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Consumer protection & Competition policy: an overview of EU and national case law

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I. Introduction

While the precise influence of consumer interests on the outcome of competition cases differs, the protection of consumers and the consumer welfare are certainly relevant to the interpretation of the competition rules. The EU's competition provisions in the Treaty on the Functioning of the European Union (TFEU) make several references to the notion of 'consumers' in the context of determining whether a competition violation has taken place. One of the conditions to justify restrictive practices based on efficiency grounds under Article 101(3) TFEU is that *consumers* are allowed 'a fair share of the resulting benefit'. Article 102(b) TFEU lists 'limiting production, markets or technical development to the prejudice of *consumers*' as a possible abuse of dominance. However, the concept and role of consumers in the interpretation of the competition rules has stayed rather elusive.

In some competition cases, the emphasis is placed on considerations beyond the protection of consumers. For instance, the Court of Justice made clear in *T-Mobile* that Article 101 TFEU 'is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such'. [*1*] In even more explicit terms, the Court of Justice argued in *GlaxoSmithKline* that there is nothing in Article 101 TFEU 'to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object'. [*2*] However, the protection of the competitive process can also go hand in hand with the protection of consumer interests, as for instance recognized more recently in *UK Generics* where the Court of Justice stated in the context of Article 102 TFEU that the conclusion of a set of pay-for-delay agreements can have 'a significant foreclosure effect on the market of the originator medicine containing the active ingredient at issue, depriving the consumer of the benefits of entry into that market of potential competitors manufacturing their own medicine'. [*3*] In a similar vein, the Court of Justice made clear in cases like *TeliaSonera* that Article 102 TFEU must be interpreted as 'referring not only to practices which may cause damage to consumers directly […] but also to those which are detrimental to them through their impact on competition'. [*4*]

Against this background, the contribution explores how the role of consumer protection evolved in selected areas of EU and national competition law in the past years from two perspectives: (1) consumers as the object of protection in competition cases and (2) consumers as the benchmark for assessing anticompetitive effects. While the first issue concerns the position of consumers as beneficiaries of the competition rules, the second issue refers to the range of consumers that is considered for establishing whether anticompetitive effects and thus a competition violation exists.

II. Consumers as the object of protection in competition cases

To illustrate recent developments relating to the position of consumers as the object of protection in competition law, several areas are worth exploring. In July 2021, the European Commission fined car manufacturers for restricting competition in emission cleaning by colluding on the extent of technical development. [*5*] The novelty of the decision is that the car manufacturers did not collude by fixing prices, dividing the market or limiting output, but by agreeing not to exploit the technical development of an emission cleaning technology to its full potential. In its decision, the Commission relied, among others, on the *T-Mobile* judgment to state that it is not possible to conclude on the basis of the wording of Article 101(1) TFEU 'that only concerted practices which have a direct effect on the prices paid by end users are prohibited'. [*6*] The *T-Mobile* case concerned a concerted practice between Dutch telecom operators to reduce the remuneration paid to dealers for concluding postpaid subscription agreements. As such, the concerted practice did not relate to prices charged to consumers. In this context, the Court of Justice clarified that there does not need to be a direct link between a concerted practice and consumer prices in order to find that a concerted practice has an anti-competitive object. [*7*] Agreements or concerted practices limiting technical development are explicitly prohibited by Article 101(1)(b) TFEU, but the Commission had not applied this provision before the *Car Emissions* case.

While the car manufacturers in question met the regulatory requirements relating to EU emission standards, they had the technology at their disposal to reduce harmful emissions beyond what the law required. Despite the technology being available, the car manufacturers colluded not to compete on cleaning better than the minimum legal emission standards called for. At several instances in its decision, the Commission refers to how such limiting of technical development reduces choice for customers. [*8*] In her press statement, Vice-President Vestager explicitly qualified the technical possibility to clean better as an important parameter of competition relevant for and to the benefit of consumers. [*9*] The decision shows how competition enforcement can contribute to achieving the EU's Green Deal objectives by taking action against attempts to restrict competition to the detriment of environmental innovations. As stated by Vice-President Vestager, the decision exemplifies 'the Commission's determination to pursue any anti-competitive conduct in this space'. [*10*] In this regard, the Commission is also revising its Horizontal Guidelines to provide more clarity about the extent to which restrictions of competition are justified when they deliver sustainability benefits. [*11*] Following the work of the Dutch and Greek competition authorities on the topic of sustainability, [*12*] one of the relevant questions is how to assess sustainability advantages that benefit society as a whole in light of the requirement of Article 101(3) TFEU that the consumers affected by the agreement should get a 'fair share of the resulting benefit'. This issue of the benchmark for assessing anticompetitive effects is discussed in the next section.

Another area where recent competition cases illustrate the consideration for consumer interests is in the context of excessive pricing in the pharmaceutical industry. In February 2021, the Commission accepted commitments from Aspen to reduce the prices for its medicines by 73% to address concerns about excessive pricing. The Commission applied the two-step test developed in the *United Brands* judgment in its commitment decision, namely that (1) the price charged by the dominant undertaking results into excessive profits and (2) the price is unfair either in itself or when compared to competing products. With regard to the first step regarding the profit

margin, the Commission reached the preliminary conclusion that Aspen had been earning excessive profits because its profitability levels were much higher than those of a number of other pharmaceutical companies with a similar profile. [*13*] Aspen was found to have imposed very high price increases, often by several hundred percent. [*14*] As to the second step regarding the unfairness of Aspen's prices, the Commission found in its preliminary assessment that Aspen's prices were unfair in themselves because of the absence of legitimate reasons for the excessive profits. In particular, Aspen had not been engaged in any commercial risk-taking, innovation or material improvement of the medicines, which were off-patent for 50 years so that the investment was long recouped. [*15*]

Beyond this, the Commission also pointed at Aspen's strategy of imposing very high price increases to exploit health systems and patients in a situation of lack of competition considering the dependency on its medicines and the large unavailability of substitutes in Europe. [*16*] In response to the resistance from national authorities against the price increases, Aspen threatened to remove the medicines from the national lists of reimbursable medicines or to even withdraw the medicines from normal supply in the Member States. [*17*] The access to medicines was mentioned by the Commission several times in its commitment decision as a relevant consideration. [*18*] This illustrates how competition law can help in ensuring affordable medicines to the benefit of consumers in their role as patients and to the benefit of the overall health system.

At the national level, several competition authorities have also pursued cases against excessive pricing. The Italian competition authority had already fined Aspen in October 2016 for excessive pricing in the form of price increases of up to 1500%. [*19*] The Danish competition authority found in January 2018 that CD Pharma had abused its dominant position by increasing the price of a drug by 2000%. [*20*] In July 2021, the Dutch competition authority fined Leadiant for charging excessive prices for a drug on which the relevant patients depend throughout their lives. No alternatives were available until the Amsterdam University Medical Center managed to manufacture a similar drug itself through compounding. According to the Dutch competition authority, Leadiant had a special responsibility as a dominant undertaking to negotiate effectively and seriously. This required active engagement on the part of Leadiant to agree on a price lower than its list price. The Dutch competition authority found that Leadiant did not do this sufficiently and had abused its dominant position by charging and collecting an excessive price until the compounding started. [*21*]

In the UK, the prices charged by Pfizer and Flynn for anti-epilepsy medicines have been under investigation by the Competition & Markets Authority (CMA). In a 2016 decision, the CMA concluded that Pfizer and Flynn abused their dominance by charging excessive prices. [*22*] The UK Competition Appeal Tribunal overturned this decision in 2018 on the ground that the CMA wrongly relied solely on a cost-plus approach for determining the excessiveness of the prices and did not properly consider the situation of comparable products. [*23*] In its turn, the UK Court of Appeal clarified in its 2020 judgment that even though a competition authority is not obliged to use multiple tests for establishing the excessive nature of prices, alternative evidence that is provided by the parties must be considered. [*24*] After reassessing the case in light of the judgments on appeal, the CMA sent Pfizer and Flynn a statement of objections in August 2021 provisionally finding that they abused their dominant position by charging unfairly high prices. [*25*]

Beyond these cases, the COVID-19 crisis has also led to increased attention among competition authorities for practices involving excessive pricing in the healthcare sector. In a March 2020 joint statement, the European Competition Network emphasized the importance of ensuring that essential healthcare products like hand sanitizers and face masks remain available at competitive prices and stressed its commitment to act against companies taking advantage of the current situation through restrictive practices or abuse of dominance. [*26*] Even

though excessive pricing has so far not been an enforcement priority and can be difficult to establish, the recent developments in the pharmaceutical industry illustrate that competition authorities are less reluctant than before to take up these cases.

III. Consumers as the benchmark for assessing anticompetitive effects

Beyond being part of the scope of protection, consumers also play a role in competition cases by forming the benchmark against which anticompetitive effects are assessed. In this regard, a key question is what range of consumers should be considered as the basis for this analysis. In the context of a system for the exchange of credit information between financial institutions, the Court of Justice noted in *Asnef-Equifax* that a restriction of competition can be exempted under Article 101(3) TFEU if it creates a benefit that positively impacts the consumers in the relevant markets overall. [*27*] As such, it is not required that every single consumer derives a benefit. This implies that subsidization among consumer groups is possible. For instance, if the higher prices imposed on some consumers are outweighed by lower prices for other consumers, the exemption of Article 101(3) TFEU is still applicable because the overall effect on consumers in the relevant markets is favourable. [*28*]

The Court of Justice further interpreted the range of consumers to be considered for the purposes of applying the exemption of Article 101(3) TFEU in *MasterCard*. The case concerned a two-sided payment system bringing together merchants and cardholders. The European Commission had alleged that the imposition of so-called multilateral interchange fees, namely the fees a merchant's bank must pay to a cardholder's bank for each payment, in the MasterCard system restricted competition. One of the issues on appeal was how to assess the advantages flowing from the system under Article 101(3) TFEU. The Court of Justice argued that all advantages must be considered for the purposes of applying an exemption, not only the advantages in the market in which the restriction has been established but also the advantages in the market that includes the other group of consumers involved in the system. [*29*] However, where the restrictive effects are only found in one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market cannot compensate for the anticompetitive effects in the absence of any advantages in the market in which the restrictive effects occur. The Court made clear that this is particularly the case where the consumers in those markets are not substantially the same. [*30*] Because no advantages had been identified in the market of merchants, the anticompetitive effects that the multilateral exchange fees caused for merchants could not be offset by the advantages for cardholders in the connected market. [*31*] As a result, subsidization across the two consumer groups of a two-sided system is possible only when at least some benefits can also be identified in the market where the anticompetitive effects occur.

Yet another issue relating to the range of consumers being considered for assessing anticompetitive effects has come up in the competition policy discussions on sustainability, namely whether benefits to society overall should be taken into account in the context of Article 101(3) TFEU. In a speech, Vice-President Vestager confirmed that sustainability benefits helping society as a whole are welcome. However, she also signaled that the burden of such societal benefits is borne by a limited group of consumers, namely those who buy products whose price has increased due to agreements made for instance for cutting those products' carbon emissions. In her view, such agreements should not go against a fundamental principle behind the competition rules according to which restrictions of competition for a particular product can only be justified if the affected consumers of that product are not worse off on balance. For this reason, Vice-President Vestager argued that sustainability agreements 'should only be legal if the consumers of the product get a fair share of the benefits they produce – a share that outweighs the extra price that they pay'. [*32*]

The Dutch competition authority has taken less a strict approach in its draft sustainability guidelines by allowing consideration of benefits for others beyond the consumers of the product in question in the case of environmental-damage agreements that help comply with an international or national standard. The Dutch competition authority defines environmental-damage agreements as agreements that reduce negative externalities and promote a more efficient use of natural resources. In the view of the Dutch competition authority, consumers of the affected products do not need to be compensated in full in the case of environmental-damage agreements because they enjoy the same benefits as the rest of society and their demand may in fact create the problem for which societal solutions need to be found. [***33***] In its Staff Discussion Paper on Sustainability and Competition Law, the Greek competition authority argues that the European Commission and the EU Courts have already considered so-called out-of-market efficiencies in certain cases [***34***] but that there is also a need for some limiting principle to control the expansion of the assessment under Article 101(3) TFEU. [***35***] In this regard, the Greek competition authority expressed the view that the group of customers affected by the restriction and benefiting from the efficiency gains should at least overlap and that sufficient benefits should be 'passed on to the broader sociological category of consumers so as to compensate, overall, for the negative effects of the restrictive agreement'. [***36***] Despite these policy developments at the national level, economists have pointed at evidence showing that more, not less competition stimulates sustainability efforts and at the risk that a wider interpretation of Article 101(3) TFEU can result into 'cartel greenwashing' to the detriment of competition and the environment. [***37***] As a result, there is no consensus on whether it is desirable to consider efficiencies for other consumers beyond those in the relevant market of the affected product.

While there are openings to expand the extent to which anticompetitive effects can be compensated across groups of consumers in the context of Article 101 TFEU, a more restrictive approach seems to develop in the areas of Article 102 TFEU and merger review. For instance, the Court of Justice already suggested in *Merci* that it can be abusive for a dominant firm to impose price increases on certain consumers to offset price reductions provided to other consumers. [***38***] Price discrimination and personalized pricing may occur more often with the advance of big data analytics, giving rise to the question whether this can be a problematic practice under Article 102 TFEU when implemented by dominant firms. [***39***] In the context of the role of gender in competition policy, the OECD brought up the issue of whether merger and abuse investigations should include an assessment of the impact of a concentration or commercial behaviour on the female welfare, rather than on the consumer welfare as a whole. [***40***] This is motivated by the fact that women often pay higher prices for similar products than men, which is a phenomenon referred to as the 'pink tax'. [***41***] One way of making such effects visible is by defining narrower relevant markets in cases where consumers can be segmented into different groups. [***42***] This possibility is already recognized by the European Commission in its 1997 Notice on Market Definition, acknowledging that 'a narrower, distinct market' may be defined when a distinct group of customers 'could be subject to price discrimination'. [***43***] As such, there is a basis for narrowing down an assessment of anticompetitive effects on a particular group of vulnerable consumers in future competition cases.

IV. Conclusion

This overview of developments, despite being inevitably incomplete, illustrates how the role of consumer protection remains an evolving area of attention in competition law. There is no full alignment of approaches across the different branches of competition law and across the different fields considered here. The impact of consumer interests on the outcome of competition cases remains subject to the individual priorities and choices of competition authorities and courts. The selected developments in the areas of sustainability, pharmaceuticals, finance and gender do point at a larger rather than a smaller role for consumers as the object of protection in

competition law. There is, however, no agreement on the proper range of consumers to be considered when assessing anticompetitive effects under Articles 101 and 102 TFEU. Future policy- and decision-making will undoubtedly further delve into this issue.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] Case C-8/08 *T-Mobile* ECLI:EU:C:2009:343, par. 38. See ***José Rivas***, *The EU Court of Justice clarifies the notion of concerted practice and holds that a single meeting amongst competitors where they exchanged sensitive information can be caught by EU antitrust rules (T-Mobile Netherlands), 4 June 2009, e-Competitions June 2009, Art. N° 35319.*

[2] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline*, ECLI:EU:C:2009:610, par. 63. See ***Anne Wachsmann, Christopher Bellamy QC, Olivier D'Ormesson, Robert Gavin, Jeffrey Schmidt, Gerwin Van Gerven***, *The EU Court of Justice confirms that the Commission must assess whether an agreement to limit parallel trade in medicines has pro-competitive benefits (GlaxoSmithKline), 6 October 2009, e-Competitions October 2009, Art. N° 41281* and ***Frances M. Murphy, Tom Bainbridge***, *The EU Court of Justice reverses the Commission decision regarding the legality of dual pricing arrangements between leading pharmaceutical undertaking and Spanish wholesalers (GlaxoSmithKline), 6 October 2009, e-Competitions October 2009, Art. N° 33766.*

[3] Case C-307/18 *UK Generics*, ECLI:EU:C:2020:52, par. 157. See ***Sandrine Mathieu, Amélie Lamarcq***, *The EU Court of Justice clarifies the conditions under which pay-for-delay agreements preventing generic versions of a patented medicine from entering the market or delaying such entry may constitute a restriction of competition 'by object' or 'by effect' as well as an abuse of dominant position (Generics - UK / GlaxoSmithKline / Actavis / Xellia Pharmaceuticals / Merck / Alpharma), 30 January 2020, e-Competitions January 2020, Art. N° 9465*, ***Kyriakos Fountoukakos, Dafni Katrana, Ruth Allen***, *The EU Court of Justice clarifies the criteria for the pay-for-delay agreements in the pharmaceutical sector (Generics - UK / GlaxoSmithKline / Actavis / Xellia Pharmaceuticals / Merck / Alpharma), 30 January 2020, e-Competitions January 2020, Art. N° 93498* and ***Donald Slater***, *The EU Court of Justice clarifies the conditions for a pay-for-delay agreement to be qualified as a restriction of competition by object (Generics - UK / GlaxoSmithKline / Actavis / Xellia Pharmaceuticals / Merck / Alpharma), 30 January 2020, e-Competitions January 2020, Art. N° 95834.*

[4] Case C-52/09 *TeliaSonera*, ECLI:EU:C:2011:83, par. 24. See ***European Competition Network Brief***, *The Swedish Competition Authority welcomes the EU Court of Justice preliminary ruling on 'margin squeeze' as a stand-alone antitrust abuse in the telecom sector (TeliaSonera), 17 February 2011, e-Competitions February 2011, Art. N° 42826.*

[5] Case AT.40178 *Car Emissions*, C(2021) 4955 final, 8 July 2021. See *e.g.* ***Michele Giannino***, *The EU Commission finds that three German car manufacturers colluded by deliberately limiting competition on innovation in greener technologies for diesel vehicles (BMW /*

Daimler / VW), 8 July 2021, e-Competitions July 2021, Art. N° 104211 and ***Lena Hornkohl, Anna Jorna**, The EU Commission imposes a first-ever fine for collusion relating solely to technical development on three car manufacturers in the area of emission cleaning (BMW / Daimler / VW), 8 July 2021, e-Competitions July 2021, Art. N° 103282.*

[***6***] Ibid, par. 119.

[***7***] Case C-8/08 *T-Mobile* ECLI:EU:C:2009:343, par. 39. See ***José Rivas**, The EU Court of Justice clarifies the notion of concerted practice and holds that a single meeting amongst competitors where they exchanged sensitive information can be caught by EU antitrust rules (T-Mobile Netherlands), 4 June 2009, e-Competitions June 2009, Art. N° 35319.*

[***8***] Case AT.40178 *Car Emissions*, C(2021) 4955 final, 8 July 2021, par. 7, 125, 139 and 160. See *e.g.* ***Michele Giannino**, The EU Commission finds that three German car manufacturers colluded by deliberately limiting competition on innovation in greener technologies for diesel vehicles (BMW / Daimler / VW), 8 July 2021, e-Competitions July 2021, Art. N° 104211* and ***Lena Hornkohl, Anna Jorna**, The EU Commission imposes a first-ever fine for collusion relating solely to technical development on three car manufacturers in the area of emission cleaning (BMW / Daimler / VW), 8 July 2021, e-Competitions July 2021, Art. N° 103282.*

[***9***] Statement by Executive Vice-President Vestager on the Commission decision to fine car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars, 8 July 2021, available at *https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3583*: 'They knew that they had the technical possibility to clean better than required by law and compete on this important parameter relevant for consumers. […] Companies must not restrict their competition on performing better than what is required by law and they should continue to compete to the benefit of the consumers'.

[***10***] Ibid.

[***11***] See the public consultation at *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13058-Revision-of-the-EU-competition-rules-on-horizontal-agreements/public-consultation_en*. See ***Kyriakos Fountoukakos, Daniel Vowden, Kristien Geeurickx, Marcel Nuys, Florian Huerkamp, Susan Black**, The EU Commission invites comments on its draft revised rules on horizontal cooperation agreements, 1 March 2022, e-Competitions March 2022 - II, Art. N° 105651* and ***Strati Sakellariou-Witt, Tilman Kuhn, Peter Citron**, The EU Commission publishes for consultation two draft revised horizontal block exemption regulations on research & development and specialisation agreements, as well as draft revised horizontal cooperation guidelines, 1 March 2022, e-Competitions Preview, Art. N° 105841.*

[***12***] Netherlands Authority for Consumers and Markets, Second Draft Guidelines Sustainability Agreements: Opportunities within competition law, 26 January 2021, available at *https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf*; Hellenic Competition Commission, Draft Staff Discussion Paper on Sustainability Issues and Competition Law, September 2020, available at *https://www.epant.gr/en/enimerosi/competition-law-sustainability.html*.

[***13***] Case AT.40394 *Aspen*, 10 February 2021, C(2021) 724 final, par. 102-105. See *Marie Cartapanis, Excessive pricing: The European Commission accepts commitments of a company to reduce prices in cancer drug sector (Aspen), 10 February 2021, Concurrences N° 2-2021, Art. N°*

100523, pp. 90-92 and ***European Commission***, *The EU Commission accepts commitments made by a pharmaceutical company to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns (Aspen), 10 February 2021, e-Competitions February 2021, Art. N° 99249.*

[***14***] Ibid, par. 15.

[***15***] Ibid, par. 176.

[***16***] Ibid, par. 87-89 and 187-189.

[***17***] Ibid, par. 90-93.

[***18***] Ibid, par. 21, 92, 93, 193, and 214.

[***19***] Press release Italian Autorità Garante della Concorrenza e del Mercato, 'A480 - Price increases for cancer drugs up to 1500%: the ICA imposes a 5 million Euro fine on the multinational Aspen', 14 October 2016, available at *https://en.agcm.it/en/media/detail?id=1c53b769-446d-4e36-bfed-49e2f7454e03*. In July 2017, the Spanish competition authority closed its case against Aspen after the European Commissioned opened an investigation. See decision of the Spanish Comisión Nacional de los Mercados y la Competencia, 20 July 2017, available at *https://www.cnmc.es/en/node/357734*.

[***20***] Press release Danish Competition and Consumer Authority, 'CD Pharma has abused its dominant position by increasing their price by 2,000 percent', 31 January 2018, available at *https://www.en.kfst.dk/nyheder/kfst/english/decisions/2018-cd-pharma-has-abused-its-dominant-position-by-increasing-their-price-by-2-000-percent/*. See ***Danish Competition Authority***, *The Danish Competition Authority fines a pharmaceutical company for abuse of dominance by charging unfair prices (CD Pharma), 31 January 2018, e-Competitions January 2018, Art. N° 86544.*

[***21***] Summary of decision on abuse of dominant position by Leadiant, ACM/20/041239, 1 July 2021, par. 7-9, available at *https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-leadiant.pdf*.

[***22***] Decision of the UK Competition & Markets Authority, Case CE/9742-13 Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, 7 December 2016, available at *https://assets.publishing.service.gov.uk/media/594240cfe5274a5e4e00024e/phenytoin-full-non-confidential-decision.pdf*. See ***UK Competition Authority***, *The UK Competition Authority fines two pharmaceutical companies for charging excessive prices concerning an anti-epilepsy drug (Pfizer / Flynn), 7 December 2016, e-Competitions December 2016, Art. N° 82459* and ***Nathdwarawala Shachi, Ajit Kainth***, *The UK Competition Authority publishes full decision on excessive pricing in the pharmaceutical sector and focuses on intention and evidence (Pfizer / Flynn), 7 December 2016, e-Competitions December 2016, Art. N° 84760.*

[***23***] UK Competition Appeal Tribunal, 1275/1/12/17 Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v Competition and Markets Authority, 1276/1/12/17 Pfizer Inc. and Pfizer Limited v Competition and Markets Authority [2018] CAT 11, 7 June 2018, available at *https://www.catribunal.org.uk/judgments/127511217-127611217-flynn-pharma-ltd-and-flynn-pharma-holdings-pfizer-inc-and-pfizer-0*. See e.g. ***James Killick, Assimakis Komninos***, *The UK Competition Appeal Tribunal announces its provisional judgment in an appeal against the*

Competition Authority's infringement decision in an excessive price case (Pfizer / Flynn), 7 June 2018, e-Competitions June 2018, Art. N° 87652, ***Sarah Jensen****, The UK Competition Appeal Tribunal partially sets aside the Competition Authority's decision that fined two undertakings nearly £90 million for charging unfairly high and excessive prices for anti-epilepsy drugs (Pfizer / Flynn), 7 June 2018, e-Competitions June 2018, Art. N° 94226* and ***Ian Giles, Clio Angeli****, The UK Competition Appeal Tribunal partly annuls the Competition Authority's decision that pharmaceutical companies abused their dominant position by setting excessive and unfair prices for an epilepsy drug (Pfizer / Flynn), 7 June 2018, e-Competitions June 2018, Art. N° 90012.*

[***24***] UK Court of Appeal, Competition and Markets Authority v Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd, 10 March 2020 [2020] EWCA Civ 339, available at *https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/339.html&query=(pharma)+AND+(competition)*. See e.g.***UK Competition Authority****, The UK Competition Authority welcomes the England and Wales Court of Appeal's judgment, calling it an important step forward in clarifying the legal test for excessive and unfair pricing (Pfizer / Flynn), 10 March 2020, e-Competitions Judicial review, Art. N° 97329,* ***Ingrid Vandenborre, Caroline Janssens****, The UK Court of Appeal of England and Wales imposes agency discretion in the methodology to establish the unfairness of prices, thereby increasing the burden of proof on companies to avoid a finding of excessive pricing (Pfizer / Flynn), 10 March 2020, e-Competitions March 2020, Art. N° 94086* and ***Matthew Hunt, Stephen Smith****, The UK Court of Appeal of England and Wales considers the test for excessive pricing after an undertaking had charged unfairly high prices for phenytoin sodium capsules (Pfizer / Flynn), 10 March 2020, e-Competitions March 2020, Art. N° 93661.*

[***25***] Press release UK Competition & Markets Authority, 'CMA accuses pharma firms of illegal pricing', 5 August 2021, available at *https://www.gov.uk/government/news/cma-accuses-pharma-firms-of-illegal-pricing*. See ***UK Competition Authority****, The UK Competition Authority finds that 2 pharmaceutical companies abused their dominant positions to overcharge the national health service for vital anti-epilepsy drugs (Pfizer / Flynn), 5 August 2021, e-Competitions July 2021, Art. N° 101987* and ***Axel P. Schulz, Fanny Abouzeid, Joao Lacerda****, The UK Competition Authority along with EU Member States cracks down on excessive pricing in the pharmaceutical sector (Pfizer / Flynn / Actavis), 5 August 2021, e-Competitions August 2021, Art. N° 104690.*

[***26***] Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, March 2020, available at *https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf*. See also the discussion in ***George S. Cary, Maurits J. F. M. Dolmans, Bruce Hoffman, Thomas Graf, Leah Brannon, Richard Pepper, Henry Mostyn, Alexis R. B. Lazda, Savannah Haynes, Kristi Georgieva, Jan Przerwa****, Exploitative abuses, price gouging & COVID-19: The cases pursued by EU and national competition authorities, 30 April 2020, e-Competitions Competition Law & Covid-19, Art. N° 94392.*

[***27***] Case C-238/05 *Asnef-Equifax*, ECLI:EU:C:2006:734, par. 70.

[***28***] Ibid, par. 72.

[***29***] Case C-382/12 P *MasterCard*, ECLI:EU:C:2014:2201, par. 237. See ***Giovanni Scoccini****, The EU Court of Justice confirms a ruling of the General Court on multilateral interchange fees (MasterCard), 11 September 2014, e-Competitions September 2014, Art. N° 70049* and ***Irene Fraile****, The EU Court of Justice dismisses the final appeal in a case regarding inter-bank card fees (MasterCard), 11 September 2014, e-Competitions September 2014, Art. N° 68929.*

[30] Ibid, par. 242.

[31] Ibid, par. 243.

[32] Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG Competition, 'Competition policy in support of the Green Deal', 10 September 2021, available at *https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en*.

[33] Netherlands Authority for Consumers and Markets, Second Draft Guidelines Sustainability Agreements: Opportunities within competition law, 26 January 2021, par. 45-48.

[34] See the references to Case AT.39595 *Star Alliance*, C(2013) 2836 final, 23 May 2013 and Case T-86/95 *Compagnie générale maritime and Others v Commission*, ECLI:EU:T:2002:50 in Hellenic Competition Commission, Draft Staff Discussion Paper on Sustainability Issues and Competition Law, September 2020, par. 73. For a discussion of the Commission's approach as to sustainability in the context of Article 101(3) TFEU, see G. Monti, 'Four Options for a Greener Competition Law', Journal of European Competition Law & Practice, vol. 11 no. 3/4, p. 125-126.

[35] Hellenic Competition Commission, Draft Staff Discussion Paper on Sustainability Issues and Competition Law, September 2020, par. 70-73.

[36] Ibid, par. 76-77.

[37] See for instance: M.P. Schinkel & L. Treuren, 'Green antitrust: Friendly fire in the fight against climate change', in: S. Holmes, D. Middelschulte & M. Snoep (eds.), Competition Law, Climate Change & Environmental Sustainability, Concurrences 2021.

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[39] For a discussion, see M. Botta & K. Wiedemann, 'To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance', European Journal of Law and Economics 2019.

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[43] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997, C 372/5, par. 43.