A Coherent Approach to the Antitrust Prohibition of Excessive Pricing by Dominant Firms[**]

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Abstract

The aim of this paper is to provide a coherent approach to the prohibition of excessive pricing by dominant firms as an antitrust violation. It first highlights the rationale for the prohibition, and shows that the prohibition exists and is also enforced in many countries. It then shows why investment considerations should be assessed on a case by case basis, rather than as an overreaching reason for a lenient approach toward all cases. Next the paper provides a three step framework that should be used to assess an excessive pricing case: The first step is to establish a "more competitive price" to which the price charged should be compared (this involves economic analysis); The second step is to assess whether the challenged price is allegedly excessive compared to this more competitive price (this does not involve economic analysis but rather a legal policy decision); The third and final step is to assess the dominant firm's efficiency claims, according to which the allegedly excessive price was necessary in order to establish a pro-consumer benefit that outweighs the harm to consumers (this step involves economic analysis). The paper then makes three particular policy claims: First, liability for excessive pricing should not be limited to cases that mix exploitative and exclusionary behavior; second, antitrust liability should be for past behavior, regardless of the prospects of future competition. Finally, excessive prices are not self-correcting.

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[**] Forthcoming in "Excessive Pricing and Competition Law Enforcement" (Frederic Jenny and Yannis Katsoulacos, eds. Springer 2018).

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1. Introduction

The purpose of this paper is to introduce a coherent approach to the prohibition of excessive pricing by dominant firms under competition law. I first show that the ultimate rationale behind competition law: preventing deadweight loss caused by high prices (or low quality or variety) and preventing transfer of value from consumers to firms, demands that the antitrust prohibition of excessive pricing by dominant firms be enforced with the same vigor as the rules that are aimed to promote competition. Competition is a tool to achieve these ultimate pro-consumer goals, but competition law in most countries is equipped to deal with situations in which the competitive process did not work in achieving this ultimate goal: the prohibition of excessive exploitation of consumers by a dominant firm.

I also show that that not only is this prohibition the norm in the vast majority of OECD countries, the enforcement of this prohibition around the world, de facto, is not smaller than a few other antitrust violations. This shows that the claim that the prohibition is hardly enforced is de facto inaccurate. These issues are all discussed in parts 2 and 3.

Part 4 shows why considerations related to the stimulation of ex ante investment by the dominant firm should be assessed on a case by case basis, rather than using them as a justification for an overall "hands off" or almost "hands off" approach to the prohibition of excessive pricing by dominant firms. Part 5 deals with the related claim according to which erroneously holding that a price was excessive when it was needed for valuable investment is not necessarily larger than the cost of erroneously holding that a price was not excessive even though it was not needed for valuable investment.

Part 6 shows my proposal (which is consistent with the case law but makes enforcement more coherent) regarding how to assess an excessive pricing case. The proposed method of assessment proceeds in three steps. First, the price to which the allegedly excessive price should be compared needs to be calculated. This is a price that is "more competitive" that the challenged price charged by the dominant firm. The "more competitive" price is either a price from a suitably comparable market, segment, or period, which is lower than the challenged price, or a measure of the relevant average cost for supplying the dominant firm's product. I explain why the comparison method, which may be enough in order to complete this stage of the assessment, is more warranted than the cost-based method. Nevertheless, I stress why the cost comparison is a legitimate method, as a last resort, when there is no good comparative benchmark. I also show how the vast majority of cases and literature on the subject see the competitive benchmark as the sole benchmark, rather than a benchmark that is affected by consumers' willingness to pay for the product. The second stage of the analysis is determining whether the challenged price charged by the dominant firm is excessive compared to the more competitive price determined in stage 1. I show how this second stage (determining what is excessively above the more competitive price) involves a legal policy question and not an economic question, while the first stage (determining the more competitive price) involves economic analysis. I show how this method for assessment is identical to the method used with antitrust violations demanding a risk of substantial harm to competition: here too, there is a first stage (economic analysis), determining the level of expected harm to competition, and a second stage (a legal policy question) determining what is "substantial harm". Finally, there should be third stage of the assessment, in which the dominant firm could show that the allegedly excessive price determined in stages 1 and 2 is nevertheless justified due to pro-consumer efficiencies, such as the need to stimulate valuable investment. I claim that while the measure of what is excessive for the second stage should ideally be fixed and predictable, in the third stage that deals with efficiencies, the special characteristics of the dominant firm can be taken into account.

Part 7 shows that it is not justified to limit intervention to cases in which the dominant firm not only exploited consumers, but also excluded rivals.

Part 8 emphasizes that antitrust liability for charging excessive prices is for past behavior of the dominant firm, and does not depend on the question whether future competition is expected to lower prices or not. Part 9 clarifies that excessive prices are not self-correcting, and the next part concludes.

2. Is excessive pricing by dominant firms an antitrust violation and why?

The first thing a competition authority, or a court enforcing competition laws, need to determine when a case of alleged excessive pricing by a dominant firm is to be considered by them is whether under their competition laws, excessive pricing by dominant firms is an antitrust violation. If it is a violation, it means the legislator wishes that the antitrust authority and courts under antitrust law enforce the prohibition. Not enforcing it, or adopting so many qualifications and proviso's that de facto the prohibition is hardly enforced, would be against the intent of the legislator and the rule of law.

According to the round table on excessive pricing conducted by the OECD Competition Committee in 2011, excessive pricing by dominant firms is considered a violation of competition law in all OECD countries but five (the US, Canada, Mexico, Australia and New Zealand).[1]

The abundance of a prohibition of excessive pricing by dominant firms, and more generally, classifying behavior by a dominant firm that exploits consumers excessively as an abuse of a dominant position, is natural and justified. After all, the ultimate aim of competition law is to fight the abuse of market power, which is precisely the power to exploit consumers. The reason competition law wishes to fight market power is the fact that market power – the power to set prices (or other trading terms) that are above competitive levels, harms consumers and social welfare. The harm to social welfare arises because prices that are higher than the marginal cost of supplying a product create deadweight loss: Consumers' loss from such high prices is higher than the firm's profit from these high prices, because the high price causes consumers who value the product at more than it's marginal cost, but less than the excessive price, not to purchase the product. From a social welfare perspective, given that the product exist and investments had been made (a consideration that we will address below), we would want consumers who benefit from the product by more than the marginal cost of supplying it to purchase the product. Of course, a price *some-what* higher than the marginal cost of producing the product is usually essential in order to stimulate entry into the market and welfare enhancing investments. But if the price is excessively high above marginal cost, then the dominant firm earns more than is necessary to stimulate such investment, and social welfare is harmed due to excessive deadweight loss.[2]

[1]See [1].

[2]As I will claim below, a dominant firm would always have the opportunity to show in its defense that the alegedly excessive price it has charged is justified by the need to stimulate investment that is valuable to consumers.

Another rationale for competition law's battle against the abuse of market power is the exclusive weight most competition laws place on consumer welfare: Since in most jurisdictions, competition law is focused solely on the promotion of consumer welfare, competition law is concerned not only with the deadweight loss caused by market power, but also with the transfer of value from consumers to the firms.

One major tool that competition law uses in order to achieve this main goal of fighting maket power is by promoting as much competition as possible. The premise is that when the competitive process works, firms will lower prices, and improve their products and variety, in order to snatch consumers from one another, and that ultimately this process would erode the ability to exploit consumers. It is well-known, however, that at times, despite the efforts of competition law and its enforcers to promote competition, the competitive process does not succeed in preventing exploitation of consumers. This is why competition law in most OECD countries supplements its norms regarding promotion of competition with a prohibition of excessive exploitation of consumers by dominant firms. The reasoning behind such a prohibition is that if a firm holds a dominant position in a market, and it uses this position to excessively exploit consumers, by definition the competitive process did not achieve its aim during the time that the dominant firm excessively exploited consumers. This raises the need to forbid such excessive exploitation directly and deter dominant firms from engaging in such exploitation. Furthermore, this prohibition is aimed at promoting the ultimate goal of competition law, which is, as noted, the prevention of market power.

3. The Prohibition of Excessive Pricing by Dominant Firms is Enforced

While in my view competition agencies are still more reluctant that what is justified to enforce the prohibition of excessive pricing, it should be noted that this prohibition is nevertheless enforced in practice. I am aware of 21 excessive pricing cases initiated by mature competition agencies around the world, and dozens of cases initiated by newer competition agencies, particularly in Eastern European countries. In order to receive some perspective on whether this level of enforcement of the prohibition of excessive pricing is high or low, we can make a comparison between the enforcement of the prohibition of excessive pricing and the enforcement of two non-controversial antitrust prohibitions. First, consider the prohibition of predatory pricing (i.e., a dominant firm charging a price for all of the units it sells that is so low that it may harm competition, such as a price below its own cost). To the best of my knowledge, the EU commission made four decisions regarding predatory pricing,[3] and there is one pending investigation.[4] Second, consider the text-book practice of a most-favored-consumer clause, where a supplier promises one buyer that the supplier will not give other buyers better terms.[5] Like the prohibition of predatory pricing, when a most-favored-consumer clause may substantially harm competition, it is uncontroversial that it is an antitrust violation. Nevertheless, the number of cases is extremely small. To the best of my knowledge, the EU commission has two decisions concerning such a practice, and one ongoing investigation.[6] In this light, it is not accurate to say that competition

[3]These are [2, 3, 4, 5].

[4]See [6].

[5]This is unlike the lately relatively abundant claim of competition agencies concerning price parity, where a hotel, for example, promises a platform, such as Booking.com, not to give end consumers a price that is lower than that posted for that hotel by Booking.com.

[6]See [7, 8], and the ongoing inquiry into E-book MFNs and related matters: See [9]. Note that even if I am underestimating the number of such cases by 50%, we can still see that the number of challenges by mature

agencies seldom initiate proceedings regarding excessive pricing, or that the prohibition is hardly enforced. It is true that the number of decisions in which the price of a dominant firm was eventually found to be excessive is small (probably too small, in my view, from a policy perspective), but as we can see, there are other non-controversial antitrust violations in which the number of decisions condemning the practice is quite similar.[7] In any case, one of the aims of this paper, and my previous papers on the subjects, is to show that the reasons often claimed to justify reluctance of antitrust agencies to enforce the prohibition are often flawed.

4. Investment considerations should be examined on a case by case basis

The wish to stimulate ex ante investment cannot, in itself, justify not prohibiting excessive pricing by dominant firms under competition law, nor can it justify systematic reluctance to enforce the prohibition. Investment considerations could justify an allegedly excessive price in a particular case, however.

Had high prices been inherently advantageous in that they are always necessary to stimulate valuable ex ante investment, competition agencies should have not been concerned, for example, with mergers or restraints of trade that may raise prices. But as Fred Jenny mentions in his paper on the subject, competition agencies commonly block mergers or restraints of trade that may cause

competition agencies against excessive pricing by dominant firms is not necessarily smaller than the number of challenges in the case of these two undisputed antitrust violations.

[7]To be sure, one reason why there are only a few cases is that there are only a few incidents of infringements to begin with. This claim, however, implies that the number of agency decisions is an imperfect proxy in order to determine whether agencies are reluctant to enforce a prohibition – whether it is the prohibition of excessive pricing or that of, say, most-favored-consumer clauses. That being said, there is no particular reason to assume that the incidence of excessive pricing infringements is more abundant than the incidents of most-favored-consumer clause infringements.

prices to rise.[8] Had high prices been always necessary in order to stimulate valuable investment, a merger that is likely to raise prices should never be blocked.

Another possible claim regarding the benefits of high prices ex post and their relationship to investment ex ante is that a firm supposedly invests and competes in order to snatch market share from its competitors, with the hope of monopolizing the market and then charging a high price. But this notion is based on the naïve notion that the firm expects to be the only one who competes in this manor, in a way that causes it eventually to be dominant. Any firm that is not as naïve knows that its rivals are likely to invest and compete themselves, so that dominance would be achieved only with a relatively small probability. The only clear exception is the rare case where competition is *for* the market and not *in* the market. That is, the rare case where firms compete ex ante in order to become the market monopoly ex post. Otherwise, firms are expected to invest in their products and compete not necessarily because they expect to eventually be monopolies, but rather because if they do not invest and compete, their rivals will, and they will lose market share.[9]

Moreover, the notion that excessive pricing by a dominant firm is *always* beneficial due to stimulation of investment stands in contrast to the premise behind competition law, according to which a competitive market structure is better for welfare than a monopoly. According to this premise, promoting competition as much as possible is welfare-enhancing. Thus, competitive profits are assumed by competition law to usually suffice to stimulate valuable investment. Had that not been the case, a dominant firm would have been able to claim that investment considerations also justify exclusionary behavior: According to such a claim, if the dominant firm

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[8]See Jenny's contribution in this volume.

[9]See, e.g., p. 701-728 in [11], who show that with intermediate levels of imperfect competition, firms tend to invest more as the market becomes more competitive. This point was also raised by Yossi Spiegel in a policy paper submitted to the Israeli Antitrust Authority. See [12].

drives rivals out of the market, or blocks entry, it could always claim in its defense that then it would be able to make higher profits, that would stimulate ex ante investment. Clearly, there is no such "investment defense" for exclusionary conduct under current competition law.

With excessive pricing claims, on the other hand, I propose to allow such an “investment defense”. Accordingly, while investment considerations do not create across-the-board permission to charge excessive prices, the dominant firm could claim that although its price is allegedly excessive, it is nevertheless justified in a particular case by efficiency or investment considerations. In such a case, the dominant firm's claim should be treated like any other claim for an efficiency defense. Such an efficiency defense is similar to an efficiency defense raised by a dominant firm who engaged in exclusionary conduct that amounts to an alleged violation. The dominant firm could then prove that there are pro-consumer efficiencies that nevertheless justify the exclusionary conduct. The same applies to efficiencies claimed to justify mergers that may raise prices. It is often claimed, in a particular case, that although the merger is allegedly likely to raise prices, it is necessary in order to achieve pro-consumer benefits or pro-consumer efficiencies or to stimulate valuable investment. In the same vein, a dominant firm may claim that an allegedly excessive price is justified by efficiencies, including the need to stimulate valuable investment, which benefits consumers in a way that offsets the harm imposed by the allegedly excessive price.

5. A note on the cost of errors

The purpose of this section is to rebut the claim that an error of condemning an excessive price that was necessary to stimulate valuable investment is inherently larger than the error of not condemning an excessive price that was not necessary to stimulate valuable investment.[10] We

[10]See Jenny’s contribution in this volume

have no real knowledge of the actual sizes of the costs stemming from each of these kinds of errors. One thing that is clear is that when the decision-maker condemns an allegedly excessive price that was necessary to stimulate valuable investment, at least consumers gain from the lower price. On the other hand, when the decision-maker makes the opposite error, and fails to condemn an excessive price that was not necessary to stimulate valuable investment, consumers' loss is total: there is no offsetting gain for consumers.

Similarly, it has been claimed that the cost of erroneously condemning a dominant firm's price as predatory (i.e., too low, in a way that may exclude competitors) is lower than the cost of erroneously condemning an excessive price.[11] This claim too overlooks, however, the fact that when mistakenly condemning a price as predatory, the decision-maker causes prices charged by both the dominant firm and its rivals or new entrants to be higher, in a way that harms consumers. It is true that such higher prices can, in turn, stimulate investment. But first, even if they do stimulate investment, at the same time they harm consumers by unnecessarily making prices higher: The dominant firm is trying to compete on the merits with regard to price, and its rivals are expected to respond by lower prices as well. The erroneous finding that this behavior by the dominant firm is predatory prevents this behavior. Second, it is not obvious that in all cases these artificially higher prices would stimulate investment. Accordingly, the cost of erroneously condemning a price as excessive may well be lower than the cost of mistakenly condemning prices as predatory: Due to erroneously condemning a price as excessive, at least consumers enjoy a lower price, and the cost of the error lays only with regard to investment. The difference between these two violations with respect to the cost of errors depends on the question what is more

[11] See Jenny's contribution in this volume.

harmful: an excessive price or less investment, and the answer to this question is not straightforward an depends on the circumstances of each case.

6. How to assess whether a dominant firm's price is excessive

One of the main objections to the prohibition of excessive pricing by dominant firms is based on the allegation that whether the price was excessive is too difficult to assess. The purpose of this section is to rebut this claim.

First, it should be noted that unlike price controls imposed by the government of a sector specific regulator, the prohibition of excessive pricing by a dominant firm is normally applied ex post, after excessive pricing occurred. Hence, the administrative costs involved in the antitrust prohibition of excessive pricing are inherently smaller than those of price-regulation by an industry-specific regulator. Once the antitrust prohibition is in place, if its deterrent effect is strong enough, it need not be actually expended, as dominant firms would refrain from charging excessive prices to begin with. Due to the ongoing deterrence created by the prohibition, the dominant firm is expected to restrain itself on an ongoing basis, with no need for monitoring its behavior. It should be noted, in this context, that the typical remedy in an excessive pricing antitrust case should not be ordering the dominant firm to charge a new, lower price, as an industry regulator does. It should involve either damages (in a private action) fines or structural remedies (in an action brought by a competition agency). These remedies should be primarily intended to deter the dominant firm from charging an excessive price in the first place. This is particularly the case with fines and damages as remedies. Of course, a structural remedy, such as demanding divestiture of one of the dominant firm's assets, has both a deterrent effect and an effect that can promote competition in the future.

Still, antitrust agencies and courts need to be willing and able to determine what an excessive price is and enforce the prohibition. This brings us to a related objection, according to which there are no clear guidelines on how to assess whether the price in a particular case is excessive or not and raising the concern that the norm is not predictable enough for the dominant firm to comply with. In the following paragraphs, I will give an outline on how I believe excessive pricing cases should be assessed, and why, in this light, the assessment of an excessive pricing claim is not more difficult than many other antitrust inquiries. Furthermore, my proposal is does not contradict the case law on the matter.

As a preview to my suggestion, let me start with a sketch of the way I propose to assess an excessive pricing case. It involves three steps. The first step is to determine the "competitive price" or an upper threshold to the competitive price. The second step is to check whether the price charged by the dominant firm is excessively above the competitive price (or the upper threshold of the competitive price). The third step is to allow the dominant firm to show an efficiency defense for the allegedly excessive price it has charged, such as a claim that this price was necessary in order to make an investment or improve the product so that as a whole, consumers were not substantially harmed. This three step analysis resembles the three steps recently approved by the Spanish Supreme Court in the Explosivos case.[12] This third step, regarding efficiencies, is not different from what is required in any other abuse of a dominance case. In exclusionary abuse cases too, after establishing a prima facie case for a violation, e.g., based on the degree of harm to competition stemming from the conduct, the dominant firm may raise the burden that pro consumer efficiencies nevertheless justify the behavior. Let me now elaborate on these three proposed steps:

[12] See [13], and Jenny's contribution in this volume.

6.1 Step 1: what is the "competitive price" or an upper threshold of the competitive price

6.1.1 Comparative benchmarks

The first thing to note, in this respect, is that from a policy perspective, in order to serve the aim of antitrust law, the only relevant benchmark to assess whether price is excessive is the competitive benchmark. That is, the court or antitrust agency needs to determine an upper bound to the so-called "competitive price" (rather than, for example, demand-based benchmarks, hinging on consumers' willingness to pay for the product).

It is true that while perfect competition brings price all the way down to the marginal cost of production (the cost of producing or supplying the marginal unit), imperfect competition in the market could produce different prices. This fact does not imply, however, that we should not strive for a competitive benchmark. It just means that we should use this benchmark wisely, being aware of the fact that the "competitive price" under imperfect competition, is ambiguous. As I will show below, the task is much easier if the plaintiff, court, or antitrust agency has a good *comparative* competitive benchmark. A good comparative benchmark exists, for example, when there is information about the price the dominant firm itself charged in a *more competitive* market, segment, or period, or in a market, segment.

When a comparison to a *more competitive* market exists, the court or antitrust agency need not pin down what the actual or ideal "competitive price" is. It only needs to check whether the price the dominant firm charged is excessively above the *more competitive* price that was found. Hence, once the legal policy decision as to what is "excessive" is made (and as will be shown below, this is indeed a legal policy question and not an economic question), all that remains for assessment of the case is inquiring whether this level of excessiveness was reached compared to the *more competitive* price found. Since the more competitive price is higher than the ideal "competitive price" we are striving for, then if the price charged was excessive compared to the *more competitive* price, it was *a fortiori* higher than the ideal "competitive price".

In particular, if the dominant firm reduced prices following entry into its market, the pre-entry price could be compared to the dominant firm's post-entry price.[13] If the price difference is excessive, this can imply a violation, subject to the efficiency defense to be discussed in section 6.3 below.

A similar benchmark can be invoked if the dominant firm reduced prices because consumers became more sensitive to price. For example, one of the benchmarks used in the Israeli class action against the leading dairy Tnuva, alleging excessive pricing of cottage cheese, is the lower price that the monopoly charged following a consumer boycott of cottage cheese.[14] Another intertemporal benchmark involves cases where the dominant firm raised prices following deregulation, or following a new strategy to exploit consumers more. A few recent examples involve the excessive pricing of drugs by pharmaceutical companies: Pfizer was held to charge an excessive price by the UK's CMA, which imposed a $84:2 million fine on Pfizer and a $5.2 million fine on its distributor, Flynn Pharma, for charging an excessive price for phenytoin sodium capsules (a drug used to treat epilepsy). The benchmark used was based on a price hike, following de branding that managed to avoid previous price regulation.[15] Another pharmaceutical company charged for excessive pricing recently was Aspen, who was fined by over 5 million Euro by the

[13]See, in this respect [14, 15]; (both discussing the virtues of assessing whether the pre entry price of a dominant firm is excessive using a comparison with the price the dominant firm charged after entry into its market by a new firm).

[14]See [16] (where the class action was approved by the Israeli district court; See p. 972-1003 in [17]. (empirically analyzing the effect of the cottage cheese boycott).

[15]See [18], and p.12 in [15].

Italian Competition Authority in September 2016. Again, the holding was based on a price hike of four anti-cancer drugs.[16] Regulation, or higher sensitivity of consumers to prices, are benchmarks for the more competitive price, because price regulation usually attempts to mimic a more competitive price, and higher sensitivity of consumers is a market mechanism that stimulates the dominant firm to lower prices to a "more competitive" price.

Alternatively, if the dominant firm operates in different geographic markets, and it charges less in one geographic market than it charges in the other, the lower price is the more competitive price, and could be used as a benchmark to measure the excessiveness of the higher price. If the price difference is excessive, there are grounds for liability, again, subject to an efficiency defense. A similar comparison can be made between the higher price the dominant firm charges one segment of consumers (e.g., households) and the lower price it charges another segment (e.g., institutional consumers).

A post-entry price cut benchmark can often be more accurate than the other benchmarks, as alternative explanations for the price difference are less convincing in the case of a post-entry price cut. It is unlikely that the dominant firm's costs, for example suddenly dropped at the same time entry occurred. This is while with a benchmark based on different geographic markets, or different types of consumers, there could be a cost difference that explains the difference.

When using a benchmark based on price differences between pre entry and post entry situations, or between different markets or segments, there is the concern that the dominant firm will not only respond to the prohibition by reducing its price in the less competitive segment, but also by elevating its price in the more competitive segment. For example, when using a post entry price cut benchmark, the dominant firm may not only reduce pre entry prices in order to avoid

[16] See [19]. This decision was recently approved by the AGCM [20]. The European Commission recently announced that it is opening an investigation against Aspen for excessive pricing of the drugs outside of Italy [21].

liability, but also raise its post entry price (compared to the case without a prohibition). Although this latter effect can raise the post-entry price (relative to the case without a prohibition), it also has an upside of encouraging the entrant to enter.[17] Also, if a few potential entrants can enter the market, competition among them would tend to lower the post entry price they charge, and compel the dominant firm to lower its post entry price as well.

A similar concern can be raised with regard to using benchmarks based on price differences between different geographic markets or different types of consumers. All of these concerns can be substantially less important if the gap allowed between the "more competitive price" and allegedly excessive price is sufficiently large. For example, suppose that the rule is that price is prima facie excessive if the gap between the more competitive price and the challenged price is higher than 25% above the more competitive price. This implies that the dominant firm would not hesitate to lower the price to the more competitive segment or market by 25% since such a price difference would not trigger liability. In order to give itself leeway to lower the price in this manner so as to respond to competition, the dominant firm is expected to also reduce the price it charges in the less competitive segment, which is what we would want it to do.

Finally, more difficult, but possible, competitive benchmarks can include the prices charged by other firms in more competitive markets. The difficulty here arises due to the need to take account of lower costs that the other firm, who charges the lower price, may have. If this other firm has higher costs than the dominant firm accused of excessive pricing, the comparison would even be a stronger indication.

In some cases, the "more competitive price" used for comparison does not necessarily come from a market whose structure is more competitive, but rather from other reasons why the firm

[17]See p.13 in [15].

restrains itself more in one market compared to the other. Such are cases where in both periods, segments, or markets, the structure of the market is equally monopolistic, but the monopoly in one market restrains itself more than the monopoly in the other market. If these two monopolies are nevertheless comparable, it matters not that the lower price does not stem from a more competitive structure of the market, but rather from self-restraint imposed by other factors (e.g., business strategy or consumers' sensitivity to high prices).

Suppose we have information about such a comparative competitive benchmark. In such a case, we don't actually need to determine the ultimate "competitive price", but only the level of the "more competitive price" that is to be compared with the challenged price charged by the dominant firm. Then we can use the measure of excessiveness determined in step 2, and check whether the price the dominant firm charged in the case under scrutiny was excessively above the price charged in the more competitive market.

As we shall see, the measure of excessiveness, determined in step 2, is merely a legal policy decision, of how tolerant we are toward dead-weight loss, and transfer of value from consumers. Ideally, this measure of excessiveness should be similar in all cases. We can leave special circumstances (such as the need to stimulate investment in a particular case) for step 3, which discusses efficiencies. As shall be emphasized below, the measure of *excessiveness* needed for step 2 is not more difficult to determine than the question what is "substantial", in the determination of many antitrust violations, which require a sufficient probability of *substantial* harm to competition.

6.1.2 A cost-based benchmark

Absent a good enough comparative benchmark, the case law speaks of another possible comparison, which in itself serves a similar goal as the "competitive price" test, namely, a comparison to cost. In order to take account of the dominant firm's total costs of producing the product (including R&D costs and investments provided they have not already been recouped in periods before the period in which the allegedly excessive price was charged), the appropriate measure of cost is the average cost: the total costs of the dominant firm in producing the product under examination divided by the number of units sold. While this measure is mentioned in many of the leading cases, in my view it is inferior to the comparative test, which compares the challenged price to a more competitive price that is comparable. This is because examining the dominant firm's relevant costs is often a formidable task, and is subject to accounting manipulation and difficulties. When the dominant firm has costs that are common to a few products, the examination would need to assess what portion of the common costs should be allocated to the product whose price was allegedly excessive. Allowing the dominant firm leeway in determining the portion that should be allocated may induce it to allocate a disproportionate portion of these common costs to the product in which it wants to charge an excessive price, so as to make it look like the profit margin made on this product is more modest than it really should be. I believe the court or antitrust agency should take account of such possible manipulations and impose more strict requirements on the allocation of common costs disproportionately to the product for which the alleged excessive price was charged. Also, in extreme cases where the dominant firm's costs are abnormally high compared to similar firms, it may be held, as Jenny notes, that the price was excessive, even though the profits were not.[18]

Despite the difficulties involved in cost assessment, in my view, if a comparative competitive benchmark does not exist, a cost comparison should be conducted. It is better to apply a test that is not perfect than apply no test at all and grant the dominant firm a de facto exemption from liability. In the Deutche Post case, for example, the EU commission relied on an average cost estimate submitted by the dominant firm itself in a previous proceeding, in order to hold that a

[18] See Jenny's contribution in this volume.

price exceeding this average cost by 25% is excessive. So although the commission here did not need to conduct the cost assessment itself, it still relied on a price-cost comparison in order to reach the conclusion that the price was excessive. As the Commission stated:

"According to the case law of the Court of Justice, the fairness of a certain price may be tested by comparing this price and the economic value of the good or service provided. A price which is set at a level which bears no reasonable relation to the economic value of the service provided must be regarded as excessive in itself, since it has the effect of unfairly exploiting customers. In a market which is open to competition the normal test to be applied would be to compare the price of the dominant operator with the prices charged by competitors. Due to the existence of DPAG's wide-ranging monopoly, such a price comparison is not possible in the present case. [...] the Commission finds that the estimated average cost of delivery for incoming cross-border mail [...] as submitted by DPAG [...] in their notification to the Commission may serve as a benchmark to estimate DPAG's costs in this respect. As mentioned above, DPAG charges [...] a price which is 25 % above the estimated average cost and the estimated economic value for that service. [...] the Commission concludes that the price charged by DPAG for incoming cross-border mail [...] exceeds the average economic value of that service by at least 25 %. [...] The Commission [...] concludes that the tariff charged by DPAG has no sufficient or reasonable relationship to real costs or to the real value of the service provided. Consequently, DPAG's pricing exploits customers excessively and should therefore be regarded as an unfair selling price within the meaning of Article 82."[19]

It should be noted in this respect that although price cost comparisons are difficult, they are required in many other antitrust violations. A price cost comparison is often needed in order to assess damages for violations in private actions, including against cartels. A full blown market definition test, based on the hypothetical monopoly test, should take account of cost, in order to assess whether a hypothetical monopoly is able to profitably raise prices.[20] Cost is also a measure

[19]See [22], Relating to a Proceeding Under Article 82 of the EC Treaty (see par. 159-167 in [23]).
[20]See [24].

required for assessing predatory pricing (pricing below cost), or price squeeze cases (to see if a dominant firm is charging too much for an input it sells its rivals, while charging too less from the end consumers, in a way that the rival cannot compete with the dominant firm over end consumers). Similarly, in order to implement the “as efficient competitor” test in cases of exclusionary discounts (such as loyalty rebates) by dominant firms, again one needs to know the dominant firm’s costs.[21]

Although a price cost comparison is difficult and subject to accounting manipulations, it is possible as a last resort, absent good competitive benchmarks. As noted, it is better to enforce the rule using a cost based test than not to enforce it at all. After all, cost is a reasonable approximation of the ideal, or lowest possible “competitive price” or “more competitive price” that the legal rule aims for. In particular, absent any imperfections of competition, such as product differentiation, capacity constraints, information asymmetries, and so forth, firms that have some costs to enter the market would enter the market until price equals average costs.

6.1.3 The correct benchmark to compare with is the competitive price, or a more competitive price, rather than the consumers’ willingness to pay

The fact that from a policy perspective, the excessiveness should be judged compared to a more competitive price, is well routed in most of the case law and literature, and fits well with the aim of antitrust law, which is maximizing consumer welfare via as much competition as possible. A different view, according to which the excessiveness of the price should also be determined according to demand considerations, and in particular the consumers' willingness to pay, is flawed in my view. It is based on an interpretation of the wording in the GM decision, in which the European Court of Justice held that the price should be compared to the "economic value" of the product. But clearly, if the interpretation of this phrase is that excessiveness is determined by consumers' willingness to pay, then no price will ever be considered excessive, because a

[21]See, e.g., [25].

monopoly would never want to charge a price higher than what consumers are willing to pay. This point was made at the time by Nils Wahl, Advocate General of the European Court of Justice, criticizing the Scandlines decision, in which allegedly consumers' willingness to pay was taken into account in favor of the dominant firm:

"As would appear evident from the Scandlines decision the Commission seems reluctant to strike down on what might be perceived as unfair prices. Indeed, if the reasoning of the Commission is correct it would seem practically impossible to strike down on a price which is not higher than the monopoly price. The monopoly price, i.e. the highest price that a dominant company would be able to charge without losing sales in excess of revenues generated by the high price, would seem to reflect the prevailing attitude of the customers, thus being a good indication of the value which customers attribute to the service or product."[22]

Nor should any other account be given to consumers' willingness to pay for the product. Such an account would imply that this particular antitrust rule, unlike any other antitrust rule, does not view consumer welfare as its sole objective. Because antitrust law places weight only on consumer welfare, it's ideal is that all surplus go to consumers, subject to the constraint that firms should still be stimulated to enter the market and invest in products that maximize consumer welfare. Under this objective of antitrust law, it would be inconsistent to construe the rule applying to exploitation of consumers by monopolies differently, in a way that suddenly gives weight also to the monopoly's entitlement to profit. In other words, when the prohibition says that dominant firms should charge "fair prices" it is not referring to fairness toward the dominant firm, but rather to fairness toward consumers. Recall that under my proposed rule, the need to stimulate investment and improvement of the product, for the benefit of consumers, is taken into account, but not in the measure of excessiveness, rather in step 3, where the dominant firm claims that the alleged excessiveness is justified by pro-consumer efficiencies.

Indeed, according to the vast majority of cases and commentators, the competitive benchmark is the only one to be used. Since it is important to make clear how abundant this

[22] See p. 61-62 in [26]. See also p. 884 in [27].

competitive benchmark standard is in the case law and literature, I shall elaborate in detail below.[23]

The large body of cases and academic papers that sees the competitive benchmark as the only correct one for assessing an excessive pricing case starts from the well-known United Brands case itself, in which the European Court of Justice stressed that:

"It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position *in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition. […] This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production*."[24] [emphasis added: D.G.]

Similarly, all cases that condemn an excessive price based on a comparison with price that was subject to more intense competition de facto imply the same interpretation of "economic value". Such is, for example, the British Leeland case,[25] where it was held that the dominant firm charged an excessive price for the registration of left-hand drive vehicles by comparing this price to the price charged by the dominant firm for right-hand drive vehicles, which were subject to more intense competition.

Such a comparison with a more competitive price was also implemented by the UK's OFT, when condemning pharmaceutical company Napp for charging an excessive price from private pharmacies. The excessiveness was determined, inter alia, by a comparison to the price Napp charged from public hospitals, a price that was subject to more intense competition and more buying power:

"The prices charged by Napp for MST in the community are excessive. The Director considers that a price is excessive and an abuse if it is *above that which would exist in a competitive market* and where it is clear that high profits will not stimulate successful new entry within a reasonable period. Therefore, to show that prices are excessive, it must be demonstrated that (i) *prices are*

[23]See also p. 769 in [28].
[24]See p. 301 par. 249-250 in [29]. See also par. III in [30].
[25]See par. 18 in [31].

higher than would be expected in a competitive market, and (ii) there is no effective competitive pressure to bring them down to competitive levels, nor is there likely to be." [emphasis added: D.G.][26]

This way of assessing whether Napp's price was excessive was upheld by the Competition Appeals Tribunal:

"In our view those comparisons, taken together, amply support the Director's conclusions that Napp's prices in the community segment were, during the period of the infringement, *well above what would have been expected in competitive conditions.* Thus we agree with the Director's finding, at paragraph 211 of the Decision, that it is only in the community segment, where buyers are less price sensitive, and where there is an absence of effective competition, that Napp can sustain a premium of 40 per cent over competitors. […] That conclusion is further supported by the fact that where Napp faces competition, in the hospital segment and export markets, Napp's prices are very significantly lower than Napp's prices in the community segment." [27] (emphasis added: D.G.)

The same principle of using the competitive price as the correct standard for measuring whether the price charged by the dominant firm was excessive is used in the EU commission's notice regarding access to telecom networks. As the Commission states:

" […] regulatory authorities have sought to determine what would have been the competitive price were a competitive market to exist (for example, in their calculation of interconnection tariffs)."[28]

The same approach is used by the UK's OFT in it's guidance from 2003:

"Under EC law, an abuse of dominance can be determined if prices are 'excessive in relation to the economic value of the service provided'. One way to determine whether prices are excessive is *to assess whether they allow the company in question to sustain profits higher than could be*

[26]See par. 203 in [32].
[27]See par. 397-398 in [33].
[28]See par. 106-109 in [34].

expected in a competitive market (see OFT, 1999c, section 2). Another way would be to *compare the price directly with the underlying costs* of the product."[29] [emphasis added: D.G.].

Waelbroeck and Frignani, in their book on European Competition Law, also stress that the comparison to the competitive price is the one set in the United Brands case, and add that this is also the standard under German competition law.[30]

The same standard appears in the holding of the South African competition appeals court in the Mittal case:

"A dominant supplier which is able, and does, simply set its price at import parity without careful reference to costs would do so at its peril, for […] the supplier could well have difficulty defending the excess as having any reasonable relation to economic value. However, *if in fact the supplier references its price to prices prevailing in other comparable but competitive markets, then its price would be likely to approximate to economic value*".[31]

Motta and Destreel too stress that:

"Since its well-known United Brands case, the Court of Justice established that a price is unfair when a dominant firm has "exploited" its dominant position so as to set prices significantly higher than those which would result from effective competition. Hence, a price is excessive and unfair when it is significantly above the effective competitive level, or above the economic value of the product. This should correspond, in the Court's view, to the normal competitive level."[32]

This vast body of case law and literature shows that the "economic value" mentioned in the early General Motors case, is no other than "the competitive price". This is why my proposal according to which the first step is to determine an upper bound for the competitive price and the second step is to see whether the price charged was excessive compared to this upper bound is not

[29]See par. 2.12 in [35].
[30]See [36].
[31]See [37].
[32]See par. 2.2 in [38].

only the analysis dictated by the objectives of competition law but also is based on well-established case law.

The two main cases that are usually cited in order to support a different view, according to which the dominant firm can be exempt from liability if consumers are willing to pay a lot for its product, are the EU Commission's Scandlines decision[33] and the UK's Attheraces decision.[34] But these cases are an exception, and also can be interpreted in a way that is aligned with the mainstream of the case law. Motta and Destreel, for example, when discussing the Scandlines case, acknowledge that:

"[…] a competitive price is not only determined by supply-side factors (in particular the cost of production), but also by demand side factors (demand elasticity, willingness and ability to pay)."[35]

In this respect, a case that mentions that demand considerations, and not only supply or cost considerations, are relevant in order to determine the *competitive price*, does not diverge from the standard advocated in the bulk of the case law, according to which price should be compared to the competitive price to see if it is excessive. This means that the competitive price, when the competitors' products are not perfect substitutes, is affected by how imperfect is the interchangeability among the competing products, and this is a demand-side question. This acknowledges that even under (imperfect) competition, price can be *somewhat above* the marginal cost of production. But this insight cannot support the view that a dominant firm is allowed to charge a price that is *excessively above* the competitive price, just because many consumers were willing to pay this price. If a firm is able to charge a price which is excessive above the competitive level, by definition this is not a competitive price.

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[33] See [39].
[34] See [40].
[35] See par. 2.4.1 in [38].

In the same vein, the courts' analysis in the Attheraces decision does not justify departing from the mainstream view that the dominant firm's price should be compared to the competitive price in order to determine whether it is excessive. Furthermore, the court there was influenced by the fact that the dispute before it was a commercial dispute between two business entities on how to split the proceeds from pre horse racing data, with no effect on end consumers:

"[…] this was not a case where the charges proposed by BHB would cause harm to the end users or downstream consumers of the pre-race data, for example by leading to increased prices. The dispute in this case arises out of the negotiations between BHB and ATR on the commercial division of the revenues derived by ATR from the overseas bookmakers in the downstream market, which is competitive."[36]

In fact, the court there explicitly refused to adopt the notion that a monopoly is allowed to charge whatever consumers are willing to pay:

"On the one hand, the economic value of a product in market terms is what it will fetch. This cannot, however, be what [the sections prohibiting excessive pricing by dominant firms] envisage, because the premise is that the seller has a dominant position enabling it to distort the market in which it operates. … BHB has two principal answers to the accusation of excessive pricing. The first is that, if the price is one which the market will reasonably bear by definition, it is not excessive. The second is that its own role and status are such that its returns are not and should not be treated as simple profit because they are ploughed back into the very product for which ATR are paying. […] We are not prepared to accept the first answer, even with the adverb 'reasonably'. 37

Therefore, if one feels the need to put weight on this holding, it can be interpreted as saying that the competitive price (under imperfect competition) is also affected by some degree of moderate product differentiation, rather than being a basis for the claim that a monopoly can charge

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[36]See par. 196 in [40].
[37]See par. 205, 210, 211 in [40].

whatever consumers can bear, or that "fairness", in the prohibition of unfair pricing by monopolies, is toward the monopoly, rather than toward consumers.

Another source for confusion in this respect is a paragraph in the United Brands case, stating that:

"The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."[38]

When put out of context, one might allegedly interpret this phrase as saying that the "excessiveness" of the price compared to cost is only a first step of the analysis, and then, above and beyond it being excessive, it should also be "unfair" for it to be a violation. Such an interpretation, however, fails on logical grounds, since excessive prices are always unfair prices. Otherwise they would not be excessive. The correct interpretation of the phrase, together with other explicit holdings of the court in the United Brands case cited above, is that one way to show that a price is unfair is by comparing it to cost, and seeing whether the price is excessively above cost, and another way of showing that the price is unfair is to compare the price with a more competitive benchmark and see whether the difference between the price and the more competitive benchmark is excessive. As the UK Chancery in the Ineos Vinyl case put it:

"What therefore is required is (a) an analysis of the costs incurred in producing the product (b) a comparison of those costs with the price charged and (c) an evaluation of whether the resulting difference – the profit – is such that the price charged is unfair – and abusive – *either because it is so plainly excessive that no comparison is needed or because it is unfair when compared with competing products*. … Another way of proving that the price charged is unfair, taking up the possibility suggested by para 253 of the citation from United Brands, is by reference to what is charged for the product in question in a suitably comparable competitive market, as suggested by the Court of Justice in Bodson v Pompes Funebres, Case 30/87 [1988] ECR 2479."[39]

Indeed, what is the point of demanding that a price be not only "excessive", but also "excessively excessive"? The terms "excessive" and "unfair" are both vague terms that should be used to import legal policy considerations. Therefore, they serve the same purpose, of indicating

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[38]See par. 114 in [29].

[39]See par. 217-218 in [41]. See also [38]; and see Jenny's contribution in this volume

what margin above the competitive price the court should tolerate. As stated, the test should consist of assessing what “the competitive price” or an upper bound of the competitive price, is, and then see whether the price charged by the dominant firm is excessively above this more competitive price. Absent a good competitive benchmark, the comparison can be made with the costs of production.

In any case, even according to the European Court of Justice itself in the United Brands case, and as also stressed by the same court in the Latvian Copyright Societies case,[40] this vague phrase relating to how to assess an excessive pricing case is not the only possible way of such an assessment.

6.2 Step 2: what is “excessive” above the “competitive price”, and the similarity between assessment of an excessive pricing case and many other antitrust violations

As mentioned, the second step of the analysis is to determine whether the price charged by the dominant firm is excessive above the competitive price (or the more competitive price) assessed in the previous step. While the first step, of assessing the more competitive price, involves economic analysis (comparisons with more competitive situations or with cost), this second step, of determining whether the price is excessive compared to the more competitive price, involves a legal policy question, rather than economic analysis. It depends on the degree of tolerance the antitrust agency or court has toward dead weight loss and transfer of value from consumers to the dominant firm. In this respect, determining what is “excessive” involves the use of judicial discretion just as does determining whether expected harm to competition is *substantial* in many other antitrust violations. This is the case in antitrust violations that are subject to a rule of reason. With such an antitrust violation, in the first step of the analysis, the court or antitrust agency needs to determine the expected harm to competition stemming from the alleged violation. This involves economic analysis. In the second step, the court or antitrust agency needs to determine whether this harm to competition is *substantial*. This involves a legal policy judgment, which is based on the degree of tolerance the decision maker has toward harm to competition and consumers.

Ideally, the difference between the price charged by the dominant firm and the more competitive price (in the case of using a competitive benchmark) or cost (in the cast of using a

[40] See par. 37 in [42].

cost-based benchmark) needs to be similar across cases, in order to improve the clarity and predictability of the rule. The special characteristics of case that justify such a price, for example because of a need to stimulate a particular investment or product improvement ex ante, should be discussed in the third step of the analysis, involving efficiencies. It should be noted that currently, such predictability and clarity does not really exist with regard to antitrust violations that require a substantial harm to competition. For example, in the case of exclusive dealing, which is discussed in the US under the rule of reason, different cases hold that different levels of foreclosure of the buyers' market from access by rival firms are enough in order to *substantially* harm competition. On one hand, for example, the US Federal court in the Brunswick case held that:

"In a vertical restraint case such as this, claimants may establish a § 1 violation by demonstrating that the conduct "substantially forecloses" competition in the relevant market."[41]

However, as the Federal Court in the Microsoft case states:

"… There is no hard-and-fast rule for determining the point at which market foreclosure becomes "substantial."[42]

Still, antitrust lawyers have a relatively good idea how to advise their clients when they try to determine whether an exclusive dealing contract is a violation or not, because there is a body of case law in which courts and agencies gave on idea on what harm they believe is "substantial". There is no reason why the prohibition of excessive pricing should not, with time, become at least as predictable. As mentioned, predictability can be improved by determining a relatively fixed level of excessiveness above the more competitive price or above cost that triggers alleged liability (subject to the efficiency defense).

Currently, the case law on excessive pricing does not give a very predictable measure, and it should. The most clear signal produced in the cases that I am aware of is that of the South African Sasol case, in which it was held that if the price difference is below 20%, then the price should not be deemed excessive (interestingly citing a rule under Hebrew Law):

"A price which is significantly less than 20% of the figure employed to determine economic value falls short of justifying judicial interference in this complex area. Ancient support can be found for

[41]See [43].
[42]See [44].

this finding. The TALMUD (Baba Bathra 90a) ruled that if the profit gained was more than 16.67% it was regarded as excessive."[43]

A similar safe harbor of 20% above the competitive price was initiated by the Israeli Antitrust Authority in 2014, when I served as head of the authority. This safe harbor was eliminated in the authority's revised guidelines, issued under the current head.

Other cases do not make a policy statement as to what is the price difference between the challenged price and the more competitive price that would trigger liability (or that a price difference below this threshold would not), but still some of the cases imply that double digit percentage differences can be enough for the price to be considered excessive. In particular, the Deutche Post case spoke of a margin of 25% above the average cost submitted by the dominant firm itself in previous proceedings as excessive.[44] The above-mentioned Napp case relied on multiple benchmarks. But one of them, which may well have sufficed for liability, was 40% above the pricing of competing firms.[45] Finally, in the Italian airport case,[46] a margin of 50% above the cost estimated by the industry regulator was considered excessive.

6.3 Step 3: the efficiency defense

As noted, the proposed rule regarding excessive pricing should have a final and third step, according to which even if the price is allegedly excessive, because it is excessively above cost (when using a cost test), or above the more competitive price (when using a comparison test), then the dominant firm can show that this allegedly excessive price was necessary in order to stimulate some pro-consumer efficiency, so that over all, consumers are not harmed by it. While, as noted,

[43]See [45].
[44]See [23].
[45]See [32]
[46]See [46].

determining whether the gap between the price charged by the dominant firm and the "competitive price" or "more competitive price" is prima facie excessive is a legal policy question, and not an economic question, assessment of the dominant firm's efficiency claim requires economic analysis. The burden to show such an efficiency would be on the dominant firm, as any other efficiency claimed in abuse of dominance cases. It is in this step that differences among different kinds of dominant firms can emerge. One dominant firm may be equipped with a stronger efficiency claim than the other. The dominant firm has superior information regarding its own pro consumer efficiencies in charging the allegedly excessive price. Hence, when it considers charging a price that cannot meet the ordinary threshold of non-excessiveness, it must be convinced, based on its efficiency claim, that the price is nevertheless lawful, due to the offsetting pro-consumer benefits.

In order to allow the investment considerations to be adequately taken into account, the dominant firm's burden in showing the efficiency claim should not be prohibitively large. In cases of exclusionary abuse, it has often been claimed that European courts do not really put weight on efficiency claims once a prima facie case of abuse has been established. But at least in exploitative abuse cases, I propose that this efficiency claim be seriously considered.

Shifting the burden to the dominant firm to show a justification for the allegedly excessive price once a prima facie case for excessiveness has been established is not a new concept. It has also been emphasized by the European Court of Justice in the case of the Latvian Copyright Organizations case, also citing previous cases, where the ECJ stated that:

"Next, it should be noted that these factors are merely indicative of abuse of a dominant position. It may be possible for the copyright management organisation to justify the difference by relying on objective dissimilarities between the situation of the Member State concerned and that of the other Member States included in the comparison (see, to that effect, judgments of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 38, and of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25). [47]

7. Liability should not be limited to mixed cases of exploitative and exclusionary abuse

In this section, I wish to stress that due to the main goal of competition law mentioned above, of preventing deadweight loss and direct exploitation of consumers, intervention against excessive pricing by dominant firms should not be limited to mixed cases, in which the dominant firm combined excessive pricing with exclusionary conduct (i.e., excluding rivals or entrants). It is true that such mixed cases of excessive pricing and exclusionary conduct, all else equal, deserve higher sanctions that cases involving only one violation. Still, this does not justify allowing dominant firms who engaged only in exploitation of consumers, and not in exclusionary conduct, to escape scrutiny. Indeed, even in cases in which the dominant firm was accused of engaging in both exclusionary and exploitative conduct, the court stressed that exploitative conduct alone would suffice for liability. For example, in the UK's Napp case, the court of appeals emphasized this point, and held that:

"If, in the defence, the Director intended to go further and say that the excessive pricing in the community segment was abusive only because of Napp's exclusionary conduct in the hospital segment, any such view would have been erroneous in law. Nothing in United Brands suggests that the existence of exclusionary conduct is a prerequisite to a finding that prices are excessive contrary to the Chapter II prohibition."[48]

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[47]See par. 57 in [42].
[48]See par. 434 in [33].

Similarly, the court in Albion Water Group Limited v. Water Services Regulatory Authority and Dwr Cymru Cyfyngedig holds that even if the allegation of excessive pricing were the only allegation against the dominant firm, it would have been exposed to prosecution:

> "Plainly, a common carriage price which bears no reasonable relation to the economic value of the service provided can be an abuse of a dominant position; it does not depend on whether the victim is a competitor and/or a customer or whether the abuse is classified as exclusionary or exploitative or, as in this case, both".[49]

In should also be noted, in this respect, that some of the allegedly "mixed" cases, in which the dominant firm is accused of another violation, alongside excessive pricing, may deal with two or more types of exploitative abuse, rather than a mix of exploitative and exclusionary behavior. For example, if the dominant firm discriminated in favor of consumers in member state A and against consumers in member state B, within the EU, there may be no exclusionary conduct, but only exploitation of consumers in member state B. Still, the dominant firm may be liable for both excessive pricing (i.e., charging unfair prices from consumers in member state B), and price discrimination between consumers in the two member states.

8. Liability is for past behavior, even when future competition is expected

Antitrust liability for excessive pricing is with regard to past behavior. The antitrust agency or private plaintiff accuses the dominant firm of pricing excessively in the past. This form of liability is meant to deter the dominant firm from exploiting consumers in the first place. Therefore, the claim that when prices are expected to fall in the future, or more competition is expected in the future, the dominant firm should be exempt from liability stemming from its behavior in the past

[49]See par. 219 in [47].

should be rejected in my view.[50] Suppose that it had been shown that the dominant firm charged an excessive price for a few years. Why should it escape liability (thereby not being deterred from such behavior ex ante), just because future competition is expected? The claim that the dominant firm should be exempt in such cases may also be related to the notion that prohibiting excessive pricing can harm the prospects of entry. But this claim in itself is often misguided. For example, Yossi Spiegel and I show that if excessive pricing is shown using a post-entry price cut benchmark, the prohibition of excessive pricing actually encourages entry.[51]

9. The false "self-correction" argument

As we have shown elsewhere,[52] excessive prices are not self-correcting. A potential entrant decides whether to enter only on the basis of the expected post-entry price, and not on the basis of the pre-entry price. Suppose the dominant firm is expected to react to entry by starting a price war, which would lead to the price that reflects the new competitive situation after entry. If the entrant nevertheless entered, it means that it is not the excessive pre-entry price that attracted entry, but rather that entry was profitable despite the expected price war. Hence if entry caused price to go down to price levels we see as non-excessive, such entry would have occurred even under a prohibition of excessive pricing. Conversely, if the entrant expects the dominant firm not to respond to entry by a price war, the entrant is entering due to his expectation for some sort of tacit collusion after entry. This is not the sort of entry that corrects an excessive price, since price is expected to remain excessive, possibly indefinitely, even after entry.

Consider now even the rare case where the costs of entry into the market and exit out of it are negligible – the case of so called contestable markets. Here, the dominant firm would not want to

[50]For such a claim see Jenny's contribution in this volume. This claim is also present in [48].
[51]See p. 13 in [15].
[52]See [49], and part II in [27].

charge an excessive price to begin with, since this would attract firms that can costlessly enter the market when prices are high and then exit when prices go down again. Accordingly, even here, excessive prices do not correct themselves: they simply do not occur in the first place. If the price was found to be excessive, without attracting such entry that lowered the price, it implies that the costs of entry and exit are not negligible and the market is not contestable.

Finally, when entry barriers are so high that entrants do not find it profitable to enter (given the expected post entry price), surely, the excessive price cannot correct itself, because entry will not occur. Elsewhere, we also show how even when the pre-entry price is assumed to be a signal for the dominant firm not being efficient, excessive prices are not self-correcting. We show that a signal to potential entrants that the dominant firm is inefficient, thereby inviting entry, may well be more clear to entrants when excessive pricing is prohibited than when it is allowed.[53] Also, although under some restrictive assumptions, dominant firms might some-what reduce their price in order to block entry by signaling that they are efficient, this lower price too may well be excessive.[54]

Conclusion

The rhetoric regarding reluctance of antitrust authorities to enforce the prohibition of excessive pricing by dominant firms is surprising, given the ultimate aim of antitrust law of preventing precisely this occurrence: most cases of objection to mergers, for example, are based by this very concern, that following the merger, prices will be excessive. Why then, do some claim that if the competitive process did not work, and the dominant firm was able to charge excessive prices,

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[53]See p. 257-262 in [49].

[54]See [49].

competition law should suddenly retreat and fail to act? Since the claim that excessive prices are self-correcting is proved to be false, the alleged answer must hinge on either problems related to assessment of excessive pricing cases or problems related to the need to stimulate valuable investment. But these concerns too, as I show, are not justified. Assessment of an excessive pricing case is no different than assessment of antitrust infringements that require an expected substantial harm to competition. Investment considerations in a particular case should receive attention, but like any other claim for an efficiency defense, should be discussed as a third stage of the analysis, on a case by case basis. This analysis shows that the prohibition of excessive pricing, if enforced in a coherent manner, can become as predictable to the dominant firm as many other antitrust violations.

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