THE CASE FOR LIMITING PRIVATE LITIGATION OF EXCESSIVE PRICING

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Table of Contents

Abstract

In the EU, private litigation of competition law violations is in its nascence. As this article shows, excessive pricing raises strong concerns for such litigation, for three reasons: (1) the inherent difficulty of defining what constitutes an unfair price; (2) additional challenges inherent to private excessive pricing litigation, such as the need to pinpoint when exactly a price becomes unfair; and (3) the institutional features of general courts in EU member states, which are ill-suited to the required tasks. We elaborate on these concerns, pointing to four specific challenges inherent to private litigation and to three instances where a lack of sufficient economic understanding could entrap general courts (a cost trap, a fairness trap, and a monopolistic competition trap). Together, these factors create a risk of error costs much higher than any experienced so far, which could potentially reduce welfare. The article suggests some measures that can be taken to ensure that welfare is served.

Keywords: Competition law, antitrust, excessive pricing, private litigation, Article 102 TFEU, Damages Directive, decision theory

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I. Introduction

The importance of private enforcement of competition laws cannot be overstated.[2] Private enforcement increases the probability of detection and the size of remedies, thereby reducing incentives to engage in anticompetitive conduct in the first place.[3] In addition, it currently provides the only way for victims to recover ill-gotten gains from violators of competition laws.[4] Finally, private actions may strengthen the culture of competition, both by creating more awareness of competition laws and by strengthening public support for their enforcement. Enabling and strengthening such private enforcement thus constitutes an important step forward in limiting harm to social welfare.[5]

At the same time, it is essential to recognize the potential pitfalls in enabling such private enforcement, where the loss of exclusive discretion of competition authorities to select what cases to bring could actually harm welfare. This article makes the claim that private litigation of excessive pricing cases raises such concerns. Despite its strong normative appeal, enabling such private litigation carries the risk of triggering a tsunami of cases which and turn courts into ill-suited price regulators, unless suitable measures are taken to limit such harm. This concern is strengthened by the experience of some jurisdictions and by statements of the European Court of Justice (EJC) in its recent decision in *AKKA/LAA.*[6]

Excessive pricing has long been prohibited under the 'unfair trade conditions' prohibition in Article 102 of the TFEU.[7] This prohibition stands on strong normative foundations, grounded in economic, moral and political rationales.[8] Placing limits on the ability of dominant firms to charge flagrantly high prices may increase consumer welfare by reducing wealth transfers and deadweight loss, so long as dynamic efficiency is not harmed. Such limitations may also be grounded in

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[2] For recognition of its importance see, e.g., Case C-453/99 *Courage Ltd. v. Bernard Crehan* EU:C:2011:6314, para. 26–7. The U.S. Supreme Court recently acknowledges it as well: Case 17-204 *Apple Inc. v. Pepper et al*. (May 13, 2019), pp. 12, 14 ("Leaving consumers at the mercy of monopolistic retailers [] directly contradict[s] the longstanding goal of effective private enforcement and consumer protection in antitrust cases".)

[3] For some empirical works on the subject focusing on the US, see Lande and Davis, "Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws", 2011(2) *Brigham Young University Law Review* (2011) 315–386; Lande and Davis, "Restoring the Legitimacy of Private Antitrust Enforcement", University of Baltimore School of Law Legal Studies Research Paper No. 2018-02 (2018).

[4] Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages", 32 *World Competition* (2009), 3–26. For an interesting suggestion in which the competition authority acts as an aggregator of private actions, see Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" 26 *World Competition: Law and Economics Review* (2003), 473–488.

[5] For an important recent step see 2014/104/EU on Certain Rules Governing Actions for Damages Under National Law For Infringements of the Competition Law Provisions of the Member States and of the European Union [2014] O.J. L 349/1 (hereinafter: Damages Directive).

[6] Case C-177/16 *Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v. Konkurences padome*, ECLI:EU: C:2017:689 ('AKKA/LAA'). See Section IV *infra*.

[7] This possibility was first acknowledged in *Parke Davis*. The ECJ indicated that wide variation in prices not justified on objective grounds would be a factor in determining whether conduct was abusive. Case 24/67 *Parke, Davis and c. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55, [1968] CMLR 47. This possibility was more clearly established in Case 40/70 *Sirena v Eda* [1971] ECR 69, [1971] CMLR 260, and most recently in CaseC-177/16 *AKKA/LAA*, op. cit. *supra* note 6, para 35.

[8] Gal, "Abuse of Dominance—Exploitative Abuses" in Lianos and Geradin (eds.), Handbook On European Competition Law (Edgar Elgar, 2013), 385–422.

concepts of fairness which regard some forms of exploitation of consumers as morally and socially abhorrent.[9] Indeed, the notion that a high price might be unfair has long historical and ideological roots.[10] The importance of the prohibition can also be exemplified by the *Rambus* case, in which a patent-ambush by a memory chip patent holder enabled it to later claim flagrantly high royalty rates. In the US, which does not prohibit high prices as such,[11] the conduct did not infringe competition law.[12] In contrast, the European Commission was able to use the excessive pricing prohibition to reach a commitment decision with Rambus, under which it agreed to significantly reduce the price it charged for licensing its patents.[13] Furthermore, as Ackerman rightly suggests, the justification for the prohibition is strengthened by the fact that, with limited exceptions, the EU generally lacks direct price control mechanisms.[14]

At the same time, as this article will show, the excessive pricing prohibition most likely raises the greatest concern for private competition law litigation, for three combined reasons, elaborated below: (1) the inherent difficulty of defining what constitutes an unfair price (elaborated in Section II); (2) additional challenges inherent to private litigation of excessive pricing allegations, such as the need to pinpoint precisely when a price becomes unfair, which is a precondition for calculating damages (Section III); and (3) the institutional features of general courts in member states hearing such cases, which are ill-suited to the required tasks (Section IV). The combination of these factors creates a risk of error costs much stronger than any experienced so far, which could potentially reduce welfare and even clash with some notions of fairness (Section V). After elaborating these points, the article suggests some measures that can be taken to ensure that welfare is served (Section VI).

Given that private litigation of competition law violations is only beginning to develop in the EU,[15] and collective redress mechanisms are still viewed with caution by many member states, this is exactly the time to ensure that as private litigation expands it will indeed increase welfare, rather than decrease it. The Israeli experience, in which dozens of private actions on excessive pricing are currently pending, should serve as a cautionary example.[16] The need to set efficient rules is further strengthened by the fact that, as elaborated below, the excessive pricing prohibition is no longer dormant.

II. The Inherent Difficulty of Determining when a Price Becomes Unfair

[9] Ibid.
[10] For elaboration, see Fish and Gal, "The Ideological Roots of the Excessive Pricing Prohibition" (on file with author).
[11] Gal, "Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?" 49 *Antitrust Bulletin* (2004), 343-384.
[12] *In re Rambus, Inc. v. FTC*, 522 F.3d 456, (D.C. Cir. 2008).
[13] Rambus (Case COMP/38.636) Commission Decision COMP/38.636 [2009] OJ 2010 C30/17. For the externalities such cases create on other jurisdictions see Akman and Garrod, "When are excessive prices unfair?', 7(2) *Journal of Competition Law & Economics* (2011), 403–426.
[14] Ackerman, "Competition Law and Regulatory Approaches to Excessive Prices: A Comparative Analysis" in Zimmer (Ed.), *The Goals of Competition Law* (Edgar Elgar, 2012), pp. 351–370.
[15] For example, the UK is currently debating the burden of proof for class action certification. Merricks v. Mastercards, <www.mastercardconsumerclaim.co.uk>, (last visited 13 May 2019).
[16] See analysis below.

The excessive pricing prohibition, though longstanding, suffers from serious and inherent difficulties in its implementation.[17] In particular, it lacks clear and workable criteria. The foundational test adopted by the ECJ in *General Motors* requires that the price should not be excessive in relation to the economic value of the product or service provided.[18] As some have argued, this test creates a logical conundrum: when a consumer buys a product, is this not a sign that at least in his eyes the product's value exceeds its price? This is the case even if the supplier enjoys a large part of the surplus created by the transaction.[19] Yet this conundrum only applies when we relate to the subjective rather than to the objective economic value of the product. Also, it is only relevant to consumers who bought the product, and not to those excluded from buying it because of its excessive price. More importantly, the test raises practical challenges regarding how to calculate a product's economic value, given that economic value depends not only on supply factors but also on demand. It also does not stipulate what constitutes a fair relation between a product's economic value and the price charged.

The ECJ provided further guidance in *United Brands,* in which it adopted a two-pronged test which requires not only that the price be excessive in relation to cost, but also that it be unfair either in itself or when compared to competing products.[20] Yet *United Brands*, like other decisions that followed, provides no clear guidance as to the permitted scope for profits. It is unclear where to draw the line between a high and excessive price, and what margin of profit a dominant firm should be allowed to charge. The challenges can be summarized as follows: in order to decide whether a price is excessive, one must determine (1) the ratio of price to cost; (2) whether this ratio is excessive (some combine these two tests); (3) whether the price is unfair in itself; and (4) whether the price is unfair when compared to competing products.

The first prong of the *United Brands* test requires proof that 'there is an excess—that is a significant difference—between the price actually charged by the dominant undertaking in the relevant market and the price which that undertaking would hypothetically have charged had there been effective competition in the market'.[21] While the sparse case law has established some methodological tools for determining cost–price differences, diagnostic difficulties abound. These difficulties include, inter alia, determining the costs related to the production of a specific product, when the firm produces multiple products.[22] The ECJ has also endorsed the comparison method among firms to establish such a difference.[23] Yet, as the Commission recognized, there exist

[17] OECD Roundtable on Excessive Pricing, DAF/COMP 2011 (2011).
[18] Case 26/75 *General Motors v. Commission* [1975] ECR 1367, [1976] 1 CMLR 95.
[19] For recognition of this problem see also *Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd. v. Competition and Markets Authority and Pfizer Inc. and Pfizer Ltd. v. Competition and Markets Authority* [2018] CAT 11, para 417..
[20] Case 27/76 *United Brands Company and United Brands Continentaal v Commission*, [1978] ECR 207.
[21] Opinion of AG Wahl, Case C-177/16 Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v. Konkurences padome, ECLI:EU: C:2017:286.
[22] See, e.g., Motta and de Streel "Excessive pricing in competition law: Never say never?" in Swedish Competition Authority (ed.), *The Pros and Cons of High Prices* (Konkurrensverket, 2007), 14–46; Calcagno, Chapsal, and White, "Economics of Excessive Pricing: An Application to the Pharmaceutical Industry", Journal of European Competition Law & Practice 1 (2019).
[23] C Joined cases 110, 241 and 242/88 *Lucazeau v. SACEM* [1989] ECR 281; most recently *AKKA/LAA*, op. cit. *supra* note 5.

'numerous obstacles to the establishment of a valid comparison.'[24] Recently, Advocate General (AG) Wahl reiterated these diagnostic difficulties, stating that 'the calculation....is a rather complex and uncertain exercise'.[25] While proposing the application of a combined methodological approach, he also recognized the limitations inherent in this procedure.[26] These difficulties were also recently highlighted in a decision of the UK Competition Appeal Tribunal in *Flynn*.[27] Despite the fact that the UK Competition and Markets Authority is one of the most economically sophisticated authorities worldwide, its decision had significant pitfalls. The opinion of the Appeals Tribunal does not provide clear guidance on how to implement the prohibition.[28]

But even if a cost–price relation can be correctly established, it remains unclear what relation should be considered excessive.[29] The ECJ's case law does not provide much guidance beyond emphasizing that the difference should be appreciable: both significantly above the benchmark and persistent.[30] Indeed, only in *British Leyland* has the ECJ found actual abuse by way of excessive pricing. Most cases in which it acknowledged the possibility that such abuse could be found—including *SACEM*,[31] *Bodson*,[32] *Ahmed Saeed*,[33] *GT-Link*[34] and *AKKA/LAA*[35]—were preliminary ruling cases in which the ECJ was not required to set the price that would be deemed excessive and unfair. The Commission's practice also does not provide clear guidance.[36] As recently observed by AG Wahl, determining how significant and how persistent the difference must be to justify an intervention 'is by no means an easy question to answer. Existing case-law of the Court does not give very precise guidance on this issue. Nor can clear patterns be found in the practice of national authorities or in economic literature.'[37] Indeed, 'it is impossible to set, a priori and in abstracto, precise thresholds which could be applicable to all circumstances'.[38] The analysis is further complicated by the fact that while the Commission sometimes uses benchmarks, the determination of what is considered excessive is still highly case-specific, and therefore findings in one case do not easily carry over to other cases.

Determining when a price becomes excessive is further complicated by the fact that a social-welfare–conscious decision-maker must take into account the dynamic effects of such price regulation. Monopoly pricing plays an important role in increasing welfare: it creates incentives for firms to invest in cost-reducing or welfare-enhancing products, services or processes that might

[24] Case COMP C-2/37/761 *Euromax/IMAX*, EC decision of 25 March 2004. See also Ackerman, op. cit. *supra* note 14, p. 364.
[25] Wahl, op. cit. *supra* note 21, para 16–17.
[26] Ibid, para 45.
[27] *Flynn*, op. cit. *supra* note 19.
[28] Ignjatovic and Hutchinson, "Excessive Intervention? A Review of Recent Excessive Pricing Investigations," 18(1) *Competition Law Journal* (2019), 29-35, p. 33.
[29] Wahl, op. cit. *supra* note 21, para 109-110.
[30] *AKKA/LAA*, op. cit. *supra* note 6.
[31] *SACEM*, op. cit. *supra* note 22.
[32] Case 30/87 *Bodson v Pompes Funebres* [1988] ECR 2479.
[33] Case 66/86 *Ahmed Saeed Flugreisen et al. v Zentrale zur Bekämpfung* [1989] ECR 803.
[34] Case C-242/95 *GT-Link v. DSB* [1997] CMLR 601.
[35] Case C-177/16 *AKKA/LAA*, op. cit. *supra* note 6.
[36] See, e.g., Gal, Exploitative Abuses, op. cit. *supra* note 8.
[37] Wahl, op. cit. *supra* note 21, para 109-110.
[38] Ibid, para 111.

enable them to gain a comparative advantage, achieve a dominant position, and enjoy the fruits thereof. Monopoly prices also signals to other firms that it may be profitable to enter the dominant firm's market, thereby fuelling the market's self-correcting forces. Accordingly, placing too-strong limitations on the profitability of dominant firms that achieved their position through fair competition could lead to over-deterrence, distorting the ex ante incentives for firms to deploy their best efforts to become more efficient and innovative, and thereby harming social and consumer welfare.[39]

This potentially chilling effect has another aspect, which is often overlooked. Should the prohibition against excessive pricing significantly reduce profits, suppliers might adopt strategies which limit the likelihood that they will achieve a dominant position—thereby deflecting any application of the prohibition. Paradoxically, one way to do this is to raise prices even beyond the otherwise profit-maximizing point, in order to keep sales below the market-share thresholds which would trigger excessive pricing allegations.[40] While such a strategy would likely reduce the quantity of products sold, the supplier's overall profits might still increase, especially if absent such a strategy his market share would not have been much above the threshold for dominance.[41] This is because once found to be dominant, he must limit the price charged on all products sold. Meanwhile, consumers would be harmed, because those willing to pay the price that would have been set absent the prohibition would no longer be able to do so. There is also another incentive for the firm to adopt such a strategy: namely, a wish to avoid having to reveal its financial reports (needed to establish the cost–price difference).[42]

An additional negative effect from overdeterrence, in case the prohibition is applied too widely, may result from the fact that investments in innovation might create positive externalities on other markets that the producer might not be able to capture. For example, a more efficient production process might be adopted well beyond the market in which it was developed; or workers trained in one innovative firm might transfer their knowledge to other firms.[43] In such situations, consumers' welfare may increase well beyond the producer surplus in the specific market. Put differently, it cannot be assumed that producer surplus equals consumer surplus. Chilling innovation might therefore come at a high price.

The question, of course, is how significant this disincentive effect is likely to be. Note that it must be balanced against counterincentives, in particular the risk of a decline in research and

[39] This was famously reflected in the dictum of the US Supreme Court in *Verizon Communications Inc. v Law Offices of Curtis V Trinko, LLP*, 540 U.S. 398 (2004) ("Mere acquisition of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.")

[40] While these thresholds are not set in stone, market shares below 40% are generally not considered indicative of significant market power.

[41] Of course, market share is only a crude indicator of market power. Raising a price well above that of one's competitors might lead courts or competition authorities to define the market more narrowly.

[42] OECD, op. cit. *supra* note 17, contribution of Britain, pp. 291.

[43] See, e.g., Orly Lobel, *Talent Wants to be Free: Why we Should Learn to Love Leaks, Raids, and Free Riding* (Yale University Press, 2013).

development efforts and consequent additional loss of market position.[44] Furthermore, the strength of the argument depends on the characteristics of the specific industry and the breadth of the prohibition. For example, the disincentive effect will be reduced to the extent that the rule does not prohibit high prices which result from dynamic efficiency, or those needed to create incentives which counterbalance static inefficiency concerns. Indeed, even a dynamic analysis of the market game could still justify excessive pricing regulation in cases where the dominant position was not achieved due to comparative efficiencies, or where profits far exceed those needed to create incentives to invest.[45] Accordingly, this challenge does not necessarily demand that we abolish the prohibition, but merely that we limit its scope in cases where harm to dynamic efficiency is not offset by static efficiency gains. Yet the complexity of determining at what point dynamic efficiency is harmed raises questions about the robustness of any simple test for excessive prices.

The second prong of the *United Brands* test, which requires that the excessive price be unfair—either by itself or in comparison with competing products—leads to even greater challenges. Under this principle, only if no valid justification exists for the significant cost–price difference may a price be considered unfair.[46] Indeed, despite the common name of the prohibition –"excessive pricing," a price is not considered unfair only because it is excessive. Despite attempts by the courts, the Commission, and some national competition authorities, there is still no sufficiently predictable and concrete definition of what constitutes an unfair price.[47] Indeed, most of the methods applied by the ECJ to determine whether the prohibition has been infringed pertain only to the first prong of the prohibition, and do not provide sufficient tools to elucidate its second prong.

With regard to the requirement that the price be unfair in itself, ECJ case law does not provide any further guidance. In the *Port of Helsingborg* cases[48] the Commission emphasized that 'fair price' relates not just to the dominant firm's production costs, but should take into account, inter alia, the uncertainties involved in determining production costs, and the cost of capital.[49] While making much sense, this requirement complicates the analysis. Recently, in *AKKA/LAA*, AG Wahl offered an extremely narrow test, which would only capture those instances in which no consideration is given to consumers who purchase the good or service, or in which the price is set at an unrealistic level for exclusionary purposes.[50] While such cases can undoubtedly be

[44] Areeda, and Hovenkamp, *Fundamentals of Antitrust Law* (Aspen Law & Business, 2002), pp. 58-62.
[45] For an exposition of cases where dynamic efficiency may not be harmed see, for example, Motta and De Streel, op. cit., *supra*, note 22; Röller, "Exploitative abuses", in Ehlermann and Marquis (eds), *European Competition Annual*; *A Reformed Approach To Article 82 EC* (Hart Publishing, 2007), 525–532, 528; Fletcher and Jardine, "Towards an Appropriate Policy for Excessive Pricing", in *European Competition Annual*, ibid, pp. 533–546.
[46] Wahl, op. cit. *supra* note 17, para 21.
[47] Gilo suggests a retrospective competitive benchmark, which compares the price charged by the dominant firm before and after entry. Gilo, "Excessive Pricing by Dominant Firms, Private Litigation, and the Existence of Alternative Products, in Charbit and Ahmad (eds.), Frédéric Jenny Liber Amicorum (Concurrences, 2018).Yet such benchmarks rarely exist. In addition, as discussed below, the price under competitive conditions may serve as an indication for the first prong of the *United Brands* test, but not for the second.
[48] Case COMP/A.36.750/D3 *Scandlines Sverige AB v Port of Helsingborg* [2006] 4 CMLR 22 (Scandlines); Case COMP/A.36.568/D3 *Sundbusserne v Port of Helsingborg* [2006] 4 CMLR 23.
[49] *Sundbrusserne*, ibid, para 199-2; *Scandlines*, ibid, para 221–224.
[50] Wahl, op. cit. *supra* note 21, para 121–123.

considered as unfair, this interpretation is yet to be adopted. Economics also does not provide clear guidance, given the complexity of the analysis, and the fact that 'fairness' is not an economic concept.

Finally, the decision-maker must decide if the price is unfair in comparison to competing products. Once again, the ECJ's case law does not provide clear guidance. The Commission, in its practice, emphasizes that the analysis must also take into account non-cost factors, 'especially as regards the demand-side aspects of the product/service concerned'.[51] This is also echoed by AG Wahl, who emphasizes that a high cost–price difference can be justified where the goods are of superior quality or regarded as particularly valuable. These additional benefits to customers justify a higher mark-up over costs.[52] While not clearly endorsing such tests, in *AKKA/LAA* the ECJ approved the use of comparisons based on consumers' relative buying power,[53] a fact which indicates that demand-side factors are relevant. Yet determining how much value was created by the dominant firm is an extremely complex exercise with no clear methodologies. The fact that fairness is not an economic concept, creates further complications in defining it due to an absence of directing principles.[54]

Some scholars have recently suggested the use of a but-for test which compares the price to that charged by the dominant firm once it is introduced to competition,[55] or the use of econometric tools that calculate what the price would have been under competitive conditions, [56] as an indicator for excessiveness. Yet such methods do not solve the problem. They suffer from an inherent limitation because the fair price, which is not the result of exclusionary conduct, is not equal to the competitive price.[57] It also does not correspond to the "economic value" test applied by the ECJ. More importantly, they do not ensure that firms will recover research and development costs or have strong incentives to innovate. Nonetheless, such benchmarks are useful for calculating the first prong of the excessive pricing test, or where the high price resulted from exclusionary conduct.

The pragmatic difficulties of determining when a price becomes unfair were recognized by the Commission and by AG Wahl, who recently emphasized the 'absence of a ubiquitous test and […] the limitations inherent in all existing methods'[58] of determining when a price is excessive. He also recognized that '[b]ecause of those limitations, antitrust authorities and economists generally

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[51] *Sundbrusserne*, op. cit. *supra* note 47, para 253. British courts have also recognized this. *Attheraces v British Horseracing Board* [2007] EWCA Civ 38.
[52] Wahl, op. cit. *supra* note 21, para 128; *Scandlines*, op. cit. *supra* note 47. Akman and Garrod interpret the case law as equating economic value with the costs of production. However, as they admit, it is difficult to square this interpretation with some of the ECJ's decisions. Akman and Garrod, op. cit. *supra* note 13.
[53] *AKKA/LAA*, op. cit. *supra* note 6.
[54] See, e.g., Calcagno et al., op. cit. *supra* note 23.
[55] Gilo, op. cit. *supra* note ?.
[56] See, e.g. Larouche and Schinkel, "Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act", *World Competition* (2013),
[57] See also Flynn, op. cit. *supra* note ?; Larouche and Schinkel, ibid ("the 'but for' comparator….is not perfect competition, but as any form of imperfect competition that would have prevailed without the abuse of dominance. In this," Observe, however, that this introduces further uncertainty into the prohibition).
[58] Wahl, op. cit. *supra* note 21, para 43.

agree that the exercise consisting of determining the benchmark price in a case of possible excessive pricing carries a high risk of producing [errors]'.[59]

These uncertainties come at a high cost. As elaborated above, uncertainty may chill dynamic efficiency of those contemplating whether to invest in entering or expanding in the market due to assessment errors. Should decision-makers not set the correct balance and create overdeterrence, dynamic efficiency will be harmed even further. Numerous economic studies have shown that in the long run, even small harm to dynamic efficiency may significantly harm welfare.[60] As Easterbook famously proclaimed, '[a]n antitrust policy that reduced prices by 5 percent today at the expense of reducing by 1 percent the annual rate at which innovation lowers the cost of production would be a calamity. In the long run a continuous rate of change, compounded, swamps static losses'.[61] Accordingly, a strong case can be made for exercising caution in applying the prohibition.

These diagnostic difficulties and the high error costs they create are echoed by many legal and economic experts. Some argue that given dynamic considerations, as well as the formidable difficulties of translating the prohibition into a sufficiently realistic legal test, the prohibition should not be applied.[62] Jenny, for example, argues that '[c]ompetition law is clearly an inadequate instrument to fight excessive prices for analytical and practical reasons'.[63] Yet even scholars who do not argue for a no-liability rule are cognizant of its enforcement problems. Bellamy and Child recognize 'the considerable difficulties of establishing this abuse.'[64] Faull and Nickpay acknowledge that 'it has proved to be a notoriously difficult abuse to prosecute'.[65] Monti argues that 'there is no workable policy to identify and penalize excessive pricing'. [66] Akman and Garrod concur that the current rule is not well defined, suffers from ex ante certainty and harms welfare.[67] Ignjatovic and Hutchinson point out that '[f]or economists, excessive pricing is arguably the most contentious and controversial area of competition law enforcement'.[68] Indeed, the OECD, in its report on excessive pricing, concluded that 'interventions by competition authorities to deal with [excessive prices] directly are considered controversial at best.'[69]

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[59] Ibid, para 42.
[60] See, e.g., the classical study of Nobel Laureate Robert Solow, "Technical Change and the Aggregate Production Function", 39 *Rev. Econ. & Stat.* (1957), 312–320. See also Gilbert, "Looking for Mr. Schumpeter: Where Are We in the Competition–Innovation Debate?", 6 *Innovation Pol'y & Econ.* (2006), 159–215.
[61] Easterbrook, "Ignorance and Antitrust", in Jorde and Teece (eds.), *Antitrust, Innovation and Competitiveness*, (OUP, 1992), 119–136.
[62] Whish, *Competition Law* (OUP, 2009), p. 769; Korah, *An Introductory Guide To EC Competition Law And Practice* (Hart, 2007), pp. 202–203.
[63] Frederic Jenny, prof. ESSEC Business School, Addressed at Cresse 12th International Conference on Competition and Regulation Heraklion: Abusively High prices, Competition Law and Economic Analysis (Jul. 1, 2017).
[64] Bellamy and Child, *European Community Law of Competition* (OUP, 2008), para 10–104 to 10–110.
[65] Faull and Nickpay (eds), *EC Law of Competition* (OUP, 2007), para 4.365.
[66] Monti, *EC Competition Law* (CUP, 2007), p. 219.
[67] Akman and Garrod, op cit. *supra* note 13.
[68] Ignjatovic and Hutchinson, op cit. *supra* note 27, p. 30.
[69] OECD, op. cit. *supra* note 17, p. 4. The British CAT also recently stated that competition authorities should be 'wary of casting themselves in the role of price regulators. Generally, price control is better left to sectoral regulators, where they exist, and operated prospectively; ex post price regulation through the medium of competition law presents many problems.' *Flynn*, op. cit. *supra* note 19, para 462.

The discussion so far reveals that it is widely agreed that enforcement of the excessive pricing prohibition is fraught with practical difficulties, and that it should be applied only where it is clear that its contributions to social welfare – both in the case at hand as well as in the long run, through the externalities it creates on other market players- significantly exceed its costs. It might well be that other types of price controls- most importantly ex ante price regulation by a sector-specific regulator, are better tools for regulating high prices.

III. Four Additional Challenges Created by Private Excessive Pricing Litigation

This state of affairs has existed ever since the excessive pricing offense was recognized. So what's new? As this section elaborates, private litigation of excessive pricing allegations creates four additional challenges to applying the prohibition, which carry the risk of increasing harm to welfare.

First, private litigation upsets the existing status quo by **preventing the use of public discretion in sorting out ex ante** those cases that harm consumer welfare from those that do not. So far, competition authorities dealt with the inherent limitations of the prohibition, as well as the fact that they are ill-suited to act as price regulators, setting a 'fair' price and monitoring compliance[70] by adopting a cautionary and largely non-interventionist approach.[71] An overview of the Commission's practice reveals that allegations of excessive pricing are rare, and are confined to situations in which prices were grossly exorbitant when compared to underlying costs or to price levels prevailing in comparable markets.[72] Indeed, the Commission has been reluctant in general to take decisions on unfair prices per se. In a period of more than fifty years, it has reached fewer than ten formal decisions on excessive pricing, most of which were essentially of an exclusionary rather than exploitative nature[73] or involved natural or statutory monopolies.[74] More recently, it has

[70] See, e.g., Paulis, "Article 82 EC and exploitative conduct" in *European Competition Annual*, op. cit. *supra* note 43, 515–524, at pp. 515–517.

[71] See, for example, European Commission (1975), *Fifth Report on Competition Policy*, point 3 ('measures to halt the abuse of dominant positions cannot be converted into systematic monitoring of prices'); European Commission (1994), *XXIVth Report of on Competition Policy*, point 207; and European Commission (1997), *XXVIIth Report on Competition Policy*, point 77; OECD, op. cit. *supra* note 17, contribution of the EU, pp. 317, 321.

[72] Hordijk, "Excessive pricing under EC competition law: An update in light of Dutch developments' in Barry Hawk (ed.), *International Antitrust Law and Policy* (Juris Publishing, 2001) 463–495.

[73] *General Motors* and *British Leyland* focused on limitations to parallel imports; *United Brands* focused on discriminatory pricing; *Deutsche Post* centred on limiting entry of competitors. See Motta and de Streel, op. cit. *supra* note 22, p. 30. *Gazprom* involved a strategy of partitioning national markets in order to limit competition, Press Release, Antitrust: Commission Imposes Binding Obligations on Gazprom to Enable Free Flow of Gas at Competitive Prices in Central and Eastern European Gas Markets (24 May 2018). Rambus, op. cit. *supra* note 12, involves a patent-ambush of a standard-setting organization. Jones and Sufrin suggest that this case was dealt with as one of excessive pricing rather than exclusionary abuse because at the time of its conduct Rambus was not dominant. Jones and Sufrin, *EU Competition Law* (OUP, 6th ed., 2016), p. 548.

[74] For example, *Deutsche Telekom* (statutory telecommunications monopoly); *Port of Helsingborg* (natural seaport); *Aspen Pharma*, European Commission press release, Antitrust: Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines (IP/17/1323, 15 May 2017) (patent-protected drugs for cancer treatment).

taken some actions against super-dominant holders of standard-essential patents.[75] Yet, to ensure that dynamic efficiency is not harmed, actions were only taken 'when the holders of those patents [had] already agreed to license their technology on fair, reasonable and non-discriminatory terms'.[76] As the Director of the Directorate General for Competition recently stated, the Commission expects excessive pricing cases to remain rare.[77] A similar pattern was adopted by national competition authorities. Although in recent years there has been a resurgence in excessive pricing investigations, these focus primarily on the pharmaceutical sector or on recently liberalized sectors.[78] Both suffer from unique market failures which are difficult to reach by other means, and thus the pricing symptom is addressed. Furthermore, both generally involve essential products. These self-imposed limitations help mitigate the potential error costs resulting from the vagueness and the inherent difficulties of the prohibition.

Advocate General Wahl expressed his approval to such a policy: 'In its practice, the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view.'[79] He suggests applying even stricter limitations, stating that '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.'[80] Indeed, as noted above, in such settings the ability to deal with the market failure directly to invigorate the competitive process might be reduced, depending on the specific laws and regulators. This view virtually closes the door to excessive pricing cases involving firms that gained their market positions based on natural comparative advantages, merit, or luck.

The option of applying public discretion in bringing excessive pricing cases, to ensure that they further welfare, is no longer available. Once private litigation is allowed, competition

[75] In Samsung and Motorola, dominant standard-essential patent holders were ordered not to ask for injunctions against consumers who were willing to pay a fair price for the license, where the patent-holder committed to license his patents under FRAND terms. COMP/39.985 *Motorola—Enforcement of GPRS Standard Essential Patents* [2014] OJ C344/6; COMP/39.939 *Samsung—Enforcement of ETSI Standard Essential Patents* [2014] OJ C30/8. In such cases the remedy avoids the need for the Commission to establish what constitutes a fair price. The issue also came up before the Court of Justice in C170/13 *Huawei Technologies vs. ZTE* EU:C:2015:477. The Court's decision does not directly relate to the prohibition against excessive pricing, but rather, to infringement of the commitment to FRAND. For applying the prohibition in cases of hold-ups due to the consumer's high sunk costs or switching costs, see Jenny, op. cit. supra note 51.
[76] Margrethe Vestager, Commissioner for Competition EC, Address at Chillin' Competition Conference, Brussels: Protecting Consumers from Exploitation (21 Nov. 2016).
[77] Johannes Leitenberger, DG Comp. EC, Address at EUI Competition Workshop Competition, Florence: Assessments and Abuse of Dominance (22 Jun. 2018).
[78] Ignjatovic and Hutchinson, op cit. *supra* note 23; Colangelo and Desogus. "Antitrust Scrutiny of Excessive Prices in the Pharmaceutical Sector: A Comparative Study of the Italian and UK Experiences", 41(2) *World Competition: Law and Economics Review* (2018) 225–254. The focus on recently liberalized sectors might be justified by the lack of an effective regulatory agency to ensure that the transition to competition does not harm consumers. See, e.g., Röller, op cit. *supra* note 43; Fletcher and Jardine, op cit. *supra* note 43. Yet many of these decisions are inconsistent and do not provide clarity. Svetlicinii and Botta, "Article 102 TFEU as a Tool for Market Regulation: "Excessive Enforcement" Against "Excessive Prices" in the New EU Member States and Candidate Countries", 8 *Eur. Competition J.* (2012) 473–496.
[79] Wahl, op. cit. *supra* note 21, para 3.
[80] Ibid, para 48.

authorities' control over which cases are brought is lost. Courts must decide all cases brought before them. Accordingly, there is no way to ensure that excessive pricing cases are brought only in rare cases unless courts apply strict limitations.The Commission's enforcement policy, whilst informative with regard to its concerns regarding overdeterrence, does not limit the courts' discretion.

Furthermore, given the high costs of a trial, the need to expose cost- and profit-related data, and the potential public visibility of excessive pricing cases, dominant firms might choose to settle even if claims are not well-grounded, thereby increasing the chilling effect. This concern is strengthened by the fact that even wrong public perceptions of unfair high prices might harm a firms' reputation and, in line with Kahenman, Knetsch and Thaler's findings, lead to loss of consumer good will and willingness to pay.[81]

The second factor which challenges the equilibrium is the fact that private suits differ significantly in what the decision-maker is required to decide, relative to the cases brought so far by competition authorities. Indeed, the task faced by general courts is more difficult than that faced by the Commission or the ECJ. Up until now, competition authorities and the reviewing courts only had to determine whether a specific price set by the dominant firm was fair. As noted above, the Commission only brought cases of flagrant abuse, where it was easy to determine unfairness. Consider, for example, the *General Motors* case.[82] Belgian law required anyone importing a vehicle to the country to obtain certification that imported vehicles met certain technical standards—certification that could only be obtained from the trademark holder. General Motors charged such parallel importers a fee 2,400 percent (!) higher than the fee charged for such certificates for cars sold by GM itself. This huge difference made it easy to determine that the price was abusive. In a private excessive pricing suit it is no longer sufficient to determine whether a specific price is unfair. Rather, to determine the size of damages, the court would **need to identify the precise point at which the price becomes unfair**. Broad-brush estimations with wide margins (to avoid error) are no longer possible. Yet, as elaborated above, there is no clear methodology for determining when exactly a price becomes unfair. Furthermore, as market conditions may have changed over the period covered by a private damages suit, the court might need to determine what constitutes a fair price under different market conditions.

Thirdly, once a violation is found, general courts hearing excessive pricing cases—unlike competition agencies—have **more limited discretion in designing remedies to reflect all the relevant considerations,** including the ability of the dominant firm to estimate in advance what will be considered a fair price. This is because the Damages Directive provides that member states must 'ensure that anyone who has suffered harm caused by an infringement of competition law....can effectively exercise the right to claim *full compensation* for that harm from that undertaking or association'.[83] Furthermore, general courts do not have the tools to directly address

[81] Kahneman, Knetsch, and Thaler, "Fairness as a constraint on profit seeking: Entitlements in the market", 76 *American Economic Review* (1986) 728-741.
[82] *General Motors*, op. cit. *supra* note 18.
[83] Damages Directive, op. cit. *supra* note 5, Article 1.

the causes of high prices, which, as Fletcher and Jardin argue, might be more efficient than addressing the symptoms.[84] In addition, courts must **decide ex post**, and do not have the flexibility of setting a fair price ex ante where uncertainty regarding its excessiveness is high, as the Commission has done in some cases.[85] This, in turn, significantly increases the risk that the fruits of success enjoyed by a would-be dominant firm could be taken away, even if the firm was not reasonably capable of determining whether its prices would be considered fair.

The final challenge arises from the fact that, unlike competition authorities, **courts cannot engage in industry-wide studies of costs,** and the parties' economic experts usually do not have access to such information, which might be needed in order to apply the prohibition. Prices—which are visible to all—may not always be indicative of costs, especially where the firm produces multiple or complementary products. Furthermore, courts and economic experts, unlike competition authorities, cannot mandate other industry participants, who are not sides to the specific dispute, to provide them with the necessary data on industry-specific conditions.

The combination of the above factors, together with the inherent difficulty of determining when a price becomes unfair, may increase overdeterrence, unless the conditions for the prohibition are set at a socially efficient level.

IV. Can We Rely on General Courts to Reach a Welfare-Enhancing Equilibrium?

The increased risk of potential overdeterrence, and its associated dangers, raise the question of whether we can rely on general courts to deal with these risks effectively, to ensure that dynamic efficiency is not impaired to the extent that overall consumer welfare is harmed. Should the answer be positive, then private excessive pricing litigation may increase social welfare. Indeed, the multiplicity of general courts means they may act as a laboratory, enabling different rules to be tested out, until the optimal one is reached. Furthermore, trial-and-error costs might be offset in the long run by the creation of efficient rules. Should the answer be negative, however, then private excessive pricing litigation is likely to increase overdeterrence and harm welfare.

In answering the above question, decision theory provides a useful tool.[86] Decision theory is based on the recognition that in designing socially optimal legal rules, not only conceptual obstacles but also practical limitations in the decision-making process should be taken into account. Realistic assumptions of enforcement must be recognized, to ensure that the benefits of a hypothetically optimal rule do not outweigh the costs of its application in practice. Accordingly, we must analyse the institutional features and competences of general courts in the different member states, and how they affect the task of determining what constitutes a fair price.

As elaborated above, designing and applying a welfare-enhancing rule against unfair excessive prices **requires the decision-maker to engage in complex economic analysis and to have a sound understanding of how markets work**. General courts generally lack economic expertise. Instead, they often rely on external economists—commonly employed by the parties—to present

[84] Fletcher and Jardine, op cit. *supra* note 43.
[85] Ackerman, op. cit. *supra* note 14, p. 356.
[86] See, for example, Beckner and Salop, "Decision theory and antitrust rules", 67 *Antitrust Law Journal* (1999) 41-76, pp. 43–45; Popofsky, "Defining exclusionary conduct", 73 *Antitrust Law Journal* (2006) 435–482.

the relevant economic arguments. Yet in the case of excessive pricing, reliance on such external experts might often not be sufficient. In the absence of clear rules and methodologies to determine when a price becomes unfair, economists are not likely to provide definitive answers that could have been clearly foreseen by industry participants. The need to pinpoint exactly when a price becomes unfair further complicates this task. These problems are not likely to be solved even if courts were to appoint their own economic experts. If the Commission—a competent administrative authority which brings together lawyers and economists with expertise in analysing market conditions and dynamics—finds it extremely difficult to determine when a price is unfair, can we honestly expect general courts to set clear rules and reach correct decisions that balance all the competing interests and ensure that social welfare is not harmed? Indeed, the failure of the Commission and the ECJ to provide clear rules so far is not due to lack of trying. It reflects the fact that it is impossible to set, a priori and in abstracto, precise thresholds which can be applied to all circumstances.[87] This difficulty is further exacerbated by the fact that the private or even court-appointed economic expert cannot mandate other industry participants to provide information regarding industry conditions, which are necessary in order to engage in the in-depth analysis necessary to ensure that dynamic efficiency is not harmed. This is not to say that economists cannot play an important role in assisting courts in efficiently regulating prices. Economists assisted courts, for example, in setting fair, reasonable, and non-discriminatory (FRAND) terms in standard setting organizations (SSOs).[88] Yet, as Brooks and Geradin observe, in such cases the FRAND commitment is the result of a voluntary contract. Accordingly, "the role of a court is not to determine what 'fair and reasonable' terms would be, but whether the terms offered, taking into account all of the specific circumstances between the parties and prevailing market conditions, fall outside the range of reasonableness contemplated by the FRAND commitment."[89] This is a different and arguably easier task than pinpointing ex post exactly what constituted a fair price, and doing so in a way which ensures ex ante certainty in a way which is not overdeterrent. Furthermore, the ability to employ talented economists might be higher in cases which involve high stakes, as is often the case with FRAND litigation, compared to excessive pricing litigation of a specific product in a specific locale, especially since no pan-European joint right of private action exists.

The courts' lack of economic training, coupled with the vagueness of the prohibition and the need to precisely pinpoint the fair price, may lead to three 'traps' which increase the risk that courts will reach socially harmful decisions. The first is the '**cost trap**': assuming that the competitive price (which is much more easily calculated), or any price near it, is the fair price. Applying such a rule makes the decision-maker's job much easier, and at first glance it also appears to serve consumer welfare: are not low, competitive prices the very essence of competition? Furthermore, such a rule may sit well with a populist but ill-founded sentiment that firms should not be allowed to charge supra-competitive prices. Several Israeli judges hearing private excessive pricing cases exhibited this tendency. The Spanish rule, which defines excessive prices as any price substantially

[87] Wahl, op. cit. *supra* note 21, para 111.

[88] See, e.g., Unwired Planet v. Huawei.

[89] Brooks, Roger G. and Geradin, Damien, Interpreting and Enforcing the Voluntary FRAND Commitment, 9(1) *International Journal of IT Standards and Standardization Research* 1 (2011).

above the competitive level, and does not require Spain's competition authority to establish the unfairness of the high price,[90] is a slightly more lenient version of this cost trap.

The dangers inherent in such a rule could be fuelled by the ECJ's statement in *AKKA/LAA* that '[t]here is in fact no minimum threshold above which a rate must be regarded as "appreciably higher", given that the circumstances specific to each case are decisive in that regard.'[91] Although the Court emphasized that 'the difference must be significant for the rates concerned to be regarded as "abusive"',[92] the question of what difference is to be regarded as 'significant' is open to interpretation. For some courts, a difference of 20% might suffice.

Courts might also adopt a version of the cost trap which uses perfect competition as the ultimate comparison benchmark. This was recently observed in the British *Flynn and Pfizer* case. There, the Competition Appeals Tribunal noted that the CMA was 'wrong in law to adopt a Cost Plus methodology that produced a result that would have pertained in circumstances of perfect or, more accurately...idealised competition, rather than the "real world"'.[93] As noted above, such a benchmark might significantly harm innovation, both in the specific market and in those affected from the innovation's positive externalities- thereby harming consumers in the long-run, goes well beyond what competition law generally seeks to achieve for consumers and the rules of the market game set by it, and therefore is also unfair to suppliers.[94]

Yet, as noted above, rules which equate the (near) competitive price with a fair price disregard long-term effects on market dynamics and create overdeterrence. As AG Wahl observed, '[w]ere a competition authority to intervene in respect of any difference—however small—between [the competitive price and the actual price], the risk of having false positives would simply be too high'.[95] Also, in light of the difficulty for a dominant firm of estimating in advance, with a sufficient degree of likelihood, where the line between a legitimate competitive price and a prohibited excessive price may be drawn, legal certainty mandates that the fair price not be set too close to the competitive price.[96] Furthermore, emphasis on profitability as a key indicator of excessiveness will turn the prohibition of unfair pricing into a prohibition of high profitability. Such an emphasis might also chill incentives to reduce costs through productive efficiency. This is because if the margin of profit over costs is constant, then cost reductions only partially benefit the dominant firm. Finally, such a rule disregards *General Motors* and the second prong of the *United Brands* test, since it does not take into account the economic value of goods in the eyes of consumers, which may be higher than the competitive price. Indeed, a simplistic cost–price benchmark disregards the fact that consumer welfare is based not only on price, but also on the quality of the product or service. A focus on price might create incentives for firms to reduce investment in other parameters, which might be important for at least some consumers.

[90] Spanish Guidelines on Excessive Pricing in Jenny, op. cit. *supra* note 57.
[91] AKKA/LAA, op. cit. *supra* note 6, para 85.
[92] Ibid, para 86.
[93] Ibid, para 310.
[94] Adi Ayal, Fairness in Antitrust: Protectig the Strong from the Weal (Hart, 2014).
[95] Wahl, op. cit. *supra* note 21, para 103.
[96] Ibid, para 104.

A similar concern may arise when simplistic yet relatively clear profit benchmarks are set. In Israel, the Excessive Pricing Draft Guidelines created under the previous Director General of the Israel Competition Authority (ICA) established a "safe harbour" defined by profits of up to 20% of costs, below which it was assumed that prices were fair.[97] While the Guidelines clearly stated that no presumption of unfairness should apply to prices above the benchmark, some courts nonetheless adopted such a presumption. This is not surprising: where no clear and straightforward methodology exists to pinpoint when a high price becomes excessive and unfair, it is only natural to attach weight to existing benchmarks. In light of these unintended consequences, the benchmark was later deleted from the Guidelines.[98]

The concern that general courts will adopt erroneous tests for identifying excessive pricing is heightened by what might be called the '**fairness trap**': the fact that linguistically the prohibition is based on fairness, rather than on consumer welfare. Indeed, even those insisting that we have economic tools to apply the offence concede that the court needs to make a legal policy assessment as to whether the price charged is excessive and unfair.[99] This, in turn, could lead some courts to disregard dynamic efficiency concerns—or, for that matter, any economic concerns—and simply apply the prohibition based on moral notions of fairness. The fact that the ECJ has never explicitly endorsed the dynamic efficiency consideration strengthens this concern.[100]

Such an interpretation is highly problematic because it clashes with the goals of competition law. The Commission and the ECJ have long recognized that competition law prohibitions should be interpreted in a manner which does not adversely impact competition in the market, with the ultimate goal being to ensure consumer welfare. However, general courts which are not immersed in the field might choose to disregard such considerations. The threat is especially significant when economic considerations clash with an intuitive notion of fairness, whereby enabling dominant firms to charge high prices is likened to abandoning consumers to market forces over which they have no control. Of course, general courts are bound by the ECJ's interpretations of the prohibition. Yet the vagueness of the available tests, the lack of a clear methodology for applying them in practice, and the fact that the tests do not specifically focus on the need to ensure dynamic efficiency may lead general courts to fall into the fairness trap. The fairness trap may also be triggered when the decision-maker is convinced that the price is 'so high that [it] just can't be justified.'[101] In the absence of clear rules, a motivation to limit the prices paid by consumers may lead to over-inclusiveness of the prohibition.

[97] Draft Guidelines of the Director of the Israel Competition Authority 1/14: The Prohibition Against the Charging of an Excessive Price by a Monopolist (April 9, 2014).
[98] Guideline 1/17: The Considerations of the Director of the Competition Authority in Applying the Excessive Pricing Prohibition (Feb 28, 2017). See also Solomon and Achmon, "Excessive Pricing in Israel—How to Deal with a 'Hot Potato'?", J. Eur. Competition L. & Prac. (2017).
[99] Gilo, op. cit. *supra* note 5.
[100] The ECJ's requirement that the cost–price ratio be significant and persistent may be an indirect indicator of such a consideration.
[101] Vestager, op. cit. *supra* note 70.

It is noteworthy that notions of price fairness have long historical roots which may find echoes in the Treaty of Rome and its later interpretations.[102] While such notions differ in the considerations that are taken into account, many require proportionality—rather than equality—between the price paid and the value of a good, and are not simply based on the dominant firm's costs. For example, the *Corpus Iuris Civilis* compiled by Emperor Justinian establishes the principle known as *laesio enormis*—literally, 'enormous injury'—which requires that the price paid for a piece of land be at least half its 'true value'.[103] Yet history also teaches us that defining what constitutes a fair price is an extremely complicated task, with no clear guidelines.[104]

Add to this a third concern, that those courts which are non-economically educated might fall into the '**monopolistic competition trap**'. Here, the concern is that the court might view market conditions through a narrow prism which appears to give one firm a dominant position, thereby meeting the basic requirement of the prohibition. To see why, let us examine the tests currently applied to determine market boundaries. Such tests are based on the cross-elasticity of demand and supply and are used to determine, inter alia, when products constitute sufficiently close substitutes in the eyes of consumers that an increase in the price of one will lead consumers to switch to another, creating competitive pressures in the market.[105] The well-known SSNIP test attempts to provide some rigor to this economic exercise. The test determines the effects on market demand of a ***s***mall but ***s***ignificant (5–10%) and *n*on-transitory ***i***ncrease in ***p***rice (hence 'SSNIP') by a hypothetical supplier-monopolist.[106] Now apply this test in a market characterized by monopolistic competition—i.e., one where products are not homogenous and consumers have preferences for different products, so that each supplier can set his price above the competitive benchmark. Take, for example, different types of cheese. Although some cheese producers may compete in the same market, brands might be sufficiently differentiated that a percentage of consumers may be willing to pay a bit more for them. In such a case, the market might be wrongly defined by a non-economically educated court as very narrow, sometimes even comprising only the specific brand or type of cheese.[107] Similar errors could occur with regard to products which are part of a portfolio.[108] Once the market is narrowly defined, a presumption of market power based on high market shares can be applied. This, in turn, increases the motivation and ability of private plaintiffs to bring excessive pricing cases where competition authorities would have rightfully treaded more carefully.[109] Alternatively, courts might deduce a dominant position from a large price gap, despite

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[102] Fish and Gal, op. cit. *supra* note 10.
[103] C.4.44.2 (285 A.D).
[104] Fish and Gal, op. cit. *supra* note 10.
[105] For high market shares as a presumption of dominance see Jones and Sufrin, op. cit. *supra* note 67, Chapter 6(b)(iii).
[106] The test was applied, for example, in Case T- 321/05 *AstraZeneca V. Commission* [2010] ECR II-2805, para 86–87. Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5, sections 15–19.
[107] The monopolistic competition trap is not unique to excessive pricing cases, and can arise whenever a market definition is necessary.
[108] Fletcher and Jardine, op cit. *supra* note 43.
[109] Of course, low market power also implies a limited ability to raise prices much above the competitive price. Yet if the product is widely sold, and if the court is likely to fall into the cost or fairness trap, it might still be profitable to bring a damages action.

the fact that the ability to raise price might result from market failures, such as relative bargaining positions of non-dominant firms. Such conduct should generally not trigger competition laws, although it might trigger other laws such as consumer laws.

Other institutional limitations abound. General courts often **do not have the tools to verify the effects of their rules on market dynamics** once a decision has been made—tools which would enable them to learn from trial and error. Can courts rely on academics or competition authorities to perform such studies? Not always. Even for those experienced in market analysis, the effect of a specific ruling on market conditions is not easily observable, and the externalities it creates on conduct in other markets are not easily discernible.[110] This makes an understanding of long-term overall market dynamics all the more important. Furthermore, as noted above, courts **must decide all cases** brought before them. Accordingly, they cannot ensure that excessive pricing suits are only brought in cases which further the public interest, unless they apply such limitations.

One may justifiably ask how the excessive pricing prohibition differs from other prohibitions which require complex economic analysis, such as predatory pricing or calculating the harm created by a cartel. Indeed, complexity alone should not prevent private litigation. The answer is simple. In the predatory pricing and cartel prohibitions the legal rule is generally clear, and the complexity arises from the difficulty of proving the elements of the offense. The decision-maker need not apply much discretion, and the dominant firm can calculate the foreseeable results of its conduct with relatively clarity. The excessive pricing prohibition does not supply such clarity. Even more importantly, clarity is not enough. As widely agreed, creating a clear rule that will apply to all industries alike, while at the same time ensure that welfare is not harmed, is an extremely complex task, to which so far not good solutions were found. In addition, its overdeterrence error costs may be higher.

V. Effects on Social Welfare

The factors discussed above may lead to an overflow of excessive pricing cases, which may detract from public welfare. Indeed, in Israel, which has copied Article 102 of the TFEU into its laws,[111] and has recognized a private right of action and the right to bring class actions, private excessive pricing suits have become the main competition law prohibition to be litigated. While the Israel Competition Authority has never been able to find even one excessive pricing case which would further social welfare (despite serious attempts several years ago to identify such cases), there has been a surge of private suits.[112] In the past three years alone almost thirty such cases have been brought, pertaining to a diversity of products and services, including margarine, cottage cheese, Gillette razors, popcorn sold in cinemas, hard cheese, cocoa powder, instant coffee, fried flakes, sour cream, soup almonds, green tea, and Coca-Cola. As can be seen, these are very specific—and not necessarily highly important—markets. None are protected from competition

[110] This problem may plague courts and competition authorities alike, especially authorities which do not have the funding or expertise to engage in such studies.

[111] Section 29A of the Israeli Competition Law 1988.

[112] For survey of some of these cases see Yossi Spiegel, "Antitrust enforcement of the prohibition of excessive pricing - the Israeli experience," in Excessive prices and competition law enforcement, Henny F. and Y. Katsoulacos eds., Springer (2018).

by high legal or regulatory barriers; none are natural or statutory monopolies; and all compete with other products. Furthermore, the price margins in some of these markets are not notably high, and in most markets the supracompetitive price arises from the comparative advantages of a more desirable product. As a result, Israeli courts have become a special kind of price regulator—one that does not have the discretion to choose the products to be regulated, and that must determine fair prices ex post.

In Israel the tsunami was triggered by relatively permissive Excessive Pricing Guidelines issued by the Competition Authority.[113] Although the Guidelines were retracted and then significantly limited in their scope by the current Director of the Competition Authority,[114] the floodgates were already opened. Yet Europe might not need such a trigger. Rather, the motivation of high compensation might be sufficient, especially since many European markets are large (meaning that compensation for a successful case is likely to be high). A flux of private cases is, of course, much more prone to happen when class actions are allowed. While currently only several EU member states allow collective redress, and most adopt an opt-in mechanism, this may change as private actions develop in Europe. The adoption of such tools is in line with the Commission's Recommendation on Collective Redress Mechanisms.[115] While developing such mechanisms for competition law violations, policy makers must not disregard the unique challenges posed by the excessive pricing offense.

Does this state of affairs harm social welfare? I argue that it does. For one, it is questionable whether turning courts into price regulators makes the best use of courts' resources. But more fundamentally, as noted above, the concern is one of overdeterrence which harms welfare. Should courts adopt over-inclusive tests, opening the floodgates to numerous erroneous excessive pricing findings, the harm to dynamic efficiency might be significant. As Evans and Padilla note, the costs of an over-inclusive prohibition are likely to be large in three contexts: in dynamic industries where firms compete by launching new products and services; in emerging industries where entrepreneurs are contemplating whether to start new businesses; and in mature industries where firms may wish to upgrade their services. The cost is bound to be highest in industries that rely on trial and error, where the cost of experimentation is high but the return to success is much higher. [116] The harms from applying such rules are not limited to the specific product market in a specific case, but rather create externalities on the conduct of other firms which are contemplating entry, expansion, and research and development. Furthermore, the price of over-inclusive tests may be much higher than for under-inclusive ones.[117] This is because, as the theoretical and empirical literature suggests, mistaken inferences and the resulting false condemnations 'chill the very conduct the antitrust laws are designed to protect'.[118] Furthermore, as elaborated above,

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[113] Draft Guidelines, op. cit. *supra* note 88.
[114] Guidelines, op. cit. *supra* note 88.
[115] *Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, (EC) No. 396/2013 of the 11 June 2013, O.J (C 201). The recommendations suggest an opt-in principle (section 20).
[116] Evans and Padilla, "Excessive prices: Using economics to define administrable legal rules", 1(1) *Journal of Competition Law and Economics* (2005) 97–122.
[117] Easterbrook, op. cit. *supra* note 55.
[118] *Verizon Communications Inc. v Law Offices of Curtis V Trinko, LLP*, 540 U.S. 398 (2004), p. 414.

overdeterrence limits the positive externalities that innovation creates. In the EU context, an additional problem may arise. Given the high level of uncertainty involved in determining when a price becomes 'unfair', courts in different member states might set different maximum prices for similar products. This, in turn, may lead to court-approved price differentiation, in a clear clash with fundamental principles of the EU.

The transfer of discretion to decide when prices are excessive to general courts may also lead to what economists call a 'tragedy of the commons'. This metaphor relates to situations where different agents, acting independently in accordance with their self-interest, use a shared good while disregarding the externalities they impose on one another. The result is over-exploitation of the shared good until it is depleted, eventually harming all users.[119] This situation arises due to a collective action problem: each user enjoys short-term benefits, while the long-term costs are borne by all. Excessive pricing decisions which involve goods that are sold in more than one jurisdiction could create a similar dynamic: each national court focuses on how high prices might harm consumers in its own jurisdiction, disregarding the chilling effect that a similar focus by other national courts might create on dynamic efficiency.[120] This concern is most significant in the smaller and less rich member states.

Finally, should general courts not follow the self-restraint adopted by the Commission and competition authorities, the divergence in their practice could affect public perceptions of competition authorities. Indeed, the more restrained conduct of the authorities might be wrongly perceived by some as indicative of inefficiency or even regulatory capture. This, in turn, could indirectly affect the ability of competition authorities to apply other competition law prohibitions (e.g., if those perceptions lead to budget cuts or reduce officials' incentives to assist in competition-related investigations), or alternatively, could motivate some authorities to become more interventionist than is otherwise justifiable.

It is important to emphasize that the above discussion does not imply that dominant firms should not be limited, in the right cases, from charging exorbitant prices with complete disregard to consumer welfare. Indeed, a policy that could be counted on to identify and punish excessive prices that harm social welfare would increase social welfare unambiguously.[121] Unfortunately, under the current case law it is unclear what the appropriate benchmark is. Accordingly, in light of institutional competences of general courts and the effect of uncertainty on market dynamics, the optimal enforcement mix between private and public enforcement in excessive pricing cases may be different than in cases in which competition law creates certainty.[122]

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[119] The problem was first recognized in Lloyd, William Forster, "Two lectures on the checks to population" (OUP, 1833). The term was coined in Hardin, "The Tragedy of the Commons" 162 *Science* (1968) 1243–1248.

[120] This concern is also relevant to the enforcement of other types of prohibitions. Yet the more settled the economic theory and the legal requirements of a prohibition, the lower this risk, and vice versa.

[121] Gal, Exploitative Abuses, op. cit. *supra* note 8.

[122] For a generally similar conclusion see McAfee, Mialon and Mialon, "Private v. Public Antitrust Enforcement: A Strategic Analysis", 92 *Journal of Public Economics* (2008) 1863-1875 ("To the extent that the court is prone to mistakes and full-time public enforcers are efficient in litigation because of increasing returns to scale, the model suggests that policy-makers should discourage private enforcement of the antitrust laws").

VI. Potential Solutions

The above concerns have led the UK Competition and Markets Authority—which has been one of the most active authorities worldwide in bringing excessive pricing cases—to suggest that in order to ensure social welfare is not harmed, no private actions should be allowed on such claims.[123] But this is not practical. This train has already left the station. In its stead, and as a second-best solution, I suggest placing significant limitations on the ability of plaintiffs to bring private excessive pricing suits, in line with the current practice of the Commission, to ensure that the prohibition does not create overdeterrence and that courts are not turned into price regulators. This section explores potential procedural as well as normative solutions.

A combined effort by the Commission, national competition authorities, and European courts could build on and complement their comparative competences. First, the courts, the Commission and national competition authorities could create more detailed guidelines that reduce at least some of the vagueness in the excessive pricing prohibition.[124] Such guidelines should emphasize, inter alia, the need to apply and differentiate both prongs of the *United Brands* test (i.e., the excessiveness and unfairness of the price charged by the dominant firm); the need to apply the rule with an eye toward a balanced view of consumer welfare (focusing not only on static efficiency but also on dynamic efficiency); and the fact that the competitive or near-competitive price must not be used as the benchmark for a fair price. The guidelines should also suggest ways to avoid the monopolistic competition trap in market definitions, and should set welfare-enhancing conditions for class actions. They might also include a general requirement for courts to ensure that hearing the case indeed serves the public interest. Such guidelines—especially when mandatory—are especially important to counter populist and ill-founded public perceptions on what should constitute a fair price and the role of courts in regulating such prices.

In addition, in line with Schinkel and Rüggeberg, competition authorities should be automatically notified and granted standing in private excessive pricing cases, so that they can ensure the public interest is protected by choosing to act as amicus curiae.[125] The competition authority could then conduct a public investigation and assess the fair price as well as the total economic damages caused by the infringement. Its report would be offered as advice to the court.[126] In fact, the Commission has increasingly applied such tools in recent years. This is also in line with the Damages Directive, which grants national competition authorities the right to 'assist national courts in the quantification of the damage'.[127]

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[123] Contribution of Britain, op. cit. *supra* note 41, p. 296.
[124] For examples of such guidelines see the *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, 2013 O.J. (C 169).
[125] Schinkel and Rüggeberg, "Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line With Efficient Private Enforcement" 29(3) *World Competition: Law and Economics Review* (2006) 395–420.
[126] Ibid.
[127] Damages Directive, op. cit. *supra* note 5, Art. 17.3

Both the Commission and academics also have an important role to play in order to ensure that general courts do not fall into the fairness trap. This can be done by exposing the relevant concepts of fairness and analysing their application in relevant cases.[128] To illustrate, once fairness is viewed as part of a social contract between all market participants,[129] an interpretation which completely disregards dynamic efficiency might be unfair to consumers. To put it simply: can we automatically assume that consumers prefer (for example) a low-priced product over a costlier but much better one that resulted from costly research and development which was motivated by the potential for high profits? Furthermore, the fairness of a price must be examined in relation not only to consumers, but also to suppliers. A combination of the cost and fairness traps might be unfair to suppliers, inter alia because once they become dominant they might be prevented from earning profit margins that non-dominant firms with differentiated products can earn.

Increasing the courts' awareness of the social costs of overdeterrence will hopefully affect the legal requirements and burdens of proof on potential plaintiffs. In accordance with decision theory, the higher the expected error costs from a lenient and unclear rule that harms dynamic efficiency, the more careful the decision-maker must be to avoid such costs. Therefore, legal requirements should be set at a level which ensures that courts are not faced with cases that do not serve welfare, and may even harm it. Such requirements may include, for example, applying the prohibition only to super-dominant firms protected by high entry barriers;[130] ensuring that it is only applied where market forces will not self-correct in the short or medium run;[131] limiting interference in markets characterized by high levels of risk, or where innovation and technological change play an important role;[132] limiting interference where market position was achieved through superior competitive merit;[133] applying several benchmarks in parallel to ensure that the price is excessive;[134] ensuring that indirect costs are not disregarded; verifying the fairness of the price against the increased value it creates for consumers;[135] not applying it where a sector-specific regulator is charged with the task of regulating prices, and no regulatory failure exists,[136] and setting high burdens of proof on plaintiffs to ensure that litigation is not abused. Finally, AG Wahl's suggestion that the offense be limited to cases which involve a dominant firm that is

[128] For such attempts see Gal, Exploitative Abuses, op. cit. *supra* note 8; Fish and Gal, op. cit. *supra* note 10; Akman and Garrod, op. cit. *supra* note 13.
[129] Gal, "The Social Contract at the Basis of Competition Law", in Lianos and Gerard (eds.) *Competition Policy: between Equity and Efficiency* (CUP, 2017); Gal, Exploitative abuses, op. cit. *supra* note 8.
[130] The requirement that markets be protected by high barriers can also be based on the ECJ's decision in AKKA/LAA, op. cit. *supra* note 5, in which the Court required the excessive price to be persistent over time. See also Davies and Padilla, "Another Look at the Role of Barriers to Entry in Excessive Pricing Cases" (2019), <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3364881>.
[131] Motta and de Streel, op. cit. *supra* note 22; Davies and Padilla, op. cit. *supra* note 125. There seems to be agreement among economists that these two conditions are essential to create a welfare-increasing balance.
[132] See, e.g., OFT (1999), Guidelines in Relation to Section II Prohibition Under the UK Competition Act.
[133] See also Ignjatovic and Hutchinson, op cit. *supra* note 27, p. 31.
[134] Wahl, op. cit. *supra* note 21, para 43.
[135] Case C-52/07 *Kanal 5 Ltd. v. Föreningen STIM upa*, [2008] E.C.R. I-9275. Adopted by national courts as well, see, e,g, *Attheraces Ltd. v. British Horseracing Bd. Ltd*., [2007] EWCA (Civ) 38, [2007] Info. T.L.R. 41 (Britain); Case C / 09 / 454521st / HA ZA 13-1279 *Foundation SDU et al. vs. SDU Publishers* (4 March 2015, the Hague Tribunal)(Netherlands).
[136] Wahl, op. cit. *supra* note 21, para 49.

protected by legal entry barriers[137] could be adopted, at least until a higher level of legal clarity is reached. Courts should also ensure that 'lack of reliable data or the complexity of the operations involved in the calculations....cannot justify an incomplete, superficial or dubious analysis'.[138] Another possibility is to limit private cases to follow-on actions to determine the extent of damages suffered by consumers. While this option does not solve the inherent problems of determining what constitutes a fair price, it may reduce overdeterrence which results from applying the prohibition in cases which increase dynamic efficiency.

It is interesting to note that in accordance with decision theory, it might be more efficient to create higher burdens of proof for excessive pricing cases brought by private parties to be heard by general courts, relative to those imposed on the Commission and national competition authorities. This is due to the significantly different characteristics of the decision-makers involved—both those who decide whether to bring a case (public/private) and those who determine whether the specific conduct infringed the law (competition agencies/general courts)—which affect the magnitude of potential error costs. Yet implementing different standards may create practical difficulties. These may involve, inter alia, the efficiency of the process by which such different standards are set; a weakening of the directive function played by the Commission, national competition authorities, and European courts; and a concern that establishing different standards may lead general courts to adopt a more lenient approach, which does not serve welfare. Instead, we suggest that private excessive pricing cases be heard before specialized courts, comprising economists as well as lawyers. At the same time, it is suggested that in private cases the burden of proving prima facie that the price is not only excessive but also unfair should rest on the plaintiff.

An important question is whether such self-imposed limitations are in line with the recent EU Damages Directive.[139] In particular, Article 1 of the Directive provides that its rules are necessary 'to ensure that anyone who has suffered harm caused by an infringement of competition law....can effectively exercise the right to claim *full compensation* for that harm'. The emphasis on full compensation could limit the ability of courts to adopt limitations on the right to claim damages. This argument is strengthened by the text that follows, which states that the directive 'sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm'.[140] Given that overdeterrence may well distort competition and create obstacles to the proper functioning of the internal market, placing limitations on such rights of action may fall within the goals of the directive. Yet the last part of Section 1 could limit such an interpretation, by emphasizing that these goals are to be achieved only through the equivalent protection of anyone who has suffered damages.

One possible counterargument is that while full compensation must be granted once an infringement has been proven, this does not imply that the standards for proof of an infringement

[137] Ibid, para 48.
[138] Ibid, para 53.
[139] Damages Directive, op. cit. *supra* note 5.
[140] Ibid, Section 1.

should be set at a level which does not optimize the goals of competition law. Rather, the requirement for full compensation applies once a competition law infringement has been proven. Indeed, the justifications for the self-imposed restraints that were acknowledged by the Commission or suggested by AG Wahl, and that apply to public enforcement of the prohibition, are even stronger when applied to private litigation.

It may be more difficult to apply this argument to rules designed specifically to limit private excessive pricing actions. This difficulty is further strengthened by Article 4 of the Directive, which requires member states to 'ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation'. This requirement can be overcome by applying a consumer-welfare–oriented interpretation to the Directive. Indeed, member states chose specifically not to mandate the adoption of class actions in the Directive, leaving the door open for different member states to apply different rules in this regard, even though allowing class actions would have surely increased consumers' ability to enjoy full compensation. Potentially, the same logic can carry over to limitations imposed on class actions or on other forms of litigation in excessive pricing cases. Furthermore, the principle of full compensation derives from ECJ ruling in *Manfredi*, where the court stressed that compensation should cover both the damage caused by the price overcharge and the loss of profits and interest.[141] It may be argued that the Directive should be interpreted accordingly.

V. Conclusion

The excessive pricing prohibition is based on deep notions of fairness and efficiency. Indeed, as Commissioner Vestager suggested, 'there can be times when competition rules need to do their bit to deal with excessive prices'.[142] Yet the question is how and by whom. The excessive pricing prohibition is probably the most difficult competition law prohibition to apply in practice, as a wide gap exists between its normative justifications and its practical enforcement challenges. Given the significant difficulties in determining what constitutes a fair price, there is widespread agreement that intervention through the pursuit of violations for excessive prices is dangerous 'because these tools are clumsy, costly and risk failing or doing more harm than good to economic efficiency'.[143] As this article shows, opening the gates to private enforcement significantly increases this danger. Even if in some cases public enforcement of excessive pricing may increase welfare, this does not imply that private enforcement will have similar effects. This article suggests both procedural and substantive tools whose adoption should limit such concerns. Given that private excessive pricing litigation in the EU is taking its first steps, there is no time to lose in taking action to ensure that welfare is not harmed.

[141] Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni* ECLI:EU:C:2006:461.
[142] Vestager, op. cit. *supra* note 70.
[143] Jenny, op. cit. *supra* note 57.