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Unmasking excessive pricing: evolution of EU law on excessive pricing from United Brands to Aspen

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ABSTRACT

It has been argued that the test for excessive pricing set out in *United Brands* is vague in a number of aspects and subsequent judgments of the EU courts have not provided much clarity on the matter. This article examines the evolution of the EU case law on excessive pricing for the last four decades including the most recent excessive pricing case investigated by the European Commission in the *Aspen* case. In particular, the article discusses the important question of what constitutes an excessive price that is "unfair in itself" and the question of how economic value is to be assessed. The article concludes that, although the abuse of unfair excessive pricing is likely to remain a difficult area for regulators to handle, the Commission's commitment decision in *Aspen*, despite the fact that it cannot change or replace judicial decisions, provides very important clarification of the legal test for excessive pricing.

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KEYWORDS Competition law; abuse of dominance; excessive pricing; unfairness

1. Introduction

It is generally accepted that the legal basis to intervene against excessive pricing can be found in Article 102 (a) of the Treaty on the Functioning of the European Union (TFEU), which states that abuse may consist in "directly or indirectly imposing unfair purchase or selling prices or other trading conditions".[1] The provision does not refer explicitly to excessive prices but it is settled case law that it can be used to prevent a dominant company imposing high prices if they are unfair.[2] Excessive

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[1]Treaty on the Functioning of the European Union art. 102, Dec. 13, 2007, 2010 O.J. (C 83).

[2]See e.g. Case 26/75 *General Motors v Commission* [1975] ECR 1367; Case 27/76 *United Brands v Commission* [1978] ECR 207 (hereinafter *United Brands*); Case 30/87 *Corinne Bodson v Pompes Funebres* [1998] ECR 2479; Case 110/*99 Lucazeau v SACEM* [1989] ECR 2811 (hereinafter *SAGEM*); see also Commission

This article has been corrected with minor changes. These changes do not impact the academic content of the article.

pricing abuses have been examined in a limited number of cases over the last four decades. Due to the fact that the evidentiary burden of proof is really high and the number of cases considerably low, this form of abuse has fallen outside of the scope of the European Commission's priorities.[3]

Despite this, the legal treatment of excessive pricing has been the centre of intense academic debate in legal and economic scholarship for decades. The vast majority of the academic literature analysing excessive pricing is focused on the economic rationale underpinning intervention in cases of excessive pricing or, more precisely, on the circumstances under which the intervention is appropriate.[4] Lawyers, in turn, have focused on the analysis of the legal approach of the Commission and the EU Courts, criticizing the inconsistent choice of benchmark for the establishment of excessive pricing and the risk that each of these benchmarks might create in practice.[5] The prevailing view is that intervention should be limited to exceptional circumstances related to the market position of the company, the existence of insurmountable barriers to entry leading to the risk that the high prices may prevent the emergence of new goods and services in adjacent markets, the lack of a sectoral regulator competent to regulate the prices, limited innovation and investment, and lack of appropriate structural remedies.[6] According to the non-interventionist approach, if the market can self-correct, the intervention will lead to discouraging firms' incentive to invest and innovate, known as type I errors, which can be more harmful to consumer welfare than intervention.[7] Thus, enforcement should be limited only

Decisions: COMP/C-1/36.915 *British Post office v Deutche Post AG* [2001] OJ L331/40 (hereinafter *Deutche Post*) and COMP/A 36.568/D3 *Scandlines Sverige AB v Port of Helsingborg* [2004] (hereinafter *Port of Helsingborg*).

[3]The Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Art. 102 TFEU] to abusive exclusionary conduct by dominant undertakings OJ C 45/7 does not deal with exploitative abuses. In para 7, it is mentioned explicitly that exploitative abuses are not on Commission's enforcement priorities.

[4]M Motta and A de Streel, 'Exploitative and Exclusionary Excessive Prices in EU Law' in CD Ehlermann and I Atanasiu (eds) *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (Hart Publishing 2006); A Fletcher and A Jardine, 'Towards an Appropriate Policy for Excessive Pricing' in CD Ehlermann and M Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Bloomsbury Publishing 2008); L Röller, 'Exploitative Abuses' in CD Ehlermann and M Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Bloomsbury Publishing 2008).

[5]P Akman, *The Concept of Abuse in EU Competition Law: Law and Economics Approach* (Bloomsbury Publishing 2012) 196.

[6]ibid. See also D Evans and J Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' 1(1) (2005) Journal of Competition Law and Economics 97 and D Geradin, 'The Necessary Limits to the Control of "Excessive" Prices by Competition Authorities – a View from Europe' (2007) Tilburg University Legal Studies Working Paper and Pedro Caro de Sousa, 'Excessive Pricing in Pharmaceutical Markets – as the First Wave Ebbs' 41 (9) (2020) European Competition Law Review.

[7]E Paulis, 'Article 82 EC and Exploitative Conduct' in Ehlermann and Marquis (Eds), *European Competition Law Annual* 2007, A Reformed Approach to Article 82 EC (Oxford/Portland, 2008) 517. For a contrasting

to cases in which a dominant position has been acquired through anticompetitive conduct or exclusive rights, and imposing a behavioural remedy can correct the market failure. Therefore, enforcement authorities should be reluctant to intervene in markets in which the only remedy is to regulate the price because price regulation can be distortive for competition, investment, and R&D and can inhibit entry/expansion by competing companies.[8]

The limited number of excessive pricing cases that have been enforced by the EU Commission and subsequently reviewed by the EU Courts have been criticized in the academic literature for the inconsistent choice of benchmark for the establishment of excessive pricing abuse, which is essential for ensuring that legal decisions are consistent, fair, and just. Moreover, the lack of clear methodology or set of rules that are used to establish when prices are unfair and as such abusive might lead to a risk of enforcement errors, which ultimately would frustrate companies' legitimate expectations.[9] The lack of clear rules is problematic because, it creates legal uncertainty, making the dominant firms unable to evaluate in advance whether their pricing is likely to be found abusive.[10]

Despite the difficulties and uncertainties outlined above, excessive pricing abuses have fallen into the spotlight again due to the increased public debate about drug prices and its impact on healthcare costs, and subsequent investigations by many national competition authorities of unfair pricing practices in the pharmaceutical sector.[11]

The most recent excessive price investigation conducted by EU Commission was against Aspen Pharma in which, the EU Commission adopted its first commitment decision in excessive pricing case in the pharmaceutical sector.[12] The decision was welcomed by many as it

point of view see A Ezrachi and D Gilo, 'Are Excessive Prices Self-Correcting? 5(2) (2009) Journal of Competition Law and Economics 249.

[8]Fletcher and Jardine (n 4); See also G Werden, 'Exploitative Abuse of a Dominant Position: A Bad Idea that Now Should be Abandoned' 17(3) (2021) European Competition Journal 682.

[9]Akman (n 5) 196.

[10]P Akman and L Garrod, 'When Are Excessive Prices Unfair?', CCP Working Paper 10-4.

[11]The CMA opens six new investigations into anticompetitive drug pricing <https://pharmaceutical-journal.com/article/news/cma-opens-six-new-investigations-into-anticompetitive-drug-pricing>; CD Pharma Danish NCA (Konkurrence- og Forbrugerstyrelsen) decision of 31 January 2018; Danish Competition Authority press release – CD Pharma has abused its dominant position by increasing their price by 2000 percent <www.en.kfst.dk/nyheder/kfst/english/decisions/2018-cd-pharma-has-abused-its-dominant-position-by-increasing-their-price-by-2-000-percent/> accessed 10 March 2021; Aspen Italian NCA (Case A480, Autorità Garante della Concorrenza e del Mercato) decision of 29 September 2016.

[12]Commission Decision of 10 February 2021 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement (Case AT.40394 (Aspen)); Other commitment decisions adopted by the EU Commission in excessive/unfair cases includes the Commitment Decision of 9 December 2009, relating to a proceeding under Article 102

resulted in immediate reductions of the prices of certain medicines by more than 70%. The decision was also considered by some as providing the long-awaited answer to a number of questions related to the framework for assessing excessive pricing.[13] However, the fact that the commitment decisions state only the preliminary findings by the Commission without the need to prove an abuse of dominant position or an imposition of a fine can be seen as a missed opportunity for the Commission to clarify the legal test for excessive pricing, bearing in mind that this was the first excessive price investigation for a very long time and the very first in the pharmaceutical sector.[14]

This paper will review the evolution of the legal standard developed by the EU Courts for excessive pricing through the analysis of the leading cases for the last 40 years. The intention is to understand whether the case law provides clarification of the legal framework, contributing to the academic debate outlined above The clarification of the legal framework is of utmost importance not only to inform competition authorities how to minimize the risk of errors but also to provide legal certainty, protect legitimate expectations, and ensure respect for the right of defence for the companies.

This paper has been divided into four parts, including this introductory section. Section 2 explores the most important EU case law on excessive pricing for the last four decades including the Aspen commitment decision. The description of the facts of each of the cases is necessary to understand whether the Court/Commission's approach reflects the economic rationale that substantiates the intervention mentioned above. Section 3 examines the development of the legal framework described in the previous sections and provides critical discussion. Section 4 concludes with how the excessive character of dominant companies' pricing should be assessed in light of the analysis in the previous sections.

of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/38.636, Rambus) and the Commission Decision of 24 May 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement (Commission Decision [2018] OJ C 258/6 Case AT.39816, Upstream Gas Supplies in Central and Eastern Europe (Gazprom)).

[13] H Mische, 'The EU Aspen Decision: The European Commission's First Excessive Pricing Decision in the Pharmaceutical Market' in *EU Competition Law and Pharmaceuticals* (Edward Elgar Publishing 2022) 171.

[14] A Skarpa, 'The European Commission Struck Down on Pharma Pricing. Shook Aspen – and the Whole Forest?' <www.linklaters.com/en/insights/blogs/linkingcompetition/2021/march/the-european-commission-struck-down-on-pharma-pricing-shook-aspen-and-the-whole-forest > accessed 13 March 2021.

2. Review of the EU case law

2.1. Early case law of excessive pricing

2.1.1. General Motors

The European Commission dealt with exploitative abuses for the first time in the General Motors decision in 1974.[15] The Commission found that General Motors Continental NV (GMC) had a dominant position with regard to the inspection of the Opel vehicles entering Belgium and the issue of certificates of conformity (a service delegated to GM by the Belgian Government).[16] The Commission found that GMC charged the parallel importers of Opel vehicles with excessive prices for the issue of certificates of conformity based on the following facts. Firstly, the price was doubled and GMC incorporated not only cost elements relating to the conformity inspections but also elements relating to non-recurring expenditure on type approval.[17] Secondly, the price was based exclusively on expenditure relating to General Motors American models, although the cost of type approving an Opel vehicle was lower.[18] Thirdly, the other Belgian firms acting as authorized agents of other manufacturers charged fees twice as low as those charged by GMC for the same services.[19] From the above, the Commission concluded that there was an extraordinary disparity between actual costs incurred and prices actually charged. On appeal, the Court of Justice confirmed that an imposition of a price, which is excessive in relation to the economic value of the service provided, might be considered "unfair", and as such could constitute an abuse of the dominant position in the sense of subparagraph (a) of the second paragraph of Art. 86 [now Art.102 TFEU].[20] However, the Court annulled the Commission's decision due to the existence of objective justifications, which were not considered by the Commission, such as the fact that GMC very quickly reduced prices in line with the real cost of the operation and refunded the excess to the parties concerned before the Commission's investigation.[21]

2.1.2. United Brands

In the *United Brands* decision, the European Commission reached the conclusion that the price of bananas in Germany, Denmark, the

[15]General Motors (Case IV/28.851) Commission Decision [1974] OJ L 29/14.
[16]ibid, para 7.
[17]ibid, para 8.
[18]ibid.
[19]ibid.
[20]Case 26/75 *General Motors Continental NV v Commission* [1975] ECR I-1367, para 12.
[21]ibid, paras 19–22.

Netherlands, and Belgium/Luxembourg was too high, comparing it to the price of bananas from the same supplier in Ireland sometimes by as much as 100%, and the price of bananas from other brands.[22] The Commission concluded that if the supplier can sell the same product at a lower price in one country with profit, then it follows that charging much higher price for the same product in another country is unfair. The Commission recommended the price be dropped by 15% – to which the parties replied that the market was so volatile that it was impossible to comply with the commission's order.

In subsequent judicial review, the Court of Justice annulled the Commission's decision on the excessive pricing allegations for insufficient evidence. On this point, the Court clarified that a price is excessive and could constitute an abuse of dominant position when "it has no reasonable relation to the economic value of the product supplied".[23] The Court clarified that this excess could be determined objectively by "making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin".[24] Further, the Court considered that the Commission should have established whether (1) "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 (2) a price has been imposed which is either unfair in itself or when compared to competing products".[25] The Court also considered that other ways for determining whether the price is excessive may be devised depending on the case.[26] In addition, the Court criticized the Commission in that it had not taken into account evidence pointing out that the prices charged in Ireland had produced a loss[27] and that the prices of bananas have been stable for nearly 20 years. Finally, the Court considered that the price of Chiquita bananas compared to those of its principal competitors was 7% higher, which according to the Court could not automatically be regarded as excessive and consequently unfair.[28]

2.1.3. British Leyland

This is the first case in which the Court of Justice confirmed that a dominant company – British Leyland – abused its dominant position by

[22]Case IV/26.699 Chiquita, Commission Decision of 17 December 1975, OJ L 95 of 9 April 1976.
[23]*United Brands*, para 250.
[24]ibid, para 251.
[25]ibid, para 252.
[26]ibid, para 253.
[27]ibid, para 261.
[28]ibid, para 266.

charging excessive pricing.[29] The Court noted that British Leyland had an "administrative monopoly" in the relevant market with regard to the issue of certificates of conformity, which placed the dealers in a position of economic dependence.[30] It then referred to the *General Motors* judgment and held that "an undertaking abuses its dominant position where it has an administrative monopoly and charges for its services fees which are disproportionate to the economic value of the service provided".[31]

The Court considered a comparison between the current price of the dominant company and the price it charged in the past. It found an increase of the fee for left-hand-drive vehicles during the relevant period from UKL 25 to 150 for dealers and UKL 100 for private individuals, whilst it left that amount unchanged for right-hand-drive vehicles. The price increase was not justified by cost increases – and, as such, was considered disproportionate to the economic value of the service, which according to the Court constituted an abuse of dominant position. Instead the price increased "solely with a view to making the re-importation of left-hand-drive vehicles less attractive".[32]

2.1.4. SACEM

In a judgment referred to the Court of Justice for a preliminary ruling, the Court was asked to clarify what framework should be applied in order to establish whether the royalties imposed on discotheque operators by a national society that manages copyrights in musical works in France (SACEM) were unfair and, as such, constituted an abuse of a dominant position.

The Court focused on the comparison of the prices of the dominant company with the prices of similar firms active in neighbouring countries and concluded that, should the fees charged by SACEM be considerably higher than those charged in other Member States, this would be an indication that the price was excessive. Should this occur, the burden of proof would shift to the dominant company, which would have to justify the difference between the prices in the Member State concerned and the situation prevailing in all other Member States.[33] In its judgment, the Court did not consider whether the costs actually incurred, and the price actually charged were excessive. However, Advocate General

[29]Case 226/84 *British Leyland plc v Commission* [1986] ECR 3263 (hereinafter *British Leyland*).
[30]*British Leyland*, para 9.
[31]ibid, para 27.
[32]ibid, para 29.
[33]*SACEM*, para 25.

Jacobs in his opinion pointed out that the application of this test was inappropriate in the present context because "it is impossible to determine the cost of the creation of a work of the imagination such as a musical work" and not that the test is not appropriate in general.[34] He also observed that in the context of the case, a comparison between the levels of the royalties charged by SACEM with that of competitors is also impossible because there are no competitors.

The Court further observed that the higher prices cannot be justified with higher operating expenses because "it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties".[35] Thus, if the cost of administration were higher compared to the costs of similar firms active in neighbouring countries, prices still might be excessive, even if profits were not.[36]

2.1.5. Deutsche Post

The European Commission found that Deutsche Post (DP), a state-owned company, obliged by law to provide basic, uniform postal services all over Germany was dominant in the German market for the forwarding and delivery of incoming cross-border letter mail and abused its dominant position by intercepting, surcharging and delaying incoming international mail.[37] The Commission found that DP abused its dominant position in the German market on the basis of four separate legal arguments. DP (1) discriminated between different customers and (2) refused to supply its delivery service unless an unjustified surcharge was paid. In addition, (3) the price charged for the service was excessive and that (4) limited the development of the German market for the delivery of international mail and of the UK market for international mail bound for Germany. These findings led to the observation that DP's behaviour was more related to limiting the entry of competitors rather than merely exploiting its customers by charging excessive prices. However, for the purposes of this paper, the European Commission's assessment of whether the prices were excessive will be discussed.

[34]Case 395/87 *Ministère public v Tournier* and Joined cases 110/88, 241/88 and 242/88 *Lacazeau v SACEM* [1989] ECR 2823, opinion of AG Jacobs, para 53.
[35]*SACEM*, para 29.
[36]M Gal, 'Abuse of Dominance – Exploitative Abuses' in I Lianos and D Geradin (eds) *Handbook on European Competition Law* (Edward Elgar 2013) Chapter 9, 385, 401.
[37]For a further discussion on Deutsche Post's infringements of EC Competition law see D Geradin and D Henry, 'Regulatory and Competition Law Remedies in the Postal Sector' in D Geradin (ed) *Remedies in Network Industries: EC Competition Law vs. Sector Specific Regulation* (Intersentia 2004).

The European Commission considered that the fairness of a certain price may be tested by comparing this price and the economic value of the good or service provided. The Commission considered that in a market that 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.[38] However, in this case, the comparison with the prices charged by competitors was not possible due to the existence of DP's wide-ranging monopoly. In addition, a detailed cost analysis of DP's average costs for the services in question during the relevant time period was also not possible due to the lack of reliable data.[39] In particular, DP had not set a "transparent, internal cost accounting system, and no reliable data exists for the period of time relevant to this case".[40] For that reason, the Commission had to use an alternative benchmark.[41] In the absence of reliable cost data, the Commission's assessment was based on comparing DP's prices for a cross-border tariff with its domestic tariffs. The Commission found that the price for incoming cross-border mail items was 25% above the average estimated cost.[42] Based on that, the Commission concluded that the tariff charged by DP had no sufficient or reasonable relationship to real costs or to the real value of the service provided and, as such, was regarded as excessive.[43]

2.1.6. Port of Helsingborg

In the *Port of Helsingborg*, the Commission assessed whether the port abused with its dominant position by charging excessive prices. The Commission followed the two-limb test developed by the Court in the *United Brands* judgment.[44] This was the first case in which the Commission assessed the difference between the costs actually incurred and the price actually charged as a first step of the assessment for excessiveness and found out that the revenues derived from the ferry operations exceeded the costs actually incurred by the port to provide these services.[45] Next, the Commission compared the profit from the ferry operations with the profit from other operations in the port and concluded

[38] *Deutsche Post* Commission Decision, para 159.
[39] ibid.
[40] ibid, para 159.
[41] The Commission took into account that Deutsche Post had undertaken a commitment to introduce a procedure enabling it to detect future infringement more easily, which lead to the imposition of a symbolic fine of €1000.
[42] *Deutsche Post* Commission Decision, para 156.
[43] ibid, para 167.
[44] *Port of Helsingborg*, para 102.
[45] ibid, para 139.

that the ferry operations generated profits whereas in general, the other operations of the port generated losses.[46] In addition, the Commission considered that the comparison between the yearly average Return on Capital Employed "ROCE" from the ferry-operations and the yearly average ROCE of the Swedish industry is not conclusive in itself, as the different industries are not comparable because some sectors are structurally more profitable than others, depending on many factors.[47] The Commission also recognized the limitation of using profitability of different ports as a benchmark because each port differs substantially from the others in terms of its mix of activities, the volume of its assets and investments, the level of its revenues and the costs of each activity.[48] It reached to the same conclusion regarding comparison with the prices charged by other ports and compared the official tariffs published by several European ports relating to their port charges vis-à-vis ferry operators.[49] The Commission considered that the services and facilities provided to each individual customer in each port were actually different from one port to the other and, as such, the port fees charged in other ports cannot be considered as a meaningful comparator.[50] Regarding the unfairness test, the Commission concluded that the evidence was not sufficient to conclude that the port fees charged were unfair when compared to the port fees charged in other ports.[51] In any event, the Commission considered that even if the profit was excessive that would not be sufficient evidence for finding abuse and, as such, an evaluation of whether the price is unfair because it has no reasonable relation to the economic value of the product is essential to be carried out.[52] The Commission considered that the economic value of the product/services must be determined not only with the cost incurred and a profit margin as a percentage of the production costs but also with regard to the particular circumstances of the case and also non-cost-related factors such as consumer preferences, which bring additional value to the service.[53] On that point, the Commission considered the features of the port under consideration, such as the fact that it was the shortest distance between Sweden and Denmark and situated very close to the road and

[46]ibid, para 122.
[47]ibid, para 154.
[48]ibid, para 155.
[49]ibid, para 203.
[50]ibid, para 202.
[51]ibid, para 207.
[52]ibid, para 158.
[53]*Port*, para 232.

rail network, which made it preferable for consumers and their willingness to pay more. In view of the above, the Commission concluded that the economic value of the services was much higher than the costs incurred[54] and, hence, the port charges were not found to be unfair in themselves.[55]

2.1.7. AKKA/LAA Latvia

This judgment was delivered on a request for a preliminary ruling from the Latvian Supreme Court in a case concerning the prices that a collecting society AKKA/LAA was charging for the public performance of musical work in commercial premises in Latvia.[56] The CJEU was asked to clarify the criteria to be applied when assessing whether a price charged by a dominant company is excessive and unfair under Article 102 TFEU. In 2013, AKKA/LAA was found to abuse its dominant position by imposing excessive prices. The collecting society had an exclusive right to issue licenses for the public performance of music in commercial premises in Latvia and, as such, it was enjoying a natural monopoly position.

The Latvian Competition Counsel (LCC) approach was to compare the rates for the use of musical works in Latvia charged by AKKA/LAA with those charged in neighbouring countries and found that the rates in Latvia were two to three times higher than those charged in Lithuania and Estonia. In addition, the LCC found that the fees, adjusted with the purchasing power parity ("PPP") index were 50–100% higher than the average level charged in approximately 20 other EU Member States, except for Romania. Accordingly, the CJEU was asked to clarify whether a comparison between the prices in Latvia and those in neighbouring marketsm and the use of the PPP index, were appropriate and sufficient when defining whether the prices were excessive and unfair.

In this context, AG Wahl produced an opinion with which he proposed that a number of approaches could be used when considering excessive pricing.[57] He suggested that excessive pricing should be measured with respect to a hypothetical benchmark price, which reflects the prices that would have been set in conditions of effective competition, and more importantly, that the benchmark price can be

[54]ibid, para 210.
[55]ibid, para 247.
[56]Case C-177/16, *Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome* (hereinafter '*AKKA/ LAA*') ECLI:EU:C:2017:689.
[57]Case C-177/16, *AKKA/ LAA*, Opinion of AG Wahl, 6 April 2017, EU:C:2017:286, para 35.

calculated through different methods. He also noted that the *United Brands* price-cost test is only one way of calculating the benchmark price. He also recognized other methods, including the assessment of the prices charged in other products or geographic markets by the dominant undertaking; the prices charged by other undertakings in the same or related markets; and the evolution of pricing over time as appropriate approaches.[58] AG Wahl further acknowledged that the choice of approach/combination of approaches should be selected in accordance with "objective, appropriate and verifiable criteria" and should depend on "the circumstances specific to each case".[59]

Following AG Wahl's opinion, the Court recognized that a number of approaches can be used when considering excessive pricing and clarified that it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis.[60] The Court confirmed that there is no minimum threshold above which a rate must be regarded as "appreciably higher", since the circumstances specific to each case are decisive in that regard.[61] The Court also agreed with AG Wahl that the difference between rates must be significant and persistent over a certain length of time in order to be regarded as "abusive".[62]However, AG Wahl's suggestion to compare the actual price with a "hypothetical" price was not endorsed by the Court.

2.1.8. Aspen

The EU Commission opened an investigation against Aspen Pharma in 2017, following significant price increases imposed by Aspen on six off-patent cancer medicines.[63] Aspen acquired the medicines from

[58]ibid, para 19.
[59]ibid, paras 42–43.
[60]ibid, para 51.
[61]*AKKA/ LAA*, para 55.
[62]ibid, para 56.
[63]And investigations by National Competition Authorities in Italy and Spain. In September 2016, the Italian Competition Authority (ICA) fined Aspen Pharma for imposing excessive prices and threatened to reduce or terminate the supply of several drugs. The ICA found that, although these drugs were off-patent, Aspen had increased prices by 300–1500% as compared with the prices previously charged by GSK, from whom Aspen bought the trademark and marketing rights in 2009. The ICA considered that the profit return on sales before the increase was well above the costs. The new price generated excess in the percentage of cost plus, ranging from 100% to almost 400%. Finally, the ICA considered that there were no competing products to be used as a benchmark and the different regulatory regimes

GlaxoSmithKline and had been outsourcing the manufacturing, commercialization and distribution to third parties. The medicines are prescription based, no substitutes for the patients using them are available, and the patent expired 50 years ago, which means that any R&D investment has already been fully recouped. Finally, Aspen implemented a strategy to achieve the price increase including a threat to de-list or withdraw the products from the market. The Commission considered that there are various ways to assess the excessiveness of an undertaking's profit and decided that the most appropriate way is (1) to compare Aspen's profit before and after the price increase and (2) to carry out a comparison of Aspen's profitability with a sample of other undertakings that sell similar products and have a profile similar to Aspen.[64] For the assessment of the profitability of the products, the Commission has identified the relevant production costs and revenues for each of the products and then calculated the profitability under two profit metrics, namely (1) gross margin and (2) Earnings Before Interest, Tax, Depreciation and Amortization ("EBITDA") margin. The Commission considered the return of 23% as a reasonable plus, and estimated that Aspen was able to generate a return, which ranged from 40–50% excess to 400–420% above cost-plus.[65] The Commission concluded that "not a single Comparator company in the entire sample of observations achieved such a high margin".[66] Further, Commission conducted a comparison between the actual prices of the products and the cost-plus level for each product individually and for the products overall at EEA level.[67] The profitability of the products at portfolio level generated excess profits of [280–300]% above the cost-plus level.[68]

For the unfairness limb, the Commission considered that the price of each of the drugs was unfair in itself due to the fact that Aspen did not offer any material improvement of the products or any justifications to reflect commercial risk-taking activity, innovation, or investment. Further, Aspen's price increases were disproportionate with costs and the magnitude of the excessiveness of Aspen's profits were very high.[69]

in the other Member States made it impossible to compare with the prices charged in the other countries. The decision was upheld on appeal on 20 February 2020 in Case No 8447/2017. The Spanish Competition Authority started an investigation on the same matter but the case was closed due to the Commission's investigation.

[64] *Aspen*, para 104.
[65] ibid, para 140.
[66] ibid, para 184.
[67] ibid, para 139.
[68] ibid, para 185.
[69] ibid, paras 177–85.

Instead, the Commission found a strategy to exploit health systems and patients. Based on that, the Commission concluded that Aspen's price was unfair "in itself" and, therefore, there were no need to consider comparison with competing products.[70] Nonetheless, the Commission considered possible comparisons with competing products and rejected the proposed ones by Aspen (potential generic and innovative price comparator products) as unsuitable. Finally, Aspen did not submit any other grounds to justify its pricing conduct.[71] On 15 April 2021, Commission published its decision, accepting commitments offered by Aspen to address concerns set out in the Commission's preliminary assessment that Aspen had been imposing excessive pricing, which resulted in price reduction by on average around 73% for the products across the EEA.[72]

3. Analysis of the evolution of the legal approach adopted by the courts and discussion

The previous section of this paper considered all major authorities in the area of excessive pricing and summarized the key legal principles arising from them. It found that the different cases use different criteria to determine excessive pricing and thus they vary from case to case, which leads to the impression that the case law of excessive pricing fails to provide clarity on the appropriate legal standard for the evaluation of excessive pricing. This section will discuss the development of the case law in order to understand the inconsistent approach taken by the courts and to clarify how the variety of benchmark comparisons should be used to reliably reach a conclusion that prices are excessive.

The first case in which the CJEU set up a framework to test excessive pricing is *United Brands*, in which, the Court specified that a price is excessive if it has no reasonable relation to the economic value of the product. The Court clarified that in order to prove that the price is excessive, the Commission should also demonstrate whether (1) the difference between the costs actually incurred and the price actually charged is excessive (excessiveness limb), and, if the answer to this question is in the affirmative, whether (2) a price has been imposed which is either unfair in itself or when compared to competing products (unfairness

[70]ibid, para 196.
[71]ibid, para 206.
[72]ibid, para 210. The Commission also accepted supply commitments, para 212.

limb).[73] Since then, this test became the leading authority for excessive pricing abuses, known as "The United Brands two-fold test".[74] The established interpretation of this test suggests that the two elements are cumulative, i.e. the assessment of excessiveness and unfairness. Further, the assessment of the unfairness limb also contains two elements, which are alternatives, i.e. prices are unfair if they are (1) unfair in themselves **or** (2) compared to competing products. The next section of the paper will analyse the assessment of excessive pricing application of the *United Brands* test in the subsequent jurisprudence in the EU.

3.1. The first limb of United Brands: excessiveness

According to the established interpretation of the *United Brands* test, the assessment of excessiveness requires an assessment of dominant company's profitability. The application of this test requires comparing the cost actually incurred and the price charged in order to determine whether the profit margin achieved by the dominant company is excessive. This would require (1) a determination of the costs actually incurred and (2) whether the profit margin can be considered excessive.[75] This test has been heavily criticized in the academic literature on the grounds that the Court failed to provide clarity on when the amount of profit margin is excessive and when the price is unfair.[76] Another set of criticism is related to the difficulties with the practical implementation of the test.[77] For example, in some industries, determination of the costs might be a very difficult if not impossible task for the following reasons. Firstly, the dominant company may produce many different products and incur costs that are common for several different products. The allocation

[73] *United Brands*, para 251.

[74] According to Wahl, 'there are different ways of interpreting the statements by the Court, but it would seem clear that the Commission interprets the statements as including a two stage test', N Wahl, 'Exploitative High Prices and European Competition Law – a Personal Reflection' in *The Pros and Cons of High Prices* (Swedish Competition Authority 2007) 60. The CJEU itself seems to have accepted this interpretation in subsequent judgments, e.g. AKKA/LAA judgment. On this point see also F Abbott, 'Prosecuting Excessive Pricing of Pharmaceuticals under Competition Law: Evolutionary Development' 24 (2) (2023) Columbia Science and Technology Law Review 173.

[75] *United Brands*, paras 251–52.

[76] Evans and Padilla (n 6); M Furse, 'Excessive Prices, Unfair Prices and Economic Value: The Law of Excessive Pricing under Article 82 EC and the Chapter II Prohibition' (2008) 4 European Competition Journal 59; A Ezrachi and D Gilo, 'Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation' (2009) 76 Antitrust Law Journal 873; D Geradin, A Farrar, and N Petit, *EU Competition Law and Economics* (OUP 2012) 272.

[77] See in general Evans and Padilla (n 6); Motta and de Steal (n 4); Geradin and others (n 76); R O'Donoghue and AJ Padilla, *The Law and Economics of Art 82 EC* Hart Publishing 2006) 604; S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2rd edn, Sweet & Maxwell 2009); D Geradin, 'The Necessary Limits to the Control' (n 6).

of these common costs might be a very difficult task since there is no consensus on which of the methods for cost allocation is superior.[78] Next, depending on the choice of the cost allocation method, the outcome may vary significantly, leading to unpredictable, lengthy, and costly litigation. Secondly, innovative industries face very high fixed costs for R&D expenditures but once the new product is invented, the marginal cost for the production of an additional unit (or granting a license to a technology) might be very low or close to zero, which should be taken into account.[79] Moreover, the dominant companies in innovative industries might face a significant sunk investment for failed projects, which also should be taken into account for the determination of the real cost incurred.[80] These observations, seem to suggest that there is no consensus among economists regarding the appropriate determination of these costs.[81] In addition, comparing the cost of production with the selling price is highly uninformative because "even a non-dominant firm is able to price above cost, and more importantly, it fails to resolve the question of how much above cost the price must be for it to be excessive".[82] The CJEU recognized these difficulties in *United Brands* by stating that determination of production costs can be a complex task due to various factors that need to be considered, which might challenge the accuracy of the assessment of production costs.[83]

Not surprisingly, in all of the cases discussed in the previous section, the European Commission carried out a price-cost test only in the *Port of Helsingborg* case and more recently in the *Aspen* decision. In the *Port of Helsingborg*, the Commission conducted a comparison between the costs actually incurred and the price charged and recognized the difficulties in establishing the precise level of the costs, profits, and equity attributable to the ferry operations[84] and nevertheless concluded that: "even if it were to be assumed that the profit margin is high (or even 'excessive'), this would not be sufficient to conclude that the price

[78]The difficulty with the allocation of the common cost is particularly relevant for the telecommunications industry. See in general M Canoy, P Bijl and R Kemp, 'Access to Telecommunications Networks', 2003 (TILEC Discussion Paper; Vol. 2003-007).

[79]D Geradin, 'Abusive Pricing in an IP Licensing Context: An EC Competition Law Analysis' (2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996491&download=yes > accessed 20 November 2018.

[80]Communication from the Commission – Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014, para 8. See also Paulis (n 7).

[81]Geradin and others (n 76) 274.

[82]G Monti, *EC Competition Law* (Cambridge University Press 2007) 220.

[83]*United Brands*, para 254.

[84]*Port of Helsingborg*, para 156.

charged bears no reasonable relation to the economic value of the services provided".[85] Moreover, the Commission explicitly stated that the decisive test in *United Brands* focuses on the price charged, and its relation to the economic value of the product.[86]

Aspen was the first occasion in which the Commission applied a full-blown price-cost analysis. The Commission assessed the profitability under two different profit metrics (gross margin and EBITDA) and used variety of benchmarks demonstrating the excessiveness of the price. What is notable is that all comparators, i.e. (1) comparison between the actual prices of the products and the cost-plus level for each product individually and (2) for the products overall at EEA level; (3) Aspen's profitability before and after the price increase; (4) comparison of Aspen's profitability with a sample of other undertakings that sell similar products and have a profile similar to Aspen, were conducted within the framework of the cost-plus test. This is in essence the methodology, widely accepted by NCA's in excessive pricing case in the pharmaceutical industry.[87] This suggests that the cost-plus test applied by the Commission is more advanced method for assessing excessiveness and as such more informative that the traditional interpretation of the price-cost test from *United Brands*. This approach clearly shows that the Commission conducted more than one benchmark for the assessment of excessiveness. Moreover, these benchmarks are not static indicators that show only positive profit. They are indicators that compare the dominant company performance against competitors in the same industry. Thus, it can be suggested that the advanced application of the cost-plus test contain elements that evaluate not only that the price is excessive but also that the price is unfair compared to the performance of similar companies in the industry. This ultimately blurs the distinction between the two steps of the *United Brands* test. Some authors suggested that the first step examines whether the high price at issue results into a positive profit and if that is confirmed then, a comprehensive analysis on the second step should then be launched.[88] However, this suggestion is based on the assumption that the test is a simple comparison between the costs incurred and the price charged, which is the established

[85] ibid, para 158.
[86] ibid, para 102.
[87] For an analysis of the development of the cost-plus test and the profitability indicators, i.e. ROCE/ROS used by the competition authorities in excessive pricing cases in the pharma industry see Miroslava Marinova, 'Rethinking the Legal Test for Excessive Pricing: Insights from the Landmark UK *CMA v Pfizer/Flynn* Case and Its Legal Implications' forthcoming.
[88] L Hou, 'Excessive Prices within EU Competition Law' 7(1) (2011) European Competition Journal 47, 61.

interpretation of the excessiveness test from *United Brands*. The Commission's cost-plus test in Aspen is more complex as indicated above and evaluates not only that the price is excessive but also that the price is unfair within the framework of the cost-plus test. This would suggest that if reliable data is available for the cost-plus test, the two limbs under the *United Brands* test would overlap. However, this approach is not appropriate in all cases as it will be discussed below.

The next issue subject to vigorous criticism is related to identifying when the profit margin achieved by the dominant company is excessive. As indicated in section two above, the Court has not clarified a specific threshold above which the profit margin should be considered excessive but the case law indicates that the profit margin should be "grossly exorbitant" to be considered excessive.[89] However, the amount of profit margin may vary depending on the industry as some industries require substantial initial fixed costs and firms have to achieve significant margins in order to recover the fixed (and sunk) costs. This observation might be taken to mean that the assessment of the reasonable rate of profit is highly uninformative and, as such, inconclusive in establishing an excessive pricing abuse. Again, this is correct if we assume that the test is giving a static indicator rate of return. An important clarification on this point was provided by the CJEU in the *AKKA/LAA* judgment in which the Court confirmed that there is no minimum threshold above which a rate must be regarded as "appreciably higher", since the circumstances specific to each case are decisive in that regard.[90] In this regard, all that matter is the comparison of this indicator with other industry-specific benchmarks as indicated in the Commission's *Aspen* case.

The application of the price-cost test as a first step in the assessment of excessive pricing abuses turns out to be not only difficult in practice but also not appropriate at all in some cases. For example, in *Deutsche Post*, the European Commission decided that the price-cost test is not applicable due to the lack of reliable data and instead, it focused its assessment on comparing Deutsche Post's prices for a cross-border tariff with its domestic tariffs. Next, the inapplicability of the price-cost test is particularly relevant in the performing rights cases, where the ascertainment of

[89] See E Pijnhacker Hordijk, 'Excessive Pricing under EC Competition Law; an Update in the Light of Dutch Developments' in *Annual Proceedings-Fordham Corporate Law Institute* (Kluwer Academic Publishers 2001) 463, 474.

[90] *AKKA/ LAA*, para 55. Controversially, in the *Pfizer/Flinn* decision, the CMA concluded that a 6% return on sales would be a reasonable rate of return (however, the CMA's decision predated the AKKA/LAA judgment). For a full-blown analysis of the Pfizer/Flinn saga see Marinova (n 87).

costs of production is impracticable and not helpful. For example, the CJEU rejected the price-cost test in the *SACEM* case as inappropriate in the context of the facts of the case and recognized the difficulties with identifying the relevant cost of an "efficient" firm, which was seen as "almost impossible to ascertain" by some prominent scholars.[91] The rejection of the price-cost test (as a way to establish excessiveness) was also interpreted by some authors "as an implicit criticism of the relevance of a cost/price analysis for establishing the existence of unfair prices" because "a monopolist is indeed free to determine its costs and profits".[92] Looking at the earlier case law (judgments before *United Brands*), the EU Courts endorsed other methods, such as, comparison of the price concerned with the price of other products or markets or the prices in the past, as reliable benchmarks. In *General Motors* and *British Leyland,* the benchmark used was comparing prices over time for the same product. The very first case in which the EU Courts had to rule on an excessive price abuse, *General Motors*, provided little guidance, as the CJEU did not provide substantial analysis on the matter and annulled the Commission's decision due to the fact that GMC very quickly reduced the prices in line with the real cost of the operation and refunded the excess to the parties concerned before the Commission's investigation.[93] In the *British Leyland* judgment, the Court used only this comparator and found that the increase in price compared to the levels of the prices in the past, which was not justified by cost increase, was abusive. Indeed, as rightly observed by one commentator, this is probably "the best and most self-evident benchmark" because a price increase should be in line with the cost increase.[94] However, the excessive price, in this case, was, not an attempt of the dominant company to exercise its market power leading to direct exploitation of its customers but, rather, to prevent the parallel trade in the market for motor vehicles. In *United Brands,* the Court criticized the Commission for not taking into consideration the fact that the price was stable for 20 years, which suggests that the Court considered this comparator, i.e. comparing the current price with the price in the past, as an important part of the assessment. In *Aspen*, the significant price increase compared to the prices in the past was the reason for the investigation initiated by the Commission;

[91]Marinova (n 87) 8.
[92]M Woude, 'Unfair and Excessive Prices in the Energy Sector' in Ehlermann and Marquis (eds) *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008).
[93]*General Motors*, para 19.
[94]Hou (n 88) 64.

comparing the profit in the past with the profit after the price increase was also used in the analysis.[95] From the above, it can be concluded that comparing prices over time was endorsed by the Courts as a reliable indicator.

Regardless, comparing prices over time was criticized by some commentators as unfounded and not applicable in all cases since the increase in the price might be due to a variety of factors not related to the costs incurred. For example, to reflect changes in market circumstances, the changing level of demand or an effort of a dominant company to increase its margins in order to invest in R&D to develop an exciting product[96] or to cover investment risk involved in developing products that may not reach the market.[97] The argument here is that this comparator is reliable in some cases but might be inappropriate in others, which is in line with AG Wahl's statement (and the case law following that judgment) that the choice of approach/combination of approaches should be selected in accordance with "objective, appropriate and verifiable criteria" and should depend on "the circumstances specific to each case".[98]

Another benchmark that was used by the Courts was to compare the prices of the product over different geographical markets. The test was used in *SAGEM* and *AKKA/LAA* Latvia in which the Court focused on the comparison of the prices of the dominant company with the prices of similar firms active in neighbouring countries. The Court held that a significant difference in fees from those charged by equivalent organizations in other Member States " … must be regarded as indicative of an abuse of a dominant position".[99] In *United Brands*, the Court criticized the Commission for not taking into consideration that the prices charged in Ireland had actually produced a loss, which suggests that the Court considered this comparator as an important part of the assessment. The Commission also adopted this approach in the *Deutsche Post*, as the other alternatives were not applicable in the context of the case. However, this approach was also criticized since a company may choose a pricing policy setting different prices for the different geographical markets in order to reflect the conditions of demand and to achieve distribution efficiency.[100] Another difficulty may be the selection of

[95]In the excessive pricing cases investigated by the National Competition Authorities – the NAPP, CD Farma and the Italian Aspen cases, this comparator was used in combination with other tests.
[96]Geradin and others (n 76) 276.
[97]EU Commission contribution to the 2011 OECD excessive pricing roundtable.
[98]AG Wahl Opinion, paras 42–43.
[99]*SAGEM*, para 38.
[100]ibid, para 277. See also Motta and de Streel (n 4) 112.

markets used as a benchmark since the market conditions in the different geographical markets may vary depending on the difference in the regulatory framework, taxes, purchasing power of consumers, variation of quality, or different levels of costs (electricity, labour cost, etc.). This problem was recognized by the Commission in the *Port of Helsingborg* decision where the Commission decided to compare the prices charged by the port to other users and the prices charged by other ports with ferry traffic. The Commission considered that comparing the price charged in different ports might not be a reliable indicator because of the different characteristics and services that each of the ports provides.[101]

However, this benchmark was considered reliable in the *AKKA/LLA* judgment in which the Court provided very important clarification, namely that the comparator should be selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. Moreover, the *AKKA/LAA* judgment clarified that a variety of benchmark comparisons should be used to reliably reach a conclusion that prices are excessive.[102] In addition, the difference between the disputed price and the normal competitive price must be "significant and persistent".[103]

The discussion of the case law in the second section of this paper shows that the EU Courts adopted different tests for the assessment of excessiveness including comparing with same or similar products in cases in which the cost-plus test was not applicable. Therefore, the standard developed by the case law shows that the test for excessiveness should demonstrate that the price is excessive compared to the degree of competition, and this is very reasonable as in some cases, a price-cost test is appropriate, otherwise, alternative indicators were used.[104]

3.2. The second limb of United Brands: unfairness

The established interpretation of the second limb of the *United Brands* test is a determination on whether the price is unfair which can be

[101]This approach was also rejected in the Italian Aspen case in which the Court concluded that the different regulatory regimes in the other Member States made it impossible to compare with the prices charged in the other countries. The same approach was adopted by the CMA in the *Pfizer/Flinn* case.

[102]For a similar interpretation see R De Coninck, 'Excessive Prices: An Overview of EU and National Case Law' (2018) e-Competitions Excessive Prices.

[103]*AKKA/LAA*, paras 55–56 and 61.

[104]On that point see e.g. M Motta and A De Streel, 'Excessive Pricing in Competition Law – Never Say Never' (2007) *The Pros and Cons of High Prices* (Swedish Competition Authority 2007) 40.

evaluated in two alternative ways, i.e. the price is unfair in itself or when compared with competing products. However, the Court clarified that there are other ways to determine whether a price is unfair leaving the question open as to the choice of methodology to be used. This approach seems unclear and creates uncertainties. For example, it is not clear when the price should be considered unfair in itself, which comparison should be used, and how much the prices in each marker should differ, how many comparators are enough and more importantly, whether the assessment of unfairness should include either "in itself" or by "comparison" or a combination of the two tests.[105]

A careful examination of the facts and the legal test applied by the EU Courts in the cases discussed in the second section of this paper reveals that the unfairness test is mainly related to lack of justifications for the excessiveness of the price already identified under the first limb of the test. For example, in *British Layland* the Court considered a comparison between the current price of the dominant company and the price it charged in the past and concluded that the price increase was not justified by cost increase and as such was considered disproportionate to the economic value of the service, which according to the Court constituted an abuse of dominant position. Similarly, in *SACEM*, the Court considered that the higher prices cannot be justified with higher operating expenses. In *Deutsche Post,* the Commission concluded that the tariff charged by *Deutsche Post* had no sufficient or reasonable relationship to real costs or to the real value of the service provided and, as such, was regarded as unfair[106] In *Port of Helsingborg*, the Commission considered that the economic value of the product/services must be determined not only with the cost incurred and a profit margin as a percentage of the production costs but also with regard to the particular circumstances of the case and also non-cost-related factors such as consumer preferences, which bring added value to the service.[107] On that point, the Commission considered the features of the port under consideration, such as the fact that it was the shortest distance between Sweden and Denmark and situated very close to the road and rail network. The Commission considered that the unique location of the port does not imply higher production costs but made it preferable for consumers because of its fast, easy, and

[105]This was central issue in the UK *Pfizer/Flynn* case, i.e., whether a competition authority should consider both alternatives of the unfairness limb, i.e., whether the "in itself" test and the "competing products" test are cumulative conditions or true alternatives. For an analysis of the Pfizer/Flinn decision see Marinova (n 87).
[106]*Deutsche Post*, para 167.
[107]ibid, para 232.

convenient services, which ultimately affected their willingness to pay more.[108] In view of the above, the Commission concluded that the economic value of the services was much higher than the costs incurred and, hence, the port charges were not found to be unfair in themselves. From the above, it can be suggested that the economic value of a product/service in this case was related to the non-cost-related factors that raise the value of the product and reflect the customers' willingness to pay. Therefore, once the excessiveness is established and there are no non-cost-related factors or other justifications, the price can be considered unfair it itself and as such abusive. This position has been confirmed by the European Commission in the *Aspen* decision. The Commission's analysis was focused on examination of the justification of the scale of price increase. In particular, the Commission considered the characteristics of the products, medicines, that had been off-patent for decades (which suggest that the significant cost for R&D have been recouped); profits that neither reflect any commercial risk-taking activity, nor innovation, nor investment, nor any material improvement, where customers are completely dependent on a product.[109] Instead, the Commission found a strategy to achieve the price increase including a threat to delist or withdraw the products from the market and as such to exploit health systems and patients. The analysis of the unfairness shows that the Commission included many additional elements that confirmed the Aspen's prices were unfair in themselves. Based on that the Commission concluded that there is no need to consider the second alternative, i.e. comparison with competing products.

3.2.1. Unfair compared to competing products

The analysis of the case law in the second section of this paper shows that comparison of the price under consideration with the price of competing products has never been used as a separate comparator for the assessment of the unfairness. However, it was used by the NCAs as a comparator for the same or similar products in different Member States as a benchmark for assessing the excessiveness of the price. Comparison of the price under consideration with the price of competing products as a comparator for the assessment of unfairness has been considered in some of the cases analysed above but was subsequently rejected. For example, in *Deutsche Post* this comparator was rejected as there were no competitors.

[108] ibid, para 216.
[109] *Aspen*, para 176.

Similarly, in *Port of Helsingborg* the Commission considered that the port fees charged in other ports cannot be considered as a meaningful comparator. Lastly, in the recent *Aspen* decision, the Commission rejected the comparison with the proposed competing drugs by Aspen as unsuitable.[110] This finding seems very reasonable as investigations in these cases concern a dominant undertaking, which means the finding suitable competing product might be very difficult if not impossible task.[111]

4. Conclusion

The aim of this paper was to explore the evolution of the legal test used for the assessment of excessive pricing developed by the EU Courts. The analysis of the facts and the key legal principles from the leading cases on excessive pricing found that different cases use different criteria to determine excessive pricing and thus they vary from case to case, which led to the impression that the case law of excessive pricing fails to provide clarity on the appropriate legal standard for the evaluation of excessive pricing. The analysis aimed to understand the inconsistent approach taken by the courts and to clarify how the variety of benchmark comparisons should be used to reliably reach a conclusion that prices are excessive. The analysis showed that the established interpretation of the *United Brands* test as a two-fold test is overrated as the excessiveness and unfairness test might overlap. In addition, the excessiveness test might use different benchmarks depending on the case. For example, only in the *Port of Helsingborg* and the *Aspen* decisions, the Commission conducted a cost-plus test. In the remaining cases reviewed, the application of the cost-plus test was not possible/appropriate, and different benchmarks such as, comparison with prices charged in other product or geographic markets by the dominant undertaking; comparison with the prices charged by other undertakings in the same or related markets; and the evolution of pricing over time have been adopted. Therefore, a variety of benchmarks for the assessment of excessiveness have been established, but in any event, as the recent Commission's decision in *Aspen* shows, if there is sufficient information for the cost-plus test to be conducted, it can be used to provide different benchmarks such as, benchmark against profitability of similar companies in the same industry and for the assessment of profitability before and after the price increase. These

[110]Similarly, the CMA rejected this comparator in the Pfizer/Flynn decision and remittal as there were no competing products.
[111]Wahl (n 74) 63.

comparators may be relevant to both limbs of the *United Brands* test. Any such comparator must be selected in accordance with objective, appropriate and verifiable criteria, and comparisons must be made on a consistent basis. To avoid false positives and negatives, a competition authority needs to consider which approach, or combination of approaches, is the most appropriate for the market it is considering and the facts that pertain as there is no single method to establish an abuse and authorities have a margin of manoeuvre in deciding which methodology to use and which evidence to rely upon. In addition, the analysis showed that the second limb of the unfairness test, i.e. compared to competing products has never been used as a separate test to establish unfairness and might has a limitation related to difficulties to find competing products as the investigation concerns a dominant undertaking. Lastly, it can be suggested that the two limbs of the unfairness test "actually address the same question, namely whether the price is excessive in relation to the economic value of the product/service".[112] Therefore, after the establishment of the excessiveness of the price, the decisive question is whether the price bears a reasonable relation to the economic value. The analysis showed that a price can be considered excessive only if the price increase is not justified and there are no non-cost-related factors such as consumer preferences, which bring added value to the product, hence the customers' willingness to pay a premium price. Therefore, an excessive price that is not justified is also unfair.

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[112]M Lamalle, L Lindström-Rossi and A Teixeira, 'Two Important Rejection Decisions on Excessive Pricing in the Port Sector' (2004) (3) Competition Policy Newsletter 40.