



The University of Oxford Centre for Competition Law and Policy

www.competition-law.ox.ac.uk

Working Paper CCLP (L) 41

Excessive Pricing: A View from Chile

Omar Vásquez Duque*

Abstract

Excessive pricing is one of the most controversial topics in competition law. Notwithstanding excessive pricing being one of the most blatant forms of abuse, a non-intervention policy tends to be the prevalent choice worldwide. Such a “hands-off” approach is based on the grounds that excessive prices self-correct, as well as practical difficulties in measuring a competitive benchmark and identifying excessiveness, and the fear of distorting ex ante incentives to innovate and invest.

This article aims at providing a more balanced approach, which might be particularly useful for small economies, since market failures tend to linger for a longer time in small markets. Accordingly, it reviews the literature concerning the merit of antitrust intervention and the tests proposed to determine when intervention should take place. Then it illustrates the Chilean experience, which shows challenges concerning the scope of competition law; its goals; and principally the identity of a jurisdiction influenced by both the American and the European systems. This work concludes, on a policy level, that antitrust law might have a role to play in excessive pricing cases; and points out that even if hard enforcement is not considered appropriate, soft-enforcement strategies might also be advisable to address excessive prices. On a practical level, this article concludes that jurisdictions where excessive pricing provisions already

* LL.B. Law and Social Sciences, Universidad de Chile. Lecturer, Economic Law Department, Universidad de Chile Law School. I did most of the thinking for this article as part of an independent academic visit to the University of Oxford Centre for Competition Law and Policy. I am very grateful to Ariel Ezrachi for his generous support, encouragement and feedback. Some of the views expressed in this article were developed in conversations with Benjamín Mordoj. Michael E. Levine provided lucid suggestions and Julian Nowag helpful comments. The opinions expressed here are those of the author and do not represent the institutions to which the author is affiliated. Comments are appreciated: ovasquez@derecho.uchile.cl

exist should prefer tests aimed at defining a workable application of such provisions. This paper provides guidelines to determine their enforcement.

Keywords: Excessive pricing – abuse of dominance – competition law – antitrust – Chile

INDEX

I. INTRODUCTION.....	1
II. THE POLICY: WELFARE AND MARKETS.....	2
III. THE THEORY: EXCESSIVE PRICING	6
A. The Concept.....	6
B. Arguments against intervention.....	9
C. Arguments in Favour of Intervention	11
IV. INTERVENTION IN CONTEXT	17
A. The Choice of a Legal Standard and a test.....	17
B. Legal Transplants in Context.....	22
V. THE CHILEAN CASE	24
A. The identity of Chilean Competition Law	24
B. Brief review of Chilean Competition Law	25
C. Chilean case law on excessive pricing	27
V. CONCLUSIONS	31
BIBLIOGRAPHY.....	33

I. INTRODUCTION

Excessive pricing is one of the most controversial topics in competition law. Indeed, whereas excessive pricing by a dominant firm is one of the most noticeable ways firms can exploit consumers and cause inefficiencies that competition laws are meant to prevent, the prohibition against excessive pricing raises practical and ideological concerns. These apprehensions lead, on a policy level, to the argument that excessive pricing is outside the realm of competition law. On a practical level, they lead enforcers not to apply excessive pricing provisions. In fact, despite a theoretical divergence between the American and the European antitrust systems –according to which the former rejects intervention and the latter condemns excessive or unfair prices– during recent years a non-intervention policy has championed in most of jurisdictions worldwide. Such an approach is based on the grounds that markets tend to self-correct, the belief that an interventionist approach might lessen incentives to invest, and practical difficulties concerning excessiveness’ assessment.

In this article I review the theory dealing with excessive pricing, with the aim of proposing a more balanced approach between the different goals that might be in conflict when enforcers decide whether to intervene in an antitrust context. I embark this analysis from previous literature that has emphasized the role of strategic behaviour and dynamic analysis of entry;¹ compared error costs between a rule of reason rule and a *per se* legality rule;² and suggested a proper analytical framework for small or developing economies.³ Accordingly, I will highlight that high prices, in and of themselves, do not attract entry; that a rule of reason is better suited for addressing excessive pricing claims as a general rule; and that small economies present features that might justify a more interventionist approach.

This article is structured as follows: In section II, I refer to the general economic theory that underlies competition law and economic regulation; I argue that the actual protection and promotion of competition involves a wide array of strategies, some closer to what, according to the conventional dichotomy, would qualify as regulation. Then I discuss the two theoretical approaches that have emerged to address excessive pricing claims. In section III, I review the literature concerning excessive pricing, with special emphasis on the arguments in favour and against antitrust intervention. Section IV deals with special circumstances that should be noted when deciding whether to intervene in an antitrust context. In particular, I argue that market’s ability to self-correct varies. Hence, different approaches might respond to diverse market realities and might be valid for particular

¹ Ariel Ezrachi and David Gilo, “Are Excessive Prices Really Self-Correcting?,” *Jnl of Competition Law & Economics* 5, no. 2 (2009): 249–68.

² David S. Evans and A. Jorge Padilla, “Excessive Prices: Using Economics to Define Administrable Legal Rules,” *Jnl of Competition Law & Economics* 1, no. 1 (2005): 97–122.

³ Michal S. Gal, *Competition Policy for Small Market Economies* (Boston: Harvard University Press, 2003); Michal Gal, “Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?,” *Antitrust Bulletin* 49 (2004): 343–84.

contexts. Next, in section V, I refer to the Chilean case, which might be useful for other small economies, particularly with respect to the adoption of legal transplants, the choice of legal tests and remedies. Finally I provide general conclusions and a more balanced approach that rejects the conventional “hands-off” wisdom and calls for a case-by-case analysis.

II. THE POLICY: WELFARE AND MARKETS

Modern economies rely on markets for the production and distribution of goods and services because free markets generally maximise social welfare. Indeed, competitive markets tend to lead to a high degree of productive, distributive and dynamic efficiency.⁴ Yet, when markets are not competitive, they fail to provide efficient outcomes. In such a case, firms enjoy a degree of market power and exercise it by reducing their output and increasing the prices of goods and services.⁵

Broadly speaking, governments have two choices to address market power: (1) to regulate the market *ex ante* or (2) to protect the *process* of competition *ex post*, by proscribing the anticompetitive exercise of market power, with the hope that market forces will erode the positions of monopoly power. This distinction is the base of the dichotomy between competition law and regulation. Indeed, the former is generally understood as *indirect* regulation, that is, as a means for protecting *the process* of competition in order to maximise consumer welfare.⁶ Economic regulation, in contrast, tends to be defined as *direct* economic supervision of market power.⁷ Both strategies address monopoly power, but they utilize different means and might respond to divergent ends.⁸

⁴ See Joseph E. Stiglitz, *Economics of the Public Sector*, 3rd Revised edition (New York: W. W. Norton & Company, 2000), 57; William J. Baumol, *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism* (Princeton, NJ: Princeton University Press, 2004); Frederic M Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 3rd ed. (Boston: Houghton Mifflin Company, 1990), 19.

⁵ Robert Pindyck and Daniel Rubinfeld, *Microeconomics*, 8 edition (Boston: Prentice Hall, 2012), 625. In an IP context, Mark Lemley’s words are illustrative: “we are currently (and mistakenly) conditioned to think of private property and private ordering as efficient in and of themselves, rather than as efficient only in the context of robust market competition”. Mark A. Lemley, “A New Balance between IP and Antitrust,” *Southwestern Journal of Law and Trade in the Americas* 13, Stanford Law and Economics Olin Working Paper No. 340 (2007): 237, <http://papers.ssrn.com/abstract=980045> (accessed June 27, 2013).

⁶ Richard Whish and David Bailey, *Competition Law*, 7th ed. (Oxford; New York: Oxford University Press, 2012), 1.

⁷ See Niamh Dunne, “Between Competition Law and Regulation: Hybridized Approaches to Market Control,” *J. Antitrust Enforcement* (2014): 229. Citing: Organization for Economic Cooperation and Development, *Restructuring Public Utilities for Competition*, (OECD Publications 2001), 11.

⁸ Stephen Breyer, *Regulation and Its Reform*, Reprint edition (Cambridge, Mass.: Harvard University Press, 1984), 156. (“Although some critics claim that antitrust is another form of governmental regulation, in principle the antitrust laws differ from classical regulation both in their aims and in their methods”). Citation omitted.

Each instrument comprises a discrete legal tool for market supervision, having each instrument its proper domain. Antitrust law's domain should be limited to controlling the unlawful acquisition or exercise of market power.⁹ Market engineering should be considered a proper task for regulation, which prescribes the desired outcome of the market and, in so doing, oversteps the market.¹⁰ As the establishment of regulatory standards and the subsequent monitoring and enforcement of those standards would often involve no negligible expenses,¹¹ it might be socially desirable to leave the correction of certain market failures to the market itself and regulate major market failures such as utilities with natural monopoly features.

Notably, the choice of leaving the correction of the market to the market itself assumes that the entry of new competitors can erode the positions of market power. Yet, such an assumption is generally wrong for the case of monopoly pricing, since a firm is not dominant unless it has substantial and durable market power.¹² Furthermore, what attracts entry is not the excessive price on itself, but the expected post-entry price, which is unrelated to whether the pre-entry price was excessive or not.¹³ This distinction is not considered in the dominant theory of contestable markets, which assumes that incumbents do not react immediately to entry by cutting their prices to protect their market share.¹⁴ What to do, then, with market failures of a low entity that do not justify ex-ante regulation or in cases where there is a regulatory failure? The question thus refers to whether antitrust law should take the place of regulation to control the exercise of market power under special circumstances, when social welfare is implicated. Two answers have emerged, at least in theory. On the one hand, U.S. antitrust law does not consider excessive pricing as

⁹ According to Areeda, Kaplow and Edlin: "... antitrust's domain is intrinsically limited... Antitrust also is not direct, extensive regulation of industry, an alternative that has been enacted for some public utilities. Rather, antitrust supplements or, perhaps, defines the rules of the game by which competition takes place". Phillip E. Areeda, Louis Kaplow, and Aaron S. Edlin, *Antitrust Analysis: Problems, Text, and Cases, Seventh Edition*, 7 edition (Aspen Publishers, 2013), 10.

¹⁰ In Justice Breyer's words: "The antitrust laws seek to create or maintain the conditions of a competitive marketplace rather than replicate the results of competition or correct for the defects of competitive markets". Breyer, *Regulation and Its Reform*, 156–57.

¹¹ See Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2 edition (New York: Oxford University Press, 2013), chap. 2.; Gunnar Niels, Helen Jenkins, and James Kavanagh, *Economics for Competition Lawyers* (Oxford; New York: Oxford University Press, 2011), 281. ("The main point to be aware of –and this may well be a decisive factor in any cost-benefit analysis of intervention– is that such regulatory structures are costly to set up and maintain").

¹² Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford: Oxford University Press, 2012), 97. Also, a monopolist would tend to discourage uninformed potential entrants by charging a limit price. "Limit pricing" consists of a pricing strategy according to which the monopolist charges a lower price than the monopoly price in order to deter entry. Ezrachi and Gilo, "Are Excessive Prices Really Self-Correcting?" 258.

¹³ Ezrachi and Gilo, "Are Excessive Prices Really Self-Correcting?" 255–57.

¹⁴ Ariel Ezrachi and David Gilo, "Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation," *Antitrust Law Journal* 76, no. 3 (2010): 881. See Elizabeth E. Bailey & William J. Baumol, "Deregulation and the Theory of Contestable Markets," 1 *Yale J. On Reg.* 111, 113 (1984).

an antitrust offense in and of itself.¹⁵ On the other hand, according to European Competition Law excessive prices may be considered *unfair*, and, consequently, an abuse of dominance.¹⁶

The diverse approach towards excessive pricing is a consequence of a major divergence between American and European Competition Laws concerning the scope of antitrust law. Indeed, the former focuses on how monopoly power is achieved when proscribing “monopolization”, while the latter condemns a wrongful use of monopoly power which might be deemed as “abusive”. In other words, European Competition Law prohibits abusive behaviour by dominant firms that might either exclude competitors or exploit consumers and not only conducts that lead to a monopoly, as is the case of American Antitrust Law.¹⁷ Such difference is a result of profoundly diverse assumptions. In fact, European Competition Law assumes that markets are not always self-correcting. For this reason, Competition Law might be the proper tool for addressing the harmful consequences of monopoly power.¹⁸ In contrast, American Antitrust Law is based on a more market-confident approach, according to which market forces are effective enough to dismantle dominant positions without the need of intervention.¹⁹ Furthermore, even if market forces were not, effective enough, courts would be ill-suited to become price regulators.²⁰

¹⁵ Areeda, Kaplow, and Edlin, *Antitrust Analysis*, 396. (“At this point in time, courts and commentators are in uncommon accord that monopolization entails something more than monopoly. Monopolization requires undesirable exclusionary conduct”).

¹⁶ See Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” in *The EU Law of Competition*, ed. Jonathan Faull and Ali Nikpay, 3rd ed. (Oxford, UK: Oxford University Press, 2014), 512–23.

¹⁷ In Fox’s and Crane’s words: “One way to understand the issue in a snapshot is to look at the different words the US and EU use in Section 2 of the Sherman Act and Article 102 of the TFEU respectively. The US refers to “monopolization” which implies a wrongful act in obtaining monopoly power. The EU refers to “abuse of dominance,” which implies an abusive act with respect to the exercise of monopoly power. Eleanor M. Fox and Daniel A. Crane, *Global Issues in Antitrust and Competition Law* (St. Paul, MN: Thomson/West, 2010), 96.

¹⁸ Pierre Larouche and Maarten Pieter Schinkel, “Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act,” *Social Science Research Network* no. ID 2293141 (2013): 13, <http://papers.ssrn.com/abstract=2293141> (accessed July 15, 2014). See also Gal, “Monopoly Pricing as an Antitrust Offense in the U.S. and the EC.”

¹⁹ As the U.S. Supreme Court has stated: “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct”. *Verizon Communications, Inc. v. Trinko LLP*, 157 L. Ed. 2d 823, 836 (2004). Likewise, in *Berkey Photo, Inc. v. Eastman Kodak Co.*, the Court of Appeals for the Second Circuit said, “Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive... Judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission”.

²⁰ Gal, “Monopoly Pricing as an Antitrust Offense in the U.S. and the EC,” 355–57.

However, this contrast is not so perceptible in practice. In fact, whereas the text of Art. 102 TFEU and the jurisprudence provide grounds for intervention, the European enforcement practice, in both the communitarian and the national levels, reveals a limited number of cases involving excessive pricing.²¹ As Ezrachi and Gilo note, “[t]he small number of cases ... reflects the practical difficulties in establishing the excessiveness of the price, the notion that excessive prices are often self-correcting and the fear that prohibition risks chilling investment incentives”.²² Still, enforcers²³ and guidelines²⁴ have recognised that excessive pricing cases might make sense under certain circumstances.

The case against excessive pricing is not an easy one. There are several strong reasons why intervention must be carefully analysed. However, a non-intervention policy is

²¹ At the Communitarian level see e.g., *Sierna v. Eda* [1971] ECR 69; *Case 26/75 General Motors v. Commission* [1975] ECR 1367; *Case 27/76 United Brands v. Commission* [1978] ECR 207; *Case 30/87 Corinne Bodson v. Pompes Funebres* [1998] ECR 2479; *Case 110/99 Lucazeau v. SACEM* [1989] ECR 2811; see also Commission Decisions: *COMP/C-1/36.915 British Post office v. Deutsche Post AG* [2001] OJ L331/40, *COMP/A 36.568/D3 Scandlines Sverige AB v. Port of Helsingborg* [Jul 23, 2004]. At the national level: the Danish Competition Appeal Tribunal decision of Nov. 14, 2006, concerning *Elsam A/S* (alleged excessive pricing in the West Denmark market for electricity); Order of the Hungarian Competition Council of Apr. 2007, concerning termination of proceedings against a power supplier company which allegedly charged excessive prices (Vj-156/2005); The Belgian Competition Council decision No.2006–I/O-12 of Aug. 31, 2006 concerning commitments from the company “Banksys” to freeze the prices for electronic payment services; The Latvian Administrative District Court decision of Feb. 25, 2005, Case No.A42129604 (*Olaines k^o udra*) rejecting allegations of excessive pricing by the Riga Stock Exchange; The Dutch Competition Authority (NMa) finding excessive pricing by *Interplay* (case 2910/Interpay, Apr. 2004). *OFT CA98/2/2001 Napp Pharmaceutical Holdings Ltd, on appeal: Napp Pharmaceutical Holdings Limited and Subsidiaries v. Director General of Fair Trading* (Case No. 1001/1/1/01, Jan. 2002). Cited by Ezrachi and Gilo, “Are Excessive Prices Really Self-Correcting?,” n. 8 and 12.

²² *Ibid.*, 253.

²³ For instance, Philip Lowe, former Director General DG Competition, in a speech noted the general prioritization policy and special circumstances that might justify antitrust intervention: (“As regards exploitative practices, we are obviously aware that in many markets intervention by a competition authority will not be necessary. We are also aware that it is extremely difficult to measure what constitutes an excessive price. In practice, most of our enforcement focuses therefore as in the US on exclusionary abuses, i.e. those which seek to harm consumers indirectly by changing the competitive structure or process of the market. It is not in our power to change the Treaty. And, in my view, we should continue to prosecute such practices where the abuse is not self-correcting, namely in cases where entry barriers are high or even insuperable. It probably makes also sense to apply those provisions in recently liberalised sectors where existing dominant positions are not the result of previous superior performance. Philip Lowe, “How Different is EU Anti-Trust? A Route Map for Advisors – An Overview of EU Competition Law and Policy on Commercial Practices,” (presented at ABA 2003 Fall Meeting, Brussels, 2003), 4–5, http://ec.europa.eu/competition/speeches/text/sp2003_038_en.pdf.

²⁴ This reality is acknowledged in the United Kingdom Office of Fair Trading Guidelines on Assessment of Individual Agreements and Conduct: “The Director General will be mindful of the need not to interfere in natural market mechanisms where high prices will encourage new entry or innovation and thereby increase competition. In such markets, *excessive prices will be regarded as an abuse only where it is clear that high profits will not stimulate successful new entry within a reasonable period*”[...] Excessive prices may be considered to be an abuse only if they have persisted in the absence of continuing successful innovation and/or without stimulating successful new entry or a significant loss of market share”. Office of Fair Trading, *Competition Act Guideline, Assessment of Individual Agreements and Conduct*, 1999, para. 2.13 and 2.19. Emphasis added.

commonly led by misperceptions on the merits of antitrust intervention. In addition to the practical difficulties that a prohibition of excessive pricing involves, the discussion concerning antitrust intervention in a manner perceived to pursue quasi-regulatory objectives is ideologically charged. Because of this, a balanced analysis is particularly helpful for small economies, where the abilities of markets to self-correct are not as effective as in big economies. Certainly, the practical difficulties concerning antitrust intervention are a challenging issue to deal with. Yet, it is important to distinguish those practical difficulties from the ideological reasons that tend to overstate the former. Besides, even when hard enforcement is not considered as the appropriate tool for addressing excessive pricing claims, competition authorities may well look into other tools for improving markets' outcomes. Indeed, the actual defence and promotion of competitive markets goes beyond a mere ex-post control of market power, and usually involves a wide set of enforcement strategies.²⁵

In the next section I will develop an excessive pricing concept as an antitrust concern. As prices above marginal cost are the general rule in markets, a legal standard has to identify particularities that justify a special treatment. I will then refer to the reasons that are often indicated to dispute antitrust intervention and subsequently to the arguments that support a more interventionist approach.

III. THE THEORY: EXCESSIVE PRICING

A. The Concept

Temporarily high prices are a normal feature of market economies. Indeed, firms compete to gain market power and by doing so they invest and pursue cost efficiency and innovation. This is the well-known economic reason that competition law does not censure market power in and of itself. In fact, market power has a double significance. On the one hand, from a static view, it opposes to perfect competition and, therefore, causes inefficiencies and consumer harm. Yet, from a dynamic standpoint, it might be vital for the development of innovation.²⁶ In reality, firms exercise their market power most of the times they operate in the market. For this reason, a legal standard based on a mere price-

²⁵ These strategies vary from ex ante advocacy, to criminal prosecution, with numerous strategies in between, such as market studies, the use of administrative guidelines and negotiated settlement procedures. See Dunne, "Between Competition Law and Regulation"; Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, SSRN Scholarly Paper (Rochester, NY, 1999), <http://papers.ssrn.com/abstract=144149> (accessed February 3, 2015). More generally, See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York; Oxford: Oxford University Press, 1995), 35.

²⁶ Justice Scalia's words in *Trinko* are well-known. See note 19. Yet, as Baker has clearly explained "Justice Scalia could have made his economic point about the role of appropriability as a spur to innovation without referencing monopolies, and he could have noted that competition also spurs innovation. By not formulating his argument this way, Justice Scalia's rhetoric appears to welcome or defend monopolies". Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, SSRN Scholarly Paper (Rochester, NY, 2014), 16 (note 53), <http://papers.ssrn.com/abstract=2333736> (accessed February 5, 2015).

cost difference²⁷ would not only lack economic sense, but also would be impracticable to administrate in an objective and effective manner.

The European case law has provided influential ideas about the concept of excessive pricing and the conditions under which such conduct should be condemned. In *United Brands*²⁸, the European Court of Justice (ECJ) broadly defined an excessive price as a price that has no relation to the economic value of the product (or service) supplied;²⁹ a definition consistently echoed by regulators, courts and legislators.³⁰ In order to implement this standard the Court set down a twofold test: (1) to determine whether the difference between the costs actually incurred and the price actually charged is excessive; and, if it actually is (2) to consider whether the price imposed is either unfair in itself or when compared to competing products.³¹

However, the Court did not provide guidelines about what level of margin is excessive; when an excessive price would be deemed unfair; or what costs should be taken into account when measuring margins.³² Furthermore, the reference to the “economic value” of products is particularly ambiguous.³³ In fact, in economic terms “value” is what costumers are willing to pay for a product. If a monopolist charges more than the value of a product, consumers will not buy it. What a monopolist can do, however, is exploit its consumers’ willingness to pay. Hence, monopoly price will be higher than the competitive price, but lower (or equal) to consumers’ value. In fact, economics show that even in a state of imperfect competition, consumers’ surplus tends to be positive.³⁴

²⁷ Which is the base of the measurement of market power according to the *Lerner Index*: $M = (\text{Price} - \text{Marginal Cost}) / \text{Price}$. See Scherer and Ross, *Industrial Market Structure and Economic Performance*, 70.

²⁸ *United Brands v. Commission* [1978] ECR 207.

²⁹ *Ibid.*, para. 250. (“charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is [...] an abuse”). This definition is particularly influential. Actually the South African Competition Act follows it when defining EP. Recent jurisprudence, however, has provided a more economic concept of what should be considered as an excessive price. In fact, in *Port of Helsingborg* the Commission stated that the economic value of a product or service cannot simple be determined by approximate costs incurred in the provision of the product or service ... a profit margin which would be a pre-determined percentage of the product costs. [Rather, the] economic value must be determined with regards to the particular circumstances of the case and take into account also non-cost factors such as the demand for the product/service. *Scandlines Sverige AB v. Port of Helsingborg* [2006] (2006) 23 [232].

³⁰ Ezrachi and Gilo, “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation,” 884.

³¹ *United Brands v. Commission* [1978] ECR 207 at [250–52].

³² See in general, Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 514.

³³ On costs, prices and demand and how particularly important the demand is for determining the prices of goods see Frank Verboven, “International Price Discrimination in the European Car Market,” *The RAND Journal of Economics* 27, no. 2 (1996): 240–68. (*i.e.* while we might think that Fiat cars are cheaper in Italy because costs should be lower, in reality Fiat cars are more expensive in Italy because consumers value them more).

³⁴ Unless there is perfect price discrimination, see Jean Tirole, *The Theory of Industrial Organization* (Cambridge, MA.: The MIT Press, 1998), 67. Cited by Ezrachi and Gilo, “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation,” 884.

Excessive prices that raise a reasonable concern are those that occur in the absence of effective competitive constraints. Indeed, where there is price discipline due to competitive pressure the market should tend to self-correct and intervention would not be justified. This is what the United Brands holding refers to as “normal and sufficiently effective competition”. Certainly, one should not expect the outcomes of perfectly competitive markets, but outcomes that would be expected from competitive behaviour, where there is rivalry between firms rather than unilateral exercise of market power.³⁵ When high prices are persistent over time, one might well assume either that high prices do not signal to uninformed potential entrants that the incumbent is inefficient or that the post-entry price deters entry. For these reasons, excessive pricing might be defined as prices significantly and persistently higher than those that had prevailed under viable competition.³⁶

This characterization is useful because it highlights two important features that can distinguish excessive prices that might be considered as an antitrust concern from mere high prices. Indeed, the requirement of significance minimizes mistakes concerning the assessment of excessiveness, and the condition of persistence is fulfilled only when the market cannot self-correct. However, jurisdictions may differ about the degree and time that amount to be permissible. In fact, while it is clear that it should not be understood as a reference to perfect competition³⁷, jurisdictions might have different conceptions about how imperfect competition is envisaged by this legal standard.³⁸ Although these concepts are open-textured, they are helpful enough to draw a normative concept, which will be complemented by the prioritization efforts of the competition authorities.

In what follows, I review the arguments in favour and against antitrust intervention. My aim is to show that when all strong arguments are considered together, the conclusion is a more balanced approach that acknowledges the risks that price intervention might cause; the practical difficulties that excessive pricing cases involve; but also the economic soundness of intervention under special circumstances and the fact that there might be diverse strategies that competition authorities can utilize to address excessive pricing

³⁵ See Simon Roberts, “Assessing Excessive Pricing: The Case of Flat Steel in South Africa,” *Jnl of Competition Law & Economics* 4, no. 3 (2008): 874.

³⁶ See Robert O’Donoghue and A. Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 2 edition (Oxford: Hart Publishing, 2013), 736. (“Economists define excessive prices as those which are set significantly and persistently above the competitive level”). See also Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 520. Renato Nazzini, “Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU,” in *International Antitrust Law & Policy: Fordham Competition Law 2012*, ed. Barry E. Hawk (New York: Juris Publishing, Inc., 2013), 461.

³⁷ See Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell/Thomson Reuters, 2010), 16. (“While both the models of perfect competition and monopoly provide a useful starting point for analysing the effectiveness of competition, neither of them provides a sound basis for policy decisions”).

³⁸ Ezrachi and Gilo, “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation,” 885.

problems. Those special circumstances should be particularly considered by small economies, where the self-correcting ability of markets is more limited.

B. Arguments against intervention

Excessive prices are self-correcting. The first and most common argument against intervention is that excessive prices are self-correcting. As Ezrachi and Gilo note, this thesis is based on two sub-arguments: (i) firstly, excessive prices attract new entry (when entry is profitable) and (ii) secondly, because of the prospects of new entry, dominant firms will lower prices and refrain from charging excessive prices³⁹. Consequently, in the absence of barriers to expansion and entry, dominant firms will not tend to price excessively *ex-ante* in order to keep their dominant position. If they do so, new competitors will enter the market and prices will drop. This argument dominates the literature⁴⁰ and the case law.⁴¹ Yet, as I will detail in the next section, its validity is quite restricted. Hence, it should not serve to justify non-intervention.⁴²

Price control lessens incentives to invest. Temporarily high prices are particularly important in dynamic markets. Where investments and innovation are vital, economic rents can be understood as the *ex post* reward of the market for *ex ante* competition to innovate.⁴³ Firms invest and innovate because they are able to appropriate the benefits from their risky investments. For this, price control may distort incentives to innovate and might lessen the creative-destructive ability of markets.⁴⁴

This argument is a legitimate concern, but its scope is restricted. Firstly, it applies to specific kinds of industries (those dynamic markets where innovation takes place). Secondly, it is important to distinguish this apprehension from the position that monopolies

³⁹ Ezrachi and Gilo, “Are Excessive Prices Really Self-Correcting?” 254.

⁴⁰ For instance, Whish and Bailey, *Competition Law*, 718–19. (“[...] if normal market forces have their way, the fact that a monopolist is able to earn large profits should, in the absence of barriers to expansion and entry, attract new entrants to the market. In this case the extraction of monopoly profits will be self-defeating in the long run and can act as an important economic indicator to potential entrants to enter the market. If one accepts this view of the way that markets operate, one should accept with equanimity periods during which a firm earns a monopoly profit: the market will in due course correct itself, and intervention by the competition authorities will have the effect of undesirably distorting this process”).

⁴¹ See *i.e.* *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979).

⁴² Ezrachi and Gilo, “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation,” 879: “the “self-correcting” reasoning should not serve to justify non-intervention”.

⁴³ Massimo Motta and Alexandre de Streel, “Excessive Pricing in Competition Law: Never Say Never?” in *The Pros and Cons of High Prices*, ed. Konkurrensverket Swedish Competition Authority (Stockholm, 2007), 18, http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_high_prices.pdf; Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 512; Damien Geradin, *The Necessary Limits to the Control of “Excessive” Prices by Competition Authorities - A View from Europe*, SSRN Scholarly Paper (Rochester, NY, 2007), <http://papers.ssrn.com/abstract=1022678> (accessed July 27, 2014).

⁴⁴ In Schumpeter’s words. See Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Routledge, 1994), chap. 7.

favour innovation. Whereas it is well known that dynamic efficiencies are vital for the development of economies (and they tend to be considered more important than static efficiencies),⁴⁵ innovation may also arise from other sources (such as pre-innovation product-market competition, which firms can seek to escape through innovation, and competition in innovation itself).⁴⁶

Excessive prices are too difficult to assess. In general, when a company with market power operates in the market, it charges a price higher than marginal cost. “The question, therefore, is where to draw the line”.⁴⁷ To resolve if a price actually charged is “excessive” causes two major difficulties. Firstly, to decide which of the dominant’s firm costs should be considered for the analysis. Secondly, to determine what level of profit margin is acceptable.⁴⁸ The natural comparison with perfect competition leads to assess excessiveness on the grounds of marginal costs, yet marginal costs raise complications. For example, in dynamic industries innovation generates very high fixed costs, however once the innovative product or service is already in the market marginal costs tend to be very low, sometimes close to zero. In such cases, an analysis based on marginal cost would not consider R&D costs properly.⁴⁹ These difficulties do not apply only to dynamic markets, in fact in static industries cost assessment might be a very complex task as well. A typical example is the measurement of common costs in multi-product firms.⁵⁰ Even when a proper methodology for cost assessment has been identified, the range of acceptable margin is still subject to debate. This is the most challenging obstacle, and might justify limited intervention or non-intervention on a case-by-case basis.⁵¹

It is impracticable to set a workable legal standard. The difficulties mentioned above show that it is quite complex to translate policy into a sufficiently realistic legal test.⁵² According to Evans and Padilla, “[t]here is no price-cost or profitability benchmark rule that implements [excessive pricing test] in a manner that satisfies the following two conditions: (a) objectivity and (b) efficiency”.⁵³ In their view, an objective rule yields predictable outcomes and ensures legal certainty. To be objective a rule must satisfy three conditions: (1) specify what measure of price and profit would be employed in the analysis;

⁴⁵ See Herbert Hovenkamp, “Restraints on Innovation,” *Cardozo L. Rev.* 29 (2007): 247–60.

⁴⁶ See Jonathan B. Baker, “Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation,” *Antitrust Law Journal* 74, no. 3 (2007): 575–602; Baker, *Taking the Error Out of “Error Cost” Analysis*, 15.

⁴⁷ Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 512.

⁴⁸ See Geradin, *The Necessary Limits to the Control of “Excessive” Prices by Competition Authorities - A View from Europe*, 7–10.

⁴⁹ *Ibid.*, 7–8.

⁵⁰ See Whish and Bailey, *Competition Law*, 719; Geradin, *The Necessary Limits to the Control of “Excessive” Prices by Competition Authorities - A View from Europe*, 8.

⁵¹ Ezrachi and Gilo, “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation,” 884.

⁵² Whish and Bailey, *Competition Law*, 719.

⁵³ Evans and Padilla, “Excessive Prices: Using Economics to Define Administrable Legal Rules,” 110.

(2) identify an unambiguous and workable comparator; and (3) define a critical threshold for the price or profit variable. To be efficient the benchmark rule must find prices excessive only when they reduce the static and dynamic efficiency of the market.⁵⁴

This is also a reasonable concern, yet not an exclusive feature of excessive pricing cases. Indeed, one should consider that there are also other antitrust issues that necessitate complex assessments, such as predatory pricing, margin squeeze and resale price maintenance.⁵⁵ Of course, complexity entails risks and costly litigation, yet non-intervention might be costly as well.

There is no appropriate remedy. Antitrust authorities can find a price is abusive and impose a fine. But how could then competition authorities remedy high prices? One might think that fines might lead the firm to stop charging excessive prices, because if the firm does not remedies its pricing policy the antitrust authority will file a complaint claiming recidivism. Certainly, this statement is too simple for most cases because in general there will be a wide grey area regarding price fairness. Moreover, in general competition authorities are hesitant to tell the dominant firm what the non-excessive price is unless they are willing to regulate prices or margins.⁵⁶ Motta and de Streel emphasize that this kind of regulation would be difficult to implement and would not solve the problem forever because intervention would be occasional. Moreover, competition authorities have no experience and no role in regulating prices.⁵⁷ While this view is right regarding the first statement (because excessive pricing problems are often due to structural issues), the last argument depends largely on the institutional design of each competition regime and the actual institutional cooperation with sector-regulators. Furthermore, other remedies exist as well, as I will note in the next section.

C. Arguments in Favour of Intervention

In light of the aforementioned complications, competition authorities have tended to prioritize the prosecution of exclusionary abuses and leave the correction of consumer exploitation to market forces.⁵⁸ Interestingly, this approach prioritizes prophylactic

⁵⁴ Ibid., 110–11.

⁵⁵ Ezrachi and Gilo, “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation,” 893.

⁵⁶ In this regard, the words of Emil Paulis are illustrative: (“intervening against excessive pricing may entail the risk of a competition authority finding itself in the situation of a semi-permanent quasi-regulator. The authority may have to come back time and again to the pricing of the dominant firm when cost or other conditions change in the industry, something that a ‘generalist’ competition authority is much less equipped for than proper regulators with their deep knowledge of and continuous involvement in their industries”). Emil Paulis, “Article 82 EC and Exploitative Conduct,” (presented at 12th Annual Competition Law and Policy Workshop Robert Schuman Centre EUI, Florence, 2007), 4, www.eui.eu/Documents/RSCAS/Research/.../200709-COMPed-Paulis.pdf.

⁵⁷ Motta and Streel, “Excessive Pricing in Competition Law: Never Say Never?,” 19.

⁵⁸ *See in general*, Larouche and Schinkel, “Continental Drift in the Treatment of Dominant Firms”; Ezrachi and Gilo, “Are Excessive Prices Really Self-Correcting?,” 252–54.

enforcement, in the sense that it focuses on abuses that lead to a lower degree of competition and can be expected to result in an exploitative practice, but it limits intervention in cases of direct consumer exploitation, which seems “paradoxical”.⁵⁹

However, a firm that has already acquired a dominant position holds immunity from the normal forces of competition, which allows it to charge excessive prices persistently. Remarkably, cartels are illegal (and often referred as “the supreme evil of antitrust”⁶⁰) because cartel members reduce output, raise prices and hinder innovation. Yet, monopolies produce the same effects and are more stable than cartels. Indeed, the fact of charging excessive prices “embodies the ultimate expression of an abuse of dominance –immunity from competitive forces and their corrective effects”.⁶¹ Certainly, intervention *might be* risky and entails complex analysis of several issues. However, “[a]rguments that price regulation is *always* inappropriate or impossible to implement are overstated”⁶² and “are based on misperceptions of what economics can and cannot say about excessive pricing”.⁶³ I will refer to those arguments in the next paragraphs.

Excessive prices are not self-correcting. As Ezrachi and Gilo have shown, high prices, *in and of themselves*, do not attract new entry.⁶⁴ The authors argue that it is the *post-entry price*, and not the *pre-entry price* that potential entrants consider when deciding whether to enter the market.⁶⁵ This is so because incumbents can cut their prices as soon as a new rival arrives and the potential entrant is aware of this risk.⁶⁶ For this reason, when entrants have sufficient information about the relative efficiency (or advantages) of incumbents, it is the expected post-entry price and not the pre-entry price that affects the entrant’s decision to enter the market.⁶⁷ Pre-entry prices can, however, signal to uninformed entrants whether the incumbent is inefficient, thereby at times attracting

⁵⁹ Bruce Lyons, “The Paradox of the Exclusion of Exploitative Abuse,” in *The Pros and Cons of High Prices*, by Konkurrensverket Swedish Competition Authority (Stockholm, 2007), 65, http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_high_prices.pdf. (“European Commissioner Neelie Kroes kicked off the current major review of Article 82 by saying: ‘it is sound for our enforcement policy to give priority to so-called exclusionary abuses, since exclusion is often at the basis of later exploitation of customers’. This is a common position to hear in policy circles, but it is inherently paradoxical. If exclusionary abuses are bad because they ultimately exploit consumers, why should the policy emphasis not be on directly exploitative abuses?”).

⁶⁰ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (Supreme Court 2004). (“[...] compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.”).

⁶¹ O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 735.

⁶² Niels, Jenkins, and Kavanagh, *Economics for Competition Lawyers*, 281. Emphasis added.

⁶³ *Ibid.*, 280.

⁶⁴ Ezrachi and Gilo, “Are Excessive Prices Really Self-Correcting?,” 255.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* “Once the incumbent detects the first steps of entry, it is expected to react immediately, and the resulting price war is expected to bring prices down to competitive levels very quickly”.

⁶⁷ *Ibid.*, 256.

entry.⁶⁸ Hence, entry will occur only when the entrant knows it is more efficient than the incumbent. This dynamic interaction is a flaw within the theory of contestable markets, which assumes the incumbents do not react to entry by cutting prices in order to keep their market share.⁶⁹ Actually, such reaction might be main deterrent for entrants.

Excessive pricing might lessen both short-term and long-term welfare. Another frequent argument against intervention is that price control benefits consumers in the short run with lower prices, but harms consumer in the long run by lessening investment incentives. While price intervention might distort incentives *ex-ante*, the presence of significant entry barriers allows the harm to remain in the long term and may lead to both static and dynamic inefficiencies.⁷⁰ In fact, the unconstrained power to charge supra-competitive prices in the long term may reduce the incentives of the dominant firm to increase its own productive efficiency and to invest in product improvements⁷¹.

Dominance does not necessarily arise from competitive forces. Where a firm has acquired a dominant position due to competition on the merits, intervention might lead to undesired *ex-ante* incentives on investment and innovation. However dominance might result from forces other than competition.⁷² That is the case of dominant undertakings that either enjoy exclusive or special rights granted by the State or were former legal monopolies.⁷³ Intervention in those markets should not tend to distort *ex-ante* incentives and may be useful to avoid welfare losses if there is no prospect of market forces removing or eroding a monopoly position.⁷⁴

Economics provide several methods to analyse when prices are excessive. The appraisal of excessiveness is the most challenging obstacle concerning excessive pricing cases. Economic theory provides numerous techniques to measure price “excessiveness”. Certainly, some of these benchmarks are more robust than others, yet their applicability depends largely on the nature of the available evidence in each case. Those methods might be broadly classified as: (i) price-cost comparisons; (ii) price comparisons across customers or geographical markets; (iii) geographic price comparisons; (iv) comparisons with competitors’ prices and (v) comparisons over time.⁷⁵ These benchmarks are not

⁶⁸ *Ibid.*, 257.

⁶⁹ Ezrahi and Gilo, “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation,” 881.

⁷⁰ Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 518.

⁷¹ Nazzini, “Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU,” 463.

⁷² See Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 519; Nazzini, “Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU,” 466–70.

⁷³ *British Leyland v. Commission* [1986] ECR 3263; *Corinne Bodson v. Pompes Funebres* [1998] ECR 2479.

⁷⁴ Niels, Jenkins, and Kavanagh, *Economics for Competition Lawyers*, 280.

⁷⁵ See O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 748; Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 519–22; Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics* (Oxford, U.K.: Oxford University Press, 2012), 276–80; Massimo

incompatible with each other. Actually, multiple benchmarks should be applied in parallel when possible in order to achieve a robust result that minimises errors.⁷⁶

(i) The price-cost benchmark. The first benchmark consists of comparing the price and the costs of the product or service. According to this method it is possible to determine margins but not to appraise the merit (or fairness) of such margins. It is advisable to use this method only as a first step because there are several issues that arise with this method, such as the choice of the proper cost measure, the definition of a reasonable profit margin, the treatment of common costs in multi-product firms, and the provision of incentives for firms to reduce their costs.⁷⁷ While this method is not conclusive on its own to condemn a firm's pricing policy, it might be useful to dismiss unfounded claims.

(ii) Discrimination benchmarks. A more sophisticated alternative is to compare the prices charged by the dominant firm in the relevant market with those prices that it charges to different customers in the same geographic market or in other geographic markets that face a different competitive level. The comparison provides a basis to consider lower margins as a "reasonable" profit. Thus, prices are excessive if the lower prices are profitable and the price-difference has no justification, such as production or supply costs.⁷⁸ Price discrimination benchmarks are very useful to resemble the doctrinal definition of excessive prices. In fact, a plausible way to determine what price the dominant firm would have charged under competition is to analyse what price the firm is charging in markets where it is not dominant.⁷⁹

However, care must be taken to apply a discrimination benchmark, since a discriminatory pricing policy might be welfare enhancing.⁸⁰ If firms know that price discrimination may expose them to excessive pricing claims, they might just refrain from such pricing policy, consequently decreasing social welfare where discrimination expanded output.⁸¹

(iii) The geographical benchmark. This method compares the prices of the dominant firm with those of other firms that operate in a different geographic market. In

Motta and Alexandre de Stree, "Excessive Pricing and Price Squeeze under EU Law," in *European Competition Law Annual 2003: What is an Abuse of a Dominant Position*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu (Oxford; Portland, Ore.: Hart Publishing, 2006), 93–104; Roberts, "Assessing Excessive Pricing."

⁷⁶ See O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 748.

⁷⁷ See *Ibid.*, 749.

⁷⁸ See Roberts, "Assessing Excessive Pricing," 874–75.

⁷⁹ See Miguel de la Mano, Renato Nazzini, and Hans Zenger, "Article 102," 521.

⁸⁰ See Scherer and Ross, *Industrial Market Structure and Economic Performance*, chap. 13; O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, chap. 15; Tirole, *The Theory of Industrial Organization*, chap. 3.

⁸¹ Miguel de la Mano, Renato Nazzini, and Hans Zenger, "Article 102," 521.

Corinne Bodson v Pompes funèbres,⁸² the ECJ compared the prices of the monopolized market of “external services” for funerals with the prices of similar products in markets considered as relatively competitive. In doing so, the ECJ determined that since more than 30,000 communes in France had not granted exclusive concessions but had left the services unregulated or operated it themselves, it was possible to make a comparison between the prices charged by undertakings with exclusive concessions and other undertakings. According to the ECJ “[s]uch a comparison could provide a basis for assessing whether or not the prices charged by the concession holders are fair”.⁸³ In *Port of Helsingborg*,⁸⁴ the Commission considered that it was not appropriate to compare profit levels between different ports in order to ascertain whether charges imposed by Helsingborg were excessive. Among other reasons, the Commission noted that each port differed substantially from the others in terms of its mix of activities, the volume of its assets and investments, the level of revenues, and the cost of each activity.

(iv) The competitors benchmark. This method consists of comparing the prices charged by the dominant company with those charged by its competitors. *General Motors*⁸⁵ and *United Brands*⁸⁶ are leading examples where this method was put into practice. However, price differences may be due to product quality, distribution costs, or pricing strategy.⁸⁷ For instance, an entrant might price aggressively to gain market share and then raise its prices.⁸⁸ Besides, the presence of competitors might suggest that the market is subject to competitive constraints, which is considered an important requirement for intervention.⁸⁹

(v) The historical benchmark. Comparisons over time are another method to determine whether a price is unfair. In this regard *British Leyland*⁹⁰ is a leading case. British Leyland held a legal monopoly to issue national certificates of conformity for vehicles in Great Britain. The Court undertook a comparison between the historical prices of the dominant firm and the prices it charged in the past and found that the fees had increased 600% during the relevant period. Thus, the Court considered they

⁸² *Corinne Bodson v. Pompes Funebres* [1998] ECR 2479.

⁸³ *Ibid.*, para. 31.

⁸⁴ Case COMP/A.36.568/D3, *Scandlines Sverige AB v Port of Helsingborg*, Commission Decision of 23 July 2004.

⁸⁵ Case 26/75 *General Motors Continental v Commission* [1975] ECR 1367.

⁸⁶ *United Brands v. Commission* [1978] ECR 207.

⁸⁷ See Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 521; O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 752; Geradin, *The Necessary Limits to the Control of “Excessive” Prices by Competition Authorities - A View from Europe*, 13.

⁸⁸ See Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics*, 278.

⁸⁹ See Geradin, *The Necessary Limits to the Control of “Excessive” Prices by Competition Authorities - A View from Europe*, 13.

⁹⁰ *British Leyland v. Commission* [1986] ECR 3263.

were abusive. In that case, it was clear that the increase in fees was not justified by an increase in costs, but was an attempt by British Leyland to prevent parallel trade in motor vehicles.

It is important to highlight that commentators⁹¹ and competition authorities⁹² have suggested focusing enforcement on cases where excessive prices are “significantly” above the competitive level and to use as many benchmarks as possible, in order to minimize error costs⁹³. As O’Donoghue and Padilla have noted, “an important common feature of cases in which excessive prices have been found is that the price was not merely above the relevant benchmark, but was significantly above it”.⁹⁴ As pointed out by Geradin, a common thread to all the European cases concerning excessive pricing is that prices had exceeded costs by more than 100%. Interestingly, the same standard has been followed in German jurisprudence⁹⁵ and Dutch case law.⁹⁶

Price regulation is not the only remedy available. As Motta and de Streeck remark, “excessive price abuse is associated with price regulation remedy. However, the two questions should be kept separate as other remedies exist”.⁹⁷ According to these authors, since excessive pricing is more a problem in the structure of the market than in the behaviour of the firm, the appropriate remedy should consist of changing the market structure for the future and the specific remedy will depend on the cause of the excessive price. Hence, if excessive prices are due to a combination of strong past market power and consumer inertia, the best remedy would be to encourage consumers to switch towards less expensive offers of new entrants. If high prices are due to important strategic entry barriers,

⁹¹ See *i.e.* O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 755.

⁹² OFT. Assessment of Conduct, Office of Fair Trading Draft Competition Law Guideline For Consultation (April 2004) para. 2.6.

⁹³ See *i.e.* Motta and Streeck, “Excessive Pricing in Competition Law: Never Say Never?,” 43; O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 755; Miguel de la Mano, Renato Nazzini, and Hans Zenger, “Article 102,” 521. Interestingly, the German Competition Act uses this definition to refer to unfair prices § 19, Section 4, No 2 GWB) see Hans-Jürgen Ruppelt, “Abuse Control: Objectives, Restrictive Practices and Institutions,” in *European Competition Law Annual 2003: What is an Abuse of a Dominant Position*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu (Oxford; Portland, Ore.: Hart Publishing, 2006), 136.

⁹⁴ O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 755.

⁹⁵ Flugpreisspaltung, Bundesgerichtshof, judgement of 22 July 1999, NVZ 2000, 326 cited by *Ibid.*, 756. (“Under this approach, a company's pricing policy is abusive, within the meaning of section 19(4) of the German Act against Restraints of Competition, if its prices significantly exceed the competitive comparison price”).

⁹⁶ See Geradin, *The Necessary Limits to the Control of “Excessive” Prices by Competition Authorities - A View from Europe*, 27. (“As a rule, the NMa assesses whether a dominant firm’s prices are excessive by examining “whether there is too great a disproportion between the costs and the price actually charged. To determine this, the realized return is compared with a measure of the cost of capital. For this, the WACC is the measure”. ... Only if the return is durably and significantly above the cost of capital does the NMa find that prices are excessive. In a number of cases it has particularly emphasized the need for a durable and significant excess before an abuse can be found”). Reference omitted.

⁹⁷ Motta and Streeck, “Excessive Pricing in Competition Law: Never Say Never?,” 40.

the best remedy would be to remove and prohibit such entry barriers. And if excessive prices are due to important structural barriers, the competition authority should try to remove the entry barrier, by the means of advocacy if the barrier is of legal nature, or by imposing vertical restructuring if the barrier is of economic nature.⁹⁸ Additionally, competition authorities can negotiate settlements by which dominant firms might agree to offer more convenient conditions for customers. Besides, a recent study has noted how hybridized powers can overcome traditional limitations of antitrust enforcement.⁹⁹ Such powers incorporate elements of competition law and regulation, “creating distinct instruments of market control pitched between the generalist *laissez-faire* antitrust approach of strengthening the market and the sector-specific interventionist regulatory approach of overreaching it”.¹⁰⁰ Hybridization might shift the focus of investigation to the general performance of the market and provide remedial powers beyond the conventional antitrust arsenal.¹⁰¹ For instance, market investigations allow competition authorities to investigate factors that prevent competition from functioning freely and then take or recommend actions in order to remedy any adverse effect identified.¹⁰²

IV. INTERVENTION IN CONTEXT

The prior sections of this work have provided an excessive pricing concept and reviewed the main arguments in favour of and against antitrust intervention. In what follows I summarize the decision theoretical approach that tends to be mentioned when arguing in favour of a per se legality rule concerning excessive pricing. I will highlight that such an approach considers debatable assumptions to justify a non-interventionist position. In contrast, when the study considers more realistic assumptions, the conclusion suggests analysing excessive pricing cases under a rule of reason standard. Next, I review different tests proposed to determine under which circumstances intervention is socially desirable. Finally, I refer to special features of small economies and why those particularities deserve a careful analysis when transplanting foreign standards.

A. The Choice of a Legal Standard and a test

In their influential article, Evans and Padilla¹⁰³ adopted a decision theoretical approach to analyse excessive pricing and rule making.¹⁰⁴ Decision Theory evaluates

⁹⁸ Motta and de Streel, “Excessive Pricing and Price Squeeze under EU Law,” 40–41.

⁹⁹ Dunne, “Between Competition Law and Regulation.”

¹⁰⁰ *Ibid.*, 231. Citation omitted.

¹⁰¹ *Ibid.*, 233.

¹⁰² This is the case of the Competition and Markets Authority (CMA) in the UK, where the Enterprise Act 2002 provides a market review power that enables the CMA to determine if any existing market features result in an “adverse effect on competition”. *See Ibid.*, 235.

¹⁰³ Evans and Padilla, “Excessive Prices: Using Economics to Define Administrable Legal Rules,” 118.

¹⁰⁴ “Decision theory sets out a process for making factual determinations and decisions when information is costly and therefore imperfect” Frederick Beckner III and Steven C. Salop, “Decision Theory and Antitrust Rules,” *Antitrust L.J.* 67, no. 1 (1999): 41.).

antitrust rules based on whether they minimize total social costs, including the costs of false convictions (type 1 errors); false acquittals (type 2 errors); and the transaction costs that the use of legal process involves. When it deals with an excessive pricing case, the cost of a type 1 error is the reduction of incentives to invest and innovate due to the decrease of the expected rate of return on successful innovations.¹⁰⁵ The cost of a type 2 error is the welfare loss to consumers (1) who paid more than they would have paid under viable competition and (2) who were excluded from consumption.¹⁰⁶

Evans and Padilla compared a rule of reason rule to a per se legality rule. They noted that the former may lead to both types of errors (false convictions and false acquittals), while the latter can only lead to type 2 errors (false acquittals). As per se rules are easier and cheaper to administer and enforce, a per se legality rule causes less administrative costs. Hence, in order to determine which rule provides better outcomes for jurisdictions, one should compare the increased costs of false acquittals under the per se rule to the additional administrative costs of having a rule of reason standard as well as the costs of false convictions from applying that standard.¹⁰⁷ Given that (1) competition authorities and courts cannot distinguish efficient and inefficient high prices and that (2) high prices are generally efficient, a per se legality standard is socially desirable.¹⁰⁸ In order to reach this conclusion, the authors assumed that legal standards apply to all industries and cases alike and also that market forces eliminate excess profits in a reasonable period of time when barriers to entry are not high.¹⁰⁹

		Can courts and regulators distinguish accurately welfare enhancing from welfare reducing prices?	
		Yes	No
Does price above cost generally lead to inefficient outcomes?	No	Rule of reason	Per se legality
	Yes	Modified per se illegality	Per se illegality

Table 1. The choice of the legal standard according to Evans and Padilla¹¹⁰

However, when the authors do not assume that legal standards apply to all industries and cases alike, they suggest a more flexible standard that allows discrimination on a case-

¹⁰⁵ Evans and Padilla, “Excessive Prices: Using Economics to Define Administrable Legal Rules,” 114.
¹⁰⁶ Ibid.
¹⁰⁷ Ibid., 118.
¹⁰⁸ Ibid. “it is better to approve all prices than to risk prohibiting many efficient pricing strategies only to catch a few harmful ones”.
¹⁰⁹ Ibid., 115. “The argument here is that with low barriers to entry, market forces can be relied upon to eliminate excess profits in a reasonable period of time, thus increasing the cost of intervention relative to its benefits”.
¹¹⁰ Ibid., 119.

by-case basis.¹¹¹ In their view, it might be preferable to adopt an interventionist approach when (1) the firm enjoys a near monopoly position in the market, which is not the result of past investments or innovations and which is protected by insurmountable legal barriers to entry; (2) the prices charged by the firm widely exceed its average total costs; and (3) there is a risk that those prices may prevent the emergence of new goods and services in adjacent markets.¹¹²

Evans' and Padilla's work is notable and influential. Indeed, it provides a comprehensive understanding of error costs and provides a coherent proposal for exceptional intervention. However, the test is too strict and overstates market forces' ability to erode the positions of monopoly power. Indeed, the requirements of insurmountable legal barriers to entry protecting a near monopoly position and the risk of preventing the emergence of new goods and services in adjacent markets restrict considerably the scope of intervention. Concerning market structure and entry barriers, de facto monopolies and natural monopolies are, in substance, likened to a legal monopoly. One may argue that a legal monopoly deserves special concern because it is unlikely to disappear thanks to the legal protection. Yet, natural monopolies might also be as long-lasting (depending on the evolution of its cause) ~~so~~ as de facto monopolies. Furthermore, market forces might be unable to correct excessive prices even if entry barriers are low.¹¹³ Regarding the emergence of new goods and services in adjacent markets, such conditions do not seem justified as the test already protects dynamic efficiency by inquiring into the provenance of market power. Besides, these conditions make the test extremely difficult to implement.¹¹⁴ Other commentators have proposed alternative tests. In what follows I will briefly review them.

Motta and de Streel proposed another influential test.¹¹⁵ In their view, intervention should take place when (1) there are high and non-transitory barriers to entry leading to a monopoly or near monopoly; (2) the monopoly or near-monopoly is due to exclusive or special rights; and (3) no sector-specific regulator has jurisdiction to solve the matters. A number of comments can be made regarding this approach. To begin with, in practice it only applies to newly liberalised sectors as a complement to the liberalisation process, whereas excessive pricing rules tend to apply to all sectors and not to discriminate among them.¹¹⁶ For this reason, this approach might advocate abstinence in some cases. In fact,

¹¹¹ Ibid.

¹¹² Ibid. The authors think this test is consistent with the European Commission's practice. Ibid., 120. Mentioning *General Motors* and *British Leyland* cases, where firms had de facto monopolies and charged very high prices for certificates of low cost aiming at impeding parallel imports and exports.

¹¹³ Ezrachi and Gilo, "Are Excessive Prices Really Self-Correcting?," 262; Ezrachi and Gilo, "Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation."

¹¹⁴ Motta and Streel, "Excessive Pricing in Competition Law: Never Say Never?," 29.

¹¹⁵ Ibid., 21.

¹¹⁶ O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 771.

“many excessive pricing cases do not concern utility sectors as such, but instances in which ... States have granted exclusive rights to an undertaking without any corresponding regulation of prices”.¹¹⁷ Furthermore, this test offers a safe-harbour in cases of regulatory inactivity.

Röller, a former Chief-Economist at DG Competition, thinks that antitrust intervention should take place in two scenarios¹¹⁸: (1) in “gap” cases, where firms acquired dominance by the means of an anticompetitive conduct;¹¹⁹ and (2) in “mistake” cases, where the competition authority did not prosecute effectively an exclusionary abuse. The screening conditions are similar to those proposed by Motta and de Streel.¹²⁰ In addition to the limitations pointed out with respect to Motta’s and de Streel’s test there are further particularities to note. In fact, it is debatable whether antitrust intervention should consider a past mistake in order to proceed. Indeed, in addition to legitimacy issues concerning the ability to prosecute *because of* a past mistake; its feasibility largely depends on the prescription rules of each jurisdiction. Indeed, it seems very unlikely that a future prosecution could be viable, unless the exclusion itself could be prosecuted (and in this case excessive prices could be considered in the determination of the fine).

Nazzini proposes three alternative tests for evaluating antitrust intervention: (1) the enhanced dominance test; (2) the enhanced consumer harm test; and (3) the post-exclusionary exploitation test.¹²¹ According to (1) the enhanced dominance test, intervention should be restricted to cases where the magnitude of the distorting effect of price regulation is lowest and the competitive harm of exploitative abuses is highest.¹²² In this sense, intervention requires something more than dominance. Consequently, “high and non-transitory barriers to entry” (as suggested by Motta and de Streel) should not be sufficient, because these conditions are inherent to finding dominance. However, a test requiring “insurmountable legal barriers to entry” (as proposed by Evans and Padilla) would be too narrow. The author thinks it is questionable to require that the dominant

¹¹⁷ Ibid., 771–72.

¹¹⁸ Lars-Hendrik Röller, “Exploitative Abuses,” in *European Competition Law Annual 2007: A Reformed Approach to Article 82*, ed. Claus-Dieter Ehlermann and Mel Marquis (Oxford, UK: Hart Publishing, 2008), 530.

¹¹⁹ “...exploitative abuse cases should be based on acquiring a dominant position through anticompetitive exclusionary conduct. In this way, exploitative abuse cases lead us back to investigating exclusionary conduct, which is in fact the proper way to identify anticompetitive practices. By focusing on the road to dominance via anticompetitive behaviour, exploitative abuse cases are firmly grounded on the way markets work; they do not make it necessary to decide what is “excessive” from an ex post point of view”. Ibid., 529.

¹²⁰ In fact, the author suggest that intervention should take place only when (1) there are significant entry barriers; (2) the market is unlikely to self-correct; (3) the dominant position was due to exclusionary abuse or government actions; (4) there is no regulator or there is a regulatory failure; and (5) there is no structural remedy available.

¹²¹ Nazzini, “Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU,” 464–72.

¹²² Ibid., 465.

position is the result of past or current special rights or not the result of past investments or innovations (as Motta and de Streel suggest) because, in practice, in liberalised markets a dominant position is in part the result of a exclusive or a special right and in part the result of investments.¹²³ Thus, there is no need to introduce a further screen at the dominance stage above and beyond the presence of a legal or de facto monopolist or quasi-monopolist protected by barriers to entry that make entry impossible or unlikely in the long term.¹²⁴

(2) The enhanced consumer harm test recommends requiring the proof of demonstrable harm distinct from, and in addition to, the harm that derives from the mere payment of an excessive price or the imposition of an excessively onerous clause. This would happen in at least 3 cases: (i) the prevention of new products or innovation; (ii) when short-term prices impact long-term prices; and (iii) where dominant firms are manifestly unable to meet demand in circumstances in which it is impossible for other undertakings to enter the market or to expand output.¹²⁵ Finally, (3) the post-exclusionary exploitation test permits to distinguish an illegal price from mere dominance, by proscribing excessive prices that are the result of an exclusionary conduct.¹²⁶

Nazzini's enhanced dominance test has the virtue of providing a more balanced structural screening test. Yet, a safeguard for dynamic efficiency is still desirable. To this end, an inquiry into the provenance of market power and the role of innovation in the market seems advisable. Concerning the post-exclusionary exploitation test, it does not answer the relevant question, since it does not allow determination of boundaries for the exercise of market power that does not embrace exclusion. Indeed, the results of the exclusionary practice might well be considered illicit profits and taken into account when determining the amount of the fine.

O'Donoghue and Padilla suggest a multi-stage approach¹²⁷. The first stage is to analyse the structure of the market under scrutiny and identify whether the following conditions are met: (1) the market is protected by high barriers to entry; (2) the consumers have no credible alternatives to the products of the dominant firm; and (3) investment and innovation play little or no role in the market. If all the conditions are met, then, as a second stage, the prices should be compared to several benchmarks. Prices should be considered abusive if (4) most or all benchmarking exercises point in the same direction; and (5) the differences between the dominant firm's prices and the various competitive benchmarks are "substantial".

This test provides a clear analytical framework that might well be put into practice. However, it is based on the assumption that markets self-correct when barriers to entry are

¹²³ Ibid., 466.

¹²⁴ Ibid.

¹²⁵ Ibid., 468–69.

¹²⁶ Ibid., 469.

¹²⁷ O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 776.

not high. Here it is important to have in mind that the ultimate entry barrier might be the price war that an entrant would face after entry. For this and the above-mentioned comments, Nazzini's enhanced dominance test and O'Donoghue and Padilla's test seems appropriate for analysing excessive pricing cases as long as the structural screening part is softened considering that what really matters is that there are no competitive constraints in the market and that entry is unlikely, due to barriers to entry that might well respond to the size of the market, economies of scale and/or strategic behaviour expected after entry.

B. Legal Transplants in Context

Norms respond to a specific context. As noted above, the US and European approaches towards unilateral conduct differ because they respond to different market realities and different ideologies. Indeed, the US views free economies as essentially competitive if there is free entry to the markets. In contrast, European law reflects a lesser belief in the ability of markets to erode monopoly power.

In more detail, the US antitrust law has been interpreted since its inception as prohibiting only exclusionary conduct rather than monopolistic status or exploitative practices not only for economic reasons, but for political and social motives as well¹²⁸. In addition to the libertarian economic principles that championed during the enactment of the Sherman Act, there were political concerns about the amount of power that trusts were achieving. However, the Sherman Act did not intend to control economic and political power by the means of direct regulation, but by preserving the competitive nature of markets.¹²⁹ Furthermore, early in the past century jurisprudential opinions started stressing the importance of monopoly pricing for the proper functioning of a dynamic market.¹³⁰

According to Gal, the current US approach is similar but more complex. In her view, it is still a process-based approach with libertarian roots, but it does acknowledge that markets may fail. However, long-lasting failures are unusual because of the signalling power of high prices. In other words, new entry –or its possibility– should constrain the monopoly's power to raise prices. Besides, even if market forces cannot erode existing market power, intervention should not take place because its costs outweigh the benefits since intervention may lessen incentives to invest. There are considerable practical difficulties concerning antitrust price control and the institutional features of courts do not allow them to perform such a regulator role properly.¹³¹

¹²⁸ Gal, "Monopoly Pricing as an Antitrust Offense in the U.S. and the EC," 350.

¹²⁹ *Ibid.*, 352.

¹³⁰ As Judge Learned Hand stated in the ALCOA case "The successful competitor, having been urged to compete, must not be turned upon when he wins" *United States v. Aluminum Co. of America*, 148 F. 2d 416 (United States/US 1945).

¹³¹ Gal, "Monopoly Pricing as an Antitrust Offense in the U.S. and the EC," 355–57.

In contrast, the signatories of the European Treaty were less confident in the ability of markets to self-correct.¹³² According to European Law, monopolists have the special obligation not to fully exploit their market power and not to lead to considerable inefficient outcomes.¹³³ Certainly, the rule against excessive pricing was not only based on economic grounds but also on a notion of fairness: there is a range of fair prices, and monopolists have the right to profit, but only by a certain fair margin. The philosophical Ordoliberal influence of this rule is well known.¹³⁴

While in practice both the US and Europe (at least at the Communitarian level) systems have tended to converge towards limiting intervention to exclusionary conducts, there is a conceptual difference in the reasons that underlie this trend. Indeed, “in the EC the reticence to intervene is based on practical reasons, while in the U.S. it is based on theoretical and ideological ones”.¹³⁵

In small economies the self-correcting power of markets is much more limited than in big economies. This results from the existence of high entry barriers in many industries, in most of which only a few number of firms can achieve an efficient scale of production and benefit from the economies of scale. The entry barriers facilitate the acquisition of monopoly power and prevent the correction of the market, allowing monopolists to charge high prices for long periods of time, despite the lack of continuing superior performance.¹³⁶ Indeed, as entry is due to the post-entry price and the relative efficiency of the entrant compared to the incumbent, entry is less likely in small economies if only a few firms can achieve an efficient scale of production. If markets do not self-correct, then antitrust

¹³² Ibid., 363.

¹³³ Ibid., 359.

¹³⁴ See Larouche and Schinkel, “Continental Drift in the Treatment of Dominant Firms”; Gal, “Monopoly Pricing as an Antitrust Offense in the U.S. and the EC,” 364.

¹³⁵ Gal, “Monopoly Pricing as an Antitrust Offense in the U.S. and the EC,” 376.

¹³⁶ Gal, *Competition Policy for Small Market Economies*, 75; Michal S. Gal, “Size Does Matter: The Effects of Market Size on Optimal Competition Policy,” *S. Cal. L. Rev.* 74 (2001): 1441. (“Small economies need a specially tailored competition policy, because they face different welfare maximization issues than large ones. The size of some industries can be suboptimal in some markets because limited market demand constrains the development of a critical mass of domestic productive activities that are necessary in order to achieve the lowest costs of production. Because of scale economies and high entry barriers, small economies cannot support more than a few competitors in most of their industries even where productive efficiency can be achieved”). See also David S. Evans, “Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules”, *Chicago Journal of International Law* 10 (2009): 187. (“Jurisdictions should adopt competition policy rules that adhere to general principles but that take into account the specifics of their countries or region ...”). The OECD has a similar view: “The design of the law should reflect the level of economic development of the country concerned, the structure of its economy and its constitution and culture. A competition law should not simply be transplanted from a developed country, or even from another developing country”. OECD, *Promoting Pro-Poor Growth, Private Sector Development* 43 (2006) Cf. George L. Priest, “Competition Law in Developing Nations, The Absolutist View,” in *Competition Law and Development*, ed. Daniel D. Sokol, Thomas Cheng, and Ioannis Lianos (Stanford, California: Stanford Law Books, 2013), 79–89.

intervention might have a role to play.¹³⁷ Certainly, the practical difficulties that excessive pricing cases cause are challenging to deal with. Yet it is important to distinguish those practical difficulties from the ideological reasons that tend to overstate the practical challenges.

V. THE CHILEAN CASE

A. The identity of Chilean Competition Law

Chile has a unique geography, a small population and concentrated markets. It is isolated from its neighbours by the Andes in the east and the Pacific Ocean in the west. From north to south Chile extends 4,260 km and from east to west, in average, only 177 km. According to the last census, Chilean population is about to reach 17 million people. A third of the whole population lives in Santiago, Chile's capital city and its administrative and financial centre.¹³⁸ Chilean markets are highly concentrated. The last Global Competitiveness Report of the World Economic Forum ranks Chile in the place 134 out of 148 in the category of "extent of market dominance"¹³⁹—that is, whether corporate activity is dominated by a few firms or spread among many firms.¹⁴⁰ In spite of the aforesaid, foreign theories have been transplanted in our antitrust system over and over again without analysing whether the rules and their underpinning logic fit our economic reality and without consideration of their internal congruence.

Chilean Competition Law might be well described as an American car with European spare parts. In fact, the original version of the Chilean Antitrust Act (DL 211) was largely based on the Sherman Act, especially with respect to the general prohibition and sanctions. However, while the American influence is still present, several amendments have reshaped DL 211's identity towards a more European approach.¹⁴¹ Interestingly, one of those amendments took place only 6 years after DL 211 was passed. That reform –

¹³⁷ Gal, *Competition Policy for Small Market Economies*, 76. Also Gal, "Monopoly Pricing as an Antitrust Offense in the U.S. and the EC," 383. ("a firm might remain dominant for long periods of time despite the lack of superior performance and *ex post* regulation of excessive prices might be deemed necessary, at least in some cases"). Yet, "regulation should be limited to cases in which the inefficiency created by the dominant firm is significant and there is no possibility for reviving competition in due time" Ibid.

¹³⁸ See The National Statistics Institute (Instituto Nacional de Estadísticas) web site: www.ine.cl reporting 16,634,603 inhabitants and 38% of them living in Santiago.

¹³⁹ World Economic Forum, *The Global Competitiveness Report*, 2013, 471, http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.

¹⁴⁰ However Chile ranks 34 out of 148 in general terms. Despite this result, serious competitive challenges remain, as the high banking spread. Interestingly, other issues that had been considered as problematic are progressing, as the bankruptcy law.

¹⁴¹ For example Act 19.911 that eliminated the criminal sanction of the Antitrust Act. However, recently the TDLC has sanctioned both individuals and firms and has tended to apply a *per se* rule concerning cartel cases. For an overview and assessment of the Chilean Antitrust System see Francisco Agüero Vargas and Santiago Montt Oyarzún, "Chile The Competition Law System and the Country's Norms," in *The Design of Competition Law Institutions*, ed. Eleanor M. Fox and Michael J. Trebilcock (New York: Oxford University Press, 2012), 149–93.

following the model of the Treaty of Rome— aimed at providing the antitrust act with a specific provision on abuse of dominance, which previously did not exist.¹⁴² Since then, Chilean Competition Law has navigated between both sides of the Atlantic in search of the best tools for achieving a high degree of social welfare and compliance with law.

This continuous journey has led to substantial practical difficulties. As Paulo Montt, Sander Van Der Voorde and Michael Jacobs note, “US and European jurisprudence has influenced the interpretation of the [Chilean] Competition Act’s simple and general substantive provisions. While the US and Europe have seen significant convergence in recent years, *important differences nevertheless remain, particularly with respect to abuse of dominance. The influence of these two sometimes divergent systems, along with other factors, has sometimes resulted in uncertainty regarding the application of the Competition Act to a particular conduct [...]*”.¹⁴³ Regarding the topic of this work, the discrepancies are much more radical. Indeed, as I will detail below, both courts that intervene in antitrust cases according to the current institutional design (the Chilean Antitrust Tribunal (TDLC) and the Supreme Court) have tended to identify themselves with different sides of the Atlantic.

B. Brief review of Chilean Competition Law

Chilean Competition Law is largely based in one general provision: Article 3 of DL 211, which delineates anticompetitive behaviour. Article 3 has evolved considerably over time, from a provision hardly influenced by the Sherman Act to a hybridized provision that includes abuse of dominance within the scope of the competition law.¹⁴⁴

Regarding the enforcement of laws, despite the fact that the text of article 3 b) is clear, it is essential to distinguish the case law of the Chilean Competition Tribunal and the Chilean Supreme Court, since there was a significant divergence between both courts.

¹⁴² See Domingo Valdés Prieto, *Libre Competencia Y Monopolio* (Santiago: Editorial Jurídica de Chile, 2006), 546.

¹⁴³ Paulo Montt, Sander Van Der Voorde, and Michael E. Jacobs, “Chile,” in *Global Antitrust Compliance Handbook*, ed. D. Daniel Sokol, Daniel Crane, and Ariel Ezrachi, 1st ed. (New York: Oxford University Press, 2014), 96. Emphasis added.

¹⁴⁴ Article 3 establishes a general prohibition in its heading and then provides some examples to illustrate the general rule. Those examples are 3 non-exhaustive subsections that refer to explicit or tacit agreements or concerted practices between competitors (art. 3 (a)); the abusive exploitation of a dominant position (art. 3 (b)); and predatory or unfair competition practices to attain, maintain, or strengthen a dominant position (art. 3 (c)). The relevant part of Article 3 for the purpose of this work reads as follows: Article 3. - Any person that enters into or executes, individually or collectively, any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effects, will be sanctioned with the measures mentioned in article 26 of the present law, notwithstanding preventive, corrective or prohibitive measures that may be applied to said actions, acts or conventions in each case. The following will be considered as, among others, actions, acts or conventions that impede, restrict or hinder competition or which set out to produce said effects: [...] b) The abusive exploitation on the part of an economic agent, or a group thereof, of a dominant position in the market, fixing sale or purchase prices, imposing on a sale another product, assigning market zones or quotas or imposing other similar abuses. FNE’s translation. Available at: http://www.fne.gob.cl/wp-content/uploads/2012/03/DL_211_ingles.pdf

Indeed, the former –in theory, as will be developed below– had avoided interfering pricing policies of firms that do not lead to exclusionary behaviour, with some remarkable exceptions.¹⁴⁵ Remarkably, a recent ruling (which is still subject to the revision of the Supreme Court) overruled the prior theoretical “hands-off” trend.¹⁴⁶ The Supreme Court – with few vacillations¹⁴⁷– has tended to condemn exploitative abuses and has even stated explicitly that excessive prices without economic justification consist of an abuse of dominance punishable by DL 211.¹⁴⁸

The prior divergence between the TDLC and the Supreme Court can be explained with a brief reference to an academic article of the TDLC’s current President. In fact, in 2011 Judge Menchaca¹⁴⁹ published an academic paper arguing that excessive pricing should not be considered as an abuse of a dominant position.¹⁵⁰ His arguments are mainly those referred in section III.B –that is, that excessive prices attract entry, encourage entrepreneurship, and that antitrust courts are not well suited for regulating prices. Yet, he went even further by denying the proscription of excessive pricing under DL 211.¹⁵¹ Despite this, his view is not contradictory with an understanding that includes exploitative abuses within the scope of competition law. Indeed, he argued that the exercise of market power becomes abusive when it protects a dominant position, increases it, or increases monopoly profits.¹⁵² In order to illustrate his point, he provided the example of exploitative *arbitrary* discrimination, which restricts the possibility of charging excessive prices because the monopolist is obligated to charge the same price to all the purchasers who are in the same situation.¹⁵³ Actually, as I will show below, this is one of the main (debatable) reasons why the TDLC has condemned excessive pricing.

¹⁴⁵ *i.e.* Tribunal de Defensa de la Libre Competencia. Judgement 100/2010. C 127-07 (21/07/10). “Demanda de Nutripro S.A. contra Puerto Terrestre Los Andes Sociedad Concesionaria S.A. y el Fisco”.

¹⁴⁶ *i.e.* Tribunal de Defensa de la Libre Competencia. Judgement 140/2014. C 245-12 (4/11/2014) “Demanda de Condominio Campomar contra Inmobiliaria Santa Rosa de Tunquén Ltda”.

¹⁴⁷ *i.e.* Tribunal de Defensa de la Libre Competencia. Judgement 100/2010. C 127-07 (21/07/10). “Demanda de Nutripro S.A. contra Puerto Terrestre Los Andes Sociedad Concesionaria S.A. y el Fisco”.

¹⁴⁸ *i.e.* Tribunal de Defensa de la Libre Competencia. Judgment 93/2010. C 183-08 (06/01/10) “Requerimiento de la FNE contra Empresa Eléctrica Atacama S.A”.

¹⁴⁹ Mr. Tomás Menchaca is the current President of the TDLC. He has played a central role in Chilean competition law since 1997, when he became part of the TDLC’s predecessor.

¹⁵⁰ Menchaca Olivares Tomás, “¿Se Debe Sancionar La Fijación Unilateral de Precios Excesivos?,” in *La Libre Competencia En El Chile Del Bicentenario*, ed. Tribunal de Defensa de la Libre Competencia (Santiago: Thomson Reuters, 2011), 249–66.

¹⁵¹ *Ibid.*, 256. In his view, art. 3 b) should be understood as a reference to the imposition of resale prices or to any other imposition of abusive prices or as a reference to price fixing.

¹⁵² *Ibid.*, 254–55.

¹⁵³ *Ibid.*, 257. In his words, anticompetitive discrimination “is such discriminatory practice that has no explanation but to hinder competition, either to exploit abusively its dominant position by charging prices to the consumers according to their willingness to pay or to exclude competitors. [...] The same occurs everywhere in the world, probably because arbitrary discrimination, including price discrimination, is a violation against the legal principle of equality.” Translated by the author. Citation omitted.

C. Chilean case law on excessive pricing

In this section I will review the Chilean experience concerning excessive pricing since 2004, when the TDLC was put into effect. I expect to illustrate that Chilean case law shows particularities that might be of the interest of foreign jurisdictions. Indeed, as I have stated before, there has been a theoretical divergence between the TDLC and the Supreme Court. I will demonstrate that such divergence is not existent in practice, but it illustrates the consequences of identity problems that arise due to the influence of different antitrust systems and an ambiguous interpretation of legal transplants. Next, I will detail that in aggregate terms, the judgements concerning both the TDLC and the Supreme Court exhibit a higher percentage of condemnatory rulings than acquittals. Finally, I will refer to the practical difficulties, concerning the scope of antitrust law, the use of benchmarks and remedies.

The TDLC has explicitly referred to excessive pricing only twice, in *EMELAT*¹⁵⁴ and *Campomar*.¹⁵⁵ In the former, a judgement of 2010, the TDLC affirmed that excessive pricing was not an antitrust offense. In contrast, in the latter, a majority ruling of 2014, the TDLC overruled what seemed as a non-intervention policy, declaring that excessive pricing is the most obvious type of abuse of dominance. The experience shows, however, that despite what the TDLC stated in *EMELAT*, the tribunal indeed intervened pricing policies on the grounds of “unfair” or “abusive” pricing.¹⁵⁶ In this respect, the case law illustrates that prices were deemed abusive when there was an arbitrary discriminatory practice, or due to the breach of regulations under certain conditions. It is relevant to note that in *EMELAT*, the TDLC dismissed the claim in a very similar wording to the U.S. Supreme Court in *Trinko*. Mr. Menchaca indeed cites *Trinko* and *Berkey Photo* in his article to support his non-intervention position.¹⁵⁷ However, he interprets a legal provision that stemmed from the Treaty of Rome on the grounds of American rulings. As I already noted, the treatment of unilateral behaviour is one of the fields where there is still a significant divergence between the European and the American systems. Furthermore, exploitative abuses are a special feature of the European model. Hence, the incorporation of American principles to enlighten cases dealing with exploitative practices can only lead to non-intervention conclusions. Given the diverse assumptions underpinning the treatment of monopolization and the abuse of dominance, such intellectual exercise seems inappropriate.

¹⁵⁴ Tribunal de Defensa de la Libre Competencia. Judgment 93/2010. C 183-08 (06/01/10) “Requerimiento de la FNE contra Empresa Eléctrica Atacama S.A”.

¹⁵⁵ Tribunal de Defensa de la Libre Competencia. Judgement 140/2014. C 245-12 (4/11/2014) “Demanda de Condominio Campomar contra Inmobiliaria Santa Rosa de Tunquén Ltda”.

¹⁵⁶ *i.e.* Tribunal de Defensa de la Libre Competencia. Judgement 73/2008. C 147-07 (20/08/08) “Requerimiento de la FNE contra Empresa Eléctrica de Magallanes S.A” and Tribunal de Defensa de la Libre Competencia. Judgement 85/2009. C 79-05 (02/07/09) “Demanda de Constructora e Inmobiliaria Independencia Ltda. en contra de Aguas Nuevo Sur Maule S.A”.

¹⁵⁷ Menchaca Olivares Tomás, “¿Se Debe Sancionar La Fijación Unilateral de Precios Excesivos?,” 258–59.

The FNE has constantly recognized “abusive pricing” within the scope of antitrust law,¹⁵⁸ yet private parties have presented the majority of the cases to the TDLC. DL 211 allows any individual party, as well as the Head of the FNE, to file a claim before the TDLC.¹⁵⁹ Concerning exploitative pricing cases, the FNE presented the case before the TDLC in 3 out of 7 of the cases (*EDELMAG*,¹⁶⁰ *Sanitarias*,¹⁶¹ *EMELAT*). The FNE also settled with the airport parking’s concessionaire in *SCL Parking*,¹⁶² before the administrative investigation adopted a judicial status. The results exhibit a majority of condemnations. Indeed, five out of seven cases ended with condemnatory rulings: *EDELMAG*, *Atrex*,¹⁶³ *EFE*,¹⁶⁴ *Sanitarias* and *PTLA*,¹⁶⁵ yet one of them was overruled by the Supreme Court: *PTLA*. And two cases ended with acquittal rulings: *EMELAT* and *Campomar*.

EDELMAG shows that there might be regulatory gaps where antitrust law may have a role to play. In fact, *EDELMAG* was a power supply monopolist, and given the size of the market, the firm was not subject to the supervision of a specific-sector regulator nor to general tariff-regulation. However, the local authority granted the right to operate in such market after a bidding process, which included, indeed, tariff regulation. Hence, *EDELMAG*’s market power was only constrained by the tender conditions. After the firm started operating, it realized it made a mistake concerning the appraisal of taxation costs and, consequently, decided to increase the price of power supply, breaching the tender conditions. The TDLC stated that given the particularities of the case –mainly, that consumers were not part of the regulatory contract so that they were not entitled to sue the monopolist– the breach of the tender conditions consisted of an abuse of a dominant position. The Supreme Court upheld the TDLC’s ruling.¹⁶⁶

¹⁵⁸ For instance, in 2012 the FNE dismissed 3 “abusive pricing” claims, but after a quick screening test (market definition and the analysis of objective justifications): Investigations N°1681-10; 1892-11; and 2127-12. In the last case, the FNE explicitly stated that although it decided not to present the case before the TDLC, the individual might well do it on his own.

¹⁵⁹ Article 18 N°1 DL 211.

¹⁶⁰ Tribunal de Defensa de la Libre Competencia. Judgement 73/2008. C 147-07 (20/08/08) “Requerimiento de la FNE contra Empresa Eléctrica de Magallanes S.A”.

¹⁶¹ Tribunal de Defensa de la Libre Competencia. Judgement 85/2009. C 79-05 (02/07/09) “Demanda de Constructora e Inmobiliaria Independencia Ltda. en contra de Aguas Nuevo Sur Maule S.A”.

¹⁶² Tribunal de Defensa de la Libre Competencia. AE 04/11 (03/05/2011).

¹⁶³ Tribunal de Defensa de la Libre Competencia. Judgement 75/2008. C. 113-06 (30/09/08). “Demanda de Atrex y otros contra SCL”.

¹⁶⁴ Tribunal de Defensa de la Libre Competencia. Judgement 76/2008. C 100-06 (14/10/08). “Demanda de GTD Teleductos S.A. contra EFE”.

¹⁶⁵ Tribunal de Defensa de la Libre Competencia. Judgement 100/2010. C 127-07 (21/07/10). “Demanda de Nutripro S.A. contra Puerto Terrestre Los Andes Sociedad Concesionaria S.A. y el Fisco”.

¹⁶⁶ Corte Suprema de Chile. Judgement N° 5505-08 (26/11/08). “Requerimiento de la FNE contra Empresa Eléctrica de Magallanes S.A”.

Campomar –the last decision concerning excessive pricing where the majority opinion overruled the prior apparent non-interventionist approach– seems to limit intervention to cases when there is a regulatory failure. Indeed, the TDLC set a test requiring high market power not due to past investments or innovation and prices significantly above the result of one or several benchmarks applied together with consistent results.¹⁶⁷ However, the TDLC ultimately justified the dismissal because there were no insurmountable barriers to entry in the market¹⁶⁸ (a requirement that was not included in the paragraph intended to define the test). *Campomar* was a condominium community where the water supply was provided by the real estate developer as a monopolist, who according to the plaintiffs was charging excessive prices. The TDLC held that a potential competitor could eventually provide the service, because there was another firm with an operative network within a reasonable radius. While the tribunal acknowledged that the cost of expanding the network could be prohibitive, in its view the plaintiffs did not prove that those costs were an insurmountable barrier to entry. Furthermore, the TDLC stressed that there must be a special restrictive consideration when dealing with excessive pricing claims.¹⁶⁹ Hence, these probative challenges raise questions about both the legal standard and the standard of proof that the TDLC will require in order to consider economic barriers to entry as insurmountable.

Concerning remedies, the Chilean experience shows that settlements may play an important role in order to improve markets' outcomes. While fines have been the most common remedy and they have been based on the economic benefit obtained from the illegal conduct in order to deter future infringements, *SCL Parking* illustrates how settlements can help to cease exploitative practices quickly and effectively. In *SCL Parking*, the airport parking's concessionaire was subject to price caps according to the tender conditions. Subsequently, the Ministry of Public Infrastructure decided to increase those price caps and three years later the Ministry deregulated the tariff. After deregulation, the fee increased steadily to 266% of its former value. The FNE started an investigation and the concessionaire, on its own initiative, approached the antitrust authority proposing to modify its pricing behaviour, reaching a settlement with the FNE that improved parking conditions for final costumers.

In addition, the FNE recently reached a settlement with EFE (Chilean Railway Company).¹⁷⁰ EFE had elaborated an internal guideline with respect to pass through rights for telecommunication equipment that allowed it to charge a fee according to the firms' ability to pay and the magnitude of the investments. The TDLC held that such pricing structure had no cost basis but was based on demand factors or willingness to pay.

¹⁶⁷ *Campomar*. C°20.

¹⁶⁸ *Campomar*. C°38.

¹⁶⁹ *Campomar*. C°37.

¹⁷⁰ Settlement approved by the TDLC in December 17th, 2013 within the adversarial proceeding “C 258-13 - Requerimiento de le FNE contra EFE”.

Accordingly, the TDLC ordered EFE to modify its guideline in a transparent, objective and non-discriminatory manner. The FNE subsequently monitored the compliance of these conditions and found that EFE had not fulfilled the TDLC's order. After the FNE filed a complaint for non-compliance,¹⁷¹ EFE settled and modified its internal guideline, amending the conditions objected by the FNE, complying with the TDLC's ruling.

In some cases the TDLC has even gone further by imposing pro-competitive duties on the defendants and proposing regulatory amendments. For example, in *Sanitarias* the TDLC found that water distribution and sewage firms were charging extra fees for areas beyond their concession, which increased the price of the services significantly. After determining that the defendants had market power even outside the concession area due to the existence of economies of scale and scope, the TDLC held that some fees were arbitrary discriminatory because there was not a justification for charging the tariffs only outside the concession area. Furthermore some of the fees, in fact, were a duplication of charges for real estate developers. Accordingly, the TDLC imposed behavioural remedies regarding negotiations between the defendants and the real estate developers for financing new projects; and also proposed regulatory amendments aimed at providing open access to water distribution. The TDLC's aim was, on the one hand, to provide more transparency to the negotiations between the defendants and the real estate developers; but also to modify the structural and institutional features that led to the abuses by proposing regulatory amendments (which were dismissed by the Supreme Court for procedural reasons).

Regarding benchmarks, when there has been a bidding process, tender conditions have provided the grounds for a formal analysis (*EDELMAG*, *Atrex*, *PTLA*). The TDLC has been of the opinion that when there is ex ante competition for the market, the regulations that arise from the competitive process represent the competitive outcome and should not be modified without prior consult to the Tribunal.¹⁷² In the absence of such conditions, the TDLC has mainly used discrimination benchmarks for a substantive analysis. For example, in *EFE* the TDLC concluded that EFE's internal guidelines allowed the firm to discriminate on a case-by-case basis exploiting consumers' willingness to pay, without an objective justification. Interestingly, the TDLC dismissed the claim that prices were excessive because in its view the FNE did not prove EFE's costs conclusively; yet, it condemned EFE on the ground of arbitrary discrimination. In addition, the TDLC has used geographic benchmarks to compare trading conditions and determine their merit. For example, in *Sanitarias* the TDLC compared regulated and non-regulated areas to conclude that some charges exclusive to the non-regulated area were abusive. In *SCL Parking*, the FNE challenged the fees along with a historical benchmark, comparing the prices according to the bidding bases and then after deregulation. The analysis is simpler concerning the

¹⁷¹ Tribunal de Defensa de la Libre Competencia .C 258-13 - Requerimiento de le FNE contra EFE.

¹⁷² Tribunal de Defensa de la Libre Competencia AE 04/11 (03/05/2011) *SCL Parking*.

Supreme Court. In fact, it has analysed exploitative cases on the base of a cost-plus standard¹⁷³ and discrimination benchmarks.¹⁷⁴

V. CONCLUSIONS

The condemnation of excessive pricing is a debatable matter for ideological and practical reasons. However, the non-intervention approach that tends to champion nowadays is commonly led by misperceptions on the merits of antitrust intervention and the self-correctiveness of excessive prices. Certainly, the practical difficulties that excessive pricing cases generate are a challenging issue to deal with, and in some cases they might justify non-intervention. Yet, it is important to distinguish those practical difficulties from the ideological reasons that tend to overstate the former. An assessment of the arguments in favour and against intervention shows, on a policy level, that antitrust law might have a role to play when the competitive process fails. Unquestionably, the prohibition of excessive prices is not costless, but neither is non-intervention. Because of this, a rule of reason standard seems better suited to address excessive pricing cases on a case-by-case basis. On a practical level, when there is a provision addressing excessive pricing as an abuse of dominance, it is advisable to follow tests that aim at defining the practical application of such a provision and discharge tests that advocate abstinence in contexts where the law does not grant antitrust immunity.

Furthermore, even if hard enforcement is considered inappropriate; soft enforcement might play a helpful role to erode the causes of high prices. Indeed, excessive pricing causes inefficiencies that competition law is meant to prevent, and competition authorities tend to count on a vast array of legal powers –including advocacy and the negotiation of settlements– that may improve the performance of markets. It is important to note that legal amendments are slow and costly. Hence, it might be desirable to contest political inertia with advocacy efforts and look for cooperative solutions with the private sector in the meantime in order to decrease the welfare losses of market failures. Of course, active enforcement is a prerequisite in this regard, since firms will only consider credible threats as incentives for achieving settlements with the authority. In addition, hybridized powers appear as an interesting choice and jurisdictions might do well in considering such powers for future legal reforms.

The Chilean experience may be helpful to point out particular situations that might arise in other small economies. Primarily, small economies adopt the competition laws of larger ones and may even mix rules from different systems that respond to diverse assumptions, market realities and ideologies. While the adoption of foreign competition laws has significant benefits, the combination of different rules may lead to identity

¹⁷³ Corte Suprema de Chile. Judgement Rol N° 1022-2010. “Requerimiento de la FNE contra Empresa Eléctrica Atacama S.A.” (18/08/10). C°4.

¹⁷⁴ Corte Suprema de Chile. Judgement Rol 5443-09 “Demanda de Constructora e Inmobiliaria Independencia Ltda. en contra de Aguas Nuevo Sur Maule S.A.” (18/05/10) C°13.

problems and legal uncertainty, which is indeed the Chilean case. As noted, the TDLC has cited American rulings to justify acquittal decisions concerning exploitative practices. The reasoning underpinning those rulings, of course, leads to non-intervention outcomes. However, such analysis lacks a proper understanding of the aims and history of a provision that was transplanted from the Treaty of Rome. Due to the non-binding nature of precedents in the continental tradition, this issue is particularly problematic. Furthermore, it is patent that the assortment of economic and philosophical components within antitrust standard leads to a higher degree of uncertainty.¹⁷⁵

The last point is closely related to the aims of competition law. In fact, according to recent rulings the TDLC has followed the conventional trend towards pursuing economic efficiency as the main goal of competition law,¹⁷⁶ yet the TDLC's practice still reveals redistributive concerns. For example, the cases concerning "arbitrary discrimination" have focused on welfare transfers from consumers to the monopolist without further consideration of whether those wealth transfers were also inefficient. Despite the fact the TDLC has analysed the possibility of an objective justification, which may well include an efficiency defence, this does not avoid condemning discriminatory practices on mere redistributive grounds.

In closing, from a policy view, the European model seems better suited for small economies, if applied correctly. Besides, even if the choice of a jurisdiction is not to intervene at all –assuming there is enough discretion for making such decision– the pursuit of the public good requires the justification of the decision with the right arguments and not by mere suppositions based on different market realities, wrong legal transplants' interpretations or mere ideological arguments.

¹⁷⁵ As Ginsburg and Fraser have pointed out: "Economic analysis leads to predictability and stability in the law, which are essential elements in a rule of law regime". Douglas H. Ginsburg and Eric M. Fraser, *The Role of Economic Analysis in Competition Law*, SSRN Scholarly Paper (Rochester, NY, 2010), 31, <http://papers.ssrn.com/abstract=1610189> (accessed March 3, 2015).

¹⁷⁶ In particular, the TDLC said that it is its function to try to maintain the conditions by which free market constrain dominant firms to decrease prices, so that they charge a price as close to the competitive price as possible and induce optimal output. Tribunal de Defensa de la Libre Competencia. Judgment 93/2010. C 183-08 (06/01/10) "Requerimiento de la FNE contra Empresa Eléctrica Atacama S.A". C°31.

BIBLIOGRAPHY

- ❖ Agüero Vargas, Francisco, and Santiago Montt Oyarzún. “Chile The Competition Law System and the Country’s Norms.” In *The Design of Competition Law Institutions*, edited by Eleanor M. Fox and Michael J. Trebilcock, 149–93. New York: Oxford University Press, 2012.
- ❖ Areeda, Phillip E., Louis Kaplow, and Aaron S. Edlin. *Antitrust Analysis: Problems, Text, and Cases, Seventh Edition*. 7 edition. Aspen Publishers, 2013.
- ❖ Ayres, Ian, and John Braithwaite. *Responsive Regulation: Transcending the Deregulation Debate*. New York; Oxford: Oxford University Press, 1995.
- ❖ Baker, Jonathan B. “Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation.” *Antitrust Law Journal* 74, no. 3 (2007): 575–602.
- ❖ ———. *Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right* SSRN Scholarly Paper. Rochester, NY, 2014. <http://papers.ssrn.com/abstract=2333736>.
- ❖ Baldwin, Robert, Martin Cave, and Martin Lodge. *Understanding Regulation: Theory, Strategy, and Practice*. 2 edition. New York: Oxford University Press, 2013.
- ❖ Baumol, William J. *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism*. Princeton, NJ: Princeton University Press, 2004.
- ❖ Beckner III, Frederick, and Steven C. Salop. “Decision Theory and Antitrust Rules.” *Antitrust Law Journal* 67, no. 1 (1999): 41–76.
- ❖ Bishop, Simon, and Mike Walker. *The Economics of EC Competition Law: Concepts, Application and Measurement*. Sweet & Maxwell/Thomson Reuters, 2010.
- ❖ Breyer, Stephen. *Regulation and Its Reform*. Reprint edition. Cambridge, Mass.: Harvard University Press, 1984.
- ❖ Dunne, Niamh. “Between Competition Law and Regulation: Hybridized Approaches to Market Control.” *Journal of Antitrust Enforcement* (2014): 1–45.
- ❖ Evans, David S. “Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules.” *Chicago Journal of International Law* 10 (2010 2009): 161–88.
- ❖ Evans, David S., and A. Jorge Padilla. “Excessive Prices: Using Economics to Define Administrable Legal Rules.” *Journal of Competition Law and Economics* 1, no. 1 (2005): 97–122.
- ❖ Ezrachi, Ariel, and David Gilo. “Are Excessive Prices Really Self-Correcting?” *Journal of Competition Law and Economics* 5, no. 2 (2009): 249–68.
- ❖ ———. “Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation.” *Antitrust Law Journal* 76, no. 3 (2010): 873–97.
- ❖ Fox, Eleanor M., and Daniel A. Crane. *Global Issues in Antitrust and Competition Law*. St. Paul, MN: Thomson/West, 2010.
- ❖ Gal, Michal. “Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?” *Antitrust Bulletin* 49 (2004): 343–84.

- ❖ Gal, Michal S. *Competition Policy for Small Market Economies*. Boston: Harvard University Press, 2003.
- ❖ ———. “Size Does Matter: The Effects of Market Size on Optimal Competition Policy.” *Southern California Law Review* 74 (2001): 1437–78.
- ❖ Geradin, Damien. *The Necessary Limits to the Control of “Excessive” Prices by Competition Authorities - A View from Europe* SSRN Scholarly Paper. Rochester, NY, 2007. <http://papers.ssrn.com/abstract=1022678>.
- ❖ Geradin, Damien, Anne Layne-Farrar, and Nicolas Petit. *EU Competition Law and Economics*. Oxford, U.K: Oxford University Press, 2012.
- ❖ Ginsburg, Douglas H., and Eric M. Fraser. *The Role of Economic Analysis in Competition Law* SSRN Scholarly Paper. Rochester, NY, 2010. <http://papers.ssrn.com/abstract=1610189>.
- ❖ Hovenkamp, Herbert. “Restraints on Innovation.” *Cardozo L. Rev.* 29 (2007): 247–60.
- ❖ Larouche, Pierre, and Maarten Pieter Schinkel. “Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act.” *Social Science Research Network* no. ID 2293141 (2013). <http://papers.ssrn.com/abstract=2293141>.
- ❖ Lemley, Mark A. “A New Balance between IP and Antitrust.” *Southwestern Journal of Law and Trade in the Americas* 13. Stanford Law and Economics Olin Working Paper No. 340 (2007). <http://papers.ssrn.com/abstract=980045>.
- ❖ Lowe, Philip. “How Different is EU Anti-Trust? A Route Map for Advisors – An Overview of EU Competition Law and Policy on Commercial Practices.” Brussels, 2003. http://ec.europa.eu/competition/speeches/text/sp2003_038_en.pdf.
- ❖ Lyons, Bruce. “The Paradox of the Exclusion of Exploitative Abuse.” In *The Pros and Cons of High Prices*, by Konkurrensverket Swedish Competition Authority, 65–87, 65–87. Stockholm, 2007. http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_high_prices.pdf.
- ❖ Menchaca Olivares Tomás. “¿Se Debe Sancionar La Fijación Unilateral de Precios Excesivos?” In *La Libre Competencia En El Chile Del Bicentenario*, edited by Tribunal de Defensa de la Libre Competencia, 249–66. Santiago: Thomson Reuters, 2011.
- ❖ Miguel de la Mano, Renato Nazzini, and Hans Zenger. “Article 102.” In *The EU Law of Competition*, edited by Jonathan Faull and Ali Nikpay, 329–538. 3rd ed. Oxford, UK: Oxford University Press, 2014.
- ❖ Motta, Massimo, and Alexandre de Streel. “Excessive Pricing and Price Squeeze under EU Law.” In *European Competition Law Annual 2003: What is an Abuse of a Dominant Position*, edited by Claus-Dieter Ehlermann and Isabela Atanasiu, 91–125. Oxford; Portland, Ore.: Hart Publishing, 2006.
- ❖ Motta, Massimo, and Alexandre de Streel. “Excessive Pricing in Competition Law: Never Say Never?” In *The Pros and Cons of High Prices*, edited by Konkurrensverket Swedish Competition Authority, 14–46. Stockholm, 2007. http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pr

os_and_cons_high_prices.pdf.

- ❖ Nazzini, Renato. “Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU.” In *International Antitrust Law & Policy: Fordham Competition Law 2012*, edited by Barry E. Hawk, 459–92. New York: Juris Publishing, Inc., 2013.
- ❖ ———. *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*. Oxford: Oxford University Press, 2012.
- ❖ Niels, Gunnar, Helen Jenkins, and James Kavanagh. *Economics for Competition Lawyers*. Oxford; New York: Oxford University Press, 2011.
- ❖ O’Donoghue, Robert, and A. Jorge Padilla. *The Law and Economics of Article 102 TFEU*. 2 edition. Oxford: Hart Publishing, 2013.
- ❖ Office of Fair Trading. *Competition Act Guideline, Assessment of Individual Agreements and Conduct*, 1999.
- ❖ Paulis, Emil. “Article 82 EC and Exploitative Conduct.” Florence, 2007. www.eui.eu/Documents/RSCAS/Research/.../200709-COMPed-Paulis.pdf.
- ❖ Paulo Montt, Sander Van Der Voorde, and Michael E. Jacobs. “Chile.” In *Global Antitrust Compliance Handbook*, edited by D. Daniel Sokol, Daniel Crane, and Ariel Ezrachi, 95–111. 1st ed. New York: Oxford University Press, 2014.
- ❖ Pindyck, Robert, and Daniel Rubinfeld. *Microeconomics*. 8 edition. Boston: Prentice Hall, 2012.
- ❖ Priest, George L. “Competition Law in Developing Nations, The Absolutist View.” In *Competition Law and Development*, edited by Daniel D. Sokol, Thomas Cheng, and Ioannis Lianos, 79–89. Stanford, California: Stanford Law Books, 2013.
- ❖ Roberts, Simon. “Assessing Excessive Pricing: The Case of Flat Steel in South Africa.” *Journal of Competition Law and Economics* 4, no. 3 (2008): 871–91.
- ❖ Röller, Lars-Hendrik. “Exploitative Abuses.” In *European Competition Law Annual 2007: A Reformed Approach to Article 82*, edited by Claus-Dieter Ehlermann and Mel Marquis, 525–32. Oxford, UK: Hart Publishing, 2008.
- ❖ Ruppelt, Hans-Jürgen. “Abuse Control: Objectives, Restrictive Practices and Institutions.” In *European Competition Law Annual 2003: What is an Abuse of a Dominant Position*, edited by Claus-Dieter Ehlermann and Isabela Atanasiu, 135–45. Oxford; Portland, Ore.: Hart Publishing, 2006.
- ❖ Scherer, Frederic M, and David Ross. *Industrial Market Structure and Economic Performance*. 3rd ed. Boston: Houghton Mifflin Company, 1990.
- ❖ Schumpeter, Joseph A. *Capitalism, Socialism and Democracy*. London: Routledge, 1994.
- ❖ Stiglitz, Joseph E. *Economics of the Public Sector*. 3rd Revised edition. New York: W. W. Norton & Company, 2000.
- ❖ Tirole, Jean. *The Theory of Industrial Organization*. Cambridge, MA.: The MIT Press, 1998.

- ❖ Valdés Prieto, Domingo. *Libre Competencia Y Monopolio*. Santiago: Editorial Jurídica de Chile, 2006.
- ❖ Verboven, Frank. “International Price Discrimination in the European Car Market.” *The RAND Journal of Economics* 27, no. 2 (1996): 240–68.
- ❖ Waller, Spencer Weber. *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement* SSRN Scholarly Paper. Rochester, NY, 1999. <http://papers.ssrn.com/abstract=144149>.
- ❖ Whish, Richard, and David Bailey. *Competition Law*. 7th ed. Oxford; New York: Oxford University Press, 2012.
- ❖ World Economic Forum. *The Global Competitiveness Report*, 2013. http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.