



# The Rediscovery of Excessive Pricing in Europe Fairness in action?

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# THE REDISCOVERY OF EXCESSIVE PRICING

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Historically, excessive pricing cases have been few and far between

However, recently there has been a bit of a revival, especially in the pharmaceutical sector:

- The ICA fined Aspen Pharmacare €5M in September 2016 for increases of between 300%-1,500% in the price of several oncology drugs
- The CMA fined Pfizer and Flynn £90M in December 2016 for increases of up 2,600% in the price of an epilepsy drug
- The European Commission opened in May 2017 an investigation on the price of Aspen's oncology drugs in several Member States
- The CMA is currently investigating Concordia International for increases of up to 6,000% in the price of a thyroid drug

In September 2017, the EU CJ delivered its judgement on the Latvian collecting societies case (AKKA/LAA)

... and an excessive pricing investigation on Gazprom's prices in several Eastern Member States has been on-going since 2012

# FIRST OF ALL, SHOULD EXCESSIVE PRICING EVEN BE AN ABUSE?

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All companies generally price above costs, otherwise they would not make any profits

The pursuit of profits is the engine of economic activity, limiting “natural” profits – even when high – would dampen the incentive for firms to invest

Moreover, in the absence of anticompetitive or regulatory foreclosure, in the long-run entry will ensure that the market converges to a “natural” level of profits

Because of this market self-correction (and the difficulty of identifying “natural profits”), in many jurisdictions (e.g. in the U.S.) excessive pricing is not even a violation of competition law

*“in its practice, the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view. In particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.” –*

AG Wahl’s Opinion in AKKA/LAA

In practice, most competition authorities and scholars agree that excessive pricing cases should be limited to certain extreme (unfair?) cases

# UNFAIR PRICING

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Article 102(a) prohibits a dominant firm from “*directly or indirectly imposing **unfair** purchase or selling prices or other **unfair** trading conditions*”.

In *United Brands*, the ECJ determined that this includes “*charging a **price which is excessive because it has no reasonable relation to the economic value of the product supplied***”.

What is the “value” of a product?

- An objective value intrinsic to the product?
- Whatever consumers are prepared to pay?
- Or some form of competitive benchmark?

None of these concepts provides a straightforward way to identify excessive pricing in practice

## value

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*noun*

1. the regard that something is held to deserve; the importance, worth, or usefulness of something.  
"your support is of great value"  
*synonyms:* merit, worth, usefulness, use, utility, practicality, advantage, desirability, benefit, gain, profit, good, service, help, helpfulness, assistance, effectiveness, efficacy, avail, importance, significance, point, sense; *informal* mileage  
"the value of adequate preparation cannot be understated"

2. principles or standards of behaviour; one's judgement of what is important in life.  
"they internalize their parents' rules and values"  
*synonyms:* principles, moral principles, **ethics**, moral code, morals, moral values, standards, moral standards, code of behaviour, rules of conduct, standards of behaviour  
"society's values are passed on to us as children"

*verb*

1. estimate the monetary worth of.  
"his estate was valued at £45,000"  
*synonyms:* evaluate, assess, estimate, appraise, assay, rate, price, put/set a price on, cost (out)  
"his estate was valued at £45,000"

2. consider (someone or something) to be important or beneficial; have a high opinion of.  
"she had come to value her privacy"  
*synonyms:* appreciate, rate (highly), esteem, hold in high esteem, hold in high regard, hold dear, have a high opinion of, think highly of, think much of, set (great) store by, attach importance to, respect, admire, prize, cherish, treasure *More*

# A PRAGMATIC APPROACH

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The United Brands test determines two conditions for excessive pricing:

- the “*difference between the costs* actually incurred *and the price* actually charged is excessive”; and
- a “*price has been imposed which is either unfair in itself or when compared to competing products*”.

This may solve the issue of the benchmark (costs or competing products), but leaves open the issue of the threshold: how high above the benchmark has a price to go before it becomes excessive?

# NORMAL MARGINS IN VARIOUS INDUSTRIES

Source: Google Finance

Company	Gross margin (Sep 2016)	Company	Gross margin (Sep 2016)
Statoil ASA	54.66%	BHP Billiton plc	83.58%
3M Co	49.33%	Dow Chemical Co	22.62%
Dell Inc	21.40%	Hewlett Packard	29.13%
BMW	19.67%	Audi	19.47%
CocaCola	60.53%	PepsiCo	54.99%
Nike	46.24%	Puma	45.47%
Johnson & Johnson	69.27%	Starbucks	59.36%

A margin of 60-80% above variable costs is not unusual, so it should not be considered excessive

In industries subject to significant recurring fixed costs (R&D, physical infrastructure, advertising), higher margins (over variable costs) are needed to justify incurring those costs

# THE COURT HAS USUALLY APPLIED A VERY HIGH THRESHOLD

From an economic perspective, excessive pricing requires a high threshold, given the potential negative implications of “regulating high prices”

Case	Price difference	Decision
General Motors, EC, 1975 (certification)	<b>100%</b> compared to other suppliers <b>500%</b> difference over time	ECJ confirmed finding of excessive prices
British Leyland, EC, 1984 (certification)	<b>400-600%</b> RHD compared to LHD vehicles	ECJ upheld EC decision of excessive pricing.
Lucazeau v SACEM, 1989 (music royalties)	<b>400%</b> compared to European average	ECJ upheld judgement that prices charged were excessive and unjustified.

However, the EUCJ recently stated that “*there is in fact no minimum threshold above which a rate must be regarded as appreciably higher, given that the circumstances specific to each case are decisive in that regard.*” and that “*a difference between rates may be qualified as “appreciable” if it is both significant and persistent on the facts*”.

## ANOTHER APPROACH TO EXCESSIVE PRICING?

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Focus on *excessive price increases* instead of *excessive prices*?

The previous (pre-increase) price could be used as a benchmark, provided that:

- It was profitable (including a consideration for recurring fixed costs); and
- There were no changes in supply or demand conditions that justify a price increase

Even in this case, however, a relatively high threshold should be applied to ensure that regulatory intervention does not discourage investments

In such cases, the price increase would typically be considered *unfair*