Excessive Pricing by Dominant Firms, Private Litigation, and the Existence of Alternative Products[**]

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Abstract

The aim of this paper is to discuss two issues concerning the antitrust prohibition of excessive pricing by dominant firms. The first is private enforcement of the prohibition and the second is the case where consumers can purchase alternative products inferior to the dominant firm's product. With regard to private suits, the paper discusses several issues that may arise in private litigation, including the tools that civil courts have to cope with such litigation and the case where the excessive price was charged for a product that was not sold directly to the end consumer. The paper elaborates further regarding determination of a "competitive price" or "more competitive price" that can be compared with the price charged by the dominant firm and discusses the virtues of comparative (rather than cost-based) benchmarks, and in particular a retrospective competitive benchmark, which compares the price the dominant firm has charged before and after entry. It then proposes to cope with concerns about accounting manipulations when a reliable comparative benchmark does not exist and the court has to revert to a cost-based benchmark, and proposes limitations on the way dominant firms should be allowed to allocate costs that are common to producing the product in question and other products. In relation to the case where consumers can purchase alternative products instead of the dominant firm's product that has been priced excessively, the paper shows why this scenario should not serve as a defense for the dominant firm, neither when the alternative products are sold for similar (excessive) prices nor when they are sold for lower prices. The paper also shows why it would be bad policy to restrict liability for excessive pricing to the case of essential products.

[**] Forthcoming in Frédéric Jenny Liber Amicorum, Concurrences, 2018.

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I. Introduction

The aim of this paper is to discuss two issues concerning the antitrust prohibition of excessive pricing by dominant firms. The first is private enforcement of the prohibition and the second is the case where consumers can purchase alternative products inferior to the dominant firm's product. With regard to private suits brought by victims of excessive pricing, given that private litigation of competition law in the member states of the European Union is expected to gain momentum, we should expect an increase in excessive pricing cases being brought in the civil courts of member states. This is true particularly in light of the European Court of Justice's (ECJ) holdings according to which each victim of an antitrust violation should be granted a private cause of action, and in light of the European Commission's (EC) legislation and initiatives to improve private litigation of antitrust violations, including class actions. The paper discusses several issues that may arise in private litigation, including the case where the excessive price was charged for a product that was not sold directly to the end consumer and the tools that civil courts have to cope with private litigation of excessive pricing cases. It shows how civil courts can use these tools to implement the three stage test I have proposed to assess an excessive pricing case: 1) determination of a "competitive price" or "more competitive price"; 2) the policy determination of what is considered prima facie excessive relative to this "more competitive price"; and 3) the final stage, where the dominant firm is allowed to show that the prima facie excessive price is justified by efficiency considerations in the particular case.[1]

The paper elaborates further regarding the first assessment stage, of determining the "competitive price" or "more competitive price" and discusses the virtues of comparative (rather than cost-based) benchmarks, and in particular a retrospective competitive benchmark, which compares the price the dominant firm has charged before and after entry. It then discusses how a court could cope with concerns about accounting manipulations when a reliable comparative benchmark does not exist and the court has to revert to a cost-based benchmark. In particular, the paper proposes limitations on the way dominant firms should be allowed to allocate costs that are common to producing the product in question and other products. Finally, the paper conjectures why some antitrust authorities include excessive

[1] For further details regarding the three stage test see David Gilo, *A Coherent Approach to the Antitrust Prohibition of Excessive Pricing by Dominant Firms*, *in* EXCESSIVE PRICING AND COMPETITION LAW ENFORCEMENT (Frédéric Jenny & Yannis Katsoulacos eds., 2018).

screens, or qualifications, in their enforcement policy against excessive pricing, and highlights why this only strengthens the case for enhanced private litigation of the prohibition.

The second topic covered by this paper concerns the case where consumers can purchase alternative products instead of the dominant firm's product that has been priced excessively. I show why this scenario should not serve as a defense for the dominant firm neither when the alternative products are sold for similar (excessive) prices nor when they are sold for lower prices. Relatedly, I show why it would be bad policy to restrict liability for excessive pricing to the case of essential products.

1. Private Enforcement of Excessive Pricing Cases

Private enforcement in Europe is gaining momentum, and this is a worthy avenue for the enforcement of the prohibition of excessive pricing by dominant firms. The benefit of private enforcement is that first, together with deterring the dominant firm from pricing excessively in the first place, it compensates victims. Second, to the extent that competition agencies have limited resources, they will not necessarily reach all excessive pricing violations. Private plaintiffs, in particular in the context of class actions brought on behalf of consumers that were harmed by the excessive price, can fill in this gap, so that private and public enforcement can de facto engage in division of labor concerning enforcement of the prohibition. Third, by their very nature, private law suits are focused on the dominant firm's illegal conduct in the past, rather than future prospects of competition. This is while at least some competition agencies seem to be focused on the future, and typically refrain from enforcing the prohibition when there are prospects for future competition.[2] Although I have criticized such an approach by competition agencies as bad policy, given that the aim is to deter the dominant firm from pricing excessively in the first place,[3] and taking such a policy on the part of competition agencies as given, private litigation serves as an important mechanism to compensate for the lack of action by the competition agency in such cases. In Israel, for example, dozens of class actions on excessive pricing by dominant firms are currently pending. One of them (against

[2] See, e.g., Fred Jenny, "Abuse of dominance by firms charging excessive or unfair prices: an assessment", in *Excessive Pricing and Competition Law Enforcement* (Frédéric Jenny and Yannis Katsoulacos, eds. Springer, 2018). This claim was also made by the Israeli Antitrust Authority's new guidelines on excessive pricing. See infra note 22.
[3] *See* Gilo, *supra* note 1.

dominant dairy Tnuva, with regard to the allegedly excessive price of Cottage Cheese),[4] was approved as a class action and is currently being litigated on the merits. Another class action by Israeli farmers, against Potash monopoly ICL, ended with a settlement.[5]

The ECJ, in its *Van Gend en Loos* decision,[6] has declared that private enforcement of competition law promotes public policy and improves the effectiveness of enforcement, alongside the public enforcement by the Commission and the competition agencies of the Member States.

Similarly, in *Courage v. Crehan*,[7] the ECJ reemphasized its holding that:

> The full effectiveness of [Article 101 EC] and, in particular, the practical effect of the prohibition laid down in [Article 101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition . . . . Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

While the Courage case involved a party to a contract constituting a competition law violation who brought a tort claim against the other party, it has been made clear that there is a pan-European right of private action under EC competition law, within the Member States, also in favor of third parties, such as consumers, who wish to bring private action to recover the damages caused to them by a competition law violation. In *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni*,[8] the ECJ held that consumers may bring a private action to collect damages for the harm caused to them by the excessive price charged by insurance companies who have allegedly colluded with each other.[9]

Indeed, the European Commission, and the legislation at the EC level, have devoted increased attention to the issue of private litigation of competition laws in the civil courts of the member

[4] *See* Naor v. Tnuva Cooperative Center for Agricultural Products in Israel Ltd (5.4.2016) (D.C.C (Central District) 46010-07-11).
[5] *See* Weinstein v. Dead Sea Works Ltd. (D.C.C (Central District) 41838-09-14).
[6] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration ECR 1 (1963). *See also* Case 127/73 BRT and SABAM ECR 51, para. 16 (1974).
[7] Case C-453/99 Courage Ltd. v. Bernard Crehan ECR I-6297, para. 26–7.
[8] Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni,* Judgment of the ECJ (July 13, 2006, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-295/04.
[9] *Id.* at para. 58–64.

states, so as to implement this vision, according to which victims of violations, including victims of excessive pricing by dominant firms, could bring private suits against violators.[10]

In particular, the European Commission has highlighted the fact that violations of Articles 101 and 102 TFEU, including excessive pricing by dominant firms, not only distort competition and the welfare of the economy, but also boil down to harm to particular victims, and particularly (but not only) consumers. As the Commission states, the violations "cause concrete harm (e.g. higher prices, lost profits) to concrete victims (e.g. infringers' direct and indirect customers, infringers' competitors and their customers)."[11]

The Commission acknowledges that the vision echoed by the ECJ, according to which each victim of an antitrust violation is entitled to full compensation, still faces obstacles in the EU, because of the fact that private suits are governed by the laws of the relevant member state, which may include such obstacles. To cope with this problem, *Directive 2014/104/EU on Antitrust Damages Actions*[12] was legislated and came into force on December 26, 2014. According to the Directive, Member States were required to implement measures supporting private suits by victims of antitrust violations and removing the main obstacles to such suits by December 27, 2016. Moreover, in order to develop an institution of class actions by consumers against violators, the Commission issued the *Commission Recommendation on collective redress*,[13] which invited Member States to introduce by July 26, 2015 collective redress mechanisms, including actions for damages, to facilitate private suits seeking compensation for the harm caused by antitrust violations.

The Commission also issued the *Communication and Practical Guide on Quantifying Antitrust Harm in Damages Actions.*[14] This communication provides guidelines that could assist civil courts in Member States, as well as the plaintiffs, in quantification of damages. It describes the main economic and empirical techniques and methods that could assist in quantifying damages caused by antitrust violations.

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[10] *See* http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

[11] *Id.*

[12] *See* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG.

[13] *See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398263020823&uri=OJ:JOL_2013_201_R_NS0013.

[14] See *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF.

One of the challenges in the quantification of damages is the issue of passing on claims, where the dominant firm claims that the direct victims of the alleged excessive price are intermediaries, and they have passed on the excessive price to end consumers, or, conversely, that consumers are not the direct victims in such a case, and therefore do not have standing to sue for damages. The Commission has addressed this issue as well, and has conducted a *Study on the Passing-on of Overcharges*.[15]

One note on the case of excessive pricing by the supplier of an intermediate product (e.g., excessive pricing by a dominant food supplier that sells to grocery chains, who, in turn, sell to end consumers), is that end consumers are often harmed by such excessive pricing more than the intermediate firm (e.g., the grocery chain). The reason is that the dominant firm could compensate the intermediate firm, such as a grocery chain, with payments, or bonuses, that are not necessarily passed on to consumers. Consider a dominant firm selling a product to a grocery chain, who, in turn, sells the product to consumers. The price per-unit charged by the dominant firm could be excessive, and this affects the grocery chain's marginal cost of operation, and is reflected in high prices to end consumers.

Moreover, the dominant supplier may behave in such a manner with all grocery chains and stores, so that they all face high marginal costs, and they are all aware of this fact. In such a situation, no matter how fiercely these stores compete with each other over end consumers, the final price consumers pay for the dominant firm's product would be excessive. The grocery chains, however, may well be content, since they receive part of the dominant firm's excessive profits, in the form of bonuses, payments, slotting allowances, and the like, that are not necessarily passed on to consumers. This implies that in cases where an excessive price of a product sold through an intermediary is discussed, looking at the dominant firm's overall profitability from dealing with the intermediary (here, the grocery chains) is not enough: Due to the payments paid by the dominant firm to the grocery chains, the dominant firm's profits may well be modest. Still, the excessive per unit price charged by the dominant firm may cause end consumers to suffer from an excessive final price. Antitrust courts and agencies should address this concern in appropriate cases.[16]

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[15] In conjunction with RBB Economics, *see* http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf.

[16] In Opinion 1/14 issued by the Israeli Antitrust Authority when I was in office, we addressed this issue explicitly. *See* Israeli Antitrust Authority, Opinion 1/14 "The Prohibition of Excessive Pricing by Dominant firms", http://www.antitrust.gov.il/subject/130/item/33113.aspx, 13. This idea was also adopted in the new IAA opinion (Opinion 1/17), *see* Israeli Antitrust Authority Opinion 1/17 "The Considerations of the Director General of the

It should be noted that in any jurisdiction in which competition law violations are litigated in civil courts, these courts are already equipped to litigate complex antitrust cases other than excessive pricing. As I have shown elsewhere,[17] antitrust cases based on the rule of reason, as well as assessment of cartel damages, or various predatory discounts by dominant firms, are not less complicated to litigate than excessive pricing cases.

In my view the correct way to approach an excessive pricing case is in three stages.[18] In the first, the court should determine a "competitive price" or at least a "more competitive price," that is to be compared to the price charged by the dominant firm. This first stage involves economic analysis, and typically requires expert witnesses. In the second stage, the court should make a legal policy assessment as to whether the price charged by the dominant firm is prima facie excessive relative to the competitive price, or more competitive price, evaluated in the first stage. This does not require an economic assessment. It is a legal policy decision, in which the court determines its level of tolerance toward harm to consumers. Ideally, the margin above the competitive price, or more competitive price, which deems the price as prima facie excessive should be similar in all cases, so as to improve predictability of the norm. In the third, and final stage, the dominant firm can raise an efficiency defense, according to which the allegedly excessive price was necessary in order to achieve a pro-consumer goal, which outweighs the harm to consumers (such as the need to stimulate valuable investment in the particular case). This stage, as the first one, requires economic analysis, so the court would usually have to rely on economic experts. This is the stage where the particular circumstances of the case may provide efficiencies that could justify a price that was deemed in the second stage to be prima facie excessive.

The first stage, in which a competitive price, or more competitive price, is determined, can be facilitated by using the comparative approach: looking for more competitive markets or periods, or more price-sensitive consumers, to which the dominant firm also sells the product. Absent a reliable comparative benchmark, the court can revert to a cost-based benchmark.

Several of the class actions currently pending in Israel are at least partly based on comparative benchmarks, some of which use a "retrospective benchmark": the price that the dominant firm has charged is compared to the lower price it charges after entry into its market. This

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Antitrust Authority When Enforcing the Prohibition of Unfair Prices," http://www.antitrust.gov.il/subject/130/item/33113.aspx, at text after n.55.

[17] *See* Gilo, *supra* note 3, at para. 6.2.

[18] *See id.* at para. 6.

benchmark is attractive for several reasons, including the fact that it is based on the actions of the same dominant firm, facing the same cost structure, and the same market. It would usually be difficult for the dominant firm to claim that the lower price it charged after entry into its market was a result of a sudden reduction in cost or total demand in the market, which happened to coincide with the entry of a new competitor. Yossi Spiegel and I have explored, in an economic model, how the use of such a retrospective benchmark affects consumer welfare.[19] Our economic model shows how in a Cournot framework, the use of this benchmark in order to assess an excessive pricing claim causes the dominant firm to lower the price it charges before entry takes place. The intuition is that the dominant firm knows that the higher is the difference between its pre-entry price and its post-entry price, the higher are the damages it might have to pay in an excessive pricing claim using the retrospective benchmark. Since the dominant firm also wants to defend its market share after entry, however, it reduces the price it charges before entry in order to allow itself leeway in cutting prices after entry. On the other hand, we show that the price after entry is higher, under the use of the retrospective benchmark, than when this benchmark is not used. This too is because according to the retrospective benchmark, the expected damages the dominant firm may be required to pay are higher the higher is the difference between the pre-entry price and the post-entry price. It turns out, in our model, that the first effect (of price reduction before entry) helps consumers more than the latter effect (of price elevation after entry) harms them. In other words, the dominant firm's eagerness to allow itself flexibility in its response to entry is so strong that consumers are better off due to the use of this benchmark.[20] Also, because this benchmark causes the dominant firm to react to entry in a softer way, it actually promotes entry. This stands in contrast to the premise that the prohibition of excessive pricing harms entry – when using the retrospective benchmark, it actually promotes entry.

To be sure, private plaintiffs in an excessive pricing case, in particular in class actions, have inferior access to the information needed in order to assess a comparative benchmark, let alone a cost-based benchmark. To alleviate this problem, it would be beneficial to allow the plaintiff

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[19] *See* David Gilo & Yossi Spiegel, *The Antitrust Prohibition of Excessive Pricing*, forthcoming, The International Journal of Industrial Organization (2018). *See also* Ariel Ezrachi & David Gilo, *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 (2010).

[20] As we show, this result does not carry over to the case of perfect price competition between the dominant firm and a new entrant that is as efficient as the dominant firm. With such perfect price competition, the entrant monopolizes the market after entry, so the dominant firm expects to make no sales. Hence it has nothing to gain from reducing prices before entry. This changes, however, when the entrant is substantially less efficient than the dominant firm. In such a case, the dominant firm does expect to make sales after entry, so it reduces its pre-entry price due to the expected fine it may have to pay.

to bring a prima-facie case based on publically available information. Such information can be used to see if there is a prima-facie case satisfying stages 1 and 2 portrayed above: determination of the competitive (or more competitive) price, and an inquiry whether the price the dominant firm has charged is prima facie excessive compared to the more competitive price. Once the plaintiff makes such a prima-facie case, the court could approve the class action and, during the litigation of the case on the merits, order the dominant firm to disclose relevant information that sheds more light on these issues.

This information could be used to establish a more reliable comparative benchmark, and if such a benchmark does not exist, to establish a cost-based benchmark. For example, in the Israeli Tnuva case, where the largest dairy in Israel has allegedly charged an excessive price for Cottage Cheese, the plaintiff and his expert witnesses used benchmarks connected to the lower prices Tnuva has charged after the Israeli consumer boycott of 2011, as well as the prices that have prevailed before removal of price controls.[21] Once a prima-facie case was made, the district court approved the class action and the parties proceeded to litigate the merits of the case. Another procedural tool that can help a civil court handle an excessive pricing case is to appoint an expert on behalf of the court, who would assist the court in reaching a conclusion, and could receive powers to request information from the dominant firm.

Cost-based benchmarks are particularly challenging in class actions, because of the fear of accounting manipulations performed by the dominant firm. This can occur especially when there are substantial costs that are common to the product in question, in which the firm is dominant, and other products, in which it is not dominant. The dominant firm might allocate a disproportionate part of its common costs to the product in which it is dominant, so as to lower the accounting profits derived from this product. This is why comparative benchmarks are much easier to litigate, since a reliable comparative benchmark does not share similar concerns of accounting manipulations. If no reliable comparative benchmark exists, however, then the court must revert to a cost-based benchmark in order to implement the first stage of assessment. Then, in order to solve problems associated with common costs, I would propose not to allow the dominant firm to allocate these costs as it wishes, but rather to impose the notion of a competitive benchmark to the correct allocation of costs: In particular, I would suggest that the

[21] *See* Naor v. Tnuva Cooperative Center for Agricultural Products in Israel Ltd. D.C.C (LOD) 46010-07-11 (5.4.2016).

portion of common costs allocated to the segment in which the challenged price had been charged should not be higher than would be allocated in a (more) competitive market.

Suppose, for example, that the dominant firm is a dairy selling Cottage Cheese, yogurt, and milk, and the dairy is dominant in the market for Cottage Cheese. Suppose further that there are common costs of 100 Euro (some production line, the costs of which were not recouped yet, which is used to produce all three products). Suppose further that the most competitive of these three markets (Cottage Cheese, yogurt, and milk) is the yogurt market. Accordingly, if the dominant dairy allocated only a third of its common costs (33 Euro) to the accounting costs of producing yogurt, it should not be allowed to allocate more than a third of its common costs (33 Euro) to the accounting costs of producing Cottage Cheese. Once common costs are allocated in this way, the corresponding cost-based benchmark could be assessed for the first stage of the analysis (of a "competitive price" or "more competitive price"). If the price charged for Cottage Cheese is prima facie excessive compared to the cost-based benchmark, we would proceed to the third stage, where the dairy could claim an efficiency defense. Among other things, the dairy could claim, for example, that under the allocation of common costs portrayed above, it could not have recouped its common costs at all (assuming it had not recouped them already).

Another concern often made with regard to class actions is the threat of frivolous suits. In my view, frivolous suits in class actions should be dealt with by ordering the plaintiff of a frivolous suit to pay punitive expenses. This concern does not justify a general reluctance to approve class actions that may well have prima facie merit. As noted, and also acknowledged by the ECJ and the EC, private litigation of antitrust law is extremely important, both in order to deter violations and in order to compensate victims. This is particularly true with respect to excessive pricing cases, because some antitrust authorities (unjustifiably, in my view) introduce so many provisos and screens according to which they will refrain from pursuing excessive pricing cases, that absent effective private litigation the aims of the antitrust rules in the relevant jurisdiction may be harmed, deterrence would be insufficient, and victims would not be compensated.

I believe that the reason that some antitrust authorities implemented such screens and qualifications according to which they will refrain from enforcing the prohibition in various cases stems from an unjustified forward-looking approach, which puts less weight on past violations. Take, for example, the notion that an excessive pricing investigation becomes redundant if future competition is expected.[22] This ignores, however, the deterrent value of the enforcement of antitrust laws: The dominant firm should be induced to refrain from pricing excessively in the first place. This makes it necessary to enforce against past violations even if in the future prices are expected to go down. Just as antitrust authorities would not hesitate to enforce the prohibition of cartels against a cartel that had already broken down, the same should be true for a dominant firm who had committed an excessive pricing violation, even if future prices are expected to be lower.

Another reason for the many qualifications and provisos standing in the way of intervention by some antitrust authorities is that it is often the case that an antitrust authority does not have sufficient personnel of the type inclined or equipped to conduct excessive pricing cases. It seems that in some antitrust authorities, lawyers and economists come from a background and an education that is accustomed to examining harm to the competitive process, and some of them may be uncomfortable with excessive pricing cases, particularly when cost-based tests are required.

This is not to say that antitrust authorities are not equipped to handle excessive pricing cases. In my view, they are. In particular, with regard to the first stage of assessment of an excessive pricing case, that deals with finding a "competitive price" or "more competitive price" to compare with the price charged by the dominant firm, if a good comparative benchmark exists, then establishing it is an exercise that should be extremely familiar to antitrust authorities. Even if a reliable comparative benchmark does not exist, and the antitrust authority has to revert to a cost-based benchmark, antitrust authorities engage in cost evaluations with regard to many other antitrust violations, including predatory pricing, price squeezes, and even market definition.[23] As for the second stage of assessment, as noted, it is no more than a legal policy call as to what is "excessive", which is identical in nature to the legal question what is "substantial harm" in the context of mergers or rule of reason analyzes. Finally, the third stage, of the efficiency defense, is no different than a similar efficiency defense that could be raised, for example, to justify a merger that may cause prices to be excessive after the merger.

[22] For example, the Israeli Antitrust Authority states in its revised guidelines on excessive pricing (Guideline 1/17) that it will not intervene if competition corrected or is likely to correct the high price. See supra note 16. Also, in the UK, the OFT closed an excessive pricing investigation against condom manufacturer Durex, because new entrants, such as Trojan condoms, have entered the market. The OFT reasoned that "any potential remedies such as a price cap could stifle such entry and hinder rather than help the competitive process"; *see* Gunnar Niels et al., ECONOMICS FOR COMPETITION LAWYERS (2d ed. 2011).

[23] *See* Gilo, *supra* note 3, at n.20–1.

Nevertheless, my impression is that some of the personnel in some antitrust authorities feel uncomfortable with excessive pricing cases. This institutional problem could tend to feed itself: the same profile of employees tend to be attracted to the antitrust authority, due to the prevailing preferences and inclinations of the existing employees, and so forth. An antitrust authority could break such a vicious cycle by making a strategic decision to recruit personnel more equipped and inclined to pursue excessive pricing cases, such as economists with an accounting background, or people previously employed by industry regulators who engage in price control. In any case, private litigation can serve as a complementary enforcement tool to fill in the gap left in this respect by some antitrust authorities.

2. The Existence of Alternatives to the Dominant Firm's Product

The question could arise how to assess an excessive pricing case involving a product supplied by a dominant firm that faces competition from other products. For example, suppose that Coca Cola is dominant in a relevant market for the sale of dark carbonated coke flavored drinks, and faces competition in this market from Pepsi and RC Cola. Suppose further that Coca Cola charges excessive prices for its product, based on the three-stage test portrayed above. That is, a good enough competitive benchmark had been calculated, the price Coca Cola has charged exceeded this benchmark by an excessive margin, based on the decision-maker's policy regarding tolerance to the harm to consumers, and Coca Cola did not have a good efficiency defense that justified the prima facie excessive margin. Let us now examine the question whether Coca Cola is entitled to an additional defense, according to which if consumers had chosen Coca Cola over the two alternatives, it is "their problem": They have a choice of alternatives, and nevertheless they buy Coca Cola. In this section I wish to claim that this is not a viable defense.

One case to consider is when the alternatives, Pepsi and RC Cola, are sold for prices similar to those of Coca Cola. This could be caused, for example, by tacit collusion between the three companies. Here, the consumer would not have been able to mitigate his harm even if she wanted to, because the prices of the alternative products are excessive too. Although there is no direct claim, in most antitrust jurisdictions, against tacit collusion, there is a direct claim against a dominant firm charging an excessive price. It would be bad policy to allow a dominant firm to charge an excessive price just because its rivals are charging an excessive price too. On the contrary, if the dominant firm is deterred from pricing excessively, this in itself can cause tacit collusion to break down, since the rival firms would then be induced to price-cut themselves, in order to defend their market shares.

Another case to consider is when the alternatives, Pepsi and RC Cola, are sold for substantially less than Coca Cola is sold. This could be explained by some form of vertical differentiation, where many consumers view Coca Cola as superior to Pepsi and RC Cola. Claiming that this situation serves as a defense for Coca Cola contradicts the rationale behind the prohibition of excessive pricing: The rationale is to prevent the dead weight loss and the transfer of value that consumers bear when the dominant firm is not restrained by competition. This is precisely the case at hand: Coca Cola, in this example, is not restrained by the imperfect competition it faces from inferior products. At the extreme, when consumers simply do not see Pepsi and RC Cola as sufficient substitutes, they are not even considered competitors operating in the same market as Coca Cola. Notably, the prevailing test for market definition in most antitrust jurisdictions, the "small but significant and non-transitory increase in price" (SSNIP) test,[24] asks if Coca Cola is able profitably to raise prices by 5% to 10% above competitive levels, without inducing too many consumers to switch to Pepsi and RC Cola in a way that renders the price-raise by Coca Cola unprofitable. If the answer to this question is affirmative, then the relevant market includes only Coca Cola, and hence Coca Cola possesses 100% of the relevant market, or so called "super-dominance". In the eyes of antitrust law, it faces no viable substitutes.

Alternatively, suppose that Pepsi and RC Cola are close enough substitutes to be in the same relevant market as Coca Cola, but they charge prices somewhat below Coca Cola. Can Coca Cola claim in its defense that consumers could have mitigated their harm by buying the substitute products, so it is "their problem" that they insisted on buying the more expensive brand? Such a claim, as noted, contradicts the basic aims of antitrust law: preventing deadweight loss and transfer of value from consumers to firms: Some consumers, who would derive more utility from purchasing Coca Cola, may have indeed switched to a substitute that is inferior in their view, and settled for Pepsi or RC Cola. Clearly, these consumers exhibit the dead weight loss antitrust laws are meant to prevent: They could have earned a larger net benefit from buying Coca Cola had its price not been excessive, and instead, they derived a smaller benefit by purchasing the alternatives. As for the consumers who did "insist" on buying the

[24] *See Commission Notice on the definition of relevant market for the purposes of Community competition law*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209(01), para. 15; and *U.S. DOJ and FTC Horizontal Merger Guidelines* (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf, at par. 4.1.2.

more expensive Coca Cola brand, they exhibit the transfer of value from consumers to firms – the second phenomenon that antitrust law is meant to prevent: these consumers are entitled to a competitive price of their preferred brand, whereas the excessive price Coca Cola had charged them in this example transferred value from them to the dominant firm.

To further illustrate, suppose that instead of a dominant firm supplying Coca Cola in this example, there are two firms supplying the preferred Coca Cola brand, selling identical products, and these two firms face competition from Pepsi and RC Cola, who sell inferior brands. Now suppose that the two firms supplying the Coca Cola brand wish to merge with each other, and that the expected effects of the merger are that the price will go up from a competitive price to an excessive price. Surely, according to conventional antitrust wisdom, this merger would be blocked by the antitrust authority. The two Coca Cola firms could not claim, in defense of their merger, that consumers have inferior alternatives, so it is "their problem" that many of them insist on buying the Coca Cola brand, and that this justifies the merger and its effects. Why then should we change this premise of antitrust law just because the Coca Cola brand is supplied by one firm instead of two, and just because the antitrust rule violated is the prohibition of excessive pricing by dominant firms rather than mergers that may substantially harm competition? Both prohibitions are founded on the same rationale: prevention of dead weight loss and transfer of value from consumers.

Another issue in this respect concerns the alleged distinction between so-called "luxury products" and more essential products. According to this alleged distinction, Coca Cola is a luxury product, since consumers could do without it, unlike water or electricity, for example, which are essential products consumers cannot do without. However, if antitrust law is about preventing dead weight loss, then by definition it applies to all products, and particularly to products that are *not* essential: With an essential product, such as electricity or water, the dead weight loss caused by an excessive price is actually smaller than with a non-essential product: Dead weight loss is caused by the fact that many consumers who, from a welfare perspective, should have bought the product, do not buy it because of the excessive price. This loss is expected to be particularly high with a non-essential product, precisely because when the price of such a product is high, many consumers refrain from buying it.

On the other hand, with an essential product, such as electricity or water, a high price does not make many consumers refrain from buying the product, making the dead weight loss actually smaller. This is not to say that the prohibition of excessive pricing by dominant firms should not be enforced when the product is essential: With an essential product, the second rationale of the prohibition, of preventing transfer of value from consumers to the dominant firm, is especially strong, precisely because many consumers are obliged to buy the product despite its excessive price. Still, the point made here is that it cannot be that excessive pricing cases should be limited to essential products, because a major objective of antitrust law is also the prevention of dead weight loss – which is particularly large when the product is not essential. While antitrust authorities could legitimately choose to prioritize between cases based on the degree to which the market is a luxury market (e.g., excessive pricing, or an illegal restraint, in the market for luxury sunglasses or perfumes), this is not the case with private litigation: If the victims of illegal restraints of trade, or excessive pricing by dominant firms in so called luxury markets sue for their harm from such violations, they should be entitled to compensation, even where the antitrust authority preferred to devote its limited resources elsewhere.

After all, there is no norm in antitrust that says that it is just about essential products. To be sure, many of the recent excessive pricing cases in Europe concern huge price hikes of life-saving drugs.[25] But this does not imply that excessive pricing cases should be limited to such extreme scenarios. If legislators would have wanted to protect consumers only when it comes to their health or life, or only when it concerns essential products, they would have said so explicitly. In such a case, the same kind of narrow point of view should have been applied to other violations such as exclusion of rivals, illegal agreements, conspiracies and mergers. Instead, antitrust laws protect not only consumers' health, life, and need for essential products. They protect the consumer from pecuniary and welfare losses stemming from violations committed in *any* relevant market, subject to explicit statutory exemptions.

II. Conclusion

The paper has shown the central role that private litigation of excessive pricing cases should play in order to deter dominant firms from violating the prohibition and compensate victims for their harm. It has also demonstrated why the existence of alternative products consumers could buy does not justify lenient treatment toward the excessive price of a dominant firm that most consumers prefer.

[25] *See, e.g.*, the Pfizer case in the UK, https://www.gov.uk/government/news/cma-.nes-p.zer-and-.ynn-90-million-for-drug-price-hike-to-nhs, recently remanded to the CMA by the UK's CAT, and the Aspen case in Italy and the EC, https://www.natlawreview.com/article/italy-s-agcm-market-competition-authority-.nes-aspen-eur-5-million-excessive; http://europa.eu/rapid/press-release_IP-17-1323_en.htm.