

Exploitative and Exclusionary Excessive Prices in EU Law[§]

Massimo Motta and Alexandre de Stree^{*}

I. Introduction

Article 82 of the EC Treaty provides for a condemnation of excessive prices. However, the general concept of ‘excessive price’ may cover two very different realities. An excessive price may be an *exploitative abuse*, i.e. direct exploitation of market power. In this case, the dominant firm charges a high price to its customers (being end-users or undertakings with which the dominant firm does not compete). Alternatively, an excessive price may be an *exclusionary abuse*, aiming to strengthen or maintain the market power of the dominant firm by putting rivals at disadvantage. In this case, the dominant firm in one market, say upstream, sets the price of the input so high that the margin between wholesale and retail prices is insufficient for an efficient firm to profitably operate in the downstream market. These two types of excessive prices are based on different legal and economic principles, hence are analysed separately in this paper.

This paper aims to study the current case law of both types of excessive prices, and on the basis of economic theories and legal reasoning, propose policy recommendations for the antitrust authorities and the Courts. This review is timely for several reasons.

First, if the number of excessive pricing cases in the EU has been relatively modest (albeit not insignificant) until now, it may increase in the future due the combined effects of the liberalisation of network industries and the decentralisation of the European antitrust. Indeed, liberalisation opens to antitrust intervention sectors of the economy where prices used to be regulated (albeit with another legal instrument) and where dominant positions are prevalent and not easily contestable. As we show, liberalised sectors are among the best candidates for antitrust intervention, in the absence of effective regulation. In addition, the decentralisation of competition law¹ increases the role of national competition authorities (NCA) and national Courts in applying Article 81(3) EC, but more generally in the application of all antitrust provisions, including Article 82 EC.² In turn, that may increase the number of excessive price actions for two reasons: first, the NCAs are probably more prone to political capture than the Commission and national politicians may like to see an end to excessive prices to please their voters; and second, the enhanced role of national Courts can increase private actions, and unfair prices cases are good candidates for unhappy customers.

[§] This paper was presented in the 8th Annual European Union Competition Workshop, Florence (June 2003) and will be published in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.), *What is an abuse of a dominant position?*, Hart Publisher.

^{*} Economics Department of the European University Institute, Florence and Universitat Pompeu Fabra, Barcelona; Law Department of the European University Institute, Florence. Thanks to E. Rousseva for helpful discussions. The paper states the law as of 1 December 2003, unless indicated otherwise.

¹ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, O.J. [2003] L 1/1.

² In other words, the long established direct effect of Article 82 EC (*BRT/Sabam* 127/73 [1974] ECR 51) will be enhanced.

Second, the Commission is undertaking a review of its policy on abuse of dominance, and wishes to rely on economic theory to evaluate and refine established practice and develop new enforcement policies where necessary (Lowe, 2003:5).

Third, at a time when antitrust systems converge across the world, the treatment of exploitative excessive pricing remains one important difference between the EU and the US. Across the Atlantic, the case law³ and the doctrine have constantly held that a competition authority may not condemn exploitative excessive prices. As put by Areeda and Hovenkamp (1996: ¶ 720b), “the Courts correctly regard as uncongenial and foreign to the Sherman Act the burden of continuously supervising economic performance, particularly the firm’s day-to-day pricing decisions”. Fox (1986:985 and 993) noted that “US law is not regulatory (in the sense of direct regulation of price and output) but rather concentrates on preserving conditions whereby free market forces constrain price and induce optimal production” and thus “rests on the principle that price should be controlled by free market unless Congress has in effect determined that the market cannot work and has established a regulatory commission”. The control of the US authorities is thus limited to exclusionary excessive prices.

The paper is organised as follow: after this introduction, Section II deals with exploitative prices and section III deals with exclusionary prices or price squeezes. Each section distinguishes the principles derived from the case law, the Commission practice and some policy recommendations. Finally, section IV briefly concludes. The paper is limited to the European level, and does not cover national practices⁴. Moreover, the paper concentrates on the cases of single dominance, and does not address the cases of excessive prices charged by collectively dominant undertakings.

II. Exploitative prices

1. Principles from the case-law

1.1. Dominant position

Article 82(a) EC prohibits a dominant firm from “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”. A firm holds a dominant position if it possesses enough market power to behave to an appreciable extent independently of the competitors, customers and ultimately consumers⁵. Due to the general formulation of Article 82, every dominant firm, however its market power has been acquired or maintained (Kauper, 1990:660), has the special responsibility⁶ not to set excessive prices. The Court of

³ *United States v. Trans-Missouri Freight Ass.*, 166 U.S. 290 (1897); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927): “(...) in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can be satisfactorily made only after a complete survey of our economic organisation and a choice between rival philosophies”; *United States v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945). For a tentative explanation of the divergence between EU and US: Fox (1986), Hawk (1988), Kauper (1990: 655).

⁴ For an overview of national practices, see Böge (2003) and Ruppelt (2003) for Germany; Green (2003) for United Kingdom; Conseil de la Concurrence français (2003) for France; and Hordijck (2002) for the Netherlands.

⁵ *United Brands 27/76* [1978] ECR 207, para 65.

⁶ To take the general formulation of *Michelin 322/81* [1983] ECR 3461.

Justice confirmed this principle explicitly for the first time in *Parke Davis*, and constantly maintained it afterwards⁷.

1.2. Abuse: Which price is excessive?

A price is excessive when above the competitive level

Joliet (1970:243) considered that a price is unfair when dominant firms have actually taken advantage of their dominant position to set prices significantly higher than those which would result from effective competition. Hence a price is excessive when significantly above the effective competitive level⁸.

This reasoning was followed by the Court of Justice in *United Brands*⁹, where it held that:

249. It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

250. In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product would be an abuse.

Thus a price is unfair when above the economic value of the product, which means above the normal competitive level. In the Guidelines on vertical restraints, the Commission defines the competitive price as the minimum average costs¹⁰. Indeed, a price below average costs would not be viable (and could not be taken as the competitive benchmark), because firms would not be able to cover their fixed costs if they set prices equal to marginal costs. For instance, when competition is *for* the market rather than *in* the market (in case of dynamic markets characterised by high investment and network effects), price need to be substantially above the average total cost of the winning firm.

As for the means of proof, the Court was very open as to the methodology to prove an excessive price in *United Brands*:

251. This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its costs of production, which would disclose the amount of the profit margin (...).

253. *Other ways* may be devised –and economic theorists have not failed to think up several– of selecting the rules for determining whether the price of a product is unfair (our italics).

And indeed over time, the Court developed a veritable cocktail of approaches to determine whether a price is excessive, summarised in Table 1 below (see similarly, albeit not identically, *Lowe* 2003:11). Indeed, an excessive price may be proved by comparing the price

⁷ *Parke Davis* 24/67 [1968] ECR 55. See lastly: *Centre d'insémination de la Crespelle* C-323/93 [1994] ECR I-5077, para 25-26; *GT-Link* C-242/95 [1997] ECR I-4449, para 39.

⁸ This more precise formulation of unfair prices is adopted by the German competition law (§19 Sec.4 No.2 GWB). From this wording, a price is proven to be excessive price with the so-called 'as-if competition' test. A price is unfair if it is significantly above the price of a comparable but competitive market plus a certain mark-up. Nevertheless, due to the difficulty to find such a comparable market, the German Courts have allowed a second mean of proof by comparing the price with the (efficient) production costs.

⁹ Cited at note 5.

¹⁰ Commission Guidelines on Vertical Restraints, O.J. [2000] C 291/1, para 126.

under review with different indicators: cost measures of the dominant firm, other prices of the dominant firms, or prices of other firms offering similar products as the one of the investigated firm.

Table 1: Proof of exploitative excessive pricing

| | Cost of the dominant firm | Other prices of the dominant firm (Discrimination) | Price of other firms offering similar products |
|---|---|---|--|
| Same relevant market (product and geographic) | <i>United Brands 1978</i> <i>CICCE 1985</i> <i>SACEM II 1988</i> <i>Ahmed Saeed 1989</i> | ----- | (Competitor comparison) <i>United Brands 1978</i> <i>Parke Davis 1968</i> <i>Renault 1988</i> |
| Other relevant market in the same Member State | ----- | <i>General Motors 1975</i> <i>British Leyland 1986</i> | <i>General Motors 1975</i> <i>Bodson 1988</i> |
| Other relevant market in another Member State | ----- | <i>United Brands 1978</i> | (Benchmarking) <i>Sirena 1971</i> <i>Deutsche Grammophon 1971</i> <i>SACEM I 1989</i> <i>SACEM II 1989</i> |

Comparison with the efficient costs of production and profitability analysis

In *United Brands*, UBC charged for its branded bananas ‘Chiquita’ different prices to the ripeners/distributors of different Member States and prohibited the distributors to resell its bananas, thereby partitioning the common market. Among other abusive practices impeding the single market (resale prohibition, refusal to deal, discrimination), the Commission¹¹ considered that the prices on several continental markets (Germany, Benelux and Denmark) were excessive for three reasons: they were (1) at least 100% higher than the price practised on the Irish market, which UBC would have admitted not to be loss making; (2) 20 to 40% higher than the prices of unbranded bananas in the continental countries, even though the quality was slightly lower; (3) and 7% higher than the price charged by competitors of branded bananas, that were profitable. The Commission imposed a fine on UBC of 1 MEUR and suggested that a decrease in price of 15% should remedy the abuse.

On appeal, the Court of Justice held that:

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

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

Based on these principles, the Court annulled the Commission Decision on the point of unfair pricing for insufficient proof. First, the Commission did not try to calculate the production

¹¹ Commission Decision of 17 December 1975, *United Brands*, O.J. [1976] L 95/1.

costs of the bananas whereas it was feasible as it emerged from a 1975 study of the United Nations Conference on Trade and Development¹². The Commission did even not request UBC to give its cost data. Second, using the Irish price as benchmark was open to criticism because it was not clear if this price was profitable. Third, a 7% difference with the main competitors could not be automatically regarded as excessive.

Following closely the wordings of the Court, Faull and Nikpay (1999:192) argue that a twofold test has been imposed in this judgement: firstly a cost/price analysis, and secondly an analysis to determine if the price is excessive in itself or by comparison with competitors' products. However, we suggest that both tests aim to prove the same thing, i.e. that price is significantly above the competitive level, and that they should not necessarily be used cumulatively. We also suggest that the Court set some priority rule among the different means of proof in favour of a direct cost calculation. Indeed the authority should try to get cost data and compare them with the alleged excessive price. It is only when it is too difficult to get these data, or in order to complement a cost analysis, that the authority may decide to compare competitors' prices, and more generally, compare the investigated prices with some benchmarked prices.

In subsequent cases, the Court of Justice refined the price/cost comparison. In *CICCE*¹³, the Court rejected a complaint against the Commission that had refused to condemn unfairly low price paid by the French television companies (a then monopsonist) for broadcasting films. In its analysis, the Commission refused to compare an average production cost for all the films with an average selling price, and instead considered that the analysis should be done for each film separately due to the considerable variance of costs and fees between the films. In its decision, the Court endorsed this approach. Thus, in case of similar products having different cost structure, an average approach should be ruled out.

In *SACEM II*¹⁴, the Court considered that the production costs to be taken into account are those of an efficient firm, and not necessarily those of the investigated firm which may have inflated production costs because of its dominant position (X-inefficiency). Indeed, the Court stated that a firm may not justify its unfair price with high production costs because the possibility may not be ruled out that it is precisely the lack of competition on the market in question that accounts for the high costs.

Finally, in *Ahmed Saeed*¹⁵, the Court addressed the difficulty of apportioning the common costs among several services. In an *obiter dictum* to a preliminary ruling case on airline tariffs, the Court held that

43. Certain interpretative criteria for assessing whether the rate employed is excessive may be inferred from (sector-specific regulation), which lays down the criteria to be followed by the aeronautical authorities for approving tariffs. It appears in particular that tariffs must be reasonably related to the long-term fully allocated costs of the air carrier, while taking into

¹² At para 254: "(Working out) the production costs of the bananas do not seem to present any insuperable problems".

¹³ *CICCE* 298/83 [1985] ECR 1105, para 24-25.

¹⁴ *Lucazeau/SACEM (SACEM II)* 110/88, 241/88, 242/88 [1989] ECR 2811, para 29. See similarly: *Tournier (SACEM I)* 395/87 [1989] ECR 2521, para 42. The interpretation of the paragraph given above is shared by the majority of the doctrine (among others, Kauper, 1990:662; Whish, 2003:692), but not by Hordijk (2002:471). He considered that it is only in exceptional circumstances that supposedly inflated production costs should be disregarded.

¹⁵ *Ahmed Saeed* 66/86 [1989] ECR 803.

account the needs of consumers, the need for a satisfactory return on capital, the competitive market situation, including fares of the other air carriers operating on the route, and the need to prevent dumping.

Therefore, if sector-specific regulation provides accounting rules for the national regulatory authority (NRA) to control prices, the very same rule may be followed by the competition agency to determine if price is excessive¹⁶.

To conclude, a first approach to assess whether prices are excessive consists of computing costs of production and establishing whether the price set by the dominant firm is above a “reasonable” price. Figure 1 illustrates this method: the price p^M is deemed excessive if it is above the price p^* . Of course, there are at least two problems with this approach. The first is that the method is to a large extent arbitrary, and we shall not dwell upon it: what is the margin of profits that the courts should be ready to accept¹⁷; or in other words, what is the maximum “fair” price p^* above which the price charged by a dominant firm is excessive? The second concerns the difficulty of computing the level of costs, c .

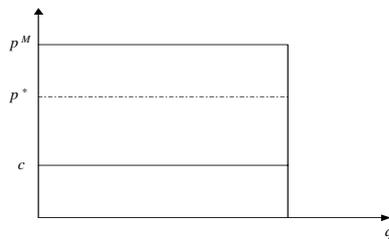


Figure 1

Comparison with other prices of the dominant firm

A direct calculation of the costs, which is already difficult for a sectoral regulator even when firms are subject to an accounting transparency obligation, may be virtually impossible for an antitrust authority. It may thus decide to compare more easily observable data, like two prices of the investigated firms. The authority may show that the same price is charged for two services having different costs, as illustrated by Figure 2. Alternatively it may show that two different but profitable prices are charged for the same service, hence the price charged to one customer is excessive as a profitable lower price has been charged to others. This situation is illustrated by Figure 3.

¹⁶ For instance, the Commission recommended the use of a Long Run Incremental Cost (LRIC) methodology for the pricing of fixed interconnection and the unbundled access to the local loop in the telecommunications sector. LRIC consists of evaluating the network elements at the current or prospective value of an efficient operator and allocate them in accordance with the principle of cost causation. See the Commission Recommendation of 8 January 1998 on interconnection in a liberalized telecommunications market (Part 1 - Interconnection pricing), O.J. [1998] L 73/42; and the Commission Recommendation of 25 May 2000 on unbundled access to the local loop, O.J. [2000] L 156/44 at Article 1(6).

¹⁷ See for instance profitability analysis as referred in OXERA (2003).

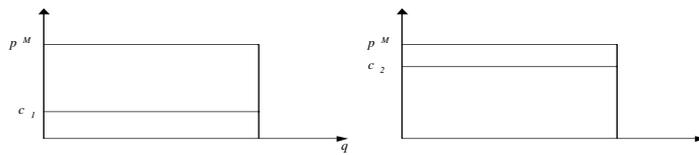


Figure 2

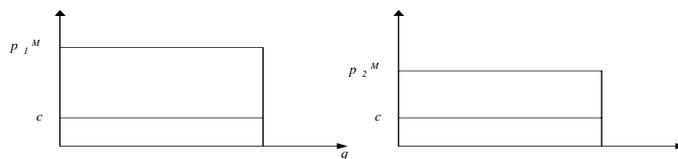


Figure 3

In these cases, the authority shows that both prices are profitable and discriminatory in order to prove that one of them is excessive. This price will be condemned under Article 82a EC (unfair price). In addition the very same prices may also be condemned under Article 82c EC (discrimination), and in practice, most excessive pricing has tended to be subsumed into price discrimination cases.

The authority may decide to compare two prices that the dominant firm charges in the same Member State. This approach was applied by the Commission in *General Motors*¹⁸, its first ever unfair pricing decision. In the beginning of the seventies, General Motors Continental had been transferred the legal monopoly to issue conformity certificate for vehicles used in Belgium. Thus, the cars sold in one Member States but re-imported in Belgium had to obtain this certificate. At the beginning, GMC was charging 146 EUR for this service, but quickly afterwards, decreased the price to 25 EUR for the European models.

The Commission considered that the initial price was unfair, and imposed a fine of 100,000 EUR, for four reasons. (1) The price of approving American models imported in Belgium was the same as the price of approving European models, whereas the cost of the former was higher than the latter because more European models were imported, hence the fixed costs were spread among more quantity. (2) GMC itself was ready to offer the service at 25 EUR for some clients who were unwilling to pay the full charge. (3) Other Belgian firms acting as authorised agent of other manufacturers carrying out inspections similar to those provided by GMC charged only 70 EUR or less. (4) The price charged by the government testing stations before the legal monopoly was granted to GMC was only 30 EUR.

¹⁸ Commission Decision of 19 December 1974 *General Motors* O.J. [1975] L 29/14.

On appeal, the Court of Justice confirmed in principle that an unfair price would be abusive¹⁹, but did not address the means of proof as it was not disputed that GMC's prices were excessive. However, the Court annulled the Commission decision because the issuance of conformity certificate was a new responsibility for GMC transferred from state testing stations, and for which it applied for an initial period a high rate, but quickly afterwards brought its rates into line with the real economic cost of the operation.

A very similar case arose ten years later. *British Leyland* also enjoyed the legal monopoly to issue national certificate of conformity. Initially, BL charged 25 £ for both right-hand-drive and left-hand-drive cars, then increased the fee for left-hand-drive cars to 150 £ for dealers and 100 £ for private individuals. Following the opening of a Commission procedure, BL charged a uniform fee of 100 £, and then reduced it to 25 £. The Commission²⁰ considered that these prices could not reflect the cost and were probably aimed at curbing parallel imports. Accordingly, it imposed a fine of 350,000 EUR.

On appeal²¹, the Court upheld the Commission Decision by considering that the only difference in relation to the issue of a certificate for right-hand-drive and left-hand-drive vehicles was a simple administrative check that could not entail significant costs. Thus the difference in cost between both services could not justify the difference in fees. In fact, the fees did not relate to the costs and were fixed solely to make the re-importation of left-hand-drive cars less attractive.

Alternatively, the authority may decide to compare the two prices that are charged by the dominant undertaking in different Member States. As seen above, this approach was followed by the Commission and implicitly endorsed by the Court in *United Brands*, which clarified the relationship between unfair and discriminatory prices. To prove unfair pricing, the Commission has to show that the prices are different without justification for the same service, and that both prices are profitable. To prove that prices are discriminatory, the Commission has to show that prices are different without justification, and that they place buyers at competitive disadvantage²².

Comparison with price of other firms offering similar product than those of the dominant firm

The authority may also compare the reviewed price with the prices of similar products offered by other firms. This method has several variants depending of the position of the other firm: it may be active on the very same relevant market than the dominant firm (hence being one of its competitors), it may be active on another market but still in the same Member State, or it may be active in another Member State.

¹⁹ *General Motors* [1975] ECR 1367, para 12: "Such an abuse (of a dominant position) might lie, inter alia, in the imposition of a price which is excessive in relation to the economic value of the service provided and which has the effect of curbing parallel imports by neutralising the possibly more favourable level of prices applying in other sales areas in the Community (...)"

²⁰ Commission Decision of 2 July 1984, *British Leyland*, O.J. [1984] L 207/11.

²¹ *British Leyland* 226/84 [1986] ECR 3263 para 28. This is the only European Court case condemning an exploitative excessive price.

²² In *United Brands*, the Court considered that the Commission had sufficiently proved that prices were discriminatory. However, the Court considered that the Commission had not sufficiently proved that prices were excessive, as it was not clear that the lower Irish prices (used as a benchmark) were profitable.

This first variant (comparison with competitor prices) is illustrated in Figure 4, where p^M is the price of the dominant firm and p^C is the price of the other firm.

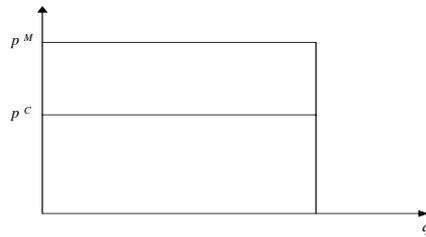


Figure 4

This approach was followed by the Commission in *United Brands*, where it compared the price of Chiquita bananas with the prices of branded bananas of similar quality. The Court implicitly endorsed the approach but hold a 7% difference is not enough to automatically be regarded as excessive²³. However, this is a particularly misleading test, since it risks the finding of excessive pricing whenever quality differences between firms' products exist. If the dominant firm has attained its leadership through superior products, then it will also be able to command higher prices, without this being abusive.

A particular application of this method consists of comparing the price of a patented product offered by the investigated firm with the price of a similar unpatented product offered by competitors.

In *Parke Davis*²⁴, the Court of Justice was asked by a Dutch Tribunal if the patented holder might charge higher prices than that of similar unpatented product coming from another Member State²⁵. The Court replied that the comparison between the prices of a patented product in one Member State and the price of a similar unpatented product in another Member State was not sufficient to prove an excessive pricing. But it was not clear at the time of the case if this insufficiency was due to the fact that two compared prices were between patented and unpatented products, or to the fact that the compared prices were between two different countries. This ambiguity was clarified three years later in *Deutsche Grammophon* (see below) where the Court held the comparison of prices between two countries might be indicative of an abuse. Thus, the judgement in *Parke Davis* was explained by the fact that the price comparison was taken place between patented and unpatented products.

Indeed, in *Renault*²⁶, the Court of Justice was asked by an Italian Tribunal if it would be abusive for a car manufacturer to register intellectual property rights in respect of an ornamental design of spare parts for cars, hence eliminate competition from independent manufacturers of spare parts. The Court replied that the mere fact of securing the benefit of an exclusive right granted by national law could not be condemned, but the exercise of such a right might be abusive if it led to arbitrary refusal to deliver spare parts to independent

²³ *United Brands*, para 266.

²⁴ Cited at note 7.

²⁵ There was a clear internal market dimension in this case as the Court was also asked if the holder of a patent on a medicinal product issued in the Netherlands might prevent the importation of similar product from another Member State where the medicinal product is not patentable.

²⁶ *Renault* 53/87 [1988] ECR 6039, para 16-17.

repairers, excessive prices for the spare parts, or a decision not to produce spare parts for a particular model even though many cars of that model remain in circulation²⁷. Then the Court held that:

17. (...) a higher price for the (registered component sold by the car manufacturer) than for the (unprotected component sold by independent producers) does not necessarily constitute an abuse, since the proprietor of protective rights in respect of an ornamental design may lawfully call for a return on the amounts which he has invested in order to perfect the protected design.

Therefore, a comparison between the price of a product protected by an IPR and the price of a similar unprotected product is not sufficient to prove that the former is unfair because investment incentives in intellectual property need to be safeguarded. As noted by Gyselen (1990:605), the Court implicitly accepted that an inventor must be given the opportunity to objectively justify its higher price as a means to recoup its extra costs and prevent third parties from taking a free ride on its efforts to innovate.

The second variant of the test (comparison with firms active in another market situated in the same Member State) is illustrated in Figure 5, where the comparison is made between the price p^M of the dominant firm under investigation and the market price p^B arising in another market B.

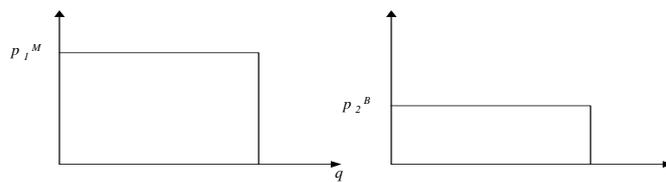


Figure 5

This second variant was explicitly endorsed by the Court in *Bodson*²⁸. In this preliminary ruling decision on the legality of public exclusive concessions to provide the external services for funeral, the Court held as an *obiter dictum* that:

31. It must be possible to make a comparison between the prices charged by the group of undertaking which hold a concession and prices charged elsewhere. Such a comparison could provide a basis for assessing whether or not the prices charged by the concession holders are fair.

²⁷ One may question whether there is a secondary market for spare parts for each car type. If potential buyers of cars are able to take into account the cost of after-sales services, including spare parts, such secondary market would not exist (Motta, 2004:chapter 3).

²⁸ *Bodson* 30/87 [1988] ECR 2479. Note that this second variant had previously been applied by the Commission in *General Motors* when it compared the charges of GMC with the charges of the agents of other manufacturers. The Commission compared in this case the prices of different monopolists, without any reference to a competitive price.

In this case, the Court rightly suggested to compare the price on a market which is not competitive (the one covered by the public concession) with the price of a competitive market (the one not covered by the public concession).

The third variant (comparison with firms active in another Member State, sometimes called ‘benchmarking’), has been endorsed by the Court, and indeed was often referred to in preliminary ruling cases as it carries with it an internal market dimension.

In *Deutsche Grammophon*²⁹, the Court of Justice was asked by a German Tribunal if a German manufacturer of sounds recording would abuse its exclusive right of distribution by imposing a selling price in Germany that is higher than the price of the original product sold in France and re-imported in Germany³⁰. The Court held that

19. The difference between the controlled price (i.e. in Germany) and the price of the product reimported from another Member State (i.e. France) does not necessarily suffice to disclose an abuse; it may however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.

In this case and contrary to *Parke Davis*, the sound recordings were protected by IPR in both Member States, and the Court concluded that the comparison of prices might be relied upon to show unfair prices.

This third variant was confirmed and refined in *SACEM II*³¹. The Court of Justice was asked by a French Court if the rate of royalty charged by a French musical copyright management society to the French discotheques, that is manifestly higher than those applied by identical societies in other Member States, is to be deemed excessive. In practice, SACEM was charging a fixed rate of 8,25% of the turnover of the discotheques, which a study done by the European Commission (cited in OECD, 1996:129) has shown to be more than four times the European average. The Court replied that

25. When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case, it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.

Thus, if there are substantial price differences between Member States, the burden of proof shifts from the authority to the dominant firm which has to show that its price is not excessive. It is interesting to note that the Court did not require in this case that the benchmarked market (i.e. the compared Member State) would be competitive. Hence, an antitrust authority may compare the prices of two markets, each of them being monopolised by a different player. In practice, following the Court judgement, SACEM reduced in 1991 its

²⁹ *Deutsche Grammophon* 78/70 [1971] ECR 487. See similarly, albeit less clearly: *Sirena* 40/70 [1971] ECR 69, para 17: “Although the price level of the product may not of itself necessarily suffice to disclose such an abuse, it may, however, if unjustified by any objective criteria, and if it is particularly high, be a determining factor”.

³⁰ The Court was also asked if a German undertaking manufacturing sound recordings may rely on its exclusive right of distribution to prohibit the marketing in Germany of sound recordings which it has itself supplied to its French subsidiary.

³¹ Cited at note 14.

royalty from 8,25% to 7,18% of the discotheques' turn-over. Following an opinion by the French Conseil de la Concurrence³², it further decreased the rate to 4,39% in 1993.

2. Recent practice of the European Commission

In more than forty years of competition practice, the Commission adopted only four formal Decisions condemning excessive prices. The first three cases (*General Motors* in 1974, *United Brands* in 1975, and *British Leyland* in 1984) have been discussed above.

In the last case *Deutsche Post II*³³ of 2001, DPAG (which enjoyed at the time a legal monopoly for internal mail) considered that any mail coming from abroad but containing a reference to Germany -usually in the form of a German reply address- had a German sender, regardless of where the mail was produced or posted³⁴. It considered that this mail circumvented domestic mail, and consequently applied the domestic tariff (0,51 EUR).

First, the Commission investigated the identity of the sender of the disputed mails. It found that they did not have German senders but on the contrary were posted from the UK. Hence, the mail did not circumvent domestic mail and should be treated as normal international mail. Second, the Commission determined that charging domestic tariff to disputed mails was above the costs. It could not make a detailed analysis of the DPAG's average costs as no reliable accounting data existed for the relevant period³⁵, nor compare DPAG' prices with those of the competitors as DPAG was a monopolist. Instead, the Commission estimated the cost of delivering of incoming international mail on the basis of the DPAG own estimation. Indeed in its notification of the REIMS II agreement³⁶, DPAG submitted that the cost related to distribution of international traffic was only 80% of the cost of processing domestic mail (as there is no need to collect the mails all over the country). Thus, the Commission estimated that the cost of the disputed mails was at least 20% lower than the charged tariffs. Accordingly, it imposed a fine, but only of the symbolic amount of 1000 EUR due to the legal uncertainty at the time. Contrary to the previous Commission Decisions on unfair prices, *Deutsche Post* did not appeal because the main point of the case was more related to the determination of the sender of the mails than to the level of the prices. Once it was established that the disputed mails were not circumvented internal mails, even DPAG did not really challenge that a lower tariff should have been applied.

The above mentioned four cases are only the visible tip of the iceberg. The Commission initiated several other cases that did not lead to formal decisions but nevertheless resulted in

³² Conseil de la Concurrence Opinion 93-A-05 of 20 April 1993.

³³ Commission Decision of 25 July 2001, *Deutsche Post II*, O.J. [2001] L 331/40, para 159-167. The Court of Justice had previously decided that DPAG was allowed to charge internal tariff for truly circumvented domestic mail to safeguard general interest objectives: *Deutsche Post C-147/97* and *148/97* [2000] ECR I-825, para 61.

³⁴ This sort of mails is becoming increasingly common for commercial mailings' companies. They centralise their mail distribution by sending mails from one distribution point to addressees in a number of countries, but they provide the possibility for the addressees to reply to an address in their own country to increase the response rate.

³⁵ The Postal Directive 97/67/EC (O.J. [1998] L 15/14) imposes the introduction of transparent internal cost accounting system, but this was not yet in place when the alleged abuse has been committed.

³⁶ Commission Decision of 15 September 1999, *REIMS II*, O.J. [1999] L 275/17, para 88, and Commission Decision of 23 October 2003, *REIMS II Extension*, not yet published, IP/03/1438.

price decreases. Most of the cases related to the recently liberalised network industries, like airlines³⁷, electricity³⁸ and in particular telecommunications³⁹.

With regard to the telephone calls on a fixed line, cases were opened in several Member States in 1998 against excessive prices for international calls, and their related wholesale charges paid between foreign operators⁴⁰. The Commission proved its cases using the discrimination method, and progressively closed the cases when the prices decreased (by 26 to 28%), sometimes due to the intervention of the national regulatory authorities (NRAs).

With regard to the calls on a mobile line, several cases were opened for excessive prices for fixed-to-mobile calls, and their related wholesale charges⁴¹. In 1998, proceedings related to unfair fixed termination charges (proved with discrimination and benchmarking), unfair fixed retention charges (proved with benchmarking), and unfair mobile termination charges (proved with discrimination and benchmarking)⁴². The cases were passed to NRAs when they had jurisdiction to intervene under national telecommunication law, and otherwise were closed after the operators agreed substantial reduction of their charges (from 30 to 80%). The issue of excessive mobile termination charges came again in 2002 in the Netherlands on a complaint of WorldCom, but the Commission decided this time to tackle the case under price squeezing abuse⁴³.

Again in the mobile sector, the Commission investigated in 1999 the high international roaming prices⁴⁴ relying on the very rarely used sector-enquiry provision which allows the Commission to enquire on a whole market rather than specific companies. No formal case has been opened yet, but in an interim report, the Commission identified several possibilities of excessive prices on the basis of discrimination, benchmarking, and an analysis of the pattern of changes of the price over a four years period. Moreover, the Commission carried out dawn raids at the premises of nine mobile operators in the UK and Germany in July 2001, and had

³⁷ In *Sterling Airways*, the Commission considered that the high fares on the Copenhagen-London route of the then legal monopolist airline SAS could be abusive due to the very high profitability (price above costs). However, the case was closed when the fares dropped considerably in comparison to the other SAS international routes: Xth Report on Competition Policy 1980, para 137.

³⁸ *Electricity transmission tariffs in the Netherlands*, XXIXth Report on Competition Policy 1999, p. 165 where the Commission held that the charges for electricity transmission must always be linked to the actual cost in order to avoid abuse within the meaning of Article 82 EC.

³⁹ Excessive prices in telecom are dealt with in the Commission Notice on the application of competition rules to access agreements in the telecommunications sector, O.J. [1998] C 265/2, para 105-109.

⁴⁰ IP/97/1180 of 19 December 1997; IP/98/763 of 13 August 1998; IP/99/279 of 29 April 1999. These cases related to the so-called accounting rates which are the charges agreed between the telecom operator of the country where the call originates and the telecom operator of the country where the call terminates for carrying a call of a duration of one minute from its origin to its destination. Each of the two companies involved receives a share –usually half- of this accounting rate.

⁴¹ IP/98/141 of 9 February 1998; IP/98/707 of 27 July 1998; IP/98/1036 of 26 November 1998; IP/99/298 of 4 May 1998.

⁴² In the case of mobile-to-fixed calls, the fixed termination charge is the fee paid by the mobile operator to the fixed operator for terminating the call. In case of fixed-to-mobile calls, the mobile termination charge is the fee paid by the fixed operator to the mobile operator for terminating the call, and the fixed retention charge is the fees kept by the fixed operator for originating the call.

⁴³ IP/02/483 of 27 March 2002. The case is still pending at the Commission.

⁴⁴ IP/00/111 of 4 February 2000; Commission services Working Document on the initial findings of the sector inquiry into mobile roaming charges, 13 December 2000, available at <http://www.europa.eu.int/comm/competition/antitrust/others/sector_inquiries/roaming/>; MEMO/01/262 of 11 July 2001. International roaming tariffs are the charges that a mobile customer has to pay while giving and receiving call abroad using another network than the one to which he is affiliated.

thought at some point to open cases for excessive price exercised by collective dominant operators.

With regard to the leased lines that are an important building block of the Information Society, the Commission launched in 1999 another sector inquiry⁴⁵ on the conditions of their provision. Relying on benchmarking, the Commission identified several possible possibilities of excessive pricing of national and international leased lines and decided to open five cases for unfair international leased lines prices. The inquiry, and most of the cases, were closed in December 2002 due to a significant drop of the prices (by 30 to 40% on average).

This rapid overview shows that, although in law every dominant firm may be liable of unfair prices, in practice the Commission used this power with great parsimony. As the Commission noted itself, it does not want to behave as a price regulator⁴⁶. It initiated very few cases and adopted even fewer formal Decisions⁴⁷. Most of them involved dominant position protected in varying degrees by government action and some special circumstances were at stake (Gyselen, 1990:613; Kauper 1990:659). Two streams of cases may be distinguished. In the first, the dominant undertaking enjoyed a legal monopoly (*General Motors, British Leyland*) and the abuse created serious impediment to the internal market. The Commission was more concerned with the freedom of circulation than with the anti-competitive exploitation of the end-users and its allocative inefficiencies (Martinez, 1998:2).

In the second stream of cases, the dominant undertaking was active on markets recently being opened to competition (*Deutsche Post*, telecommunications cases) and any pricing abuse may have weakened the political momentum for the liberalisation program. As noted by a senior Commission official (Ungerer, 2001:11), “the procedures aimed particularly at passing on rapidly the advantages of liberalisation in terms of price reductions and service developments to consumers – a major objective in order to show as rapidly as possible the effective consumer benefits and to secure sustained public support for liberalisation.” Moreover, the Commission relied as much as possible on national regulators, limiting its intervention when sectoral regulator had no legal power to intervene (mobile termination rates, roaming charges, or international leased lines tariffs), or was not intervening appropriately (international accounting rates, fixed retention or termination charges, national leased lines tariffs).

With regard to the means of proof, the Commission relied on different comparative indicators, often using them cumulatively. In particular, it relied extensively on the discrimination and the benchmarking methods⁴⁸. In addition most of the interventions were based on price above

⁴⁵ IP/99/786 of 22 October 1999; Commission services Working Document on the initial results of the leased lines sector inquiry, 8 September 2000, available at <http://www.europa.eu.int/comm/competition/antitrust/others/sector_inquiries/leased_lines/>; IP/00/1043 of 22 September 2000; IP/02/1852 of 11 December 2002.

⁴⁶ Vth Commission Report on Competition Policy 1975, para 76; XXIVth Commission Report on Competition Policy 1994, para 207: “(...) the existence of a dominant position is not in itself against the rules of competition. Consumers can suffer from a dominant company exploiting this position, the most likely way being through prices higher than would be found if the market were subject to effective competition. *The Commission in its decision-making practice does not normally control or condemn the high level of prices as such.* Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it” (our italics); XXVIIth Commission Report on Competition Policy 1997, para 77.

⁴⁷ Note as well that most of the Court cases are due to preliminary ruling questions, not appeal against Commission Decisions.

⁴⁸ Benchmarking has also been extensively used by telecommunication law in the early phase of telecom liberalisation. It aims to ensure that telecom incumbents prices’ fulfilled the sectoral cost-orientation obligation

100% of the comparators (Hordijk, 2002:474), even though in some cases, it has relied on a much smaller spread was used (Haag and Klotz, 1998:38; Martinez, 1998:8).

3. Policy Recommendations

Arguments against antitrust control of excessive prices

The main arguments against excessive pricing cases in competition law are the following⁴⁹. First of all, it is useful to recall the difference between sectoral regulation and competition law. While the former pertains to markets where there exist legal barriers to entry and/or significant market failures, the latter generally applies to markets where competitive forces are in principle free to operate. In such markets, the general presumption should be that market forces will reduce over time the market power of a dominant firm, or at least oblige the latter to reduce its prices so as to avoid that consumers would switch to competitors. In other words, exploitative practices are self-correcting because excessive prices will attract new entrants.

In such markets, the use of excessive price actions to increase consumer welfare might help in the short-run, but it is likely to have serious negative effects of a longer duration. If firms anticipated that an antitrust authority is ready to cap their prices when they are so successful as to become dominant and enjoy high profits, then their incentive to invest and innovate would be strongly diminished. The threat of excessive price actions that “expropriate” firms from the fruit of their investments would diminish the expected returns and thus discourage them to invest. In other words, if the charging of monopoly prices is prohibited, then in fact monopoly itself is prohibited since a monopolist must be entitled to maximise profits.

Things are made worse by the fact that establishing the “excessiveness of prices” is a very complex operation whose outcome is necessarily hard to predict. Indeed, in many situations even to compute the relevant measures of costs would be a complex exercise: how does one allocate common costs to different products (long-run incremental cost, stand-alone costs), how does one choose between different accounting methods (historic cost, current cost), which measure of costs should be adopted to measure profits in industries where there are important fixed costs? All these difficulties are of course underlined by the fact that a competition authority does not – unlike an industry regulator – have a deep knowledge of the sector being investigated.

Furthermore and unlike an industry regulator, a competition authority’s role is not to set prices, whereas an excessive pricing action de facto amounts to telling a firm that a price above a certain level would not be acceptable. On top of that, the intervention occurs only at a given point in time, and leaves open the issue of how prices should evolve over time. Unless a structural remedy is imposed (a measure which might have other important drawbacks), the antitrust authority should impose behavioural remedies, or continue to monitor prices over time, therefore converting itself in a regulator.

at a time when no cost transparent cost accounting was in place, hence the information asymmetry between the regulator and the operators was important.

⁴⁹ See among others: Areeda and Hovenkamp 1996:720; Gyselen 1990:600; Hordijk, 2002; Korah, 2000:147; Whish, 2003:688.

Antitrust control of excessive prices is justified only in specific cases of dominant position

All the reasons listed above suggest that excessive pricing is a very dangerous instrument to use in competition law. Yet, there might be exceptional circumstances that might justify the use of such a provision. We believe in particular that the following conditions must *simultaneously* arise to justify an excessive pricing action (as an exploitative abuse).

The first necessary but not sufficient condition is static and relies on the presence of *high and non-transitory barriers to entry*. In such a case, it is extremely unlikely that market forces would be able to challenge the dominant firm and that the abusive practices will be self-correcting. In practice, the investigated firm should enjoy a monopoly (or near monopoly), or control an essential facility whose position may not be contestable.

This approach is consistent with some recent NCAs statement. For instance the French Conseil de la Concurrence (2003:67) commits to impose cost-orientation only exceptionally, in particular in case of control essential facilities. It also notes that it is not an appropriate tool to remedy a competitive problem, but should mainly be used to support a liberalisation process and help entry of new firms in the markets. The British Office of Fair Trading (1999:6) requires two elements to intervene: price higher than would be expected in competitive market, *and* no effective market pressure to bring them down to competitive level nor is there likely to be. As its French counterpart, the OFT notes that excessive prices cases are particularly relevant where a dominant undertaking is exploiting an essential facility⁵⁰.

The second necessary condition is dynamic and limits intervention to monopoly (or near monopoly) that are *due to current or past exclusive or special rights*⁵¹. Considering that every incontestable monopoly may be condemned would be justifiable in a static setting looking at the market situation ex-post. However, in a more dynamic setting taking into account the effect of the intervention on investment incentives, this simplistic argument is no longer valid because fear of antitrust intervention may undermine investment incentives. There is thus a trade-off between static short-term considerations (which would imply that only the first condition should be met for intervention to take place) and dynamic long-term considerations (which would call for additional conditions). Due to all the drawbacks of an antitrust excessive price actions, we suggest that the balance should tilt in favour of dynamic consideration. Hence, interventions would only be justified if they have no effect on investment incentives, or in other words, if monopoly (or near monopoly) was due to current or past legal protection.

Thus, if the dominant position has been attained in a market where entry was unrestricted (through investments, innovation, or simply business luck), then competition law should not

⁵⁰ In addition, the OFT (1999:6) recognises three situations where a price that appears to be above cost is not abusive: (1) high prices may occur for short period within a competitive market; (2), high prices may reflect superior technology/products; and (3) prices may be high in market with continuous innovation that should be rewarded.

⁵¹ Note that the above two conditions justifying antitrust control of excessive prices are close, but not identical, to the conditions justifying sectoral regulation. According to the Commission, telecom regulation is justified mainly when there are high permanent entry barriers and when behind the barriers, the structure of the market is not conducive to competition. However, these two conditions for sectoral regulation are broader-easier to meet by the authority- than the ones we proposed for exploitative abuse. Indeed, the sectoral conditions cover all cases of natural monopoly (however acquired), as well as cases of tight oligopoly leading to tacit collusion: Recitals 9 to 16 of the Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, O.J. [2003] L 114/45.

intervene. More likely than not, firms had anticipated that the winner would have enjoyed such a strong position and heavy investments have probably been made to obtain it. High prices are likely to be the reward for past investments⁵². For instance, many network markets are characterised by such a situation, where there is competition *for* the market rather than competition *in* the market. Conversely, if the dominant position has been obtained through past or current legal barriers, intervention may be justified. In such a case, high prices are not the reward for past efforts and investments, but simply a rent due to reasons not related to market competition.

Cases in point are most of the industries formerly dominated by public monopolies in Europe. Telecommunications, energy, postal services are all industries where the former incumbent monopolists enjoy dominant positions in the national markets, and where – due to a combination of network effects, switching costs, exclusionary practices, and regulatory mistakes – competition does not work properly despite the fact that nominally entry is free.⁵³

Interestingly enough, these two conditions are broadly consistent with the Commission's practice. Indeed, it has intervened mainly in cases of legal monopoly not justified by investment (e.g. General Motors, British Leyland, SACEM), or in newly liberalised sector (like telecom industries). It is also the view recently advocated by the Director General of DG Competition who stated that: "There can moreover be a legitimate interest to prosecute exploitative practices at least where they are not self-correcting, namely where entry barriers are high or even insuperable. In particular in newly liberalised sectors, entry barriers remain high and supra-competitive profits will therefore not automatically attract new entrants. Moreover dominant firms in those sectors often obtained their position not through superior efficiency, but through State intervention". (Lowe, 2003:9)

Moreover, two additional conditions related to the institutional issues may have to be fulfilled for the antitrust action being justified. First, there *should not be effective way for the competition authority to eliminate the entry barriers*. Indeed, when the dominance is due to current legal barriers, it may be more cost-effective for the authority to lobby the government to lift the barriers and liberalise effectively the sector than to open several exploitative abuse cases. As noted by Fingleton (2003), "Advocacy may be more effective in that a decision by the State to liberalise a sector (and even better to implement liberalisation with enthusiasm) and pro-consumer focus may be a faster remedy to develop competition than a long and expensive court case" (see also Amato and Laudati, 2001).

Second, there should be *no sector-specific regulator*. Indeed, a specific regulator usually has better knowledge of the sector, and usually has the right to intervene with a lower burden of proof. Hence, it would police exploitative abuses much more efficiently than an antitrust authority would. The intervention may also be justified if the regulator is doing poorly and if the antitrust authority would correct the regulatory failure. This hypothesis is particularly relevant in the diagonal relationship between the European antitrust authority (DG Competition) and the national regulators. In practice, many cases opened by the Commission in the telecom sector were proceeding to correct failure to act from the NRAs. Admittedly,

⁵² A particular example of this category is given by monopoly positions obtained through intellectual property rights protection, such as patents (of course, IPRs must be worth protecting, but this is another matter...).

⁵³ See Motta (2004: chapter 2) for a thorough discussion of the several reasons why markets in which there exists free entry in principle are not necessarily markets where competition works in practice, with dominant positions persisting over time.

this entails a value judgement on the performance of the regulator and might lead to some institutional conflicts.

The proof of the abuse

We may then screen with the economic theory the Court's cocktail of approaches to prove that a price is excessive.

First, the antitrust authority may show that the reviewed price is above the production costs of an efficient firm. However, contrary the predatory pricing cases⁵⁴, the Court did not go into much detail on the type of cost to be taken into account (marginal cost, long term average cost, total cost, ...). This uncertainty is regrettable, particularly in oligopolistic or multi-services industries with important common costs where the effective competitive price does not equal the marginal cost and where the allocation of these common costs raise difficult issues. Moreover, the Court did not clarify what level of profit may be acceptable⁵⁵, that is, by which degree prices should be above costs in order for them to be gauged excessive (in yet other words, in terms of Figure 1 it is not clear at which level p^* is)

Second, as the production costs are not easily observable, particularly for antitrust enforcers who face important asymmetric information, the authority may compare different prices of the investigated firm and show some discrimination (across customers in the same country or across countries). If this mean of proof is relatively straightforward and has been used extensively by the Commission, it raises difficult issues (Varian, 1989). Indeed, it would be tantamount to prohibiting price discrimination across markets (which might be different for demand, costs, and market structure reasons), a prohibition that cannot be justified on efficiency grounds. Economic theory shows that price discrimination may be an efficient way to recoup costs. Disallowing price discrimination might have adverse welfare effects, for instance by discouraging investments and innovations, and by pushing a firm not to serve some markets at all (Motta 2004:7.4).

Third, the antitrust authority may also compare the investigated price with the prices of other firms offering similar product. The first variant is to look at the price of the competitors of the dominant firm. We are puzzled by a rule considering that a dominant firm's price above competitor prices would be automatically unlawful. This higher price may cover lots of different situation, the majority of them being compatible with a competitive outcome. First, it may indicate that the products are not in the same relevant market, thus the market was wrongly defined (and the compared firms are not competitors). Second, it may indicate that the products are part of the same market, but the product of the dominant firm has a superior quality that justified a premium price. Moreover, the very presence of competitors is a strong (albeit not absolute) indication that entry is possible and that the dominant firm's position can be contested. In short, a mere comparison with competitors' prices give much too little indication to infer any conclusion on the anti-competitive behaviour of the dominant firm. It should be supplemented by additional elements.

⁵⁴ *Akzo* 62/86 [1991] ECR I-3359 para 69-74; *Tetra Pak II*, para 144-149; *Compagnie Maritime Belge* C-395/96, C-396/96P [2000] ECR I-1365. A price is deemed to be predatory if it is below the dominant company's average variable costs, or if it is below average total costs and part of an anti-competitive plan. No proof of recoupment possibility has yet been required by the case law.

⁵⁵ In *Alsatel/Novasam* (247/86 [1988] ECR 5987, para 10), the Court of Justice provided some limited and qualified guidance stating that a price increase of more than 25% might be abusive.

The antitrust authority may also compare the investigated price with the prices of other firms active on other relevant markets than the dominant undertaking (being in the same Member State or in another Member State). Here as well, a simple rule should be avoided and two important elements should be kept in mind. Firstly, it is preferable that the compared market is a competitive one, as the comparison between two monopolised markets gives very little indication on the level of the competitive price. Second, price discrimination between markets may be justified on efficiency grounds, hence a mere difference of price between market should not suffice to condemn an exploitative abuse.

To conclude, the proof of an excessive price, or in other words the search for the competitive price, may be like a quest for the Holy Grail. Even if the authorities had perfect knowledge of the costs, questions related to the allocation of common cost would arise and involve difficult policy choices. Most of the time, these authorities do not know these costs, and would guess competitive price with observable but imperfect other price indications. However, economic theory teaches us that a mere comparison of price should not suffice to prove abusive practice. The comparison should always be complemented by a detailed assessment of market characteristics and a thorough economic analysis of anti-competitive rationale explaining the divergence in prices.

III. Exclusionary price

In the previous section, we dealt with the case where the dominant firm whose pricing policy is under investigation sells its product or service to final consumers or firms with which it does not compete (see Figure 6a). Now, we are considering a setting where the dominant firm is vertically integrated. Its upstream affiliate produces an input that is used by its downstream affiliate as well as downstream independent firms for the production of a final good. Figure 6b illustrates this situation, in the simple example where there is only one downstream rival.

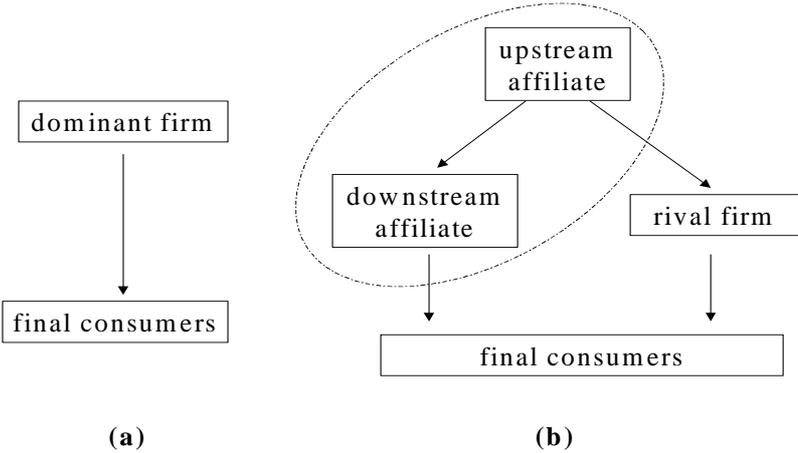


Figure 6

In this situation, if the dominant firm charges an excessive price of the input to the downstream rival, the latter would suffer a competitive disadvantage with respect to the dominant firm’s downstream affiliate, and might end up being excluded from the market. This

type excessive pricing, which is general is referred as a price squeeze, amount to an exclusionary abuse. It is one of the many foreclosure strategies (like refusal to deal, tying, predatory prices, ...) that may be used by the investigated firm to create, maintain or strengthen a dominant position on the downstream market.

1. Principles from the case-law

If the case law on foreclosure devices is fairly extensive (for an overview: Bellamy and Child, 2001:724-756; Whish, 2003:653-732), there is only one decision by the Court of First Instance on the particular strategy of price squeezing⁵⁶. Moreover, this judgement touched only slightly the issue when upholding a Commission's rejection of a complaint about vertical price squeezing. However, we may expect a much more articulated decision in the forthcoming Deutsche Telekom case⁵⁷.

1.1. Dominant position: Which firms are controlled?

As two markets (upstream and downstream) are involved, it should be determined if antitrust intervention would require that the investigated firm would be dominant on both markets or only on one of them. The doctrine seems to consider that a 'double dominance' is required (Faull and Nikpay, 1999:174; Bellamy and Child, 2001:730). Nevertheless, in *Poudres sphériques* the Court of First Instance held that:

178. (...) Price squeezing may be said to take place when an *undertaking which is in a dominant position on the market for an unprocessed product* and itself uses part of its production for the manufacture of a more processed product while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such level that those who purchase it do not have sufficient profit margin on the processing to remain competitive on the market for the processed product (our italics).

Thus, the Court did not require a dominant position on both markets, but only on the upstream market. That makes sense because a price squeeze is a strategy to leverage the upstream market power elsewhere (see similarly Crocioni and Veljanovski 2003:39).

In addition and similarly to the exploitative abuses, due to the general formulation of Article 82 EC, every dominant firm, however its market power has been acquired or maintained, has the special responsibility not to set exclusionary pricing abuse.

1.2. Abuse: What is a price squeeze?

As for every exclusionary practice, it should be distinguished between competitive and anti-competitive margin squeeze. Indeed, Article 82 EC does not prevent a company (even a dominant one) from competing on the merits, and a mere insufficient margin for a competitor to enter should not always be considered abusive. Thus only the margin squeeze that excludes a more efficient competitor than the vertically integrated firm would be anti-competitive and

⁵⁶ *Poudres sphériques* T-5/97 [2000] ECR II-3755, para 178. Note that the US case-law is a bit more extensive, and started with *Alcoa*, cited at note 3.

⁵⁷ Commission Decision of 21 May 2003, *Deutsche Telekom*, O.J. [2003] L 263/9, appeal pending *Deutsche Telekom/Commission* T-271/03, O.J. [2003] C 264/29.

should be condemned. More precisely, according to Crocioni and Veljanovski (2003:30), “a anti-competitive price squeeze arises when a vertically integrated undertaking, with market power in the provision of an ‘essential’ upstream input, prices it and/or its downstream product service, in such way and for a sufficiently long period of time to deny an equally or more efficient downstream rival a sufficient profit to remain in the market”.

An anti-competitive margin squeeze may have several causes. It may be due to an upstream excessive price (understood as above) that may be discriminatory or not⁵⁸. It may also be due to a downstream predatory price (understood with the AKZO case law referred above)⁵⁹. Thus, in *Poudres sphériques*, the Court of First Instance held that:

179. (...) In the absence of abusive prices being charged by the (dominant firm) for the raw material or of predatory pricing for the derived product, the fact that (a new entrant) cannot, seemingly because of its higher production costs, remain competitive in the sale of the derived product cannot justify characterising (dominant firm)’s pricing policy as abusive.

However, we suggest that this apparently limiting statement was linked to the facts of the case and does not imply that the Court of First Instance considered that price squeeze might not be an independent abuse from excessive or predatory pricing. Indeed in *Continental Can*, the Court of Justice considered that Article 82 covers all types of anti-competitive exclusionary practices.⁶⁰

26. The [Article 82] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in [Article 3(g)] of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.

There are two reasons why price squeeze may be anti-competitive even though excessive or predatory prices may not be proven. First, the price squeeze may be due in practice to excessive or predatory prices as defined by the EU case law, but the authority is unable to prove them due to lack of data and rely instead on the proof of an exclusionary margin. In this case, the proof of a margin squeeze is an indirect way to show other prohibited pricing practices. Second and more importantly, the price squeeze and the elimination of efficient competitors may happen without the presence of excessive or predatory pricing as defined by the EU case law⁶¹. In this case, it would be impossible for the authority to show any excessive

⁵⁸ Note however that every anti-competitive margin squeeze that is due to upstream non discriminatory excessive price will necessarily lead to a cross-subsidisation of the retail division by the wholesale division of the vertically integrated undertaking. Indeed, due to the insufficient margin, the retail division is making a loss that is compensated by the excessive profit in the wholesale division.

⁵⁹ Two sorts of predatory downstream price may be distinguished. The downstream price may be predatory *independently of the level of the upstream price*. In this case, the price does not cover the wholesale and the retail costs. Alternatively, the downstream price may be predatory *only if the level of the upstream price (supposed to exceed costs) is taken into account*. In this case, the downstream price covers the wholesale and the retail costs, but does not covers the upstream price (supposed to be excessive) and the retail costs. If the upstream price is regulated on cost-orientation basis (as it is often the case in regulated industries), only the first type of predatory downstream price may arise (see Bouckaert and Verboven, 2003).

⁶⁰ *Continental Can* 6/72 [1973] ECR 215; see similarly *Hoffman-La Roche* 85/76 [1979] ECR 461, para 91.

⁶¹ Suppose for instance that for the vertically integrated firm the cost of producing the input (of which the upstream affiliate has the monopoly) is 10, that the cost of producing the final good is 5, and that one unit of input is needed to produce one unit of the final good. Suppose also that the marginal cost of producing the final good is 5 for the rival firm as well. Consider now a situation where the vertically integrated firm sells the input at

or predatory price and still intervention is appropriate. For both reasons, authorities should be able to condemn margin squeeze independently, but under very strict conditions. Similarly, Faull and Nikpay (1999:174) argue that “even if neither the upstream nor the downstream price is in itself abusive (i.e. excessive or predatory) the combination of the two (the squeeze) is contrary to Article 82”.

Until now, there is no case dealing with the proof of the price squeeze, independently of other abusive practices. As we suggest below, any proof should consist of (1) a rigorous comparison between the appropriate upstream and downstream prices, and (2) be complemented by an economic analysis of the possibilities and the incentives to foreclose entry.

2. Practice of the European Commission

In more than forty years of practice, the Commission adopted only three formal price squeeze decisions, with three different ways to prove the margin squeeze.

In *National Carbonising*⁶², NCB had a virtual monopoly (95% market share) on the wholesale market for coal and, via its subsidiary NSF, a very strong dominance (85% market share) on the retail market for domestic hard coke. NCC, one of the downstream competitors, complained that due to several increases of the wholesale price, the margin between coal and hard coke had become insufficient to allow domestic coke producer to operate economically.

In an administrative letter⁶³, the Commission services considered that

An enterprise in a dominant position may have the obligation to arrange its price so as to allow a reasonably efficient manufacturer of derivatives a margin sufficient to enable it to survive in the long term.

Thus, the Commission services considered that the squeeze might be proved by calculating that the margin is insufficient to cover the costs of an efficient new entrant on the retail market. Due to the facts of the case, the Commission services held the preliminary view that no price squeeze has been committed. However, because NCC was questioning this appraisal at the Court⁶⁴ and there was a risk that it would go bankrupt during the Court proceeding, the Commission ordered NCB to decrease the price charged to NCC to allow it to break even during the likely duration of the appeal.

In *British Sugar*⁶⁵, BS held a dominant position on both markets for industrial non-packaged sugar and retail packaged sugar. Moreover, due to the Common Agricultural Policy Sugar Regime, the UK sugar market was not flexible and entry was strongly limited. Napier Brown,

a price of 13 to the rival, and where it also sets the price of the final product at 17. In this case, an excessive price action is unlikely to be successful (the upstream firm is earning a 30% margin, which is probably not excessive); a predatory pricing action would not be motivated either, since the vertically integrated firm is making profits of 2 (its total costs being 15). Yet, the rival will not be able to sell unless below cost, as its total costs are 18, which is higher than the final price charged by the vertically integrated firm.

⁶² Commission Decision of 29 October 1975, *National Carbonising*, O.J. [1976] L 35/6.

⁶³ Cited in the Commission decision referred above.

⁶⁴ *National Carbonising Company/Commission* 109/75R [1975] ECR 1193; and 109/75-114/75 [1977] ECR 381.

⁶⁵ Commission Decision of 18 July 1988, *Napier Brown-British Sugar*, O.J. [1988] L 284/41.

one of the competitors just entering the retail market, complained that BS was pursuing several strategies (refusal to supply, undercutting retail prices, discrimination, loyalty rebates) to drive out Napier Brown from the market. On the pricing policy, the Commission held that

66. A company which is dominant in the market for both a raw material and a corresponding derived product may not maintain a margin between both prices which is insufficient to reflect that dominant company's own costs of transformation with the result that competition in the derived product is restricted.

Thus, the Commission proved the squeeze by calculating that the margin was insufficient to cover the retail costs of the dominant firm. With regard to the facts of the case and in particular the obvious other BS's exclusionary practices, the Commission considered that BS's pricing policy was predatory and imposed a fine of 3 MEUR.

In *Deutsche Telekom*⁶⁶, DTAG held a nearly monopoly position on the wholesale market for fixed telephone local infrastructure, and a strong dominant position on retail market for the local telephone lines (i.e. access to lines being analogue, ISDN, ADSL). Moreover, this strong market power resulted from previous monopoly rights. In the context of the telecommunication regulation, the German NRA, the RegTP, controlled each wholesale price individually, and the retail tariffs with a price-cap on a basket of services. However, the new entrants on the German telecommunications market were unhappy with this regulation, and complained at the Commission that DTAG was practising margin squeeze such that entry on the retail market was rendered uneconomic.

In its decision, the Commission held that:

107. If the difference between the retail prices charged by the dominant undertaking and the wholesale price it charges its competitors for comparable services is negative, *or* insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market (our italics).

Thus the Commission proved the squeeze by calculating a negative margin, or a positive margin insufficient to cover the cost of the dominant operator (as in *British Sugar*). As the wholesale access to the local loop might be used to provide several types of retail access, the Commission compared the wholesale charge of the local loop access with the price of a basket composed of three retail services (namely analogue, ISDN and ADSL connections) weighted according to the consumption pattern of DTAG's customers for the different services. It found a negative margin for several years, and then an insufficient positive margin afterwards. Accordingly, it imposed a fine of 12,6 MEUR.

This case was difficult for at least two reasons. First, different types of access to the local loop may be given at the wholesale level and different services may be offered at the retail level. To address this problem, the Commission chose to compare the price of one type of wholesale access with the price of a weighted basket of retail services. Both choices are subject to criticism, in particular the composition of the basket. Secondly, any condemnation of DTAG's tariffs was an indirect critique of the German regulator's policy. To address this problem, the Commission carefully noted that within the borders of the regulatory obligations (in particular the price cap basket), DTAG enjoyed some discretionary power regarding the prices of each

⁶⁶ Cited at note 57.

specific service that would have enabled it to alleviate any price squeeze, either by reducing the wholesale charges and/or increase the retail subscriber fees.

Again, these three formal decisions represent only the tip of the iceberg, as several other procedures were opened in particular in the telecommunications sector⁶⁷. In 1995, the Commission⁶⁸ sent a statement of objection against Belgacom regarding unfair prices related to access to subscribers' data for the publication of telephone directories, which had the effect to exclude competitors on the directory market. After a detailed cost analysis, Belgacom settled the case with the Commission in 1997, and agreed to substantially reduce its tariff (by more than 90% of the original price). In 1996, the Commission⁶⁹ opened a procedure against Deutsche Telekom regarding its new retail business tariffs, considering that they would discriminate in favour of business customers vis-à-vis residential ones, have price squeezing effects on competitors and represent an undue bundling of monopolised and competitive services⁷⁰. To close the file, the Commission required the opening of the infrastructure market (thereby enhancing the liberalisation process) and that the Federal Minister of Post and Telecommunication (then the telecom regulator) ensure fair access price to DTAG network. As a result, DTAG accepted to reduce substantially its access price (from 38% to 78%)⁷¹. As already mentioned, the Commission opened in 2002 a case against KPN for setting excessive mobile termination charges that have inter alia price squeezing effect. However, no formal decision has been adopted yet.

Thus, most of the cases related to firms enjoying a near monopoly position on the wholesale market and an already strong dominance on the retail market. The foreclosure strategies were aimed at reinforcing or maintaining this retail dominant position. In addition, and similarly to exploitative abuses, the cases mainly related to newly liberalised sectors with the goal of ensuring the success of the liberalisation programme and condemning any strategic impediment to market entry. With regard to the means of proof, the Commission considers that price squeeze may be condemned as such, without having to show excessive or predatory price. Indeed, it relied on three tests: margin that is negative, positive but unprofitable for the dominant vertically integrated firm, or positive but unprofitable for an efficient operator. Unfortunately, the assessment is often only complemented by a too superficial analysis of the possibilities and incentives for the dominant firm to foreclose entry with a price squeeze.

3. Policy Recommendations

Economic incentives to foreclose

⁶⁷ Telecom Access Notice, cited note 39, para 117-119. See also the Guidelines by some national regulators: in the United Kingdom: OFTEL, The Application of Competition Act in the Telecommunications Sector, January 2000; in the Netherlands, OPTA/NMa, Price Squeeze Guidelines, February 2001; at the European level: European Regulators Group and European Commission, Consultation Paper on a Joint approach on appropriate remedies in the new regulatory framework, November 2003.

⁶⁸ IP/97/292 of 11 April 1997; *ITT Promedia/Commission* T-111/96 ECR [1998] II-2937. See also Haag and Klotz (1998). More generally for the price squeeze action in the directory services: P. Richards (2003).

⁶⁹ IP/96/543 of 25 July 1996; IP/96/975 of 31 October 1996; Haag and Klotz (1998:37).

⁷⁰ In particular, the Commission determined that the wholesale access price was excessive as it exceeds by more than 100% the prices found on comparable competitive markets.

⁷¹ Moreover, in 1997, the Commission opened another case against Deutsche Telekom regarding excessive price of carrier pre-selection and number portability, that had the effects of increasing end-users switching costs, thereby rendering entry less attractive. The case was pursued further by the German NRA, and the fees were reduced considerably by DT (by almost 50%): IP/98/430 of 13 May 1998.

Although the logic of the argument which consists of setting the input price so high as to disadvantage and even exclude downstream competitors might seem compelling at first sight, economics teaches us that a vertically integrated firm will not necessarily have an incentive to exclude rivals.

Indeed, the influential Chicago School argued that anti-competitive exclusion was not rational, hence every exclusion should be based on efficiency grounds. They argued that when a firm enjoys substantial market power, there is only one monopoly rent to be gained and that there is usually no need to use vertical integration and foreclosure strategies to reap this rent. This claim was based on a model where an upstream monopolist sells to perfectly competitive firms. In such circumstances, the upstream monopolist is able to extract all the profits from the market (since there is no problem of double marginalisation). Hence, a vertically integrated firm would not gain anything from discriminating against or excluding downstream rivals.

It is only recently that economists have rigorously shown that under certain circumstances a vertically integrated firm has an incentive to exclude rivals, resulting in anti-competitive outcomes. A full account of the different situations where foreclosure arises is beyond the scope of this paper, but such situations include the use of different instruments. For instance, refusal to supply (which is just the extreme case of excessive price of input, and therefore equivalent to it) can allow a firm enjoying an upstream monopoly to solve commitment problems that would otherwise erode its profits (Rey and Tirole, 2003). Tying two goods together⁷² might in some circumstances allow a firm to exclude rivals (Whinston, 1990), although one should expect that this operation is more likely to be profitable when the goods are independent than when they are vertically related, i.e. complementary. In network industries, a dominant firm might have the incentive to make it difficult for rival firms to inter-operate with its own products⁷³ (Katz and Shapiro, 1985)⁷⁴.

More generally, recent economic models allow us to analyse situations where there exist several downstream and/or several upstream firms, and show that in certain cases a vertically integrated firm *might* create foreclosure, and that foreclosure is welfare detrimental.

These analyses show that the vertically integrated firm wants to continue to supply the independent downstream firms in several instances. First, ceasing to supply (or setting an excessive price of the input) downstream rivals would not be profitable when the latter serve an at least partially different market than the integrated downstream firm. Second, even if the upstream integrated firm ceases to supply (or sells at higher prices) the downstream rival firms, the cost of the input for the latter will not increase if (i) there exist other upstream firms which are ready to increase their supply of the input, and (ii) the lower demand for the input (caused by the withdrawal from the market of the downstream affiliate of the integrated firm) will tend to reduce input prices. Therefore, foreclosure (in the sense of an increase in the prices of the input available to independent firms), will occur only if there are no other upstream producers which sell close enough substitute inputs (or if they exist but they are capacity constrained).

⁷² Note that when a vertically integrated firm is the monopolistic producer of a necessary input, committing to tying implies selling only the final good, thus denying the input to downstream rivals. Therefore, tying is similar to refusal to supply (and excessive pricing of) the input.

⁷³ Making it very costly (or impossible) for rivals to inter-operate with an input is similar to charging a very price for (or refusing to supply) it.

⁷⁴ For a comprehensive analysis of the different foreclosure practices, see Motta, 2004: Chapters 6 and 7.

Therefore, it is appropriate to keep in mind that a number of conditions must hold for a vertically integrated firm to engage into anti-competitive foreclosure. In particular, theory suggests that one should expect this to arise only in those cases where the vertically integrated firm enjoys a monopoly (or a near monopoly) of an input for which there is no good substitute. This implies that unless a very strong dominant position in an input market exists and is close to the control of an essential facility, it would not make sense to investigate foreclosure practices.

Antitrust control of prices squeeze is justified only in specific cases of dominant position

Similarly to what we did for exploitative excessive prices, we may now propose some conditions for opening a price squeeze case. Although there is very little economic literature on this topic (a welcome exception is Choné, 2002), as price squeezing is one of the many different foreclosure strategies, the principles developed above apply.

Hence, the first condition is static and relies on the presence of high and non-transitory barriers to entry. In other words, the investigated firm enjoys a monopoly or quasi-monopoly at one stage of the production.

However, this condition may not be restrictive enough as the same conflict between static and dynamic objectives underlined above applied equally here. Indeed, condemning a monopolist that tries to reap its rent through excluding practice may have negative effects on investment incentives. Condemning a firm for excessive pricing of inputs, and obliging it to reduce that price, is similar in its effects to oblige the owner of an infrastructure to grant rivals access to it. Both types of actions impinge upon the property rights of the owner of the asset, and determine a fall in its profits. In turn, and to the extent that the monopoly over the input is the fruit of investments, this reduces the remuneration from the investments made in the past, and has the additional effect of discouraging further investments by this and other firms (any firm will observe the action taken against the input monopolist and will expect similar actions in case it also had monopoly over an input which turns out to be “essential”).

Should we then conclude that a second condition related to the way monopoly has been acquired should be added, and that price squeeze action should be limited to cases where monopoly is due to current or past legal entry barriers? If the numerous drawbacks of antitrust actions against exploitative prices clearly tilt the balance in favour of very strict conditions to intervene, that is relatively less the case for exclusionary prices. Thus, we would advise the authority to take into account the effects of its intervention on investment incentives, but would not go as far as requiring that monopoly resulted from current or previous legal monopoly to justify intervention. In other words, if the monopoly was not the result of investment in a (ex-ante) competitive market, but rather the inheritance from the past of a legal monopoly, then the case for an excessive pricing action (or compulsory access or licensing) would be much stronger, as it is not a situation where the antitrust authorities would deprive the firm of the fruit of its investments⁷⁵.

Proof of the price squeeze

⁷⁵ Finally, the two additional institutional conditions related to the efficient way for the antitrust authority to remove the entry legal barriers and the presence of an efficient sectoral regulator would equally applied.

To prove a price squeeze, the authority may show that the upstream price is excessive, or that downstream price is predatory, as understood above.

The authority may also show that there is an insufficient margin between wholesale and retail prices to cover the retail costs of a firm that is at least equally efficient than the dominant firm. This comparison may be complex, in particular in multi-services industries where fixed costs have to be allocated to different services and where dominant firm may benefit from important economies of scope (Crocioni and Veljanovski, 2003; Grout, 2001). As a general rule, the antitrust authority should avoid a too laxist test that would favour entry of less efficient firm than the dominant one. In addition, the margin calculation should always be complemented by a rigorous analysis of the possibility and the incentive of the dominant firm to foreclose entry with a price squeezing strategy. This additional economic analysis is indispensable as it is always very difficult to distinguish between competitive and anti-competitive margin squeeze, hence there is a high risk of false condemnation (type I errors). Thus, the authority should show why the monopolist has to reap or protect its monopoly rent by excluding its rivals.

Without such strict burden of proof, we may end up with a multiple and unjustified price squeeze actions as in the US electricity sector in the seventies. As noted by Joskow (1985:174), “the great quantity of litigation motivated by concern about price squeezes in particular, and retail market competition in general, has had no positive efficiency consequences; it is at best a waste of time and litigation expense and at worst a source of inefficiency”.

IV. Conclusion

Fifteen years ago, Fox (1986:992) noted that, “the Common Market law on excessive pricing has profound implications. It assumes that high pricing is unfair, it assumes that unfairly high pricing can be identified by courts, and it implies that courts are better mechanisms than markets to correct unfairly high pricing”. Indeed, the EC Treaty gives competition authorities very large powers to intervene against excessive prices (being exploitative or exclusionary), that may embody a form of price regulation that the authors of the Treaty may not have excluded at the time. However, this regulatory conception is not in line with the insight of the current legal and thinking. It is nowadays generally accepted that antitrust authorities should not aim to directly regulate firms’ prices, access and output, but instead should focus on preserving structures and conditions whereby market forces constrain price and increase output (see Hawk, 1988:81). Obviously, the Commission and the Court can not change the Treaty, and the types of practices that are expressly mentioned therein must at least in certain circumstances be regarded as abusive. Therefore, we suggest that the Commission uses its power with great parsimony and that the Court sets high level of proof.

With regard to *exploitative excessive prices*, we suggest that the Commission intervenes only in cases of very strong dominance (confined to a monopoly or near monopoly) that are caused by past or current legal entry barriers, whenever market forces alone are unlikely to lead to a competitive results. With regard to *exclusionary excessive prices*, we suggest that the Commission intervenes only in cases of very strong dominance (confined to a monopoly or near monopoly). In particular, the Commission should focus (albeit not necessarily limit) its

activities on monopolies that are due to past or current legal entry barriers. Moreover, the means of proof should be elaborated, and relies on a thorough analysis of the market characteristics and the economic incentives of the undertakings.

Thus excessive prices actions should mainly be concentrated on monopolised sectors, or recently liberalised ones (like telecom, post, railways, ...). In other words, competition law applied to some sectors may be different (and more interventionist) than in others (see Larouche, 2000). Similarly, Hancher and Buendia Sierra (1998, 943) proposed a less strict test –more easily met by the authority- for predatory prices in some sectors and noted that “competition rules cannot be applied in newly liberalised markets in exactly the same way as they have been applied in ‘normal’ sectors because the market structures and the risks for competition are substantially different.” At a more general level, we suggest that the mere dominance concept as interpreted by the Court in *United Brands* is too generic to lead to appropriate public policy towards firms with market power. In fact, intervention against specific behaviour should depend on the level and the cause of market power, or in other words, dominance should be differentiated according to the abuse to be condemned⁷⁶.

References

- Amato G. and Laudati L.-Eds (2001), *The Anticompetitive Impact of Regulation*, Edward Elgar.
- Areeda P.E. and Hovenkamp H. (1996), *Antitrust Law*, v. III revised Ed, Little Brown and Co.
- Bellamy and Child (2001), edited by Roth P., *European Community Law of Competition*, 5th Ed, Sweet & Maxwell.
- Böge U. (2003), “Abuse of Dominant Position”, paper presented at the Fordham Corporate Law Institute.
- Bouckaert J. and Verboven F. (2003), *Price Squeezes in a Regulatory Environment*, CEPR Discussion Paper No 3824.
- Choné Ph. (2002), *Théorie et pratique des tests de ciseau tarifaire*, Mimeo.
- Conseil de la Concurrence français (2003), “Etudes thématiques: L’orientation des prix vers les coûts”, in *Rapport d’activités 2002*, 67-88.
- Crocioni P. and Veljanovski C. (2003), “Price Squeezes, Foreclosure and Competition Law: Principles and Guidelines”, *Journal of Network Industries* 4, 28-60.
- Faull J. and Nikpay A. -eds. (1999), *The EC Law of Competition*, Oxford University Press.
- Fingleton J. (2003), “De-monopolising Ireland”, in Ehlermann C.D. and Atanasu I. (eds), *What is an abuse of a dominant position?*, Hart.
- Fox E.M. (1986), “Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness”, *Notre Dame Law Review* 61, 981-1020.
- Green N. (2003), “Problems in the identification of excessive prices: The United Kingdom experience in the light of Napp”, in Ehlermann C.D. and Atanasu I. (eds), *What is an abuse of a dominant position?*, Hart.
- Grout P.A. (2001), *Recent Developments in the Definition of Abusive Pricing in European Competition Policy*, CMPO Working Paper 00/23.
- Gyselen L. (1990), “Abuse of monopoly power within the meaning of Article 86 of the EEC Treaty: Recent Developments”, in B. Hawk (ed), *Fordham Corporate Law Institute*, 597-650.

⁷⁶ The readers can find a similar point, that is, that antitrust intervention should be linked not only to the existence of a dominant position, but also to the source of such a position, in Motta (2004: 2.5.2 and 2.5.3), as well as Vickers (2003).

- Haag M. and Klotz R. (1998), "Commission Practice concerning excessive pricing in Telecommunications", *Competition Policy Newsletter* 2, 35-38.
- Hancher L. and Buendia Sierra J.L. (1998), "Cross-Subsidization and EC Law", *Common Market Law Review*, 901-941.
- Hawk B.E. (1988), "The American (Anti-trust) Revolution: Lessons for the EEC?", *European Competition Law Review*, 53-87.
- Hordijk E.P. (2002) "Excessive pricing under EC Competition Law: An update in the light of 'Dutch developments', in B. Hawk (ed), *Fordham Corporate Law Institute*, 463-495.
- Joliet R. (1970), *Monopolization and Abuse of Dominant Position*, Liège, Ed. Faculté de Droit de Liège.
- Joskow P. (1985), "Mixing Regulatory and Antitrust Policies in the Electricity Power Industry: The Price Squeeze and Retail Market Competition" in Fisher F. (ed), *Antitrust and Regulation: Essays in Memory of John McGowan*, MIT Press.
- Katz M. and Shapiro C. (1985), "Network Externalities, Competition, and Compatibility", *American Economic Review* 75, 424-440.
- Kauper T.E. (1990), "Whither Article 86? Observations on excessive prices and refusals to deal", in B. Hawk (ed), *Fordham Corporate Law Institute*, 651-686.
- Korah V. (2000), *An Introductory Guide to EC Competition Law and Practice*, 7th ed, Hart.
- Larouche P. (2000), *Competition Law and Regulation in European Telecommunications*, Hart.
- Lowe Ph. (2003), "DG Competition's review of the policy on abuse of dominance", Speech at Fordham Corporate Law Institute, available at <<http://www.europa.eu.int/comm/competition/speeches/>>..
- Martinez M. (1998), *Some views on pricing and EC Competition policy*, Speech 7.12.1998, available at <<http://www.europa.eu.int/comm/competition/speeches/>>.
- Motta M. (2004), *Competition Policy: Theory and Practice*, Cambridge University Press.
- OXERA (2003), *Assessing profitability in competition policy analysis*, OFT Economic Discussion Paper 6.
- Office of Fair Trading of United Kingdom (1999), *Guidelines on the Assessment of Individual Agreements and Conduct*.
- OECD (1996), *Abuse of Dominance and monopolisation*, OCDE/GD(96) 131.
- Rey P. and Tirole J. (2003), "A Primer on Foreclosure", in M. Armstrong and R. Porter (eds), *Handbook of Industrial Organization*, V. III, North-Holland, forthcoming.
- Richards P. (2003), "Competition issues on access to databases for the provisions of directory information services in the EU", *Telecommunications Policy* 27, 563-583.
- Ruppelt H-J. (2003), "Abuse Control: Objectives, Restrictive Practices and Institutions", in Ehlermann C.D. and Atanasiu I. (eds), *What is an abuse of a dominant position?*, Hart.
- Ungerer H. (2001), *Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector*, Speech 6.5.2001, available at <<http://www.europa.eu.int/comm/competition/speeches/>>.
- Varian H.L. (1989), "Price discrimination", in Schmalensee R. and Willig D. (eds), *Handbook of Industrial Organization* V.I, North Holland, 597-654.
- Vickers J. (2003), "How Does the Prohibition of Abuse of Dominance Fit with the Rest of Competition Policy", in Ehlermann C.D. and Atanasiu I. (eds), *What is an abuse of a dominant position?*, Hart.
- Whinston (1990), "Tying, Foreclosure and Exclusion", *American Economic Review* 80, 837-859.
- Whish R. (2003), *Competition Law*, 5th Ed, London, Butterworths.