive prices in general, and the application of profitability analysis in particular. Assessment of excessive pricing is used in several contexts. The first is price setting in regulated utility industries, where the context is a firm operating as a natural monopolist, the second is in anti-trust investigations generally - for example it is a key input in UK market investigations. As Geroski (2005) notes, in this context profitability is acting as a signal of the competitive conditions in a market. A further application of a profitability test is in the context of EC rules on state aid, where in effect the test is whether profits are high enough to be commercially viable. Economic theory suggests that in a perfectly competitive market, an efficient firm will only be able to earn a "normal" rate of profit. That is, its rate of return on invested capital for a particular business activity should be equal to its cost of capital for that activity. Equivalently, in such markets prices should be equal to the marginal cost of production of an efficient firm (where cost is defined including normal profit).

2. The determination of excessive prices

Broadly, there are two ways of determining whether prices are excessive. We can either use what is essentially a method of comparison, or we can focus on some aspect of profitability. In principle, the latter is likely to be more meaningful, as prices might legitimately differ for supply cost reasons. For example, one might expect physical products to be more expensive in remote island communities because of logistical costs. By contrast, one would not expect on-line products (such as software) to cost more in these locations. There are other obvious examples of regional cost differences besides transport and delivery costs. Labour costs differ between regions, real estate costs differ, and so on. If the marginal cost of supply is different, then basic economic theory suggests prices will be, even in well-functioning markets. Furthermore, local demand will differ, so affecting economies of scale. These basic examples suggest that despite the obvious appeal of cross-location price benchmarking, a simple geographical comparison of prices, without considering some aspect of profitability, is potentially highly misleading. Indeed, the ECJ rejected an EC's decision in the United Brands case because it was based on a simple comparison of prices of bananas in the Irish and Danish markets.

One possibility is to attempt to assess market dominance by examining pricing across time. This may be useful in certain circumstances, for example in detecting predatory pricing. It is also likely to be of key interest in merger cases. However, it can only take us so far, as a simple defence for the firm (or firms) being investigated is that any price differences or price changes reflect changes in costs, or alternatively that such prices are necessary in order to recoup the costs of past risky innovation or research and development activity.

In general, such cases will require the investigation of the substance of such claims. Inevitably, this takes us on to profitability analysis, and we should note that in other Article 102 cases, the EC has specifically considered profitability (rather than simple price) comparisons. In what follows, we use profitability analysis in a general sense, including the simple assessment of mark-ups on cost and sales

margin analysis, as well as more sophisticated analyses of return on capital employed and discounted cash flow (DCF) measures of profit.

3. The basics of profitability analysis

Before examining the detail of how profitability analysis is conducted, it is worth reminding ourselves of some of the limitations highlighted by Paul Geroski in the speech referred to in the introduction. First, such profitability analysis is typically backward looking, but there are circumstances (most obviously encountered in mergers, but also when examining market remedies) where we need a clear understanding of the incentives a merger sets up with regard to future profitability. This implies moving well beyond an analysis of past profitability, however such profitability is assessed. Second, even with an analysis of backward profitability, one must push beyond the simple observations that profitability is high and ask questions about what market features have caused profits to be high. For example, profits may be high because a particular firm is capturing the benefits of risky past innovation. Alternatively, a monopolist's profits may appear not to be excessive because the firm has opted for an easy life. In other words, it is worth remembering that profitability analysis can only ever take us so far. That said, how far it can take us rather depends on how well the task is carried out and it is to that issue that we turn next.

The first important observation is that what we are looking for in any profitability analysis is the existence of *persistent* excessive profits. That implies we need to look at longer term patterns of profitability, ideally over the length of an economic cycle. We start with the heroic assumption that we can accurately measure the costs of the activity we are interested in, and the assets needed to undertake that activity (we return to the obvious difficulties involved in establishing these later). The most simple analysis that we then can conduct is to measure the long-run average of the return on capital employed (ROCE) earned by the firm. In theory, if investment takes place at the beginning of an accounting period, with all cash flows and dividend flows occurring at the end of the accounting period, then the ROCE for period t is simply Accounting Profit (or Total Earnings, TE) at time t divided by the *opening* Capital Employed (CE), i.e. TE_t/CE_{t-1}. As CE includes an element financed by long term debt, the TE measure needs to be some measure of earnings *before* the deduction of interest charges. It can either be a simple pre-tax earnings measure (i.e. earnings before interest and taxes, or EBIT) or a post tax measure, where taxes are adjusted for any tax relief obtained on debt. Whilst an alternative equity level measure can easily be employed in accounting or valuation analyses (that is, we can think about profit attributable to shareholders divided by opening equity book value), it is not appropriate for profitability assessment as it conflates operating surpluses with gains from financial gearing or leverage.

One further requirement is that all accounting earnings are so-called "clean surplus" in nature. This simply means that all gains and losses in asset values must flow through the earnings number. This is an important basic requirement, but one that is often overlooked. For example, in some countries at various points in the past, firms have been able to write off purchased goodwill directly to reserves or revalue property (real estate) investments upwards. Although the adoption of International Financial Reporting Standards (IFRS) has generally moved accounting in the direction of being "clean surplus" there are still important areas where changes in asset values can be made directly to equity. These include: foreign currency translation differences; changes in actuarial values of pension schemes; and changes in fair value of various financial instruments. However, all such items are required to be reported in a "Statement of Comprehensive Income". Strictly, profitability tests should be based upon this comprehensive income figure, as otherwise the profit number being assessed will not articulate with the balance sheets measures of asset value being employed. Note that tests using historical financial statements would need to be mindful of when countries adopted IFRS and potentially may need to restate either income statements or balance sheets to ensure the numbers used in any analysis were consistent.

Given these assumptions on cash flow timings and clean surplus accounting, it is helpful to think about the concept of a "normal" profit or earnings measure, which is simply the cost of capital multiple by opening capital employed. The difference between actual earnings and normal earnings is termed "abnormal earnings" or "residual income", and this is a useful direct test of excess profits. Last, note that it is always possible to show that over the life of the firm, the value of the firm is the present value of the expected future residual income stream plus the opening book value of the assets. A useful property of this approach is that this is true no matter what accounting system is employed, since over the long run any changes in asset values brought about by accounting policy choices have an offsetting effect on abnormal profits. This is important when considering, say, the importance of accounting for intangible assets. This relationship works out because of the offsetting effect of book values on the normal profit calculation. As a simple example, compare two short life firms in the same industry, one of which does not depreciate its assets, and the other, which is ultra-conservative, writing off 100% of its assets in the year of acquisition. The first firm will have a higher book value, but a lower residual income as the cost of capital will be applied to this higher book value.

We provide a simple illustration of these concepts in Table 1. In the base case, the firm start business with €1000 worth of assets. It expands these assets at the rate of 5% per annum, until year 20 when the business closes, and assets are sold for their book value. The assets generate initial operating cash flow of €200 at the end of the first year of operation, and we assume that the rate of economic depreciation of the assets is identical to the accounting depreciation, at 10% of the opening asset value, and further that this loss of economic capacity is replaced each year. The free cash flow at the end of year 1 is therefore €200 - €100 replacement of assets - €50 expansion of the asset base, which is €50. These cash flows grow at 5% p.a. until the firm is terminated. If we assume that this firm is all equity financed, all of this free cash flow is available to pay as a dividend. Assuming the equity cost of capital is 7%, it is simple to show that the firm is worth €1472 using a dividend discount model.[1]

The accounting profit will be €200 operating cash flow, less €100 accounting depreciation, or €100. We can also show that the residual income in year 1 is €30, this being the €100 profit less the 7% cost of capital multiplied by the opening book value of €1000. So equivalently, we can value the firm as the present value of the residual income stream, €472, plus the opening book value of €1000, which reconciles to the dividend discount model value of €1472. Such approaches to valuation must always be equivalent if consistent assumptions are made in estimating cash flows.[2]

We can now think of our basic profitability test in three ways. First, we can think about a simple ROCE approach. This shows an ROCE of 10% each year, implying an "excess" profit of 3% each year. Second, we can interpret the residual income as the *absolute* cash amount of the excess profit. This starts at €30 and rises to €76 in year 20. However, in scale terms it is always 3% of opening book value.

Finally, we can think about profitability in terms of a present value relationship. First and most simply, we can calculate the present value of the residual income (RI) stream, which we know is €472. However, we can also calculate the internal rate of return (or IRR) that the firm earns on its assets. This bypasses any accounting profit measure and calculates the IRR over the firm's life, *N*, by solving the following for *i*:

$$V_0 = \sum_{t=1}^{t=N} \frac{C_t}{(1+i)^t} + \frac{V^N}{(1+i)^N} \qquad (1)$$

1 Which is identical to the free cash flow model given all surplus cash flow are paid as dividends and the firm is financed entirely by equity.

2 For a formal proof, see Lundholm and O'Keefe (2001).

Where V_0 is the initial cost of the assets, V_N is the disposal value of the assets and C_t are the annual free cash flows from operations. In the case of our example, $i = 0.1$, or 10%.

So in this simple setting, all of our profitability tests yield precisely the same answer.

4. Basic problems with standard profitability measures

Given the above, one might wonder why there are any problems when it comes to the analysis of profitability at all. Why bother with highly complex adjustments techniques when we can easily show that clean surplus accounting and a residual income or "abnormal profits" approach works perfectly well? There are three basic problems. First, it turns out that average accounting rates of return can be misleading when, as is typically the case, accounting depreciation rates do not match economic depreciation rates, or when investment rates in new assets are non-constant. Second, even if we concentrate on residual income measures, the present value relationships explained above only hold over the entire lifetime of the firm. Over any shorter period, it turns out that accounting issues matter. There is little point in telling a regulator or competition authority that if we wait until the firm eventually ceases to exist (whether that be by bankruptcy, being acquired or by voluntarily liquidating itself), we can look back and measure excess profitability with certainty from the accounting statements. For this reason, a typical profitability analysis will involve assessment of profits over a limited, or *truncated*, period. Note, though, that there are cases where a whole life analysis is possible, and indeed more meaningful. For example, the UK Competition Commission used a whole asset life approach when investigating railway rolling stock leasing companies (ROSCOs) as it believed that truncated asset values would not be reliable.[3] Third, we need to concern ourselves with whether all assets owned by the firm are adequately captured by recorded asset values. It may be that the firm possesses real intangible assets which are not present on the balance sheet. Obvious examples of such intangible assets include "knowledge assets", typically built up by past investment in research and development, and customer bases, built up as a result of past marketing activity.

We next explore these points in more detail.

4.1. Differences between accounting and economic rates of depreciation

To give a simple illustration of the problems caused by such differences, assume that the firm in our example changes its depreciation method to an accelerated rate of write-down, but this has no effect on cash flows.[4] Instead of depreciating assets at 10%, the assumed rate of economic depreciation, we assume this becomes 15%. The results are now reflected in Table 2. Clearly the firm must be worth the same amount, as cash flows have not changed. However, both RI and ROCE change. The effect is to lower the RI and ROCE in the early years, and raise it in later years. Whilst the present value of the RI stream remains unaffected, the simple average of the ROCE now gives a misleading picture of profitability. In part this is caused by the mis-match between economic depreciation and accounting depreciation, and in part by the fact that we now have a gain on disposal of the asset, in effect caused by an "error" in the way accounting records asset values compared to its fair economic value, captured on disposal. Of course, the IRR is unaffected by the accounting changes as it uses cash flows, not accounting profits.

None of this means that ROCE is impossible to use as a measure. Peasnell (1982) shows that we can always find a weighted average ROCE that is equivalent to an IRR. The IRR is a linear weighted sum of the individual year ROCEs plus a proportion of the accounting valuation "error". However, this is a rather

3 See: http://www.competition-commission.org.uk/rep_pub/reports/2009/546roscos.htm

4 In some countries, changing depreciation rates have tax effects. In others 9e.g. the US and UK), there is no relationship between accounting choices on depreciation rates and tax allowable rates of depreciation. For simplicity, we assume no tax effects here.

complex calculation that is unlikely to be carried out in practice, especially since the IRR needs to be known in order to calculate the appropriate weights.[5] The important message from a rigorous exploration of the relationships between accounting rates of return and value is that a *simple* average of ROCE is likely to give a misleading picture of the true rate of profitability. Indeed, once we start to encounter non-constant asset replacement patterns, using ROCE becomes even more problematic if conventional straight line accounting depreciation is used, as ROCE tends to be lower in the early years of an asset's life and higher in later years. The simple examples used above ignored this problem by assuming a constant rate of replacement of assets, but in reality with "lumpy" asset replacement and expansion patterns we would need to be aware of the age profile of the asset base when interpreting ROCE numbers.

4.2. The truncated period problem

As we noted above, the assertion that accounting does not matter in an RI framework given clean surplus accounting is only true over the life of the firm. Suppose, though, that we need to measure profitability for the firm in the above examples over the period from year 10 to year 15. First, in the case of our base model, where we had constant rates of asset replacement and economic rates of depreciation equal to accounting rates of depreciation, all methods give the same simple and unambiguous result, shown in Table 3. The RI is positive, the ROCE is 10% each year, and the IRR is 10%.

However, when we start to analyse profitability in the case where the firm adopts a conservative accounting approach, so that accounting rates of depreciation are not equal to economic rates of depreciation, we run into a problem. First, as we see in Table 4, the ROCE over the period is not constant, and rises from 10.4% to 11.2%, with an average over the period of 10.9%. This implies the firm is becoming more profitable over time, but from the cash flows we know this is not the case and is merely an artefact of the accounting method.

To calculate the IRR in (1), we need the equivalent of V_0 and V_N at the beginning of year 10 and the end of year 15 respectively. Unfortunately, if we base these values on accounting book values, in general we end up with a meaningless IRR unless accounting book values equal economic values at both the beginning and end of the period being investigated. Conceptually, the answer is straightforward – we simply substitute the economic value of the asset for the accounting book value. The implied cash flows from investing in the assets at economic value are shown in Table 4. Note, though, that if we substitute such economic values for accounting book values the ROCE can be re-stated. It is still not a perfect measure, because it is still subject to arbitrary changes in depreciation charges, but can serve as a useful cross check on the IRR in practice.[6]

4.2.1. What is meant by "economic value" of an asset?

The economic value of an asset is the value of that asset to the business. It is alternatively known as the "value to the owner", "deprival value" or "opportunity cost" of the asset. It can be summed up as follows:

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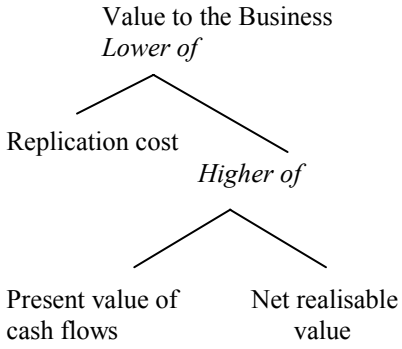
[5] See Peasnell (1982), Theorem 3, equations 20-23. Alternatively, the ROCE can be estimated by iteration (Kay, 1976). The formulae are easily applied to our example, showing that the weighted average ROCE is equal to the IRR at 10%.

[6] See, for example, the recent UK Competition Commission Provisional Findings on Pay TV Movies.



The reasoning behind this diagram is that if a business was to be deprived of this asset for any reason, it would face a decision as to whether or not to replace that asset.[7] Typically, for an asset employed in a positive NPV activity, the value to the business will be the replication cost, as in such a situation it would be worthy replacing the capacity lost. To be more specific, replication cost is the current cost of replacing the service capacity given by the asset that is currently used. Note that this is subtly different from a simple "replacement cost" definition. However, there are times when replication cost is *not* the relevant value to the business. Suppose that since acquiring the asset, the market for the product or service it produces had declined, so that replacing the asset no longer has a positive NPV. Nonetheless, it had not previously been worth scrapping the asset. Under these circumstances deprival value is less than replication cost, but greater than the net realisable value, and is simply the present value of the economic benefits foregone by not having the asset. Finally, if we imagine a situation where the product or service would actually generate net cash flows with a present value less than net realisable value, production is no longer viable and so the asset is only worth its net realisable value. This "value to the business" principle is sometimes called the "modern equivalent asset" (MEA) principle, and such values have an obvious appeal in any NPV analysis. Edwards, Kay and Mayer (1987) show that provided book values are adjusted to MEA values, truncated period IRRs derived from such values are economically meaningful in a way that conventional ROCE measures are not.

For newly purchased assets, accounting book values will be accurate measures of value to the business, assuming the decision to acquire the asset has been the result of a rational NPV analysis. However, through time there can be a gulf between accounting book values and MEAs. The most obvious examples of why such a gulf might emerge include inflation and technological change.

4.3. The intangible asset problem

The economic value argument set out above applies not just to tangible assets but also intangible ones. Typically, balance sheets do not record the full value of intangible assets. Whilst it is the case that product development expenditures may be capitalised, most research and development (R&D) expenditures are written off in the year in which they are incurred. Similarly, marketing expenditures are written off even if the effect of such expenditures is to build a long term customer base. Ignoring such expenditures would have the effect of overstating both the ROCE and the IRR earned by the firm. A simple illustration is provided in Table 5. Here, we assume a firm starts in Year 0, and invests in R&D. R&D investment is assumed to have a five year life. It grows at 5% per annum, and has a cost of capital of 10%. We assume accounting book values and accounting depreciation accurately reflect economic values, *except* for the value of intangibles. By year 6, the firm is in a steady state in terms of the economic amortisation of the benefits of past R&D expense. A simple profitability calculation shows that ROCE is 19.5%. In Table 6, we show what happens when the R&D expenditure is capitalised and then amortised at its assumed

[7] Originally the deprival value concept seems to have been developed by Bonbright (1965) in the context of insurable values of assets – see Baxter (1984).

economic amortisation rate. Here, we see that the ROCE now falls to 16.3%. Finally, in Table 7 we show the result of two truncated IRR calculations, conducted over years 6-10, with and without the inclusion of intangibles. Given the assumptions of constant growth in assets and cash flows, and that accounting book values equal economic values of assets (except intangibles in the first case), of course the IRR equals the ROCE. The important point is that failing to recognise intangibles generally biases ROCE and IRR upwards.

However, this is not always the case. If assets have been acquired as a result of an acquisition, then goodwill will typically be recorded as the difference between the acquisition cost of the asset and its "fair value" (in the historical accounting sense of the term). Several problems can arise here. First, the acquiring firm may over-pay for the target firm,[8] meaning that goodwill may overstate the true economic value of the assets acquired. Second, some element of "goodwill" may reflect the difference between value to the business of the assets acquired and their balance sheet value. Thus if we uplift the book values to MEAs as discussed above, including goodwill as well would lead to double counting. Finally, a particular problem for regulators is that goodwill may simply reflect the present value of excess profitability in the firm acquired. For all these reasons, the general approach should be to exclude purchased goodwill from the calculations, but instead to estimate the MEAs of both tangible and intangible assets.

However, estimating the MEA of intangible assets is far from straightforward. A particularly interesting recent example is to be found in the recent UK Pay TV case, where Oxera built a model for Ofcom that attempted to value the intangible asset of Sky's subscriber base. The Competition Commission agreed with Oxera that such an approach was valid, and accepted its use in a truncated IRR model.[9]

5. Cost and asset allocation problems

In practice, we are rarely interested in an entire firm when undertaking profitability analysis – more typically we may be investigating a segment of the business, thereby necessitating assumptions concerning both cost allocation and asset allocation. Cost and asset allocation problems are common to any attempt to analyse business segment profitability, whether profitability measurement in being conducted on a straightforward accounting return basis or a more complex IRR basis. Cost allocation issues arise whenever products have joint costs or common costs. Joint costs are those where a production process produces more than one output, and it is impossible to produce one product in isolation – oil refining would be a classic example. Common costs are those where products are produced together although they could be produced separately. Broadly, we can identify three levels of cost: the marginal or incremental costs of producing one extra unit of output; so-called "full cost", which includes allocated joint and common costs, and; stand-alone costs, which would be the cost of producing the output given no common or joint costs. Whilst marginal cost and stand alone costs form boundaries on plausible costs of output, there is typically a great deal of scope for discretion in allocation, something that is clearly problematic from a profitability analysis perspective. Common bases for allocation in practice include revenues, volume, direct costs or some activity-based costing allocation method. However, there is also a theoretical literature based around the notion of sharing savings from common versus stand-alone allocations, sometimes called "mutually satisfactory allocations" (Jensen 1977). Although not commonly used, they would seem to have something to offer to regulators when it comes to judging the fairness or otherwise of cost allocations used by firms.

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8 The academic evidence on the long run performance of acquiring firms is consistent with this. For a summary, see Agrawal and Jaffe (2000).

9 See: http://www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/provisional_findings_report.htm

Cost allocation issues also affect any attempt of conducting margin analysis, and the problems are not therefore limited to analyses based on ROCE and IRR. However, ROCE and IRR also require an asset base to be established, and in many cases, assets are shared between businesses. This means that to measure profitability, common assets have to be allocated between businesses on some reasonable basis. For example, in the UK Pay TV Movies case, the transmission technologies used for the film channels are necessarily shared with sports and other channels, and some capacity is provided to outside operators. The difficulty in allocating assets led the UK Competition Commission to assess disaggregated profitability on a return on sales basis. We return to this type of analysis below.

6. The Cost of Capital

All of the models discussed above require the observed return (be this the ROCE or the IRR) to be compared with the firm's cost of capital. The appropriate benchmark here is the weighted average cost of capital, or WACC, for the business segment being assessed. Whether this is estimated on a pre or post tax basis depends on whether accounting profits, or firm cash flows, are estimated pre or post tax – in principle, all that is required is that the two measures are consistently estimated.

In general, the cost of debt capital is relatively uncontentious, although we discuss some issues surrounding gearing (or leverage) levels below. However, the cost of the equity element is generally more open to dispute. First, there is the question of the appropriate asset pricing model. By far the most common approach around the world is the use of the capital asset pricing model, or CAPM, although US regulators make some use of the dividend discount model.[10] The CAPM gives the required return on equity ($E[R_i]$) as:

$$E[R_i] = r_f + \beta_i \left(E[R_m] - r_f \right) \qquad (2)$$

where:

$$\beta_i = \frac{\sigma_i \sigma_m \rho_{im}}{\sigma_m^2}$$

And where $E[R_m]$ is the expected return on the market for risky assets, and r_f is the risk-free rate. There are several areas of contention here. First, there is the issue of beta. Given that we are typically trying to estimate the cost of capital for a business segment, rather than the whole firm, we need to find suitable proxy or analogue firms for the business activity being evaluated. For example, in the UK Competition Commission into store card profitability, not only was the direct measurement of beta impossible, but there were no UK proxies for store cards. In this particular case, the Commission used two US credit card providers, MBNA and Capital One, as comparators. Having decided on a choice of comparators, two further issues arise, namely over what interval to estimate beta, and whether to do so using daily, weekly or monthly data. Finally, when we are dealing with comparators with different levels of gearing, we need a model to estimate the underlying asset beta, as the equity beta observed by the estimation process are function of the underlying business risk and the financial structure of the analogue firm.

Whilst it may be thought that Modigliani and Miller (1963) have provided us with a proof of the relationship between the cost of equity for leveraged and unleveraged firms, in practice there are two areas for debate. The first is whether we assume that target debt levels are static or whether we assume they are adjusted so as to keep the debt:equity ratio constant in market value terms (a so-called "active" debt

[10] An excellent international review can be found in a forthcoming UK Competition Commission Working Paper by Sudarsanam et al.

management policy). In recent UK cases, the effective assumption has been instantaneous rebalancing, such that the relationship between equity and asset betas is given by:

$$\beta_E = \beta_A + (\beta_A - \beta_D)\frac{D}{E} \qquad (3)$$

The second area of contention is the debt beta. Historically, regulators have tended to assume debt betas are zero, but more recently they have started to examine the potential importance of debt betas when gearing levels are high.

The other area of contention in the application of the CAPM is in the matter of the estimation of the $E[R_m]$ and r_f terms. There are several issues to be considered. The first is whether it is better to estimate these terms directly, or whether one should instead estimate the "market risk premium", or MRP, which is $E[R_m] - r_f$. Whilst many regulatory cases discuss the MRP, Wright et al (2003) and Gregory (2011) point out that $E[R_m]$ may be more stable than the MRP.[11] Importantly, Jenkinson (1993) points out that there is only one r_f term in the CAPM, a point that is sometimes forgotten when using estimates of the MRP directly. For example, a common error is to take an MRP derived from a historical analysis of returns (which will have employed realisations of the risk free return) yet include some measure of the *current* risk free rate as the first term in the right hand side of (3). Intriguingly, in some recent cases the r_f term itself has been the subject of some dispute. Some cases have, for example, argued that the observed long run government bond rate has been biased downwards because of the effect of quantitative easing. Nonetheless, provided $E[R_m]$ and r_f terms are estimated directly, the estimate of r_f will have little effect for a firm with a beta close to the market average of 1.

Finally, we should note that the use of the CAPM in the estimation of the cost of equity has been disputed. There is considerable evidence, both from the US and internationally, that the simple unconditional CAPM of the type favoured by regulators does not adequately describe the observed cross-section of stock returns. What is open to dispute is whether there exists a better model than the CAPM, and whether these results are a result of using "noisy " realised measures of past returns as opposed to estimates of expected return. These issues are the subject of considerable debate on which there is a large academic literature, and so we do not attempt to do anything other than note that debate here.

That said, it seems probable that any debate about profitability analysis will focus more heavily on the areas of modelling, particularly with regard to asset valuation issues, than it will on cost of capital estimation.

7. Alternative measures of profitability – Sales Margin Analysis

In the above assessments of profitability, we noted that an essential input is a modified asset value. Specifically, we need some notion of MEAs in order to assess the underlying assets employed, and this is true whether we are assessing an IRR on an ROCE based on MEAs. However, there are cases where determination of the asset base is highly problematic. This may be because of asset allocation issues (as in the recent Pay TV Movie case discussed above), or because of the valuation of intangibles, or even because a firm has very few physical assets, as in the case of many businesses based around intellectual property. In such cases, one may have to fall back upon margin analysis in assessing profitability. Conceptually, margin analysis is related to pre-tax ROCE as follows:

[11] Current market conditions perhaps provide a useful reminder of why this may be the case.

$$ROCE = \frac{EBIT_t}{CE_{t-1}} = \frac{EBIT_t}{S_t} \times \frac{S_t}{CE_{t-1}} \qquad (4)$$

Where *St* = sales (or turnover) at time t. We can define this EBIT/S measure as net return on sales (ROS). We can then split this into a gross margin and "other cost" components, by:

$$ROS = \frac{EBIT}{S} = \frac{(S - COGS)}{S} - \frac{OC}{S} \qquad (5)$$

Where COGS = cost of goods sold, and OC = other costs. The first term in the decomposition is "gross margin". Conceptually, separating return on sales into gross margin and other cost elements is useful as it focuses on the direct costs of producing a product and separates out the allocated general overheads and administrative costs that are likely to dominate the "other cost" category. However, comparability issues are difficult because firms may define the cost of goods sold and "other" elements differently. Whilst raw materials will always be an element of COGS, labour costs and other production costs will generally be separated into "direct" and "indirect" elements. In general, these cost classifications will differ between firms according to their internal management accounting processes, which means that any competition authority attempting to benchmark margins would have to ensure that all margin calculations had been carried out on a comparable basis.

8. Conclusions

In general, the problem that we need to address in any profitability analysis is whether a particular firm or group of firms is earning profits that differ from the normal profit one would expect to be earned in a competitive market. Theoretically, it is easy to show that the best solution to the problem is the application of the truncated IRR approach, a process which involves establishing opening and closing values of MEAs, and calculating the IRR implied by realised free cash flows derived from those assets. This approach has been the subject of a UK Office of Fair Trading working paper,[12] and has also been applied in a number of UK regulatory cases, including the current movies on Pay TV inquiry. However, we should note two caveats. First, when such MEAs can be calculated, subject to certain assumptions it is possible to show that an ROCE based on these values can give a reasonable solution to the problem. That said, IRR is less restrictive in the assumptions required for it to give a good signal of profitability. The second caveat is that IRR (or MEA-based ROCE) can only be robustly calculated when the requited MEAs can be established, and when adequate cash flow data is available. A particular challenge for such profitability analyses is the adequate valuation of intangible assets.

Despite these difficulties, the advantage of establishing either a truncated IRR or an ROCE based on MEAs is that such measures can be compared with a benchmark WACC derived from market-based estimates. Nonetheless, there may be occasions when the valuation of intangibles proves an intractable problem, or where the firm has no significant physical assets. In such cases, regulatory authorities would have to fall back on cruder comparative measures such sales margin.

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Table 1. Example Firm where accounting book value equals economic value

Item:		Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	Yr 6	Yr 7	Yr 8	Yr 9	Yr 10	Yr 11	Yr 12	Yr 13	Yr 14	Yr 15	Yr 16	Yr 17	Yr 18	Yr 19	Yr 20
Initial asset purchases	1000																				
Replacement		100	105	110	116	122	128	134	141	148	155	163	171	180	189	198	208	218	229	241	0
New assets		50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	-2274
Operating cash flows		200	210	221	232	243	255	268	281	295	310	326	342	359	377	396	416	437	458	481	505
Net cash flow	-1000	50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	2780
Dividends		50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	2780
Accounting depreciation		100	105	110	116	122	128	134	141	148	155	163	171	180	189	198	208	218	229	241	253
Earnings		100	105	110	116	122	128	134	141	148	155	163	171	180	189	198	208	218	229	241	253
Closing book value		1050	1103	1158	1216	1276	1340	1407	1477	1551	1629	1710	1796	1886	1980	2079	2183	2292	2407	2527	0
Closing equity		1050	1103	1158	1216	1276	1340	1407	1477	1551	1629	1710	1796	1886	1980	2079	2183	2292	2407	2527	0
Residual income		30	32	33	35	36	38	40	42	44	47	49	51	54	57	59	62	65	69	72	76
Value firm RIV	1472	1525	1579	1634	1691	1748	1807	1866	1926	1987	2049	2111	2173	2236	2298	2360	2421	2481	2540	2598	0
Change in economic value		53	54	55	57	58	59	59	60	61	62	62	62	62	62	62	61	60	59	57	-2598
Plus Dividends		50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	2780
Market rate of return		7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%	7%
ROCE		10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%

Table. 2. Example Firm where accounting depreciation is greater than economic depreciation so that accounting book value does not equal economic value

Item:		Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	Yr 6	Yr 7	Yr 8	Yr 9	Yr 10	Yr 11	Yr 12	Yr 13	Yr 14	Yr 15	Yr 16	Yr 17	Yr 18	Yr 19	Yr 20
Initial asset purchases	1000																				
Replacement		100	105	110	116	122	128	134	141	148	155	163	171	180	189	198	208	218	229	241	0
New assets		50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	-2274
Operating cash flows		200	210	221	232	243	255	268	281	295	310	326	342	359	377	396	416	437	458	481	505
Net cash flow	-1000	50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	2780
Dividends		50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	2780
Accounting depreciation		150	150	151	153	156	160	165	170	176	183	191	199	207	217	227	237	248	260	273	286
Earnings		50	60	69	78	87	95	103	111	119	127	135	143	152	160	169	179	188	198	209	873
Closing book value		1000	1008	1022	1042	1068	1099	1135	1176	1221	1271	1325	1382	1444	1511	1581	1656	1735	1818	1907	0
Closing equity		1000	1008	1022	1042	1068	1099	1135	1176	1221	1271	1325	1382	1444	1511	1581	1656	1735	1818	1907	0
Residual income		-20	-10	-1	7	14	20	26	32	37	42	46	51	55	59	64	68	72	77	81	740
Value firm RIV	1472	1525	1579	1634	1691	1748	1807	1866	1926	1987	2049	2111	2173	2236	2298	2360	2421	2481	2540	2598	0
Change in economic value		53	54	55	57	58	59	59	60	61	62	62	62	62	62	62	61	60	59	57	-2598
Plus Dividends		50	53	55	58	61	64	67	70	74	78	81	86	90	94	99	104	109	115	120	2780
Market rate of return (%)		7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0	7.0
ROCE (%)		5.0	6.0	6.9	7.7	8.3	8.9	9.4	9.8	10.1	10.4	10.6	10.8	11.0	11.1	11.2	11.3	11.4	11.4	11.5	45.8

Note that the Year 20 profit includes the gain on disposal of the asset

Table 3. Truncated IRR calculation for years 10-15 for the firm when accounting book value of the assets equals the economic value of the assets

Truncated period, year 10-15	Opening	Year 10	Year 11	Year 12	Year 13	Year 14	Year 15
Opening Accounting Book Value		1551	1629	1710	1796	1886	1980
Opening deprival value		1551	1629	1710	1796	1886	1980
Closing deprival value							2079
Accounting earnings		155	163	171	180	189	198
ROCE		10.0%	10.0%	10.0%	10.0%	10.0%	10.0%
Residual Income		47	49	51	54	57	59
Implied truncated cash flows	-1551	78	81	86	90	94	2178
PV RI over period	249						
Average ROCE over period	10.0%						
IRR over period	10.0%						

Table 4: Truncated IRR calculation for years 10-15 for the firm when accounting book value of the assets does not equal the economic value of the assets

Truncated period, year 10-15		Year 10	Year 11	Year 12	Year 13	Year 14	Year 15
Opening Accounting Book Value		1221	1271	1325	1382	1444	1511
Opening deprival value		1551	1629	1710	1796	1886	1980
Closing deprival value							2079
Closing Accounting Book Value							1581
Accounting earnings		127	135	143	152	160	169
ROCE		10.4%	10.6%	10.8%	11.0%	11.1%	11.2%
Residual Income		42	46	51	55	59	64
Implied truncated cash flows	-1551	78	81	86	90	94	2178
PV RI over period	247						
Average ROCE over period	10.9%						
IRR over period	10.0%						
Tuncated cash flows implied by accounting book values	-1221	78	81	86	90	94	1680

IRR on accounting book values	10.8%

Table 5. Accounting numbers and cash flows for firm growing at 5% p.a. without capitalisation of intangible assets

Item:	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6(H)
Opening tangible BV		1000	1050	1103	1158	1216	1276
Opening intangible BV		0	0	0	0	0	0
Opening equity		1000	1050	1103	1158	1216	1276
Closing tangible BV		1050	1103	1158	1216	1276	1340
Closing intangible BV		0	0	0	0	0	0
Growth		5%	5%	5%	5%	5%	5%
Gross income		300	315	331	347	365	383
R&D expense		105	110	116	122	128	134
R&D capitalised		0	0	0	0	0	0
R&D amortisation		0	0	0	0	0	0
Net income		195	205	215	226	237	249
Inv in new tangible assets		50	53	55	58	61	64
Inv in new intangible assets		0	0	0	0	0	0
FCF		145	152	160	168	176	185
PV FCF	2900	132	126	120	115	109	2298
ROCE		20%	20%	20%	20%	20%	20%
Capital charge		100	105	110	116	122	128
RI		95	100	105	110	115	121
PV RI	2900	86	82	79	75	72	1506

Table 6. Accounting numbers and cash flows for firm growing at 5% p.a. with capitalisation of intangible assets

With capitalisation	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6(H)	Year 7	Year 8	Year 9	Year 10
Opening tangible BV		1000	1050	1103	1158	1216	1276	1340	1407	1477	1551
Opening intangible BV		0	105	194	267	322	359	377	396	416	437
Opening equity		1000	1155	1297	1425	1538	1636	1717	1803	1894	1988
Closing tangible BV		1050	1103	1158	1216	1276	1340	1407	1477	1551	1629
Closing intangible BV		105	194	267	322	359	377	396	416	437	459
Gross income		300	315	331	347	365	383	402	422	443	465
R&D expense		105	110	116	122	128	134	141	148	155	163
R&D capitalised		105	110	116	122	128	134	141	148	155	163
R&D amortisation		0	21	43	66	91	116	122	128	134	141
Net income		300	294	288	281	274	267	280	294	309	324
Inv in new tangible assets		50	53	55	58	61	64	67	70	74	78
Inv in new intangible assets		105	110	116	122	128	134	141	148	155	163
FCF		145	152	160	168	176	185	194	204	214	225
PV FCF	2900	132	126	120	115	109	2298	n.a.	n.a.	n.a.	n.a.
ROCE		30.0%	25.5%	22.2%	19.7%	17.8%	16.3%	16.3%	16.3%	16.3%	16.3%
Capital charge		100	116	130	142	154	164	172	180	189	199
RI		200	179	158	139	120	103	108	114	120	126
PV RI	2900	182	148	119	95	75	1283	n.a.	n.a.	n.a.	n.a.

Table 7. Truncated IRR calculations for years 6-10 with and without capitalisation of intangible assets

Truncated IRR calculations:	End year 6	End year 7	End year 8	End year 9	End year 10
Implied cash flows, no intangibles:	-1340	194	204	214	1854
IRR	19.5%				
Implied cash flows, with intangibles	-1717	194	204	214	2313
IRR	16.3%				

SOME BACKGROUND ON EXCESSIVE PRICES

By Misja Mikkers and Wolf Sauter[*]

1. Health care reforms in the Netherlands

The introduction of competition in the Dutch health care sector has been long debated[1]. The Dutch government plans a step-by-step introduction of price competition between hospitals. For a comprehensive overview of the reform process, we refer to Helderman et al. (2005).

The Dutch reforms are based on a mandatory health insurance system for all Dutch citizens combined with a model of managed competition for hospitals. The health insurance package includes primary medical care and hospital care, but excludes dental and nursing home care. It involves virtually no co-payments and an optional deductible (between 0 and 500 Euro). Supplementary insurance policies (e.g. for dental and cosmetic care) are optionally available. The mandatory insurance for the basic benefits package aims at ensuring risk solidarity and universal health care access for all Dutch citizens. The mandatory insurance is complemented by a mandatory acceptance by health insurers of all enrollees, without room for risk selection (i.e. a refusal to insure) or price discrimination. A sophisticated ex-ante risk adjustment system is in place to compensate insurance companies for actuarially predictable health expenditure differentials induced by sociodemographic factors, such as age, sex, income, location and prior health care consumption (chronic pharmaceutical dependencies and prior hospitalization). The ex-ante risk adjustment system levels the playing field for health insurers by enabling price competition on the premium rates However, there is also an ex-post risk-sharing scheme in place, consisting of both a proportional risk-sharing component and an outlier risk-sharing component. These ex-post compensations between profit- and loss making health insurers partly dilute the ex-ante incentives for vigorous price negotiations with health care providers.

The basic idea behind these reforms is that health insurers will start 'managing competition' between health care providers by negotiating price discounts from a selectively contracted network of health care providers. In this way, insurers can compete for enrollees by offering health plans that are both attractively priced, but still give a reasonably broad choice of health care providers. Reports by the Dutch Healthcare Authority monitoring the competitive hospital segment, however, indicated that selective contracting of hospitals has been virtually non-existent. Rather, most insurers have been contracting almost every hospital. The main reasons for this lack of selective contracting are lack of transparency of quality information, as well as the legal constraints on using co-payments for out-of-network health care. This makes patient steering to preferred providers more difficult because the benefits (higher quality) are not transparent and there is little financial downside for out-of-network care.

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[*] Both authors are employees and Dutch Healthcare Authority and affiliated with Tilburg Centre for Law and Economics (TILEC, University of Tilburg). This paper reflects the personal views of the authors, which are not necessarily those of their employers. This paper is not in any way binding for the Dutch government, in particular for future decisions of the Dutch Healthcare Authority on the topics discussed.

[1] This paragraph is taken from Halbersma et al.(2010)

Other characteristic features of managed care in the United States, such as utilization review by health insurers, are also still in their infancy in the Dutch health care system.

Annual health care expenditures (excluding long-term care) in the Netherlands for amount to approximately 2,400 Euro per capita, half of which were funded by payroll taxes, the other half being funded by the insurance premiums.

The next important development is the progressive ("step by step") liberalization of prices of curative health care. Fully liberalized hospital prices now account for now approximately 35% of the number of treatments, and this is likely to be 70% by 2012. The other parts of hospital production (complex care, urgency care etc.) remain regulated. Within the free professions some production is liberalized (e.g. physiotherapy) and other parts remain regulated (e.g. general practitioners).

Long term care on the other hand remains dominated by regional monopsony purchasers facing private providers with little competition so far. These providers are regulated.

2. Dutch Healthcare Authority

In October 2006 the Healthcare Authority NZa has been introduced as an independent regulator as well as sector-specific competition authority, an innovation that (with the recent exception of the UK) appears largely unique in the EU today.[2] Apart from the NZa there are a number of other authorities that are involved in healthcare regulation in The Netherlands. For instance there is an agency, CVZ, that is responsible for advising on whether specific forms of care should be covered by basic insurance or not and that is also responsible for the administration of the risk adjustment system. The healthcare inspectorate IGZ is in charge of the quality of healthcare provision and of developing and/or approving health quality standards. Apart from these healthcare specific agencies there are a number of regulators that are responsible for the entire economy and therefore also cover healthcare. These include the General Competition Authority NMa as well as the general regulators for behavioural and solvency aspects of financial supervision, the Central Bank DNB and the Securities Authority AFM.

The Healthcare Authority is responsible for market supervision as well as market development: i.e. health insurance markets; healthcare provision markets; and healthcare contracting markets. It is also charged with the more traditional tasks of a rate regulator such as tariff and performance regulation; setting prices (including maximum and minimum rates as well as bandwidth rates, various forms of price caps and/or unregulated prices) and budgets; and defining standard product categories.

Furthermore the Healthcare Authority supervises the application of the 2006 Health Insurance Act, notably the key elements of the system, i.e. the duty of care; open enrolment; and community rating. Similarly relating to long term care (e.g. nursing homes and care for the handicapped) the Healthcare Authority is charged with supervising the lawful and effective execution of the Act on Long Term Care. Finally the Healthcare Authority is responsible for advising the Health Minister both on request and ex officio. This latter role tends to take the form of competition advocacy.

Of primary interest for the purposes of this paper are two types of relevant powers enjoyed by the Healthcare Authority:

[2] This paragraph is based on the chapter "Experiences from the Netherlands: the application of competition rules in healthcare" by W. Sauter in Van de Gronden et al. (2011).

- The power to impose specific obligations on individual parties with SMP. This power is based on EU principles developed in the context of electronic communications, and may for that reason perhaps be more relevant outside The Netherlands.

- The power to impose general obligations on all market parties by intervening in contract terms and the contracting process. This power so far appears to be unique to The Netherlands as an instrument of sector-specific competition policy. Examples are obligations with respect to transparency (of quality and contractual terms), but also to other contractual terms (entry to electronic networks, response time etc).

As a background for the OECD roundtable we will only address the power to impose specific obligations.

2.1. Significant market power (SMP)

A finding of SMP empowers the Healthcare Authority to impose specific obligations on the party or parties with SMP in order to promote effective competition. As mentioned above, the concept of SMP was borrowed from electronic communications. It is applicable across the entire healthcare sector (hence both to the regulated and the liberalised segments), and is applied to individual undertakings based on an in-depth (and time-consuming) analysis. The key criterion for a finding of existence of significant market power is dominance.

There are three steps to determining SMP:

- First, the definition of the relevant (product and geographical) market, on case by case basis, as in the case of merger analysis. The product market is less contested - as mentioned above from the perspective of the patient different treatments are unlikely to be in the same market, whereas from the perspective of the provider they may be grouped together by specialisation or even more abstractly as clinical versus non-clinical care: the results do not so far lead to significant problems or discussion - whereas the geographical market is highly problematic due to the third party pays principle. The same new methods devised for mergers that were mentioned above will be used here as well.

- The second element is dominance analysis. The question here is whether the party (or parties, in the case of collective dominance) concerned has the ability to determine its behaviour independent from other market participants, i.e. customers, suppliers and competitors. The necessary analysis is based on a combination of market share (with a presumption of dominance at shares that are over 55\%), market structure, and effects. Unlike dominance abuse in general competition law, proof of abuse is not necessary for an SMP finding. Nevertheless, based on national electronic communications case law with regard to SMP where showing 100\% market share was not considered sufficient, the existence of "opportunities" and "incentives" to restrict competition must be shown.

- Third a proportionate remedy (obligations) must be imposed. These remedies will be dealt with in more detail in the next paragraph.

A finding of SMP triggers proportional ex ante obligations. These are intended to be preventive, and not punitive. Unlike dominance abuse, which involves a legal transgression that is met with sanctions, a finding of SMP does not mean any legal rule has been breached. On the other hand if SMP obligations are not met or respected a breach will occur, and sanctions can be meted out accordingly.

The possible remedies are the following: transparency; non-discrimination; the obligation to deal; providing a reference offer; the obligation to provide unbundled services; apply cost accounting principles; accounting separation; and individual price regulation (in case of a risk of excessive or predatory pricing). In each case the maximum term of an obligation (prior to renewed examination of its continued justification) is three years. The Health Minister can add new categories of obligations, one of which, structural separation, is regularly debated as a possible supplement to the current toolbox. From a perspective of effectiveness and least intrusive intervention it might make more sense to provide the Healthcare Authority with more powers regarding mergers, i.e. ex ante to avoid competition issues arising, rather than with draconic divestiture powers ex post.

1. SMP remedies must always be tailored to the specificities of the case at hand. The proportionality of the remedy to the competition problem involved is one key to judicial review, the "opportunities and incentives" for anticompetitive behaviour that were mentioned above are the other. Finally, it is possible for the Healthcare Authority to impose interim measures in those cases where there is an irredeemable risk of harm as a result of a presumptive SMP position. In this case it is the former rather than the latter dimension that is likely to be strictly scrutinised.

The policy priorities of the Healthcare Authority toward SMP are exclusion and selling power. Where possible it would combat exclusion of competitors as a first order effect rather than the exploitation of consumers which is a second order effect. That is to say it considers promoting competition a more effective way of fighting exploitation than regulation which is likely to create dependency, is likely to throw up entry barriers and perpetuates itself. Likewise the Healthcare Authority intends to concentrate on selling power and not buying power especially where the benefits of buying power are eventually passed on to consumers. This would appear to be the case as long as health insurance markets are competitive.

The Healthcare Authority would tend to concentrate on horizontal instead of on vertical restraints of competition, and on leveraging of market power (for instance leveraging of SMP from the regulated into the liberalised sector). In the event of horizontal and vertical integration it would focus on foreclosure. The Healthcare Authority would address issues like low prices and discrimination only in presence of clear-cut foreclosure effects. This approach is broadly in line with the general competition policy priorities as expounded by the European Commission, albeit applied to the healthcare context. It is worth noting however that these are so far largely points of principle rather than examples of actual practice, which is slow in emerging.

3. A price cap for the Zeeland Hospitals

This case[3] is a merger between the only two general hospitals in central Zeeland[4], located on a peninsula between Antwerp and Rotterdam that is isolated from major population centres and hospital facilities (by Dutch standards). It took over three years between the first notification in September 2005 (which was withdrawn after the Competition Authority decided a formal second phase clearance would be required) and the final second phase decision (following a second notification) which cleared the merger subject to a number of conditions in March 2009. The case was subject to extensive lobbying efforts, while the Healthcare Authority submitted four opinions and the Inspectorate submitted two. Eventually it was the argument of improved quality that turned out to be decisive in the context of an efficiency defence.

There was a nearly complete overlap between the offerings of the two merging parties with 345 and 365 beds respectively, except for a top-clinical treatment facility for AIDS/HIV in cooperation with the

3 This paragraph is mainly based on Canoy and Sauter (2010)

4 Decision of 25 March 2009, Case 6424 Ziekenhuis Walcheren – Oosterscheldeziekenhuizen, http://www.nma.nl/images/6424BCV22-154011.pdf

medical centre of the University of Rotterdam operated by one of them. As such this was a horizontal merger between the two nearest rivals: a travelling time analysis showed that the merging hospitals were first and second choice for over 75% of consumers in the area. (The nearest general hospital was at 45 minutes travelling distance and the next nearest hospitals at between an hour and 90 minutes.) The product market in this case was defined as the markets for clinical general hospital care respectively for non-clinical general hospital care.

The geographical market, based on an analysis of travelling time and consumer flows was defined as central Zeeland. In the case as it was finally decided the market definition was not contested.

The merger would create a near-monopolist with 84% of the market for clinical general hospital care and 88% of the market for non-clinical general hospital care. There were no alternative providers within the relevant market nor was there any threat of market entry. Moreover health insurers could not exert countervailing market power given their obligation to contract adequate levels of care and the lack of alternatives in the region. Hence it was clear that the merger would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position.

The hospitals raised an efficiency defence, claiming that individually their departments were too small to ensure 24/7 continuity of care (especially in paediatrics and gynaecology); that they were attracting too few cases to allow for sub-specialisation, or create a first aid treatment centre and an intensive care unit at higher levels that (according to the merging parties) were required given their regional function. As a result, they claimed, they were underperforming which could lead to a downward spiral where it would become impossible to attract consultants and consultants already present would desert the hospital, with a danger that intensive care as well as mother and child care would be closed down and disappear from the region. A merger on the other hand would lead to the needed quality improvements (as well as the cost efficiencies and enhanced leadership more generally claimed in mergers).

The relevance of this plea was underlined as it was supported by the Quality Inspectorate (the Quality regulator on behalf of the Ministry of Health). In fact the Inspectorate claimed that the downward spiral could lead to the disappearance of general hospital care from central Zeeland altogether and that only a complete merger between the two parties could save the day.

As mentioned before, the Dutch Healthcare Authority issued four opinions on the case. Although the Dutch Healthcare Authority pleaded for structural remedies in the first place, they advised to impose behavioral remedies (including a price cap), whenever structural remedies were not possible.

The Competition Authority held, in the first place, that the conditions for a successful efficiency defence had not been met. It felt that it was not plausible that the benefits claimed would accrue to consumers and that they could not be verified. Crucially, the Competition Authority did however accept - on the authority of the Inspectorate - that the improvements were merger specific. It next solved the case as follows: the remedies would ensure that the conditions for the efficiency defence could be met after all, allowing clearance of the monopoly merger. Thus it:

- imposed a price cap for the competitive sector,
- required commitments with relation to the quality improvements that had been claimed (e.g. the next level intensive care and first aid units),
- and demanded opening up of the collective agreement between the hospitals and their consultants enabling the latter to set up shop in competition with the merged entity.

Structural remedies were not considered because they were considered too complicated to put in place.

The price cap suggests that the average product price (in the liberalized segment) in the merged hospital cannot exceed the average product price in the sector when corrected for case mix. This can be formulated into the following requirement for hospital *h*:

$$\frac{R_{h^*}}{\sum_d y_{h^*d}} \leq \frac{\sum_{h \neq h^*} R_{h^*}}{\sum_{h \neq h^*} \sum_d y_{h^*d}} \bullet \frac{\sum_d w_d y_{h^*d} / \sum_d y_{h^*d}}{\sum_{h \neq h^*} \sum_d w_d y_{hd} / \sum_{h \neq h^*} \sum_d y_{hd}} \qquad (1)$$

The left hand side is the revenue of hospital *h** with the price cap per DRG volume. The DRG volume is a simple summation of the treatments *y* provided at a given hospital and it therefore does not reflect the hospital's degree of specialization. On the right hand side, the first fraction is the industry wide DRG revenue, while the last fraction, the product mix index, is intended to correct for the fact that the product mix of hospital *h** may be more or less resource demanding than the industry mix. The products are weighted (*w*) with the prices of the products in the liberalized segment. Quality of treatments is not mentioned in the above formulation.

In the implementation of the remedies, the Competition Authority closely cooperates with both the Quality inspectorate (especially with regard to the monitoring of the implementation of the required quality improvements) and the Dutch Healthcare Authority. The Dutch Healthcare Authority has both the data and the models to calculate and announce the imposed price cap. The merged hospital will report with the inclusion of a statement by an independent auditor, the Dutch Competition Authority about the compliance with announced price cap.

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SUMMARY OF DISCUSSION

By the Secretariat

1. Introduction to Excessive Prices as a Competition Problem

The Chair, Alberto Heimler, opened the Roundtable discussion on excessive prices by remarking that exploitative abuses constitutes the area of antitrust where one finds perhaps the lowest consensus among competition authorities and between lawyers and economists. It therefore provides a rich and controversial topic for discussion. In relation to price discrimination, for example, lawyers have typically maintained that a blanket prohibition is necessary, principally on grounds of fairness, whereas economists argue that price discrimination may often be pro-competitive. In time, the latter arguments proved to be the more compelling, and price discrimination cases are rarely taken nowadays, at least under antitrust laws. The situation is more complex, however, in relation to the question of excessive prices. Allocative inefficiency—meaning the departure of prices from marginal cost—is, under basic economic theory, a particularly damaging feature for a market economy, a factor that might support the conclusion that antitrust enforcement against excessive prices is necessary. Yet, few economists support intervention in excessive price cases, because of the potential negative effects on investment and entry, which arguably may outweigh any positive effects resulting from reduced prices. While lawyers are typically more ready to intervene in such cases, the Chair noted the example of Article 102 of the Treaty on the Functioning of the European Union (TFEU), a provision which makes express reference to exploitative abuses in its text, yet has been applied mainly to address exclusionary abuses. Thus, the central question is whether and how excessive prices should be addressed via antitrust enforcement.

The Chair then introduced the three specific subtopics to be addressed during the Roundtable: firstly, whether the unilateral conduct provisions of a jurisdiction extend to a prohibition of excessive prices; secondly, standards for intervention, which includes the question of when a price can be said to be non-excessive; and thirdly, the role of regulation and the relationship between competition enforcers and regulators in addressing excessive prices. The Chair also introduced the two experts that would speak during the discussion: Alan Gregory of the University of Exeter, and Misja Mikkers of the Dutch Healthcare Authority.

The Chair, however, first gave the floor to David Gilo from the Israeli delegation, who spoke in his former function as university professor, noting the general reluctance of competition authorities to take on excessive price cases. In the United States, excessive prices cannot constitute an antitrust violation, while in the European Union (EU), excessive prices may violate the competition rules but the European Commission exercises its enforcement power with great caution in this area. The reasons for this reluctance are threefold: (i) excessive prices are presumed to invite new entry into the market, and are therefore self-correcting; (ii) excessive prices are presumed to encourage *ex ante* investment; and (iii) the difficulty of implementing any rule against excessive prices. The presentation focused on the first ground, namely, the relationship between excessive prices and entry. There are two sub-arguments involved here: that excessive prices encourage entry, after which the price goes down, and moreover, that due to the prospect of new entry, the dominant firm will lower its price in order to deter entry already *ex ante*. Gilo challenged these assumptions, arguing that if the potential entrant knows what the post-entry price will be, meaning that there are no information problems, and assuming that secret entry is not possible, then, in

general, excessive pre-entry prices are irrelevant and will not invite entry. Given that it is the post-entry price that determines the profitability of entry, the pre-entry price cannot encourage entry.

David Gilo then noted some alleged qualifications of this assessment. Firstly, it has been argued that where the potential entrant has information problems, in particular where it does not know the efficiency or marginal cost of the dominant firm, excessive prices invite entry because the potential entrant believes the incumbent to be inefficient, and so that entry is more profitable than in reality. In this situation, however, David Gilo argued that where excessive prices are prohibited, the pre-entry price may have an even stronger signalling effect. It is sufficient that an inefficient incumbent, subject to a rule prohibiting excessive prices, sets its price somewhat above that of an efficient incumbent; assuming that the antitrust agency can assess the competitive price, the inefficient dominant firm is permitted to charge somewhat more than an efficient one, which has even stronger signalling value than alternative pricing decisions in the absence of excessive price enforcement. Secondly, it has been argued that excessive prices could signal to the potential entrant that under collusion, the collusive price is going to be high, that is, an excessive price might invite a potential entrant hoping to collude with the dominant firm. However, David Gilo argued that entry of this sort is not in fact desirable. Thirdly, excessive prices may signal to the entrant that there are capacity constraints in the market, so the potential entrant could enter and add capacity. While this point has some merit, situations where the capacity constraints are imposed exogenously on the market (e.g. after a natural disaster) must be distinguished from situations where the capacity constraints are the result of a strategic decision made by the dominant firm in response to an existing barrier to entry. Under the first scenario, high prices should be tolerated by the competition authority, in order to allow the excess demand to be dissipated away. Excessive prices should not be permitted in the second situation, however, on the basis that where the dominant firm chooses strategically to decrease capacity, it must be assumed that entry barriers are high, in which case the potential entrant will not enter in any event, fearing the response of the dominant firm after entry. Furthermore, David Gilo suggested that excessive prices may actually deter entry at times, citing three examples. Firstly, where the entrant lacks information about its own costs after entry, an excessive price might suggest that costs in the industry are large, which could deter entry. Secondly, the dominant firm might want to present the appearance of being an efficient firm even when it is in fact inefficient, and thus will charge the efficient price in order to mislead potential entrants and deter entry. This practice may be more common in cases where excessive prices are permitted than where these are prohibited. Again, excessive prices deter entry in this case, because by permitting excessive prices mimicking efficiency by the dominant firm becomes more salient. Thirdly, the fact that a dominant firm reduces its prices significantly after entry may indicate that prices were excessive prior to entry. If this benchmark is used, dominant firms will tend to react to entry in a softer manner, rendering entry easier. In this way, again, excessive prices deter entry, and so prosecution of excessive prices makes entry more likely.

As a final point, David Gilo highlighted some special considerations that apply to Israel that may justify greater antitrust enforcement against excessive prices than in other jurisdictions. Firstly, Israel's Antitrust Authority (IAA) has wider information gathering powers than sector regulators. Secondly, decisions on excessive prices taken by the IAA are appealed to a specialised tribunal with particular technical expertise, rather than an ordinary civil court. Thirdly, Israel is a small market, with limited international trade, limited trade with its neighbours, and where demand is often highly inelastic. Finally, the country has many former government monopoly companies which have retained a highly entrenched dominant position even after liberalisation.

In response to a request for clarification on the issue of exogenous constraints by an EU delegate, David Gilo explained that this occurred in cases such as the aftermath of Hurricane Katrina, where capacity in the market was destroyed. In these cases, high prices are necessary in order to ration the excessive demand over supply that results. Clarifying the issue of the role of demand in response to a question from a

delegate from Chinese Taipei, Gilo explained that although demand in Israel was not entirely inelastic, it was relatively so, insofar as Israelis generally did not respond to high prices.

2. Identifying Excessive Prices

The Chair then moved the discussion to considerations of when prices are excessive—an issue separate from the question of when prices are non-excessive, which would be considered at a later stage. To present the topic of price screens, the Chair introduced Frank Maier-Rigaud from the OECD Secretariat, who began by noting the general difficulty of identifying when prices are excessive. Indeed, it could be argued that tests for excessive prices resemble the test proposed by Justice Stewart of the US Supreme Court, namely "I know it when I see it".[1] Nonetheless, the literature on excessive prices has addressed these difficulties through the notion of screens, which seek to identify the conditions under which excessive prices are most likely to arise. There are two dimensions inherent to the screens concept: (i) under what conditions are excessive prices more likely to arise, that is, when are authorities more likely to see them; and (ii) under what conditions do excessive prices become a policy problem, so that authorities are less likely to look away? The presentation focused on the four most prominent screens, noting the discussion of additional screens in the background paper. While the presentation focussed on individual screens, the literature often suggests a cumulative application, with a series of different screens to be passed before pursuing an excessive price case. The single most important screen is that of *high and non-transitory entry barriers*, which ensures the permanence of an excessive price scheme—that is, an entrenched monopoly position. Where there are legal barriers to entry, the appropriate remedy is advocacy. Where there are strategic barriers to entry, the competition authority can bring a standard antitrust action against exclusionary conduct. The principal domain of excessive price cases arises when entry barriers are structural in nature, although here too there may be a role for advocacy. Two further screens have been proposed that both concern dominance: one focuses on the *degree of dominance*, essentially requiring super-dominance before an excessive price case should be pursued; and the other concerns the *origin of dominance*, for example, whether it is the result of competition on the merits, or conversely, whether it is the result of a past unprosecuted exclusionary abuse, or a market position inherited by a former state-owned enterprise. The fourth principal screen views *competition authorities as regulators of last resort*, in markets where the sector regulator is weak or entirely absent. Such circumstances may arise because the regulator has weak legal powers or where the regulator applies its substantial powers inappropriately, either because it is newly established or captured. While it may be argued that advocacy for improved regulation is the most appropriate response in such cases, there are reasons why competition enforcement may be preferred: for example, there may be weak *ex ante* grounds for regulation; or cross-jurisdictional issues without proper cross-jurisdictional regulator; competition enforcement may provide a more timely response; in economies transitioning to a market based economy or where liberalisation and privatisation stopped short of creating competitive markets, enforcement may provide a possibility to jump-starting competition. Where competition law is enforced in regulated sectors, however, one must bear in mind the considerations already discussed during a Roundtable in February 2011 on the Regulated Conduct Defence in. As a final issue, limitations to the use of screens were considered. The principal problem associated with the use of such screens is the fact that they are based on the prosecutorial discretion of the competition authority. Informal or non-binding screens that are used in a case selection or priority-setting context are neither part of the competition law nor of the case law. The submission from South Africa, for example, discusses this problem with respect to super-dominance, where the legal requirement is merely to establish dominance. This may lead to difficulties in the context of private actions, insofar as the law applied by the courts may not reflect additional screens utilised by the competition authority. Moreover, within an administrative law system, a competition authority relying on screens may run the risk of an administrative review.

1 *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

In response to the presentation, the Chair reminded delegates that the effectiveness of an advocacy strategy greatly depends on its reception by the executive or legislature as it otherwise merely provides a description of the problem without solution. The Chair then mentioned the *United Brands* case,[2] in which the European Court of Justice (ECJ) established the legal test for excessive prices as an abuse of dominance under EU competition law. He asked whether the test remains valid, and in particular, in light of the reference in *United Brands* to competitors' costs, whether and how the test could be applied in situations without competitors, for example, in an unregulated monopoly case. The delegate from the European Union took the position that the *United Brands* test remains a valid way of thinking about excessive prices. Interestingly, the facts of *United Brands* did not present a typical example of excessive prices, insofar as the market concerned (bananas) was different to the sort of markets (for example, those with high entry barriers) in which excessive price concerns typically arise. In the case itself, the Commission found that the price charged for bananas differs greatly between Member States—in particular, the prices charged in Ireland were half those charged in Germany, Denmark and other markets. The Commission, on the assumption that the price charged in Ireland had to be profitable, took the view that charging the double in other markets must be excessive. However, the Commission lost the case on appeal before the ECJ, on that basis that it was not obvious that the price in Ireland was a profit-making price; the ECJ held that the Commission should have looked at both the price and the cost of supplying bananas, which it had not done. The ECJ then outlined a two-stage test for excessive prices under EU law. The first limb of the test seeks to establish whether there is an excessive profit margin, by comparing prices to costs. The rationale here is avoidance of a finding of excessiveness where the price seems to be high but is in fact justified, either by the risks linked to the particular investments made for example or where the margin is low as costs are high as well. Thus, there is no *a priori* condemnation of high prices. The second limb of the test assesses whether the price is unfair or excessive in itself or compared to competing products. The second part of this second limb seeks to avoid the condemnation of high profits that result from efficiency, even though there may not always be a competing product in any particular case—instead, only high profits that result from the exercise of market power are worthy of antitrust scrutiny. Such a comparator might be identified by comparing the price under scrutiny with the price obtained for the same product in another market, or the price charged by the dominant firm with the price of a smaller rival in the same market, or it may be that the price has gone up over time without any justification. In every case, the test would seek to distinguish between situations where profit-margins are high because of efficiency or superior market performance, on the one hand, and where there are high prices as a result of the exercise of market power, on the other. In that manner, the *United Brands* test is a valuable mechanism by which to narrow the type of situations where the Commission will intervene. So, the delegate concluded, the test remains valid and useful, but it is necessary to take into account its background and meaning, which was acknowledged by the ECJ in *United Brands* itself, which stated that the test is not the only or exhaustive way to look at the problem of excessive prices.

Alberto Heimler, the Chair then described a case taken by the Swiss Competition Commission (ComCo), addressing mobile termination rates between domestic mobile telecommunications operators in Switzerland. These rates were unregulated, and the ComCo held that the prices charged were excessive. The Chair inquired about the test used by the ComCo to determine that the rates were excessive, and furthermore, about the role of regulation in the case. The delegate from Switzerland explained that the test used was a combination of several tests, primarily a benchmark test, which compared Swiss termination rates to rates charged in a number of similar or neighbouring markets, namely: tariffs for on-net calls including termination rates; the regulated termination rate on the fixed network; the regulated termination rate for international calls in the mobile network; and regulated and unregulated termination rates for calls in other European countries. The ComCo further benchmarked the profits of the dominant operator, Swisscom, and concluded that, in international comparison, Swisscom's profits were extraordinarily high.

2 Case 27/76 *United Brands v Commission of the European Communities* [1978] ECR 207.

Finally, the ComCo engaged in a comparison of cost estimations for termination rates used by other European regulators, which revealed that the true costs of termination was below the Swisscom rates.

As regards the role of regulation, the delegate explained that in Switzerland a purely *ex post* regulatory regime is in place in the telecommunications sector. In relation to termination rates, priority is afforded to negotiations between telecommunications operators, and it is only in cases where private agreement proves impossible that the regulator becomes active. Thus, in the case at hand, the regulator did not claim jurisdiction. Nonetheless, the telecommunications regulator and the ComCo have a good working relationship, and regularly provide support to each other. While Swisscom had claimed at the beginning of the investigation that termination rates were outside the jurisdiction of the ComCo, this issue was resolved by the appeal court, which held that the telecommunications act did not exclude the application of competition law. On appeal on the merits, the federal administrative court and the appeal court both confirmed that the termination rates charged by Swisscom are very high, and both decisions appear to support the approach taken by the ComCo in the case. However, the ComCo's decision was ultimately overturned.

The Chair turned the discussion to the well-known *Mittal* case concerning excessive prices in the steel sector in South Africa. This case does not concern a natural monopoly and the concerned prices were arguably market-based insofar as they were based on producer and transport costs, although above the competitive price. The Chair asked how the South African Competition Commission had proceeded in analyzing the case under these circumstances, and more specifically whether, in case the domestic producer had been found to be less efficient, this could have justified the price. The delegate from South Africa clarified a number of factual points concerning the role of exports, efficiency and costs, including the question whether the market could be considered a natural monopoly. Mittal charged its local customers the same price that those customers would have to pay for steel imported to South Africa from the Black Sea. As there was no domestic competition, local customers had no alternative to paying this price. At the same time, Mittal exported a substantial portion of its production at lower prices. South Africa is one of the cheapest steel producers in the world, with huge resources of iron ore and low production costs. Thus, the level of exports was not motivated by low local demand, but rather by falling average costs over the whole range of feasible output with local demand below the minimum efficient scale. Another key consideration costs and whether Mittal's costs are low because the firm is efficient, or if this is due to other factors. The complainants argued that Mittal was not particularly efficient, insofar as it was not making the level of profits that could be expected in light of its low material costs. On appeal, the court remitted the case back to the Competition Tribunal for a further assessment of the question of profitability.

The Chair turned to the United States, one of the few jurisdictions where excessive prices are not an antitrust violation. However, the US competition authorities still scrutinise prices, and since 2002, the Federal Trade Commission (FTC) has tracked retail gasoline prices in a significant number of cities and urban areas. The Chair inquired about the result of these nine years of monitoring in particular whether a threshold has been identified above which gasoline prices become excessive so as to warrant further examination. Such examination may not necessarily be based on a unilateral conduct violation, but may lead the FTC to suspect that some other violation, such as for example a cartel, may be in place. More generally, the Chair asked whether there are any tangible results from the monitoring project. The delegate from the United States explained that the monitoring project is not concerned with setting a benchmark or threshold, but rather seeks to determine whether there have been unusual or anomalous price patterns over time. If patterns appear unusual, the FTC investigates whether the reasons for this are benign business conduct or not. In almost all instances to date, the FTC has determined that the anomalous price patterns identified are attributable to normal business conduct. Both informal inquiries and full-scale formal investigations have been opened on the basis of the monitoring data, but thus far the FTC has had no reason to pursue these cases further to a complaint or a consent decree. Nonetheless, the monitoring project

has proven useful to the FTC, both for purposes of greater market knowledge, and to be better able to respond to inquiries about the gasoline market in the US.

The Chair remarked that the monitoring exercise may have an indirect effect, insofar as the industry knows that gasoline prices are being monitored by the FTC, so it may serve as an *ex ante* warning. The Chair then introduced a case dealt with by the Bulgarian competition authority, which addressed excessive prices in an unregulated market, namely the market for inputs to cement production. The Chair asked the delegate from Bulgaria to clarify the issue of dominance in that case, as well as whether under Bulgarian competition law producers are obliged to justify prices according to costs, and whether the case might be better conceptualised as an example of price discrimination, insofar as the firm discriminated between producers and in favour of its own cement-producing subsidiary. The delegate from Bulgaria explained that the case concerned the market for granulated slag, a waste product from iron production, and an essential raw material in the production of slag cement. The defendant firm was the only iron producer, and thus also the only producer of granulated slag, in Bulgaria. The competition authority considered the possibility of competition from imports, but this proved unfeasible due to the high transportation costs involved. The competing cement factories confirmed that it was impossible for them to import the raw material. Moreover, there were no free quantities of granulated slag available in the countries neighbouring Bulgaria. On this basis, the competition authority took the view that the defendant firm had monopoly power in the market. On the question of discrimination, the delegate noted that the case originated in the competition authority's consideration of an agreement for a joint venture between the dominant firm and a new entrant. Prior to the assessment of that agreement, the competition authority was unaware of the competitive price level for the product—a "cellophane fallacy"-type problem. When the authority examined the agreement, it realised that the prices charged to other cement producers were very high in comparison, and so the authority prohibited the agreement and opened an investigation for excessive price. The evidence revealed that the prices charged were indeed very high, and so the competition authority held that the dominant firm had set excessive prices for all four competing cement producers.

The Chair, Alberto Heimler, then turned to Germany, noting that German law has a particularly developed jurisprudence on excessive prices, with the law specifying how to make comparisons and identify excessive prices. In its submission, Germany reported on a specific provision relating to the energy sector, authorizing profitability comparisons with other public utilities, to assist the Bundeskartellamt in identifying excessive prices in this sector. The Chair inquired about the operation of this cross-sector comparison mechanism, and whether the "reasonable mark-up" standard found in the German law provided sufficient legal certainty for companies. Furthermore, the Chair noted two cases that had occurred in the energy sector, relating to gas and district heating prices, both of which had ended with the acceptance of commitments, and asked for clarification as to the scope of the commitments granted and whether the cases remained on-going. The delegate from Germany confirmed that the German competition authorities have recently conducted several cases in the field of excessive prices, which in the view of the authority have had immediate benefits for consumers. At the same time, the authority was aware of the need to avoid potential negative effects on competition, and so exercised great care when taking enforcement action against high prices. Recent cases focused on the electricity and gas sectors, where ten years after liberalisation, these markets remain characterised by high concentration, vertical integration, and important technical, structural and sometimes even legal barriers to entry. In order to foster competition in these sectors, the German government introduced several measures to facilitate abuse control. In particular, a special provision was adopted in 2007 that only applies to electricity and gas markets and prohibits the abuse of a dominant position in these markets by demanding fees and other business terms which are less favourable than those charged by other public utilities or in the same or in comparable markets. Further to this, the provision also prohibits "demanding fees which unreasonably exceed the costs". Choosing a suitable benchmark within the comparable market approach requires the identification of companies that are as similar as possible to those under investigation. Although in theory, comparator companies could be in a different sector, in practice such companies are unlikely to be

sufficiently similar for comparison. Differences such as structural differences in cost are taken into account via mark-ups or deductions from the benchmark, and the German Federal Court of Justice emphasised that, especially in cases where there is a small basis for comparison (e.g. only one comparator company), the benchmark price with the mark-ups and deductions has to be calculated as precisely as possible, with an additional security mark-up to be added to the benchmark price, to account for general uncertainties. These mechanisms are safeguards to ensure that the established benchmark price will be as adequate as possible for comparison.

The heating current case by the Bundeskartellamt provides, in the view of the delegate, a practical example of how a suitable benchmark might be found; the proceedings started with information-gathering from 25 suppliers of electricity used for heating purposes, which were all active on different regional markets. Nineteen of these companies were under suspicion of charging potentially excessive prices, and another six were seen as potential benchmark companies. During the investigation, one of the suspected companies could show comparative low net returns, and so the initial suspicion of excessive prices was dropped, and that company was later used as a benchmark. The specific energy sector abuse provision mentions explicitly the demanding of fees that unreasonably exceed cost, thus codifying the concepts of cost control and profit limitation that had been developed under the general unilateral provisions. On the question of legal certainty for companies, the delegate noted that in principle, excessive prices will be investigated and prohibited only where these are the result of the abuse of market dominance and are not objectively justified; this is the case under both the special utilities provision, as well as the general unilateral provisions contained in German competition law, which correspond to Article 102 TFEU. What exactly constitutes an abuse can be decided only after an appraisal of all the relevant circumstances of an individual case. However, only substantial deviations from the benchmark price are considered to be abusive, which is why a substantiality mark-up is added to the benchmark price in the comparative analysis. For the calculation of that mark-up, the degree of competition on the market under investigation is taken into account, which ensures that as effective competition develops on that market, the need and potential for intervention declines. For the gas and electricity markets, the legislature added a reversal of the burden of proof, and so the dominant companies have the responsibility of demonstrating that their behaviour is not abusive and that their prices are objectively justified.

As a result of the gas price proceedings, many companies entered into commitments with the Bundeskartellamt, committing to postpone envisaged price increases and to grant customers a bonus with their next gas bill. The delegate explained that the direct benefits to consumers amounted to about €130 million, while total benefits (including indirectly through the tax system) amounted to about €440 million. On the basis of these commitments, the Bunderkartellamt terminated proceedings against the companies concerned. In the heating current case, most proceedings were similarly closed with commitment decisions. Initially, the Bundeskartellamt investigated nineteen companies as potentially demanding excessive prices; four of those companies were found to have comparatively low net returns, so that the cases against these were dropped. One company unsuccessfully appealed the obligation to provide information, so that proceedings remain on-going, with a decision in the case to be published shortly. In relation to the heating current case, the delegate expressed the view that the commitments received will reduce entry barriers and make consumer switching easier, thereby stimulating competition in the market concerned. So, despite the difficulties of excessive price cases, by focusing on the most obvious cases, benefits for consumers and competition can be achieved through antitrust enforcement on this basis. The Chair noted the possibility, mentioned in the German submission, that judges in private enforcement cases may diverge from what the Bundeskartellamt considers to be the appropriate outcome, because judges are bound only by the law. Thus, the Chair asked whether the delegate was of the opinion that the further guidance of the Bundeskartellamt for businesses would not be followed in private enforcement cases. The delegate from Germany responded that, in private enforcement cases, excessive price claims remain as difficult to establish as before, because the switch in the burden of proof does not apply to private actions.

The Chair moved to the submission from Korea, which featured an action taken by the Korean Fair Trade Commission (KFTC) against excessive cash advance fees for credit cards and other bank charges. The Korean Supreme Court subsequently ruled against the KFTC, finding that the banks concerned could not be held individually or collectively dominant; however, the Chair asked whether the case suggested that there is an implicit antitrust obligation on companies to maintain prices in a fixed proportion to costs. The delegate from Korea noted that although Korean competition law prohibits dominant companies from setting unreasonably high prices, the KFTC has not been particularly active in its enforcement of excessive prices in its 30 year history, having taken action in only two such cases, which occurred ten and twenty years ago, respectively. The Chair's question related to the case taken ten years ago, in which the KFTC had challenged credit card companies and banks for a too modest reduction in transaction fees in relation to a reduction in borrowing costs for banks. The case has a special social context in Korea: at the time, credit delinquency had greatly increased after the Asian financial crisis, and many people were having difficulty acquiring reasonably-priced credit, which created significant social problems. This case was also the last in which the KFTC had sanctioned price practices of dominant companies. Nowadays, the general position is that Korean competition law does not impose obligations on dominant companies to set prices in a fixed proportion to costs. The KFTC takes such a restrictive approach to excessive prices for various reasons: both because regulation of excessive prices can lead to adverse side effects, such as undermining investment or innovation, and also based on the practical considerations that assessing illegality and devising effective remedies can be difficult in such cases.

In the Czech Republic, the Chair continued, the competition law prohibition of excessive prices has been applied only once, against UPC, a cable television company. In its submission, the Czech competition authority referred to the case as being rather "formal"; the Chair asked for clarification of what formal meant in the context of excessive prices, and an explanation of the market problem that the Czech authority had sought to address. The delegate from the Czech Republic explained that by describing the case as "formal", this indicated that it had involved almost no economic analysis of the market problem at the time. Initially, the case had seemed fairly straightforward, insofar as there had been a price increase in the region of 100%, and up to 300% in some instances, and so the Czech competition authority treated this as an example of "I know it when I see it". It held that these price increases were excessive, a finding that was upheld by the Czech Supreme Court on appeal. However, the initial prices charged by the cable company could be viewed as predatory, and the very low starting level of the charges was not addressed in the decision. Thus, the decision could be read as suggesting that where predatory prices are corrected by increasing prices to a normal level, this can amount to abusive excessive prices. The delegate noted that the case was old, and out of line with the current enforcement practice of the Czech competition authority. Thus, "formal" in this context meant that the issue was more complex than the treatment in the decision suggests.

The Chair noted that the Czech cable case could possibly be explained on a network effects basis, insofar as the firm increased its prices when a sufficient client base had been attracted. He then moved on to the submission of Israel, which reported a number of private class action cases on the basis of excessive prices, but no enforcement actions by the competition authority (IAA). The Chair asked the delegate from Israel, firstly, whether under domestic competition law the IAA is obliged to investigate all complaints that it receives, and secondly, whether the IAA can intervene as amicus curiae in private cases and if so, how such submissions are typically received by the court. The delegate from Israel answered that the IAA aims to provide a substantive answer to all complaints received, but that it retains the power to dismiss complaints on the basis of resource constraints. Moreover, at the time of the cases mentioned by the Chair, the IAA's policy was to refrain from intervention (and thus conserve scarce resources) when there was on-going private enforcement. Nevertheless, in an appropriate case the IAA might wish to intervene, although it is unclear whether it has the right to do so without the support of the State Attorney General. Although the receptiveness of the court to the intervention would depend on the specific case and general openness of the court, the delegate expressed the view that, normally, a court would welcome the input of the IAA in

a private antitrust action. In one of the cases cited in the Israeli submission, concerning the former monopoly on international calls, the State Attorney General did intervene, assisted by the IAA. In that case, the private plaintiff attempted to use post-entry price cuts as a benchmark, in order to establish that the monopolist's prices were excessive before entry. While prices before entry were regulated, it could be shown that the telecommunications department had wanted prices on international calls to be high in order to subsidise domestic calls. Thus, the benchmark used by the plaintiff was problematic, and the case was dismissed by the Supreme Court.

The Chair moved on to the United Kingdom's submission, a publication on the pros and cons of antitrust enforcement against excessive prices. While the paper did not refer to any specific UK case, the Chair noted the *Napp* decision,[3] and asked the delegation from the UK whether the OFT, like the IAA, had the ability to choose which complaints it pursues, or whether it is obliged to reach a conclusion in each individual case whether prices are excessive or not. The Chair also asked the delegation to elaborate on another aspect of its submission regarding antitrust interventions against high prices outside the excessive prices rubric. The delegate from the UK (OFT) explained that the OFT is not obliged to answer every complaint that it receives; rather, it focuses its resources on those cases that pose the greatest threat to consumer welfare. The OFT has published and applies to its work a set of prioritisation guidelines, which focus on four areas: (i) impact—the likely direct and indirect impact on consumer welfare; (ii) strategic influence—fitting with the agency's annual plan and objectives; (iii) risk—the likelihood of success; and (iv) resource implications. Excessive price issues can arise in the context of broader complaints. In *Napp*, for example, there were two elements: one was exclusionary low prices in the hospital pharmacy sector, and the other was excessive prices in the community pharmacy sector. The UK competition authorities have a range of tools available to address excessive price issues. For example, it may be necessary to examine the cause of the abuse—i.e. the circumstances in which excessive prices arise—by carrying out a market investigation under the Enterprise Act, in circumstances where features of the market may restrict, distort or prevent competition. The OFT also carries out market studies, which can identify barriers to entry or expansion; these sometimes arise on the demand side, relating possibly to characteristics and behaviours of buyers. In its banking study, for example, the OFT identified a lack of customer switching, and recommended that there be clearer publication of the charges relating to accounts, which might improve switching options. Additionally, price regulation can be imposed by sector regulators in liberalised sectors, such as telecommunications and public utilities. The delegate then passed the floor to his colleague from the Competition Commission (CC), who spoke about profitability analysis and the review of prices in market investigations. Many investigations that begin at the OFT are subsequently sent on to the CC, which is asked to examine the market in its entirety. The delegate clarified that the analysis conducted by the CC is neither determinative nor decisive, but remains only part of the assessment. In that context, the analysis can be treated as a market outcome, and one may then consider what observations can be made more generally about the market. Moreover, the statute under which the CC operates makes it clear that the competition authorities are not intended to engage in price regulation—rather, they are responsible for the identification and remedying of market problems.

The Chair drew to a close the first part of the Roundtable discussion, on identification of excessive prices, and opened the floor for questions and comments. The delegate from Spain spoke about the Spanish competition authority's most important excessive price case to date. The case was concluded in 2008 and concerned the explosives sector in the Canary Islands. The competition authority found that the prices charged for explosives in that region were 1000% above the prices charged on the Spanish mainland. Although the authority was of the opinion that these prices were sufficiently high to establish excessive prices, it nonetheless investigated the cost of delivering the goods to the Canary Islands, and found that this additional cost could not explain the enormous difference in prices between the Canary Islands and

3 *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1.

mainland Spain. The Spanish competition authority also opened another excessive prices case in January 2011, concerning prices charged by mobile network operators to downstream competitors for text and image messages, which remains on-going. The Chair asked whether the Spanish authority in the Canary Island case had identified a threshold below which prices would not be considered excessive. The delegate from Spain explained that it is not a question of thresholds but of economic rationale and that there was no rational justification for the high prices charged. While there were some differences regarding storage costs for explosives, and the defendant company was the only one in the market which could provide the necessary storage services so there was dominance, the costs involved where not sufficient to justify the very high prices charged. The competition authority imposed a fine on the company for the violation, and instructed it to reduce its prices without identifying any particular price level.

3. Identifying Non-Excessive Prices

The Chair then introduced the second part of the discussion—identification of non-excessive prices—beginning with a presentation by Alan Gregory on profitability analysis, a technique that can be instrumental in the identification of a threshold for non-excessive prices. Alan Gregory began by looking at how to measure and assess an excessive price. In general, two methods are available: comparison (for example, geographical comparison or comparison over a time series), or the measurement of profitability. In terms of profitability analysis, the focus is either on margins or on the calculation of an acceptable return on capital employed that can be calculated either by looking at accounting rates of return, or by calculating cash flow rates of return. Comparisons are conceptually simple: there is no need to worry about cost allocations, or estimating costs, or the capital employed or asset base. However, price comparisons can potentially be very misleading, as for instance in case of important cost differences, for example due to economies of scale. If prices are examined over time, the price may go up due to increases in costs. In other instances, comparable products may simply not exist. Moreover, the possibility that numerous firms in numerous markets are each charging an excessive price for the product cannot be excluded. These difficulties with comparative approaches render profitability analysis of interest. Measuring profitability with sales margins is problematic as the benchmark is a margin earned by a comparable firm, therefore still requiring a comparison. An alternative mechanism is to examine returns on capital, introducing the notion of an accounting rate of return. Problems arise concerning the cost of capital benchmark. For the internal rate of return metric, it is almost always a notion of the firm's cost of capital. Two qualifications concerning the profitability test apply: (i) what is assessed may simply be a fair reward for risky past innovation; and (ii) the monopolist under assessment may not be efficient.

Considering the question of rate of return in greater detail, Alan Gregory explained that accounting rates of return are premised on some notion of earnings or profit, with reference to the opening book value of the firm. More specifically, one wants to exclude financing effects, partly because this renders comparisons more meaningful, and also because it allows comparisons based on different weighted average costs of capital. Formally, return on capital employed is earnings before interest and tax, divided by opening capital employed. Sometimes an after-tax measure is used, but this can create problems with interest charges. While this approach is appealing because of its simplicity, there are some difficulties with this analysis, as accounting values and economic values do not necessarily match —for example, accounting depreciation does not match economic deprecation, which means that accounting book values frequently do not represent current economic book values. Although, theoretically over the entire life of a firm these differences are not a cause for concern, competition authorities typically do not have the time to take such a long view, and therefore have to assess profitability over a shorter window, a truncated period. The correct way to assess asset return values in such cases is to use some notion of value to the owner, deprival value, or the so-called modern equivalent asset (MEA) value, which is basically the replication cost of the service potential of the assets. Over the truncated period, the opening MEA is measured, profitability is considered, and then the ending MEA is factored in; on this basis, it is possible to show that

return on capital employed, subject to certain conditions, gives reliable indications of true profitability, which can be compared conceptually with the firm's weighted average cost of capital.

The question thus arises, as to whether return on capital employed on these MEA values is sufficient. Firstly, accounting must be clean surplus in nature, and the accounting measure called comprehensive income does this. However, when the profit rates change over time, a more complex average of the return on capital employed is needed. This motivates an internal rate of return alternative, which takes into account the costs of undertaking the business activity, the opening MEA; the cash flows over the truncated period associated with this business activity; and the closing MEA. In effect, this amounts to a mini-present value analysis of the project; by measuring the internal rate of return on that mini-analysis, an accurate measure of profitability emerges, which can be compared with the firm's weighted average cost of capital. There are some complications to this approach, for example, dealing with intangible assets (goodwill is excluded, for example), and establishing the weighted average cost of capital. From an accounting point of view, there are cost allocation problems. Finally, when considering the profitability of different streams, there can be problems allocating the capital employed to different business streams.

If these problems become insurmountable, sales margins can be used as a fall-back position. There are two ways to do this: (i) look at simple return on sales (ii) or break this down further into gross margin and net margin, which separates costs in other and direct costs of goods sold. While conceptually this is useful, classification problems may arise as firms use different cost classifications. It also leaves the problem of allocating common cost unsolved. In conclusion, it is straightforward to show that the best theoretical approach to assess profitability is an internal rate of return approach using MEA values. If these values can be established, a modified return on capital employed estimate based on these values would also give a reasonable answer. If MEAs cannot be established, however, it becomes necessary to fall back on margin analysis—and if even costs cannot be established, then price comparison is the last resort. Theoretically, therefore, there is a clear hierarchy in terms of desirable ways to assess the problem of excessive prices.

The Chair noted that in most of the exploitative abuse cases described in the submissions, the defendant company was dominant in only one or several specific product markets, rather than being dominant in all markets. He asked whether it would be possible to calculate returns on capital with the available data in such circumstances, that is, for a multi-market, multi-product firm. Alan Gregory confirmed that this is indeed possible, citing the example of mobile phone termination charges in the UK. The best approach is to assess different business segments, and while such an exercise is not without its difficulties, it remains conceptually feasible. Firms generally have the necessary information to conduct a profitability test, and so competition authorities have to insist on that point. The market investigation into liquid petroleum gas (LPG) markets in the UK is an example where the competition authority had access to the internal records of the firms, and could get them to break down their costs and asset values between business units.

The Chair then introduced the Swedish submission, and the district heating case taken by the Swedish competition authority. The case is a paradigmatic excessive price case involving a natural monopoly. The Swedish delegation was therefore asked to provide a more detailed presentation of the case, to be used as a basis for further discussion. The delegate from Sweden began by explaining the importance of the district heating sector in Sweden. The local markets are highly concentrated, as distribution is an issue for the municipalities, although many districts have now sold their distribution companies to one of the three main firms that operate in the Swedish energy market. About ten years before, substantial price increases for district heating resulted in numerous complaints to the competition authority. While the authority generally does not pursue excessive price complaints, the issue complained about here had a substantial impact on consumer welfare. District heating distribution companies in Sweden constitute unregulated natural monopolies; although there is a Swedish energy regulator, its remit does not extend to district heating. The competition authority took on the case, focusing on the Stockholm market for district heating which is the

most important one in Sweden, and then engaged in a very thorough and complex investigation that took five years to complete. The delegate explained that perhaps the most difficult aspect of the case, from the perspective of the Swedish competition authority, was to find a generally accepted method by which to assess the excessive price claims. The case was concluded in 2010, with commitments from the defendant energy firm for greater transparency in price-setting for consumers, as well as voluntary price regulation, with an obligation to report back to the competition authority in June 2012. Meanwhile, over the course of the investigation prices for district heating had decreased, meaning that the price increase that had prompted the initial investigation was no longer an issue. The Swedish competition authority was satisfied with the result obtained, providing a forward-looking *ex ante* solution, although the authority still takes the view that price regulation is needed in the market for distribution of district heating. Moreover, the delegate suggested that third party access would not provide an adequate response to the market problems identified in this case.

The delegate from Sweden then gave the floor to her colleague, who presented the economic aspects of the case. He stressed the "last resort" nature of intervention in this case—fundamentally, this case was an instance of price regulation, and so the analysis is comparable to that of ulterior price regulation. The delegate returned to the *United Brands* test, which emphasises two aspects—that of economic value, which in the case at hand was assumed to be equivalent to the regulated price, and that of reasonable relationship. While the delegate agreed that allegations of excessive prices frequently arise in natural monopoly situations, he argued that competition enforcement in such markets may actually be more difficult than in the "bananas"-type of case. The delegate noted that the "unfair in itself" aspect of the second limb of the *United Brands* test is in some sense a form of cost-of-service or rate of return regulation, whereas the "unfairness in comparison to other products" aspect is like price cap regulation. The delegate then discussed some of the complexities of testing for excessive prices in the district heating market. District heating is premised on economies of scale in the production of heating, which are so large that it renders the costly infrastructure for the distribution of heating profitable. It is extremely capital intensive, requiring large, bulky and long-term capital investments. In addition, the joint production of electricity has to be factored into the analysis. It is a natural monopoly, both in the production and distribution of heat. There is a problem in using accounting measures in establishing costs, in particular concerning joint costs. Given that district heating facilities are used to produce both electricity and heat, the question is how the costs should be allocated between these two outputs. Additionally, it is necessary to allocate the investment over time. The delegate picked up the point made by Alan Gregory regarding the discrepancy between cost measures from the perspective of accounting and economics—use of accounting data is problematic, since it has goals other than merely assessing profitability, but use of the more accurate MEA values tends to be difficult in terms of information-gathering. In the district heating sector, there is the additional complication that the plants were established initially with low production and low capacity utilisation, meaning that while they are now making a profit, this was initially not the case. Accordingly, profitability must be assessed over the whole lifespan of the facility, and so excessive prices cannot be established merely for a given year but only over lifespan.

The delegate then considered how the problems identified might be overcome in practice, in order to generate legal certainty for firms. One solution would be to use the most cautious rule, but this would generally set the threshold for a finding of excessive price very high. Another approach would be to use the calculation methods used in regulation, but this is problematic because different types of regulation use different rules of cost allocation, depreciation etc. Indeed, this approach may prove to be unworkable in practice, because regulation is a simpler exercise than application of the excessive price test in an abuse of dominance context. Regulation specifies *ex ante* the choices that have to be made, and for that reason provides some legal certainty that one does not get when one approaches the issue through the prism of abuse of dominance provisions. Thus, in sector-specific regulation in Sweden, issues such as allocation of joint costs, reporting obligation etc. are specified *ex ante* in the regulation, although they might be assessed *ex post*. Conversely, in an abuse of dominance case, the authority has to prove to the court how the

regulated price should be determined generally, what it should be in the specific case, and then it must show a reasonable relationship between the regulated price (economic value) and the price actually being charged.

The Chair asked why the electricity regulator in Sweden had not addressed the case. The delegate from Sweden answered that price regulation in Sweden does not extend to district heating, so while there is an energy regulator—the market is liberalised, which means that there is no price regulation although there is monitoring of prices at a wholesale level—for district heating, there is no regulatory scrutiny at all. Alan Gregory noted that the Swedish case was an interesting one, and asked for clarification as to whether the electricity side of the business was regulated, and if so, under what formula (cost plus etc.). The delegate from Sweden clarified that electricity generation is not regulated in Sweden, but that electricity distribution is regulated. Alan Gregory agreed that the cost allocation problem is a complicated one, and it has been argued that the problem is an unsolvable one insofar as it is impossible to determine a fair application in practice. Nonetheless, Alan Gregory noted the existence of a strand in the literature that focuses on the benefits of doing things jointly rather than separately, and uses that as the basis for allocation. While this is still a fairly arbitrary approach, it is at least based on some form of game-theoretic notion of how costs can be allocated fairly, sharing the gains of jointness between the two business activities. The delegate from Sweden noted, however, that the problem of legal certainty remains unsolved even under that approach. Although it might be possible to make a strong case for the allocation of joint costs in a particular way, and there are many candidates for such a formula, unless this approach is specified *ex ante* there is legal uncertainty for firms. Alan Gregory agreed with the legal certainty argument, and noted that when utilities were privatised in the UK, this was essentially what was done with the so-called RPI-X (Retail Price Index-X) formula. Thus, the process that would be used to cap prices was specified in advance, and although there are objections, the general view in the UK is that the current approach leads to a fairer outcome for consumers than the alternative return on capital employed approach used in the US. The Chair inquired further about the nature of the voluntary code for district heating prices adopted under the commitments. The delegate from Sweden confirmed that the code was publicly available and that its contents were rather simple, specifying what was basically an average-revenue approach.

Misja Mikkers noted that many of the problems outlined in the presentation would be difficult to solve even via regulation. As soon as some notion of an excessive price is established, and a competition authority begins to remedy it by reference to some norm price, the authority essentially starts to regulate, insofar as the authority will only intervene if it expects the prices to be excessive for a substantial period of time. The authority then needs to take into consideration the issue of efficiency incentives, as well as setting the norm price in a more dynamic manner. The delegate from Sweden responded that, in choosing between the *United Brands* options of the fairness of the price in itself and those charged by competitors, an authority has a choice of regulatory schemes—the question is whether this is an either/or choice, or whether the authority must do both, that is, to establish that the price exceeds both reasonable cost-plus regulation and price cap regulation. That issue remained an open question. On this view, the Chair remarked, the *United Brand* test retains its validity, because it handles both aspects, static and dynamic. The delegate from Sweden summed up by saying that there is an enormous difference between markets for bananas and district heating, and that throughout the investigation the Swedish competition authority has given consideration to how the particular circumstances of the case (natural monopoly etc.) impacted on the interpretation of the *United Brands* test.

The delegate from the EU asked the Swedish delegation, in relation to the legal certainty point, to what extent it took the view that this was a decisive argument in favour of regulation and against competition enforcement. The delegate argued, firstly, that uncertainty is always an issue in competition enforcement, but not an insurmountable one. Moreover, in most jurisdictions including Sweden, excessive price investigations are pursued in only a very limited number of cases, and generally only when the relevant prices were very high. Although determination of the appropriate remedy may remain difficult, the

delegate from the EU argued that the resulting uncertainty for companies may be rather low as intervention is rare and the price differences involved are generally so spectacular that the finding does not change irrespective of how costs and risks are allocated. The delegate from Sweden answered that in the particular case of district heating, there were so many fundamental issues and choices, and in particular the allocation of costs for long-term investment and the question of the reasonable relationship were so much more complex than in the simple bananas case. In concluding the discussion on the Swedish district heating case, the Chair noted to the case would come up again later in the Roundtable, particularly when discussing the interface between antitrust and regulation: here there was no regulator, it was clearly a natural monopoly case, and it was perhaps also an excessive price case. Thus, if one accepts that regulatory intervention is necessary in natural monopoly situations, perhaps antitrust can provide a supplementary function in this respect in cases where the natural monopoly is unregulated.

In Turkey the competition authority has addressed the issue of excessive prices in quite a number of cases. In one particular case, involving thermal energy, the authority intervened where there was a *future risk* of excessive prices, and imposed a monitoring exercise on the firm. The Chair asked for further details of the monitoring exercise and the delegate from Turkey noted in return that in the specific case, the prices involved were not found to be excessive. However, the Turkish competition authority decided that there was a potential risk of excessive prices in the future, and so required that the market in question be monitored for a period of five years. The idea was that, under such close scrutiny, the company would price reasonably. In implementing the monitoring exercise, the competition authority compared the cost and price structures of the company with figures obtained from an association of thermal energy producers, as well as prices in neighbouring towns. After a year of monitoring, the competition authority determined that the company was increasing its prices at less than the rate of inflation and that it was not making a particularly high profit. On this basis, the competition authority decided that there was no remaining risk of future potential high prices, and so discontinued the monitoring exercise. In its next decision, the Turkish competition authority reverted to a more conventional competition advocacy approach, which in this instance consisted in making reports and sending opinions to the Ministry for Energy and the sector regulator.

The Chair moved on to the submission from Lithuania, which described a case in which the competition authority had found high prices and price discrimination for access to communication tunnels, including price differences of up to 28 times for the same product. The delegate from Lithuania clarified that a communication tunnel is basically a tube under the ground which carries different wires etc. in it, and the operator of the network leases space in the tunnel to telecommunications companies, heating companies etc. In this particular case, a key reason why the price was considered excessive was because it was above the regulated price. Another issue was the fact that the price differed so greatly across leased areas.

More generally, the delegate from Lithuania argued that there are no “magic numbers” or threshold price levels in excessive price cases—for example, even a big difference in price is not conclusive evidence of abuse because the lower comparator price may be predatory. Therefore, competition authorities have a difficult task in addressing excessive price cases, and the *United Brands* test remains the best guidance available. In Lithuania, the competition authority suffers from an image problem as a result of its past as a price regulator, which means that it is less eager to pursue excessive price cases, which it did frequently in the 1990s. Consequently, the authority applies strict screening tests to such cases, focusing on barriers to entry, the existence of specific rights, and whether the issue can be resolved by a regulator. It considers that there is plenty of scope for advocacy efforts, and going forward, the Lithuanian competition authority is keen to increase its advocacy efforts. In the past, the authority had insufficient resources to dedicate to this task. However, new competition legislation is pending in Lithuania, which will give the authority the right to engage in case prioritisation, which should free up resources for advocacy. Under Lithuanian competition law, in excessive price cases the authority can intervene against both the

defendant company and against a public administrative body such as sector regulators, because such bodies are prohibited from adopting decisions that distort competition. In conclusion, the delegate from Lithuania noted the limits to advocacy and to the screening tests that can be run, and the residual possibility that an authority might be faced with high prices and no regulation. In such a case, the authority might have no alternative but to apply the "I know it when I see it" rule.

Under Brazilian law, according to the Chair, it is a crime to gain a profit higher than 20% by abusing the "pressing need, carelessness or inexperience" of the other party. The Chair requested clarification as to the application of this provision, and also about the role played by the Brazilian competition authority in such cases. The delegate from Brazil explained that Brazilian consumer and competition law does not contain provisions that limit profits, but rather addresses only excessive prices. It is the law of popular economy that limits profits to a 20% margin. As outlined in the Brazilian submission, there are many doubts regarding the constitutionality of this limitation. The law in question dates from 1951, when Brazil suffered from rampant inflation, and government intervention in the economy was aggressive in its attempts to counter this trend. In the view of the Brazilian competition authority, this limitation is unconstitutional and should not be enforced by the courts. In particular, it is incompatible with Brazil's free market economy, which is protected by fundamental constitutional provisions. Unfortunately, some courts in Brazil continue to apply the provision, usually using the gross profit margin as the benchmark, and they consider that gross profit margins higher than 20% can be deemed abusive. More specifically, in the *Gasoline* case cited in the submission, the judge determined that a retailer of ethanol could not exceed a gross profit margin of 20%. However, the decision does not consider the impact on investment, nor does it take into consideration that the net profit was actually much lower than the gross profit recorded. Fortunately, more recent court decisions have rejected this approach, and have ruled against application of the profit limitation provision, on the basis that it is contrary to the fundamental principle of free competition. The Chair asked whether the Brazilian competition authority could play a role in such cases, and the delegate from Brazil confirmed that it could have, but that it did not participate in the particular cases, possibly because the authority may not have had the information that private proceedings are taking place.

The Chair then introduced the submission of Denmark, where the competition authority has frequently intervened against excessive prices. The Danish submission contained an extensive report of excessive price cases in the electricity sector, in particular one case in Western Denmark where the generator was held to have abused its dominant position by charging an excessive price for wholesale electricity, and another case in Eastern Denmark where the prices were finally held not to be excessive. Given that prices can rise due to scarcity, particularly in the electricity sector, the Chair asked the delegate from Denmark to elaborate on when prices are considered excessive and when not—the juxtaposition of the two electricity cases providing a good opportunity to identify a benchmark. The delegate from Denmark agreed that high prices are not in themselves a problem, but that these may be attributed to exploitative conduct by a dominant firm. In examining the Danish electricity markets, the competition authority performed a profitability analysis and an analysis of the actual bids of the price-setting dominant firm, Elsam. Since the authority put a lot of weight on the latter test, the delegate elaborated on the actual bid analysis. By looking at the actual bid curves of the dominant firm, it was possible to establish the actual pricing behaviour of the firm in areas with very high prices, and thus it was possible to determine whether the high prices were due to scarcity or excess market power. When prices were high but the dominant player did not exercise power (i.e. bid at the marginal cost), these prices were deemed not to be excessive. However, there were many instances in which the dominant firm bid far above the marginal cost, which the competition authority identified by comparing the marginal cost at each of the plants in the dominant firm's portfolio with the actual price on the market. During the investigation, the dominant firm failed to provide any objective justification to legitimize its pricing behaviour, and so the authority concluded that Elsam's pricing behaviour in the Western Denmark electricity market was in fact exploitative. One key element was that, during a dawn raid at Elsam's premises, the authority found an internal note that

described how to maximise profits on the market, and when the authority examined the bids put into the Nord Pool electricity spot market, these followed closely the pattern described in the note. The authority determined, accordingly, that the prices were excessive. With regard to the Eastern Danish market, the prices charged were similarly high. However, when the authority analysed the actual bid curve, it found that the dominant firm had bid at its marginal costs, and so the high prices were due to other market factors, relating to scarcity of electricity transmission capacity between Denmark and Sweden. Consequently, there was no finding of excessive prices in this second case.

In Russia, the Chair continued, excessive prices are frequently prosecuted. The Russian submission referred to a double test: revenues above costs, and prices above a competitive benchmark. Although these tests are easy to describe, they can be difficult to apply and for firms to follow, and so the Chair asked whether the Russian competition authority (FAS) produced any guidance for companies on these tests, or whether FAS took the view that the law and case law was sufficiently clear for companies to understand their obligations. The delegate from Russia explained that there is no formal definition of an excessive price set out in Russian competition law, and so the monopoly high price definition is applied to such offences. In enforcement against excessive prices, FAS makes a standard market evaluation, which the delegate then described in some detail. The relevant market is analysed in accordance with officially adopted and published tools and regulations, which require FAS to take into account both quantitative and qualitative features of the market, and not merely to calculate the profits and costs of any commodity. FAS analyses the market over a long period of time, which allows it to determine whether there has been an unreasonable increase in profits in comparison with normal economic conditions. The Russian submission provided a detailed description of an evaluation of prices in an oil product market, as an example of the methodological approach. The profitability analysis performed takes into account the impact on investment, as well as barriers to entry, inflation and other factors. If profit is excessively higher than average profitability under comparable conditions, then there are grounds for antitrust investigation and intervention. In all cases, FAS must identify a comparable market to determine a fair market price, which is compared with the price charged by the dominant firm.

In terms of protective criteria in excessive price cases, the delegate from Russia explained that amendments to the Russian competition law have been suggested, which would require that commodity exchange prices and other world market price indicators should be taken into account. Across the spread of antitrust enforcement in Russia, excessive price cases comprise a small percentage of enforcement activities—in 2010, such cases accounted for less than 5% of abuse of dominance cases. Those cases that have arisen occurred mainly in local agricultural markets, infrastructure industries and oil product sectors. As a general rule, excessive price cases occur in tandem with other types of abuse of dominance cases, such as price discrimination cases. In relation to the issue of legal certainty, FAS has held a long-term open discussion with businesses about prices, both in regulated and unregulated sectors, and so businesses operating these sectors are now well aware of FAS's position on the issue of excessive prices. This position is reflected in its decisions in individual cases, which are public, and FAS takes the view that the case law is sufficient to guarantee legal certainty. Moreover, FAS's position has been supported by the highest national court in an important oil product case, which is described in the Russian submission.

The Chair emphasized the considerable number of cases that have been taken by FAS on excessive price issues, supporting FAS's view that the substantial quantity of case law on the issue was sufficient to generate legal certainty. The Chair then moved on to the submission of Greece, which reported a number of excessive price cases all conducted on the basis of the *United Brands* standard. In most cases, the Hellenic Competition Commission (HCC) did not find any violation, as the price difference found was not sufficiently great to satisfy the *United Brands* test. In one case concerning airport parking, however, the HCC held that the parking fees charged were excessive. The Chair asked the HCC how it had identified excessiveness in that instance. The delegate from Greece explained that the case in question was an interim decision; the HCC subsequently refrained from issuing a final decision, and instead ordered the

investigative body, which had recommended rejecting the case, to further investigate the possible anticompetitive impact of the concession arrangement for operation of the airport parking lot. The HCC suggested that the investigative body examine the contents and implementation of the agreement, with a view to ordering any necessary behavioural measures regarding the concession fee, and to issuing a recommendation to the airport authority for the implementation of those measures. While the airport authority itself is not mandated to decide upon competition issues, the authority has the power to ensure that prices at the airport are as low possible. At the same time, in the case at hand the authority was a party to the concession agreement concluded after the bid had taken place. As to the role of competitors in the comparative analysis, the competitors of the firm that won the concession to operate the parking lot were the State authorities which ran other airport parking lots. These were hypothetical competitors, however, since in the geographical market in question the highest bidder—the undertaking in question—was a monopolist.

More generally, the delegate argued that in excessive price cases, the dominant undertaking extracts profits from consumers that do not correspond to the true value of the product—this is the logic of the *United Brands* test—and so the dominant undertaking has a responsibility to refrain from engaging in such exploitative wealth transfers. Moreover, the paradigm of self-correcting excessive prices does not appear to be the norm. Intervention may be necessary in situations where there is no or only limited potential for market self-correction within a reasonable time frame. In particular, this may be the case where high entry barriers and aggressive conduct by the dominant firm prevent entry. In smaller economies like Greece, market size limitations facilitate the preservation of market power. Conversely, competition authorities, particularly in smaller economies, have very limited resources and therefore are likely to concentrate their efforts on markets with manifestly dysfunctional competition. Hence, type II errors are likely to be rarer in such cases. In assessing excessive price cases, the HCC uses in principle the *United Brands* two-tier test. Following recent legislative reform, the HCC now also has the power to prioritise cases, and it has recently introduced priority enforcement guidelines. Thus, in the view of the HCC, there are valid public policy and general interest considerations in favour of intervention against abusive (excessive) prices, particularly in times of economic crisis when consumer power is weakened. The HCC takes the view that competition authorities are often well-placed to deal with such cases, despite the inherent difficulties in devising and applying the appropriate methodologies and benchmarks needed to substantiate the abusive conduct.

The Chair then introduced the submission of Finland, where the competition authority has also examined a district heating case. Here, the authority chose a threshold of 10% in excess of the reference price level, a price that allows for a risk-adjusted return on investment. The Chair asked whether this standard was easy to apply in practice, and furthermore, whether a regulator might have been better placed to address the complaint. The delegate from Finland confirmed that profitability analysis is a challenging method to assess excessive prices, and so the Finnish competition authority attempted to use this technique in a more flexible and simplified manner (e.g. by using book values as capital base). The authority is in the process of conducting a sector inquiry in the district heating market, the aim of which is to determine whether there are strong and clear signals of abusive pricing in the sector, a question preceding any assessment of whether such an abuse in fact occurred. Before conducting the profitability analysis, the authority considered various outcome scenarios, and identified three different options that would have been desirable outcomes for the exercise: (i) a finding that one or two companies had a distinctively higher excess of reference price level compared to the others, in which case the authority could have concluded that there were reasons for a more in-depth investigation against those particular companies; (ii) instead of the 10% threshold, the reference price could be exceeded industry-wide by a considerable margin (e.g. 30-50%), in which case there would be a good case for regulation of the sector; and (iii) the overall outcome for the industry would fall below the 10% threshold, in which case the investigation could be closed on the basis that there were no apparent pricing problems in the industry. The eventual result, however, fell within none of the three optional outcomes: industry-wide, prices were above the 10% threshold, but less than 20% of the reference price. On that basis, the authority indicated that regulation would be helpful in the

industry to reduce prices, but it has not advocated particularly aggressively for this because the outcome was not sufficiently serious to merit such action. The Chair asked whether the case had therefore been closed without any finding of excessive prices, and the delegate from Finland clarified that the case remained on-going and that there had been some further contacts with the companies and some further investigations, but that based on the profitability analysis so far conducted, there seemed not to be grounds for intervention.

BIAC had submitted a critical report on antitrust intervention against excessive prices, and in particular, against the standards that have been developed, principally in Europe where most excessive price cases have been taken. The Chair noted that the text of Article 102 TFEU is unlikely to change in the foreseeable future, and so the law will continue to be applicable against exploitative abuses, even though it is applied only in exceptional case. On this basis, the Chair asked whether BIAC had any recommendations as to how the law should be applied against such conduct. The Chair also noted the possibility of private enforcement against excessive prices, and asked whether this actually made public enforcement more desirable, insofar as competition authorities are the more appropriate institution to develop legal standards via enforcement in this area. The delegate from BIAC argued that the BIAC contribution is not wholly critical, but rather that the organisation is concerned about the potential negative consequences of antitrust enforcement against excessive prices, in particular the potential chilling effects of over-enforcement. BIAC's general position is that agencies should be reluctant to intervene in such cases: firstly, in most cases the markets will have the ability to self-correct, and secondly, it is very difficult to apply unilateral conduct provisions to alleged excessive conduct. The delegate highlighted a particular concern of BIAC: the relationship between high prices and innovation is not understood precisely, and because it cannot be ruled out that high prices may create incentives for companies to invest, intervention should not take place too readily. This does not mean, the delegate emphasized, that authorities should never intervene, but BIAC is strongly in favour of the use of screens, as discussed earlier in the Roundtable. In the opinion of BIAC, those screen should require at least: (i) high, non-transitory barriers to entry; (ii) dominance derived from special or exclusive rights in the past; and (iii) absence of a sector-specific regulator; and (iv) as a matter of principle, excessive price cases should not be taken in markets involving intellectual property rights (IPRs). BIAC agrees with the view that the *United Brands* test remains open to debate. In the EU, the Commission shows sensible reluctance to pursue excessive price cases, but on the other hand, the FRAND provisions of the Horizontal Guidelines permit the Commission to intervene readily in IPR cases, an approach that BIAC disagrees with. IPRs are a complex area; in particular, it is difficult to determine which research and development costs should be taken into account in determining appropriate licence fees.

As a general approach, the delegate from BIAC argued that competition authorities should treat excessive prices as a symptom rather than a disease in itself: it is preferable, therefore, to look at the underlying causes and consider whether it is necessary to remedy the particular underlying problem. Intervention is justified only in exceptional circumstances, determined on the basis of the four screens outlined, and it is sensible to allow for a relatively large margin of error. With respect to the risk that courts may take a more formalistic approach to excessive price claims than competition enforcers, the delegate argued that courts do not act in a void. Many courts are well informed and interested in the approach of national and EU competition authorities, and there is the possibility for authorities and the EU Commission to intervene in national court cases where appropriate, which may provide a means by which to assist courts in adopting a more economic approach to excessive prices. Moreover, there is a lot of scope for advocacy by authorities, development of guidelines etc. The Chair remarked that all participants to the discussion had recognised that such cases are rare, and the cases discussed had reflected the exceptional nature of enforcement on an excessive price basis.

To conclude the second portion of the discussion, the Chair opened the floor. The delegate from the EU asked whether excessive price cases might be so disfavoured because competition authorities are

reluctant to face the consequences that follow from defining a price as excessive. In previous EU cases, the Court of Justice has consistently taken the approach that a margin is excessive where the price goes above some measure of cost, which is the basis of regulation in general—the aim being to mimic a competition outcome. A recurrent fear is that punishing excessive prices will undermine entry; however, as persuasively demonstrated earlier by David Gilo, this is not a valid argument. There is also a fear that capping prices will deter investment; but on this point, again, the literature suggests that investment in research and development etc. is more likely to be high in less concentrated markets. So the main plausible explanation for the general reluctance of competition authorities to pursue excessive price cases is that these are difficult to implement. Consequently, the delegate from the EU raised the question of what should happen when the authority has a case that is relatively easy to implement. As a second issue, the delegate from the EU raised the question of what authorities should do when they cannot identify a good benchmark for price assessment. He suggested that the solution might lie in only taking cases where there are high and non-transitory entry barriers, but rejected the restrictive approach of BIAC that in particular excludes all cases involving IPRs. In circumstances where it is clear that the market will not solve a particular pricing problem in the foreseeable future, is it only reluctance to engage in price regulation that prevents competition authorities from taking enforcement action?

The Chair suggested that, in some sense, there is a problem insofar as competition authorities are constantly told that they are not price regulators, but at the same time, authorities deal with prices in many other areas and often without much problem—for example, loyalty discounts, predatory pricing and antitrust interventions relating to interchange fees. Bearing in mind that authorities essentially regulate prices in these other areas, there must be a more philosophical objection to excessive price cases, but really this should be a non-issue. The delegate from the EU noted that at least in the case of predation, there is a clear benchmark—a prohibition of prices below cost—and so raised the question of whether authorities are afraid to establish a similar clear standard for excessive price cases, or lack confidence in their ability to identify such standards, or perhaps do not want to subject companies to counterintuitive obligations that might force them to mask what is logical behaviour, i.e. increasing prices. The delegate from Chinese Taipei argued that from an economic perspective, it was very difficult to determine a benchmark price, and that being the case, questioned how it is then possible to determine that a price is excessive. Competition authorities should consider whether the market is functioning properly: if supply is functioning and demand is functioning, the delegate argued against the existence of any excessive price abuse. The Chair acknowledged the validity of the delegate's approach, but argued that following such logic, it was difficult to argue for intervention to set prices in any industry including telecommunications and electricity. The argument would not only lead to a rejection of excessive prices but also of most sector-specific regulation. The Chair expressed the view that if one accepts intervention by sector regulators, then an additional reason is needed to reject intervention in this area by antitrust agencies, apart from the fact that such intervention tends to be very difficult in practice.

The delegate from BIAC emphasised the organisation's concern about the lack of legal certainty that is inherent in the *United Brands* test, and so BIAC takes the view that some limiting principles are required, which would make it clearer to companies when prices are excessive. Although BIAC is not arguing that intervention against excessive prices should never occur, the delegate from BIAC argued that there were in fact two possible reactions to the Spanish case: intervention by the competition authority, or conversely, to examine the market, because entry should be possible. The delegate from Spain clarified that the Canary Islands case had arisen because there was only one provider, with legal barriers to entry due to the need for administrative permits to sell explosives, as well as the need for depots. In that case, the dominant firm took advantage of the existence of legal, strategic and geographical barriers to entry to exploit its dominant position. The delegate from Spain outlined his view on why competition authorities are generally reluctant to pursue excessive price cases arguing that it is against the nature of competition enforcement to intervene in such cases. The Canary Islands case was exceptional as the difference in prices was overwhelming, the problem was caused by the behaviour of a single firm, and there was no reasonable

justification for the price difference. Thus, it was clear that the company was abusing its dominant market position, but such cases are very rare. Generally, competition enforcers would prefer to work on other, clearer, less resource-consuming cases—but from time to time, excessive price cases like the Canary Islands example are unavoidable.

The delegate from Israel raised two points. Firstly, while it is true that a monopolist would not normally want to charge more than the monopoly price, this is the same price that a well-functioning cartel would want to charge, and competition authorities would obviously want to prosecute that high price. In fact it is the same dead-weight loss that authorities are trying to avoid when they prosecute excessive price cases. Secondly, on the issue of uncertainty for firms in excessive price cases, the delegate responded that in order to lessen possible uncertainty, it could be useful to develop guidance for firms using the case law on this issue. However, the delegate argued that the prohibition of excessive prices is not actually so different from any other rule of reason based antitrust rule; for example, the prohibition on exclusive dealing creates similar uncertainty for firms.

The delegate from South Africa also raised the issue of certainty. He noted that progress was being made in this area, because the identification of standards like super-dominance and the way in which the dominance has been acquired creates a degree of certainty, because it is clear that most firms are going to fall outside the ambit of the prohibition of excessive prices and so have little to fear. The delegate noted that the set of firms that potentially come within this prohibition will be of very different sizes in different economies—South Africa is similar to Israel in that respect, insofar as it had a large former government-owned sector. The delegate furthermore noted that in the *Mittal* case, the judge held that special cost advantages enjoyed by the firm should not be counted against it, but the concept of special cost advantage was not defined in the judgment, and could possibly be extended to the fact of buying a firm that has been privatised. Thus, the very firms that might be subject to excessive price prohibitions after applying the first screen would be excluded under this interpretation of the test, because they obtained their cost advantage by acquiring the particular company. The delegate expressed the fear that the courts and the competition authority in South Africa hold conflicting views on this issue.

The delegate from the United States responded to the second point made by the delegate from Israel, relating to certainty: she argued that the excessive prices analysis is very different to other rule of reason analyses because of the remedy to be imposed. The fact that the remedy is a price intervention, which is not the outcome in other rule of reason cases, constitutes an important distinction. The Chair noted, however, that in a loyalty discounts case, for example, the competition authority must determine the non-exclusionary level of discounts, which amounts to a price intervention—which support's the delegate from Israel's larger point about general difficulties of assessment. The delegate from the EU added that in refusal to deal cases, if the competition authority intervenes, it must identify a benchmark price for the obligation to supply, and if the authority cannot identify an appropriate benchmark, such as past behaviour or past supplies, it ends up determining an acceptable supply price, in which case there is an overlap between exclusionary and exploitative abuses. The Chair added margin squeeze cases to the list of situations where a competition authority must determine the appropriate price, although the delegate from the EU argued that these could also be seen as a sub-category of refusal to deal cases.

The delegate from the EU agreed that authorities should not punish a firm for being a more efficient purchaser and therewith realising high profits. On the other hand, however, excessive prices may be partly disguised or hidden where the company is buying a particular input or business at a high price because of the expected high profits to be derived from excessive prices later on. This was an issue in the Swedish district heating case, where part of the problem of assessing prices and costs was the fact that the predominant firm may itself have paid a high price for the city heating activities. The delegate from the EU asked for clarification regarding the *Mittal* case. Noting South Africa's comparative advantage in steel production, the delegate asked whether Mittal was considered to be efficient, which should not be held

against the firm, or whether the South African competition authority had taken the view that the firm was not as efficient as it should have been given its natural advantages. The delegate from South Africa noted that the efficiency argument originated in the Mittal defence, there being no dispute in the case that the cost of the raw materials was very low. A comparator analysis was used in the case, comparing the low costs and the prices, steel being a relatively homogeneous product in terms both of inputs and outputs. Mittal, in its defence, argued that the firm was not profitable, and the question was whether this was due to inefficiency or other reasons. The Competition Tribunal's assessment of the question of profitability focused on issues of efficiency and measurement of replacement cost versus incremental investments and expanding output. The benchmarking approach extended to costs: steel production is a mature industry in South Africa, so the delegate suggested that one could add as an additional screen the fact that an industry is mature and therefore not engaged in innovation. Other factors in the case were Mittal's super dominance, and the fact that it held a privileged position that emanated from former State ownership. These factors are important because they allow for accurate yardstick/benchmark comparisons, thus allowing the competition authority to examine issues of efficiency. The delegate noted that such cases are unusual, and tend to arise only where there are economies of scale, substantial distances from other industrial economies or highly localised markets. As a final point, the delegate added that there needs to be a reality check in terms of the position being bequeathed. For example, if the company was privatised shortly before the end of Apartheid to interests closely aligned with the State, this is a very different position than a situation where dominance was the result of risky investments.

4. Excessive Prices, Antitrust & Regulation

The Chair then moved the discussion to the last section of the Roundtable: the question of why not simply regulate high prices. One of the key criticisms advanced against competition authority intervention in excessive price cases is that competition authorities are not price regulators—regulators fix prices, competition authorities do not. The Chair noted that, already in the discussion, it had become clear that this absolute dichotomy is untrue, because there are many cases where competition authorities do fix prices in one way or another. Thus, it is anomalous that it is only within the realm of excessive prices that competition authorities insist that they are not in the business of setting prices. Nonetheless, there is a division of labour between regulators and competition authorities, with the major difference being that regulators intervene in the market by identifying a single path for action and telling firms what to do, whereas competition authorities tell firms what not to do. This is the dilemma of excessive prices: where the authority determines that a certain price is excessive, it also needs to identify when the price stops to be excessive, as otherwise it becomes difficult for firms to comply.

As a result, competition authorities have much to learn from regulators, and so the Chair introduced Misja Mikkers, who began by noting that as sector-specific regulator, the Dutch Healthcare Authority (NZa) is more worried about other forms of abuse of dominance than excessive prices, for example about low quality. In a recent paper by Gaynor & Propper, it was shown that in the absence of price competition, mortality is higher in more concentrated hospital markets than in more competitive markets, emphasizing the importance of quality. The role of the NZa is in-between that of a regulator and a competition authority: it regulates part of the healthcare sector, and has overlapping competition law powers with the Dutch competition authority (NMa). The NZa can impose general obligations to all market operators, such as a price caps or obligations of transparency, and it also has the ability to impose specific obligations on firms with market power. Misja Mikkers noted that the Roundtable discussion had focused in particular on the idea of a price norm; one of the principal norms discussed is based on cost levels and profitability analysis. As a regulator, he noted that he is particularly concerned about the impact on dynamic incentives of this test, both on efficiency and capacity, the latter being a factor that is particularly important in the energy sector but also in healthcare. One aspect that had not been discussed much is the modelling or engineering approach: for example, the Dutch telecommunications regulator regulates the network under an engineering model, which tries to establish the replacement costs of the assets. The NZa uses a great

deal of economic modelling based on information about demand, costs and competition to assess the degree of market power, as well as the relationship with prices directly, which can also establish a type norm. Finally, benchmarking of prices and costs is an important way for a regulator to establish norms: while this is a flexible mechanism for a regulator to use, there are also many problems associated with this approach. Dr Mikkers noted that many of the problems discussed by Alan Gregory also applied in this context.

Misja Mikkers then discussed a typical example from the healthcare sector, comparing hospital prices with mortality rates per patient corrected for population. When a straightforward regression analysis is run on these figures, the almost paradoxical result obtains that the higher the price, the higher also the mortality rates. When the problem is examined more closely, however, the relationship between prices and quality is less direct, which leads to the conclusion that enforcement against excessive prices would only be desirable against some firms in that analysis. He then described an example of co-operation between the NZa and NMa in a merger case—the NZa typically advises the NMa in such cases, but the ultimate decision is taken by the NMa. In the particular case, the only two hospitals in an isolated south-western part of the Netherlands merged to monopoly. The key reason why the merger was finally approved was because the quality inspector for healthcare said that the merger was necessary to sustain quality at a minimum level in the area. However, the NMa imposed a price cap remedy for the competitive segment of the hospital, which basically consisted of a simple average price for comparable products in the Netherlands, corrected for the product mix of that specific hospital, which in the rest of the country is charged to insurers. This is an example of "yardstick competition," regulation. Such an approach is possible in hospital markets because they are highly localised, and so the regulator can make these kinds of comparisons. Additionally, the remedy imposed required commitments in relation to the quality improvement claimed, as well as the opening of collective agreements between the hospital and its doctors, enabling the latter to set up competition in the area. The price cap has been imposed for an indefinite time; it is recalculated every year by the NZa, which provides the information to the NMa that monitors compliance with the remedy.

The Chair remarked that the efficiency frontier discussed in Misja Mikkers' presentation provided much material for thought. In the hospital merger case described, the same product could have very different quality, a characteristic of healthcare markets, whereas quality has been a less pressing concern in many other cases discussed during the Roundtable. Misja Mikkers agreed, but suggested that these kinds of approaches would also be applicable in, for example, the Swedish district heating case, where there are multiple outputs such as electricity and heating. It is only the firm that charges high prices for both outputs that merits investigation—if only one output is considered, there may be problems of economies of scope, asset allocation and cost allocation. It is possible to use these multiple input and output models to examine the firm as a whole, which prevents the regulator from arriving at a norm that would not be achievable by any firm because it incorporates the best norms on each dimension.

In Hungary, continued the Chair, the number of excessive price cases has sharply declined in recent years—there were fifteen such decisions in 2003, and zero in 2009 and 2010. The Chair speculated that this decline may indicate that the competition authority no longer pursues such cases, or alternatively that companies are now behaving better, having received guidance from the competition authority in the past. The delegate from Hungary suggested that the true answer was probably neither of these alternatives and rather that competition had solved the problem. Many of the earlier cases arose in the telecommunications sector, specifically relating to cable television operations. Before 2008, local monopoly operators provided these services in most areas in Hungary. The prices charged by these companies were usually very high, and the package of programme content available was usually modified to the detriment of consumers. As a result of technological innovation, however, the fixed telephone network which has 100% coverage in Hungary is now able to provide cable television services. Additionally, in rural areas satellite television became popular, while in more densely populated urban areas, various parallel television network operators have constructed their own networks. With increased competition, monopoly provision

disappeared, and so the case provides a good example of how technological innovation itself can solve competition problems. With respect to the years 2009 and 2010, the delegate noted that some cases from those years remain under investigation, whereas other excessive price cases examined during those years were closed without a finding of breach.

In Chile, the Chair explained, the competition authority has intervened frequently against excessive prices, including many cases in regulated sectors. The Chilean submission concludes that intervention in these instances was necessary because of the weak performance of the regulators, and so the Chair asked for clarification on this point. The delegate from Chile explained that the submission outlined the more recent cases that have been adjudicated by the country's Competition Tribunal. Under the former competition system, the antitrust commission examined some excessive prices cases particularly in the transport and healthcare sectors, although many of these did not end with a finding of breach. The seven more recent cases outlined in the submission mainly arose outside of the natural monopoly area. Some of the cases were brought by the competition authority, whereas others were private enforcement actions. One reason why the competition authority chose to pursue enforcement within these regulated sectors was that the regulator involved was the same one that had granted the relevant concession originally. Advocacy efforts were pursued by the competition authority initially, but eventually the authority took the view that enforcement action before the Competition Tribunal was necessary. One reason for direct competition enforcement is therefore because of a problem concerning the legal structure. The same regulator that awarded the concession is required to enforce the regulatory duties on the concessionaire. A second reason is on efficiency grounds. In particular, private parties wanted an independent tribunal to assess their cases, rather than submitting a complaint to the regulator and having to go through the administrative law system. A third reason for going directly to the Competition Tribunal is because of its specialist expertise: two members of the Tribunal are economists, so one would expect a more technical analysis of the case in such a forum. Ultimately, of the seven cases discussed in the submission, two were rejected: one case brought by the competition authority was lost before the Tribunal, and a private enforcement case was lost before the Supreme Court. Most of the rulings have been upheld on appeal.

In Mexico, the competition law does not permit the competition authority to intervene in excessive price cases. The Chair asked whether the authority receives complaints about excessive prices nonetheless, and if so, what it does to address these—whether it refers the cases to the relevant regulator, or whether there is simply a gap in the authority's enforcement jurisdiction. The delegate from Mexico confirmed that there is no possibility to sanction excessive prices under Mexican competition law. The delegate noted that the concept of an excessive price was a normative one rather than a positive one, which creates an impossibility for the determination of a methodology to reach a specific definition of such prices. Thus, market prices above any equilibrium could have resulted from private behaviour or a distortive public regulation. In terms of dealing with excessive prices that result from private restraints, the competition authority has two tools: firstly, merger control, which is a means by which to avoid market concentration that endangers competition; and secondly, prohibition of exclusionary conduct, whereby the dominant firm prevents competitors from entering or operating in the market. In the case of regulatory restraints, the authority has two further powers. Firstly, the Mexican constitution allows the executive branch to regulate in certain sectors which relate to key products for popular consumption. Before exercising this power, the executive branch must request that the competition authority analyse the market, and it is only in the absence of effective competition that the executive branch is permitted to regulate. Secondly, in sectors where there is pre-existing regulation, the competition authority can be asked to analyse whether a particular firm holds a dominant position in that market, in which case the sector regulator gains the power to regulate—for example, in the telecommunications, aviation, road and rail transport, maritime, natural gas and LPG markets. The Chair asked how long it would take for the executive branch to regulate prices in a particular area, if it wished to do so. The delegate explained that national law defined the procedure to be followed in such cases, and that the market analysis process takes a similar amount of time to the

amount the authority would take in any other investigation, for example relating to abuse of dominance or collusion, which generally under Mexican law take about one to one and a half years.

The Chair noted that the US was in a similar situation to Mexico, insofar as price regulation is accepted only for natural monopolies, and there can be no antitrust intervention against excessive prices. The Chair asked how the US competition authorities would deal with a Swedish district heating-type case, concerning an unregulated natural monopoly, and in particular how difficult it would be to put in place regulation in this new market. The delegate from the US confirmed that the antitrust laws in the US are not used to regulate the prices of lawful monopolists. Nonetheless, there can be regulation of natural monopoly situations, which occurs when either Congress or an individual State decides to set up a regulatory scheme and establish a regulatory body to take control of the market. In the case of district heating, the process would probably consist of an analysis of whether there is in fact a situation of durable natural monopoly power. Subsequently, there would be an examination of the balancing of the harms caused by the natural monopoly against the costs and inevitable harms of a regulatory structure. In the specific case of district heating, the levels of natural monopoly power in the US are not particularly great, although there are two States that have regulated this type of heating (New York and Colorado).

The delegate from the EU remarked that while it had been mentioned during the course of the discussion that US antitrust law does not extend to excessive prices, such cases do sometimes come within the remit of the US antitrust authorities. He noted the *Evanston Hospital Merger* case, where the merged hospital facility began to charge excessive prices, and the federal antitrust authorities successfully sued for unbundling of the merged entity on that basis. The delegate from the US clarified that *Evanston Hospital* concerned a consummated merger; under merger analysis, while high prices can be indicative of problems in the market, the US authorities would not pursue this in the manner of a stand-alone antitrust abuse of excessive prices. Ultimately, the judgment in *Evanston Hospital* could not be implemented because the merger had already been completed.

The Chair moved to the submission from Chinese Taipei where the government in 2008 passed an action plan for the stabilisation of prices, according to which a special committee in charge of monitoring prices of commodities was established. Given that the Fair Trade Commission (FTC) of Chinese Taipei sits on that committee, the Chair asked whether the FTC had been given any new statutory powers to support its new role. Secondly, the Chair asked about the case law relating to excessive hoarding under Chinese Taipei competition law. The delegate from Chinese Taipei answered that when the FTC sits within the committee, it works only within the ambit of its concerted action and abuse of dominance powers. The 2008 action plan was the result of a continuous surge in global oil and raw material prices, in response to which the cabinet established the commodity price stabilising task force, and passed the action plan. Twelve government agencies are involved in the committee, including the Ministry of Economic Affairs, the Ministry of Finance, and the Council of Agriculture. The purpose of the committee is to monitor developments in commodity prices in and outside of Chinese Taipei, and to develop corresponding measures to stabilise domestic prices in a timely manner. The taskforce intervenes through open market operations without direct control of prices. The FTC's role is to investigate the business records and arrangements of firms under suspicion, and to prevent co-ordinated price rises through collusive conduct. Additionally, the FTC can impose sanctions where restrictions of competition or unfair competition conduct are confirmed during an investigation. As to the question of whether hoarding is *per se* prohibited by Chinese Taipei competition law, the delegate argued that the answer was both yes and no. Under criminal law, hoarding is prohibited on a *per se* basis, but the conditions for establishing a case of criminal hoarding are very strict. Where the criminal prosecutor identifies an apparent case of hoarding but cannot establish the high threshold for criminal conduct, the case can be transferred to the FTC. If the case concerns a dominant firm, the FTC can investigate on the basis of the improperly set maintenance or charging of excessive prices. If the case does not concern a company with a dominant position, it can be investigated on an unfair conduct basis.

Australia is a jurisdiction that combines competition law and regulatory functions. The **Chair** asked whether having dual functions within the one agency meant that it is easier to engage in price regulation when this is deemed necessary. The delegate from Australia explained that the Australian Competition & Consumer Commission (ACCC) is an agency that performs competition, regulatory and consumer protection functions, and so there are many different perspectives, and market regulation approaches, within the one organisation. The ACCC considers this to be an advantage for the Australian system, although the delegate noted that, in his view, the organisation (including its regulators) does not think like regulators. Instead, the general culture is that, normally, markets work well where one allows them to do so. Accordingly, it is necessary to conduct a close assessment of any market that is not working well, in order to determine the most appropriate approach within the organisation to address the problem. Price regulation is a tool that is very rarely used by the ACCC; the emphasis of the agency at the moment is on encouraging deregulation and properly functioning markets. If a problem of excessive prices for "district cooling" were to arise in Australia, the first response of the agency would probably be encouragement or facilitation of entry of competitors through some sort of access arrangement. One significant advantage of having regulators within the same organisation as the competition authority, is that they have great expertise in the areas in which they regulate. For example, very recently Australia legislated for a carbon tax, and under this legislation the ACCC has a specific role and has been given additional funds to monitor and enforce false claims that might be made between price rises and the carbon tax. There is a concern that businesses may take advantage of the new tax to raise prices, and so the ACCC has an important informational role before the tax is introduced to ensure that businesses are aware that they cannot falsely claim that price increases are attributable to the carbon tax. In preparing for this role, the ACCC has drawn heavily on intra-agency expertise, from within the energy regulator and the competition and consumer divisions, which have worked together to devise an action plan. Thus, in the typical district heating-style case, the ACCC is able to draw on a range of different expertise.

5. Excessive Prices: Conclusion

The Chair, Alberto Heimler, summed up the discussion. Many issues have been considered, and yet some question marks remain. While the experts insist that profitability analysis can be performed and benchmarks can be identified, the identification of benchmarks has proven difficult in practice, in particular because of the difficulty of allocating costs over the life of an investment. The Chair noted the OECD Secretariat's 2004 paper on access pricing, which may provide some guidance in this respect. One remarkable feature of the discussion was that, in no jurisdiction where the competition authority retains the possibility of applying competition law against excessive prices, did the authority declare that it would not do so—although, of course, some jurisdictions do not have such enforcement powers at all. Given that competition interventions on this basis remain not merely possible but likely, it is necessary for authorities to apply better standards by which to assess such cases. While there is little case law in this area, the older EU case law of *United Brands* continues to maintain its validity. Excessive price cases are rare, and are likely to remain rare. Screens are an important instrument in this respect, including factors such as the maturity of the industry, super-dominance, high entry barriers, and holding a market position obtained through some privilege. The hope is, therefore, that the Roundtable discussion will lead to better and better argued cases.

COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

1. Introduction aux prix excessifs en tant que problème en termes de concurrence

Le Président Alberto Heimler ouvre la discussion de la table ronde sur les prix excessifs en faisant observer que les pratiques d'exploitation constituent un domaine du droit de la concurrence où l'on trouve le moins de consensus parmi les autorités de contrôle de la concurrence et entre les juristes et les économistes. Il offre dès lors un sujet de discussion riche et controversé. S'agissant de la discrimination par les prix, par exemple, les juristes ont généralement affirmé qu'une interdiction générale était nécessaire, principalement pour des motifs d'équité, alors que les économistes soutiennent que la discrimination par les prix peut souvent favoriser la concurrence. Au fil du temps, les arguments des seconds se sont avérés les plus convaincants, et les affaires de discrimination par les prix sont rares aujourd'hui, du moins dans le cadre du droit de la concurrence. Cela étant, la situation est plus complexe en ce qui concerne la question des prix excessifs. L'inefficacité dans la répartition des ressources, par laquelle on entend la dissociation entre les prix et le coût marginal, est, en théorie économique élémentaire, une caractéristique particulièrement dommageable pour une économie de marché, un facteur qui pourrait étayer la conclusion qui veut que l'application du droit de la concurrence à l'encontre des prix excessifs est nécessaire. Pourtant, rares sont les économistes qui prônent l'intervention dans les cas de prix excessifs, en raison des effets négatifs potentiels sur l'investissement et l'accès au marché qui, soutiennent-ils, pourraient l'emporter sur les effets positifs découlant de prix réduits. Si, en règle générale, les juristes sont plus disposés à intervenir dans ce type de cas, le Président relève l'exemple de l'article 102 du traité sur le fonctionnement de l'Union européenne (« TFUE »), une disposition qui fait explicitement référence aux pratiques d'exploitation dans son texte, mais qui a été principalement appliquée pour traiter les pratiques d'éviction. Par conséquent, la question essentielle est de savoir s'il faut ou non traiter les prix excessifs par le biais du droit de la concurrence, et de quelle manière.

Le Président présente ensuite les trois sous-questions qui seront abordées pendant la table ronde : premièrement, le point de savoir si les dispositions d'un pays relatives au comportement unilatéral couvrent l'interdiction des prix excessifs ; deuxièmement, les critères d'intervention, qui comprennent le point de savoir à quel moment l'on peut dire d'un prix qu'il n'est pas excessif ; et, troisièmement, le rôle de la réglementation et de la relation entre les organes d'application et les organes de réglementation dans le traitement des prix excessifs. Le Président présente aussi deux experts qui prendront la parole pendant la discussion : M. Alan Gregory de l'université d'Exeter, et M. Misja Mikkers, de l'Autorité néerlandaise des soins de santé.

Le Président donne toutefois tout d'abord la parole à M. David Gilo, de la délégation israélienne, qui s'exprime en tant qu'ancien professeur d'université et note la réticence générale des autorités de contrôle de la concurrence à examiner les cas de prix excessifs. Aux États-Unis, les prix excessifs ne peuvent constituer une infraction au droit de la concurrence alors que, dans l'Union européenne, les prix excessifs peuvent constituer des infractions aux règles de concurrence, mais la Commission européenne exerce son pouvoir d'exécution avec beaucoup de prudence dans ce domaine. Les raisons de cette réticence sont triples : 1° les prix excessifs sont censés susciter l'arrivée de nouveaux entrants et sont dès lors autocorrecteurs ; 2° les prix excessifs sont supposés encourager l'investissement *ex ante* ; et 3° la difficulté d'appliquer une règle quelconque contre les prix excessifs. L'exposé est centré sur la première raison, la

relation entre les prix excessifs et l'arrivée de nouveaux entrants. Deux sous-arguments entrent en jeu ici : les prix excessifs encouragent cette arrivée, le prix baisse ensuite et, de plus, suite à la perspective de cette arrivée, l'entreprise dominante baissera ses prix afin de dissuader *ex ante* les arrivées de nouveaux entrants. M. Gilo élève des doutes au sujet de ces hypothèses et soutient que, si l'arrivant potentiel sait ce que sera le prix après son arrivée, autrement dit s'il n'existe pas de problèmes d'information et à supposer que l'arrivée secrète est impossible, en règle générale, les prix avant l'arrivée n'entrent pas en ligne de compte et n'induiront pas de nouvelles arrivées. Puisque c'est le prix après l'arrivée de nouveaux entrants qui détermine la rentabilité, le prix avant cette arrivée ne peut encourager celle-ci.

David Gilo relève ensuite certains correctifs allégués de cette évaluation. Premièrement, l'on a affirmé que, là où l'arrivant potentiel a des problèmes d'information, en particulier lorsqu'il ignore l'efficacité ou le coût marginal de l'entreprises dominante, les prix excessifs invitent à l'arrivée dans la mesure où l'arrivant potentiel croit que l'entreprise en place est inefficace et que son arrivée sur le marché est plus rentable qu'elle ne l'est en réalité. Dans cette situation, David Gilo soutient que, là où les prix excessifs sont interdits, le prix avant l'arrivée du nouveau venu peut avoir un effet de signal encore plus fort. Il suffit qu'une entreprise inefficace en place, soumise à une règle qui interdit les prix excessifs, fixe son prix à un niveau légèrement supérieur à celui d'une entreprise efficace en place ; à supposer que l'organisme de contrôle de la concurrence puisse évaluer le prix concurrentiel, l'entreprise dominante inefficace peut pratiquer un prix légèrement supérieur à celui de l'entreprise efficace, ce qui a une valeur de signal encore plus forte que d'autres décisions de fixation du prix en l'absence de mesures de mise en œuvre des règles en matière de prix excessifs. Deuxièmement, l'on a affirmé que les prix excessifs pourraient signaler à l'arrivant potentiel qu'en situation de collusion, le prix de collusion va être plus élevé, c'est-à-dire qu'un prix excessif pourrait avoir un effet d'invitation sur l'arrivant potentiel qui espère conclure une entente avec l'entreprise dominante. David Gilo soutient toutefois qu'en réalité, ce type d'arrivée sur le marché n'est pas souhaitable. Troisièmement, les prix excessifs peuvent envoyer à l'arrivant le signal qu'il existe des déficits de capacité sur le marché, de sorte que l'arrivant potentiel pourrait entrer sur le marché et ajouter de la capacité. Bien que cet argument ait une certaine validité, il faut distinguer les situations dans lesquelles les contraintes de capacité sont imposées de manière exogène sur le marché (par exemple, après une catastrophe naturelle) des situations où ces contraintes sont le résultat d'une décision stratégique prise par l'entreprise dominante en réponse à un obstacle à l'arrivée existant. Dans le premier scénario, les prix élevés devraient être autorisés par l'autorité de contrôle de la concurrence afin de permettre de dissiper la demande excédentaire. Les prix excessifs ne devraient toutefois pas être autorisés dans la deuxième situation. En effet, lorsque l'entreprise dominante choisit, pour une question de stratégie, de diminuer sa capacité, il faut supposer que les obstacles à l'arrivée restent importants, auquel cas l'arrivant potentiel sur le marché n'entrera en aucun cas sur celui-ci parce qu'il craint la réaction de l'entreprise dominante après son arrivée. En outre, David Gilo affirme que les prix excessifs peuvent, en réalité, avoir un effet dissuasif sur les arrivants potentiels à tout moment, et il cite trois exemples. Premièrement, lorsque l'arrivant n'a pas d'informations sur ce que seront ses propres coûts après avoir accédé au marché, un prix excessif pourrait donner à penser que les coûts sont élevés dans le secteur, ce qui pourrait décourager l'entrée sur le marché. Deuxièmement, l'entreprise dominante pourrait vouloir apparaître comme une entreprise efficace même si elle ne l'est pas en réalité, et pratiquera dès lors le prix rationnel pour tromper les arrivants potentiels et décourager l'entrée sur le marché. Cette pratique peut être plus courante dans les cas où les prix excessifs sont permis que lorsqu'ils sont interdits. Encore une fois, les prix excessifs découragent l'entrée dans ce cas, parce qu'en permettant des prix excessifs, la simulation de l'efficacité par l'entreprise dominante devient plus manifeste. Troisièmement, le fait qu'une entreprise dominante baisse sensiblement ses prix après l'entrée sur le marché peut indiquer que les prix étaient excessifs avant cette entrée. Si l'on utilise cet étalon, les entreprises dominantes auront tendance à réagir moins vigoureusement à l'entrée de nouveaux arrivants, ce qui facilite l'entrée. Ici aussi, les prix excessifs découragent l'entrée et celle-ci augmente la probabilité de poursuites pour prix excessifs.

Enfin, David Gilo met en évidence certaines considérations s'appliquant à Israël qui peuvent justifier, plus que dans d'autres pays, une application plus rigoureuse du droit de la concurrence contre les prix excessifs. Premièrement, l'Autorité israélienne de la concurrence détient plus de pouvoir de collecte des données que les organes de réglementation sectoriels. Deuxièmement, les décisions relatives aux prix excessifs prises par l'Autorité sont susceptibles d'appel devant un tribunal spécialisé possédant une expérience technique particulière, et non devant une juridiction civile ordinaire. Troisièmement, Israël est un marché de taille modeste avec des échanges internationaux limités et où la demande est souvent fortement inélastique. Enfin, le pays possède de nombreuses entreprises publiques monopolistiques qui ont conservé une position solidement établie, même après la libéralisation.

En réponse à une demande d'éclaircissements au sujet de la question des contraintes exogènes formulée par un délégué de l'Union européenne, David Gilo explique que cela s'est produit dans certains cas, comme au lendemain de l'ouragan Katrina, où la capacité du marché a été détruite. Dans ces cas, les prix élevés sont nécessaires pour rationner la demande excessive supérieure à l'offre qui en découle. Précisant le rôle de la demande en réponse à une question posée par un délégué du Taipei chinois, M. Gilo explique que, bien que la demande en Israël ne soit pas totalement inélastique, elle l'est relativement dans la mesure où les Israéliens ne réagissent généralement pas aux prix élevés.

2. Identifier les prix excessifs

Le Président oriente ensuite la discussion vers le point de savoir à quel moment les prix sont excessifs, une question distincte de celle relative au moment où les prix ne sont pas excessifs, qui sera examinée à un stade ultérieur. Pour présenter le sujet des filtres de prix, le Président présente M. Frank Maier-Rigaud, du Secrétariat de l'OCDE, qui note tout d'abord la difficulté générale de l'identification des prix excessifs. En réalité, l'on pourrait affirmer que les vérifications des prix excessifs ressemblent à celle proposée par le juge Stewart de la Cour suprême des États-Unis, à savoir qu'il faut juger sur pièces (« *I know it when I see it* »).[1] La littérature sur les prix excessifs a toutefois abordé ces difficultés par la notion de filtres, qui tente de déterminer les circonstances dans lesquelles la probabilité d'apparition de prix excessifs est la plus grande. Il existe deux dimensions inhérentes au concept de filtres : 1° quelles sont les circonstances dans lesquelles la probabilité de prix excessifs est la plus grande, autrement dit, à quel moment les autorités risquent-elles le plus de les voir ? ; et 2° dans quelles circonstances les prix excessifs deviennent-ils un problème de politique qui fait que les autorités risquent le moins de les ignorer ? L'exposé est centré sur les quatre filtres les plus notables, et note que le document de référence analyse des filtres supplémentaires. Si l'exposé s'intéresse aux différents filtres pris séparément, la littérature fait souvent état d'une application cumulative, avec une série de filtres différents à appliquer avant d'entamer des poursuites dans une affaire de prix excessif. Le premier filtre, et le plus important, est celui des *obstacles forts et non transitoires à l'entrée*, qui assure la permanence d'un régime de prix excessifs, autrement dit, une position de monopole solidement établie. Lorsqu'il existe des obstacles juridiques à l'entrée, le remède approprié est la persuasion. Lorsque les obstacles sont stratégiques, l'autorité de contrôle de la concurrence peut intenter une action fondée sur le droit de la concurrence à l'encontre du comportement d'exclusion. Le principal domaine des cas de prix excessifs se présente lorsque les obstacles à l'entrée revêtent un caractère structurel, bien qu'ici aussi, la persuasion puisse jouer un rôle. Deux autres filtres ont été proposés qui concernent tous deux la dominance : l'un est centré sur le *degré de dominance* et requiert essentiellement une situation de super position dominant avant d'introduire une action pour prix excessifs ; et l'autre concerne l'*origine de la dominance*, par exemple, le point de savoir si elle est le résultat de comportements d'exclusion antérieurs qui n'ont pas fait l'objet de poursuites, ou d'une position sur le marché héritée par une ex-entreprise d'État. Le quatrième filtre principal considère les *autorités de contrôle de la concurrence comme les organes de réglementation de dernier ressort*, sur les marchés où l'organe de réglementation du secteur est faible ou totalement absent. Ces circonstances peuvent se

[1] *Jacobellis c. Ohio*, 378 U.S. 184 (1964).

produire parce que l'organe de réglementation a peu de pouvoirs juridiques où qu'il applique mal les pouvoirs dont il dispose, soit parce que sa création est récente, soit parce qu'il est captif. Bien que l'on puise prétendre que la persuasion dans le sens d'une meilleure réglementation est la réponse la plus adéquate en pareils cas, il existe des raisons de préférer l'application du droit de la concurrence : par exemple, les raisons *ex ante* qui plaident en faveur de la réglementation peuvent être faibles ; ou des problèmes transnationaux en l'absence d'organe de réglementation approprié à ce niveau ; l'application du droit de la concurrence peut fournir une réponse plus rapide ; dans les économies en transition vers une économie de marché ou dans lesquelles la libéralisation et la privatisation n'ont pas réussi à créer des marchés concurrentiels, l'application du droit de la concurrence peut offrir un tremplin vers la concurrence. Lorsque le droit de la concurrence est appliqué dans des secteurs réglementés, il faut tenir compte des considérations déjà examinées lors de la table ronde de février 2001 sur les moyens de défense fondés sur une conduite réglementée. Enfin, les limitations de l'utilisation de filtres sont étudiées. Le principal problème associé à l'utilisation de ces filtres est le fait qu'ils sont basés sur le pouvoir discrétionnaire de l'autorité de la concurrence en matière de poursuites. Les filtres informels ou non contraignants qui sont utilisés dans la sélection des cas ou dans un contexte de hiérarchisation ne relèvent ni du droit de la concurrence, ni de la jurisprudence. Les observations soumises par l'Afrique du Sud, par exemple, analysent ce problème en ce qui concerne la super position dominante, où la règle juridique impose simplement d'établir la dominance, ce qui peut entraîner des difficultés dans le contexte des actions privées, dans la mesure où le droit appliqué par les tribunaux peut ne pas cadrer avec les filtres supplémentaires utilisés par l'autorité de la concurrence. De plus, dans un système de droit administratif, une autorité de la concurrence qui s'appuie sur des filtres peut risquer un contrôle administratif.

En réponse à l'exposé, le Président rappelle aux délégués que l'efficacité d'une stratégie de persuasion dépend largement de son accueil par le pouvoir exécutif ou législatif, sans quoi cette stratégie se borne à fournir une description du problème sans apporter de solution. Le Président cite ensuite l'affaire *United Brands*,[2] dans laquelle la Cour de justice de l'Union européenne a établi le critère juridique pour les prix excessifs, à savoir l'existence d'un abus de position dominante au sens du droit de la concurrence de l'Union européenne. Il demande si ce critère reste valable et, en particulier, à la lumière de la mention des coûts pour les concurrents dans cet arrêt, si et comment ce critère peut être appliqué dans des situations où il n'existe pas de concurrents, par exemple, dans le cas d'un monopole non réglementé. Le délégué de l'Union européenne estime que le critère appliqué dans l'arrêt *United Brands* reste une manière valable de considérer les prix excessifs. Il est intéressant de noter que les faits dans cette affaire ne constituent pas un exemple typique de prix excessifs, dans la mesure où le marché concerné (les bananes) est différent du type de marchés (par exemple, ceux où les obstacles à l'entrée sont importants) dans lesquels se produisent d'ordinaire des problèmes de prix excessifs. Dans l'affaire elle-même, la Commission a estimé que le prix appliqué pour les bananes différait fortement d'un État membre à l'autre — en particulier, les prix pratiqués en Allemagne, au Danemark et sur d'autres marchés sont le double de ceux pratiqués en Irlande. La Commission, partant du principe que le prix pratiqué en Irlande devait forcément être rentable, a estimé qu'appliquer le double de ce prix sur d'autres marchés était nécessairement excessif. La Commission a toutefois été déboutée en appel devant la Cour de justice de l'Union européenne, au motif qu'il n'était pas évident que le prix pratiqué en Irlande était un prix rentable ; la Cour de justice de l'Union européenne aurait dû considérer à la fois le prix des bananes et le coût de leur mise sur le marché, ce qu'elle n'avait pas fait. La Cour de justice de l'Union européenne a ensuite défini un critère en deux étapes pour les prix excessifs au regard du droit de l'Union européenne. La première branche de ce critère tente d'établir s'il existe une marge bénéficiaire excessive en comparant les prix et les coûts. La justification de cette démarche est qu'il convient d'éviter de conclure à l'existence d'un prix excessif lorsque celui-ci semble élevé, mais qu'il est en réalité justifié, soit par les risques liés aux investissements particuliers consentis, par exemple, soit parce que la marge est faible parce que les coûts sont élevés eux aussi. Il n'existe donc pas de condamnation a priori des prix élevés. La seconde branche du critère évalue si le prix est inéquitable

[2] Affaire 27/76 *United Brands c. Commission des Communautés européennes* [1978] Recueil 207.

ou excessif en soi ou par rapport aux produits concurrents. Le deuxième volet de cette seconde branche s'efforce d'éviter la condamnation de marges bénéficiaires élevées qui sont le résultat de l'efficacité, même s'il se peut qu'il n'existe pas toujours de produit concurrent dans un cas particulier — seules les marges élevées qui résultent de l'exercice de pouvoir sur le marché justifient un examen au titre du droit de la concurrence. Un tel comparateur pourrait être identifié en comparant le prix à l'examen avec le prix obtenu pour le même produit sur un autre marché, ou le prix affiché par l'entreprise dominante avec le prix d'une entreprise rivale plus modeste sur le même marché, ou il se peut que le prix ait augmenté au fil du temps sans aucune justification. Dans chaque cas, la vérification s'efforcerait de faire la distinction entre les situations dans lesquelles les marges bénéficiaires sont élevées en raison de l'efficacité ou du meilleur fonctionnement du marché, d'une part, et les situations dans lesquelles les prix sont élevés suite à l'exercice du pouvoir sur le marché, d'autre part. De cette manière, le critère appliqué dans l'affaire *United Brands* est un mécanisme précieux qui permet de réduire les types de situations dans lesquelles la Commission interviendra. Ainsi, conclut le délégué, le critère reste valable et utile, mais il est nécessaire de tenir compte de son contexte et de sa signification, qui ont été reconnus par la Cour de justice de l'Union européenne elle-même dans l'arrêt *United Brands*, qui a déclaré que le critère n'est pas la seule manière, ni la plus complète, de considérer le problème des prix excessifs.

Le Président Alberto Heimler décrit ensuite un cas examiné par la Commission suisse de la concurrence (« ComCo »), qui concerne les tarifs de terminaison entre opérateurs nationaux de télécommunications mobiles en Suisse. Ces tarifs n'étaient pas réglementés et la ComCo a soutenu que les prix appliqués étaient excessifs. Le Président s'enquiert du critère utilisé par la ComCo pour déterminer que les tarifs étaient excessifs et, en outre, du rôle de la réglementation dans ce cas. Le délégué de la Suisse explique que le critère utilisé était une combinaison de plusieurs critères, principalement un critère par comparaison des tarifs de terminaison suisses avec ceux pratiqués sur un certain nombre de marchés similaires ou voisins, à savoir : les tarifs pour les appels dits « *on net* » comprenant les tarifs de terminaison ; le tarif de terminaison réglementé pour les appels internationaux sur le réseau mobile ; et les tarifs de terminaison réglementés et non réglementés pour les appels passés dans d'autres pays européens. La ComCo a comparé en outre les bénéfices de Swisscom, l'opérateur dominant, et a conclu qu'en comparaison à l'échelle internationale, les bénéfices de Swisscom étaient extraordinairement élevés. Enfin, la ComCo a procédé à une comparaison des estimations de coût pour les tarifs de terminaison appliqués par d'autres opérateurs européens, comparaison qui a montré que les coûts effectifs de terminaison étaient inférieurs aux tarifs de Swisscom.

S'agissant du rôle de la réglementation, le délégué explique qu'en Suisse, un régime réglementaire purement a posteriori est en place dans le secteur des télécommunications. En ce qui concerne les tarifs de terminaison, la priorité est donnée aux négociations entre opérateurs de télécommunications et c'est uniquement dans les cas où un accord de caractère privé s'avère impossible que l'organe de réglementation entre en action. Ainsi, dans le cas en question, cet organe n'a pas revendiqué de compétence. Il n'empêche que l'organe de réglementation des télécommunications et la ComCo entretiennent de bonnes relations de travail et s'appuient régulièrement entre eux. Bien que Swisscom ait soutenu au début de l'enquête que les tarifs de terminaison ne relevaient pas de la compétence de la ComCo, cette question a été tranchée par le tribunal d'appel qui a déclaré que la loi sur les télécommunications n'excluait pas l'application du droit de la concurrence. Au degré d'appel sur le fond, le tribunal administratif fédéral et la Cour d'appel ont confirmé tous deux que les tarifs de terminaison pratiqués par Swisscom étaient très élevés, et les deux décisions semblent appuyer la démarche adoptée par ComCo dans cette affaire. La décision de la ComCo a toutefois été infirmée en dernière instance.

Le Président appelle ensuite l'attention sur l'affaire *Mittal* bien connue, concernant les prix excessifs dans le secteur sidérurgique en Afrique du Sud. Cette affaire ne concerne pas un monopole naturel et l'on peut affirmer que les prix concernés étaient fondés sur le marché dans la mesure où ils s'appuyaient sur les coûts du producteur et les coûts de transport, même s'ils étaient supérieurs aux prix concurrentiels. Le

Président a demandé comment la Commission sud-africaine de la concurrence a procédé lors de l'analyse du cas dans ces circonstances et, plus précisément, si, au cas où il a été conclu que le producteur national était moins efficace, cela pouvait avoir justifié le prix. Le délégué de l'Afrique du Sud précise un certain nombre de points factuels concernant le rôle des exportations, de l'efficacité et des coûts, notamment le point de savoir si le marché pouvait être considéré comme un monopole naturel. Mittal a appliqué à ses clients locaux le même prix que celui qu'ils auraient payé pour de l'acier importé en Afrique du Sud depuis la mer Noire. En l'absence de concurrence intérieure, les clients locaux n'avaient d'autre choix que de payer ce prix. En même temps, Mittal exportait une partie importante de sa production à des prix inférieurs. L'Afrique du Sud est un des producteurs d'aciers les moins chers du monde, grâce à ses énormes ressources en minerai de fer et à ses faibles coûts de production. Par conséquent, le niveau des exportations n'était pas motivé par une demande locale faible mais bien par des coûts moyens en baisse pour tout l'éventail de la production réalisable, et par une demande locale au-dessous de l'échelle efficiente. Un autre aspect essentiel est celui des coûts : sont-ils faibles parce que l'entreprise est efficace ou est-ce dû à d'autres facteurs ? Les plaignants ont soutenu que Mittal n'était pas particulièrement efficace dans la mesure où il n'atteignait pas les niveaux de bénéfices que l'on pourrait attendre au vu des ses coûts de matières premières faibles. Au degré d'appel, le tribunal a renvoyé l'affaire au tribunal de la concurrence pour une nouvelle évaluation de la question de la rentabilité.

Le Président Alberto Heimler passe ensuite aux États-Unis, une des rares juridictions où les prix excessifs ne constituent pas une infraction au regard du droit de la concurrence. Les autorités de contrôle de la concurrence des États-Unis n'en passent pas moins les prix au crible et, depuis 2002, la Federal Trade Commission (« FTC ») a suivi les prix de détail de l'essence dans un grand nombre de villes et de zones urbaines. Le Président s'enquiert des résultats de ces neuf années de suivi et demande, en particulier, si un seuil a été déterminé au-delà duquel les prix deviennent excessifs et justifient un examen plus approfondi. Cet examen peut ne pas être nécessairement fondé sur un comportement d'infraction unilatérale, mais amener la FTC à soupçonner l'existence d'une autre violation, par exemple, un cartel. De manière plus générale, le Président demande si le projet de suivi a produit des résultats tangibles. Le délégué des États-Unis explique que le projet de suivi ne s'occupe pas de fixer un prix de référence ou un seuil, mais de déterminer s'il y a eu des profils de prix inhabituels ou anormaux au fil du temps. Si ces profils paraissent inhabituels, la FTC examine si les raisons relèvent de la conduite ordinaire des affaires. À ce jour, dans la quasi-totalité des cas, la FTC a déterminé que les profils de prix anormaux sont imputables à une conduite d'entreprise normale. Tant les enquêtes informelles que les enquêtes formelles à part entière ont été ouvertes sur base des données du suivi mais, à ce jour, la FTC n'a pas eu de raison d'intenter des poursuites dans ces affaires au-delà d'une plainte ou d'un jugement d'expédient. Cela étant, le projet de suivi s'est avéré utile pour la FTC, à la fois pour améliorer la connaissance du marché et pour pouvoir mieux répondre aux demandes relatives au marché de l'essence aux États-Unis.

Le Président fait observer que l'opération de suivi peut avoir un effet indirect, dans la mesure où le secteur sait que les prix de l'essence sont surveillés par la FTC. Elle peut donc servir d'avertissement *ex ante*. Le Président présente ensuite une affaire traitée par l'autorité bulgare de la concurrence, qui concernait des prix excessifs sur un marché non réglementé, en l'espèce, le marché des intrants pour la production de ciment. Le Président demande au délégué de la Bulgarie de préciser la question de la dominance dans cette affaire, si le droit bulgare de la concurrence oblige les producteurs de justifier les prix par rapport aux coûts, et si l'on pourrait mieux considérer l'affaire comme un exemple de discrimination par les prix, dans la mesure où l'entreprise établissait une discrimination entre les producteurs et en faveur de sa propre filiale de production de ciment. Le délégué de la Bulgarie explique que l'affaire concernait le marché du laitier granulé, un déchet de la production de fer et une matière première essentielle dans la production de ciment de laitier. L'entreprise défenderesse était le seul producteur de fer et, par conséquent, le seul producteur de laitier granulé en Bulgarie. L'autorité de la concurrence envisage la possibilité de concurrence de produits importés, mais cela s'est avéré impossible en raison des coûts de transport élevés que cela impliquait. Les usines de production de ciment

concurrentes ont confirmé qu'il leur était impossible d'importer la matière première. En outre, il n'existait pas de quantités libres de laitier granulé dans les pays voisins de la Bulgarie. Compte tenu de ce qui précède, l'autorité de la concurrence a estimé que l'entreprise défenderesse détenait un pouvoir monopolistique sur le marché. S'agissant de la question de la discrimination, le délégué a indiqué que l'affaire trouvait son origine dans l'examen, par l'autorité de la concurrence, d'un accord de coentreprise entre l'entreprise dominante et un nouvel arrivant sur le marché. Avant l'évaluation de cet accord, l'autorité de la concurrence ignorait le niveau de prix concurrentiel pour le produit — un problème du type « sophisme du cellophane ». Lorsque l'autorité a examiné l'accord, elle s'est rendue compte que les prix appliqués à d'autres producteurs de ciment étaient très élevés en comparaison, et l'autorité a dès lors interdit l'accord et ouvert une enquête pour prix excessif. Les éléments de preuve ont révélé que les prix appliqués étaient effectivement très élevés, et l'autorité de la concurrence a donc déclaré que l'entreprise dominante avait fixé des prix excessifs pour l'ensemble des quatre producteurs de ciment concurrents.

Le Président Alberto Heimler passe ensuite à l'Allemagne et note que le droit allemand possède une jurisprudence particulièrement développée concernant les prix excessifs, la loi précisant comment mener des comparaisons et identifier les prix excessifs. Dans sa note, l'Allemagne a signalé une disposition spécifique relative au secteur énergétique, qui autorise les comparaisons de rentabilité avec d'autres services d'utilité publique afin d'aider le Bundeskartellamt à déceler les prix excessifs dans ce secteur. Le Président s'enquiert du fonctionnement de ce mécanisme de comparaison intersectorielle et demande si le critère de « marge commerciale raisonnable » qui figure dans la loi allemande offre une sécurité juridique suffisante pour les entreprises. En outre, le Président relève deux affaires qui se sont produites dans le secteur de l'énergie concernant les prix du gaz et du chauffage urbain, qui se sont terminées toutes deux par l'acceptation d'un engagement. Il demande des précisions sur la portée des engagements reconnus et si les affaires sont toujours en cours. Le délégué de l'Allemagne a confirmé que les autorités allemandes de la concurrence ont récemment eu à connaître, dans le domaine des prix excessifs, de plusieurs affaires qui, selon cette autorité, ont eu des avantages immédiats pour les consommateurs. Cela étant, l'autorité n'ignore pas qu'il est nécessaire d'éviter les effets négatifs potentiels sur la concurrence et se montre dès lors extrêmement prudente lorsqu'elle prend des mesures répressives à l'encontre des prix élevés. Des affaires récentes concernaient les secteurs du gaz et de l'électricité où, dix ans après la libéralisation, ces marchés restent caractérisés par une forte concentration, une intégration verticale et des obstacles importants à l'entrée, qu'ils soient techniques, structurels, voire juridiques. Afin de favoriser la concurrence dans ces secteurs, le gouvernement allemand a instauré plusieurs mesures pour faciliter le contrôle des abus. En particulier, une disposition spéciale a été adoptée en 2007 qui s'applique uniquement aux marchés de l'électricité et du gaz et interdit l'abus d'une position dominante sur ces secteurs en imposant des redevances et autres conditions générales de vente qui sont moins favorables que celles appliquées par d'autres services d'utilité publique sur le même marché ou sur des marchés comparables. En outre, la disposition interdit aussi de « pratiquer des prix qui excédent déraisonnablement les coûts ». Choisir une valeur de référence adéquate à l'intérieur de marchés comparables requiert l'identification d'entreprises qui sont aussi similaires que possible à celles qui font l'objet de l'enquête. Si, en théorie, les entreprises servant de référence pourraient se situer dans un secteur différent, celles-ci risquent de ne pas être suffisamment similaires aux fins de comparaison. Les différences, notamment les différences structurelles en termes de coût, sont prises en compte par des ajustements à la hausse ou à la baisse de la valeur de comparaison, et la Cour de justice fédérale allemande a insisté sur le fait qu'en particulier dans les cas où la base de comparaison est restreinte (par exemple, s'il n'existe qu'une seule entreprise de référence), le prix de comparaison, ajustements compris, doit être calculé avec la plus grande précision possible, en ajoutant un ajustement supplémentaire de sécurité au prix de référence pour tenir compte des incertitudes générales. Ces mécanismes constituent des sauvegardes pour garantir que le prix de référence établi se prête autant que possible aux comparaisons.

L'affaire relative à l'électricité utilisée pour le chauffage, dont est actuellement saisi le Bundeskartellamt, fournit selon le délégué un exemple concret de la manière de trouver une valeur de

référence convenable ; la procédure a débuté par la collecte d'informations auprès de 25 fournisseurs d'électricité utilisée pour le chauffage, tous actifs sur différents marchés régionaux. Dix-neuf d'entre eux étaient soupçonnés de pratiquer des prix excessifs, et six autres ont été considérés comme des références potentielles. Au cours de l'enquête, une des entreprises suspectes a pu faire la preuve de rendements nets comparativement faibles, de sorte que la suspicion initiale de prix excessifs a été abandonnée et que l'entreprise a été par la suite utilisée comme référence. La disposition propre au secteur de l'énergie concernant les abus mentionne explicitement l'exigence de redevances déraisonnablement excessives par rapport au coût, ce qui codifie les concepts de contrôle des coûts et de limitation du bénéfice qui avaient été établis au titre des dispositions générales relatives au comportent unilatéral. S'agissant de la question de l'incertitude juridique pour les entreprises, le délégué note qu'en principe, les prix excessifs feront l'objet d'enquêtes et ne seront interdits que lorsqu'ils résultent de l'abus de position dominante sur le marché et ne sont pas objectivement justifiés ; c'est le cas aussi bien au titre de la disposition spéciale pour les services d'utilité publique qu'au titre des dispositions générales relatives au comportement unilatéral contenues dans le droit allemand de la concurrence, qui correspondent à l'article 102 du Traité sur le fonctionnement de l'Union européenne (TFUE). Ce qui constitue exactement un abus ne peut être décidé qu'après une évaluation de toutes les circonstances pertinentes d'un cas précis. Toutefois, seuls les écarts importants par rapport au prix de référence sont jugés abusifs, ce qui explique pourquoi un ajustement de substantialité est ajouté au prix de référence dans l'analyse comparative. Pour le calcul de cet ajustement, il est tenu compte du degré de concurrence sur le marché examiné, ce qui garanti que, lorsqu'une concurrence effective se développe sur ce marché, la nécessité et l'éventualité des interventions diminuent. Pour les marché du gaz et de l'électricité, le pouvoir législatif a ajouté un renversement de la charge de la preuve : ce sont les entreprises dominantes qui doivent prouver que leur comportement n'est pas abusif et que leurs prix sont objectivement justifiés.

Suite aux procédures relatives au prix du gaz, beaucoup d'entreprises ont conclu avec le Bundeskartellamt des conventions par lesquelles elles s'engagent à reporter les augmentations de prix envisagés et à accorder aux consommateurs une réduction sur leur prochaine facture de gaz. Le délégué explique que les avantages directs pour les consommateurs se chiffrent à environ 30 millions d'euros et que le total des avantages (y compris les avantages indirects par le jeu de la fiscalité) représente quelque 400 millions d'euros. Compte tenu de ces engagements, le Bundeskartellamt a suspendu la procédure à l'encontre des entreprises concernées. Dans le cas de l'électricité utilisée pour le chauffage, la plupart des procédures ont été clôturées par des décisions d'engagement similaires. Au départ, le Bundeskartellamt a enquêté sur dix-neuf entreprises appliquant des prix potentiellement excessifs ; pour quatre d'entre elles, il a été conclu que leur rendements nets étaient relativement faibles, de sorte que les procédures entamées contre elles ont été abandonnées. Une entreprise s'est pourvue en vain en appel contre l'obligation de communiquer des informations, de sorte que la procédure reste pendante, une décision dans cette affaire devant être publiée sous peu. En ce qui concerne le cas de l'électricité utilisée pour le chauffage, le délégué estime que les engagements reçus réduiront les obstacles à l'entrée et faciliteront le changement de fournisseur pour les consommateurs, ce qui stimulera la concurrence sur le marché en question. Par conséquent, malgré les difficultés que présentent les affaires de prix excessifs, il est possible, en se concentrant sur les cas les plus manifestes, d'engranger sur cette base des avantages pour les consommateurs et pour la concurrence par l'application du droit de la concurrence. Le Président note la possibilité, mentionnée dans la note allemande, que les juges s'écartent de ce que le Bundeskartellamt considère comme le résultat adéquat dans les affaires intentées à titre privé, parce que les juges ne sont tenus que par le droit. Le Président demande dès lors si le délégué estime que les autres indications du Bundeskartellamt pour les entreprises ne seraient pas suivies dans les affaires intentées à titre privé. Le délégué de l'Allemagne répond que, dans les affaires intentées à titre privé, l'allégation de prix excessifs est aussi difficile à établir qu'auparavant, parce que le renversement de la charge de la preuve ne s'applique pas dans ces affaires.

Le Président passe à la note de la Corée, qui décrit une affaire intentée par la Commission coréenne du commerce équitable (« KFTC ») contre les frais excessifs pour avance de fonds pour les cartes de crédit et autres commissions bancaires. La Cour suprême de Corée a donné par la suite tort à la KFTC, estimant que les banques concernées ne pouvaient être considérées individuellement ou collectivement comme dominantes ; le Président demande toutefois si l'affaire semble indiquer qu'il existe pour les entreprises une obligation au titre du droit de la concurrence de maintenir les prix dans une proportion fixe par rapport aux coûts. Le délégué de la Corée note que le droit coréen de la concurrence interdit aux entreprises dominantes de fixer des prix déraisonnablement élevés, mais que la KFTC n'a pas été particulièrement active dans ses actions contre les prix excessifs au cours des 30 années de son existence et qu'elle a intenté des procédures dans deux de ces cas seulement, qui se sont produits respectivement il y a dix et vingt ans d'ici. La question du Président concerne l'action intentée il y a dix ans, dans laquelle la KFTC a attaqué des sociétés émettrices de cartes de crédit et des banques pour avoir accordé des réductions trop modestes des frais de transaction dans le cadre d'une diminution des coûts d'emprunt pour les banques. L'affaire s'inscrivait dans un contexte particulier en Corée : à l'époque, les incidents de remboursement avaient fortement augmenté après la crise financière asiatique et beaucoup de personnes éprouvaient des difficultés pour obtenir un prêt à des prix raisonnables, ce qui créait d'importants problèmes sociaux. Cette affaire a aussi été la dernière dans laquelle la KFTC a sanctionné les pratiques d'entreprises dominantes en matière de prix. Actuellement, la position générale est que le droit coréen de la concurrence n'impose pas aux entreprises dominantes l'obligation de fixer les prix proportionnellement aux coûts. La KFTC adopte cette attitude restrictive vis-à-vis des prix excessifs pour diverses raisons : à la fois parce qu'une réglementation des prix excessifs peut avoir des effets secondaires néfastes, notamment d'inhibition de l'investissement ou de l'innovation, et aussi pour des considérations pratiques, parce qu'il peut être difficile, dans ces cas, d'évaluer l'illégalité et de concevoir des recours efficaces.

En République tchèque, poursuit le Président, l'interdiction des prix excessifs au titre du droit de la concurrence n'a été appliquée qu'une seule fois, contre UPC, une société de câblodistribution. Dans sa note, l'autorité tchèque de la concurrence qualifie cette affaire de plutôt « formelle » ; le Président demande de préciser ce que formel signifie dans le contexte des prix excessifs, ainsi qu'une explication du problème de marché que l'autorité tchèque à voulu aborder. Le délégué de la République tchèque explique que le qualificatif « formelle » appliqué à cette affaire indique qu'elle n'a comporté virtuellement aucune analyse économique du marché à l'époque. Au départ, l'affaire a semblé assez simple, dans la mesure où il y avait eu une augmentation de prix d'environ 100 %, et jusqu'à 300 % dans certains cas, et l'autorité tchèque de la concurrence l'a traitée comme un cas à juger sur pièces. Elle a affirmé que ces augmentations de prix étaient excessives, une conclusion qui a été confirmée en appel par la Cour suprême tchèque. Les prix pratiqués initialement par la société de câblodistribution pourraient toutefois être jugés prédateurs, et la décision n'a pas abordé le niveau initial très faible des redevances. On peut dès lors interpréter la décision comme indiquant que, lorsque les prix prédateurs ont été rectifiés en les portant à un niveau normal, cela revient à pratiquer abusivement des prix excessifs. Le délégué note que l'affaire est ancienne et ne correspond pas à la pratique actuelle d'application du droit de l'autorité tchèque de la concurrence. Par conséquent, le qualificatif « formelle » signifie dans ce contexte que l'affaire était plus complexe que ne le suggère son traitement dans la décision.

Le Président note que l'affaire du câblodistributeur tchèque pourrait peut-être s'expliquer par des effets de réseau, dans la mesure où la société a augmenté ses prix lorsqu'elle a atteint un nombre suffisant de clients. Il passe ensuite à la note d'Israël, qui signale un certain nombre d'affaires de recours collectifs privés pour prix excessifs, mais en l'absence de mesures d'application du droit prises par l'autorité de la concurrence israélienne (« IAA »). Le Président demande au délégué d'Israël, premièrement, si, en droit de son pays, l'IAA est tenue d'instruire toutes les plaintes qu'elle reçoit et, deuxièmement, si l'IAA peut intervenir en tant qu'*amicus curiae* dans des affaires privées et, si c'est le cas, comment ces recours sont habituellement reçus par le tribunal. Le délégué d'Israël répond que l'IAA s'efforce d'apporter une réponse sur le fond à toutes les plaintes reçues, mais qu'elle conserve le pouvoir de rejeter les plaintes par manque

de ressources. En outre, à l'époque des affaires en question, la politique de l'IAA consistait à s'abstenir d'intervenir (et donc à préserver ses maigres ressources) lorsqu'une affaire intentée à titre privé était pendante. Cela étant, l'IAA peut souhaiter intervenir si une affaire s'y prête, même si l'on ne voit pas bien si elle a le droit de le faire sans le soutien du procureur général de la République. Bien que la réceptivité du tribunal à cette intervention dépende de l'affaire concernée et du degré général d'ouverture du tribunal, le délégué estime que, normalement, un tribunal accueillerait volontiers l'apport de l'IAA dans un recours privé relevant du droit de la concurrence. Dans une des affaires citées dans la note d'Israël, qui concerne l'ancien monopole pour les appels internationaux, le procureur général de la République est effectivement intervenu avec l'assistance de l'IAA. Dans cette affaire, le plaignant privé avait tenté d'utiliser les diminutions de prix après son arrivée sur le marché comme prix de référence pour établir que les prix monopolistiques étaient excessifs avant cette arrivée. Bien que les prix avant l'arrivée fussent réglementés, il a pu être démontré que le Ministère des télécommunications avait voulu que les prix des appels internationaux soient élevés afin de subventionner les appels nationaux. Le prix de comparaison utilisé par le plaignant posait donc problème, et le demandeur a été débouté par la Cour suprême.

Le Président passe à la note du Royaume-Uni, une publication sur les avantages et les inconvénients de l'application du droit de la concurrence à l'encontre des prix excessifs. Bien que le document ne cite aucune affaire spécifique au Royaume-Uni, le Président note la décision dans l'affaire *Napp*[3], et demande à la délégation du Royaume-Uni si l'Office of Fair Trading (« OFT »), tout comme l'IAA, est habilité à choisir les plaintes auxquels il donne suite ou s'il est tenu d'aboutir à une conclusion dans chaque affaire, que les prix soient excessifs ou non. Le Président demande aussi à la délégation de fournir des précisions sur un autre aspect de sa note concernant les interventions au titre du droit de la concurrence contre des prix élevés qui ne relèvent pas de la catégorie des prix excessifs. Le délégué du Royaume-Uni (OFT) explique que l'OFT n'est pas tenu de répondre à toutes les plaines qu'il reçoit ; il concentre ses ressources sur les affaires qui représentent la plus grande menace pour le bien-être des consommateurs. L'OFT a publié et applique à ses travaux une série d'instructions pour la hiérarchisation, centrés sur quatre domaines : 1° l'incidence (l'incidence directe et indirecte probable sur le bien-être des consommateurs ; 2° l'influence stratégique (la conformité au plan et aux objectifs annuels de l'organisme) ; 3° le risque (la probabilité de réussite) ; et 4° les implications en termes de ressources. Les problèmes de prix excessifs peuvent surgir dans le contexte de plaintes plus larges. L'affaire *Napp*, par exemple, comporte deux éléments : l'un concerne les prix faibles d'exclusion dans le secteur de la pharmacie d'officine et l'autre, les prix excessifs dans le secteur de la pharmacie communautaire. Les autorités britanniques de la concurrence disposent d'une série d'outils pour traiter les questions de prix excessifs. Il peut être nécessaire, par exemple, d'examiner la cause de l'abus (c'est-à-dire les circonstances dans lesquelles apparaissent des prix excessifs) en procédant à une enquête sur le marché au titre de la loi sur les entreprises, dans les circonstances où certaines caractéristiques de ce marché peuvent limiter, fausser ou empêcher la concurrence. L'OFT réalise aussi des études de marché qui peuvent déterminer les obstacles à l'entrée ou à l'élargissement ; ces obstacles se produisent parfois au niveau la demande et peuvent concerner certaines caractéristiques ou certains comportements des acheteurs. Dans son étude sur le secteur bancaire, par exemple, l'OFT a pointé une trop grande fidélité à une même banque chez les clients et a recommandé une publication plus claire des frais liés aux comptes, ce qui pourrait améliorer les choix de changement. En outre, une réglementation des prix peut être imposée par les organes de réglementation sectoriels dans les secteurs libéralisés, comme les télécommunications et les services d'utilité publique. Le délégué cède ensuite la parole à son collègue de la Commission de la concurrence (« CC »), qui évoque l'analyse de rentabilité et l'examen des prix dans les enquêtes relatives aux marchés. Beaucoup d'enquêtes qui prennent naissance à l'OFT sont ensuite transmises à la CC, qui est invitée à examiner la globalité du marché. Le délégué précise que l'analyse menée par la CC n'est ni décisoire, ni décisive, mais reste un simple élément de l'évaluation. Dans ce contexte, l'analyse peut être traitée comme un effet du marché et

3 *Napp Pharmaceutical Holdings Limited and Subsidiaries c. Director General of Fair Trading* [2002] CAT 1.

l'on peut ensuite examiner quelles sont les observations plus générales à formuler au sujet du marché. De plus, le statut qui régit l'activité de la CC montrent clairement que les autorités de la concurrence n'ont pas pour mission de se livrer à la réglementation des prix : elles sont chargées d'identifier et de corriger les problèmes de marché.

Le Président met un terme à la première partie de la discussion de la table ronde sur l'indentification des prix excessifs et donne la parole aux participants pour les questions et les remarques. Le délégué de l'Espagne évoque l'affaire la plus importante de prix excessifs de l'autorité espagnole de la concurrence. L'affaire a été conclue en 2008 et concernait le secteur des explosifs dans les îles Canaries. L'autorité de la concurrence a constaté que les prix appliqués pour les explosifs dans cette région étaient supérieurs de 100 % aux prix pratiqués en Espagne continentale. Bien que l'autorité estimât que ces prix étaient suffisamment élevés pour les considérer comme excessifs, elle a néanmoins étudié le coût de la fourniture des biens aux îles Canaries et a conclu que ce coût supplémentaire ne pouvait expliquer l'énorme écart de prix entre les îles Canaries et l'Espagne continentale. L'autorité espagnole de la concurrence a également ouvert en janvier 2011 une enquête relative à des prix excessifs qui concernait les prix appliqués par les opérateurs de réseaux mobiles aux concurrents en aval pour les messages textuels et graphiques. La procédure est pendante. Le Président demande si, dans l'affaire des îles Canaries, l'autorité espagnole avait déterminé un seuil en-deçà duquel les prix ne seraient pas jugés excessifs. Le délégué de l'Espagne explique que ce n'est pas une question de seuils, mais de justification économique rationnelle pour les prix élevés qui étaient pratiqués. Bien qu'il existât certaines différences de coûts d'entreposage pour les explosifs, que l'entreprise défenderesse fût la seule sur le marché qui puisse offrir les services d'entreposage nécessaire et que l'on fût donc en présence d'une position dominante, les coûts concernés n'étaient pas suffisants pour justifier la hauteur des prix pratiqués. L'autorité de la concurrence a condamné l'entreprise au paiement d'une amende pour cette infraction et lui a enjoint de diminuer ses prix, sans toutefois préciser un niveau de prix particulier.

3. Identifier les prix non excessifs

Le Président ouvre ensuite la deuxième partie de la discussion : l'identification des prix non excessifs. Cette seconde partie débute par une intervention d'Alan Gregory sur l'analyse de la rentabilité, une technique qui peut aider à identifier un seuil pour les prix non excessifs. Alan Gregory étudie tout d'abord les moyens de mesurer et d'évaluer un prix excessif. Il existe en règle générale deux méthodes : la comparaison (comparaison géographique ou entre divers moments dans le temps, par exemple) ou la mesure de la rentabilité. L'analyse de la rentabilité se fonde soit sur les marges, soit sur un taux de rentabilité économique (ROCE) acceptable, lequel peut être mesuré par le taux de rentabilité comptable ou calculé en fonction des flux de trésorerie générés. Le concept même des comparaisons est simple : nul besoin de déterminer l'affectation des coûts ou encore d'estimer les coûts, le capital investi ou la base d'actifs. Cependant, les comparaisons de prix peuvent sérieusement induire en erreur, notamment lorsqu'il existe d'importantes différences dans les coûts, en raison d'économies d'échelle par exemple. Si les prix sont étudiés au fil du temps, il est possible que leur augmentation soit imputable à une hausse des coûts. Dans d'autres cas, il est tout simplement possible qu'aucun produit comparable n'existe. Sans oublier la possibilité que plusieurs entreprises, sur plusieurs marchés, vendent un produit à des prix excessifs. Puisque les approches comparatives soulèvent ces difficultés, l'option d'analyser la rentabilité devient intéressante. Mesurer la rentabilité à l'aide des marges de vente pose problème, puisque l'on compare ces marges à celles enregistrées par une société comparable, ce qui nécessite donc toujours une comparaison. Une autre solution consiste à examiner la rentabilité du capital, ce qui introduit la notion de taux de rentabilité comptable. Mais l'étalon employé pour le coût du capital n'est pas non plus sans poser problème. Dans l'utilisation du taux de rentabilité interne, l'on se trouve presque toujours confronté à une notion du coût du capital de l'entreprise. On peut émettre deux réserves à l'égard du test de rentabilité : (i) l'examen peut porter tout simplement sur un prix qui n'est que la juste rétribution d'un effort

d'innovation risqué entrepris par le passé ; et (ii) le détenteur de monopole examiné peut ne pas être efficace.

Sur la question du taux de rentabilité, Alan Gregory précise que les taux de rentabilité comptable reposent sur une certaine notion du résultat, ou bénéfice, par rapport à la valeur comptable de l'entreprise en début de période. Plus spécifiquement, on cherche à exclure les effets du financement, d'une part pour accroître la pertinence des comparaisons, et d'autre part parce que cela permet d'effectuer des comparaisons même en cas de divergence du coût moyen pondéré du capital. La règle stricte veut que la rentabilité économique (ROCE) soit le quotient du résultat d'exploitation (EBIT) sur le capital investi au départ. Une mesure après impôts est parfois employée, mais les charges d'intérêts peuvent alors poser problème. Aussi attrayante que l'approche puisse paraître en raison de sa simplicité, ce type d'analyse soulève des difficultés. En effet, les valeurs comptables ne correspondent pas toujours aux valeurs économiques. À titre d'exemple, la dépréciation enregistrée en comptabilité ne correspond pas à la dépréciation économique. Par conséquent, les valeurs comptables ne reflètent souvent pas les valeurs économiques en vigueur. En théorie, ces écarts n'ont rien de préoccupant à l'échelle de la vie d'une société. Cependant, les autorités de la concurrence n'ont bien souvent pas le temps d'adopter un point de vue à si long terme. Elles doivent donc évaluer la rentabilité sur un laps de temps plus court, une période tronquée. Dans de tels cas, il convient d'évaluer la rentabilité des actifs à l'aide d'une certaine notion de valeur pour le détenteur, de valeur pour l'entreprise, ou de ce que l'on appelle la valeur d'un actif moderne équivalent (MEA), ce qui revient peu ou prou au coût de réplication des services que peuvent rendre les actifs. Sur la période tronquée, la valeur MEA de départ est mesurée, la rentabilité est prise en compte, puis la valeur MEA d'arrivée est prise en compte. À l'aide de cette méthode, il est possible de montrer que la rentabilité économique, dans certaines conditions, reflète fidèlement la rentabilité réelle, une mesure conceptuellement comparable au coût moyen pondéré du capital de la société.

Se pose alors la question de savoir si la rentabilité économique basée sur ces valeurs MEA est suffisante. Tout d'abord, la comptabilité doit se faire selon la méthode du résultat global, et c'est le cas lorsqu'on utilise la mesure comptable dite du « résultat étendu ». Néanmoins, lorsque les taux de rentabilité évoluent au fil du temps, il est nécessaire d'utiliser une moyenne de rentabilité économique plus complexe. Dans cette situation, on est amené à employer une autre méthode, basée sur le taux de rentabilité interne et qui tient compte des coûts engendrés par l'activité, de la valeur MEA de début de période, des flux de trésorerie générés par cette activité au cours de la période tronquée, et enfin de la valeur MEA de fin de période. Dans les faits, cette méthode s'apparente à une mini-analyse de la valeur actualisée du projet. En mesurant le taux de rentabilité interne de cette mini-analyse, on obtient une mesure exacte de la rentabilité, qui peut être comparée au coût moyen pondéré du capital de l'entreprise. Cette approche présente elle aussi certaines difficultés, notamment lorsqu'il faut tenir compte des actifs incorporels (la survaleur est par exemple exclue) et lorsqu'il s'agit d'établir le coût moyen pondéré du capital. D'un point de vue comptable, l'affectation des coûts pose problème. Enfin, lorsque l'on étudie la rentabilité de diverses branches, il n'est pas nécessairement aisé d'affecter le capital investi aux différentes branches d'activité.

Si ces problèmes deviennent insurmontables, les marges de vente peuvent être employées en dernier recours. Il existe alors deux manières de procéder : (i) tenir compte d'une simple rentabilité des ventes ou (ii) faire une analyse plus poussée en distinguant la marge brute et la marge nette, ce qui permet de séparer les charges diverses des coûts directs des produits vendus. Si, conceptuellement, cette méthode est utile, le fait que les entreprises emploient des systèmes de classification des coûts différents peut poser problème. Par ailleurs, elle ne permet pas de résoudre la question de l'affectation des coûts communs. En conclusion, il est aisé de démontrer que, sur le plan théorique, la meilleure approche pour évaluer la rentabilité est d'employer un taux de rentabilité interne qui repose les valeurs MEA. Ces valeurs, si elles peuvent être déterminées, permettent d'estimer la rentabilité économique modifiée, laquelle représenterait aussi une solution raisonnable. Dans le cas contraire, cependant, il devient nécessaire de se replier sur une analyse des marges – et si même les coûts ne peuvent être déterminés, il faut alors se résoudre à employer une

comparaison des prix en dernier ressort. En théorie, il existe donc une hiérarchie claire des meilleurs moyens d'évaluer le problème des prix excessifs.

Le Président note que dans la plupart des affaires d'abus d'exploitation décrites dans les documents soumis, la société défenderesse jouissait d'une position dominante non pas sur tous les marchés d'un produit spécifique, mais sur l'un d'entre eux ou plusieurs d'entre eux seulement. Il demande s'il serait possible de calculer la rentabilité économique à l'aide des données disponibles dans ces circonstances, à savoir dans le cas d'une société implantée sur plusieurs marchés et fournissant plusieurs produits. Alan Gregory confirme que ce calcul est effectivement possible et cite l'exemple des frais de résiliation d'abonnement de téléphonie mobile au Royaume-Uni. La meilleure approche consiste à évaluer divers segments d'activité, une tâche qui reste conceptuellement faisable malgré les difficultés qu'elle présente. Les sociétés disposent généralement des informations nécessaires pour effectuer un test de rentabilité. C'est un point sur lequel les autorités de la concurrence doivent donc insister. L'enquête de marché qui a été menée sur les marchés du gaz de pétrole liquéfié (GPL) au Royaume-Uni illustre une affaire dans laquelle l'autorité de la concurrence a eu accès aux données internes des sociétés et a convaincu ces dernières d'effectuer une répartition de leurs coûts et de leurs valeurs d'actifs entre les différentes divisions de l'entreprise.

Le Président présente ensuite la note soumise par la Suède, et l'affaire de chauffage urbain traitée par l'autorité de la concurrence suédoise. Il s'agit ici d'un exemple paradigmatique d'affaire de prix excessif impliquant un monopole naturel. La délégation de Suède est donc priée de présenter cette affaire plus en détail afin qu'elle puisse servir à approfondir la discussion. La déléguée de Suède commence par expliquer l'importance du secteur du chauffage urbain en Suède. Les marchés locaux sont très concentrés car la distribution pose problème aux municipalités, bien que de nombreux districts aient désormais vendu leurs sociétés de distribution à l'une des trois principales entreprises exerçant sur le marché de l'énergie en Suède. Il y a environ 10 ans, une forte augmentation du prix du chauffage urbain a entraîné le dépôt de nombreuses plaintes auprès de l'autorité de la concurrence. Bien que cette dernière ne traite généralement pas les plaintes pour prix excessifs, l'objet des griefs avait ici un impact considérable sur le bien-être des consommateurs. Les sociétés de distribution de chauffage urbain en Suède constituent des monopoles naturels non réglementés. Bien qu'il existe une autorité de réglementation de l'énergie en Suède, ses prérogatives ne s'étendent pas au chauffage urbain. L'autorité de la concurrence a accepté l'affaire en se concentrant sur le marché du chauffage urbain de Stockholm, le plus important en Suède. Elle a ensuite mené une enquête très poussée et complexe qui a duré cinq ans. Selon la déléguée, la principale difficulté rencontrée dans l'affaire, du point de vue de l'autorité de la concurrence suédoise, a peut-être été de trouver une méthode largement acceptée pour examiner les allégations de prix excessifs. À la conclusion de l'affaire en 2010, la société énergétique défenderesse s'est engagée à faire preuve de davantage de transparence dans sa politique de prix envers les consommateurs et à réglementer les prix de manière volontaire, tout en étant tenue de rendre des comptes à l'autorité de la concurrence en juin 2012. Les prix du chauffage urbain ont baissé pendant que se déroulait l'enquête, gommant ainsi le problème qui était à son origine. L'autorité de la concurrence suédoise a jugé le résultat satisfaisant et a fourni une solution *ex ante* tournée vers l'avenir. Néanmoins, elle estime toujours qu'une réglementation des prix est nécessaire sur le marché de la distribution de chauffage urbain. De plus, la déléguée laisse entendre qu'un droit d'accès à des tiers ne serait pas une réponse adéquate aux problèmes de marché identifiés dans cette affaire.

La déléguée de Suède laisse ensuite la parole à son collègue, qui a présenté les aspects économiques de l'affaire. Ce dernier souligne le fait que l'intervention ait été un « dernier recours » dans cette affaire. Fondamentalement, il s'agissait d'une affaire de réglementation des prix. Son analyse est donc comparable à celle d'une réglementation ultérieure des prix. Le délégué revient sur le test *United Brands*, qui met en relief deux aspects – celui de la valeur économique (l'hypothèse étant ici qu'elle était égale au prix réglementé) et celui de la relation raisonnable. En cas de monopole naturel, il n'est pas rare que des

allégations de prix excessifs voient le jour. Mais, selon le délégué, il est possible que le droit de la concurrence soit plus difficile à appliquer sur ces marchés que dans des affaires du type de celle des « bananes ». Le délégué note que, dans la seconde branche du test *United Brands*, le fait de déterminer si le prix est « inéquitable en soi » revient en quelque sorte à réglementer sur la base du coût du service ou du taux de rentabilité. En revanche, l'« iniquité par rapport aux produits concurrents » revient à réglementer à l'aide d'un plafonnement des prix. Il mentionne ensuite certaines des difficultés que soulèvent les tests de prix excessifs sur le marché du chauffage urbain. Ce dernier repose en effet sur des économies d'échelle tellement importantes dans la production de chaleur qu'elles permettent à une infrastructure de distribution d'être rentable malgré son coût élevé. C'est une activité fortement capitalistique qui exige des investissements importants, massifs et à long terme. L'analyse doit par ailleurs tenir compte de la production parallèle d'électricité. Il s'agit d'un monopole naturel, à la fois dans la production et la distribution de chaleur. Employer les mesures comptables pour déterminer les coûts soulève des problèmes, notamment lorsqu'il s'agit de coûts communs. Les installations de chauffage urbain étant utilisées pour produire à la fois de l'électricité et de la chaleur, la question est de savoir comment répartir les coûts entre ces deux types de production. Par ailleurs, il est nécessaire d'inscrire l'investissement dans une période donnée. Le délégué revient sur la remarque faite par Alan Gregory à propos de la différence entre les coûts mesurés d'un point de vue comptable et d'un point de vue économique. Le recours aux données comptables pose problème dans la mesure où l'objectif de ces dernières n'est pas simplement d'évaluer la rentabilité. Les valeurs MEA, quant à elles, sont plus justes, mais nécessitent des informations souvent difficiles à obtenir. Le secteur du chauffage urbain présente une difficulté supplémentaire. En effet, à l'origine, les centrales ont été établies avec des taux de production et d'utilisation des capacités faibles. Ainsi, bien qu'elles soient actuellement rentables, elles ne l'étaient pas à l'origine. Par conséquent, la rentabilité doit être évaluée sur l'ensemble de la durée de vie des installations et les prix excessifs ne peuvent donc être déterminés simplement au titre d'une année donnée, mais seulement depuis le début de leur existence.

Le délégué examine ensuite comment résoudre, dans la pratique, les problèmes identifiés afin d'aboutir à une certitude juridique pour les entreprises. L'une des solutions possibles consisterait à employer le principe de la plus grande prudence, ce qui conduirait toutefois à fixer un seuil de prix excessif très élevé. Une autre approche consisterait à employer les mêmes méthodes de calcul que celles servant à la réglementation. Cette solution n'est toutefois pas idéale car les diverses réglementations utilisent des règles différentes en matière de répartition des coûts, de dépréciation, etc. Cette approche peut même se révéler impraticable dans les faits car il est plus simple de réglementer que de réaliser le test de prix excessifs dans un contexte d'abus de position dominante. Une réglementation établit *ex ante* les choix qui doivent être faits et fournit dès lors un degré de certitude juridique qui fait défaut lorsque l'on traite le problème à travers le prisme des dispositions régissant les abus de position dominante. Par conséquent, concernant la réglementation sectorielle en Suède, des points tels que la répartition des coûts communs et les normes de publication des informations, etc. sont spécifiés *ex ante* dans la réglementation bien qu'ils puissent être évalués *ex post*. À l'inverse, dans une affaire d'abus de position dominante, l'autorité doit prouver au tribunal la manière dont le prix réglementé doit être calculé d'une manière générale, et à quel montant ce prix doit s'élever dans l'affaire concernée, avant de démontrer une relation raisonnable entre le prix réglementé (valeur économique) et le prix effectivement appliqué.

Le Président demande pourquoi l'autorité de réglementation suédoise de l'électricité ne s'est pas chargée de l'affaire. Le délégué de Suède répond que la réglementation des prix ne s'étend pas au chauffage urbain en Suède. Ainsi, bien qu'il existe une autorité de réglementation de l'énergie – le marché est libéralisé, ce qui signifie que les prix ne sont pas réglementés, bien qu'ils soient surveillés sur le segment de la distribution en gros – il n'existe aucune surveillance prudentielle du secteur du chauffage urbain. Alan Gregory note l'intérêt de l'affaire suédoise et demande si l'activité de production et de distribution d'électricité du groupe était réglementée et, dans l'affirmative, à l'aide de quelle formule (coûts plus marge, etc.). Le délégué de Suède explique que la production d'électricité n'est pas

réglementée en Suède, à l'inverse toutefois de la distribution. Alan Gregory reconnaît que l'affectation des coûts est un problème compliqué et que certains l'estiment impossible à résoudre, faute de pouvoir déterminer une application juste dans la pratique. Néanmoins, Alan Gregory note l'existence d'ouvrages soulignant les avantages d'une approche globale plutôt que dissociée et qui utilisent ce principe comme fondement d'une affectation conjointe. Si cette approche reste plutôt arbitraire, elle repose au moins sur une certaine forme de notion – issue de la théorie des jeux – de la manière dont les coûts peuvent être affectés équitablement, en partageant les avantages procurés par le fait que les deux activités soient conjointes. Le délégué de Suède remarque toutefois que cette approche ne permet pas non plus de résoudre le problème de la certitude juridique. Bien que les arguments en faveur d'une affectation particulière des coûts communs puissent être convaincants – et nombreux sont les candidats pour lesquels une telle formule serait appropriée – cette approche n'évite pas l'incertitude juridique aux entreprises si elle n'est pas précisée *ex ante*. Alan Gregory acquiesce sur ce point et note qu'au moment de la privatisation des services aux collectivités au Royaume-Uni, c'est en substance ce qui a été fait avec la formule RPI-X (Retail Price Index-X, ou indice des prix au détail-X). La procédure utilisée pour plafonner les prix a été spécifiée à l'avance et, bien qu'il existe des objections, l'opinion générale au Royaume-Uni est que l'approche actuelle aboutit à un résultat plus juste pour les consommateurs que l'approche basée sur la rentabilité économique employée aux États-Unis. Le Président demande des informations complémentaires sur la nature du code des prix du chauffage urbain adopté volontairement dans le cadre des engagements. Le délégué de Suède confirme que le code est disponible au public et que son contenu est relativement simple. Il ajoute qu'il s'agit en quelque sorte d'une approche basée sur le revenu moyen.

Misja Mikkers note que bon nombre des problèmes mentionnés dans la présentation auraient été difficiles à résoudre même par voie réglementaire. Dès lors qu'un certain degré de prix excessif est établi et qu'une autorité de la concurrence commence à prendre des mesures correctives en se fondant sur une sorte de prix normatif, elle se met en quelque sorte à réglementer, dans la mesure où elle n'interviendra que si elle estime que les prix resteront excessifs pendant un certain temps. L'autorité doit ensuite tenir compte du problème des incitations à l'efficience et établir un prix normatif d'une manière plus dynamique. Le délégué de Suède répond que, lorsque l'autorité de la concurrence choisit entre les options de l'affaire *United Brands*, à savoir l'équité du prix en soi et par rapport aux prix appliqués par les concurrents, elle a en fait le choix entre deux systèmes de réglementation. La question est de savoir si elle doit choisir l'un ou l'autre ou si elle doit employer les deux à la fois, c'est-à-dire établir que le prix dépasse à la fois un plafond « coûts plus marge » raisonnable réglementé et un plafond de prix réglementé. Cette question reste en suspens. À ce sujet, le Président note que le test *United Brands* conserve toute sa validité car il traite à la fois l'aspect statique et l'aspect dynamique. En résumé, le délégué de Suède indique qu'il existe une différence de taille entre le marché des bananes et celui du chauffage urbain, et que tout au long de l'enquête, l'autorité de la concurrence suédoise a gardé à l'esprit la manière dont les spécificités de l'affaire (monopole naturel, etc.) influençaient l'interprétation du test *United Brands*.

Au sujet de la certitude juridique, le délégué de l'UE demande à la délégation suédoise dans quelle mesure l'autorité a estimé que cet argument plaidait de manière décisive pour une réglementation plutôt que pour une application du droit de la concurrence. Le délégué indique tout d'abord que l'incertitude est toujours un problème dans l'application du droit de la concurrence, sans être toutefois un obstacle insurmontable. Par ailleurs, dans la plupart des juridictions, y compris en Suède, les enquêtes pour prix excessifs sont menées dans un nombre très limité d'affaires, et en règle générale seulement lorsque les prix en question sont très élevés. Bien qu'il puisse être difficile de déterminer la mesure corrective appropriée, le délégué de l'UE mentionne que l'incertitude ainsi créée pour les sociétés peut être bien faible puisque les interventions sont rares et que les écarts de prix concernés sont généralement si spectaculaires que les conclusions restent les mêmes quelle que soit l'affectation des coûts et des risques. Le délégué de Suède répond que, dans l'affaire du chauffage urbain, les problèmes et les choix fondamentaux étaient extrêmement nombreux – en particulier, l'affectation des coûts des investissements à long terme et la question de la relation raisonnable étaient bien plus complexes que dans l'affaire des bananes, simple quant

à elle. Pour conclure la discussion sur l'affaire du chauffage urbain en Suède, le Président note qu'il sera de nouveau fait référence à cette affaire ultérieurement lors de la Table ronde, notamment à propos de l'interface entre le droit de la concurrence et la réglementation : dans cette affaire, il n'y avait pas d'autorité de réglementation, il s'agissait clairement d'une affaire de monopole naturel, et peut-être aussi d'une affaire de prix excessifs. Ainsi, si l'on convient que l'intervention d'une autorité de réglementation est nécessaire en présence d'un monopole naturel, peut-être le droit de la concurrence peut-il jouer un rôle complémentaire à cet égard lorsque le monopole naturel n'est pas réglementé.

En Turquie, l'autorité de la concurrence a traité des problèmes de prix excessifs dans un grand nombre d'affaires. Dans l'une d'entre elles, portant sur l'énergie thermique, l'autorité est intervenue pour prévenir un *risque futur* de prix excessifs et a imposé une surveillance à la société. Le Président demande des détails sur cette surveillance et le délégué de Turquie ajoute que, dans cette affaire particulière, il s'est avéré que les prix n'étaient pas excessifs. Néanmoins, l'autorité de la concurrence turque a déterminé que les prix risquaient de devenir excessifs à l'avenir et a donc exigé que le marché en question soit surveillé pendant cinq ans ; l'idée étant que la société appliquerait des prix raisonnables sous une surveillance aussi étroite. Lors de la mise en place de la surveillance, l'autorité de la concurrence a comparé les structures de coût et de prix de la société avec les données d'une association de producteurs d'énergie thermique, ainsi qu'avec les prix de villes voisines. Après une année de surveillance, l'autorité de la concurrence a estimé que la société augmentait ses prix à un rythme inférieur à celui de l'inflation et qu'elle ne réalisait pas un bénéfice particulièrement élevé. Devant ces éléments, elle a estimé qu'il n'y avait plus aucun risque de constater des prix élevés à l'avenir et a mis un terme à la surveillance. Dans sa décision suivante, l'autorité de la concurrence turque est revenue à une approche plus conventionnelle de plaidoyer pour la concurrence, à savoir, dans ce cas, établir des rapports et transmettre des avis au ministère de l'Énergie et à l'autorité chargée de la réglementation sectorielle.

Le Président aborde ensuite la note soumise par la Lituanie. Cette dernière décrit une affaire dans laquelle l'autorité de la concurrence a établi l'existence de prix élevés et d'une discrimination par les prix pour l'accès à des tunnels de communication, et notamment l'existence d'écarts de prix pouvant aller de 1 à 28 fois le prix constaté pour le même produit. Le délégué de Lituanie explique qu'un tunnel de communication est en quelque sorte un tube souterrain dans lequel passent divers câbles et fils, etc. L'opérateur du réseau loue l'espace dans le tunnel aux sociétés de télécommunications, de chauffage, etc. Dans cette affaire le prix a été jugé excessif en particulier parce qu'il était supérieur au prix réglementé. La remarquable variation de prix entre les zones louées a également joué un rôle.

Plus généralement, le délégué de Lituanie affirme qu'il n'existe pas de « nombre magique » ou de seuils de prix dans les affaires de prix excessifs. Par exemple, même un écart de prix important ne constitue pas une preuve formelle d'abus car le prix inférieur qui sert d'étalon peut être révélateur d'une pratique d'éviction. Par conséquent, les affaires de prix excessifs donnent grand mal aux autorités de la concurrence et le test *United Brands* reste encore la meilleure méthode à suivre. En Lituanie, l'autorité de la concurrence souffre d'un problème d'image en raison de son passé d'autorité de réglementation des prix. Par conséquent, elle est moins encline à traiter les affaires de prix excessifs, comme elle le faisait fréquemment dans les années 1990. Elle applique donc des tests de filtrage stricts à ces affaires en se concentrant sur les barrières à l'entrée, l'existence de droits particuliers, et la possibilité, ou non, que l'affaire soit résolue par une autorité de réglementation. L'autorité de la concurrence lituanienne estime que des efforts considérables peuvent être déployés pour des plaidoyers et elle souhaite justement multiplier les initiatives dans ce domaine. Par le passé, elle disposait de ressources insuffisantes pour cela. Cependant, le droit de la concurrence est sur le point d'évoluer en Lituanie et la nouvelle législation habilitera l'autorité à établir un ordre de priorité des affaires, ce qui devrait libérer des ressources pour les plaidoyers. En vertu du droit de la concurrence lituanien, l'autorité de la concurrence peut intervenir, dans les affaires de prix excessifs, à la fois contre la société défenderesse et contre une administration publique telle qu'une instance de réglementation sectorielle, puisque ces organismes n'ont pas le droit de prendre de

décisions faussant la concurrence. En conclusion, le délégué de Lituanie note les limites des plaidoyers et des tests de filtrage qui peuvent être effectués, ainsi que la possibilité qu'une autorité doive faire face à des prix élevés sans réglementation. Dans ces cas, l'autorité peut être contrainte de juger sur pièces (« *I know it when I see it* ».

Au regard du droit brésilien, le Président explique qu'il est un crime de générer un bénéfice de plus de 20 % en abusant du « besoin impérieux, de la négligence ou du manque d'expérience » de la contrepartie. Le Président demande des informations complémentaires sur l'application de cette disposition et sur le rôle joué par l'autorité de la concurrence brésilienne dans de tels cas. Le délégué du Brésil explique que le droit de la consommation et de la concurrence brésilien ne prévoit pas de dispositions limitant le bénéfice, mais qu'il vise seulement les prix excessifs. C'est la loi de l'économie populaire qui limite les bénéfices à une marge de 20 %. Comme il est indiqué dans la note soumise par le Brésil, la conformité de ce plafonnement avec la constitution est largement mise en doute. La loi en question a été votée en 1951, alors que le Brésil était en proie à une inflation galopante et que l'État intervenait de manière musclée dans l'économie afin d'endiguer cette tendance. Selon l'autorité de la concurrence brésilienne, cette limite est anticonstitutionnelle et ne devrait pas être appliquée par les tribunaux. Elle est notamment incompatible avec l'économie libre de marché qui prévaut au Brésil et qui est protégée par des fondamentaux de la constitution. Malheureusement, certains tribunaux brésiliens continuent d'appliquer cette disposition, en se basant généralement sur la marge bénéficiaire brute et en considérant que cette marge peut être jugée abusive lorsqu'elle dépasse 20 %. Plus précisément, dans l'affaire de l'*Essence* citée dans la note, le juge a déterminé qu'un distributeur d'éthanol ne pouvait générer une marge bénéficiaire brute de plus de 20 %. La décision ne tient toutefois pas compte de l'impact sur l'investissement, ni du fait que le bénéfice net ait été bien inférieur au bénéfice brut enregistré. Heureusement, des décisions de justice plus récentes ont pris le contre-pied de cette approche et n'ont pas appliqué ce plafonnement du bénéfice, au motif qu'il va à l'encontre du principe fondamental de libre concurrence. Le Président demande s'il est possible que l'autorité de la concurrence brésilienne joue un rôle dans ces affaires. Le délégué confirme qu'elle aurait pu participer mais que cela n'a pas été le cas dans les affaires citées, peut-être faute d'avoir été informée que des actions en justice privées étaient en cours.

Le Président présente ensuite la note soumise par le Danemark, où l'autorité de la concurrence est souvent intervenue pour lutter contre des prix excessifs. La note du Danemark contenait un rapport détaillé sur des affaires de prix excessifs dans le secteur de l'électricité. Elle revenait notamment sur une affaire dans l'ouest du pays, dans laquelle la société de production électrique s'est vu reprocher un abus de position dominante pour avoir facturé un prix de vente d'électricité en gros excessif. Une autre affaire concernant cette fois l'est du pays portait sur des prix qui ne se sont finalement pas révélés excessifs. Étant donné que les prix peuvent augmenter en cas de rareté de l'offre, notamment dans le secteur de l'électricité, le Président demande au délégué du Danemark de préciser dans quels cas les prix sont jugés excessifs ou non – la juxtaposition des deux affaires dans le secteur de l'électricité fournissant une bonne occasion d'identifier un point de référence. Le délégué du Danemark reconnaît que des prix élevés ne sont pas un problème en soi mais qu'ils peuvent être dus à une pratique d'exploitation de la part d'une société en position dominante. En étudiant les marchés de l'électricité au Danemark, l'autorité de la concurrence danoise a effectué une analyse de rentabilité ainsi qu'une analyse des appels d'offres de la société en position dominante – et qui fixait donc les prix – Elsam. L'autorité ayant insisté surtout sur ce dernier test, le délégué explique plus en détail l'analyse des appels d'offres. En étudiant les courbes d'appels d'offres de la société en position dominante, il était possible d'établir le mode de fixation des prix adopté par la société sur les segments aux prix très élevés, et ainsi de déterminer si les prix élevés étaient dus à la rareté de l'offre ou à un pouvoir de marché excessif. Lorsque les prix étaient élevés mais que la société n'exerçait pas de pouvoir (en lançant des appels d'offres au coût marginal), ils n'étaient pas jugés excessifs. En revanche, à de nombreuses reprises, la société en position dominante a lancé des appels d'offres bien au-dessus du coût marginal, ce dont l'autorité de la concurrence s'est rendu compte en comparant le coût marginal de chacune des centrales détenues par la société en question au prix effectif sur le marché. Au

cours de l'enquête, la société en position dominante n'a fourni aucune justification objective légitimant son comportement tarifaire. L'autorité a donc conclu que les tarifs appliqués par Elsam sur le marché de l'électricité dans l'ouest du Danemark traduisaient une pratique d'exploitation. L'un des éléments clés a été que, lors d'une saisie effectuée à l'aube dans les locaux d'Elsam, l'autorité a découvert une note interne décrivant comment maximiser les bénéfices sur le marché. Lorsque l'autorité a examiné les appels d'offres lancés sur Nord Pool, le marché de l'électricité au comptant, elle a constaté qu'ils suivaient de près les modalités décrites dans la note. L'autorité a déterminé par conséquent que les prix étaient excessifs. Sur le marché de l'est du Danemark, les prix pratiqués étaient similaires. Néanmoins, lorsque l'autorité a analysé la courbe des appels d'offres, elle a découvert que la société en position dominante avait lancé les appels à ses coûts marginaux. Les prix élevés étaient donc dus à d'autres facteurs de marché liés à la rareté des capacités de transmission d'électricité entre le Danemark et la Suède. L'autorité n'a donc pas conclu à des prix excessifs dans cette seconde affaire.

En Russie, poursuit le Président, des pratiques de prix excessifs font souvent l'objet de poursuites. La note soumise par la Russie mentionnait un double test : des revenus supérieurs aux coûts et des prix supérieurs à un élément de comparaison concurrent. Bien que ces tests soient faciles à décrire, ils peuvent être difficiles à mettre en œuvre et, pour les sociétés, difficiles à suivre. Le Président demande donc si l'autorité de la concurrence russe (FAS) a émis des conseils à l'attention des sociétés sur ces tests ou si elle est partie du principe que la législation et la jurisprudence étaient suffisamment explicites pour que les sociétés comprennent les obligations qui leur incombent. Le délégué de Russie explique qu'il n'existe aucune définition formelle des prix excessifs dans le droit de la concurrence russe. Ainsi, c'est la définition d'un prix monopolistique élevé qui est employée dans ces infractions. Pour faire appliquer le droit contre les prix excessifs, la FAS effectue une évaluation de marché standard que le délégué décrit plus en détail. Le marché concerné est analysé conformément aux réglementations et outils officiellement adoptés et publiés. La FAS est donc tenue de prendre en considération à la fois les caractéristiques quantitatives et qualitatives du marché, et pas seulement de calculer les bénéfices et coûts d'une marchandise. La FAS analyse le marché sur une période prolongée qui lui permet de déterminer si l'augmentation du bénéfice est déraisonnable par rapport aux conditions économiques normales. Pour illustrer l'approche méthodologique, la note de la Russie donnait une description détaillée d'une évaluation des prix sur le marché d'un produit pétrolier. L'analyse de la rentabilité tient compte de l'impact sur l'investissement ainsi que des barrières à l'entrée et de l'inflation, entre autres facteurs. Si le bénéfice est par trop supérieur à la rentabilité moyenne dans des conditions comparables, une enquête et une intervention de l'autorité de la concurrence sont alors justifiées. Dans tous les cas, la FAS doit identifier un marché comparable pour déterminer un prix de marché équitable qui sera comparé au prix appliqué par la société en position dominante.

Au sujet des critères de protection dans les affaires de prix excessifs, le délégué de Russie explique qu'il a été proposé de modifier le droit de la concurrence russe afin d'exiger la prise en compte des cours en vigueur sur les marchés de matières premières et d'autres indicateurs de prix sur les marchés internationaux. Les affaires de prix excessifs représentent un pourcentage modeste des nombreuses mesures d'application du droit de la concurrence prises en Russie : en 2010, elles représentaient moins de 5 % des affaires d'abus de position dominante. Ces affaires de prix excessifs sont survenues essentiellement sur les marchés agricoles locaux ainsi que dans les secteurs des infrastructures et des produits pétroliers. En règle générale, les affaires de prix excessifs s'accompagnent d'autres affaires d'abus de position dominante (discrimination par les prix, etc.). Concernant la certitude juridique, la FAS a ouvert des discussions de longue date avec les entreprises au sujet des prix, aussi bien dans les secteurs réglementés que non réglementés. Par conséquent, les entreprises exerçant dans ces secteurs sont aujourd'hui bien informées de la position de la FAS sur la question des prix excessifs. Cette position se traduit dans les décisions qu'elle prend dans chaque affaire. Ces décisions sont publiques et la FAS part du principe que la jurisprudence suffit à assurer la certitude juridique. Par ailleurs, la position de la FAS a été

étayée par les plus hautes instances nationales dans une importante affaire concernant les produits pétroliers, décrite dans la note soumise par la Russie.

Le Président souligne le nombre considérable d'affaires traitées par la FAS sur la question des prix excessifs, renforçant ainsi l'argument de la FAS selon lequel la jurisprudence fournie dans ce domaine est suffisante pour créer une certitude juridique. Le Président aborde ensuite la note soumise par la Grèce, laquelle mentionne un certain nombre d'affaires de prix excessifs menées selon le modèle *United Brands*. Dans la plupart des affaires, la Commission hellénique de la concurrence (CHC) n'a établi aucune infraction, l'écart de prix constaté n'étant pas suffisant pour remplir les critères du test *United Brands*. Dans une affaire de parking aéroportuaire, cependant, la CHC a conclu que les tarifs de stationnement étaient excessifs. Le Président demande à la CHC comment elle a établi leur caractère excessif dans ce cas particulier. Le délégué de Grèce explique que l'affaire en question était une décision intermédiaire. La CHC n'a ensuite pas émis de décision finale, préférant enjoindre l'instance d'instruction – qui avait recommandé le rejet de l'affaire – d'approfondir son étude des possibles répercussions anticoncurrentielles de la concession accordée pour l'exploitation du parking de l'aéroport. La CHC a proposé que l'instance d'instruction examine le contenu et la mise en œuvre du contrat afin d'ordonner toutes les mesures comportementales nécessaires sur la redevance de concession et d'émettre une recommandation à l'autorité aéroportuaire pour la mise en œuvre de ces mesures. L'autorité aéroportuaire n'est pas elle-même mandatée pour prendre des décisions sur les problèmes de concurrence, mais elle est en mesure de s'assurer que les prix appliqués à l'aéroport soient aussi bas que possible. Parallèlement, dans cette affaire, l'autorité était l'une des parties au contrat de concession conclu après l'appel d'offres. Concernant le rôle des concurrents dans l'analyse comparative, le délégué ajoute que les concurrents de la société qui s'est vu accorder la concession d'exploitation du parking étaient les autorités publiques qui exploitaient d'autres parkings aéroportuaires. Cela étant, ces concurrents n'étaient qu'hypothétiques car, sur le marché local en question, la société ayant remporté l'appel d'offres était en situation de monopole.

D'une manière plus générale, le délégué énonce que, dans les affaires de prix excessifs, la société en position dominante tire, au détriment des consommateurs, des bénéfices qui ne reflètent pas la valeur réelle du produit – c'est la logique qui sous-tend le test *United Brands*. Par conséquent, il incombe à la société en position dominante de se garder d'effectuer des transferts de richesse de la sorte, qui relèvent d'une pratique d'exploitation. Par ailleurs, le paradigme de l'autocorrection des prix excessifs ne semble pas être la norme. L'intervention peut être nécessaire lorsque le marché n'est pas ou peu susceptible de s'autocorriger dans un délai raisonnable. C'est notamment le cas lorsque des barrières importantes à l'entrée et un comportement agressif de la part de la société en position dominante entravent l'arrivée de nouveaux acteurs. Dans des petites économies telles que la Grèce, la taille du marché pose des limites qui facilitent la préservation du pouvoir de marché. Parallèlement, les autorités de la concurrence – notamment dans les petites économies – disposent de ressources très limitées et sont très susceptibles de consacrer la majeure partie de leurs efforts aux marchés qui affichent des dysfonctionnements manifestes de la concurrence. Par conséquent, il est probable que les erreurs de type II soient plus rares dans ces circonstances. Lorsqu'elle examine les affaires de prix excessifs, la CHC utilise en principe le test à deux branches *United Brands*. Après la récente réforme législative, elle est désormais aussi habilitée à établir un rang de priorité des affaires ; elle a d'ailleurs récemment mis en place des directives d'application des priorités. Ainsi, selon la CHC, l'intérêt public et général plaident valablement pour une intervention contre les prix abusifs (excessifs), notamment en période de crise économique, lorsque le pouvoir des consommateurs est affaibli. La CHC estime que les autorités de la concurrence sont souvent bien placées pour traiter ces affaires malgré les difficultés inhérentes à concevoir et appliquer les bonnes méthodes et les bons étalons de comparaison nécessaires pour établir l'existence d'un comportement abusifs.

Le Président présente ensuite la note soumise par la Finlande, où l'autorité de la concurrence a également traité une affaire de chauffage urbain. Dans cette affaire, l'autorité a choisi un plafond de 10 % au-delà du prix de référence, un prix qui permet un rendement sur investissement ajusté du risque. Le

Président demande si cette norme est facile à appliquer en pratique et, en outre, si une autorité de réglementation n'aurait pas été mieux placée pour traiter la plainte. Le **délégué de Finlande** confirme que l'analyse de rentabilité est une méthode délicate pour évaluer les prix excessifs. L'autorité de la concurrence finlandaise a donc tenté de recourir à cette technique de manière plus souple et simplifiée (en utilisant les valeurs comptables comme base de capital, par exemple). L'autorité mène à l'heure actuelle une enquête sectorielle sur le marché du chauffage urbain dans le but de déterminer s'il existe des signaux manifestes d'abus tarifaires dans le secteur, une question à laquelle il faut répondre avant d'examiner si un tel abus est effectivement avéré. Avant d'effectuer l'analyse de rentabilité, l'autorité a examiné les diverses conclusions possibles et identifié trois scénarios différents qui auraient abouti à des conclusions souhaitables : (i) établir qu'une ou deux sociétés appliquaient des tarifs notablement supérieurs, par rapport aux autres, au prix de référence, auquel cas l'autorité aurait pu conclure qu'une enquête plus approfondie sur ces deux entreprises était justifiée ; (ii) constater que le prix de référence était dépassé, dans tout le secteur, non pas du plafond de 10 % mais d'une marge bien plus considérable (30-50 %, par exemple), auquel cas la situation aurait appelé à une réglementation sectorielle ; et (iii) observer, d'après les conclusions globales pour le secteur, des écarts de prix inférieurs au plafond de 10 %, auquel cas l'enquête aurait pu être close au motif qu'il n'existait aucun problème tarifaire manifeste dans le secteur. Néanmoins, les conclusions de l'enquête ne se sont inscrites dans aucune de ces catégories : sur l'ensemble du secteur, les prix étaient de 10 % à 20 % supérieurs au prix de référence. Devant ce constat, l'autorité a indiqué qu'une réglementation serait utile dans le secteur pour réduire les prix, sans pour autant plaider énergiquement pour cette réglementation car les dépassements n'étaient pas assez graves pour justifier une telle action. Le Président demande si l'affaire a dès lors été close sans conclure à l'existence de prix excessifs. Le délégué de Finlande précise que l'affaire demeure ouverte, que les relations se sont poursuivies avec les sociétés et que de nouvelles enquêtes ont eu cours, mais que, à en croire l'analyse de rentabilité menée jusqu'à présent, une intervention ne semblait pas justifiée.

Le BIAC a soumis un rapport critique sur les interventions des autorités de la concurrence contre les prix excessifs et, notamment, sur les normes qui s'imposent surtout en Europe, où a été traité le plus grand nombre d'affaires de prix excessifs. Le Président relève que le texte de l'Article 102 TFEU ne sera probablement pas changé prochainement et que la loi restera applicable dans les cas de pratiques d'exploitation par les prix, bien qu'elle ne soit appliquée qu'exceptionnellement. Sur ce constat, le Président demande si le BIAC a des recommandations sur la manière d'appliquer la loi contre ce type de pratiques. Il note également qu'il est possible de prendre des mesures d'application contre les prix excessifs par des moyens privés, et demande si l'application du droit par les instances publiques n'est pas plus souhaitable dans ces circonstances, étant donné que les autorités de la concurrence sont l'institution la plus appropriée pour mettre sur pied des normes juridiques au travers de mesures d'application dans ce domaine. Le délégué du BIAC explique que la contribution du BIAC n'est pas exclusivement critique, mais que l'organisation s'inquiète plutôt des répercussions néfastes que peut avoir l'application du droit de la concurrence contre les prix excessifs. Elle est notamment préoccupée par l'effet potentiellement nuisible d'une application excessive des dispositions. L'opinion générale du BIAC est que les agences doivent se montrer réticentes à intervenir dans ces affaires : tout d'abord, dans la majeure partie des cas, les marchés seront en mesure de s'autocorriger et, d'autre part, dans les pratiques présumées excessives, il est très difficile d'appliquer des dispositions relatives aux compartiments unilatérales. Le délégué souligne un point qui inquiète tout particulièrement le BIAC : on ne comprend pas encore précisément la relation entre les prix élevés et l'innovation. On ne peut dès lors exclure que les prix élevés incitent les sociétés à investir, ce qui plaide en défaveur d'interventions trop prestes. Cela ne signifie pas, insiste le délégué, que les autorités ne doivent jamais intervenir, mais le BIAC recommande ardemment l'utilisation de filtres, comme cela a été indiqué auparavant au cours de la Table ronde. Selon le BIAC, ces filtres doivent exiger au moins : (i) des barrières à l'entrée élevées et durables ; (ii) une position dominante héritée de droits spéciaux ou d'exclusivité passés ; et (iii) l'absence d'autorité de réglementation sectorielle ; par ailleurs (iv) pour des questions de principe, des affaires de prix excessifs ne devraient pas être traitées sur des marchés impliquant des droits de propriété intellectuelle (DPI). Le BIAC convient que le test *United*

Brands reste discutable. Dans l'UE, la Commission fait preuve d'une sage frilosité à poursuivre les affaires de prix excessifs. Cependant, les dispositions FRAND des lignes directrices horizontales permettent à la Commission d'intervenir rapidement dans les affaires de DPI, une approche que désapprouve le BIAC. Les DPI sont un domaine complexe. Il est notamment difficile de déterminer quels coûts de recherche et développement doivent être pris en considération pour calculer les droits de licence appropriés.

D'une manière générale, le délégué du BIAC soutient que les autorités de la concurrence devraient traiter les prix excessifs comme un symptôme plutôt que comme la maladie elle-même : il est donc préférable d'observer les causes sous-jacentes et de voir s'il est nécessaire de traiter le problème à la racine. L'intervention n'est justifiée que dans des circonstances exceptionnelles déterminées à l'aide des quatre filtres énoncés. Par ailleurs, il est raisonnable de conserver une marge d'erreur relativement importante. Au sujet du risque que les tribunaux suivent une approche plus formaliste des plaintes pour prix excessifs que les autorités de la concurrence, le délégué mentionne que les tribunaux agissent dans un cadre. Nombre d'entre eux sont bien au fait de l'approche des autorités de la concurrence nationales et de l'UE et s'y intéressent. Par ailleurs, les autorités et la Commission européenne peuvent intervenir dans des affaires jugées par des tribunaux nationaux lorsqu'une telle intervention est appropriée, ce qui peut être un moyen d'aider les tribunaux à adopter une approche plus économique des prix excessifs. En outre, les autorités disposent d'une marge importante pour multiplier les initiatives de plaidoyer, établir des directives, etc. Le Président souligne que tous les participants à la discussion ont reconnu que ces affaires étaient rares et que les affaires mentionnées reflétaient la nature exceptionnelle de l'application du droit de la concurrence sur la base de prix excessifs.

Pour conclure le second volet de la discussion, le Président donne la parole à tous les participants. Le délégué de l'UE se demande si les affaires de prix excessifs ne seraient pas impopulaires parce que les autorités de la concurrence ne souhaitent pas supporter les conséquences qu'engendre le fait de définir un prix comme excessif. Dans des affaires passées de l'UE, la Cour de Justice a toujours considéré une marge excessive lorsque le prix excédait une certaine mesure du coût, ce qui est le fondement de la réglementation en général – le but étant de reproduire les effets de la concurrence. L'une des craintes souvent formulées est que les sanctions imposées en cas de prix excessifs n'entravent l'entrée sur le marché. Cependant, comme l'a démontré de manière convaincante David Gilo, cet argument n'est pas valable. Certains redoutent également que le plafonnement des prix ne décourage l'investissement. Là encore, les recherches suggèrent que l'investissement en recherche et développement, etc. est plus susceptible d'être élevé sur des marchés moins concentrés. Ainsi, la principale raison plausible pour laquelle les autorités de la concurrence sont généralement réfractaires à l'idée de poursuivre les affaires de prix excessifs est que ces dernières sont trop difficiles à mettre en œuvre. Par conséquent, demande le délégué de l'UE, que doit-il se passer lorsque l'autorité doit traiter une affaire relativement simple à appliquer ? Autre problème soulevé par le délégué de l'UE, que doivent faire les autorités lorsqu'elles ne peuvent identifier un étalon de mesure adéquat pour évaluer les prix ? Le délégué laisse entendre que la solution pourrait être de n'accepter que les affaires dans lesquelles il existe des barrières à l'entrée élevées et durables, tout en rejetant l'approche restrictive du BIAC, laquelle exclut en particulier toutes les affaires impliquant des DPI. Lorsqu'il est manifeste que le marché ne corrigera pas un problème tarifaire donné dans un avenir proche, est-ce seulement leur réticence à réglementer les prix qui empêche les autorités de la concurrence de prendre des mesures d'application ?

Le Président soulève un paradoxe : les autorités de la concurrence s'entendent constamment dire qu'elles ne sont pas des autorités de réglementation des prix mais, dans le même temps, elles traitent de questions de prix dans bien d'autres domaines, et souvent sans que cela pose particulièrement problème – remises fidélité, prix de vente d'éviction et intervention liées aux commissions d'interchange par exemple. Puisque les autorités réglementent en quelque sorte les prix dans ces autres domaines, l'objection élevée à l'encontre des affaires de prix excessifs doit avoir des fondements plus philosophiques, mais ce problème ne devrait pas en être un. Le délégué de l'UE note qu'il existe un élément de comparaison clair, du moins

dans les cas de prix de vente d'éviction – l'interdiction d'appliquer des prix inférieurs aux coûts. Il demande si les autorités craignent d'établir une norme aussi claire pour les affaires de prix excessifs ou si elles n'ont pas confiance dans leur capacité à déterminer une telle norme, ou encore si elles ne souhaitent peut-être pas imposer aux sociétés des obligations paradoxales qui les forceraient à dissimuler un comportement qui est logique : l'augmentation des prix. Le délégué du Taipei chinois indique que, d'un point de vue économique, il est très difficile de déterminer un prix de référence. Partant, il demande comment l'on peut donc établir qu'un prix est excessif. Les autorités de la concurrence devraient déterminer si oui ou non le marché fonctionne correctement : si les mécanismes d'offre et de demande fonctionnent correctement, le délégué soutient qu'il n'y a pas de prix excessifs. Le Président reconnaît la validité du point de vue du délégué mais ajoute que si l'on suit cette logique, il est difficile de plaider en faveur d'une intervention visant à fixer les prix quel que soit le secteur, y compris dans les télécommunications et l'électricité. Non seulement l'argument entraînerait un rejet des prix excessifs, mais il irait à l'encontre de la plupart des mesures de réglementation sectorielle. Selon le Président, si l'on accepte l'intervention d'autorités de réglementation sectorielle, il faut avancer une raison autre que leur difficulté d'application pour rejeter les interventions des agences de la concurrence dans ce domaine.

Le délégué du BIAC souligne l'inquiétude de l'organisation à l'égard du manque de certitude juridique inhérent au test *United Brands*. Le BIAC estime qu'il est nécessaire d'adopter quelques principes de limitation qui permettraient aux entreprises d'identifier plus clairement quand les prix sont excessifs. Bien que le BIAC ne plaide pas pour qu'aucune intervention contre les prix excessifs ne soit entreprise, le délégué du BIAC indique qu'il existe en fait deux réactions possibles à l'affaire espagnole : l'intervention par l'autorité de la concurrence ou, à l'inverse, un examen du marché, car l'entrée doit être possible. Le délégué d'Espagne explique que l'affaire des Îles Canaries était née du fait qu'il n'existait qu'un seul fournisseur et que les barrières à l'entrée étaient d'ordre juridique en raison de l'obligation d'obtenir des permis administratifs pour vendre des produits explosifs et de disposer de dépôts. Dans cette affaire, la société en position dominante a tiré parti des barrières juridiques, stratégiques et géographiques à l'entrée pour exploiter sa position dominante. Selon le délégué d'Espagne, les autorités de la concurrence sont généralement réticentes à traiter les affaires de prix excessifs car de telles interventions sont contre nature dans l'application du droit de la concurrence. L'affaire des Îles Canaries était exceptionnelle puisque l'écart de prix était phénoménal, le problème émanait du comportement d'une seule société et aucun élément ne pouvait raisonnablement justifier cet écart. Il était donc clair que la société abusait de sa position dominante sur le marché, mais ces cas sont très rares. En règle générale, les autorités de la concurrence préféreraient travailler sur d'autres affaires plus transparentes et monopolisant moins de ressources mais, de temps à autre, il est impossible d'échapper à des affaires de prix excessifs telles que celle des Îles Canaries.

Le délégué d'Israël soulève deux points. Tout d'abord, s'il est vrai qu'une société en situation de monopole ne souhaitera normalement pas facturer plus que le prix monopolistique, ce dernier est égal à celui qu'une entente fonctionnant correctement souhaiterait facturer, et il est évident que les autorités de la concurrence voudraient intervenir contre ce prix élevé. C'est en fait la même perte sans contrepartie que les autorités tentent d'éviter lorsqu'elles interviennent dans les affaires de prix excessifs. Ensuite, au sujet de l'incertitude qui entoure les affaires de prix excessifs pour les sociétés, le délégué répond qu'afin de réduire le possible manque de certitude, il pourrait être utile d'établir des conseils et recommandations à destination des sociétés à l'aide de la jurisprudence existante sur cette question. Néanmoins, le délégué note que l'interdiction des prix excessifs ne diffère finalement pas grandement de toute autre règle de concurrence guidée par la raison : par exemple, l'interdiction des pratiques d'exclusivité crée une incertitude similaire pour les sociétés.

Le délégué d'Afrique du Sud aborde lui aussi la question de la certitude. Il souligne les progrès réalisés dans ce domaine : en effet, l'identification de normes comme la position ultra-dominante et la manière dont la position dominante a été acquise créent un certain degré de certitude dans la mesure où la

plupart des sociétés n'entreront pas dans le champ de l'interdiction des prix excessifs et ont donc peu à craindre. Le délégué note que les sociétés qui pourraient être concernées par cette interdiction formeront un éventail très divers dans des économies elles-mêmes différentes – à cet égard, l'Afrique du Sud est similaire à Israël dans la mesure où le secteur des anciennes sociétés d'État y est important. Le délégué mentionne par ailleurs l'affaire *Mittal*. Dans cette dernière, le juge a estimé que les avantages spéciaux en termes de coûts dont jouissait la société ne devaient pas lui être reprochés. Pour autant, le concept d'avantage spécial en termes de coûts n'a pas été défini dans le jugement, et il pourrait éventuellement être étendu au rachat d'une société privatisée. Ainsi, les sociétés qui pourraient tomber sous le coup d'interdictions de prix excessifs après application du premier filtre seraient exclues au regard de cette interprétation du test car elles ont obtenu leur avantage en termes de coûts en rachetant l'entreprise concernée. Le délégué redoute que les tribunaux et l'autorité de la concurrence n'aient des positions opposées sur ce sujet en Afrique du Sud.

La déléguée des États-Unis répond au deuxième point soulevé par le délégué d'Israël concernant la certitude : selon elle, l'analyse des prix excessifs diverge nettement d'autres analyses conformes à la règle de raison, du fait de la mesure corrective qu'elle engendre. Il existe une différence notoire entre les deux : la mesure corrective dans les affaires de prix excessifs est une intervention sur les prix, ce qui n'est pas le cas d'autres affaires entrant dans le champ d'application de la règle de raison. Le Président note toutefois que, si l'on prend l'exemple d'une affaire de remise fidélité, l'autorité de la concurrence doit décider où se situe le seuil de remise qui constitue une pratique d'éviction, ce qui revient à une intervention sur les prix. Ce rapprochement étaye la remarque plus générale faite par le délégué d'Israël à propos des difficultés générales d'évaluation. Le délégué de l'UE ajoute que, dans les affaires de refus de vente, si l'autorité de la concurrence intervient, elle doit identifier un prix de référence applicable à l'obligation de fourniture. Si elle ne parvient pas à en trouver un adéquat – prix d'usage ou de fourniture antérieur –, elle doit finalement déterminer un prix de fourniture acceptable, auquel cas les pratiques d'éviction et d'exploitation par les prix se confondent. Le Président ajoute les affaires d'étranglement des marges à la liste des situations dans lesquelles l'autorité doit déterminer le prix approprié ; le délégué de l'UE avance toutefois que ces affaires peuvent aussi être considérées comme une sous-catégorie des refus de vente.

Le délégué de l'UE reconnaît que les autorités ne devraient pas sanctionner une entreprise qui réalise des bénéfices élevés grâce à son efficacité supérieure en qualité d'acheteur. En revanche, il est d'autres circonstances qui peuvent partiellement dissimuler ou masquer des prix excessifs : lorsqu'une société achète un intrant ou une activité à un prix élevé car elle compte tirer ultérieurement un grand bénéfice en pratiquant des prix excessifs. Cette considération entrait en ligne de compte dans l'affaire du chauffage urbain en Suède. En effet, les prix et les coûts étaient difficiles à évaluer en partie parce que la société prédominante sur le marché avait peut-être elle-même payé un prix élevé pour les activités de chauffage urbain. Le délégué de l'UE demande des précisions concernant l'affaire *Mittal*. Il relève que l'Afrique du Sud dispose d'un avantage comparatif dans la production d'acier et demande si la société Mittal a été jugée efficace, ce qui ne devrait pas lui être reproché, ou si l'autorité de la concurrence sud-africaine estimait que la société n'était pas aussi efficace qu'elle aurait dû l'être étant donné ses atouts naturels. Le délégué d'Afrique du Sud fait observer que l'argument de l'efficacité a été avancé par la défense de Mittal, toutes les parties s'accordant sur le fait que les matières premières étaient très bon marché. Une analyse comparative a été employée pour confronter les faibles coûts et les prix puisque l'acier est un produit relativement homogène en termes d'intrants et d'extrants. Lors de sa défense, Mittal a avancé qu'elle n'était pas rentable, la question étant de savoir si cela était dû à son inefficacité ou à d'autres raisons. En évaluant la question de la rentabilité, le Tribunal de la concurrence s'est concentré sur l'efficacité et sur la mesure du coût de remplacement au regard des investissements supplémentaires et de la hausse de la production. Le délégué étend l'approche comparative aux coûts. En Afrique du Sud, la production d'acier est une industrie mature, il suggère donc qu'un autre filtre pourrait être ajouté : le fait qu'une industrie soit mature et ne déploie donc pas d'efforts d'innovation. Dans cette affaire, Mittal avait par ailleurs la particularité d'être en position ultra-dominante et de jouir d'une position privilégiée pour avoir été

antérieurement dans le giron de l'État. Ces facteurs sont importants dans la mesure où ils permettent des comparaisons / étalonnages concurrentiels, ce qui permet à l'autorité de la concurrence d'examiner les questions d'efficacité. Le délégué relève que ces affaires sont peu courantes et qu'elles n'ont généralement cours qu'en présence d'économies d'échelle, de distances importantes avec les autres économies industrielles ou de marchés très localisés. Pour conclure, le délégué ajoute qu'il est indispensable de vérifier objectivement la position héritée lors de la privatisation. Par exemple, si cette privatisation a eu lieu peu de temps avant la fin de l'apartheid et que la société a été cédée à des intérêts proches de ceux de l'État, la situation est alors bien différente des cas dans lesquels la position dominante résulte d'investissements risqués.

4. Prix excessifs, droit de la concurrence et réglementation

Le Président oriente ensuite la discussion vers la dernière section de la table ronde : pourquoi ne pas simplement réglementer les prix élevés ? Une des critiques importantes formulées à l'encontre de l'intervention de l'autorité de la concurrence dans les affaires de prix excessifs est que ces autorités ne sont pas des organes de réglementation des prix : ces organes fixent les prix, ce que ne font pas les autorités de la concurrence. Le Président note qu'il est apparu clairement, déjà dans la discussion, que cette dichotomie absolue n'est pas exacte. En effet, il existe de nombreux cas où les autorités de la concurrence fixent les prix d'une manière ou d'une autre. Il est donc anormal que ce soit dans le seul domaine des prix excessifs que les autorités de la concurrence soutiennent que leur mission ne consiste pas à fixer les prix. Il existe toutefois une répartition des tâches entre les organes de réglementation et les autorités de la concurrence, la principale différence étant que les premiers interviennent sur le marché en définissant une voie d'action unique et en disant aux entreprises ce qu'elles doivent faire, alors que les autorités de la concurrence disent aux entreprises ce qu'elles ne peuvent pas faire. C'est le dilemme des prix excessifs : lorsque l'autorité conclut qu'un certain prix est excessif, elle doit aussi déterminer à quel moment ce prix cesse d'être excessif, faute de quoi les entreprises ont du mal à se conformer.

Il s'ensuit que les autorités de la concurrence ont beaucoup à apprendre des organes de réglementation. Le Président présente dès lors Misja Mikkers, qui commence par noter que l'Autorité néerlandaise des soins de santé (« NZa »), en tant qu'organe de réglementation spécifique du secteur, est plus préoccupée par d'autres formes d'abus de position dominante que les prix excessifs, par exemple, par la qualité médiocre. Dans un document récent de Gaynor & Propper, il a été démontré qu'en l'absence de concurrence par les prix, la mortalité est plus élevée sur les marchés hospitaliers plus concentrés que sur les marchés plus concurrentiels, ce qui met en évidence l'importance de la qualité. Le rôle de la NZa est un rôle intermédiaire entre celui d'organe de réglementation et celui d'autorité de la concurrence : elle réglemente une partie du secteur des soins de santé et sa compétence au titre du droit de la concurrence recoupe en partie celle de l'autorité néerlandaise de la concurrence (« NMa »). La NZa peut imposer des obligations générales à tous les opérateurs du marché, notamment des plafonds de prix ou des obligations de transparence, et est également compétente pour imposer des obligations spécifiques aux entreprises exerçant un pouvoir de marché. Misja Mikkers note que la discussion de la table ronde s'est centrée en particulier sur l'idée d'une norme de prix ; une des principales normes examinées est fondée sur les niveaux de coûts et sur l'analyse de la rentabilité. En tant que membre de l'organe de réglementation, il se déclare particulièrement préoccupé par l'incidence des incitations dynamiques de ce critère à la fois sur l'efficacité et sur la capacité, cette dernière étant un facteur qui est particulièrement important dans le secteur de l'énergie, mais aussi dans celui des soins de santé. Un aspect qui n'a pas été beaucoup évoqué est la méthode de la modélisation ou de l'ingénierie : par exemple, l'organe néerlandais de réglementation des télécommunications réglemente le réseau au titre d'un modèle d'ingénierie, qui tente de déterminer les coûts de remplacement des actifs. La NZa utilise de nombreux modèles économiques fondés sur des informations relatives à la demande, aux coûts et à la concurrence pour évaluer le degré de pouvoir de marché, ainsi que la relation directe avec les prix, ce qui peut également définir une norme type. Enfin, la définition de prix et de coûts de référence est, pour l'organe de réglementation, une manière importante

d'établir des normes : bien qu'il s'agisse d'un mécanisme souple d'utilisation pour l'organe de réglementation, de nombreux problèmes sont associés à cette approche. M. Mikkers note que beaucoup de problèmes analysés par Alan Gregory s'appliquent également dans ce contexte.

Misja Mikkers analyse ensuite un exemple caractéristique emprunté au secteur des soins de santé, en comparant les prix hospitaliers et les taux de mortalité par patient, corrigés de la population. Lorsqu'une régression est effectuée sur ces chiffres, le résultat presque paradoxal est que, plus le prix est élevé, plus les taux de mortalité le sont également. Toutefois, lorsque l'on examine le problème de plus près, la relation entre les prix et la qualité est moins directe, ce qui mène à la conclusion que l'application du droit de la concurrence à l'encontre des prix excessifs ne serait souhaitable qu'à l'encontre de certaines entreprises dans cette analyse. Il décrit ensuite un exemple de coopération entre la NZa et la NMa dans une affaire de fusion : la NZa conseille d'ordinaire la NMa dans ce type de cas, mais la décision finale est prise par la NMa. En l'espèce, les deux seuls hôpitaux dans une région isolée du sud-ouest des Pays -Bas ont fusionné pour former un monopole. La raison essentielle pour laquelle la fusion a finalement été approuvée est que l'inspecteur de la qualité pour les soins de santé a dit que la fusion était nécessaire pour préserver un niveau de qualité minimum dans la région. Toutefois, la NMa a imposé, pour la partie de l'hôpital ouverte à la concurrence, une mesure correctrice de l'écart de prix sous la forme d'un plafond égal au simple prix moyen pour les produits comparables aux Pays-Bas appliqué aux assureurs dans le reste du pays, corrigé pour tenir compte de la combinaison spécifique de produits pour l'hôpital concerné. C'est un exemple de réglementation par la concurrence de comparaison. Cette méthode est possible sur les marchés des hôpitaux parce qu'ils sont fortement localisés et que l'organe de réglementation peut dès lors effectuer ces types de comparaison. En outre, la mesure correctrice imposée nécessite des engagements par rapport à l'amélioration alléguée de la qualité, ainsi que l'instauration de conventions collectives entre l'hôpital et les médecins, permettant à ceux-ci de faire jouer la concurrence dans la région. Le plafond des prix a été imposé pour une durée non déterminée ; il est recalculé chaque année par la NZa, qui communique les informations à la NMa, celle-ci surveillant le respect de la mesure correctrice.

Le Président fait observer que la frontière d'efficacité analysée dans l'exposé de Misja Mikkers donne largement matière à réfléchir. Dans le cas de la fusion d'hôpitaux qu'il décrit, le même produit pourrait avoir une qualité très différente, ce qui est une caractéristique des marchés des soins de santé, alors que la qualité est un souci moins prégnant dans beaucoup d'autres cas évoqués pendant la table ronde. Misja Mikkers en convient, mais indique que ces types d'approches seraient également applicables, par exemple, dans l'affaire suédoise du chauffage urbain, où il existe des produits multiples comme l'électricité et la chaleur. Seule l'entreprise qui pratique des prix élevés pour les deux produits mérite une enquête ; si un seul produit est pris en compte, il peut y avoir des problèmes d'économies d'échelle, d'affectation des actifs et d'affectation des coûts. Il est possible d'utiliser ces modèles à intrants et extrants multiples pour examiner l'entreprise dans sa globalité, ce qui évite que l'organe de réglementation parvienne à une norme qui ne serait applicable par aucune entreprise parce qu'elle incorpore les meilleures normes pour chaque dimension.

En Hongrie, poursuit le Président, le nombre d'affaires concernant des prix excessifs a fortement diminué ces dernières années. Il y a eu quinze décisions de ce type en 2003, et aucune en 2009 et 2010. Le Président estime que cette diminution peut indiquer que l'autorité de la concurrence n'entame plus de poursuites dans ces affaires, ou que les entreprises se comportent mieux aujourd'hui, ayant reçu dans le passé des instructions de l'autorité de la concurrence. Le délégué de la Hongrie indique qu'aucune de ces deux explications n'est probablement la bonne, mais que c'est plutôt la concurrence qui a résolu le problème. Parmi les cas qui se sont produits précédemment, beaucoup se situaient dans le secteur des télécommunications et concernaient les sociétés de câblodistribution. Avant 2008, ce sont des opérateurs monopolistiques qui assuraient ces services dans la plupart des régions en Hongrie. Ceux-ci pratiquaient généralement des prix très élevés et le contenu en termes de programmes était d'habitude modifié au détriment des consommateurs. Suite aux innovations technologiques, le réseau de téléphonie fixe, dont la

couverture atteint 100 % en Hongrie, est toutefois en mesure aujourd'hui de proposer des services de télévision par câble. En outre, la télévision par satellite s'est largement répandue dans les zones rurales tandis que, dans les zones urbaines à forte densité de population, divers opérateurs parallèles de réseaux de télévision ont constitué leurs propres réseaux. Suite à la concurrence accrue, le service monopolistique a disparu et ce cas fournit donc un bon exemple de la manière dont l'innovation technologique elle-même peut résoudre les problèmes de concurrence. En ce qui concerne les affaires des années 2009 et 2010, le délégué note que les enquêtes sont toujours en cours pour certaines d'entre elles, tandis que d'autres affaires du domaine des prix excessifs ont été clôturées sans conclusion d'infraction.

Le Président explique qu'au Chili, l'autorité de la concurrence est souvent intervenue contre des prix excessifs, notamment dans de nombreux cas dans des secteurs réglementés. La note chilienne conclut que l'intervention était nécessaire dans ces cas en raison de l'inefficacité des organes de réglementation, et le Président demande dès lors des précisions sur ce point. Le délégué du Chili explique que la note décrit les affaires les plus récentes sur lesquelles a statué le Tribunal de la concurrence. Dans l'ancien système régissant les questions de concurrence, la Commission du droit de la concurrence examinait certains cas de prix excessifs, en particulier dans les secteurs des transports et des soins de santé, bien que bon nombre de ces cas ne se soient pas terminés par une constatation d'infraction. Les sept cas les plus récents décrits dans la note se sont produits principalement en dehors du domaine des monopoles naturels. Certains de ces cas ont été soumis par l'autorité de la concurrence, tandis que d'autres étaient des actions privées. Une des raisons pour lesquelles l'autorité de la concurrence a choisi d'intenter des poursuites dans ces secteurs réglementés était que l'organe de réglementation était le même que celui qui avait accordé à l'origine la concession concernée. Initialement, l'autorité de la concurrence a tenté la persuasion, mais elle a fini par considérer qu'une exécution forcée par le recours au Tribunal de la concurrence était nécessaire. Une des raisons de l'exécution directe au titre du droit de la concurrence est donc un problème de structure juridique : le même organe de réglementation qui a accordé la concession est tenu de faire respecter les obligations réglementaires par le concessionnaire. Une deuxième raison concerne l'efficacité. En particulier, les parties privées voulaient une juridiction indépendante pour évaluer leurs cas plutôt qu'introduire une plainte auprès de l'organe de réglementation et devoir passer par le système du droit administratif. Une troisième raison de s'adresser directement au Tribunal de la concurrence est son savoir-faire particulier : deux membres du tribunal sont des économistes et l'on pourrait dès lors s'attendre à une analyse plus technique dans ce type d'institution. Enfin, sur les sept affaires analysées dans la note, deux ont été rejetées : dans une affaire introduite par l'autorité de la concurrence, celle-ci a été déboutée devant le tribunal, et une action privée a été perdue devant la Cour suprême. La plupart des décisions ont été confirmées en appel.

Au Mexique, le droit de la concurrence ne permet pas à l'autorité de la concurrence d'intervenir dans les affaires de prix excessifs. Le Président a demandé si l'autorité reçoit néanmoins des plaintes pour prix excessifs et, si c'est le cas, ce qu'elle fait pour les traiter : les renvoie-t-elle à l'organe de réglementation concerné ou existe-t-il simplement un hiatus dans la compétence d'exécution de l'autorité ? Le délégué du Mexique confirme qu'il n'existe pas, dans le droit mexicain de la concurrence, de possibilité de sanction à l'encontre des prix excessifs. Le délégué note que le concept de prix excessif est un concept normatif plutôt que positif, qui crée une impossibilité à établir une méthode pour aboutir à une définition spécifique de ces prix. Ainsi, des prix du marché supérieurs à tout équilibre pourraient être le résultat d'un comportement privé ou d'un réglementation publique ayant des effets de distorsion. En ce qui concerne le traitement des prix excessifs qui découlent de contraintes de nature privée, l'autorité de la concurrence dispose de deux outils : premièrement, le contrôle des fusions, qui est un moyen pour éviter la concentration du marché ; et, deuxièmement, l'interdiction de toute conduite d'exclusion par laquelle l'entreprise dominante empêche les concurrents d'accéder au marché ou d'y exercer leurs activités. Dans le cas des contraintes réglementaires, l'autorité dispose de deux pouvoirs supplémentaires. Premièrement, la Constitution mexicaine permet au pouvoir exécutif de réglementer dans certains secteurs qui concernent des produits essentiels pour la consommation de la population. Avant d'exercer cette compétence, le

pouvoir exécutif doit demander à l'autorité de la concurrence d'analyser le marché, et ce n'est qu'en l'absence de concurrence effective qu'il est autorisé à réglementer. Deuxièmement, dans les secteurs où une réglementation préexistante existe, l'autorité de la concurrence peut être invitée à analyser si une entreprise déterminée détient une position dominante sur ce marché, auquel cas l'organe de réglementation du secteur se voit dotée du pouvoir de réglementation. C'est le cas, par exemple, dans les secteurs des télécommunications, de l'aviation, des transports routiers et ferroviaires, des transports maritimes, et sur les marchés du gaz naturel et du GPL. Le Président demande combien de temps il faut au pouvoir exécutif pour réglementer les prix dans un domaine déterminé, s'il souhaite le faire. Le délégué explique que la législation nationale défini la procédure à observer dans ces cas et que le processus d'analyse du marché prend environ autant de temps que celui que l'autorité prendrait dans toute autre enquête, par exemple, une enquête relative à un cas de position dominante ou de collusion, ce qui, dans la législation mexicaine, est de l'ordre d'un an et demi.

Le Président note que la situation des États-Unis est similaire à celle du Mexique : la réglementation des prix est admise uniquement pour les monopoles naturels et il ne peut y avoir, au titre du droit de la concurrence, d'intervention contre les prix excessifs. Le Président demande comment les autorités américaines de la concurrence traiteraient un cas comme celui du chauffage urbain en Suède, qui concerne un monopole naturel non réglementé et, en particulier, s'il serait difficile, et à quel point, de mettre en place une réglementation sur ce nouveau marché. Le délégué des États-Unis confirme que les lois relatives à la concurrence aux États-Unis ne sont pas utilisées pour réglementer les prix des entreprises monopolistiques légales. Il peut toutefois exister une réglementation dans les situations de monopole naturel, ce qui se produit lorsque soit le Congrès, soit un des États décide de mettre en place un régime et un organe de réglementation pour prendre le contrôle du marché. Dans l'affaire du chauffage urbain, le processus consisterait probablement en une analyse de l'existence ou non d'un pouvoir de monopole naturel durable. Viendrait ensuite un examen comparatif des préjudices que cause le monopole naturel et des coûts et préjudices inévitables d'une structure réglementaire. Dans le cas précis du chauffage urbain, le pouvoir lié aux monopoles naturels aux États-Unis n'est pas particulièrement grand, même si deux États ont réglementé ce type de chauffage (New York et le Colorado).

Le délégué de l'Union européenne fait observer que, bien qu'il ait été dit dans la discussion que le droit de la concurrence aux États-Unis ne s'étend pas aux prix excessifs, ces cas relèvent parfois malgré tout de la compétence des autorités de la concurrence du pays. Il cite l'affaire de la *fusion de l'hôpital d'Evanston*, dans laquelle l'unité hospitalière résultant de la fusion a commencé à pratiquer des prix excessifs, et où les autorités de la concurrence des États-Unis ont intenté avec succès une action en justice fondée sur ce motif, visant à obtenir la dissociation de l'entité fusionnée. Le délégué des États-Unis précise que l'affaire de l'*hôpital d'Evanston* concernait une fusion consommée ; dans l'analyse d'une fusion, bien que des prix élevés puisent être une indication de problèmes sur le marché, les autorités des États-Unis n'intenteraient pas sans plus une action en justice contre un abus isolé de prix excessifs contraire au droit de la concurrence. En fin de compte, l'arrêt dans l'affaire *hôpital d'Evanston* n'a pas pu être exécuté parce que la fusion avait déjà eu lieu.

Le Président passe à la note du Taipei chinois, où le gouvernement a adopté en 2008 un plan d'action visant à stabiliser les prix, en vertu duquel un comité spécial chargé du suivi des prix des produits de base a été mis en place. Étant donné que la Commission du commerce équitable (« FTC ») du Taipei chinois siège à ce comité, le Président demande si la FTC s'est vu conférer, en vertu d'une loi, de nouveaux pouvoirs à l'appui de son nouveau rôle. Deuxièmement, le Président s'enquiert de la jurisprudence relative à l'accumulation excessive de capacités au regard du droit de la concurrence du Taipei chinois. Le délégué du Taipei chinois répond que, lorsque la FTC siège au comité, elle travaille uniquement dans le champ de son action concertée et de ses pouvoirs en matière d'abus de position dominante. Le plan d'action de 2008 est le résultat de la hausse continue des prix du pétrole et des matières premières, en réponse à laquelle le conseil des ministres a mis sur pied un groupe de travail pour la stabilisation des prix des produits de base

et adopté le plan d'action. Douze organismes gouvernementaux participent au comité, dont le Ministère des affaires économiques, le Ministère des finances et le Conseil de l'agriculture. Le comité a pour but de suivre l'évolution des prix des produits de base à l'intérieur et à l'extérieur du Taipei chinois et d'élaborer les mesures correspondantes pour stabiliser rapidement les prix des produits de base. Le groupe de travail intervient par des opérations d'*open market* sans contrôle direct des prix. Le rôle de la FTC consiste à passer en revue les documents et les mécanismes des entreprises suspectes et à empêcher les augmentations coordonnées des prix par un comportement collusoire. En outre, la FTC peut imposer des sanctions lorsque les restrictions de la concurrence ou le comportement inéquitable en termes de concurrence sont confirmés pendant une enquête. Quant au point de savoir si l'accumulation de capacités est interdite en soi par le droit de la concurrence du Taipei chinois, le délégué déclare que la réponse est à la fois oui et non. En droit pénal, l'accumulation de capacités est interdite en soi, mais les conditions pour établir un cas d'accumulation délictueuse sont très strictes. Lorsque le procureur identifie un cas apparent d'accumulation mais ne peut établir le franchissement du seuil élevé d'un comportement délictueux, l'affaire peut être transférée à la FTC. Si elle concerne une entreprise dominante, la FTC peut mener une enquête pour maintien ou application indus de prix excessifs. Si l'affaire ne concerne pas une entreprise occupant une position dominante, elle peut faire l'objet d'une enquête pour comportement inéquitable.

L'Australie est un pays qui combine le droit de la concurrence et les fonctions réglementaires. Le Président demande si le fait d'avoir des fonctions doubles au sein d'un même organisme signifie qu'il est plus facile d'appliquer une réglementation des prix si celle-ci est jugée nécessaire. Le délégué de l'Australie explique que l'Australian Competition & Consumer Commission (Commission australienne de la concurrence et des consommateurs) (« ACCC ») est un organisme qui exerce des fonctions dans les domaines de la concurrence, de la réglementation et de la protection du consommateur, et qu'il existe donc au sein d'une même organisation, de nombreuses perspectives différentes et de nombreuses approches de la réglementation des marchés. L'ACCC estime qu'il s'agit d'un avantage pour le système australien, bien que le délégué note qu'à son avis, l'organisation (y compris ses services de réglementation) n'a pas la même approche que les organes de réglementation. La philosophie générale est plutôt que, normalement, les marchés fonctionnent correctement lorsqu'on leur permet de le faire. En conséquence, il est nécessaire de mener une évaluation approfondie de tout marché qui ne fonctionne pas comme il se doit afin de définir la démarche la plus adéquate au sein de l'organisation pour s'attaquer au problème. La réglementation des prix est un outil qui est rarement utilisé par l'ACCC ; actuellement, l'organisme met l'accent sur l'encouragement de la dérégulation et le fonctionnement correct des marchés. Si un problème de prix excessifs pour la « climatisation urbaine » devait se poser en Australie, la première réaction de l'organisme serait probablement d'encourager ou de faciliter l'arrivée de concurrents sur le marché par un quelconque mécanisme de facilitation de l'accès. Un avantage important de l'intégration des organes de réglementation dans la même organisation que l'autorité de la concurrence est leur grand savoir-faire dans les domaines qu'ils réglementent. Par exemple, l'Australie a adopté tout récemment une loi instaurant une taxe sur le carbone et, au titre de cet instrument, l'ACCC a un rôle spécifique et s'est vu doter de fonds supplémentaires pour surveiller et poursuivre les allégations mensongères rapprochant les augmentations de prix de la taxe sur le carbone. L'on craint que les entreprises profitent de la nouvelle taxe pour augmenter les prix, et l'ACC a dès lors un rôle d'information important avant l'instauration de la taxe afin de veiller à ce que les entreprises sachent qu'elles ne peuvent alléguer faussement que les augmentations de prix sont imputables à la taxe sur le carbone. Pour se préparer à ce rôle, l'ACCC a fait largement appel au savoir-faire interorganisations au sein de l'organe de réglementation de l'énergie et des divisions de la concurrence et des consommateurs, qui ont coopéré pour établir un plan d'action. Par conséquent, dans un cas typique comme celui du chauffage urbain, l'ACCC est en mesure de profiter de tout un éventail de savoir-faire différents.

5. Prix excessifs – Conclusion

Le Président Alberto Heimler résume la discussion. Beaucoup de questions ont été examinées, mais il subsiste des points d'interrogation. Bien que les experts assurent qu'une analyse de rentabilité peut être faite et que des valeurs de référence peuvent être établies, l'identification de celles-ci s'est avérée difficile en pratique, en particulier parce qu'il est difficile d'imputer les coûts sur la durée de vie d'un investissement. Le Président note le document de 2004 du Secrétariat de l'OCDE sur la fixation des prix d'accès, qui peut fournir certaines indications à cet égard. Un des aspects remarquables de la discussion a été que, dans aucun pays où l'autorité de la concurrence conserve la possibilité d'appliquer le droit de la concurrence à l'encontre des prix excessifs, elle a déclaré qu'elle ne le ferait pas même si, bien sûr, certains pays ne possèdent nullement ces pouvoirs d'application de la loi. Étant donné que des interventions au titre du droit de la concurrence sur cette base restent non seulement possibles mais aussi probables, il est nécessaire que les autorités appliquent de meilleurs critères pour évaluer ces cas. Si la jurisprudence demeure limitée dans ce domaine, la jurisprudence plus ancienne de l'Union européenne représentée par l'arrêt *United Brands* conserve sa validité. Les cas de prix excessifs sont rares et le resteront probablement. Les filtres sont un instrument important à cet égard, notamment des facteurs comme le degré de maturité d'un secteur, la super position dominante, les fortes barrières à l'entrée, et l'occupation d'une position sur le marché obtenue par l'un ou l'autre privilège. L'espoir est dès lors que les discussions de la table ronde déboucheront sur des dossiers de mieux en mieux argumentés.