



## Excessive pricing – a legal perspective

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# Article 102 TFEU applies to unfair prices

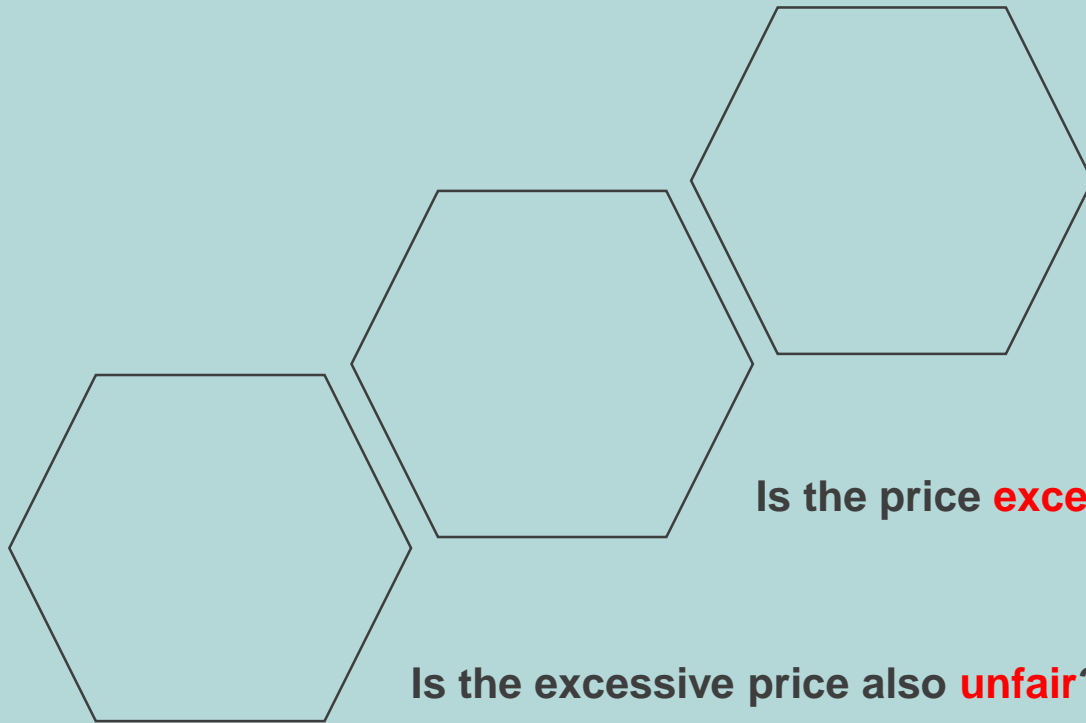
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Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing **unfair** purchase or **selling prices** or other unfair trading conditions; [...]



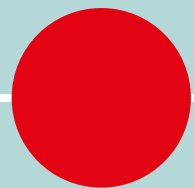


Is the company **dominant**?

Is the price **excessive**?

Is the excessive price also **unfair**?





What is needed:  
dominance or monopoly?



## **CD Pharma (Denmark, 2018)**

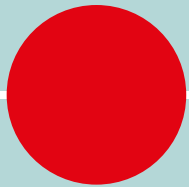
- Orifarm had been awarded a public contract for Syntocinon, a drug used in hospitals in connection with childbirth.
- Orifarm, a parallel trader, was unable to supply the required volumes.
- CD Pharma AB was the only alternative supplier. It had an exclusive supply contract for Syntocinon covering *i.a.* Denmark.
- CD Pharma was not active in Denmark until it was requested to supply.
- First product supply on 8 April 2014: DKK 45.
- 28 April 2014: Price hiked to DKK 945 (!)
- CD Pharma market share in 2014: 60-70% (by volume).
- Decision upheld by appeals board on 29 November 2018.

## **Most enforcement actions target monopolists**

- If no barriers to entry, high prices should be self-correcting.

*“I am convinced that unfair prices under Article 102 TFEU can only exist in regulated markets, where the public authorities exert some form of control over the forces of supply and, consequently, the scope for free and open competition is reduced”* (AG Nils Wahl opinion (2017) in Latvian Copyright).

- Investigated companies typically enjoy a legal monopoly.
- Interesting exception: *CD Pharma* (Denmark).



Excessive price:  
A free choice between  
several possible tests?



# No unlimited freedom to choose test

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- A price is unfair if it has no reasonable relation to the economic value of the product.
- A comparison with costs only one of several permissible tests to determine whether a price is excessive (*United Brands*).
- Several other tests have been validated in case-law, including:
  - the dominant player's own prices;
  - competitors' prices in the same market;
  - price levels in other Member States.
- Whether a chosen test is appropriate in each case is part of the legal review - e.g., *United Brands*:
  - The Commission had relied on a comparison with the dominant player's own prices in other Member States.
  - ECJ: it was possible in this case to investigate costs and the Commission should have done so.

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***“The Commission was at least under a duty to require UBC to produce particulars of all the constituent elements of its production costs.”***

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ECJ in case 27/76 *United Brands*, para 256

## Latvian Copyright (C-177/16)

- The Latvian Competition Council had fined the Latvian authors' association for excessive pricing.
- This collective management organisation handles copyright licences for musical works in Latvia.
- The decision was based on a comparison of its licensing fees with those applicable in Estonia and Lithuania (100-200% higher in Latvia).
- The fees were also compared, as a further illustration, to those in 20 other Member States (Latvian rates 50-100% higher than average).
- Following a series of appeals, Latvia's Supreme Court referred several questions to the EUCJ.

## An obligation to use several tests?

- AG Nils Wahl opinion in *Latvian Copyright*:

*“[C]ompetition authorities should strive to examine a case by combining several methods among those which are accepted by standard economic thinking and which appear suitable and available in the specific situation.”*

- Not explicitly endorsed by the EUCJ:

An illustrative comparison with 20 other Member States “*may serve to verify the results already obtained*” by means of the comparison with fee levels in Estonia and Lithuania.





## Pfizer/Flynn Pharma (CAT, 2018)

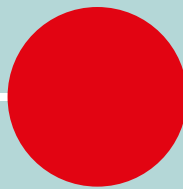
- Pfizer transferred its marketing authorisation for the capsule form of phenytoin sodium (an anti-epilepsy drug) to Flynn Pharma.
- Flynn sold the capsules to the National Health Service (NHS).
- Pfizer continued to manufacture the capsules.
- Flynn de-branded the drug, so that it was no longer subject to the UK's PPRS voluntary pricing scheme (which covers only branded drugs).
- Pfizer significantly increased its sale price to Flynn. Flynn also increased the price at which it sold the drugs to the NHS (2,300% to 2,600% higher than Pfizer's price under the PPRS).
- Flynn's new price was still 25% below the price of phenytoin sodium *tablets*, which the NHS had been paying for many years.
- In 2016 the CMA fined Pfizer GBP 84.2m and Flynn GBP 5.2m. The CMA's decision was based on a cost-plus approach.
- In June 2018, the CAT set aside the findings of abuse (and the fines). This judgment is under appeal.

## An obligation to use several tests?

*“[T]he CMA was wrong in law to restrict its Excessive Limb assessment to a Cost Plus approach, and to exclude other methodologies, rather than seeking to establish a benchmark price (or range) that would have pertained in circumstances of normal and sufficiently effective competition using the evidence more widely available” (para. 310).*

*“[A] competition authority should consider a range of possible analyses, reflecting market conditions and the extent and quality of the data that can be obtained, to establish a benchmark price, or range, that reflects the price that would pertain under conditions of normal and sufficiently effective competition. On the facts of a particular situation, there might be only one basis of analysis that was credible, but the authority is not entitled to select one basis of analysis and ignore others that are also credible” (para. 443).*





When is the data sufficient to establish an excessive price?



# The chosen test must be applied correctly

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- AG Nils Wahl opinion in *Latvian Copyright* (2017):

*“Whether a given method has been applied correctly in a specific case is clearly something which is, as a matter of principle, for the competent national courts to determine.”*

- However, the competition authorities enjoy a margin of appreciation:

*“It falls to the competition authority concerned to make the comparison and to define its framework, although it should be borne in mind that that authority has a certain margin of manoeuvre and that there is no single adequate method.” (EUCJ in *Latvian Copyright*)*

- The requirements will be specific to the test used, e.g.:
  - Are there any justifications for the difference from prices in other Member States?
  - A valid comparison with prices in other Member States must adjust for differences in purchasing power (*Latvian Copyright*).

*“The ability of shop or service centre operators to pay for the services of the copyright management organisation is influenced by living standards and purchasing power. Thus the comparison, for an identical service, of the rates in force in several Member States in which living standards differ necessarily implies that the PPP [purchasing power parity] index must be taken into account.”*

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EUCJ in *Latvian Copyright* (2017)

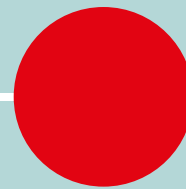
# What if the data is incomplete?

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- *Latvian Copyright*: Detailed comparison with rates in Estonia and Lithuania (rather than in all Member States) could be acceptable:
  - *“no minimum number of markets to compare”*
  - *“the choice of appropriate analogue markets depends on the circumstances specific to each case”*
  - BUT: comparison only relevant if *“the reference Member States are selected in accordance with objective, appropriate and verifiable criteria”*.
- However, a finding of abuse cannot rest on an incomplete analysis or dataset:

*“[A] lack of reliable data or the complexity of the operations involved in the calculation of the benchmark price (or in corroborating it) cannot justify an incomplete, superficial or dubious analysis by a competition authority. In other words, difficulties encountered by an authority when carrying out an assessment cannot be to the detriment of the undertaking being investigated.”* (AG Nils Wahl opinion in *Latvian Copyright*)





When is a price  
excessive?

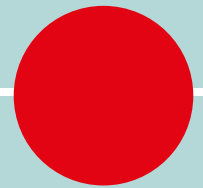


# A significant and persistent difference is needed

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- How much higher than costs or price benchmark?
  - No “minimum threshold”: depends on circumstances in each case (*Latvian Copyright* – rates exceeded EU average by 50-100%).
  - But the difference between the rates must be “*significant*”.
- Price difference “*must persist for a certain length of time and must not be temporary or episodic*” (*Latvian Copyright*).
  - Lufthansa investigated for price increases of 25-30% on some domestic routes following Air Berlin bankruptcy in October 2017. *Bundeskartellamt* closed the investigation after prices had fallen back to previous levels following easyJet’s entry in February 2018.
- Where a scale of fees leads to different rates for different customer groups, is it sufficient that a single rate level is excessive?
  - It was “*permissible to make a comparison within one or several specific segments if there are indications that the possibly excessive nature of the fees affects those segments*” (*Latvian Copyright*).





Can an excessive price be fair?



# The price must not only be excessive, but also unfair

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- Article 102 TFEU refers to “*unfair...selling prices*”.
- If the cost-price margin is excessive, it must be determined whether the price “*is either unfair in itself or when compared to competing products*” (*United Brands*).
- AG Nils Wahl’s analysis in *Latvian Copyright*:
  - Alternative 1 (“unfair in itself”) satisfied where no comparison with similar/competing products is needed:
    - nothing of value is sold (e.g., C-358/07 *Der Grüne Punkt*); or
    - there is no intention to sell (e.g., 26/75 *General Motors*).
  - Alternative 2 (“unfair when compared to competing products”) acts as a “sanity check”:
    - Can the difference from the benchmark price be explained by legitimate reasons?
    - E.g., is the value of the product/service to customers higher than the benchmark price?





# Are the two unfairness alternatives genuine alternatives?

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- The CMA in *Pfizer/Flynn Pharma*:

*“Having established that Pfizer’s and Flynn’s prices are unfair in themselves it is not necessary for the CMA to consider whether the Parties’ prices were also unfair when compared to competing products. However, the CMA has nevertheless considered whether there are any other products that could provide a meaningful comparison. The CMA has concluded that there are no such products in this case” (para. 1.45).*

- CAT judgment (under appeal):

*“In our view, it cannot be right that an authority can simply ignore a prima facie valid argument that a price is fair under one Alternative and proceed to find an infringement of Article 102 solely on the basis of the other Alternative establishing that prices are unfair. That is not to say that the authority cannot find that there is an infringement where one Alternative demonstrates unfairness and the other does not since it does not need to succeed on both heads. However, the authority must consider whether a prima facie case of fairness under one Alternative undermines the basis for the finding of unfairness under the other Alternative and produce a reasoned basis for determining that the Unfair Limb is satisfied.”*

- CAT: Tablets could be a meaningful comparator to capsules. The CMA had not provided sufficient reasons for rejecting a comparison with tablets (in its 466 pages decision).



# What triggers excessive pricing cases: the price or the conduct?

The Commission will investigate information indicating that Aspen has imposed very **significant and unjustified price increases** of up to several hundred percent, so-called 'price gouging'. The Commission has information that, for example, to impose such price increases, Aspen has threatened to **withdraw the medicines** in question in some Member States and has actually done so in certain cases.

Press release re *Aspen Pharma* investigation (2017)

[T]he **significant price increase strategy** implemented by Sanicorse resulted from a desire **to deter** the healthcare institutions from developing alternative solutions for the disposal of infectious medical waste. (...) The healthcare establishments, which had been **"taken hostage"** (...) were in the end **forced to conclude** individual contracts at the prices set by Sanicorse.

*Autorité de la Concurrence* press release re *Sanicorse* excessive pricing fine (2018)

The amount it paid per pack rose from around £4.46 before it was de-branded in 2007 to £258.19 by July 2017, **an increase of almost 6,000%**, while production costs remained broadly stable.

CMA press release re *Concordia* investigation (2017)

Sidst i april 2014 **hævede CD Pharma prisen** på lægemidlet med **2000 procent** fra 45 kroner til 945 kroner.

*Konkurrencestyrelsen* press release (2018)





Questions?



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