Working Party No. 2 on Competition and Regulation

EXCESSIVE PRICES

-- European Union --

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ARTICLE 102 AND EXCESSIVE PRICES

1. Introduction

1. 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.

2. 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. 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.

3. 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?

4. 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.

5. 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 purchase or selling prices or other unfair trading conditions." This example of an abuse is generally

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).
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. Also more recent research suggests that the legislative intent for Article 102 was to apply only to exploitative abuses and not exclusionary abuses.

6. 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.

7. 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. 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?

8. 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.

9. 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 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.

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4 See, for example, R. Joliet, Monopolization and Abuse of Dominant Position, 1970.
6 See the Rambus case described later in this paper.
10. 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." 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.

11. 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.

12. 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.

13. 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.

14. 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 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

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predation and margin squeeze, where in general the question is "simply" whether the price is higher or lower than the relevant cost benchmark.

15. 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.

16. 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.

17. 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

18. General Motors: 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.

19. 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.

20. 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 has the effect of curbing parallel imports. However, the Court did not find that on the facts of the

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9 General Motors Continental NV v Commission Case 26/75 [1975].

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
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.

21. **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.

22. 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. The Court did not agree with the Commission's analysis.

23. 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.

24. **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

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\(^{11}\) United Brands Co. v Commission Case C-27/76 [1978].

\(^{12}\) Case 27/76 United Brands, paragraph 252.

\(^{13}\) Corinne Bodson v SA Pompes funèbres des régions libérées Case 30/87 [1988].
"external services" for funerals (e.g. the carriage of the body after it has been placed in the coffin, the provision of hearse, 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.

25. 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.

26. 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.

27. SAGEM$^{14}$: 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 countries 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.

28. 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.

29. 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 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

$^{14}$ F. Lucazeau v Société des Auteurs, Compositeur 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 Société des Auteurs, Compositeur 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].
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.

30. 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.

31. 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%.

32. 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.

33. 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.

34. 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.

35. 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.

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16 Commission decision COMP/36.568 – Scandlines Sverige AB v Port of Helsingborg [2004].
36. 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

37. 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.

38. **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.

39. 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.

40. 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

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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
chips based on JEDEC standards adopted when Rambus was a member of JEDEC, and (ii) to charge a maximum royalty 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?**

41. 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.

42. 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**

43. 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.”\(^{20}\)

44. 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

\(^{19}\) 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.
with other comparable prices charged by the dominant company or by other undertakings could, for instance, be explained by differences in cost conditions. However, a very high profit margin may thus be indicative of abusive pricing.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

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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.
51. 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 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

52. 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.

53. 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.

54. 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.

55. 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).

56. 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

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.\textsuperscript{25}

57. In its \textit{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.

58. In its \textit{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

\textsuperscript{25} A similar reasoning was followed in the more recent \textit{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/doc_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. This would fit the second limb of the test.

59. 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. In other words, the focus is on the second limb of the United Brands test.

### 8. Conclusion

60. 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.

61. 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.

62. 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.

63. 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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